

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 19

Reference No: READT 013/2022

IN THE MATTER OF

An appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN

NQ
Appellant

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 2104)**
First Respondent

AND

NT
Second Respondent

AND

IAN BOSWELL
Third Respondent

Tribunal:

D J Plunkett (Chair)
G J Denley (Member)
F J Mathieson (Member)

Representation

The appellant:

Self-represented

Counsel for the first respondent:

S Farnell, G Maslin, S Waalkens

Counsel for the second and
third respondents:

K Burkhart, R Bingham

SUBJECT TO NON-PUBLICATION ORDER

DECISION

Dated 9 August 2023

INTRODUCTION

[1] The appellant, NQ (the purchaser), was the purchaser of a property at an auction. The second respondent is NT (the auctioneer). The third respondent is Ian Boswell (Mr Boswell or the agent). The purchaser alleges that the auctioneer's process was unorthodox and he was "hoodwinked" by an auctioneer who misused the purchaser's price indication as a bid. He further alleges the agent's advertising misrepresented the property.

[2] The purchaser made a complaint to the first respondent, the Real Estate Agents Authority (the Authority). Complaints Assessment Committee 2104 (the Committee) dismissed the complaint concerning the auction process. It partially upheld the complaint about the advertising, finding Mr Boswell to be in breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) and therefore guilty of unsatisfactory conduct under the Real Estate Agents Act 2008 (the Act).

[3] The purchaser appeals seeking to uphold the entire complaint against both the auctioneer and the agent and impose a more severe penalty on the agent.

BACKGROUND

[4] The purchaser bought a residential property in a seaside suburb in Auckland.

[5] The auctioneer is a licensed branch manager under the Act and at the relevant time was engaged by Barfoot and Thompson t/a Barfoot & Thompson Ltd (the agency). Mr Boswell was a listing agent for the property. He is a licensed salesperson and was also engaged by the agency.

[6] The agency and the vendors entered into an agency (listing) agreement on 13 November 2020. Mr Boswell was identified as one of two listing agents.

[7] The online advertising text, which named Mr Boswell as one of two contact agents, stated under the caption, "T-L-SEA":¹

When it comes to the WOW factor this substantial north facing, 3 level property will blow your socks off with its impressive waterfront presence on [suburb's] beautiful shoreline and marine playground.

[8] As for the bedrooms, it stated:

... and separate study which could also double as a 5th bedroom if required.

¹ At 32–37 and 80–85 of the Authority's bundle of documents (the bundle).

[9] Under “Property details”, the number of bedrooms given was “5”.

[10] An advertising video was produced. One still from the video had the caption “4 BEDROOMS” and another the caption “5th BEDROOM/STUDY”.²

[11] On 14 December 2020 (at 6:57 pm), the other listing agent emailed an information package to the purchaser, including the LIM report and an aerial map.³

[12] The purchaser viewed the property at about 7:45 pm on 14 December 2020 with the other listing agent.

The auction

[13] The purchaser was the sole bidder at an auction on 15 December 2020. He purchased the property for \$2M. He signed the sale and purchase agreement at the conclusion of the auction.

[14] It is relevant to the purchaser’s complaint to understand the mechanics of the auction.

[15] At the start of the auction, the auctioneer suggested an opening bid of \$1.7M. The purchaser duly made this bid standing at the back of the auction room and “\$1,700,000” was displayed on the screen in the auction room. The auctioneer then called for further bids in increments of \$50,000. As no other bids were made, the auctioneer left the lectern and the words “Currently Negotiating” were displayed on the screen.

[16] The auctioneer approached the purchaser and asked him to improve his bid. The auctioneer and purchaser then left the auction room for privacy reasons. The precise wording of their discussion is disputed but the purchaser said he could go to \$2M and the auctioneer understood this to be a bid. They walked back into the auction room and the auctioneer announced the \$2M to the room, while about two metres from the purchaser. The screen was updated with the figure of “\$2,000,000” next to “Currently Negotiating”.

[17] The auctioneer then approached the vendors as he did not have instructions to sell at \$2M. The vendors asked for \$2.05M. The auctioneer returned to the purchaser and asked for another \$50,000, which the purchaser refused.

