

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 26

READT 54/12

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **SARAH MASSON**

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY**

Respondent

AND **SIMON DAMERELL, KYM AIKIN, and PATRICIA LAFFERTY**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

HEARD at AUCKLAND on 6 March 2013

DATE OF THIS DECISION 28 March 2013

APPEARANCES

The appellant on her own behalf
Ms J M Pridgeon, counsel for Authority
Mr P Hunt and Ms F Harrison, counsel for second respondents

DECISION OF THE TRIBUNAL

The Issue

[1] Ms Sarah Masson (the appellant) maintains that she failed to acquire a residential property in Freemans Bay, Auckland, at auction on 5 April 2012 due to deficient conduct on the part of the second respondent licensees Simon Damerell, Kym Aikin and Patricia Lafferty. They are all real estate agents working at Damerell Earwaker Realty Ltd in Ponsonby and Kym Aikin and Patricia Lafferty, in particular, marketed the property on behalf of the vendor. Simon Damerell is also a director of that company.

[2] Are they guilty of unsatisfactory conduct under s.72 of the Real Estate Agents Act 2008 (“the Act”) or of misconduct under s.73 of that Act? In this case, we do not think it necessary to set out those definitions.

[3] The essence of the appellant's complaint is that the licensees mishandled her bid at the auction for that property.

[4] After carefully considering the complaint on the basis of the written material before it, Complaints Assessment Committee 20006 determined to take no further action. Ms Masson appeals that decision.

Background Facts

[5] On 5 April 2012, the appellant took part in an auction held by the agency in respect of a property in Freemans Bay.

[6] Kym Aikin and Patricia Lafferty knew the appellant was very interested in purchasing it. The appellant had registered as a bidder and had a building inspection done on it prior to auction.

[7] At the auction, bidding stopped below the reserve price; and the appellant had not yet bid. The vendor, who was in the auction room up until this stage, was taken to an adjoining room for instructions. She was told that the appellant would not bid until the property was on the market. She has stated that she chose to disregard the appellant's possible participation as she considered her unpredictable.

[8] Kym Aikin states that, during the time when the vendor was giving instructions, she (Kym Aikin) informed the appellant that she needed to bid to secure the property. The appellant asked Kym Aikin to advise the auctioneer that she would not bid until he called the property for the final time; and she refused to engage with anyone until the property was called. Kym Aikin told all appropriate parties, including the auctioneer, of the appellant's auction strategy.

[9] While in the adjoining room, the vendor instructed that the property was still not on the market, that the auction be re-opened, and that she would deal exclusively with the top bidder should bids fail to meet the reserve. The auctioneer made this clear to all present before restarting the bidding.

[10] The auctioneer then called for further bids and made statements to the effect that the vendor would deal exclusively only with the top bidder. He did this a number of times. Still, the appellant did not bid.

[11] The appellant states that the auctioneer called the auction twice at \$1 million. She asserts that this is when she made her first bid of the night; i.e. on the second fall of the hammer. She states she did so by raising her hand and calling out her bid. She admits that she placed her bid close the final call. She states that the auctioneer did not acknowledge her bid and closed the auction, offering negotiating rights to the ultimate purchaser of the property. The appellant states that she challenged this and approached Simon Damerell to ask if the auction could be reopened. She also states that Kym Aikin acknowledged that she placed her bid before the third call.

[12] The appellant recalls that Simon Damerell ushered her into his agency's nearby offices and discussed her dispute with her. The other two licensees were present for some parts of this discussion. She asked for the auction to be re-opened but was told this could not happen. Because it was the Thursday evening before the Easter weekend, the appellant asked if the negotiations between and vendor and ultimate purchaser could be put on hold under after the long weekend so that she could obtain legal advice. This was not agreed to nor done.

[13] Simon Damerell later informed the appellant that the vendor had decided to negotiate only with the ultimate purchaser and nothing more could be done. She states that Simon Damerell told her that the vendor knew about her disputed bid.

[14] The vendor acknowledges that she knew about the appellant's bid. She states that she felt that the appellant and all potential purchasers were well informed by the licensees throughout the whole process. She also states that when she decided to sell the property by auction, she made it clear to the licensees that they were not to put any form of pressure on her (the vendor) and that she did not want any hassles at the auction. She felt that this was respected by the licensees and is very happy with the outcome.

