

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA**

MISCELLANEOUS APPEAL NO COA2021MS00001

**BETWEEN MICHAEL REID APPELLANT
AND REAL ESTATE BOARD RESPONDENT**

Isat Buchanan and Iqbal Cheverria instructed by Isat Buchanan for the applicant

Further written submissions for the appellant filed by John Clarke

Miss Gillian Burgess for the respondent

Real Estate Profession - application for a real estate salesman licence by applicant with three previous convictions - power in the Real Estate Board to determine who is a fit and proper person to be granted a licence - whether the Real Estate Board erred in finding that the appellant was not a fit and proper person to be granted a licence because of his previous convictions – whether a conviction is a relevant factor to be considered in determining who is a fit and proper person

Procedural fairness – whether Real Estate Board is required to observe rules of natural justice in refusing application for salesman’s licence - whether Real Estate Board required to give the appellant an oral hearing before refusing the licence – whether, in any event, the Real Estate Board failed to follow its own procedural rules - Real Estate (Dealers and Developers) Act, ss 5, 13, 14, 21, and 41 - Real Estate (Dealers and Developers) Regulation, 1988

7 March 2023 and 8 April 2024

BROOKS P

[1] I have had the privilege of reading, in draft, the comprehensive judgment of my learned sister Edwards JA. I agree with her reasoning and conclusion and have nothing to add.

STRAW JA

[2] I too have read the draft judgment of Edwards JA and agree with her reasoning and conclusion.

EDWARDS JA

Introduction

[3] Mr Michael Reid ('the appellant') pursued a real estate salesman's course at the Real Estate Training Institute in January 2020, and sat his qualifying exams in July of that same year. He was offered a position as a sales associate by a real estate agency, pending the issuance of a salesman's licence. The appellant applied to the Real Estate Board ('the Board') for a salesman's licence on 12 November 2020, lodging with the Board the requisite documents, one of which was a police certificate. That certificate disclosed that the appellant had three previous convictions, all acquired within the 10 years immediately prior to his application to the Board. The offences ranged in seriousness, as the convictions were for rape (for which he was sentenced to four years' imprisonment), assault occasioning bodily harm (for which he was admonished and discharged), and malicious destruction of property (for which he was ordered to pay a fine of \$50,000.00 or to serve three months' imprisonment).

[4] The appellant obtained his first conviction at the age of 40, and he was 48 years old when he obtained the others. The application to be registered as a real estate salesman was made on the 3rd anniversary of the appellant's convictions for assault occasioning bodily harm and malicious destruction of property, 10 years after his conviction for rape, but six years after the sentence for the rape conviction would have run its course. Even though the offences of assault occasioning bodily harm and malicious

destruction of property may have been “spent” within the meaning of section 3 of the Criminal Records (Rehabilitation of Offenders) Act, and the appellant could, therefore, have been considered to be a rehabilitated person within the definition of that Act regarding those offences, he could not have been considered as a rehabilitated person in relation to the offence of rape, as the sentence of four years for the rape was incapable of being “spent”. The latter conviction could not have been expunged from the appellant’s record.

[5] Following a pre-registration inspection, it was confirmed that the appellant had met the academic qualifications to be registered as a real estate salesman. However, the issue of his previous convictions was left for the consideration of the Board which eventually decided to refuse to grant the licence because of those convictions.

[6] The Board’s adverse decision was communicated to the appellant by letter dated 17 December 2020. The Board indicated that, due to the appellant’s previous convictions, the appellant had not satisfied it, as required by section 14(1)(b) of the Real Estate (Dealers and Developers) Act (‘the Act’), that he was a fit and proper person to hold such a licence. The appellant filed this appeal seeking to challenge that decision of the Board.

Grounds of appeal

[7] An amended notice of appeal was filed on 3 February 2022, with the following grounds attached:

“The Decision of the Board that Mr Michael Reid is not a Fit and Proper Person to be registered as a Salesman cannot be supported in all the circumstances; In that:

- (a) The Board erred in finding that Mr. Reid was not a ‘fit and proper’ person solely on the basis of his Prior Conviction.
- (b) The Board’s Approach [sic] to determine who is a fit [sic] Fit and Proper person to be registered as a salesman resulted in a denial of the appellant’s right to Due [sic] process and deprived him of natural Justice.

- (c) The Board went beyond its authority by not approving Mr. Reid's Application on the sole basis of his Prior [sic] convictions without affording him a fair hearing.
- (d) The Board Erred [sic] in Law [sic] in exercising its discretion under section 5(e) of the Real Estate (Dealers and Developers) Act to deny the appellant a salesman [sic] licence on the basis of his convictions."
(Emphasis as in original)

[8] The order appealed was the denial of the licence to conduct real estate business in the areas of property sales and rentals. The following findings of fact and of law were challenged:

- "(a) Findings of fact:
 - i. THAT THE APPLICANT IS NOT A "fit and proper person"
- (b) Finding of Law
 - i. THAT THE APPLICANT IS NOT A "fit and proper person" UNDER SECTION 14(1)(B) OF THE REAL ESTATE (DEALERS AND DEVELOPERS) ACT.
 - ii. THE BOARD'S DUTY UNDER SECTION 5(e) OF THE REAL ESTATE (DEALERS AND DEVELOPERS) ACT GAVE THEM A DISCRETION TO DENY MR. REID A SALESMAN LICENCE ON THE BASIS OF HIS PRIOR CONVICTIONS." (Emphasis as in original)

[9] Counsel asked this court to grant the following relief:

- "i. The Boards [sic] decision to decline approval of Mr Reid's Individual Salesman [sic] licence be quashed.
- ii. A finding that the board [sic] went beyond the scope of its authority in denying Mr Reids [sic] Licence solely on the basis of his prior convictions.
- iii. A directive that a salesman [sic] Licence be issued to Mr Reid or in the alternative that further submissions

and material in support of Mr Reid's application for his licence be submitted following the date of this decision.

- iv. The Board be directed to consider Mr Reid's application afresh, taking into account any further submissions on his behalf at a hearing to determine "Fit and Proper" [sic] with guidance from the decision of the Court.
- v. Any such order that the Court [sic] Honourable Court of Appeal deems fit." (Emphasis as in original)

[10] Grounds (a) and (d) raise the same issue as to whether the Board fell into error when it found that the appellant did not satisfy it on the fit and proper criterion, having exercised its discretion to refuse the licence solely on the basis of the appellant's previous convictions for serious offences. Grounds (b) and (c) raise the same issue as to whether the Board was in breach of natural justice in denying the appellant a licence without first affording him an oral hearing.

[11] During the consideration of this appeal, the grounds of appeal filed challenging the Board's decision, and the submissions in support of the grounds, it came to the attention of this court that, although several sections of the Act were cited and argued before the court, one crucial section was not cited, and that is section 41 of the Act. This section states:

"Notwithstanding anything contained in this Act the Board shall not refuse any application under this Act unless the Board has afforded to the applicant a reasonable opportunity to be heard in support of his application and any person so entitled to be heard may be represented before the Board by an attorney-at-law or other representative of his choice."

