

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 42

READT 070/14

IN THE MATTER OF

charges laid under s.91 of the Real Estate Agents Act 2008

BETWEEN

REAL ESTATE AGENTS AUTHORITY
(per CAC 301)

Prosecutor

AND

GARY MURPHY & PROPERTY LINK
GROUPS LTD

Defendants

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

HEARD at AUCKLAND on 12, 13, and 23 March 2015

DATE OF THIS DECISION 3 June 2015

COUNSEL

Ms S M Earl for the prosecution
Mr J Waymouth for the defendants

DECISION OF THE TRIBUNAL

Introduction

[1] This case concerns the duty of a real estate agent to protect the public from effects of methamphetamine contamination at a property being marketed.

[2] Gary Murphy (“the licensee”) and Property Link Groups Limited (“the agency”) face one charge of misconduct (for alleged disgraceful conduct) laid by Complaints Assessment Committee 306 pursuant to s.73(a) of the Real Estate Agents Act 2008 (“the Act”).

[3] Section 73 of the Act reads as follows:

“73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee’s conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or*

- (c) *consists of a wilful or reckless contravention of—*
 - (i) *this Act; or*
 - (ii) *other Acts that apply to the conduct of licensees; or*
 - (iii) *regulations or rules made under this Act; or*
- (d) *constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee’s fitness to be a licensee.”*

Background Put to Us

[4] The charge relates to the marketing of a property at 78 Mauku Road, Pukekohe which was being sold by way of mortgagee sale. The agency was engaged by New Zealand Property Auction Company (NZPAC) to sell the property.

[5] The licensee is a director of the agency, and a licensed agent. The branch manager of the agency is his wife, Elizabeth Murphy, who was also involved in the marketing of the property by assisting with two of the open homes and the auction day viewing. She is the other director of the agency.

[6] The licensee defendant conducted the first open home for the property on 28 September 2013. As a result of feedback received from those who viewed the property, he decided to have the property tested for methamphetamine contamination. He was aware that, many years earlier, the deceased owner of the property was a known Headhunters gang member.

[7] Initial testing (“indicative testing”) of the property for methamphetamine contamination was carried out on 3 October 2013 by Georgina Lidgard for MethSolutions Ltd. She had a discussion with the licensee on that day. It is alleged that the licensee told her that the previous owner of the property was a large “P” maker with gang involvement who had made P in the barn, but that he did not know if it was made in the house. Mr Murphy denies making those statements.

[8] Ms Lidgard says that she experienced dizziness while inside the house and that her mouth felt clogged.

[9] It is put by the prosecution that despite not knowing the results of the tests conducted on that day, and with the knowledge that the previous owner was believed to have been involved in the manufacture of methamphetamine, a second open home was held at the property on 5 October 2013. There was apparently further feedback from the public given on that day that the property could have been a “drug house”.

[10] Following the second open home, the licensee was made aware that the initial tests conducted at the property had given an indication of a positive test result and that further testing would be required.

[11] That additional and detailed testing was conducted on 8 October 2013. Elizabeth Murphy provided access to the property on this day for the testing to be carried out by Mr Todd Sheppard of Enviro Scientific Group Ltd. It is put that while at the address, he told Mrs Murphy not to go into the house, due to his knowledge of the initial test results. Mr Sheppard says that it was clear to him that the property was contaminated because of the smell, which he noticed straight away.

[12] On 12 October 2013, a third open home was held at the property.

[13] On 15 October 2013, the licensee was supplied with the results of the detailed testing. The buildings tested positive for contamination, and some of the results were at levels significantly in excess of the Ministry of Health guidelines.

[14] On 16 October 2013, a final private viewing was held at the property, prior to the off-site auction of the property that day.

The Detailed Charge

[15] The full charge as laid on 12 August 2014 reads as follows:

“Charge 1

Complaints Assessment Committee 306 charges Gary Murphy (licensee) and Property Link Groups Ltd (agency) with misconduct under s.73(a) of the Real Estate Agents Act 2008 (Act), in that the conduct of the licensee and the agency would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

- 1) The licensee marketed a property at 78 Mauku Road, Patumahoe (property). The property was being sold by way of mortgagee sale. The mortgagee was Pepper (NZ) Custodians Ltd. The licensee received his instructions from New Zealand Property Auction Company (NZPAC), who had been engaged by the mortgagee to sell the property.*
- 2) The licensee conducted an open home at the property on 28 September 2013. Following that open home, the licensee recommended that NZPAC arrange testing of the buildings on the property for methamphetamine contamination.*
- 3) The initial tests were carried out on 3 October 2013.*
- 4) Despite not knowing the results of the tests carried out on 3 October 2013, the licensee conducted a second open home at the property on 5 October 2013.*
- 5) After the second open home was conducted, the licensee became aware that the initial testing had given indications of a positive test result and that further testing would be required.*
- 6) On 8 October 2013, Elizabeth Murphy, a licensed agent and branch manager for the agency, provided access to the property for further testing for methamphetamine contamination to be conducted. Elizabeth Murphy had also assisted with two open homes at the property.*
- 7) The licensee conducted a third open home at the property on 12 October 2013.*
- 8) On 15 October 2013, the licensee was supplied with the results of the further tests carried out at the property. The buildings on the property tested positive for methamphetamine contamination at levels above the Ministry of Health recommended guidelines.*

