

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 38

READT 084/15

IN THE MATTER OF a charge laid under s91 of the Real Estate Agents Act 2008

BY THE REAL ESTATE AGENTS AUTHORITY (CAC 306)

AGAINST LISA MARIE WHITE

Defendant

Hearing: 23 May 2016

Tribunal Hon P J Andrews, Chairperson
Ms N Dangen, Member
Mr J Gaukrodger, Member

Appearances: M Hodge for the prosecution
M Wenley for the defendant

Decision: 9 June 2016

DECISION OF THE TRIBUNAL

[1] The defendant, Ms White, has been charged with misconduct pursuant to s 73(a) of the Real Estate Agents Act 2008 (“the Act”). Complaints Assessment Committee 306 (“the Committee”) alleges that Ms White’s conduct in relation to the sale to the complainants of a property at Jervoistown, Napier (“the property”) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful. The defendant denies the charge.

The factual background

[2] To a large extent, the parties are agreed as to the facts.

[3] The defendant, Ms White, and her partner, Mr Miller, had owned the property since November 1999. On 13 August 2013 the complainants, Ms Phillips and her partner Mr Wright, entered into an agreement to purchase the property. The purchase was settled on 10 October 2013. The sale of the property was undertaken by Ms White in her private capacity, not in her capacity as an estate agent.

[4] The charge focuses on representations allegedly made by Ms White concerning the septic tank (“the tank”) by which the property’s sewerage system was managed.

[5] In the course of her dealings with Ms Phillips and Mr Wright, Ms White advised them that a lean-to room at the rear of the garage, and a pot belly stove, did not have permits. She also advised them that the tank had been replaced “like for like”¹ in around 2005. She further advised them that the tank had been emptied in July 2013, as a result of her having used cleaning products which were incompatible with the sewerage system.

[6] The sale conditions included a requirement that the tank would be emptied prior to settlement. At some stage before settlement Ms White advised Ms Phillips and Mr Wright that there was a problem with the tank, in that it was filling quickly, and to a level that was too high, with water. She told them that the problem was caused by a leak from a large fish pond on the property.² The complainants arranged for the leak to be repaired.

[7] A week after moving into the property Ms Phillips and Mr Wright noticed the toilet gurgling and filling right up when flushing. The same problem was noticed shortly after the fish pond was repaired. They considered that the water level in the tank was still too high. It was later suggested that a broken water main pipe might be responsible for the continuing high water level. Ms White’s partner, Mr Miller, arranged for a plumber to lay a new water main. Ms Phillips’ evidence was that this did not fix the problem.

¹ That is, the design of the sewerage system was not changed and the work involved removing the old tank and replacing it with a new one.

² There is a dispute between the parties as to when the complainants were told this. The complainants say it was 2-3 days before settlement, the defendant says it was prior to the complainants’ making an offer. We do not consider it necessary to resolve this dispute.

[8] The tank was inspected in June 2014 by Mr Crockford, of Effluent Management Services. Mr Crockford provided a brief report.

[9] A pump was subsequently installed by Ms Phillips and Mr Wright, in order to keep the tank level correct. It appears that this has remedied the problems.

The complaint

[10] On 8 July 2014 Ms Phillips and Mr Wright submitted a complaint to the Real Estate Agents Authority. Although they mentioned a number of other issues, the nub of the complaint was that Ms White had misled them by failing to disclose known problems with the tank.

[11] Ms White responded to the complaint on 18 August 2014. She asserted that she had sold the property in good faith, and not misled Ms Phillips and Mr Wright in any way. She said that Mr Miller had told them about the leaking fish pond, which was allowing water to leach into the tank. She also said that there were no problems with the tank during the time she lived there. Further, she said that in making comments about any matters other than the interior of the property she relied on Mr Miller.

[12] On 2 October 2014 Ms Phillips and Mr Wright responded to specific points made by Ms White. They stated, among other things, that Mr Miller had advised them after the sale that the septic tank had been emptied four times between Christmas 2012 and October 2014. Ms White responded further in statements dated 11 November 2014 and 5 March 2015. In the latter statement she said that she was not involved in the planning or installation of the replacement tank in 2005, she was not aware that a permit was required for that installation, she was not aware of there being any issue in respect of the replacement tank not having a permit, and she left all matters relating to the replacement to Mr Miller.

