

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 12

READT 038/13

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

BETWEEN **DAVID GRAY**

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20008)**

First respondent

AND **MALCOLM FORSYTH**

Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at ROTORUA on 21 January 2014

DATE OF DECISION 13 February 2014

APPEARANCES

The appellant on his own behalf
Mr L J Clancy, counsel for the Authority
The second respondent licensee on his own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] David Gray alleges that the second respondent licensee, Malcolm Forsyth, mishandled the appellant's bid at an auction for a residential property in Rotorua and that, because of this, he (David Gray) failed to acquire the property. The licensee is the principal of LJ Hooker Rotorua the real estate firm which organised the auction, but with an independent auctioneer contracted.

[2] Complaints Assessment Committee 20008 decided to take no further action on the complaint; but Mr Gray appeals that decision to us.

Background Facts

[3] On 14 August 2012, the property at 40 Devon Street, Rotorua was listed with LJ Hooker Rotorua. That agency marketed the property and set an auction date for 12 September 2012. The appellant made a pre-auction offer of \$210,000 which was rejected by the vendor.

[4] On auction day, the instructing vendor ("the vendor") set a reserve price of \$220,000. There were two auctions being conducted in the same auction room that day, with approximately 20-25 people in the room for both properties. The auctioneer was aware that the appellant had made a pre-auction offer on the property and was rather interested in bidding. However, in line with the agency's procedures, the auctioneer was not aware of the reserve price which had been set.

[5] Bidding for the property started at \$165,000 and moved to \$200,000. The appellant had not bid at that stage. The instructing vendor was in Australia, but the licensee was on the telephone to him throughout. The vendor's sister was present at the auction as a co-vendor. The licensee spoke to them both when bidding reached \$200,000, but the vendor did not want to accept this bid. However, the vendor agreed to lower the reserve price to \$205,000. The bidder who had offered \$200,000 increased his bid to \$205,000 and the property was put on the market, which was relayed to the room, and the auction resumed.

[6] The licensee says that the auctioneer, about then, asked the appellant to bid, but the appellant declined. The appellant denies that the auctioneer asked him to bid but agrees that he was asked to make an offer before the property was "*put on the market*" and refused to. He said that he strongly signalled to the agents present at the auction that he did not want to be disturbed in his bidding strategy.

[7] As there was no further bidding when the auction resumed with the property "*on the market*" at the offer of \$205,000, the auctioneer called the property three times, announced that the property was sold, and brought the hammer down. There is evidence that it was at this time that the appellant called a bid but that the bid was at or after the banging of the auctioneer's hammer. The licensee says that he was in the room and did not hear the bid and the auctioneer did not see the bid. There is more evidence on that issue below.

[8] The appellant acknowledges that he adopted a strategy of waiting until the property was on the market and until the auctioneer had called for last bids.

[9] When the property was called as "*sold*" and the auctioneer's hammer had gone down, the licensee says that the appellant approached him and stated that he wanted his bid confirmed. The licensee also says that the appellant told him that his bidding strategy was not to bid during the auction and he spoke to the vendor's sister and she said that she had not heard the bid called at the time the hammer went down. The licensee then spoke to the salespeople who were present at the auction and says that two of these salespeople did see the appellant indicate a bid, but confirmed that it was at the exact same time that the hammer went down. After the licensee consulted with LJ Hooker's head auctioneer, a Mr Ross Foreman (who was not present at the auction), and with the vendor, the auction was not re-opened.

[10] According to the licensee, when he informed the appellant that the property would not be resubmitted for auction, the appellant said that he wanted to discuss

this with his solicitor. The licensee says that he offered the appellant the office telephone and the appellant used that to telephone his solicitor in Auckland. The conversation between the appellant and his solicitor took some time and the appellant then left the building without speaking to the licensee again. The licensee says that the appellant has never asked him for the agency's resolution and complaints procedure to be applied to the appellant's situation.

[11] The listing agent for the property was a Ms Debbie Smith. At the auction, she worked with people in the auction room who were considering bidding. She stood at the rear of the room. She was aware of the appellant in the room and said that he was standing beside her with Anne Tregalgis and Debora Toal (two other agents of LJ Hooker), who had all spoken with the appellant and were standing nearby. She says that she heard the appellant bid at \$206,000 only after the room went quiet and the auctioneer had said *"going once, going twice, third and final call, sold"*. She said that only the three agents standing beside the appellant heard him bid as he spoke very quietly. At this stage, they alerted the auctioneer of the bid. She believes that the appellant, although he had much time to call his bid, left it to the last second.