- 9) *On 16 October 2013, a final open home was held at the property, prior to the auction of the property on that day which was held off-site. Elizabeth Murphy conducted the open home.*
- 10) *Accordingly, the licensee conducted an open home at the property on 12 October 2013 at a time when he knew that the test results for methamphetamine contamination were likely to be positive. Neither the licensee nor the agency made any enquiries or took any steps to ascertain whether it was safe to allow members of the public to access the property in those circumstances. The licensee did not inform members of the public who attended the open home that the test results for methamphetamine contamination were likely to be positive.*
- 11) *An open home was held at the property on 16 October 2013 at a time when the senior officer of the agency (the licensee and Elizabeth Murphy) knew that the buildings on the property had tested positive for methamphetamine contamination at levels above the Ministry of Health recommended guidelines. They did not make any enquiries or take any steps to ascertain whether it was safe to allow members of the public to access the property in those circumstances. They did not inform members of the public who attended the open home that the buildings on the property had tested positive for methamphetamine contamination at levels above the Ministry of Health recommended guidelines.”*

A Summary of the Evidence for the Prosecution

The Evidence of Mr M D Stratford

[16] Mr Stratford is a director of MethSolutions Ltd a company which provides a methamphetamine residue sampling and testing service. He outlined his normal testing procedure and basically explained Ministry of Health guidelines. He then referred to being instructed to conduct urgent composite testing in early October 2013 at the said property of 78 Mauku Road, Pukekohe for NZ Property Auction from a Ms L Miller that company's account manager.

[17] Accordingly, he instructed Ms G Lidgard, a certified sampler, to carry out the testing which she did on the house and the barn at that address. On 3 October 2013 Mr Stratford emailed Ms Miller and referred to Ms Lidgard having advised him that there was a known methamphetamine history at the property.

[18] On 4 October 2013 the sample results were available (and Ms Miller was advised) to the effect that the eight samples taken from the house totalled 32 mg/100 cm and the eight samples from the barn 3.1 mg/100/cm. This was the indicative sampling test report from Mr Stratford's company MethSolutions Ltd. Also, Mr Stratford recommended detailed testing to be carried out because, as he put it in his evidence-in-chief, *“it was likely there was a methamphetamine issue at the property”*.

[19] Mr Stratford added that if he had then been asked by the defendant (or any other real estate agent) whether it was safe to hold open homes at the property, he would have said *“no”* based on the results of the composite testing. Although those were then indicative, he had produced samples which he felt were likely to be significantly above the Ministry of Health guidelines and he had been advised verbally that the readings in the property were high particularly in the garage area.

[20] On 17 October 2013 he sent an email to various real estate agencies on his company's database, as well as on its certified sampler database, pointing out that open homes should not be held when people are in possession of information that, as he put it, "*absolutely confirms*" that the property they are involved with is contaminated with high levels of methamphetamine.

[21] Of course, Mr Stratford was carefully cross-examined by Mr Waymouth. The various test reports were referred to in some detail and Mr Stratford considered they showed that, as at 11 October 2013, the house was contaminated whether by manufacture or use, and the interim results showed that the contamination was likely to be at high levels.

[22] It seemed to be accepted that, as at 3 October 2013, the defendant could not have been expected to know of health risks from the contamination. Mr Stratford was surprised that on 4 October 2013 Ms Miller had not communicated to the defendant licensee but admitted that he took no direct steps to advise the licensee either. He explained that he was dealing with his instructing client through Ms Miller and not with the defendant.

The Evidence of Mr W D Radovich

[23] In the usual way, as the investigator for the prosecution, Mr Radovich gave evidence to explain the relevance of the many items in the agreed bundle of documents. He responded to Mr Waymouth that at all times the defendant licensee had been cooperative in that investigation.

The Evidence of Mr G R Reddington

[24] Mr Reddington is a self employed company director who happened to attend an open home at the property on 16 October 2013. He lived only a short distance away and says he was aware, before viewing the property, that the owner was involved in the Headhunters gang and there were rumours in the area that the owner was also involved in manufacturing methamphetamine at the property. At the open home he was accompanied by his wife and his father.

[25] It seemed he received a copy of the LIM report for the property and he recollected that, before he went to the open home, the defendant provided him with a drug test report.

[26] He said that when he arrived to attend the open home there was a woman handing out pamphlets to attendees but she did not provide any information about drug tests nor give any warning about potential health risks at the property. He said that he went into the house and his eyes started to sting and he could smell some chemical odour but he did not know what it was. He added that the said woman also opened up the garage which was next to the house and there the odour was very bad and the stinging in his eyes was worse. Similarly, when they went in to the barn where apparently a woman and her child were living. He said that his wife and father also suffered that stinging to the eyes while at the property and his wife was very much affected by that and it took a few hours for the stinging in his eyes to wear off.