[13] On 16 December 2015 the Committee charged Ms White with disgraceful conduct pursuant to s 73(a) of the Act. Following a brief recitation of the salient facts, the charge alleged that:

“ ...

- 5 The Defendant did not disclose to the Complainants that the septic tank was installed without a permit having been obtained.
6. The Defendant represented to the Complainants that, apart from unpermitted work on the house (i.e. not including the work done in relation to the septic tank) there was no unpermitted work at the property, when she knew or should have known that this was false.
7. The Defendant must have been aware of some or all of the problems described in paragraph 3 above, prior to the sale of the property, and chose to withhold disclosure of those problems from the Complainants.”

The hearing

[14] Ms Phillips, Ms White, and Mr Miller confirmed their evidence as set out in statements of evidence filed before the hearing. The evidence of two witnesses called by Ms White was taken as read. The essence of the evidence is encapsulated in the background summary set out above. Cross examination focussed on whether Ms Phillips and Mr Wright were told that there was no permit for the replacement of the tank in 2005, and whether Ms White and Mr Miller had experienced problems with the tank while they lived at the property.

[15] Ms Field, who lives next door to the property, gave evidence of seeing a septic tank truck coming to the property to empty the tank during the period before the property was sold to the complainants. She could not say how many times that had occurred other than that it was more than once. She also said that the septic tank on her own property had only been cleaned once in 10 years, so it was odd that the tank next door was emptied more than once.

[16] Mr Crockford was called by the Committee to give expert evidence. He gave evidence that to the best of his knowledge there is no provision for a septic tank to be replaced in a “like for like” manner in Jervoistown, and any such installation would be subject to the provisions of building and drainage standards enforced by the Napier City Council and the Hawkes Bay Regional Council. In his opinion a building permit and resource consent would be required. Having viewed the

property, he had concluded that the tank was in good condition, however the effluent soakage trenches were not allowing the effluent to soak into the soil.

[17] He further considered that the entire sewerage system was pressurised, causing sewage outflow at the gully traps, and causing the toilets to malfunction. He also said that further investigation should be undertaken. Finally, in his opinion, the waste problems at the property would likely have been apparent (particularly in the winter months) to the previous owners prior to their selling the property.

“Disgraceful conduct”

[18] It was accepted by both parties that a charge of disgraceful conduct pursuant to s 73(a) of the Act must be proved to a very high standard. In *Real Estate Agents Authority v Jenner Real Estate Ltd*,³ the Tribunal adopted the test set out in *Pillai v Messiter [No 2]*⁴ in the context of the legal profession. This is to the effect that “disgraceful conduct” requires more than “mere professional incompetence”. What is required is a “deliberate departure from accepted professional standards, or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a legal practitioner.”⁵

[19] A licensee may be found guilty of disgraceful conduct in relation to non-real estate agency work, provided there is a sufficient nexus between the alleged conduct and the fitness or propriety of the licensee to carry out real estate work.⁶

The issues

[20] The charge raises two issues:

- [a] Whether Ms White failed to disclose to Ms Phillips and Mr Wright that no permit had been obtained for the installation of the replacement tank.

³ *Real Estate Agents Authority v Jenner Real Estate Agents Ltd* [2012] NZREADT 68.

⁴ *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197, at [117].

⁵ *Pillai v Messiter*, at [117].

⁶ See *Complaints Assessment Committee v Subritzky* [2012] NZREADT 19 at [17]-[18].

[b] Whether Ms White failed to disclose to them that there were problems with the tank prior to their purchase of the property.

The first issue: was a permit required?

[21] Paragraphs 5 and 6 of the charge allege that Ms White did not disclose to Ms Phillips and Mr Wright that the tank was installed without a permit having been obtained, and that she represented to them that (apart from specific items) there was “no unpermitted work at the property”. A necessary pre-condition to that charge is that the tank did require a permit.