[15] The auctioneer states that the appellant placed her bid only a moment after the final hammer fell. He states that given the vendor's instructions, it would have been inappropriate for him to accept the appellant's bid. He also emphasised clauses 2.3 and 2.6 of the Particulars and Conditions of Sale of Real Estate by Auction (Auction contract). These provide:

"2.3 The auctioneer may refuse a bid;"

"2.6 If a dispute arises concerning any bid, the auctioneer will determine the dispute or re-offer the property at the last undisputed bid."

[16] The auctioneer states that he utilised cl.2.6 to determine the appellant's dispute by refusing to accept her late bid, rather than re-opening the bidding.

[17] Simon Damerell acknowledged that the auctioneer called the bid "*reasonably*" quickly and passed the property to the party who had the top bid. He states that immediately after the sale he listened to the appellant's concerns and, in good faith, said he would ask the top bidder for authority to re-open the bid. The top bidder was not interested in that and expressed concern that the appellant's request and stance were even being considered. Mr Damerell also states that the licensees kept the vendor well informed of what was happening but that she wanted to negotiate exclusively with the top bidder who participated in the auction throughout.

[18] In summary, the following key facts appear undisputed:

- [a] Everyone, including the auctioneer, was aware that the appellant was interested in the property;
- [b] Everyone, including the auctioneer, was aware of the appellant's bidding strategy, that is, that she would bid only after the second call;
- [c] The licensees urged the appellant to place a bid and warned her that only the final bidder would have negotiating rights with the vendor;
- [d] The appellant did not bid any time before the disputed bid. This was despite the licensees urging her to and the auctioneer asking her if she was ready to bid.
- [e] Everyone, including the auctioneer, vendor, and the ultimate purchaser, knew that the appellant disputed the timing of her bid. Indeed, the appellant states she expressed her concerns to the auctioneer with "*fervour*";

- [f] The timing between the second and third hammer was reasonably close;
- [g] The appellant placed her bid within moments of the final call (be that before or after the hammer came down);
- [h] The vendor feels that she (the vendor) was well-informed throughout the entire process. The vendor feels that her request that the licensees not pressure her was respected;
- [i] The licensees' attempted to come to a solution with the appellant after the auction; they informed the vendor of what had happened and also asked the ultimate purchaser if he was willing to re-enter the auction process;
- [j] The auction was not re-opened and the vendor did not, and would not, negotiate with the appellant.

[19] Prior to the hearing before us it was put that the following facts are in dispute:

- [a] Whether the appellant placed a bid just before or just after the fall of the hammer;
- [b] Whether Kym Aikin acknowledged that the appellant bid before the property was passed in;
- [c] Whether the auctioneer expressly stated that he refused to re-open the auction; and
- [d] Whether the licensees did all that could be reasonably expected of a salesperson.

[20] As Ms Pridgeon put it for the Authority, the briefs of evidence filed on behalf of the licensees and the appellant raise, among other things, the following points:

- [a] During the auction but prior to the property selling, Ms Aikin approached the appellant to see if she would bid. The appellant told Ms Aikin about her bidding strategy. Ms Lafferty also approached the appellant querying whether she would bid. The auctioneer knew that the appellant was an interested party;
- [b] Prior to the property selling, the auctioneer invited interest from the appellant;
- [c] The appellant acknowledges that she did not bid until at least after the second call, but says she did bid before the property was passed in by the auctioneer;
- [d] Ms Aikin acknowledges she thought the appellant might have bid before the property passed in. Ms Lafferty says she heard the appellant's bid but could not tell if it was just before, at the same time, or just after the property was passed in. Mr Damerell says he is "*clear*" that he thought the bid came after the auctioneer passed the property in;
- [e] Ms Lafferty and Ms Aikin raised the confusion surrounding the appellant's bid with the auctioneer, but the auctioneer said her bid was not in on time;

- [f] Mr Damerell discussed matters with the appellant after the auction closed. He says he knew the appellant wanted to re-open the auction. Because the auctioneer refused to re-open the auction, Mr Damerell told the appellant that the auction could not be re-opened without the top bidder's authority. Mr Damerell approached the top bidder for his authority to re-open the auction, which the top bidder did not give. The top bidder was frustrated that the licensees were even considering this approach;
- [g] As a solution, Ms Lafferty suggested that the appellant and the top bidder enter into a tender process. The appellant said this was not acceptable to her; she wanted the auction re-opened;
- [h] The vendor did not specifically realise that the appellant was trying to have the auction re-opened, but knew that the appellant disputed the timing of her bid'
- [i] The vendor insists she was satisfied with Ms Lafferty and Ms Aikin's conduct. She felt she was well informed by the licensees and treated with respect and that they particularly honoured their agreement not to pressure her and to avoid hassles with the auction process.

