

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 60

READT 50/12 & 51/12

IN THE MATTER OF

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

BETWEEN

**REAL ESTATE AGENTS
AUTHORITY (CAC 20006)**

AND

**PENELOPE MILNE AND JOHN
BOWRING**

Defendants

READT 60/12 & 61/12

IN THE MATTER OF

appeals under s 111 of the Real Estate Agents Act 2008

BETWEEN

**PENELOPE MILNE AND JOHN
BOWRING**

Appellants

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 20006)**

First Respondent

AND

JUDITH AND DOUGLAS EADES

Second Respondents

MEMBERS OF TRIBUNAL

Ms K Davenport QC -- Deputy Chairperson
Mr J Gaukrodger -- Member
Mr G Denley -- Member

HEARD at Auckland on 4-5 June 2013

DATE OF DECISION 16 July 2013

APPEARANCES

Mr R McCoubrey for Real Estate Agents Authority [Meredith Connell]
Mr S Hunter for Ms Milne [Gilbert/Walker Solicitors]
Mr S Bonnar for John Bowring [McVeagh Fleming, Auckland, Solicitors]

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Milne and Mr Bowring are respectively a real estate agent practicing in Auckland and an auctioneer practicing in Auckland. Mr Bowring is also a licensed agent. The complaint which has led to the charge and the appeal arises from their actions on 1 October 2011 at the auction of 17 Ara Street, Remuera.

The Facts

[2] Mr and Mrs Eades listed their property for sale by auction with Pene Milne Properties Limited, Jervois Road, Herne Bay. The date set for auction was 1 October 2011. Ms Milne engaged Mr Bowring to act as the auctioneer on the sale. There had been a great deal of interest in the property and the complainants had set their reserve at \$2.7 million. The bidding commenced with bids from four interested parties and one other party in the room who had not made a bid. The auction stalled at a price of \$2.5 million and Mr Bowring called a pause to the auction while he discussed with Mr and Mrs Eades a reduction in the reserve price. He and Ms Milne spoke to them upstairs at the property and the complainants agreed to reduce the reserve to \$2.6 million. Mr Bowring went downstairs again to discuss the sale with Mr Alan Sinclair, the highest bidder. Mr Sinclair then made an offer to Mr Bowring. He said that he would be prepared to pay \$2.7 million for the property if the property was withdrawn from auction and it was then sold directly to him.

[3] This was an unusual offer and there was a great deal of uncertainty about what to do. Mr Bowring says that he spoke to the vendors and expressed his concerns that what Mr Sinclair proposed might not be possible or ethical. His conclusions were that he could not sell the property outside the auction process while the auction was in progress, but if the property was withdrawn from auction any sale would need to be documented on a standard Sale and Purchase Agreement not an auction agreement.

[4] Mr Bowring said that he phoned Mr Mark Sumich [a top real estate auctioneer] to get advice. Mr Bowring recalled that Mr Sumich said that any sale to Mr Sinclair could not be completed on the auction document. Mr Bowring said that the impression that he got from Mr Sumich was that no side deal or sale could be completed with Mr Sinclair while the auction process was still underway. He concluded that the only option was for the vendors to cancel the auction and commence dealing with Mr Sinclair or to continue with the auction process. He also considered that there was a risk that if they chose to cancel the auction Mr Sinclair might renege on the verbal indication that he would pay \$2.7 million.

[5] He denied that he had been asked to get anything in writing from Mr Sinclair before the Eades made the decision.

[6] Mr Bowring said that Mr and Mrs Eades decided they did not want to cancel the auction and decided to proceed with it. He said that they understood that there was a risk that the hammer might fall at less than \$2.7 million. He said that the Eades did not instruct him to raise the reserve price to \$2.7 million (again). Mr Bowring told the Tribunal that Mr Sinclair was very angry that his offer was not accepted but Mr Bowring persuaded him to stay at the auction. Mr Sinclair subsequently bid at auction and the property was sold to Mr Sinclair for \$2.605 million. Mrs Eades was very unhappy about this sale process which resulted in them receiving \$95,000 less than they had been offering by Mr Sinclair. She almost immediately complained to the Real Estate Agents Authority.

[7] Ms Milne gave similar evidence but did not at any time speak to Mr Sinclair. She said that her view was that it was not possible to have Mr Sinclair sign an agreement to purchase the property on the auction form. She said she would have needed to have gone back to her office in Herne Bay and obtained a copy of the ordinary agreement for sale and purchase. Ms Milne said she did not recall Mr Eades saying he wanted something from Mr Sinclair in writing. She confirmed that her view was that the property would need to be withdrawn from auction before any binding agreement could be entered into with Mr Sinclair. She said that Mr and Mrs Eades understood clearly that they had a choice between withdrawing the property from auction and dealing exclusively with Mr Sinclair or reopening the bidding on the floor. Ms Milne confirmed that Mr and Mrs Eades understood that the reserve would be \$2.6 million. She did not discuss putting the reserve price back up again.