[12] Debora Toal was also present at the auction. She scribed the bids and was facing the room of bidders and onlookers from the front of the room. She was aware of the appellant standing against the wall with Anne Tregalgis. After the auctioneer called for final bids and announced the property to be on the market, Ms Toal said that the auctioneer called the property once and invited the appellant to bid. The auctioneer then called it twice and then said *"third and final bid, any more bids"*. She (the auctioneer) then shouted *"sold"* and it was at that point that the appellant raised his hand. Ms Toal says that it was *"a split second difference ... almost simultaneously were the two activities"*. Ms Toal did not hear the appellant say the amount bid as he was *"very quietly spoken"*.

[13] Anne Tregalgis was also present and describes the appellant as *"her buyer"*. She says that she kept asking the appellant to bid, but he refused. She says that the appellant did not bid but decided to quietly say *"\$206,000"* after the hammer had gone down.

[14] The Authority's investigator has spoken with the vendor's sister. She confirmed that she was present at the auction and said that the auction room was *"not huge"* – there were six to eight people present. She was standing near the appellant, just a few feet away. When questioned as to when she heard the appellant bid, she said that the auctioneer said *"going once, going twice, going, going ..."* Initially, she was *"sure"* the auctioneer said *"gone"* before the appellant made his bid. However, she subsequently said it could have been *"a split-second either way and she was not 100%"* sure. She said that the licensee spoke to her after the appellant and objected to the property being sold. The licensee then told her that the appellant had made his bid a split second too late and *"they would have to confirm the first offer"*.

[15] The appellant insists that he bid before the hammer came down and the auctioneer declared the property sold; but he acknowledges that his bid could have not been received as it was softly spoken. Nevertheless, he says that he was clear in his signal and indication to bid with his hand raised.

[16] The appellant also disagrees with what the other agents present have said. He says that his bid was registered by three agents in the room, including Ms Toal, who was standing at the front of the room next to the auctioneer and has stated *"David spoke and rose his hand"*.

[17] The appellant also says that, after he bid, the auctioneer was unclear as to what to do as she left the room with the licensee to consult with the said Mr Foreman. The appellant says that during this time, he spoke to Ms Toal, Ms Tregalga and Ms Smith. According to the appellant, all these agents said they saw him bid prior to the property being sold and the hammer falling. He says he recalls an agent saying “do not worry, they will open the auction again”. However, the appellant says that none of these agents were consulted by the auctioneer as to what had happened. He adds that despite this, when he later spoke to Ms Tregalga, she had changed her position and said that his bid was made after the auctioneer declared the property sold.

[18] As to the dispute process available through LJ Hooker (and, perhaps, through the Authority), the appellant says that despite requesting a resolution and complaints procedure, he was not given any advice as to the agency’s dispute resolution process by the licensee or any other agent present. He says that he was told it was too late and that the auction had ended.

Additional Relevant Evidence Adduced before us

Evidence from the Appellant

[19] The appellant has been a property investor for 13 years or so and has an interest in 10 properties. He works as a forestry contractor. He said that he is not a novice with regard to auctions and has attended more than 30 auctions in his time, both in New Zealand and Australia, and bid at more than 10 of these .

[20] The appellant described how, during the auction of 40 Devon Street, Rotorua, on 12 September 2012, he stood at the rear corner of the room with Ms Tregalga (whom he described as “my representative agent”) next to him on his left and Ms Smith, the listing agent, some metres away along the same back wall to the left of Ms Tregalga. The appellant observed that the licensee was on the telephone to the vendor throughout the auction and kept updating the vendor on the auction situation. Another agent, Ms Toal, was “spotting and scribing” as she stood at the front of the auction room facing the bidders.

[21] The appellant said that his strategy for the auction was to wait until the property was “on the market” and then wait until the auctioneer had called for last bids.

[22] The bidding initially stopped at \$185,000 and the auctioneer took an adjournment to speak to the vendor. He then resumed the auction placing the property “on the market” at \$205,000.

[23] The appellant said that, during the adjournment when the property was not on the market, he was asked to put an offer forward but declined to do that.