² Stills reproduced at 167 of the bundle.

³ Auckland Council GEOMAPS (2018) at 170 of the bundle.

[18] The auctioneer next went back to the vendors, who had been having discussions with the agent. The vendors agreed to lower the reserve to \$2M.

[19] About five minutes after the auctioneer had left the lectern, he returned to it and announced he had instructions to sell at \$2M and would take further bids in increments of \$10,000. The screen displayed “\$2,000,000” and “Now Selling”. There were no further bids and following the final call, the property was sold to the purchaser.

[20] Settlement of the property transaction occurred on 26 February 2021.

Complaint made to agency

[21] Meanwhile, the purchaser made a complaint to the agency by email on 17 February 2021.⁴ He said that at the auction, the auctioneer left his lectern and proceeded to the back of the room to have a private chat with him. He was asked, “Could you go to \$2M?” and replied, “I could”. The auctioneer then left the purchaser and about 30 seconds later, the screen showed a bid of \$2,000,000. The purchaser said he was taken aback, as he had not advised the auctioneer in their private conversation that his indication was a bid. The auctioneer had taken a private aside and translated it into an unauthorised bid. Later, the auctioneer exited a meeting with the vendors and asked him if he could do another \$50,000. He declined. The property was then sold to him.

[22] According to the purchaser, he was denied being the highest bidder below reserve. He realistically expected to get the property at \$1.9M, so the actions of the auctioneer had cost him \$100,000.

[23] The purchaser added that he was also concerned about the advertising which misrepresented the property as located on the shoreline and referred to a fifth bedroom which could not be classified as a bedroom.

Agency responds to complaint

[24] The agency responded to the complaint on 4 March 2021.⁵ The sequence of events at the auction was set out. The purchaser had not requested that his bid of \$2M be withdrawn. No concerns had been raised by him during the auction process or at the time the sale and purchase agreement was signed.

⁴ Email (17 February 2021) from the purchaser to the agency at 72–73 of the bundle.

⁵ Email (4 March 2021) from the agency to the purchaser at 106–108 of the bundle.

[25] In regard to the advertising text, the agency was satisfied with the way the property was represented regarding the location and the study.

Complaint to the Authority

[26] The purchaser was not satisfied with the agency's response, so he made a complaint to the Authority on about 17 March 2021.⁶ He set out the content of his letter of complaint to the agency.

[27] An explanation was provided by the auctioneer to the Authority on 21 July 2021.⁷ He set out the sequence of events at the auction. According to the auctioneer, the purchaser never raised an issue with him. He was no more than two metres from the purchaser when he called the bid which could be clearly heard on the video. When he (the auctioneer) returned to the purchaser, the latter could have withdrawn his bid or alerted him to not having made a bid. The purchaser did not raise the issue with the agents on signing the contract. The purchaser was never under any pressure during the auction and all discussions were held in a friendly manner.

[28] An explanation was also provided by Mr Boswell on 21 July 2021.⁸ The advertising text had stated the property had an impressive "waterfront presence", not that it was on the waterfront. An aerial map emailed to the purchaser prior to the viewing clearly showed another house in front. The council's rates information also emailed to the purchaser at the same time contained an aerial map showing properties in front. Attached to the email was the LIM report which contained maps showing other properties in front.

[29] According to the agent, the purchaser viewed the property prior to the auction on 14 December 2020 before sunset. There was adequate time for him to view the location, surrounds and sea views. The properties in front would have been clearly visible.

[30] It was acknowledged by the agent that the online advertising text referred to the property having four bedrooms and a separate study which could be a fifth bedroom if required. The 2D and 3D floorplans emailed to the purchaser on 14 December both showed the property as having four bedrooms.

⁶ Complaint (17 March 2021) at 1–10 of the bundle.

⁷ Email (21 July 2021) from the auctioneer to the Authority at 95–99 of the bundle.

⁸ Email (21 July 2021) from the agent to the Authority at 100–102 of the bundle.

Decisions of the Committee

[31] The Committee relied on the following provisions of the Rules:

5 Standards of professional competence

- 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

...