The Committee's Decision

[21] The Committee considered that the fundamental issue was whether the appellant bid before the fall of the hammer.

[22] The Committee noted the onus on the appellant to establish her case, *Hodgson v CAC & Arnold* [2011] READT 03, before stating that, on the balance of probabilities, the evidence pointed towards her having bid after the fall of the hammer.

[23] The Committee stated that the appellant employed a dangerous bidding strategy which gave rise to a real possibility of a dispute about when she placed her bid. We certainly agree. The Committee could find no evidence contradicting the evidence of Kym Aikin and Patricia Lafferty that they attempted to encourage a bid from the appellant throughout the auction process. We also agree with that finding.

[24] For these reasons, the Committee found that the licensees met the standards required of them under the Real Estate Agents Act 2008 and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, and decided to take no further action.

Relevant Additional Oral Evidence Before Us

[25] There are detailed briefs of evidence from a number of witnesses, mainly, for the respondent licensees but their content is summarised above. Key witnesses confirmed their briefs and were carefully and thoroughly cross-examined before us, and we now cover that.

The Appellant

[26] In her cross-examination the appellant made it clear that she felt that the licensees had failed in their duty to the vendor to obtain the highest sale price. As we cover below, the vendor gave evidence before us that she was completely satisfied

with the outcome of the auction of her property and with the conduct of all the licensees.

[27] The appellant emphasises that the licensees knew she was going to bid and she is concerned that she believes she made a valid bid in time before the third call or hammer of the auctioneer, that it was not recognised, and that, somehow, the licensees should have remedied that at the time.

[28] She is also clearly very put out, understandably, that she was effectively removed from the hall, particularly, by the licensee second respondent Mr Damerell although his evidence is that he simply steered the appellant from the hall in terms of restoring calmness as two more property auctions were to take place. We have no reason to doubt that.

[29] Naturally, the appellant is very irked that, at all stages, she disclosed to the licensees that she would be bidding at virtually the last moment of the auction but that her bid did not get communicated to the auctioneer. We refer further to his evidence below. The complainant seemed to be criticising the auctioneer's decision not to accept her bid as being made in time.

[30] We are not concerned with the conduct of the auctioneer, not that there seems anything to be concerned about. Our jurisdiction is simply to examine the conduct of the licensees at all material times regarding the marketing and sale by auction of the property.

[31] The appellant seemed to be asserting that spotters should have been put near her by the second respondents. However, the evidence is clear that Ms Aikin and Ms Lafferty were very near her (and, in effect, Mr Damerell also) and were carefully observing the appellant at all times because they were determined to do all they could to extract a bid from her.

[32] We certainly accept that, at a very late moment in the auction process, the appellant called a \$5,000 bid and raised her hand; although the evidence is that her voice was rather soft. In any case, the evidence from the auctioneer is that, although he was looking out for a bid from the appellant and using all his experience and technique to extract such a bid from her, she did not make a bid before his final call; and, in view of all the tolerance he had given her to that point (so he put it), he readily decided not to re-open the bidding.

[33] Among the many questions put to the appellant was that her strategy to make a bid at the very last moment she could "*had some risk*", but her response was "*no, I had disclosed my hand*". This meant that she had told Ms Aikin, in particular, that her bid would be coming very late in the auction. We find the evidence to be clear that was passed onto the auctioneer by Ms Aikin and others, namely, that there would be a very late bid from the appellant. Also, it seems to us that the auctioneer gave the appellant every opportunity to bid before he closed the auction on the basis of the property being passed in and for the vendor to deal with the top bidder.

[34] It was put to the appellant, and the auctioneer gave evidence on this theme, that the auctioneer spelt out that he was offering people the last chance and final opportunity a number of times, that he looked at the appellant on those occasions, and he also made it clear that the vendor would deal with the highest bidder if the reserve price was not reached which it was not. She did not seem to demur.

[35] It seemed to us that all witnesses endeavoured to be truthful. The appellant herself made it clear that she had told the licensees Ms Aikin and Lafferty that she, the appellant, did not want to be pestered about making a bid, that she had her own strategy, and knew what she was doing, and she did not want to be pressured by the licensees to bid when she was not ready to. This meant that the licensees felt unable to stand alongside the appellant as spotters and, for instance, the appellant had said to Ms Aikin *"I will do this my way"*. They also understood that she did not want them asking her if she was about to bid. They said that the appellant had refused to discuss the likely price range of her bids with any of the three respondents.