[24] The appellant asserts that he called his bid prior to the auctioneer saying that the property was “sold” and before the hammer was brought down by the auctioneer. He admitted that his bid could have been regarded as softly spoken but maintains that “I was clear in my signal and indication to bid with hand raised”.

[25] The appellant said that immediately after the auction had ended there was a consultation period for the auctioneer to decide whether to reoffer the property at the last undisputed bid. The appellant seems to think that the final decision on whether

or not to reopen the bidding was made by, or should have been made by, the licensee.

[26] The appellant also says that he was not given any written or verbal advice or option to go through a dispute resolution process by the licensee or any other agent present at the auction. He said that, as a result of his own research, he ascertained that there was a complaint process through the Authority so that he submitted a concern form to the Authority on 26 September 2012 which led to an investigation by it, but the appellant maintains that investigation was not independent.

[27] The appellant/complainant gave quite some evidence about what others present at the auction had told him as to their interpretation of relevant events.

[28] Under cross-examination, the appellant noted that the auction room was not large and that all attending the auction were relatively close to each other and could see and hear all that happened. He said that it was to the licensee to whom he said he would not bid when asked to bid and that he did not indicate to the auctioneer that he would not bid. He also said he felt that the salespersons present in the room were "*unduly pressing*" him and he told them to leave him to himself and that he would decide when and if he would bid.

[29] It emerged that the salespersons knew that the complainant/appellant was then also quite interested in another property.

[30] We had understood that the appellant's evidence would be that when the bid was at the level of \$205,000, the auctioneer asked the appellant if he wished to bid and the appellant said he did not; and, shortly after that, the auctioneer started to call for the first time that he was about to sell to the then top bidder. However, before us the appellant seemed to be stating that he did not say to the auctioneer that he would not bid; but he simply remained silent, and the auctioneer inferred from that that he would not bid. The appellant says that he merely meant that he was not going to bid at that point but intended to bid later.

[31] It was put to the appellant that he did not give any of the three agents in the room the opportunity to advise him of their agency's complaints procedure. The appellant said that after the auction he expected bidding to be re-opened. He also said that he contacted his solicitor by telephone immediately but was very much available had the licensee wished to approach him and discuss matters, but he did not. The appellant also admitted that his solicitor's advice at the time was not supportive of the appellant's position and he simply left the building, but not until he was told that the licensee was unavailable to discuss matters with him. The appellant also stated, under cross-examination, that his solicitor's advice was that once the hammer had fallen, and regardless of whether the bid was made before or after that, the auction was over and it was too late for the appellant to bid.

[32] It seems there was no further contact between the appellant and the licensee until the licensee received a notice of complaint from the Authority.

The Evidence of the Licensee

[33] As part of the background, the licensee noted that when the appellant's pre-auction offer of \$210,000 was rejected by the vendor, the appellant indicated to the agents that he had another property in mind and, if he did not secure the Devon Street property, he would be proceeding with the other property and would not be

attending the auction. However, the licensee and his colleagues maintained contact with the complainant.

[34] The licensee said that the feedback which the agency received during the marketing of the property was that it should sell between \$170,000 and \$190,000, but the vendor set the reserve at \$220,000. The licensee said that the auctioneer was aware of the interest of the complainant and that he had made an offer prior to the auction, but was not aware of the reserve price and the only person with that information was the licensee.

[35] When bidding commenced at the auction, there were two people bidding in the room and there was also a bidder by telephone. Bidding started at \$165,000 and moved to \$185,000 and the telephone bidder held that bid. The licensee said that the appellant did not bid *“despite his agent standing with him and encouraging him to do so as the price was under what he had previously offered”*.

[36] During the adjournment in bidding referred to above, the licensee spoke with the vendor in Australia by telephone and with the vendor’s sister who was present at the auction and asked if the vendor would accept the cash bid on offer which seemed to have then got to \$200,000, but he was able to get that (telephone) bidder to increase his offer to \$205,000. This happened after much discussion because the vendor had been hesitant about accepting \$200,000 as a price. The licensee said he then also asked the salesperson working with the complainant to ask the complainant if he was interested in putting forward an offer, but the complainant refused to do that.