[27] Mr Reddington added that he went to the auction, which was not held at the property, and noted that the auctioneer "*said words to the effect that the property was potentially contaminated*". He said that he had not been aware of risks in going into the property and nothing was said to him about drugs in relation to the property.

[28] In cross-examination he made it clear that he was not warned of any health risk from entering the property nor was he told not to enter it.

The Evidence of Ms Lidgard

[29] Ms Lidgard is currently a recruitment consultant but she was involved in the said initial test at the property. She explained that she became a certified sampler to conduct methamphetamine composite screening tests on 2 May 2013.

[30] Accordingly, she attended the property on 3 October 2013 to conduct a methamphetamine composite sampling test. She was met at the property that day by the defendant. She wore gloves and covers on her shoes to carry out the testing and said that as she walked into the house she felt dizzy and her mouth also felt clogged. She outlined the nature of the testing she undertook and said that, having completed that, she was not concerned about her own health. She mentioned that, because the defendant had remained outside while she conducted her testing, he was not aware of how she had been feeling. She added that she did not smell any odours at the property and would not expect to have. She took her samples to Hill Laboratories for analysis. She said that conditions at the property did not bother her at the time but she did soon have a clogged mouth and felt a bit dizzy but could not smell any odour.

[31] It was put to her by Mr Waymouth that those symptoms might have alerted her to there being a drug problem at the property. She responded that when she had, quite recently then, obtained the relevant certificate about drug testing, she understood that such symptoms would not necessarily be related to methamphetamine.

The Evidence of Mr T B Sheppard

[32] Mr Sheppard is the owner operator of Enviro Scientific Group Ltd which conducts drug testing on properties and operates a decontamination cleaning business. He holds a testing certificate for methamphetamine residue testing. When advised of a positive reading from a composite test at a property, he undertakes a detailed site investigation and takes separate samples in a methodical way. These are then sent to Hill Laboratories to be analysed. When he receives the results from that laboratory, he prepares a report and advises remedial action. In this case MethSolutions had carried out the composite test which had been devised by Hill Laboratories.

[33] Mr Sheppard said he conducted appropriate testing at the property on 8 October 2013 on the instructions of Pepper Custodians NZ. He then met a real estate agent at the property who seems to have been the wife of the defendant. He was aware of the sample results of MethSolutions and, when that real estate agent went to go into the house, he told her not to "*due to my knowledge of the results*". He said it was quite clear to him that the property was contaminated because of its smell which caused him to use a breathing apparatus when carrying out his testing.

[34] He then sent his samples to Hill Laboratories for analysis and received its analysis report on 11 October 2013. Accordingly, he prepared two reports for Pepper Custodians NZ that day, one relating to the barn and the other relating to the house. He then continued in his evidence-in-chief:

"3.10 In respect of the house, I advised that methamphetamine had been detected in sub surface paint on all 10 of the samples that were taken. I recorded that eight of those samples were above Ministry of Health recommended guidelines

of 0.5ug/100 cm². I noted that this was not a surface contamination. I recommended decontamination to all areas of the property.

3.11 In respect of the barn, I advised that methamphetamine was detected on all five surface samples taken from the property. I recorded that three of the samples were above the Ministry of Health recommended guidelines of 0.5ug/100 cm². I recommended decontamination to all areas of the property.”

[35] Mr Sheppard added that those results showed that a number of the samples were significantly over the recommended guidelines and, particularly, in the garage.

[36] Mr Sheppard was carefully cross-examined by Mr Waymouth. He said that he was instructed by Ms Miller that there was a contamination issue at the property and he advised her not to enter the property until some more significant testing had been done. The indicative test told him that there was methamphetamine present at the property and he immediately noticed a very strong smell of that when entering it. He was dressed in full protective clothing comprising a suit, a mask, and breathing apparatus. He observed that whether or not there might be an aroma from methamphetamine could be related to whether the property had been shut up or ventilated prior to entry.

[37] Under cross-examination, Mr Sheppard said that when the analysis results were received from Hills Laboratory he made it quite clear to “*the agent on the site*” that there was methamphetamine present in the property. That must have been on 15 October 2013. It seems that he did not go so far as to tell the defendants to warn people not to enter the property until it had been decontaminated.