[36] Also in cross-examination, the appellant accepted that she did not want other prospective buyers at the auction to know that she, the appellant, might be a bidder until the very last opportunity and that was her strategy.

[37] There was cross-examination as to whether the place of the appellant in the auction room was inconspicuous; but that seems academic because the auctioneer says that he saw her and directed to her many of his pleas to bid.

[38] In the course of cross-examination the appellant candidly stated, inter alia, *"I didn't want to be made to bid before I was ready to bid"*. She also seemed to accept that because she had made it clear to Ms Aikin and Lafferty that she did not want their advice, they did not stand beside her but only nearby within a yard or so. The appellant seems to have indicated to them that she wanted space from them but she said to us that she had made it clear to them that, when she commenced to bid, she expected them *"to be on my tail"*.

[39] It seems that immediately the appellant eventually bid, Ms Aikin simultaneously called her bid to the attention of the auctioneer also because she felt that the appellant was speaking rather softly.

[40] There was much cross-examination about a theme of the appellant that the licensees should, in the appellant's view, have made more effort to have the auctioneer re-open the auction. We are satisfied that they made massive efforts in that respect and with regard to any other options.

[41] Insofar as the appellant wished to consult her lawyer and have matters frozen over the next weekend i.e. until after Easter, we accept the evidence of Mr Damerell, in particular, that she could have consulted her lawyer had she wished to telephone him or her at material times; and that, in terms of the vendor achieving a sale to her satisfaction, it simply was not feasible to postpone matters until the next week.

[42] Also before us, the appellant made it clear that, at all times, she felt capable of handling the situation and her own strategy, and that she regards herself as a strong woman.

Mr Damerell

[43] Mr Damerell made it clear that the plan of the licensees was to do all they could to encourage bidding from the appellant during the auction and they kept near her to facilitate that - even though the appellant made it clear that his presence was not welcome as she (the appellant) had her own strategy to come in at some very late point in the auction.

[44] Mr Damerell said that he also called her bid to the attention of the auctioneer immediately the appellant had made it, and he realised that Ms Aikin had done that also. He said that the moment he called the appellant's bid, indeed as the words were leaving his mouth, he realised that the auctioneer had moved on and was advising those present that the vendor would negotiate with the top bidder because the auction had ended. He realised that it was futile to argue with the auctioneer who had ruled that the appellant's bid was not made in time and had firmly decided not to re-open bidding. Mr Damerell knew that this was in accord with the conditions of sale for the auction. As it happens, those conditions of sale had been read out much earlier in the night at the commencement of the evening of auctions and the appellant was not then present. However, the issue before us is not the conduct of the auctioneer, but the conduct of the licensees.

[45] We accept the evidence of Mr Damerell that the licensees did all they could in an effort to convince the auctioneer to re-open the bidding or for the vendor to consider every possible option to give the appellant a chance to treat with the vendor in the purchase of the property.

[46] Mr Damerell made it clear that because of the strong mutual knowledge of the three licensees of the appellant's bidding strategy, the auctioneer had been absolutely briefed about the appellant's intention and that he deliberately made numerous calls in the course of the auction endeavouring to get the appellant to bid. Mr Damerell was most emphatic about that latter point. He was also most emphatic that, as he put it on behalf of the three licensees, *"our big focus was on how to get you to bid"*. He added *"we tried every strategy to get you to bid"*. However, he felt that the auctioneer decided that the auction had gone on for too long and that the appellant did not want to bid, and brought the auction to an end fairly quickly. Indeed, Mr Damerell also stated in cross-examination by the appellant *"we tried every strategy we knew of to get your bid including telling the auctioneer and appealing to you, but we were deterred by you"*.

Ms Aikin

[47] Ms Aikin also seemed to us a very honest witness who is clear and precise. She confirmed the above themes for the licensees. She said that she kept a very close eye on the appellant throughout the auction and was only about a metre to the appellant's right and when, eventually, the appellant made a bid she (Ms Aikin) put her right arm out and also called the bid. She also described how the auction went on for quite a longer time than usual, but was eventually brought to an end quite quickly, and that she immediately went to the auctioneer pleading with him to re-open the bidding and to accept the appellant's bid.

