

Disclosure of sensitive issues

Information sheet

One of the most difficult decisions a licensee can face is whether or not to disclose a sensitive issue that doesn't relate to the physical state of the property. Examples of a sensitive issue are a murder, suicide or a vicious crime.

This information sheet provides guidance on this issue.

Background

The decision about whether to disclose a sensitive issue is not an easy or straightforward one. However an appeal decision made by the High Court in 2015 provides some guidance.

What you need to consider

Disclosure of a sensitive issue depends on the facts of the case. The High Court has provided the following guidance:

- If you are faced with a sensitive issue you need to consider whether or not it is something you need to disclose
- It is not just unnatural deaths that you need to consider disclosing but also other matters such as particularly vicious crimes
- A cautious approach is a good rule of thumb to follow
- You must consider each situation based on its facts but the types of considerations that might be relevant include:
 - The fact that a murder, manslaughter or suicide has occurred in the property
 - The location of the event. Sometimes it will be reasonable to view a tragedy in the grounds of a property differently from one in a living area of a house
 - How long ago the event happened
 - The circumstances following the tragedy. For example, whether the house has been lived in and, if so, for how long
 - The circumstances of the tragedy and whether the tragedy has a degree of notoriety (even if just in the local neighbourhood)

- The likely reaction of potential purchasers and the possible impact on the price.
- Make sure you discuss disclosure with your vendor client and take their views into account when making your decision. You cannot make disclosure without the consent of your vendor. If you are of the view that disclosure should be made, but your vendor will not agree, then the only appropriate action for you to take, is to cease to act for the vendor and not disclose the information.

If you decide disclosure must be made and the vendor agrees then you should handle the disclosure sensitively. There is no need to advertise the information or tell everyone who views the property. Your obligation is to tell purchasers who have indicated an interest in submitting an offer on the property.

Need help in deciding whether to disclose or not?

*Get in touch with us: 0800 367 322 or (04)
471 8930 info@reaa.govt.nz*

The case

[Barfoot and Thompson v REAA & Campbell \[2014\] NZHC 2817](#) was a case where the central issue was whether or not a licensee is obliged to disclose that a suicide occurred in the property.

The facts of the case

The complainants were the purchasers of the property. Twelve months prior to listing, a tenant had committed suicide in the garage. The property was listed for sale with Century 21 who disclosed this fact to prospective purchasers. When the vendors also listed with Barfoot and Thompson, a branch manager from Century 21 informed the Barfoot listing agent that the sad event had occurred and that their agency had been disclosing it. The matter was considered by senior staff at Barfoot and Thompson who concluded that because it was a personal matter of the occupants and did not relate to the condition of the property it did not need to be disclosed.

Five months after purchasing the property the complainants decided to sell it and entered into a sale and purchase agreement. The complainant's neighbour asked them if they were on-selling so quickly because of the suicide – which was the first the complainants heard about it. The complainants disclosed the event to their

purchasers who did not want to move in so they on-sold the property before settlement.

Decisions by the Complaints Assessment Committee and the Real Estate Agents Disciplinary Tribunal

The Complaints Assessment Committee that first considered the complaint found that while the agency carefully considered the situation it came to the wrong decision about disclosure and an agency or a licensee should err on the side of disclosure when matters such as this arise. The agency was found guilty of unsatisfactory conduct based on a breach of rule 6.4 of the Code of Conduct and section 50 and section 72(b) of the Real Estate Agents Act 2008. No penalty other than the finding itself was ordered.

The complainant appealed the order seeking compensation. The agency appealed the unsatisfactory conduct finding to the Real Estate Agents Disciplinary Tribunal who dismissed the appeal and upheld the unsatisfactory conduct finding.

High Court decision

The agency then appealed to the High Court who upheld the appeal and overturned the finding of unsatisfactory conduct.

Whether it needs to be disclosed will depend on the facts of the case

The High Court confirmed that whether or not something needs to be disclosed will very much depend on the facts of the case:

“[50] ...An evaluation of what “should by...fairness” be provide to a client must be undertaken in the particular circumstances of each individual case.”