A Summary of the Evidence for the Defence

The Evidence of the Defendant

[38] Mr Murphy noted that he and his said wife were directors of the defendant Property Link Groups Ltd. He set out the following relevant chronology:

- | | |
|--------------------------|--|
| <i>“28 June 2013</i> | <i>Property inspected as request of mortgagee’s agent to ‘bid’ for listing.</i> |
| <i>17 September 2013</i> | <i>Authority to act for New Zealand Property Auction Company [as agents for Pepper New Zealand Custodian) Limited] as first mortgagees given by Minter Ellison Rudd Watts by letter same date.</i> |
| | <i>The property to be marketed and sold as a mortgagee sale.</i> |
| <i>28 September 2013</i> | <i>Open home No. 1.</i> |
| <i>1 October</i> | <i>I spoke to Lindi Miller at NZPAC and I suggested vendor supply drug test.</i> |
| <i>3 October</i> | <i>I attended the property to facilitate the first drug test – Meth Solutions Limited.</i> |
| <i>5 October</i> | <i>Open home No. 2 in which I spoke to the buyers and advised that the drug test had been undertaken but was not yet available.</i> |

- 7 October *I was advised by Lindi Miller that a further drug test was required.*
- 8 October *My wife Liz again attended the site to facilitate the completion of the second test (Enviro Scientific Group Ltd).*
- 12 October *Open home No.3 – no drug test results available – open home conducted in which I highlighted to all attendees on the Open Homes Register in bold colour at the top that the drug test was not yet available.*
- 15 October *Drug test results provided to me on day prior to auction. Auction protocols marketing and particulars of sale amended to reflect the same.*
- 16 October *Auction day, prior to the same a private viewing was conducted for all buyers with the Terms and Conditions so they could check the property before the auction. All buyers with the Terms and Conditions had a copy of the test results.”*

[39] Essentially, the defendant asserts that he saw no signs of drug use at the property and never detected anything *“that would make me suspicious that there may be a drug issue”*. He was conscious that the owner’s ex wife and a tenant were still living at the property.

[40] He stated that while he was conducting the first open home he was asked whether a drug test was available and his company had a policy with regard to such an issue in terms of advice from REINZ. Accordingly, he decided it would be better for his company to be able to provide a drug report for the property and he recommended that to his instructing client, Ms Miller, who then arranged that. He emphasised that he did not arrange such report and he was not the client for it and, in fact, did not see the initial report until he was subsequently shown it by the Authority’s investigator. He emphasised that he and Ms Miller obtained such a drug test report because that was his and his company’s practice when dealing with rental properties and because prospective buyers had also raised the issue, he thought it best to have a standard test done for distribution to such persons rather than various of them obtaining their own tests.

[41] As it happens, Mr Murphy had dealt with the mortgagor owner about 25 years previously and understood that he was then a member of a motor bike gang but had not had contact with him since then. Mr Murphy had received his marketing instructions through the mortgagee. He denied ever having stated to anyone that the owner had been a large P maker.

[42] Inter alia Mr Murphy covered that, prior to the second open home set for 5 October 2013, he again rang Ms Miller seeking a drug report so that he could distribute it to all attendees because, as he put it, *“I expected it to be a negative test”*. She soon told him that the test report had arrived but further information was being sought. He was instructed by her to conduct a second open home because, he says, she put it to him *“there is no reason not to proceed”*.

[43] Accordingly, he undertook the second open home on 5 October 2013 and again advised all attendees that a drugs test was being obtained. On 7 October 2013 he was advised that a further drugs test was required so that on 8 October his wife facilitated that by opening the property for Mr Sheppard.

[44] Mr Murphy received the second report on 15 October 2013 and asserts *“that was the first time that I was aware that there was an issue with drugs and the extent of the issue with drugs”*. He said that as soon as he received that report he immediately contacted all persons who had received the terms and conditions for the auction sale and distributed them a copy of the drug report. Also, he added that to the general marketing information package for the property.

[45] Accordingly, any further party who expressed any interest in the property was provided with a copy of that drug report and clauses were placed in the auction particulars and conditions. He also changed the preamble to be read out by the auctioneer (himself) notifying all attendees of the drug testing to ensure that they were familiar with the position before they bid. Also the drug report was available as a general hand-out at the auction. The defendant believes that, once the drug test was received, every person who registered interest received the marketing pack with the drug test report inserted and he said *“from October 15, 2013 further, copies of the drug test report were distributed prior to the auction”*.

[46] Mr Waymouth took the defendant through his above evidence in some detail with reference to relevant documents.

[47] The defendant insists that had he had any drug warning signs at the property, he would have immediately ceased marketing even as early as 5 October 2013 but, as at 9 October 2013, he was simply told that further testing was being undertaken and that he could continue his marketing process.

[48] Mr Murphy emphasised that as at the third open home on 12 October 2013 he had still not received any test results. There were then a number of people interested in bidding for the property and he held a further private viewing on the afternoon of the auction (16 October 2013) for particularly interested parties who by that stage were able to be given a copy of the drug report. He also covered the position in his preamble to the auction sale because he was the auctioneer.

[49] He asserted that he and his company are alert for such situations because they run a property management business also and take heed of any warning signs about the property having been used in relation to drugs; but there was no warning whatsoever to him regarding this property. He said his concern was not about the current owner of the property, who had recently died, but that there had been tenants in the property and it was only because of that that he felt he should get a drug test report on the property particularly since people were raising that issue with him at the first open home. He says that there were no warning signs to him and as at 7 October 2013 and he was also told by Ms Miller that there was no reason for him not to proceed with the second open home. He insisted that, at all material times, he had no evidence to believe that the testing would be positive and it only occurred to him that that might be a possibility but he did not really suspect or expect there would be any issue.