[12] It follows that, since this section was not cited by either side, no argument was made on it. Consequently, the Registrar of this court, at the instance of this panel, wrote to the parties, on 4 March 2024, requesting that written submissions be made on the meaning and effect of the section, within 14 days of the receipt of the request. Both the appellant and the respondent filed written submissions, as requested, on 14 March 2024 and 15 March 2024, respectively. As a result of the written submissions received from

both parties, I have determined that grounds (b) and (c) of the appeal can be disposed of on the basis of the interpretation to be given to section 41. The issue, in the light of section 41, is whether the Board erred when it refused to grant the appellant a real estate salesman licence, on the basis that he had previous convictions for serious offences, without first giving him a reasonable opportunity to be heard. Grounds (a) and (d), nevertheless, remain to be considered and the issue with regard to that is whether the Board erred when it took account of the appellant's previous convictions as a relevant factor in determining whether or not he was a fit and proper person to be granted a real estate salesman's licence.

Whether the Board erred when it took account of the appellant's previous convictions as a relevant factor in determining whether or not he was a fit and proper person to be granted a real estate salesman's licence (grounds (a) and (d))

Discussion

A. The applicable statutory provisions

[13] The Board was established for the purpose of carrying out the provisions of the Act. The power and functions of the Board are set out in section 5 of the Act, and include the regulation and control of the practice of real estate business. It specifically mandates the Board to consider and determine applications for the registration of real estate dealers and salesmen, and to grant and renew licences to real estate dealers and salesmen. As part of its functions, it can also conduct examinations of applicants for registration as real estate dealers and real estate salesmen. The function of the Board that is relevant to this appeal, is the consideration and determination of applications for licences and renewal of licences for real estate salesmen (section 5(a)). In carrying out this function, it is given several powers under the Act, including the following:

"5. (a) ...

...

- (c) to make enquiries and collect information as it may think necessary or desirable for the purpose of carrying out its functions;
- (d) to hold and conduct such examinations of applicants for registration as real estate dealers or real estate salesmen as it thinks necessary or desirable; and
- (e) generally to take all such other lawful measures as it may consider necessary or desirable to assist it in carrying out its functions under this Act, or the *Timeshare Vacations Act, 2014* **and in protecting the mutual interests of persons entering into land transactions.**"
(Emphasis added)

[14] Sections 13 states that:

- "13. (1) A person who desires to be registered as a real estate dealer or a real estate salesman shall apply to the Board for approval of such registration and shall pay the prescribed fee.
- (2) Every application for registration shall be made in such manner and contain such particulars and be accompanied by such documents as may be prescribed."

[15] Section 14 provides that:

- "14. (1) If, in relation to any application for registration as a real estate dealer or real estate salesman, the Board is satisfied –
- (a) that the provisions of section 13 have been complied with;
 - (b) that the applicant is a fit and proper person to be so registered; and
 - (c) that the applicant is not disqualified for registration under section 21,

the Board shall, subject to subsection (2), approve the registration of the applicant as a real estate dealer or, as the case may be, a real estate salesman.

(2) An approval by the Board pursuant to subsection (1) may be unconditional or subject to such conditions as may be prescribed or such other conditions as the Board may determine and any such conditions may limit the registration of the applicant to a specified branch or specified branches of the practice or real estate business and may prohibit the issue of a licence under section 20 to the applicant to engage in other branches of such practice.

(3) Upon an approval of an application for registration as a real estate dealer, the Board shall furnish the applicant with a certificate of registration in the prescribed form.

(4) If the Board is not satisfied as to any of the matters specified in subsection (1) the Board shall refuse to register the applicant and shall notify him in writing accordingly and inform him of the right of appeal conferred by section 22."

The fit and proper criterion is, therefore, to be found in section 14(1)(b) which provides that the Board may grant the licence or registration of a person as a real estate dealer or real estate salesman, if it is satisfied that the applicant is a fit and proper person to be so registered, and that the person has complied with all the requirements of the Act.

[16] Section 15(1)(a) empowers the Board to cancel or suspend the registration of a person, and remove that person's particulars from the register, if that person has been convicted of any offence under the Act or any offence involving fraud or dishonesty.

[17] Section 21(2) is also relevant and states that:

"21. (2) An individual shall not be qualified for registration as a real estate salesman if-

(a) he is under the age of eighteen years;

(b) he does not possess the prescribed qualifications for registration as a real estate salesman; and

(c) he has had an order in bankruptcy made against him which remains undischarged.”

The existence of any one of the circumstances listed in section 21(2), therefore, would provide an absolute prohibition from being registered as a real estate salesman.

[18] An appeal from the decision of the Board lies to this court pursuant to section 22 of the Act. This court is empowered to consider the appeal and give such directions as it thinks proper and the Board “shall comply”.

[19] Section 41, as indicated previously, mandates that the Board should not refuse any application under the Act without giving the person affected a reasonable opportunity to be heard.

B. *The appellant’s application*

[20] The appellant, was an individual over the age of 18 years old, who duly completed the qualifying course, sat and passed the prescribed exams, and who was not, by all accounts, an undischarged bankrupt. He was, therefore, not absolutely prohibited under section 21 to apply for a licence. However, in applying for the licence under the Act, the appellant was still required to satisfy the Board that he had complied with the provisions of section 13 (making an application to the Board in the prescribed form and paying the prescribed fee), and that he was a fit and proper person to be registered as a real estate salesman pursuant to section 14. There is no dispute that the appellant complied with the requirements of section 13. What remained was for him to satisfy the Board that he was a fit and proper person to be granted a real estate salesman’s licence.

[21] The appellant’s application to be registered as a real estate salesman was supported by the following letters:

- a. Letter dated August 24, 2020 from a Real Estate Agency to the Real Estate Board (hereinafter referred to as the 'job letter');
- b. a character reference letter dated October 2, 2020 from a Minister of Religion;
- c. a character reference letter dated October 28, 2020 from a Justice of the Peace and President of the Board of Directors of a company;
- d. a character reference letter dated November 9, 2020 from a retired army major and Justice of the Peace; and
- e. letter dated October 29, 2020 from the Jamaica Constabulary Force to the Board (hereinafter referred to as 'the police report').

The job letter simply indicated that the appellant had been offered a job, pending his registration. The character references did not mention the appellant's convictions nor his rehabilitation. The letter to the Board from the Jamaica Constabulary Force set out the appellant's police record and lists his convictions and sentences.

C. The decision

[22] The Board's refusal to grant the real estate salesman licence to the appellant came after a pre-registration inspection was conducted and a report dated 17 November 2020 was produced. That report confirmed that the appellant had pre-qualified for the licence by virtue of his participation in a 108-hour pre-licensing course, that he was not a bankrupt, and that he was of the required age. Although it was acknowledged that the appellant had met those requirements, in the light of the convictions recorded on the appellant's criminal records, which were confirmed in the report, the decision whether to

grant the licence was left up to the Board. As a result, the appellant's application was referred to the Legal Committee of the Board, which produced a report for the Board's consideration. The Legal Committee did not recommend the approval of the application.

