

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 88

READT 070/14

IN THE MATTER OF

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

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC 306)**

Prosecution

AND

**GARY MURPHY & PROPERTY LINK
GROUPS LTD**

Defendants

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms N Dangen - Member

BY CONSENT HEARD ON THE PAPER AS TO PENALTY

DATE OF THIS DECISION ON PENALTY 9 December 2015

COUNSEL

Ms C Paterson for the Authority/Prosecution
Mr J Waymouth for the Defendants

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] On 3 June 2015 we released our decision herein concerning misconduct charges laid against the defendants. We found them not guilty of misconduct, but guilty of unsatisfactory conduct.

[2] Simply put, we found that it was unsatisfactory of the defendants to have allowed prospective bidders for a residential property to enter and view it when the defendants had clear evidence that the property was contaminated by P and a danger to human health. The extracts from our decision set out below provide more background.

[3] On 23 September 2015 we held a hearing in Auckland as to penalty and we cover below submissions we then received.

Our Decision of 3 June 2015

[4] Relevant extracts from our said decision of 3 June 2015 ([2015] NZREADT 42) are:

[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.

...

[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.

...

[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.

...

[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.

...

[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. ..."

The Submissions on Penalty from the Prosecution

Re Gary Murphy

[5] Ms Paterson made the succinct point that we found that Mr Murphy's conduct became unsatisfactory when, having received the final analysis drug report on 15 October 2013, he continued to conduct private viewings on 16 October 2013. At this stage Mr Murphy knew that the property was contaminated, but failed to make enquiries about whether it was safe for members of the public to enter the property.

[6] Ms Paterson noted that we stated that Mr Murphy was responsible for those persons which were permitted to inspect the property; and that exposing those persons to potential harm fell below the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee.

[7] Ms Paterson submits that it is concerning that Mr Murphy proceeded with the private viewings despite the final analysis drug report indicating contamination levels above

Ministry of Health recommended guidelines, and that the viewings were held without regard for the health and safety of these members of the public.

[8] Although we found that the conduct did not amount to misconduct, the Committee submits that Mr Murphy's actions are a more serious example of unsatisfactory conduct.

[9] Ms Paterson submitted that, given the increasing awareness of health risks associated with properties contaminated by methamphetamine operations, the penalty should be of a nature and level that deters other licensees from similar conduct; and the penalty which best suits this objective is a fine. Accordingly, the Committee submits that the appropriate response to Mr Murphy's conduct is a fine in the range of \$5000-\$6000.

Re Property Link Groups Ltd

[10] Ms Paterson notes that Mr Murphy and his wife, Elizabeth Murphy, are the two directors of the second defendant, Property Link Groups Ltd.

[11] She puts it that the above submissions in respect of Mr Murphy as a licensee apply equally to Property Link Groups Ltd. We agree. We found that the second defendant's conduct was unsatisfactory because it permitted members of the public to enter the property when it knew it was contaminated and without making enquiries about the potential health risks.

[12] The evidence before us was that Mrs Murphy had been provided with the final report and was familiar with the REINZ Best Practice Guide for P-Labs and Methamphetamine. However, Property Link Group Ltd took no steps to ascertain whether it was safe before conducting private viewings on 16 October 2013.

The Submissions for the Defendants

[13] Mr Waymouth emphasises that Mr Murphy (and the defendant company) was charged with two counts of misconduct and, in the alternative, two counts of unsatisfactory conduct. But all charges were rejected by us.

[14] Mr Waymouth submitted that a real estate agent is a form of conduit, presumably, between vendor and the public and, in particular, with prospective purchasers. He seemed to be putting it that, generally speaking, a real estate agent is an unqualified person so, for instance, would not have any type of medical knowledge and could not be expected to well understand results from methamphetamine testing. Mr Waymouth submitted that a mitigating factor is that the defendants did not have the detail about contamination of the property from the testing experts at material times. In fact, we have found, and we are satisfied, that the defendants had that detail on 16 October 2013 as covered above.