[22] Mr Hodge submitted for the Committee that Ms White had accepted that in saying that the tank had been replaced “like for like”, in the context of her statement that the lean-to room and pot-belly stove did not have permits, it was implicit that no permit was required for the tank. He submitted that Ms White had not qualified her statements by saying something to the effect that Ms Phillips and Mr Wright should check the position for themselves. He also referred to Mr Miller’s evidence that in 2005 he had asked the Council if a permit was required, but had made no further check when the property was sold in 2013. He submitted that the high threshold for disgraceful conduct was met.

[23] For Ms White, Mr Wenley submitted that the Committee had not presented any evidence that a permit was required for the tank. He submitted that, to the contrary, a permit was not required. He referred to s 41 and Schedule 1 of the Building Act 2004, which provide that a building consent is not required for building work which is a “replacement with a comparable component or assembly in the same position ... including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters and Drainlayers Act 1976”.

[24] Mr Wenley submitted that Mr Crockford’s evidence (summarised at [16] and [17], above) did not assist the Committee, as Mr Crockford had acknowledged that he was not aware of the Building Act provisions, and did not undertake independent enquiries as to whether a permit was required.

[25] We accept Mr Wenley's submission. As a necessary precondition of its case that Ms White failed to disclose that the tank did not have a permit, the Committee had to establish, to the appropriate standard, that a permit was required. We accept that Mr Crockford's evidence (particularly in the light of his not being aware of the Building Act provisions) does not achieve that.

[26] Accordingly, we cannot find that Ms White failed to disclose that the tank was installed without a permit, and that (apart from specific items) there was no unpermitted work on the property.

Did Ms White fail to disclose that there were problems relating to the septic tank?

[27] At paragraph 8 of the charge the Committee alleges that Ms White must have been aware of problems with the tank prior to the sale, but chose to withhold disclosure of them from Ms Phillips and Mr Wright.

[28] The witnesses were adamant in their evidence. Ms White and Mr Miller (and the two witnesses whose evidence was taken as read) were adamant that there were no problems with the sewerage system, at all, during the period of their ownership. Ms Phillips' evidence was that problems were immediately evident when they moved in. Her next door neighbour (Ms Field) gave evidence of seeing a sewerage disposal truck at the property in the year before the sale (although she was not sure how many times this was), and Mr Crockford said that in his opinion, problems with the sewerage system must have been evident to Ms White and Mr Miller prior to sale.

[29] Mr Hodge submitted that there was no basis on which the evidence of Ms Phillips, Ms Field, and Mr Crockford could not be believed, and no reason to reject it. He submitted that the Tribunal could infer from the evidence that problems with the sewerage system were evident before the sale, and were not disclosed by Ms White. He submitted that the "non-disclosure" issue was not a "threshold" issue.

[30] Mr Wenley agreed that there were problems with the sewerage system, in that excess water was entering the tank. He submitted that this was fairly disclosed, and a reasonable theory as to the cause of the excess water (the leak from the large fish

pond) was given. He also referred to Ms White's disclosure that the tank had been replaced, and that it had been emptied in July 2013. He further referred to the condition of sale that the tank was to be emptied prior to settlement.

[31] Mr Wenley submitted that the evidence showed that there was a reasonable basis on which Ms White could say what she believed the cause of the problem to be. He further submitted that the evidence that there were no other evident problems (for example, the toilet filling and gurgling) should be accepted. In the circumstances, he submitted, the Tribunal should find that Ms White made fair disclosure.

[32] Again, it is for the Committee to prove the charge. In this case, as would be expected, the only evidence as to whether there were problems (other than those disclosed) was given by Ms White and the witnesses called by her. Ms Field's evidence was equivocal as to the number of times the septic truck was seen. In the face of the evidence given by and for Ms White we do not consider that we can infer from Ms Field's and Mr Crockford's evidence that there were problems with the sewerage system other than those disclosed, that Ms White must have been aware of them, and that she chose not to disclose them.

[33] We find that the Committee has not satisfied us on the evidence that there were problems with the sewerage system, beyond those that she disclosed, that Ms White must have been aware of, and that she chose not to disclose.

Result

[34] The charge against Ms White is dismissed.

[35] 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.

Hon P J Andrews
Chairperson

Ms N Dangen
Member

Mr J Gaukrodger
Member