[23] At the 400th meeting of the Board, as set out in the minutes of that meeting which were provided to this court, the Board considered the pre-registration inspection report and the report of the Legal Committee. The Board took account of the fact that the Legal Committee had considered the previous convictions of the appellant, and that these convictions had not been expunged and were of a "violent nature". The Board also took into account that, on those bases, the Legal Committee had concluded that the appellant was not fit and proper to be registered and did not recommend the approval of appellant. The Board further considered the Legal Committee's stance that the Board had a statutory obligation under section 5(e) of the Act to protect the public and regulate the profession.

[24] Having considered the reports, the Board agreed with the recommendation of the Legal Committee and did not approve the appellant's application.

[25] The appellant was advised of the Board's decision in a letter dated 17 December 2020. That letter reads:

"December 17, 2020

Michael Wayne Reid
13A Charlton Avenue
Apartment 1, Block D
Kingston 8

Dear Mr. Reid:

Re: Application for Licence to become Real Estate Salesman

We write in relation to the captioned matter and in response to your application to become a Real Estate Salesman.

Unfortunately, the Board of Directors is of the view that you are not a fit and proper person under Section 14(1)(b), to hold a license [sic] in relation to Real Estate Business and

therefore, your application is denied. If you wish to appeal this decision, you may do this within forty-two (42) days of the date of this letter and the appeal lies with the Court of Appeal.

We wish you the best in your future endeavours.

Yours sincerely,
REAL ESTATE BOARD/
COMMISSION OF STRATA CORPORATION

...
Sandra Garrick (Mrs.)
Chief Executive Officer"

D. *Were the appellant's previous convictions relevant to his application for a licence?*

(i) Appellant's submissions

[26] Counsel for the appellant, Mr Buchanan, submitted that the Board's approach to evaluating the appellant's application was wrong, in that, it relied solely on the appellant's previous convictions to find that he was not a fit and proper person. Counsel maintained that the convictions were not a proper basis, and could not have provided sufficient evidence, upon which the Board could have made a determination that he was not a fit and proper person. He asked this Court to consider and find that the approach as set out in the Legal Committee's report was also wrong.

[27] Counsel for the appellant contended that, not only was that approach wrong, but that the Board ought to have followed the approach taken in the case of a New Zealand Tribunal, in the case of **Robert William Revill v Registrar of the Real Estate Agents Authority** [2011] NZREADT 41 at para. 11 ('**Revill**'), which counsel said was more forward-looking. Counsel summarized the approach as set out in that case, as follows:

"a. The Tribunal will make its own assessment of whether it is satisfied that he is a fit and proper person to hold a license [sic]. Each case is determined on its own facts, with reference to the material available to the Registrar and any additional material provided to the Tribunal.

- b. The onus is on the applicant to satisfy the tribunal on the basis of sufficient and adequate information that he is a fit and proper person to hold a license [sic]. The standard of proof is the ordinary civil standard of the balance of probabilities.”

Counsel then outlined the factors relied on in **Revill**, based on the case of **Re T** [2005] NZLR 544 at page 547, which he believed to be relevant to the assessment, in this case, of whether an applicant is a fit and proper person to hold a salesman’s licence, as follows:

- i. The focus is necessarily forward-looking. The function of the registrar and the tribunal on review is not to punish the applicant for past conduct but to assess the applicant’s worthiness and reliability for the future.
- ii. The onus of a person who has erred in the professional sense following admission to the industry is heavier than one on a candidate for admission.
- iii. The Registrar (and the Tribunal) must look at the facts of the case ‘in the round’ and not just have regard to the facts of the previous convictions.
- iv. The Tribunal has placed emphasis on the presence of robust supervision and support structures available to the applicant in the proposed workplace.”

[28] Counsel invited this court to adopt and affirm this approach as the correct one to take in circumstances such as this, and maintained that having a previous conviction should not result in an automatic disqualification. He submitted that prior convictions were only relevant if there was evidence that the appellant was likely to engage in similar conduct again. There was no such evidence before the Board and it made no such enquiries, counsel said. In that regard, counsel relied on the case of **Aston Reddie v The Firearm Licensing Authority and Others** (unreported), Supreme Court, Jamaica, Claim No HCV 1681 of 2010, judgment delivered 24 November 2011, as well as **Fenton**

Denny v The Firearm Licencing Authority [2020] JMSC Civ 97, for the submission that it is important to consider the impact the person, as at the time the application is made, would have on the public if allowed to be a part of a profession. Counsel also cited the Privy Council's decision in **Layne v Attorney General of Grenada** [2019] UKPC 11 (**'Layne'**), which, he said, discussed the good character requirement for entry into a profession. That case, he submitted, held that the finding of good character was one of evaluation confined to a specific power, and was not an exercise of discretion. In that regard, counsel submitted that the Act could have given the Board the discretion to bar persons on the basis of offences other than those listed, or on the basis of the seriousness of the offence, but did not. Counsel argued, therefore, that the Board was required to limit its consideration to whether the appellant was a fit and proper person at the time of the application, and that the Board went beyond its authority by in effect extending the prohibitions in section 15(i)(a) of the Act.

[29] Counsel further argued that the Board ought to have taken a forward-looking approach based on the applicant's present character as that taken by the General Legal Council, in its decision in respect of Isat A Buchanan, delivered 22 November 2017, in which the applicant had two convictions for drug offences at the time he applied to the Council for a qualifying certificate and a certificate pursuant to section 6 of the Legal Profession Act for enrolment to the Jamaican Bar (see <https://www.generallegalcouncil.org/judgements/glc-2017-11-22-isat-a-buchanan-application-decision.pdf>). In that case, counsel said, the applicant's good character was considered as of the date of the hearing, unlike in this case, where the Board only took account of the appellant's historic offences.

[30] Counsel maintained that the Board ought to have held a hearing and ought to have given Mr Reid an opportunity to explain himself. Counsel asserted that the appellant's disclosure of his convictions confirmed his honesty, candour and integrity, and was directly relevant to the question of whether allowing him to hold a licence would promote public confidence in the industry.

(ii) Respondent's submissions

[31] Counsel for the Board, Miss Burgess, submitted that the evidence of the appellant's character was insufficient to satisfy the Board that he was a fit and proper person to be granted a licence. She relied on the definition of "fit and proper person" in Stroud's Judicial Dictionary of Words and Phrases (7th Ed), to argue that the question of whether one is a fit and proper person, in the context of an application for entry into a profession, depends on whether that person has "the personal qualities and professional qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do".

[32] Counsel cited the case of **Layne** for the proposition that the entry requirement of good character into any profession has two facets: (a) personal attributes and (b) risk of damage to public confidence in the profession. She noted that, in **Layne**, all the judges considered previous convictions to be of relevance in determining good character.