Rejection of requirement that agents should err on side of caution and disclose

The High Court rejected an earlier finding by the Tribunal that rule 6.4 requires that where it is in doubt whether an issue should be disclosed the licensee must err on the side of caution and disclose:

“[50] The reading in of such a rule is not appropriate or justifiable.....There is no presumption either way.”

But cautious approach still a good rule of thumb in practice

However, the High Court acknowledged that a cautious approach of erring on the side of disclosure may well be “an appropriate rule of thumb in practice.”(para [50]).

Unsatisfactory conduct finding inappropriate when issue finely balanced

Justice Thomas acknowledged that the issue is a finely balanced one on which people can have different views:

"[80] I accept this is a matter on which reasonable people can have different views. While some may be affected by it, others may be so to a lesser extent, or, indeed, not at all.

"[81] This is a very finely balanced decision. In favour of the appellant are the facts that the suicide took place in the garage, over 12 months before the sale, and the property had been occupied during that 12 month period. Furthermore, there was no industry standard or guidance available to assist in the decision as to whether the suicide required disclosure.

[82] As against that, one estate agency had decided that disclosure was required, although this is not determinative. More telling is the fact that the agency was unable to affect a sale. However, there could have been other reasons for that. The reaction of the second respondents and their purchasers provides evidence only after the event."

Because the issue was so finely balanced, Justice Thomas concluded that it would be inappropriate to find a breach of rule 6.4:

"[83] Because the decision is so finely balanced and because there was no industry standard or guidance available, I conclude that it is inappropriate to find the appellant in breach of the rule."

Guidance by the High Court

The High Court then went on to consider issuing guidance as to the application of the requirement of fairness in rule 6.4. While expressing reluctance in doing so without the benefit of wide ranging evidence and "[85]...also mindful of the need for caution in making a general rule as a result of a specific case.", Justice Thomas noted that "[85]...the facts of this case have provided a useful framework, however, for considering this issue."

Justice Thomas noted that a natural death will not need to be disclosed:

"[87] The appellant and Authority agreed that the fact a natural death has occurred in a house would not require disclosure. That is an everyday occurrence. But suicide, although relatively common, carries with it feelings of unease and is generally regarded with some disquiet amongst most cultures."

Justice Thomas noted that any guidelines need to be reviewed from time to time:

"[88] Any guidelines will also require reconsideration after time to account for changes in societal attitudes. "

She then emphasised that the guidance is general only and that each situation still needs to be considered on its facts:

"[89] I stress that the following is intended only as general guidance rather than to provide hard and fast rules. The particular case and fact situation must always be paramount. Furthermore, there is a need to consider questions of confidentiality and fairness to the vendor."

Having made these observations, Justice Thomas, listed relevant considerations about whether disclosure should be made:

"[90] With these considerations and caveats in mind, relevant considerations as to whether disclosure should be made would include:

- The fact that a murder, manslaughter or suicide has occurred at the property.
- The location of the event. It is reasonable to view a tragedy in the grounds of a property differently from one in a living area of a house.
- The proximity in time from the event.
- The circumstances pertaining from the tragedy. For example, whether the house has been lived in and, if so, for how long.
- The circumstances of the death and whether the death has a degree of notoriety (even if just in the local neighbourhood.)
- The likely reaction of potential purchasers and the possible impact on the price."

Lastly, Justice Thomas noted that events other than unnatural deaths may also give rise to a need to disclose what took place:

"[91] I do not suggest that fairness would preclude disclosure of all events other than an unnatural death. There are other matters which in fairness should be disclosed in a particular case and fact situation. For example, a particularly vicious crime which has considerable notoriety should in my assessment be disclosed if only because it would not be fair for a purchaser from outside the locality to be ignorant of such an event in contrast to those with local knowledge."

Real Estate Agents Authority

PO Box 25 371, Wellington 6146
0800 367 7322 or (04) 471 8930
info@reaa.govt.nz
reaa.govt.nz

To the best of the Real Estate Agents Authority knowledge, the information in this guide is accurate at the date shown below. However, the requirements on which this information is based can change at any time and the most up-to-date information is available at www.reaa.govt.nz [Version 2.0, 290517].