[50] In terms of the final private viewing of the property prior to the auction, both of which he conducted, his attitude was that the attendees were provided with a copy of the drug report as to the then position regarding its contamination and whether they then entered the property or not was their decision. It was put to him by Ms Earl that just providing the results of testing does not explain risks to prospective attendees and should not the defendant have got further advice from the author of the report? The defendant seemed to think that the author of the report should have warned him and cautioned about access if that was necessary. Indeed, the defendant would not countenance any responsibility on his part in that respect and, in particular, emphasised that the time in question related to a

private viewing and not to an open home to the public. He did not seem to accept that, prior to that final report, the house could be regarded as contaminated.

[51] It was firmly put to him by Ms Earl that he should have stopped permitting people to enter the property as at the time of the third open home, but he responded that nothing was then proven and that it was common enough for people to raise such issues in an endeavour to reduce the price of a property.

[52] For all that, we find Mr Murphy to be a credible witness.

The Evidence of Mrs E K Murphy

[53] Mrs Murphy is familiar with this matter and holds an agent's licence under the Act.

[54] Mrs Murphy stated that she had never noticed any smell or telltale signs whatsoever to indicate that the property was or had been used for drug use, drug consumption, or drug manufacturing. She emphasised that she is aware of an agent's obligation to make a due and diligent inspection of the property which she asserts that she did. She asserts again that she never detected anything that would make her suspicious that there may be a drug issue with the property. She seemed very familiar with the REINZ Best Practice Guide for P-Labs and Methamphetamine and what signs to look for.

[55] Mrs Murphy confirmed that the agency company always recommends any prospective purchaser of a property which has been used for rental purposes to consider obtaining a drug test to check that the property is uncontaminated.

[56] She confirmed that on 7 October 2013 the agency was advised that a further drugs test was required so that on 8 October 2013 she facilitated same by meeting with Mr Sheppard at the property to open it for him. She said that as soon as the company received his report: *"all persons who had received the terms and conditions for the auction were immediately contacted and had distributed to them a copy of the drug report, and I added to the general marketing information"*. She said that was then distributed to any further interested party and appropriate clauses were placed in the auction particulars and conditions, and the preamble to be read by the auctioneer was changed appropriately also to notify all attendees of the drug test *"to ensure they were familiar with it before they bid"*. She said that the report was also available as a general hand out at the auction. Mrs Murphy believes that, once the drug test was received, every person who registered interest also received the marketing pack with the drug test report inserted, and copies of that report were distributed prior to the auction from 15 October 2013.

[57] It was clarified that Mrs Murphy is the branch manager for the said agency and, although she has an agent's licence, her time and skills are applied to administrative work for the agency company rather than marketing. However she has done the REINZ P-seminar course.

[58] Generally, she covered much the same ground as the defendant and was cross-examined in a fairly similar way to that applied to her defendant husband. When, after the first sample test, she learned that it was necessary to have a further more detailed test, there was no suggestion that a positive result was likely and she had no idea why a further test was thought necessary. Nevertheless, she felt some alarm but understood that the first test had not been properly effected.

[59] Inter alia, Mrs Murphy explained that when she allowed prospective visitors access to the property on a private basis just prior to the auction, those people had requested

access knowing it was contaminated and having been provided with a copy of the final drug analysis report. She said that, although she provided access to those people, she had not read the report herself; but it seems she must have scanned it and felt she did not understand it. She knew that each such party had spoken to the defendant and had received the report.

[60] It was put to Mrs Murphy that would it not have been prudent for her to have read the report immediately it was available? She responded that she felt that it was more important that she provided the report to any person intending to enter the property. It was also put that should she not have stopped holding open homes earlier? She responded that if she had thought the property was contaminated then she would have.

The Evidence of Mr M Pinkney

[61] Mr Pinkney is a licensed real estate agent and gave evidence as an expert witness. His evidence was helpfully detailed but, suffice to say, that he believes that the defendant and the agency company conducted themselves in an entirely appropriate manner *“as would be expected of a professional, proficient and knowledgeable real estate agent in the marketing of the property”*.

[62] Mr Pinkney considered that there were no indicators of any drug problem at the property but that the defendant *“because of the level of interest”* determined that it was in everyone’s interest to have the vendor get the property so tested rather than expect any interested party to do that. Mr Pinkney noted that visitors to the second open home were verbally advised that drug testing was underway and those attending the third open home were additionally alerted by the prominent notation at the top of the Open Home Register that a test was being undertaken and the results would be made available, but were not yet available.

[63] Of course Mr Pinkney was carefully cross-examined by Ms Earl who pressed him on key issues. He seemed to be of the strong view that until the final report was available, there was no need to prevent people entering the property but, all in all, the matter was a judgment call on the information available from time to time.