[33] Counsel pointed to the fact that licensed salesmen have to be trusted by members of the public, as they typically operate in the privacy of their clients' homes and are required to show properties to prospective purchasers. Counsel argued that convictions for sexual offences must be carefully scrutinized with respect to licensing real estate salesmen, as the public places a high degree of trust in persons approved and licensed by the Board.

[34] Counsel also pointed to subsidiary regulations to the Act which, she said, contain a code of conduct for real estate salesmen. By this code, she argued, real estate salesmen are enjoined to maintain the dignity and integrity of the profession. The Board, she said, is also required to consider the impact on the public's confidence in the profession, if it were to be seen to be offering licences to unfit candidates.

[35] Counsel argued further, that the appellant had incorrectly interpreted section 15(1)(a) of the Act, as that section, she said, related to the cancellation and suspension of registration and not to the initial licensing process. Nonetheless, she submitted, section

15(1)(b) and (c) included a wide range of conduct for which registration could be cancelled. Section 15, she said, was not relevant to this case.

(iii) Analysis and disposal of grounds (a) and (d)

[36] I agree with counsel for the respondent that, on a reading of the Act, it gives three different categories of broad requirements for an applicant to be successful in an application for registration and licensing. The first are the procedural requirements in section 13 (which are referenced in section 14(1)(a)). The second is the “fit and proper person” requirement in section 14(1)(b), and the third is the disqualifying prohibitions in section 21.

[37] I also agree that section 21 is an absolutely prohibitive section and that the Board has no discretion to grant a licence to an individual who falls into any one of the categories listed there. However, section 21 is not the only gateway to disqualification. The “fit and proper person” provision in section 14(1)(b) may also disqualify an individual, if he or she, fails to satisfy the Board that, he or she, is a fit and proper person to be registered and licensed as a real estate salesman.

[38] Counsel for the Board, as do I, accepts that the Board’s approach should be forward-looking. The Board still has an obligation, however, when taking that approach, to assess the risk of future misconduct and harm to the public or profession, and despite counsel for the appellant’s objections to this, the Board also has an obligation under section 5(e) to take lawful measures to protect the mutual interests of persons entering into land transactions. One of those measures is to ensure that persons who are not fit and proper are not licensed to sell real estate.

[39] In **Layne**, at paras. 57-59, Lord Sumption held that a conviction is *prima facie* evidence of bad character, unless it is old, minor or irrelevant. In this case, the convictions were not old or minor, nor were they irrelevant.

[40] Counsel for the respondent asked the court to consider the following factors as relevant to the decision the Board had to make:

- (a) the age of the applicant at the time;
- (b) the nature of the offending;
- (c) the time that had elapsed since the offence was committed; and
- (d) evidence of successful rehabilitation.

[41] I agree with counsel for the Board that those are relevant factors for the Board's consideration. I also agree that the offence of rape is serious in nature. Counsel argued that rape being a violent sexual offence, there is the risk that it would cause anxiety in the public and could cause an adverse impact on the reputation of the profession, if such a person is registered. It is difficult to disagree with that assessment as the fact of a conviction and the type and nature of the offence are relevant considerations when contemplating the licensing of an individual to conduct professional activities which may involve interaction with members of the public.

[42] In **Layne**, despite some criticism of the judgments of the court at 1st instance and the Court of Appeal, the Privy Council upheld the decision not to award a Legal Education Certificate to a reformed murder convict. In the case of Isat Buchanan, the General Legal Council required the applicant to attend an oral hearing before it to consider his application for a qualifying certificate pursuant to section 6 of the Legal Profession Act of Jamaica, in the light of his two convictions for drug trafficking offences. Mr Buchanan gave evidence before the Council and called several character witnesses. The Council, holding that it was guided by the decision in **Layne**, considered that Mr Buchanan had been very young at the time of the offending and had not reoffended in two decades. It determined that Mr Buchanan had shown that he was a valuable asset to society and that he would be an asset to the legal profession.

[43] In this case, the offence which caused the Board some anxiety was committed by the appellant when he was at an advanced age, and he reoffended relatively soon thereafter (within three years of the end of his sentence for the 1st offence). It was open to the Board to consider whether there had been any sign of rehabilitation.

[44] Although the minutes of the meeting of the Board do not reflect a long discussion of the assessment of the appellant's character, it is clear the Board was concerned about the convictions. Convictions are a relevant consideration when taking account of a person's fit and proper status for any profession, and especially one which involves interaction with the public (see the majority decision in **Layne**). It was incumbent on the appellant to show that he was a fit and proper person to be registered and granted a licence, despite his convictions for serious offences, one of which was not capable of being spent and expunged.

[45] The appellant suggested that the approach that was taken in the case of **Revill** is an appropriate one to take in this case. That case was decided by the Real Estate Agents Disciplinary Tribunal on an application for review of the decision of a Registrar to decline the applicant's application for a salesperson's licence, by virtue of section 112 of the Real Estate Agents Act 2008 of New Zealand. Under the Real Estate Agents Act, provision is made for the Tribunal to hear evidence which the Registrar had not heard. The applicant sought and was granted an oral hearing by the tribunal, where more extensive evidence was adduced than that which had been before the Registrar.

[46] The issue in **Revill** was whether the applicant should be granted a salesperson's licence despite his numerous past convictions. The provisions of the Real Estate Agents Act 2008 are worded entirely differently from the Act, but some of the sections are, in essence and spirit, the same. Section 36 of the New Zealand Act refers to the "Entitlement to a licence", and under that section an individual may be licensed if the individual satisfies the Registrar as to the age qualification; that the prohibitions in section 37 do not apply; that the prescribed qualifications are held; and that he or she is a fit and proper person to hold a licence.

[47] The Tribunal recognised that the fit and proper criterion in section 36 was in addition to the prohibitions in section 37. So that, the circumstances of the particular individual might very well not fall within the prohibitions in the latter section, but nevertheless, the individual may still fail to show that he or she is a fit and proper person

to be licensed. The Tribunal also recognised that under the clear language of section 36(2), the burden was on the applicant to show that he was a fit and proper person. Although section 14(1) of the Act (the equivalent to section 36) does not explicitly state that it is the applicant who must satisfy the Board, it is generally accepted that if the Board is to be satisfied then it is the applicant who must satisfy it, the standard of proof being the civil standard.

[48] The Tribunal in **Revill** further recognised that adequate information must be given to meet the standard of proof. The Tribunal considered the case of **Re T** at pg 547, a high court decision from New Zealand on the approach to be taken in assessing cases under the Law Practitioners Act 1982. In that case, the court suggested a forward-looking approach which does not punish for past conduct, but which, instead, considers the question of “worthiness and reliability for the future”. It also suggested that consideration should be given to youth and immaturity, and that the case be considered in the round. The Tribunal in **Revill** concluded that the cases affirm that it is a significant step to deprive a person of a licence. The primary consideration is whether the court is satisfied, objectively, that the candidate is a fit and proper person, and that judgment is being made in the interest of the community, having regard to the profession.