[37] Then the vendor agreed to adjust his reserve price to \$205,000 (from \$220,000) so that the auction was resumed. The auctioneer informed the audience of the revised bid at \$205,000 from the telephone bidder and that the vendor had advised that the property was *“on the market”*. The auctioneer emphasised that the property would now be sold to the highest bidder and the licensee says that the auctioneer then specifically asked the appellant if he was interested in putting forward an offer and emphasised that the property was about to be sold to the highest bidder; and the licensee states that the appellant answered that he was not bidding.

[38] The licensee states that as there were no further bids, the auctioneer called the property three times and announced that it was sold but he understands that, at the time the hammer was brought down, the appellant called a bid. The licensee said he was in the auction room at the time but did not hear or see any bid from the appellant and that the auctioneer did not see any such bid.

[39] The appellant disputed the situation and was told by the auctioneer that the property had been sold. The licensee then said *“Mr Gray approached me and stated that he wanted his bid to be confirmed”*. There then seemed to be much discussion which led to the licensee informing the appellant that the property would not be resubmitted for auction. The appellant would not accept that and said he would like to discuss the situation by telephone with his Auckland solicitor and was given an office and a telephone to do that. The licensee said that the appellant’s conversation with his solicitor took some time during which the licensee was involved with other activities. He understood that the appellant finished his conversation and left the building without asking to speak to the licensee. He then concluded his evidence-in-chief: *“I have had no contact from Mr Gray since that day and I have never been asked for our Resolution and Complaints procedure”*.

[40] The licensee asserts that there was no bid placed by the appellant prior to the fall of the hammer and he knows that through being in the auction room where “everybody was quite close and could see and hear everyone else”. The licensee also states that he believes that the representing agent of the appellant gave the complainant every opportunity to bid, as did a number of other agents and the auctioneer, but the appellant would not take that opportunity.

Committee’s Decision

[41] The Committee considered that the evidence before it raised three important points, namely:

- [a] The appellant had not bid nor shown any inclination to bid up until the point when the auctioneer was closing the auction in the usual manner.
- [b] The appellant submitted a bid either literally at the same moment the auctioneer said “gone” and brought the hammer down or a split second before that happened, and
- [c] The appellant said his bid quietly. It was only those next to him who heard him speak, and then only softly.

[42] After considering the evidence, the Committee concluded that the auctioneer and the licensee had acted fairly and carefully, the auction was run in a manner that was straightforward and unproblematic, and the appellant had “*ample opportunity to bid*”. The Committee found that the appellant did not bid “*until either when the auctioneer brought the hammer down, or so close to that point that any difference in time is miniscule.*”

[43] The Committee noted that the appellant adopted a strategy that risked “*backfiring*” and that is what happened in this case. The Committee decided to take no further action.

Discussion

[44] This appeal only relates to the conduct of the licensee at material times and is an appeal against the Committee’s decision to take no further action.

[45] Mr Clancy noted that this hearing constitutes a general appeal and that we have jurisdiction to rehear it all and come to a decision. He put it that we need to decide whether we have heard sufficient evidence to warrant a finding against the licensee of a disciplinary nature; but submitted that the Committee’s decision to take no further action is correct from the evidence available to us.

[46] Mr Clancy put it that the complainant’s stance of endeavouring to bid at the very last moment is, obviously, a risky strategy.

[47] The complainant emphasised that he has not caused these proceedings as a result of “*sour grapes*” on his part against the licensee. He said he had his auction strategy and made his bid before the fall of the hammer so that the auction should have been reopened. He asserts that the best interests of the vendor were not served. He maintains that what he has been told from time to time by the three agents involved in the room conflicts. He maintains that there have been poor professional standards on their part and that the only person to benefit is the

purchaser by buying at a good price of \$205,000. He again asserts that the vendor has lost and that it is the appellant's duty to uncover a breach of standards by the licensee. He emphasises that his bid was a *"complying bid"* (as he put it) and that, if there was doubt about that, the bidding should have been reopened.

[48] We observe that the Particulars and Conditions of Sale have on their front page a segment under the heading *"Conduct of Auction"* which contains a paragraph 2.6 reading: *"If a dispute arises concerning any bid, the auctioneer will determine the dispute or reoffer the property at the last undisputed bid"*. That segment also provides that the highest bidder whose bid is accepted by the auctioneer shall be the purchaser and that the auctioneer may refuse a bid.

