

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 20

READT 058/14

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

BETWEEN **LEE ZUO**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 306)**

First respondent

AND **STEPHEN AND SHEANAGH
NOLES**

Second respondents

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Mr G Denley – Member
Mr J Gaukrodger – Member

HEARD at AUCKLAND on 27 February 2015

DATE OF DECISION 26 March 2015

APPEARANCES

Ms L Zuo – appellant in person
Ms S Earle – for first respondent
Mr T Rea & Mr M Singh – for second respondents

DECISION OF THE TRIBUNAL

The Issue

[1] Ms Zuo appeals against a decision of the Complaints Assessment Committee dated 25 June 2014. Ms Zuo was the successful bidder at an auction held on 13 August 2013 for the purchase of 12 Jane Eyre Drive, Somerville, Howick. Mr and Mrs Noles were the agents to the vendor. Ms Zuo and her mother and an agent assisting Ms Zuo saw the property on or about 10 August 2013. They then made a pre-auction offer of \$760,000. The offer was presented to the vendor who accepted it was a fair price and decided to bring the auction forward to Tuesday 13 August 2013. After the offer but before the auction a second open home was held on Sunday 11 August 2013 which the complainant and her mother attended for a final further viewing of the property.

[2] Mrs Zuo was told by Ms Noles when she arrived that there had been a pre-auction offer made and that this offer was in the \$700,000s. During the course of the open home Ms Zuo said that she heard a second discussion between Mr Noles and another gentleman, subsequently identified as Mr Ye. Ms Zuo said that she overheard Mr Noles tell Mr Ye that the offer was in the “*mid to high \$700,000s*”. She says that she heard the word ‘offer’ being mentioned and felt that it was very unfair to her that the agents tell other potential bidders what the offer was. She complained to the Authority about this discussion. It was her submission that the auction process was compromised because this information was given to other potential bidders when she had been assured that it would be completely confidential except to the vendor herself, her agent and the auctioneer. Ms Zuo complained to the Complaints Assessment Committee that if there had been no disclosure of the level of the pre-auction offer she would not have had to pay what she considered to be a significant amount more at the auction to become the successful purchaser. Ms Zuo ended up paying \$26,000 more for the property than her offer.

[3] The Complaints Assessment Committee found that the listing agents had been informed of the level of the pre-auction offer by the vendors. However it found that Ms Zuo had not been able to “*establish unequivocally*” that either Licensee 1, (Ms Noles) or Licensee 2 (Mr Noles) disclosed any more than the (the fact of) the offer and the fact that the offer was in the \$700,000s.

[4] The Committee found that the licensees behaved properly and did not disclose the amount of the offer and therefore could not cause the complainant to be disadvantaged at the auction. The Committee also noted that the pre-auction offer was both the starting bid and the reserve at the auction. They said “*As soon as it was announced it became public knowledge and other interested parties could choose to bid against the starting point or not*”.

[5] Ms Zuo appeals this decision.

The evidence for the Appellant

[6] Ms Zuo presented evidence from herself and her mother. She also obtained a witness statement from the other bidder at the auction Mr Ye. He did not come to the Tribunal to give evidence. Mr Ye’s evidence was that he could not recall exactly what had happened at the property as it had been many years ago. He therefore assumed that the information provided by Ms Zuo and Barfoot’s was correct. His evidence was that he went to an open home at Jane Eyre Drive but cannot remember whether it was a Saturday or a Sunday. He said that “*I asked the listing agent for a price range of the house. The agent has given me the indication price of mid to high \$700,000s*”. He said he did not know the exact pre-auction price until when the auction started and he did not recall asking the listing agent about the pre-auction offer but he was clear that he received a price indication of mid to high \$700,000s.

[7] Ms Zuo says that Ms Noles told her that a pre-auction offer had been made and that it was in the \$700,000s. She then heard part of the conversation with Mr Ye which she set out as follows:

Buyer:	Is the offer in the low \$700,000s or high \$700,000s?
Mr Noles:	... May be in the mid \$700,000s.
Buyer:	Are the people who made the offer Chinese?

