BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 57

READT 07/2020

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	IAN & SHARLEEN BUCHANAN Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 521) First Respondent
AND	KEVIN SEYMOUR & KAYLENE WAIN Second Respondents
Hearing:	11 August 2020
Tribunal:	Mr J Doogue, Deputy Chairperson Mr N O'Connor, Member Ms F Mathieson, Member
Appearances:	Mr I and Ms S Buchanan, Appellants Mr M Hodge and Ms L Lim, on behalf of the First Respondent Ms S Mitchell, on behalf of the Second Respondents
Date of Decision:	8 December 2020

DECISION OF THE TRIBUNAL

Background

[1] The appellants made a complaint against Kevin Seymour (**licensee 1**) and Kaylene Wain (**licensee 2**) who are both licensed agents under the Real Estate Agents Act 2008 ("**the Act**"). The Complaints Assessment Committee dismissed the appellants' allegations against the licensees, that they had engaged in unsatisfactory conduct.

[2] The matter arose following the sale of a property at 24 Grace James Road ("**the property**") which the second respondents were engaged by the vendor to sell. The second respondents, having learned that there may have been methamphetamine consumption at the property, advised the vendor to have the property tested for methamphetamine contamination. They recommended that a company called Meths Solutions Limited ("**the tester**") be engaged to undertake the testing and that duly occurred on 5 October 2018 and 16 November. Both tests found traces of methamphetamine at the property but at extremely low levels and well below the health hazard threshold of 15 micrograms per 100 centimetres.[1]

[3] Given the readings that had been obtained, the second respondents sought advice about what their obligations were from the first respondent. The first respondent referred the second respondents to the REA guideline on methamphetamine disclosure. The guidelines on "methamphetamine disclosure" advised licensees that contamination over the safe limits of 15 micrograms per 100 square centimetres was considered to be a property defect that should be disclosed to potential buyers pursuant to rule 10.7 of the Professional Conduct and Client Care Rules 2012 ("**Client Care Rules**"). It advised licensees that they did not have to disclose test results below that level:

> You do not have to disclose test results below 15µg per 100cm2 unless specifically asked by a prospective buyer or where a prospective buyer has clearly shown an interest in methamphetamine contamination (rule 6.4 of the Code of Conduct).

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[1] The level at which methamphetamine contamination would be regarded as harmful according to the Prime Ministers chief science advisor, Sir Peter Gluckman in a report dated 29 May 2018.

[4] According to the guidelines, disclosure was not required where methamphetamine had "only been used at the property" (as opposed to manufactured) and the property had been successfully remediated.

[5] The second respondents having considered the REA guidelines, discussed the question with the vendors. The vendors and the second respondents concurred that because of the minimal levels of methamphetamine present in the property in the REA guidelines required that the test results were to be disclosed to prospective purchasers only if they specifically enquired about or clearly showed an interest in methamphetamine contamination.

[6] On 31 October the second named second respondent took the appellants through the property. During the course of this inspection the second licensee pointed out water staining but told the appellants that the leak from which the water originated had been repaired. The second named respondent happens to be a licensee, as well. But she viewed the property in the capacity of a potential buyer

[7] The appellants arranged for a building inspector to visit the property which occurred. The second respondents and the appellants were present during the inspection. During this visit the second appellant asked second licensee whether there was anything else "I should know" to which the second licensee replied "no".

[8] The appellants and the second respondents differ on the question of which viewing this question was raised and they also disagree about the form the question took. The appellants say that the second appellant asked:

> Is there anything material to our decision to purchase that we should know before we make an offer.

[9] In our view the differences between the two parties on this question are not material. We will assume the question was as stated in the previous paragraph. We will discuss the relevance of this question later in our decision.

[10] On 4 November 2018 the appellants purchased the property for $1.4 million. Subsequently the appellants became aware that the property had been tested for

methamphetamine and asked the second respondents for the results. The second respondents obtained authorisation from the vendor to disclose the results and thereafter supplied them to the appellants

[11] The appellants subsequently complained that the second respondents owed a duty pursuant to Client Care Rules 5.1, 6.2 and 6.4. to make enquiries of the appellants to ascertain what issues would be relevant to their purchasing decision. They said that that was particularly important given the licensees' knowledge of the existence of past use of methamphetamine at the property:

> … albeit apparently at a low level.

[12] A second possible basis upon which the second respondents might arguably be held to have breached the rules was because they did not disclose a relevant factor, namely that testing had been carried out for methamphetamine residues at the property. The fact that that had occurred suggested that methamphetamine had been used in the property and that fact had a tendency to "stigmatise" the property and was therefore a relevant matter that ought to have been disclosed.

[13] The appellants apparently are also of the view that the information that the property had been associated with methamphetamine use was something that the second respondents ought to have disclosed because of the general enquiry from the appellants about anything that might affect their decision to buy the property which is referred to in paragraph [8] above. They said that they were "sensitive to the issue of methamphetamine contamination" which the second respondents would have discovered had they asked the appellants.

The principles relating to appeals

[14] We accept that the submission which Ms Lim on behalf of the REA filed correctly described the process where there is an appeal in a case of this kind. She submitted:

> 3.1 Appeals from Committee decisions to take no further action under s 89(2)(c) of the Act proceed on general appeal principles (as articulated in Austin, Nichols), and are by way of rehearing. Accordingly, if the Tribunal reaches the view that it should substitute a finding of unsatisfactory conduct, it may do so.

Submissions

[15] The submissions of the REA focused on the fact that methamphetamine contamination could potentially engage the obligations Rule 10.7 provides as follows:

> 10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either -
>
> (a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or
>
> (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice of the customer so chooses.