Evidence from Mr S McElhinney

[64] Mr McElhinney’s brief was admitted by consent. He is a salesperson at the Pukekohe office of Barfoot & Thompson Ltd and familiar with the property having listed it for sale from 16 March 2013 until 19 July 2013. He is aware of the best practice guide about P labs and methamphetamine issued by REINZ subsequent to that listing. He stated *“at the time of listing and throughout the term of the listing and with the open homes that I was conducting on the property, I never saw or experienced any of the warning indicators or signs as contained in that best practice guide”*. He had conducted nine open homes during his listing and did not gain any inkling which would lead him to believe that the property had been used as a P lab or for the production of methamphetamine.

The Stance of the Prosecution

[65] For the Committee, Ms Earl submits that there are two key areas in which the defendants’ conduct fell below the standards referred to above; namely:

- [a] The third open home (12 October 2013) was held at a time when Mr Murphy was aware that the results for methamphetamine contamination were likely to

be positive. Regardless of this, an open home was held without regard for the health and safety of members of the public who were attending. Neither the licensee nor any other senior member of the agency, such as Mrs Murphy, made any enquiries or took any steps to ascertain whether it was safe to hold that open home. Similarly, the final open home (16 October 2013) was held at a time when the senior officers of the agency knew that the buildings had tested positive for methamphetamine contamination at levels above Ministry of Health Guidelines. The defendants did not make any enquiries or take any steps to ascertain whether it was safe to allow members of the public to access the property in those circumstances.

- [b] Mr Murphy did not inform members of the public who attended the third open home (on 12 October 2013) that the test results were likely to be positive. While he refers to the open home register then recording that the drug test results would be available that week, this did not provide any disclosure to those attending that the initial results indicated that the property was contaminated. The licensee had sufficient knowledge that there was a potential risk with the property, but that information was not passed on to those who were potentially exposed to that risk. Furthermore, while those who had already been in contact with the agency were provided with the drug results in advance of attending the final open home prior to the auction, no information was given about the results at the open home, so that anyone attending on that day who had not previously been in contact with the agency would not have been provided with that information.

[66] Ms Earl also submits that the issue of methamphetamine contaminated houses has been well publicised, and it is well-known that affected houses require de-contamination for health reasons and that any agent of good standing would be aware of this.

[67] She submits for the prosecution that, given what the senior officers of the agency knew about the property, both after the initial testing had been conducted and after the final test results were known, it was disgraceful to allow members of the public to access the property without taking any steps to ensure that it was safe for them to do so. She puts it that even prior to learning that the first test had given indications of contamination, the licensee had been made aware of the deceased owner's gang connections, the fact that it could have been a drug house, and that the owner had made "P" at the house.

[68] Mr Stratford's evidence is that if the agency had made enquiries with him, he would have advised that open homes should not have been held in this case. The prosecution submits that the defendants' decision to proceed with open homes, without making any enquiries about whether members of the public would be put at risk, represented a marked or serious departure from the standards of an agent of good standing or, indeed, a reasonable member of the public. Ms Earl also noted that members of the public did, in fact, suffer side effects after attending the property.

[69] The prosecution also submits that such misconduct is further aggravated by the fact that there was no disclosure that the property was likely to be contaminated. Accordingly, not only were open homes held, but those attending the third open home were unaware that it was likely that the house was contaminated. It is submitted that, in the circumstances, it was insufficient to simply note that the property was being tested for drug contamination, without more. While those attending the final open home (in fact a private viewing just prior to the auction) who had already been in contact with the licensee had

been provided with the test results, no information was provided at the open home for others who might have attended.

[70] The prosecution submits that, if the evidence adduced by it is accepted by us, the charge of misconduct is proved.

The Stance of the Defendant

[71] Mr Waymouth emphasised that it was the defendant himself who suggested to the mortgagee vendor on 1 October 2013 that the vendor obtain and provide a drug test in relation to the property even though there was no sign to create suspicion at that point of there being any methamphetamine residue in the property.

[72] Mr Waymouth also referred to the evidence of Mr McElhinney, which we have covered above, that he had found no signs whatsoever to create suspicion of drug use or consumption or manufacturing at the property; and that Mrs Murphy gave similar evidence.

[73] Mr Waymouth also emphasised that at all material times, the defendant was acting as a conjunct agent with NZ Pacific Auction Co a licensed real estate agent which seemed to issue instructions to the defendants. Mr Waymouth put it that Mr Murphy and his agency company did not have direct contact or access to the vendor mortgagee but only through NZPAC as the decisionmaker.

[74] Mr Waymouth submits that there is no convincing evidence presented by members of the public that they entered the property and suffered consequences as a result and without being warned.

[75] Mr Waymouth particularly referred to Mr Sheppard's evidence that he could have, but did not, warn the agents of the test results and any likely possible danger to members of the public from entering the property and there was similar evidence on the part of Mr Stratford. Accordingly, Mr Waymouth emphasises the uncontested evidence of Mr Murphy that, if he had been advised of such danger to the public, he would have immediately ceased all marketing of the property.

[76] Mr Waymouth referred to the evidence of Mr Pinkney, although Ms Earl seemed to question whether Mr Pinkney had appropriate credentials to be an expert witness in this case.