[49] The Tribunal accepted that, based on the information before the Registrar, it was open to the Registrar to find that the applicant had not satisfied the Registrar that he was a fit and proper person to hold a licence as a result of his criminal convictions. However, having heard from the applicant and his witnesses, the Tribunal took the view that the applicant could be granted a licence, based on the evidence of significant rehabilitation, testimonials from persons who had been aware of the applicant’s convictions and could speak positively of his efforts to turn his life around, and the fact that the applicant would have stringent supervision at his work place which required that sales persons be supervised and mentored. The Tribunal was careful to note that if the applicant were to leave that work setting, there might be a case for further assessment on renewal.

[50] Based on the decision I have arrived at on grounds b and c, the approach in this case and the case of **Layne**, may be of some assistance to the appellant. I agree with Counsel for the Board that there are procedural aspects of the provisions in the New Zealand Act which are different from the Act in this jurisdiction. It is to be noted, that the Tribunal in **Revill** found that the Registrar was correct to deny the licence, which the Tribunal itself only granted on further evidence being provided by persons who were aware of the appellant's convictions, of significant rehabilitation, and the fact that he was going into a supervised work environment.

[51] That **Revill** was a special case, on its facts, is emphasized by the Tribunal's findings in **Yang Shi v Registrar of the Real Estate Agents Authority** [2013] NZREADT 2. In that case, the applicant had a conviction for kidnapping. The Tribunal, in reviewing the Registrar's refusal of a licence, said this at para. [45]:

"The real estate industry must pivot on the highest ethical standards and the public expect that to be fundamental as it must be. Despite all the circumstances about the crime outlined by the applicant from her point of view, we consider that her involvement was so serious that she cannot be confidently regarded as a fit and proper person for the purpose of holding a licence as a real estate salesperson...."

[52] Whilst I accept counsel's contention that the assessment should be forward-looking, and that convictions alone would not automatically disqualify a person from obtaining a licence, a conviction is *prima facie* evidence of bad character. I accept that the fit and proper person criterion for entry into the profession as a real estate salesman must be satisfied at the date of the application and not historically (see **Layne** at para. 38 with regard to good character for entry into the legal profession). I also accept that the issue is one to be determined by evaluation and is not one of discretion (see para. 39 of **Layne** with regard to the assessment of good character for admission into the legal profession).

[53] In **Layne** the Privy Council determined that good character had two facets. The first was the applicant's own attributes, and the second was the risk of damage to the

public's confidence in the profession. In the case of a consideration regarding whether a person is fit and proper, for my part, I would add a third facet, that is, the risk of injury, loss or damage to members of the public.

[54] The Privy Council decided in **Layne** that the actions of a candidate at any stage of his career may be relevant to the question of his good character, and that evidence of convictions is necessarily relevant. The question whether the public can reasonably be expected to have confidence in the admission of the candidate was also held to be relevant. Lack of confidence by the public must be objective and not be misguided.

[55] In this case, the appellant's convictions for rape, for which he spent time in prison, and his two subsequent convictions for violent offences shortly after coming out of prison, demonstrated that the appellant was *prima facie* of bad character, and therefore, *prima facie* not a fit and proper person. Those convictions are objectively serious and relevant. Evidence of rehabilitation and present good character at the time of the application should have been presented by the appellant.

[56] The risk to the reputation of the profession and the safety of the public is high in such cases, and it must be shown that the risk has been minimised, either by rehabilitation, supervision, or both, and that the objectives of the obligations placed on the Board in section 5(e) can still be met after his registration. Public safety concerns from a convicted rapist must be of paramount concern, and attendant to that, is the risk of a failing public confidence in the profession from the registration of such persons. It was incumbent on the appellant to satisfy the Board that there was no such risk or that any such risk was minimised.

[57] I conclude, therefore, that the Board did not err in considering the investigative report, the report of the Legal Committee, the appellant's previous convictions and their obligation to protect those who are in the real estate business, as relevant to their determination of whether the appellant was a fit and proper person to be granted a licence under the Act.

[58] Grounds (a) and (d) would necessarily fail.

[59] That, however, is not the end of the matter, for having determined that the convictions were relevant to their decision and that a refusal was imminent, as a result, consideration ought to have been given to section 41 of the Act.

Whether the Board erred when it refused to grant the appellant a real estate salesman licence on the basis that he had previous convictions for serious offences without first giving him a reasonable opportunity to be heard (grounds (b) and (c))

Discussion

A. *The submissions*

[60] Counsel for the appellant initially argued that the failure of the Board to defer the appellant's application and require him to attend a meeting of the Board, as well as to bring counsel to represent him with any witness he thought fit, was a breach of due process and a deprivation of natural justice. As a result, it was submitted, the decision ought to be set aside.

[61] In his further written submissions on the meaning and effect of section 41 of the Act, counsel maintained that the section was a legislative codification of procedural fairness and natural justice, which imposed a statutory duty on the Board not to act without giving the applicant an opportunity to be represented by an attorney or other representative of his choice at a hearing before the Board. Counsel argued that it was a question of fact whether the appellant had been given a reasonable opportunity to be heard by the Board. Counsel submitted that, on the facts, the appellant was not afforded a reasonable opportunity to be heard, despite the express statutory requirement. He argued further that procedural fairness was enhanced by the provisions in section 41. That section, he submitted, required the Board to hold an oral hearing, as that was the only means by which the appellant could be represented before the Board.

[62] Counsel argued that the Board's decision was arrived at by a process that breached the statutory provisions regarding procedural fairness, and that if the appellant had been

given a reasonable opportunity to be heard, relevant material could have been placed before the Board which could have caused it to decide in his favour.

[63] Counsel for the Board had initially submitted that the appellant had had a fair hearing which was conducted on the uncontested material. Counsel had also submitted that the New Zealand approach used in **Revill** was not applicable, as it was based on the New Zealand Real Estate Agents Act 2008 which is not similar to the Act. She pointed out that in the case of New Zealand, the application is made to a Registrar at first instance, with an appeal to the Tribunal based on section 43 of the New Zealand Act. That legislation also prescribes a procedure which is not replicated in the Act. As an example, counsel pointed to the fact that the New Zealand Act allows the applicant to furnish further evidence to the Tribunal and it also vests the Tribunal with all the powers of the Registrar. Counsel also submitted that the appellant had the opportunity to be “heard” on paper, and that there was no breach of natural justice.

[64] However, in her written submissions on the meaning and effect of section 41, counsel conceded that the issue was relevant to grounds (b) and (c) if those grounds were amended to include a complaint that the Board had failed to follow its own procedure. Counsel submitted that it is arguable that section 41 introduces a two-stage process to the decision to refuse an application. Counsel pointed to the fact that section 14(4) indicates that the Board is empowered to refuse to register an applicant who has not satisfied it as to any of the matters specified in section 14(1). She, however, conceded that section 41 required the Board to permit the applicant to make representations before it, before a decision to refuse is made. Therefore, she conceded that, as this was not done in the appellant’s case, there was a breach of procedural fairness.