[16] The REA noted that the level of methamphetamine contamination in this case was below the level requiring disclosure in the REA guidelines. Ms Lim pointed out that the guidelines in turn were based upon the report of the chief scientific advisor, Sir Peter Gluckman, and that therefore contamination below the levels at which he stated were hazardous should not be regarded as a disclosable defect pursuant to rule 10.7.

[17] In regard to the alleged breach of a requirement to make fair disclosure, counsel for the first respondent submitted:

[18] As Ms Lim put it:

> 6.3 Licensees are required to ensure they comply with rr 6.1. (fiduciary obligations to client) and 9.1 (act in client's best interests) at all times. It is well known that the possibility of methamphetamine contamination stigmatises properties, and has the potential to negatively impact the price that a vendor could otherwise achieve for a property. Clearly, the fact of methamphetamine testing where the test results do not indicate harmful levels may deter prospective purchasers (as evidenced by the appellants' views in

this case). It is clear that disclosure of such information is not in the vendor's best interests.

6.4 Of course, a licensee's obligation to their client must also be balanced against a purchaser's right to be fairly informed about the property they are purchasing. Depending on the circumstances of the particular case, the balance may be delicate.

6.5 However where there is nothing in the methamphetamine test results to indicate any safety issue (as clarified by the Gluckman report), the Authority submits that r 6.4 does not require disclosure of the test results, and therefore that the REA guidelines set the bar at an appropriate level, achieving the delicate balance that must be reached between vendor client and customer.

[19] The REA submissions also considered whether rule 6.4 had any application. That rule provides as follows:

6 Standards of professional conduct

6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

[20] The REA further submitted

4.11 For the purposes of complying with r 6.4 in the context of methamphetamine test results, the REA guidelines set out that a licensee must disclose methamphetamine test results where a prospective buyer has "specifically asked" or has "clearly shown an interest in methamphetamine contamination". In either such situation, the Authority submits fairness requires that test results be disclosed, and further, a failure to disclose would be to mislead the customer. The requirement provided in the REA guidelines, consistent with r 6.4, is that licensees must be truthful when addressing a specific issue that is raised by a customer.

[21] Counsel for the second respondent, Ms Mitchell and Mr Tian, submitted that the methamphetamine levels being of a lesser magnitude than those identified in the Gluckman report, there was, in accordance with the guidelines, no obligation to disclose the testing results.

[22] Counsel for the second respondents also responded to the suggestion that the second respondents breached their obligations because they did not make disclosure of the methamphetamine issue when asked by the second -named appellant whether

there was anything else that she should know about the property, that is the query which has been referred to at paragraph [8] above. Counsel submitted:

> 50. The CAC considered it was unnecessary to resolve these issues on the basis that it was of no consequence as to when the question was asked or what form it took. Rather, its decision rested on the undisputed fact that neither form of question specifically mentioned methamphetamine nor there was any evidence that the appellants had shown any interest in methamphetamine.
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> 51. Further, having considered the respondents' disclosure obligations in relation to both forms of the question, the CAC resolved that the respondents were not required to seek clarification on the scope of the question. It is submitted that this must be the correct conclusion. The guideline puts the onus squarely on the purchaser to raise the issue of methamphetamine as a specific consideration for them. There is no suggestion in the guidelines that the licensee is required to raise it as a possible concern.

Assessment

[23] The appellants were subject to an onus requiring them to establish that the licensees had engaged in unsatisfactory conduct. It was their obligation to establish that this particular property was subject to a defect which the licensees knew of or ought to have known about.

[24] The presence of very low methamphetamine residues does not, in our view, constitute a relevant defect under R 10.7.

[25] The allegation that the conduct of the second respondents contravened rule 6.2 and 6.4 cannot succeed in our view, either. Licensees cannot be found to have contravened their ethical obligations through not disclosing minimal and harmless faults in a property. We consider that the guidelines which the Authority issued provide a logical and balanced approach to the matter by providing that levels of methamphetamine concentration which are below those identified in the Gluckman report as hazardous need only be disclosed where there is a specific question addressed to the licensee.

[26] We deal next with the contention that the enquiry that the appellants addressed to the second named second respondent[2] did not have the effect of imposing an obligation on the second respondents which they might not otherwise have been subject to.

[27] We will consider this point on the basis of assuming that it is possible for a customer to expand the obligations of licensees to make disclosure by putting a question of this kind to them. We do not necessarily accept that they can do so - at least for the reason that individuals will have different appreciations of what is relevant to a decision to purchase including aesthetic and other factors.

[28] Before the licensees could be held to be in breach of an obligation arising from such a broad question, it is necessary to reach an understanding about what the customers (that is the appellants in this case) regarded as being relevant. In the absence of any reference by them to the matter of methamphetamine levels in their discussions with the licensees, the licensee would be obliged to surmise what they might regard as being relevant. Any obligation that they might have would have to be one that was reasonable to impose on the licensees in the circumstances. We do not consider that disclosure of the presence of methamphetamine levels which were not harmful to humans would constitute a relevant matter that the licensees were obliged to disclose.

[29] Nor is the fact that the property had been tested but found not to have harmful methamphetamine levels. Even assuming that this fact was widely known, we are not convinced that it would result in the property being of less value because of a "stigma" effect than it might otherwise have.

[30] For all of the reasons stated, we are of the view that the decision of the Committee was the correct one. On rehearing this matter, we have not been persuaded that we should come to an opposite view. The appeal is therefore dismissed.

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[2] Refer paragraph [8] above.

[31] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal o the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Mr J Doogue
Deputy Chairperson

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Mr N O'Connor
Member

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Ms F Mathieson
Member