Mr Noles: Yes.
 Buyer: ...
 Mr Noles: I probably have told you more than I should.

[8] Ms Zuo said she had attended many open homes and she knew it was common practice for listing agents to provide price feedback. She submitted that it was *“unusual in my experience with a pre-auction offer, that price range is discussed to such an extent”*. Ms Zuo said on the day before at the open home that the previous price indications had been in the \$600,000s but it changed to the \$700,000s after the licensees acquired knowledge of the pre-auction offer. She said that there was no documentation to support the fact that the agents were giving ‘price feedback’ as opposed to disclosing the terms of the offer. She submitted further that it made little difference whether the communications were described as ‘price feedback’ or ‘the offer price’ as the change in price indication was made on the basis of the knowledge which had been gained by the pre-auction offer.

[9] Ms Cuicui Lee, the appellant’s mother gave evidence with the help of a translator. She said her English was not very good but she and her daughter, husband, and agent went to the house on 10 August and were shown around. She went back the next day. At that time she heard numbers being mentioned in English which she could recall and state for the Tribunal. She said she saw Mr Noles having a conversation with a young Chinese man in his late 20s or 30s and this conversation went on for six to eight minutes. She said the young man said in Chinese to his associates that it *“should be in mid \$700,000s, they are Chinese”*. She is certain that this was the young man who bid at the auction. During the course of her evidence she confirmed that she heard the words *“offer”* and the word *“\$700”* during the course of the conversation.

The Respondents

[10] Mr Noles gave evidence for the respondents first and he said:

- (i) That the ethnicity of the buyer was of no importance to them at all and he said that after he became aware of the offer he felt that they had an obligation to purchasers who had budgets in the mid \$600,000s to tell them that the price feedback was above this level. He said that he recalls a young man being very angry that he would not disclose the level of the pre-auction offer but he gave him a price feedback.
- (ii) He said that the young man (presumed to be Mr Ye) asked about the pre-auction offer and he said they could not and would not disclose the pre-auction offer, but he pushed Mr Noles. Mr Noles said that it would be in the \$700,000s, but he would not give him any more information. He believed it was Mr Ye however who asked if the offer was in the mid \$700,000s? He did not respond to this.
- (iii) He said that Mr Ye then asked him whether if he had \$800,000 he could buy the property. He said to him that he should come along to the auction and to find out the opening offer. He stressed that he did not tell him the amount of the offer.
- (iv) He said further that there had been feedback in the \$700,000s from various agents/colleagues. He said that this was why they gave buyers at

the second open home feedback that the property was likely to sell in the \$700,000s.

[11] Ms Noles' evidence was similar but she did not hear the conversation that her husband had with Mr Ye. She said that the vendors told them that they had been given an offer for \$760,000. She and her husband agreed with the vendors that they would bring the auction forward. She said she and her husband discussed the fact that given the level of price feedback they had received they would tell people that the price feedback should be in the \$700,000s to avoid misleading people who thought they might be able to secure the property for the \$600,000 level. She said her standard response when a pre-auction offer is made is that an unconditional offer of an acceptable amount had been made to the vendor, who is bringing the auction forward. This offer would be the opening bid and the reserve. She said that the price feedback to date had been in the \$700,000s. She said that she always declined to give the amount of the offer even though she was asked on several occasions. She said she overheard someone asking her husband about the vendor's price expectations who was very persistent. Her recollection was that even though he was told the feedback was in the \$700,000s the person kept asking whether it was middle or high \$700,000s. She did not hear her husband's response.

Submissions

[12] Ms Zuo submitted that:

- (i) The respondents changed the price feedback to \$700,000s immediately after they gained knowledge of the pre-auction offer. By doing this they took advantage of the confidential knowledge of the amount of the offer.
- (ii) The price feedback was based on Ms Zuo's offer. She posed the key question as this: Had the vendor not contacted the agents to consult on the pre-auction offer price what price feedback would they have been given at the open home on 11 August? She submitted it would have been much lower.
- (iii) No documentation was used to determine price feedback other than the agent's knowledge of her pre-auction offer. She submitted that "*it is one thing to provide legitimate price feedback obtained from genuine buyers when there isn't a pre-auction offer but a serious concern of professional conduct when so-called price feedback was based on a confidential pre-auction offer and disclosed subsequently*".