[77] In the course of his submissions Mr Waymouth put it as follows:

“Proper Course of Action

48. *Under those circumstances therefore, the correct and proper steps undertaken by Mr Murphy at the open homes, where the evidence is not challenged, were:*

48.1 *After the first open home he made the suggestion to NZPAC to obtain the drug test (his brief para 6(c) and (d));*

48.2 *It was not available before the second open home;*

48.3 *He made enquiry through his conjunct agent NZPAC as together or not to hold the second open home and was specifically instructed by NZPAC there was no reason not to (para 18 his brief);*

- 48.4 *The results were not known as a fact to him prior to the third open home;*
- 48.5 *Accordingly he advised everybody on the open home sheet, as can be seen, highlighted, that drug test results not yet available (his brief para 5);*
- 48.6 *As soon as the drug test results were available he contacted everybody and advised them of the results (his brief para 23 & 26);*
- 48.7 *He ensured that all attendees at the auction were advised of the drug test results and had a copy (his brief para 24); and*
- 48.8 *He ensured that the three parties who attended the private final viewing on the day of the auction, were again also in possession of full knowledge of risk.*
49. *Under those circumstances the actions of Mr Gary Murphy and ipso facto PLG, are not the actions of an agent that “could reasonably be regarded by agents of good standing as disgraceful” under s.73(a).*
50. *Nor those of an agent acting in such a manner that it “constitutes seriously incompetent or seriously negligence real estate agency work” – s.73(b).”*

Discussion

[78] We considered the ambit of the word “disgraceful”, as used in s.73, in *CAC v Downtown Apartments Limited* [2010] NZREADT 06 and held:

“[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word. But s.73(a) qualifies the ordinary meaning by reference to the reasonable regard of agents of good standing or reasonable members of the public.

[56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. See Blake v Preliminary Proceedings Committee of the Medical Council of New Zealand, 1997, 1 NZLR 71.

[57] The ‘reasonable person’ is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s.73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.

[58] So while the reasonable person is a mystified ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the ... defendant.

[59] So, in summary, the Tribunal must find on balance of probabilities that the conduct of the ... defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public.”

[79] We observe that Mr Waymouth seemed to be submitting that the standard of proof in this case ought to be at the highest or most extreme end of the scale. There is no doubt that the onus of proof rests with the prosecution but the statutory standard of proof under

the Act is that of the balance of probabilities – refer s.110(1) of the Act. It is clear from the Supreme Court decision of *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 that there is no intermediate standard of proof between the criminal and civil standards. In this prosecution we are simply dealing with the balance of probabilities in the usual way in terms of the Act. We realise that all matters coming before us are serious and, particularly so, from the point of view of licensees.

[80] Mr Waymouth particularly referred to the High Court decision in *Brown v Real Estate Agents Authority* [2013] NZHC 3309 with regard to the standard of proof. In the course of that decision, Priestley J dealt with the meaning of “*serious negligence*” in s.73 of the Act and stated inter alia:

“[58] It is very difficult, if not impossible, to consider relevant thresholds for such standards as “incompetent”, “negligent”, “unacceptable”, “disgraceful”, “seriously incompetent”, and “seriously negligent” in a vacuum. All relate to occupational standards and practice. Care must be exercised before applying the disciplinary standards of one professional occupation to another. Such tests as departure from accepted standards, indifference, and abuse of privileges as they had relevance to New South Wales medical practitioners in Pillai might not illuminate the varying standards and contexts to which ss.72 and 73 of the Act apply.

[59] The context of the alleged misconduct, and in particular the context of the professional or occupational standards and norms, are critical. ...

... [64] Serious negligence is a grave charge to level against a real estate agent, particularly one of Mrs Brown’s experience. The charge in s.73(b), as I have said, is linked to serious incompetence, disgraceful conduct and wilful or reckless contravention of the Act. Different tests must inevitably apply to those other types of misconduct stipulated in s73. Nonetheless those other types of misconduct must inform serious negligence.”

[81] Both counsel referred to quite a number of case decisions but we prefer to focus on the particular facts of this case.

[82] Essential aspects of the detailed charge set out above are that Mr Murphy conducted an open home at the property on 12 October 2013 at a time where (allegedly) he knew that the test results for P were likely to be positive. We think it is stretching a long bow to conclude that he would have thought that to be likely but, certainly, he must have thought it possible.

[83] It is also provided in the charge that neither Mr Murphy nor his agency made any enquiries, or took any steps, to ascertain whether it was safe to allow members of the public to access the property in the circumstances covered above. That is correct; although one might have expected the analysts to have firmly and clearly warned the defendants that it was unsafe to allow members of the public to access the property.

[84] The charge also includes that, as at 12 October 2013, Mr Murphy did not inform members of the public who attended the open home that the test results for methamphetamine contamination were likely to be positive; but he was not supplied with the results of the thorough testing until 15 October 2013.

[85] The detailed charge finishes on the note that the defendants were responsible for an open home held at the property on 16 October 2013, a matter of hours before the auction of the property, at a time when senior officers of the agency (Mr and Mrs Murphy) knew

that the buildings on the property had tested positive for P at levels above Ministry of Health recommended guidelines. It is again put that they did not make enquiries or take any steps to ascertain whether it was safe to allow members of the public to access the property in the circumstances, nor did they inform members of the public attending that open home of the situation.