[65] Counsel submitted, however, that not every breach of procedural fairness automatically nullified a decision, and that the issue must be considered against the background of how material or significant the breach was. The relevant question in this case, counsel submitted, was whether the outcome could have been different if the breach had not occurred. Counsel pointed to the fact that the appellant maintained that,

had he been given the opportunity, he would have brought evidence to show rehabilitation. That evidence, counsel conceded, could have affected the Board's decision. She reminded the court that the Board's position was that the previous convictions were relevant to its decision, and she asked that this court remit the case back to the Board for a hearing, with directions on the factors the court considered appropriate "in assessing the convictions, the weight, if any, relevant to any particular factor and the relevance of expungement of the offences on the [Board's] assessment of the applicant".

B. *The applicable legal principles*

[66] As stated previously, none of the parties initially alerted the court to section 41 of the Act and the effect of its interpretation on this appeal. It would appear that the section was inadvertently overlooked, not only by the parties, but also by the Board. This is not surprising as this very important provision was placed at the back of the legislation under the nondescript label of "Miscellaneous". As it turns out, it is a very important provision and provides a complete answer to grounds (b) and (c) of the grounds of appeal.

[67] At common law, the complaint of a breach of natural justice has been decried in many and varied cases. However, the question of whether there has actually been such a breach depends on the circumstances of the particular case (see the case of **University of Ceylon v E F W Fernando** [1960] 1 WLR 223 at page 231). Each case stands on its own set of facts, and very often, the outcome will also depend on the category of case, the nature of the enquiry, the subject matter, and the legislation governing that subject matter, so that, what may constitute a breach of natural justice in an employment case, may not be found to be so in, for instance, a licensing case.

[68] In the seminal case on the common law rules of natural justice, **Ridge v Baldwin and Others** [1964] AC 40, at page 65, Lord Reid opined that the difficulty in reconciling the various cases on natural justice, was that insufficient attention had been placed on the significant differences between the various types of cases in which the principle was being applied. I will endeavour not to make that mistake. That will result in the citing of more cases than perhaps would ordinarily be necessary. Sadly, whilst Lord Reid discussed

the application of the principles to several categories of cases, the category involving licensing cases was not one of them. He only mentioned the Privy Council decision in **Nakkuda Ali v M F DE S Jayaratne** [1951] AC 66, which he found was not relevant to the case before him. Lord Evershed, in his dissenting opinion, did mention the category of cases involving the withdrawal of a licence, briefly in his judgment, at page 94 to 95 as well as the case of **Metropolitan Police Commissioner, Ex parte Parker** [1953] 1 WLR 1150, which, he said, supported the view that the consideration of natural justice principles in those cases will have different results from cases involving the withdrawal of a right or proprietary interest.

[69] There are three simple broad requirements for natural justice in any case. Firstly, the person likely to be affected adversely by a ruling should know what he is accused of; secondly, that person should be given an opportunity to state his case; and thirdly, the decision maker should act in good faith (see **Byrne v Kinematograph Renters Society Ltd** [1958] 1 WLR 762 at 784, as cited in the case of the **University of Ceylon v E F W Fernando** at page 232).

[70] Sometimes the cases refer to the duty to act fairly. In the case of **R v Secretary of State for the Home Department, Ex p Doody** [1994] 1 AC 531 at 560 Lord Mustill speaking of the requirement for fairness, said this:

“(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own

behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

[71] The nature and limits of the requirement for natural justice are set out in the House of Lord’s decision in the case of **Board of Education v Rice and Others** [1911] AC 179, a case dealing with the decision of a Board of Education in England. At page 182, the House of Lords stated as follows:

“In such cases the Board of Education will have to ascertain the law and also to ascertain the facts...[I]n doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.”

[72] In **Wiseman and Another v Borneman and Others** [1971] AC 297, it was said by the House of Lords, at page 310, that, “where a statutory tribunal has been set up to decide final questions affecting parties’ rights and duties, if the statute is silent up on the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied”. The tribunal in that case was held to be a judicial tribunal.

[73] Taking the facts in that case from the speech of Lord Donovan (on whose exhortation I cannot improve), at pages 312 to 313, he described how the appeal arose in that case, in this way:

“...[T]his appeal arises out of the provisions of section 28 of the Finance Act, 1960, which is intended to cancel tax advantages from certain transactions in securities. Where the

circumstances defined in the section exist, and a person obtains a tax advantage in consequence of a transaction in securities, or is in a position to do so, then the Commissioners of Inland Revenue may cancel it by an assessment to tax, or by nullifying a right to repayment of tax, or the requiring of the return of a repayment already made, and so on. These consequences are not to follow, however, if the taxpayer shows that the transaction was carried out for bona fide commercial reasons, or in the ordinary course of making or managing investments, and that the obtaining of a tax advantage was not a main object, or one of the main objects, of the transaction. Section 29 of the same Act gives the Commissioners of Inland Revenue power to call for the information they require before setting section 28 in motion.

That is done by a notice served on the taxpayer by those commissioners stating that they have reason to believe that section 28 may apply to him in respect of a transaction or transactions specified in the notice. Such a notice was served on each of the two appellants on February 23, 1967.

This gave each of them the right under section 28(4) to make a statutory declaration, within thirty days of the issue of the notice, stating the facts and circumstances which, in the opinion of the taxpayer, made section 28 inapplicable in his or her case, and to send it to the said commissioners."

[74] The procedure under section 28 of the relevant Act in that case, is set out in the judgment of Lord Wilberforce, at pages 319 to 320, as follows:

"...[F]irst, the commissioners must notify the taxpayer that they have reason to believe that the section may apply to him in respect of a transaction or transactions. These must be specified in the notification...Then the taxpayer may make a statutory declaration stating the facts and circumstances on which he bases his opinion that the section does not apply and sends this to the commissioners. It is then for the commissioners to decide if they wish to proceed, and if so they send to the tribunal a certificate to that effect with the statutory declaration and, if they wish, a counter-statement."

[75] The appellants (the taxpayers), having, at the Court of Appeal, abandoned their claim that they were entitled to an oral hearing, argued before the House of Lords that

they had a right to see the counter-statement of the Commissioners of Inland Revenue and to reply to it, as well as to have that reply considered by the Tribunal. The Tribunal is a statutory body. The section directs that the tribunal considers the declaration, the certificate, and the counter-statement of the taxpayer, in coming to its decision. The Law Lords considered that the taxpayer had the opportunity to set out fully his reasons for considering that section 28 did not apply. They also considered that the taxpayer is given the right to challenge the Tribunal's decision by way of appeal to special commissioners and can also apply for a rehearing before the tribunal. The taxpayer also has the right to go to the High Court by way of a case stated on a point of law. The Law Lords found that these rights fully satisfied the requirements of natural justice. The Law Lords also considered the additional right of the taxpayer to stop the proceedings altogether, if through his statutory declaration, he can satisfy the Board of Referees that there is no prima facie case for proceeding. The Law Lords found that, in following the course set out in the statute and by not extending it to give further rights, the Tribunal did not act unfairly. According to Lord Donovan, at page 316, "the better view is that the taxpayer, having set out, in his statutory declaration, all the facts and grounds upon which he bases his opinion that section 28 does not apply to him, has, if the tribunal nevertheless finds that a prima facie exists, simply failed to qualify for the special advantage which he sought".