[13] The counsel for the respondents submitted that:

- (i) The Complaints Assessment Committee had made the correct decision. The Noles trod the difficult line between misleading purchasers and disclosing confidential information absolutely appropriately.
- (ii) Mr Rea submitted that the evidence of Mr Ye did not support the appellant's allegations that she overheard the amount of the offer being disclosed. He submitted that all the respondents did was to give appropriate price feedback. In all the circumstances he said that was a correct discharge of their obligations.

[14] Ms Earle of the Real Estate Agents Authority submitted that:

- (i) As soon as the auction began it was clear what the pre-auction offer was because it was the opening bid and the reserve price for the auction.
- (ii) It seems to be accepted by all parties that the disclosure to the appellant was that the offer was in the \$700,000s. It also appears to be accepted that the exact level of the offer was not disclosed.
- (iii) Ms Earle submitted that while the licensees were required to act in the best interest of the vendor they also owed duties to customers. The agent's primary duty was to the vendor but if the purchaser had made a pre-auction offer on the basis that it would be confidential and the level of offer is disclosed then there may be a breach of that duty.
- (iv) Ms Earle also submitted that the price feedback to be given must not be misleading. She submitted that it would have been misleading to have continued to have said that the feedback was in the \$600,000s. Her submission was that information provided to purchasers should provide them with a "*fair indication to enable them to make a decision as to whether to incur costs associated with making all enquiries needed to make an unconditional offer at auction*".

[15] The Real Estate Agents Authority acknowledged however that it may be artificial to describe information disclosed to other prospective purchasers as "*price feedback*" where prospective purchasers are aware that an offer has been made.

Discussion

[16] The issue for the Tribunal to determine is whether there has been a breach of the rules by the agents so as to overturn the finding of the Complaints Assessment Committee and substitute a finding that there has been unsatisfactory conduct.

[17] The burden of proving the appeal is on Ms Zuo. Ms Zuo did a sterling job of discharging that burden in that she carefully articulated the premise on which her appeal was based, namely that it was very unfair to her as the prospective purchaser that had been any indication of a price feedback which would give any of the potential other bidders some knowledge of where her offer had been made.

[18] The Tribunal acknowledge that this is a difficult area for any agent and purchaser and that there is a fine line between the obligation to act in the best interest of the vendor (and therefore to obtain the best possible price) and a duty not to mislead purchasers. The Tribunal agrees that in circumstances where there has been a pre-auction offer it is somewhat artificial to describe the information being given as "*price feedback*". What is being given to the prospective purchaser is an indication of where other potential bidders have indicated that the property might sell.

[19] However having carefully listened to all of the evidence and weighed up the facts and the information available at the time to the agents which was genuine price feedback we do not conclude that the agents in this case have breached the Rules. They appear to have, [with some difficulty and facing some pressure], to have successfully managed their role. They provided a price range [whether called feedback or not] which did not mislead other purchasers but also reflected the fact that the property would not sell for \$600,000 and we do not consider therefore that the decision reached by the Complaints Assessment Committee was wrong. We cannot conclude on the balance of probabilities that the agents did disclose the

amount of the offer. They certainly mentioned there was an offer and it was in the \$700,000s. However, we do not consider that this disclosure in any way breached their duty to keep Ms Zuo's offer confidential. Taken to its logical conclusion Ms Zuo is asking the Tribunal to find that the agents should have continued to give a price indication in the \$600,000s when they knew well it was going to sell for much more than this. This would have been misleading, and the agent's duty is not to mislead. The Tribunal therefore dismisses the appeal.

[20] The Tribunal draws the parties' attention to the provisions of Rule 116 of the Real Estate Agents Act 2008.

Ms K Davenport
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member