[15] Mr Waymouth also submitted that Mr Murphy has had a long and unblemished record and has been a respected leader in the real estate industry and, if he had known that there were any harmful effects likely from methamphetamine having been used in those premises, he would immediately have ceased marketing them and he does not need to be educated about that.

[16] Mr Waymouth puts it that we have simply found one event of unsatisfactory conduct on the part of Mr Murphy and suggests that we should formulate some guidance rules to assist the industry with regard to methamphetamine contamination of premises.

[17] We allowed Mr Murphy to make a statement to us with regard to penalty. We accept that he is very experienced in the real estate industry with no previous concerns and has been a leader and manager in the industry for about 19 years. Also he has a good record at training other agents, has been a top salesperson, and has contributed to education and management structures in the industry.

[18] Essentially, the stance of the defendants is that, on the facts of this case, the necessary information about methamphetamine contamination of the premises they were marketing had been withheld from them and, as soon as it was made available, Mr and Mrs Murphy disclosed it to all concerned. Mr Murphy observed that the company defendant was merely a sub-agent in this situation. He put it that reports had been commissioned (by him) from experts on the issue of possible contamination of the premises from methamphetamine and he and the defendant company simply relied on those reports.

Discussion

[19] We feel we have covered the nub of this prosecution in our comprehensive decision of 3 June 2015 as indicated by the above extracts we have set out from it. Essentially, we consider that the defendants were too slow in being candid to prospective purchasers as to the effect of methamphetamine exposure at that property, and they failed to warn viewers of the property on auction day, 16 October 2013, of the health risk of then entering the property. Broadly, we agree with the submissions of Ms Paterson for the prosecuting Authority.

[20] The only guideline we formulate is that agents must favour candour rather than their understandable desire to sell a property in terms of their duty to their vendor client. Accordingly, any tell-tale sign of, in this case, methamphetamine contamination of the property being marketed should have been rigorously pursued and the ongoing situation candidly explained to all interested parties.

[21] Essentially, Mr Murphy got feedback at the initial open home as to the possibility of the property being contaminated from methamphetamine and he related that to some knowledge he had of the property from many years previously. It is to his credit that he arranged for the property to be tested for methamphetamine contamination. We take into account that the first tester seems to have been rather inexperienced; but the final test report made it clear that it was dangerous for a person to enter the property due to its methamphetamine contamination. It should then have been made clear to those final viewers of the property that they were undertaking quite a health risk and, indeed, they should not have been permitted to enter the property.

[22] We accept that real estate agents in such a situation are not expected to act like medical practitioners but, when a red flag would appear to a sensible person, they are expected to be open and candid and be more concerned for the health of the interested parties than to achieve a sale for their vendor client. If there is something suspicious about the healthiness of the property it must not be covered up or even glossed over. If real estate agents wish to be regarded as professional, then their standards must be lifted to a professional level.

[23] We take into account standard principles of sentencing including factors such as aggravating and mitigating features, and remorse. We accept, of course, that the principle purpose of the Act is to promote and protect the interests of consumers in respect of real estate transactions and promote public confidence in the performance of real estate

agency work. One of the ways in which the Act achieves its purpose is by providing accountability through an independent, transparent, and effective disciplinary process.

[24] Professional standards must be maintained. The aspects of deterrence and denunciation must be taken into account. It is settled law that a penalty in a professional disciplinary case is primarily about the maintenance of standards and the protection of the public, but there can be an element of punishment. Disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future. Having said all that, it is often appropriate to consider rehabilitation of the professional, and that may involve requiring a licensee to undergo training or education.

[25] We accept that the defendants did take some positive steps to ascertain if entering the property posed health risks; and that they are remorseful of the circumstances we have detailed.

[26] We do not need to impose further training or education on either defendant.

[27] In terms of our assessment of the facts and general sentencing factors, they are each fined \$2,000 to be paid to the Registrar of the Authority at Wellington within one calendar month of this decision.

[28] 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

Mr J Gaukrodger
Member

Ms N Dangen
Member