[76] The House of Lords found that there had been no breach of natural justice by the Tribunal, and held (as accurately reported in the headnote) that:

"[S]ection 28 of the Finance Act, 1960, gave the taxpayer a sufficient opportunity of stating his contentions to the tribunal and that the tribunal was entitled to make its determination on the documents specified for there was nothing so unfair about the procedure specified in the section as to entitle the court to say that the principles of natural justice were not followed."

The limitations of the natural justice principles were stated in **Wiseman v Borneman**, by Lord Reid, at page 308, as follows:

“Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.”

C. *Analysis and disposal of grounds (b) and (c)*

[77] In its submissions before this court, the appellant relied on a case involving the Firearm Licensing Authority. That case is **Aston Reddie v The Firearm Licensing Authority and Others** (unreported), Supreme Court Civil, Claim No HCV 1681 of 2010, judgment delivered 24 November 2011. In that case, McDonald-Bishop J (as she then was) considered the principles of natural justice and its application to proceedings conducted by the Firearm Licensing Authority (the Authority), in respect of the grant and revocation of firearm licences. The claimant’s firearm licence had been revoked by the Authority, and the revocation was upheld by the Minister, acting on the advice of the Review Board, to whom the relevant law permitted the claimant to appeal. Neither the Authority, nor the Minister, had given the claimant a hearing before making their decisions. In revoking the claimant’s licence, the Authority had purported to exercise its power under section 36 of the Firearms (Amendment Act), 2005. It was held that that section did not impose an obligation on the Authority to conduct a hearing before it revoked a licence. However, the legislation did provide a scheme of arrangement whereby a person whose licence was revoked could obtain a hearing at which evidence could be received. The right to be heard, the court found, would operate at the stage where the review of the decision of the Authority takes place, by the Review Board or the Minister. It was held, therefore, that whilst the Authority was not in breach of natural justice, the failure to give a hearing at the review stage was a breach of natural justice.

[78] The questions that arose in this case, on the grounds of appeal which were filed, are whether the Board was bound to observe the common law rules of natural justice, and if so, what form that observance should have taken, as well as whether the Board failed to observe them. The answer to those questions would depend on the legislative scheme of arrangement under which the Board operates. Under the legislation, the jurisdiction of the Board extends locally to all persons wishing to be registered as real estate salesmen. With regard to those persons, the Board is tasked with the duty to ensure, amongst other things, that only qualified persons are registered, and that those qualified persons who apply to be registered, are fit and proper persons to be so registered. In making that decision, the Board must take account of the mutual interests of persons entering into land transactions, and must take whatever lawful measures are necessary or desirable to protect those interests. The Board's functions are set out in section 5 of the Act. With respect to the application brought by the appellant, the Board's function was to ensure that he was qualified and that he was a fit and proper person to be registered.

[79] In carrying out these functions, section 5 of the Act empowers the Board to make enquiries, collect information and hold and conduct examinations of applicants as it thinks necessary. This is clearly within the discretion of the Board. There is no procedure laid out in the Act for these functions to be carried out and it is clear that the Board has set out its own procedure, as it has a right to do. There are regulations made under sections 25 and 43 to which there has been an amendment in 2010, but these do not assist. There is also a discretion in the relevant Minister, after consultation with the Board to make regulations governing the requisite procedure in respect of applications for a salesman licence. The Real Estate (Dealers and Developers) Regulations 1988 does in fact provide, among other things, the required qualifications and the form the application should take. It is entirely up to the Board how it receives information touching and concerning what it must decide and be satisfied of, but the information received must provide the opportunity to enable it to be so satisfied. The Board considers all the information placed

before it, and procedurally, it does so on paper. There is no requirement to hold an oral hearing, in every case, when considering whether to grant a licence.

[80] No submission was made as to the procedure followed by the appellant in his application, however, that procedure is set out in regulations 2, 3, 4 and 11 of the Real Estate (Dealers and Developers) Regulations, 1988 (the regulations) made under and by virtue of section 43 of the Act. That section gives to the relevant Minister the power, after consultation with the Board, to make regulations for the "better carrying out of the objects and purposes of the Act". Regulation 2 provides for persons desirous of applying to be a real estate salesman to apply in writing in the form specified in form A of the regulations and pay a specified fee. Based on the chronology of events filed in this court along with the documentary evidence, it would appear that the appellant did fill out an application form and paid the prescribed fee. Regulation 3 requires the applicant to submit, in support of the application, original certificates evidencing the necessary qualification, along with three character references. Regulation 3(e) also requires the submission of any other records or particulars that the Board may ask for. The appellant did submit the application along with the references and what is known locally as a 'police record'. The latter, although not specifically stated in the regulations appears to be a record or particulars that the Board required. Regulation 11 sets out the absolute qualification requirements to be registered as a real estate salesman.

[81] The Board was not bound to hold an oral hearing or interviews, or hear submissions as part of its application procedures. The legislature gives it no power to administer oaths and it need not make the examination of witnesses a general part of its application process, unless it thinks it fit to do so. In deciding whether an applicant has satisfied it that he or she is fit and proper to be granted a licence, the Board must act fairly and not arbitrarily. Where legislation provides no guidance, it must act "honestly" using "honest means" (see **University of Ceylon v E F W Fernando** at page 233, quoting from **Local Government Board v Arlidge** [1915] AC 120 at 138).

[82] By virtue of the provisions in the Act, the Board has to be satisfied by the applicant, not only that he is qualified but also that he is a fit and proper person to be licensed. The Board, apparently in order to satisfy itself, then causes the application to be investigated, after which it meets and comes to a decision. There is no legitimate expectation to be registered but there is a right to be heard on the application. That right to be heard on the application does not necessarily mean having an oral hearing and the oral examination of witnesses. The applicant not only fills out a form but has the opportunity, through the requirement for references to be submitted, to show that he is a person of good character and is, therefore, a fit and proper person. It would seem to me that this procedure has, in built in it, an element of fairness and would be sufficient for the Board to grant a licence.

[83] The case of **R v Gaming Board for Great Britain, ex parte Benaim and another** [1970] 2 ALL ER 528, is instructive as a case in which the application for a licence was refused after a hearing was granted. In that case, the owners of a gaming club, called Crockford's, applied to the Gaming Board of Great Britain, for a certificate of consent to apply for a licence. The Gaming Board was set up under the English Gaming Act of 1968, and was the body given the authority to issue certificates of consent for applicants to apply for a gaming licence under Schedule 2 of that Act. The Gaming Board, after due consideration, refused to grant Crockford's a certificate of consent. The principals had been present at the meeting of the Gaming Board in consideration of their application, and were questioned by members of the Board. After hearing from the principals and their attorneys, including further submissions which they were invited to make after the meeting, the Gaming Board refused its consent to certification. A rehearing was requested but that was refused. The Gaming Board was then asked to give reasons for its decision, which it did. The Gaming Board was further asked to clarify which of the matters set out in its reasons was still troubling the Board but it refused, instead, it indicated a willingness to consider further written submissions on any of the matters set out in its reasons. The principals of Crockford's were aggrieved by the refusal and applied for an order of *certiorari* to quash the decision, as well as an order of *mandamus* to

require the Gaming Board to provide sufficient information to enable them to answer the case against them, claiming that the Gaming Board did not act in accordance with the rules of natural justice.