[86] In fact the viewing of the property on 16 October 2013, not long before the auction, was not an “*open home*” but a private viewing by arrangement for serious prospective bidders. It is correct that the defendants did not make enquiries as to whether it was safe to allow people to access the property in the circumstances. However, there is at least a gloss on the part of the charge that they did not inform people attending the private viewing of the situation, because every one of those persons was handed, inter alia, a copy of the final report about the contamination of the property.

[87] Inter alia, the prosecution put it that the issue of methamphetamine contaminated houses is a widely known problem in New Zealand as a health issue for occupants so that it is common sense that such contaminated houses are a possible hazard to members of the public viewing them. It is also put for the prosecution that, in the above circumstances, it was the licensees’ obligation to make the necessary enquiries about safety; that it was inadequate to merely disclose the final analysis report; it was Mr Murphy’s obligation to take steps to ensure that it was safe for the public to access the property; and it is disgraceful of him not to have done so.

[88] In the light of his evidence to us, it is surprising that Mr Stratford did not advise the defendants that it would be unsafe to continue to hold open homes at the property; although, under cross-examination, he seemed to accept that the defendants could not have been expected to know of any health risks from the property as at 3 October 2013.

[89] We feel there is something of a hindsight factor here, and with this prosecution in general, and also Mr Stratford had Ms Lidgard, attend the property and actually carry out the sampling.

[90] We take into account the evidence of Mr Reddington that he seems to have attended the private viewing shortly before the auction on 16 October 2013 and, although he received a copy of the final drug test report from Mrs Murphy, he was not warned of any health risk from entering the property nor that he should not enter it. He explained in his evidence how he was affected temporarily by some sort of chemical odour at the property.

[91] Interestingly, when taking samples on 3 October 2013 Ms Lidgard experienced fairly mild symptoms also but felt that such symptoms would not necessarily be related to methamphetamine.

[92] We have also covered Mr Sheppard’s evidence above and note that upon entering the property on 8 October 2013 he immediately noticed a very strong smell. He remarked that could have been because the property had been shut up prior to his visit. He is to be commended for making it quite clear to either Mr or Mrs Murphy on 15 October 2013 that there was methamphetamine present in the property; but it is a little surprising that he does not seem to have gone so far as to have people warned not to enter the property.

[93] We have covered Mr Murphy’s evidence in some detail above but, essentially, he did not accept that there was a drugs issue regarding the property until he received Mr Sheppard’s report on 15 October 2013. It is puzzling that he then continued the next day with a private viewing before the auction but, presumably, prospective bidders wished to view the property again and Mr Murphy took care to provide them with the full report

about contamination. Also, no analyst had indicated to him that people should no longer enter the property. All that was in a context of the defendants having been retained to market the property for the vendor mortgagee.

[94] For all the very detailed evidence and submissions put to us in this case, which we value, our finding is simply that until the final analysis drug report was available the day before the auction, the conduct of the two defendants as covered above could not be regarded as disgraceful, nor could it be regarded as seriously incompetent or seriously negligent real estate agency work; or in any way a wilful or reckless contravention of the law.

[95] However, a point of concern is the conduct of the defendants from the time the final analysis report was available on 15 October 2013. Between then and the auction, both defendants must be regarded as responsible for prospective bidders being permitted to inspect the property when it was clearly contaminated and a danger to human health. We do not think that the defendants can be exonerated from having insisted that any such person receive a copy of the analysis report prior to that person deciding to inspect the property and enter it.

[96] Nevertheless, we do not think that such deficient conduct on the part of the defendants breaches s.73 of the Act i.e. we do not find that conduct to be misconduct. However, we do consider that such conduct is unsatisfactory in terms of s.72 of the Act, which defines unsatisfactory conduct on the part of the licensee as follows:

“72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
- (c) is incompetent or negligent; or*
- (d) would reasonably be regarded by agents of good standing as being unacceptable.”*

[97] We consider that to allow prospective bidders to privately enter and view the property on the day of the auction, as the defendants did with the knowledge the defendants then had, fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee in terms of s.72(a), would be in breach of various regulations in terms of s.72(b), is probably incompetent or negligent in terms of s.73(c), and is certainly conduct which in terms of s.72(d) *“would reasonably be regarded by agents of good standing as being unacceptable”*.

[98] Overall, we accept that the defendants did not perceive, even at 12 October 2013 with the final report, that there was a health risk in entering the property.

[99] Accordingly, in terms of our power to do so under s.110(4) of the Act we dismiss the charges of misconduct but enter a finding of unsatisfactory conduct against both defendants. In the usual way, the question of penalty will be the subject of either a further

hearing confined to penalty or submissions on the papers on that topic. We direct the Registrar to arrange a Directions Hearing by telephone between our chairperson and the parties to arrange a timetable to deal with penalty.

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

Judge P F Barber
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member