[8] Mrs Eades agreed that she had been told that these were the two options (ie continue with the auction or withdraw the property from the auction and then sell to Mr Sinclair) but also said that her husband asked on three occasions whether or not the offer could be put in writing. She says that she was told that this was not possible. She agreed that they decided that the auction was to proceed but also said that there was no discussion about the reserve price being raised again.

[9] Evidence was given by a number of experts. Mr Keightley appeared for the Real Estate Agents Authority. His evidence was very simple. He considered that an auction could be cancelled at any time because of the provisions of the auction agreement and in particular Clause 2.5. He said that the correct position would have been to have used the auction form (deleting what was not necessary) to record Mr Sinclair's offer. He said that he would have asked Mr Sinclair to sign an agreement which was conditional upon the property being withdrawn from auction. He said the correct advice Mr Milne and Ms Bowring to give to the vendors was:

"We have an offer of \$2.7 million on auction terms from a bidder. However this bidder has said he will only offer that right now if you agree to sell it at that level to him and do not reopen the auction. That means two things, firstly your property will be sold for \$2.7 million and secondly that is the most you will get today. Shall I get this in writing so you can see it?"

[10] He also said because of the confusion and stress created by this offer no one discussed raising the reserve again to \$2.7 million, even though they knew that Mr Sinclair was willing to pay \$2.7 million for the property. He said they should have had this discussion with Mr and Mrs Eades.

[11] Expert evidence was also called for Mr Bowring from Mr Sumich, an auctioneer. Mr Sumich did not recall being phoned by Mr Bowring on the day of the auction but agreed that he would have said that the offer from Mr Sinclair could not have been concluded on the auction form. His view was that no sale to Mr and Mrs Sinclair could have been undertaken by the auctioneer on that day because:

"If a vendor enters into a side agreement with a buyer during an auction in which they agree to sell the property to that buyer even if the vendor has not formerly signed the documents at that stage the property has been sold and the parties are actually in breach of Rule 6.2 of the Code of Real Estate Agents Act (Professional Conduct and Client Care Rules) and Clause 2.5 of the auction agreement and in my opinion unethical".

[12] He agreed that Mr Sinclair could not have been invited to sign the auction agreement. He considered that Mr Keighley's approach would be likely to bring the industry into disrepute and be in breach of Rule 6.3 of the Rules. He concluded that the advice that Mr Bowring and Ms Milne gave that the auction price could result in a sale for more or less than \$2.7 million (subject to the reserve price) was correct. He did not consider that the defendants should have told the Eades' that they might want to consider re-raising the reserve price.

[13] Mr Damerell, (the expert for Ms Milne) is a real estate agent working in Auckland. Mr Damerell said that he had never encountered or heard of a situation such as this. He considered that Mr Keightley's approach would be in breach of Rule 6.2 of the Professional Conduct and Client Care Rules (which requires licensees to treat all parties fairly) and would bring the industry into disrepute in breach of Rule 6.3. He agreed that the property would need to be withdrawn from auction but was doubtful about whether a favourable offer constitutes a valid reason for withdrawing the property from sale without giving other interested parties an opportunity to participate in the purchase. Mr Damerell had ethical concerns about raising the reserve again. He considered that in this case there was no requirement on a reasonable agent to discuss raising the reserve with the vendors again.

The Issues

[14] This case has resulted in a charge being laid against Ms Milne and Mr Bowring. The charge against Mr Bowring is a charge of misconduct under s 73(b) of the Real Estate Agents Act 2008:

The Charge:

The Complaints Assessment Committee 20006 charges the defendant John Bowring (Mr Bowring) with misconduct under s 73(b) of the Real Estate Agents Act 2008 in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.

Particulars:

On 1 October 2011 Mr Bowring's conduct was seriously incompetent or seriously negligent during the sale of 17 Ara Street, Remuera by auction from the complainants to Alan Sinclair (Mr Sinclair) because:

- (i) Mr Bowring did not clearly advise the complainants as to the steps they could take when Mr Sinclair made an offer of \$2.7 million; and*

- (ii) *The withdrawal of Mr Sinclair's offer was not relayed to the complainants. The complainants were not given a further opportunity to raise their reserve back to \$2.7 million after Mr Sinclair withdrew his offer.*

Ms Milne faces a charge on identical terms.

The Issues:

Issue 1

[15] What should Mr Bowring and Ms Milne have advised the complainants were the appropriate steps to take when Mr Sinclair's offer was made?

Issue 2

[16] Should the complainants have been given a further opportunity to raise the reserve back to \$2.7 million after they decided to proceed with the auction?

Issue 3

[17] Do the actions of the defendants amount to a breach of s 73(b) of the Real Estate Agents Act 2008, i.e. are they seriously incompetent or seriously negligent real estate agency work?

Discussion

Issue 1

[18] The Tribunal are concerned that two of the three experts expressed concern about whether or not the agent and auctioneer would be in breach of Rules 6.2 and 6.3 of the Rules by cancelling the auction and dealing with Mr Sinclair. Rule 6.2 provides that a licensee must "*act in good faith and deal fairly with all parties engaged in a transaction*" and 6.3 "*a licensee must not engage in any conduct likely to bring the industry into disrepute*".