[49] The appellant complainant submits that there was a failure by all the agents present to advise him of their agency's in-house complaints process, or of the Authority having such a process, and he submits that contravenes Rule 12.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 which reads:

"12.3 A licensee must also ensure that prospective clients, clients, and customers are aware that they may access the Authority's complaints process without first using the in-house procedures; and that any use of the in-house procedures does not preclude their making a complaint to the Authority."

[50] He also submits that Rule 5.1 of those rules has been contravened because (in his view) the licensee failed to exercise skill, care, competence and diligence in this situation. The complainant also submits that what he refers to as the decision by the licensee to not resubmit the property for auction is a breach of Rule 6.2 which requires a licensee to act in good faith and deal fairly with all parties engaged in a transaction.

[51] Was the auction conducted in such a way as to warrant a finding that the licensee, as principal of the agency, engaged in unsatisfactory conduct as defined in s.72 of the Real Estate Agents Act 2008? That section reads:

"72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
- (c) is incompetent or negligent; or*
- (d) would reasonably be regarded by agents of good standing as being unacceptable."*

[52] Did the licensee, as principal of LJ Hooker Rotorua, do all that could reasonably be expected of him at all material times, including after the auction?

[53] Licensees are generally obliged to act in their client's best interests and in accordance with their clients' instructions. In this particular case, the vendor was consulted and agreed with the course of action taken.

[54] Given the inherent risks in the strategy employed by the appellant, and the need to ensure fairness to all other parties, Mr Clancy submits for the Authority that the

Committee was correct to conclude there had been no unsatisfactory conduct by the licensee. We have outlined the evidence of the appellant above. His stance is that the licensee failed to have the appellant lodge a bid, or re-open the auction, or to initiate a mediation procedure.

[55] Simply put, the appellant/complainant had his own private strategy with regard to his intention to bid at the auction and he declined all assistance from the licensee or the other agents involved and present.

[56] Regrettably for the appellant, and for the vendor, he made his bid with a quiet voice and, apparently, with raised arm but in a relatively small room. He made his bid as the auctioneer's hammer went down after a first, second, and third calling and use of the word "sold". There had been a reference from the auctioneer to the complainant just prior to that calling process, indeed, after the first calling the auctioneer invited the appellant to bid. Throughout the auction Ms Tregalgis had kept asking the appellant if he wished to bid. After that calling process the auctioneer then said that the property was sold and brought down his hammer.

[57] On the balance of probabilities, the evidence shows that the appellant called his bid as, or a split second after, the auctioneer's hammer went down. At law the auction had ended and a sale and purchase contract had been created between vendor and highest bidder. Of course, the auctioneer, not the licensee, is in charge of the auction process and procedure.

[58] We consider that the appellant/complainant had every opportunity to bid but adopted a risky strategy, namely, that in endeavouring to bid at the very last second he might be too late to create a proper bid in time. We observe that even if the complainant's bid had been accepted, others (including previous bidders and the complainant) would have had the opportunity to bid further so that the consequences of what might have happened are conjecture.

[59] It is simplistic for the appellant to claim that the auctioneer should have simply reopened the bidding and continued with the auction. This is because part of the integrity of an auction process is that if the last and highest bidder holds the bid at the fall of the hammer, then a contract has been created. It would be wrong to endeavour to deprive such a purchaser of the property.

[60] We are not concerned with the conduct of the auctioneer but it seems to us that the auctioneer followed a proper process and, in the usual way, created a contract with the purchaser. In this case, on the balance of probabilities from the evidence, the complainant's bid was made too late. Certainly, there is no evidence of any failure on the part of the licensee. The auction was controlled by the auctioneer under her conditions of sale and not by the licensee. The auctioneer is concerned with a bidding process and a purported bid made after the hammer comes down is outside that process; so that the complainant's bid was made after the auction had ended.

[61] In the course of the hearing, there was reference to our decision in *Masson v REAA and Damerell & Others* [2013] NZ READT 26 where a prospective bidder at an auction of a residential property, having bid too late for the auctioneer, sought unsuccessfully to blame some real estate agents for that. Part of our reasons for decision in that case read:

“[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.

...

[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, 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.”

[62] We consider that the Committee has correctly assessed the situation and that to decide to take no further action was and is appropriate. The licensee’s conduct could not be regarded as unsatisfactory. We confirm that decision and dismiss this appeal.

[63] 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 G Denley
Member

Mr J Gaukrodger
Member