Ms Lafferty

[48] Ms Lafferty's evidence also confirms the above themes for the licensees. She said that the appellant had made the appellant's bidding strategy clear to her. It seems that Ms Lafferty was also standing very close to the appellant when she eventually put in a bid and that she had also advised the auctioneer of the appellant's bidding strategy. Ms Aikin could not tell whether the appellant's bid was finally made in time but thought it might have been. However, we are only concerned with the conduct of the licensees, not that of the auctioneer. Ms Lafferty emphasised that the appellant's bid came in very close to the final call and she said she could not say whether it was made in time but *"it could have been in"*.

The Auctioneer

[49] The auctioneer stated to us that the auction had proceeded very slowly with numerous trial closes and final calls being taken. He said that he went “*once, twice, third*” a number of times, which is not uncommon, and that he had been firmly told by the licensees that the appellant was “*hanging back until the finish*”. He emphasised that, therefore, he made his appeals for a bid to the total room. He said that at virtually the end of the auction, the bidding had paused and he explained again that the top bidder only would have rights until midnight to treat with the vendor. He made a first call and a second call, asking a number of times whether all bids were in and stressing that this was the final opportunity and at all times he himself carefully scanned everywhere in the room.

[50] He said that when he ended the auction and explained that the property had been passed in for negotiation by the highest bidder with the vendor, someone told him that there was a bid over where the appellant stood. He said he had no hesitation in refusing to re-open the bidding “*given the amount of time bidders had had*”. He was conscious that there were two more auctions to be handled by him and he said “*I had made my decision*”. He also stated that he did not finish the auction “*particularly quickly*” and was very conscious of his duty to get the top bid for the vendor and that he had hung back and given all bidders every opportunity to be the top bidder.

[51] In cross-examination from the appellant, the auctioneer said that he had no difficulty in seeing the appellant at all times during the auction and he saw the licensees go up to the appellant a number of times. He said that he had been carefully told of the appellant’s bidding strategy by Ms Aikin and he said to the appellant before us: “*I tried very hard to get a bid from you. I knew that you were going to make a late bid*”. He said that he noted the appellant’s bid as coming in immediately after he had closed the auction. He stated “*It is still my position absolutely that your bid was late*”.

[52] The auctioneer said that he made it clear to Ms Aikin’s pleas immediately after the auction that he, the auctioneer, had made the decision and he would not entertain re-opening the auction. He told us he had no regrets or second thoughts about that. Indeed, he emphasised and told the appellant herself “*I gave you every opportunity to bid*”. He stated that he had experienced all sorts of bidding strategies in the course of his long career as an auctioneer. He also stated to the appellant “*I knew your position straight away but you were too late*”. He added that there was no disputed bid while the auction was in progress and that the stance of the appellant was made “*after the auction*”.

The Vendor

[53] By agreement the vendor made herself available for cross-examination by telephone. For present purposes, we note that she was very satisfied with the outcome of the sale and with the conduct of the three licensee second respondents at all times. She seemed very content with the decision of the auctioneer and regarded that as his domain and she had no criticism of his handling of the situation. Her overall attitude is that the appellant apparently had a waiting strategy but did not bid “*so I put you out of my mind*”. She added “*I wasn’t interested in your pleas as you had not participated in the auction*”.

Discussion

[54] It was put that the key issue is whether, even if it is accepted that the appellant placed her bid prior to the fall of the hammer, the licensees can be said to have engaged in unsatisfactory conduct under s.72 of the Act (if not misconduct under s.73). It was also put that it is a matter for us whether or not the appellant placed her bid before or after the property was passed in by the auctioneer. The evidence shows that, under the rules of the auction, the appellant did not make a valid bid in time.

[55] We think it suffices to simply decide whether the conduct of the licensees, or any of them, was in any way deficient with regard to their marketing of the property (including the auction process) up to the time of sale to the ultimate purchaser.

[56] It is now accepted by all parties that the auctioneer knew of the appellant's bid dispute; and that, despite this, he did not re-open the auction process. It is also accepted that the licensees strenuously attempted, albeit unsuccessfully, to find a solution for the appellant after the final fall of the hammer. Although the vendor knew of the appellant's late bid, she stated that she wanted to negotiate only with the ultimate purchaser.

[57] Realistically, the primary legal issue for us is whether, even with the confusion surrounding the timing of the bid, the licensees have engaged in unsatisfactory conduct under s.72 of the Real Estate Agents Act 2008.