[19] While it is obviously important for an agent to act in good faith and deal fairly it cannot override their fiduciary obligations to the vendor client. This is not to say that an agent must not act in good faith and unfairly. Generally there should be no compromise of both rules. However it is not a breach of either Rule to cancel an auction when the auction terms specifically provide that the vendor can cancel an auction at any time.

[20] The Tribunal agree that the auction could have been stopped to subsequently sell the property to Mr Sinclair. Any suggestion of unfairness was eliminated by the fact that notwithstanding there had been some bidding the reserve had not been met before the auction was paused. We therefore conclude that it would have been entirely permissible under the Rules and the auction terms for the auction to have been ended and an arrangement entered into with Mr Sinclair.

[21] The Tribunal has said on many occasions that real estate agents are not expected to be lawyers. However there is no doubt that this case would have benefited from some simple legal advice at the time Mr Sinclair's offer was made. We agree with

Mr Keightley that Mr Sinclair's offer could have been (and should have been) recorded in writing. The offer would have been subject to the auction being cancelled. This could have been done by an amendment of the auction terms by the adding of additional clauses, or indeed could have been recorded on a sheet of paper with the reference to the contract including all of the terms under the Real Estate Agent's Agreement for Sale and Purchase, 8th edition. However we do not expect an agent to understand the nuances of contract and land law. What we do expect is that an agent should understand why it is important to record contractual offers in writing and how to do it. Ultimately the choice as to whether or not to accept Mr Sinclair's offer lay with the Eades but as everyone seems to have expressed some concern as to whether or not Mr Sinclair would stick to his oral offer this offer (and the condition) should have been recorded in writing. This was the appropriate discharge of the defendants' obligation to the vendors. Mr and Mrs Eades could then have made a decision as to whether they wanted to stop the auction and accept this price or continue with the auction. Recording the offer in this way would have eliminated any anxiety about the possibility that the auction would be stopped and Mr Sinclair would renege on the offer. Mr Sumich and Mr Damerell's evidence relating to the recording of the agreement is not correct.

Issue 2

[22] Further it seems from the evidence that no consideration was given by anybody as to whether or not the reserve should have been raised to \$2.7 million again. Mr Sinclair had indicated that he was prepared to say \$2.7 million (albeit on the condition that the auction be stopped).

[23] Mr Bowring now knew that there was somebody in the room who was, on certain conditions prepared to pay this amount of money. There should therefore have been a discussion with the vendors as to whether in these circumstances the reserve should be raised again. The reason that the reserve was reduced was to encourage bidding from Mr Sinclair and a Mr Randall who had been in the room but not made any offer. That assumption should have been critically re-examined by the defendants once they were aware of this additional information about Mr Sinclair. They would have been required to have given the Eades a warning that Mr Sinclair might not make this offer at auction. We assume that there would have been a debate on this issue, but at least the Eades would have been in possession of all of the information and able to make the decision themselves.

[24] We conclude therefore that Ms Milne and Mr Bowring erred in the way in which they handled the offer from Mr Sinclair.

Issue 3

[25] The charges have been laid under s 73. The Real Estate Agents Authority must establish that is that there has been be a deliberate departure from accepted standards or such serious negligence although not deliberate, to portray indifference. (see *Complaints Assessment Committee v APC*)¹.

[26] The difficulty that the Real Estate Agents Authority have in establishing a charge of misconduct (or unsatisfactory conduct) is the fact that the expert evidence of two of

¹ [2008] 3 NZCR 105

the three experts did not support the view that the conduct of Ms Milne and Mr Bowring was seriously negligent or indeed wrong at all. In Lake v the Medical Council of New Zealand (Auckland HC 123/96, 23 January 1998, Smellie J) the Court held that a Tribunal could not substitute its own view of what a doctor should have done in the circumstances, contrary to the expert evidence. However they could reach the conclusion that the level of care indicated by the evidence fell below that required by public interest and maintenance of standards within the profession. The Court said that this later conclusion was a legitimate and indeed essential aspect of the Tribunals' statutory duty. However the Tribunal could not substitute its own view of the appropriate standards in the face of expert evidence.

[27] This case is not one where substitution of the experts' view is needed for the maintenance of standards or in the public interest. This is a unique situation in which we consider that the agents reached the wrong conclusion. However the expert evidence shows that the industry did not agree with the Tribunal conclusion. We do not consider that this conduct can amount to professional misconduct given the conflicting expert evidence. If two out of three experts consider the agent's actions were acceptable we cannot conclude this conduct is in breach of s 73.

[28] The Tribunal consider that this decision should be educative for the industry in the future. It concludes that the correct way was that espoused by Mr Keightley.

[29] However they cannot conclude that the actions of Mr Bowring and Ms Milne amount to a deliberate departure from accepted standards or such serious negligence as portrayed indifference and abuse of the privileges which accompany registration. Accordingly the charges are dismissed.

[30] The appeals from the Complaints Assessment Committee's decisions are upheld and the decision of this Tribunal is substituted for their decision.

[31] The Tribunal draw the parties' attention to s.116 of the Real Estate Agents Act 2008.

Ms K Davenport QC
Deputy Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member