[84] Lord Denning, writing in the Court of Appeal, at page 533, said that it was “not possible to lay down rigid rules as to when natural justice principles will apply” nor was it possible to state definitively what the “scope and extent” of those principles are likely to be, because each case would depend on the subject matter.

[85] Licensing cases usually are considered in two categories, existing licensees and first-time applicants. In the above case, Lord Denning made it clear that in the category of first-time applicants, there is no right to a licence or any legitimate expectation to get one. In applying for such a licence, it is for the applicant to show that he can be trusted with it. Lord Denning, however, accepted that the Gaming Board was bound by the rules of natural justice. In his view, whilst an applicant had no right to a licence, fairness dictates that the applicant be heard. In describing the Gaming Board’s duty, he remarked, at page 534, that:

“It follows, I think, that the board have a duty to act fairly. They must give the applicant an opportunity of satisfying them of the matters specified in Sch 2, para 4(5). They must let him know what their impressions are so that he can disabuse them. But I do not think that they need quote chapter and verse against him as if they were dismissing him from an office (*Ridge v Baldwin*), or depriving him of his property, as in *Cooper v Wandsworth Board of Works*. **After all, they are not charging him with doing anything wrong. They are simply enquiring as to his capability and diligence and are having regard to his character, reputation and financial standing. They are there to protect the public interest, to see that persons running the gaming clubs are fit to be trusted.**” (Emphasis added)

[86] Lord Denning further opined that the Gaming Board was entitled to receive and consider information on applicants from any source but that the applicants are to be given a chance to answer, although the Gaming Board need not disclose the source or the

details of the information received if it would be contrary to the public interest or put the informant in danger. However, he said, fairness dictated that sufficient detail ought to be given of the information adverse to the applicant, so that he can answer it. Lord Denning went on to opine that the Gaming Board was not under any duty to give reasons, its only duty was to give its opinion as to the capability and diligence of the applicant. He found that, in that case, the Gaming Board had acted fairly by putting to the applicants all the information which had led it to doubt their suitability. The applicants were given the full opportunity to deal with the information.

[87] I will refer to one other case, and that is **McInnes v Onslow Fane and another** [1978] 1 WLR 1520, a case where the plaintiff was refused a boxers' manager's licence by the British Boxing Board of Control without an oral hearing. The plaintiff took out a summons for a declaration that the Boxing Board's refusal was in breach of natural justice. It was held that the plaintiff had no legitimate expectation to get a licence, and that there was no forfeiture of any existing right or deprivation of any existing position. The Boxing Board was under a duty to act honestly but was not obligated to give reasons or to grant the plaintiff an oral hearing. Megarry V C was of the opinion that there was a distinction between forfeiture cases (the withdrawal of a licence or membership) and application cases. In the former he said, natural justice principles are "clearly apt". In the application cases where nothing is being taken away and there are no charges normally, there is no requirement for an opportunity to be heard in answer to charges. The wider question in such cases is the general suitability of the applicant for the licence or the membership. The distinction, he said, was well recognised for the courts will "require natural justice to be observed for expulsion from a social club, but not on an application for admission to it" (see page 218). Megarry VC also referenced legitimate expectation cases, which he opined were more in line with the forfeiture cases, since they raised the question of, what may have caused the applicant to be viewed as unsuitable, when he was previously thought to have been suitable.

[88] This of course is the common law position which took two different approaches to the same question. In this case, there is a legislative provision which determines the issue of what is to take place if the Board is inclined to refuse an application and that is to be found in section 41. Unfortunately, the Board did not follow this mandate.

[89] I agree with counsel for the Board that the Act, by the inclusion of section 41, contemplates a two-pronged process. The first stage is the application process. The second stage is the decision-making process. The requirement to afford a reasonable opportunity to be heard in section 41 is an additional step imposed in the decision-making process, after the application has been submitted and is being reviewed. Section 41 dictates that before an application is refused the applicant must be given a reasonable opportunity to be heard on the application. I agree with counsel for the appellant that, implicit in the wording of the section, is a requirement for the applicant to be informed that the Board has a concern with regard to a particular issue, as well as a requirement that the Board give the applicant a reasonable opportunity to make his case before it in respect of that issue, where he may be represented by an attorney or some other person of his choice.

[90] Counsel for the appellant did cite some authorities outside of this jurisdiction in support of his position. I have read them, but in the light of the clear wording of section 41, as well as the concession made by counsel for the Board, I do not think it necessary to have resort to those cases.

[91] I did consider whether a hearing on paper would be sufficient compliance with section 41, since the section does not actually mandate an oral hearing. I am inclined to the view that a paper hearing could be considered a "reasonable opportunity" to be heard, once the applicant is informed of the adverse traces, and given "reasonable" time to make submissions. One case may require an oral hearing whilst another may not and written submissions to the Board may suffice. The wording of the Act is wide enough, in my view, to accommodate both approaches. I believe that the Board is the master of its own procedure, and should be able to determine whether the procedure adopted in each case

suits the justice of that case. If an applicant requires an oral hearing so that witnesses may be called before the Board and interviewed, then that request should not be unreasonably refused. The Board, the applicant, and his representative, may agree on the procedure to be followed so that an applicant can have a reasonable opportunity to be heard in support of his application.

[92] In this particular case, it is clear that the appellant wishes to have an oral hearing and, in the circumstances of this case, I find that it would be reasonable for the Board to hold one.

[93] In the final analysis, the Board having failed to follow the dictates of section 41 when it wrote to the appellant indicating that he is not fit and proper to be granted a licence, and refusing to grant said licence, before giving him a reasonable opportunity to be heard, was in breach of its own procedures. Although grounds (c) and (d) which were complaints in respect to alleged breaches of the rules of natural justice at common law, were not amended, in so far as the Board failed to follow its own fair procedures as set out in section 41, these grounds have merit.

[94] The decision of the Board will have to be set aside. The case will, therefore, have to be remitted to the Board for an oral hearing to be held so that the appellant is afforded a reasonable opportunity to be heard in support of his application, as per the requirements in section 41 of the Act.

BROOKS P

ORDER

1. The appeal is allowed.
2. The decision of the Real Estate Board made on 17 December 2020, refusing the grant of a real estate salesman's licence to the appellant, is hereby set aside.

3. The case is remitted to the Real Estate Board for an oral hearing to be held to give the appellant a reasonable opportunity to be heard on his application for a licence as a real estate salesman.
4. Costs to the appellant to be agreed or taxed.