[58] We bear in mind that licensees are obliged to act in their client's best interests and in accordance with their client's instructions, - Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, r.9.1. Their client was the vendor. In this particular case, the vendor instructed the licensees that she did not want to be pressured by them in the auction process. With the appellant's complaints in mind, she has stated that she is very satisfied with the licensees' conduct. Of course, licensees also have duties to customers.

[59] When the auction concluded, Ms Lafferty and Ms Aikin both immediately approached the auctioneer to raise the issue of the confusion surrounding the appellant's unaccepted bid. The auctioneer insisted that the appellant had bid after the property was passed in, and refused to re-open the auction. The particulars and conditions of sale upon which the auctioneer conducted this auction contained the clauses 2.3 and 2.6 set out above. Accordingly, it is clear that, upon there being a dispute about bidding, the auctioneer was entitled to resolve it in any proper way he saw fit, as long as it did not disadvantage the vendor.

[60] Because the auctioneer refused to re-open the auction, Mr Damerell approached the successful purchaser to discuss whether he would agree to re-open the auction; but the successful purchaser did not agree.

[61] We feel that the appellant's challenge in this case is, in substance, against the auctioneer's conduct of the auction, rather than the licensees' conduct as such. As indicated above, we are only concerned with the conduct of the licensees, although we accept that the conduct of the auctioneer may indirectly affect that. In any case, we do not think that the auctioneer's conduct can be criticised.

[62] The basic issue is whether any of the second respondent licensees are guilty of unsatisfactory conduct or, possibly, even misconduct due to their role in the said auction process.

[63] It seems that the appellant's grievance is that the auctioneer knew a late bid was coming from her but did not accept it and that, somehow, the licensee second respondents should have enabled acceptance of her too late-bid.

[64] Various factual matters are in dispute but they do not affect our reasoning whoever is to be believed.

[65] The appellant's strategy was to hang back as late as she possibly could before the property was knocked down on a final call by the auctioneer; and an important part of that strategy was for her to give no indication whatsoever of her timing or price range. Presumably, she expected that strategy to enable her to gazump everybody at the very end of the auction.

[66] It seems to us that she hung back just a split second too long and the auctioneer himself decided that enough was enough. His evidence was to that effect, particularly in view of his endeavours throughout the auction to attract a bid from her and, more particularly, in the light of the strong briefing he had had from the licensees as to the appellant's intention to bid and, indeed, of her precise strategy.

[67] It seems to us that the appellant's strategy simply did not come off. In effect, she outmanoeuvred herself, but now seeks to blame someone else (i.e. the licensees) when she has only herself to blame.

[68] We cannot find any failure on the part of any of the respondents.

[69] It cannot be proven that the appellant made a bid in time. In any case, the decision whether or not to accept her bid was that of the experienced auctioneer. The three licensees were dedicated to extracting a bid from her throughout the auction but, through no fault of any of them, failed to achieve that. The appellant was given many opportunities by the auctioneer to bid.

[70] A lesson from all this is that the appellant ran a risky strategy. Perhaps, real estate agents should emphasise to bidders at auctions of real estate the dangers of such strategies (and they probably do) but we think that to be self-evident and there can be no fault of any licensee in that respect on the facts of this case. The licensees kept a close eye, so to speak, on the appellant throughout the auction from only about a metre away and did all they could to have the appellant bid, but the appellant wanted to do it her own way.

[71] As our member Mr G Denley pointed out towards the end of the hearing, it might be helpful for licensees acting as spotters at real property auctions to make a diary entry, or some type of note, immediately after any situation of disputed bidding so that there is a record made very near to the time of the matters in issue.

[72] In terms of the facts referred to in para [19] above as being in dispute, we find that the appellant did not effect a valid bid at the auction. We find that Ms Aikin did her best to remedy the situation as did the other two licensees. It does not matter much whether Ms Aikin acknowledged that the appellant bid before the property was passed in, as that decision is for the auctioneer alone. Similarly, it does not matter whether or not the auctioneer expressly stated that he refused to re-open the auction

as there has been no failure in any respect on the part of any licensee. In terms of the final of the factual issues set out in para [19] above, we are well satisfied that the licensees did all that could be reasonably expected of a salesperson at all material times.

[73] We record that we consider that all witnesses (including all parties) endeavoured to be truthful and sincere. We can understand the disquiet and disappointment of the appellant, but she ran a risky strategy as events proved.

[74] Accordingly this appeal is dismissed.

[75] 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

Mr G Denley
Member