6 Standards of professional conduct

...

- 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

9 Client and customer care

General

...

- 9.2 A licensee must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure.

...

[32] The Committee issued a liability decision on 20 May 2022. In respect of the complaint about the failure to conduct a proper auction and increasing the purchaser's bid of \$1.7M to \$2M without his knowledge or approval, the Committee was satisfied that the purchaser was more likely than not to have understood that he had placed a bid of \$2M.

[33] The Committee was satisfied that the practice of negotiating mid-auction was reasonably evident as part of the process. Furthermore, the acceptance of \$2M as a bid was announced verbally and visually at the auction and it was confirmed by the purchaser when he declined to go higher than \$2M. It was the practice of the auctioneer to approach the highest bidder midway through the auction to negotiate. The auction screen displayed "Currently Negotiating" when the auctioneer left the lectern.

[34] The Committee was not satisfied the process placed undue pressure on the purchaser. No further action would be taken against the auctioneer.

[35] In respect of the complaint that the proximity of the property to the shoreline was misrepresented, the Committee found that overall the advertising and information given about the property did not misrepresent its position. The statement (“impressive waterfront presence on [suburb’s] beautiful shoreline”) was not inconsistent with the placement of the property and the photos which provided context. The photos and videos used in the advertising clearly showed the property’s position in relation to the beach and surrounding properties and that it was set back from the shoreline behind other properties. No further action would be taken against the agent concerning that head of complaint.

[36] In respect of the complaint as to misrepresentation of the number of bedrooms, the Committee was satisfied that overall, the marketing information given to the purchaser stated that the property had five bedrooms (including the study). The study though did not comply with the ventilation requirements for a bedroom set out in the Housing Improvement Regulations 1947. The ability to use the study as a bedroom was not qualified, so the advertising provided incorrect information in breach of r 6.4 of the Rules. The agent had therefore engaged in unsatisfactory conduct.

[37] In the penalty decision on 13 October 2022, the Committee censured the agent and fined him \$500 for the unsatisfactory conduct concerning the advertising of the study as a fifth bedroom. It was accepted that the agent was unaware that the study did not conform with the legal criteria for a bedroom. The provision of incorrect information was unintentional. The severity of the agent’s conduct was low level. The agent had a long career with an unblemished record. He had acknowledged his conduct and had taken steps to qualify information used in future marketing.

APPEAL

[38] The purchaser has appealed against the Committee’s decision (20 May 2022) to take no further action on certain items of his complaint. In his submissions (8 November 2022), he has also criticised the penalty imposed in the penalty decision (13 October 2022) and the process used to obtain submissions on the penalty. We will treat this as an appeal against the penalty decision.

Submissions of the purchaser

[39] There are submissions from the purchaser (8 November 2022, 2 June and 3 August 2023).

[40] The purchaser takes the Tribunal step-by-step through certain parts of the auction process by reference to the auction video timing. He says he made a bid of \$1.7M (at 1:29:34). The auctioneer called for \$50,000 bid increments (1:29:37). The auctioneer then said he was going for a walk and left the lectern (1:30:07). He approached the purchaser at the back of the auction room and they moved outside the room. The auctioneer said to him, "... just wanted a private chat, what can you get to?". The purchaser replied, "Two million". The auctioneer returned to the auction room and talked to the vendors in a side room before calling, "Two million" (1:30:50). The auctioneer then spoke to the purchaser again saying, "Can you do another \$50,000?", to which he replied, "No". The auctioneer resumed his position at the lectern (1:35:04). He called, "Two million dollars is the bid" (1:35:11). The hammer fell and the property was sold (1:35:29).

[41] The purchaser says he was not aware his private conversation with the auctioneer was construed as a bid and it was unjustifiable to do so because:

1. The verbal exchanges with the auctioneer were brief.
2. The auctioneer did not use the word, "bid".
3. No bid increments were called and it is preposterous to consider a change of \$300,000 as a bid.

[42] It is contended that the auctioneer's job is to act carefully, fairly and without unduly pressuring the clients. While an auction may have pressures, at the same time there should be certainty around the process.

[43] The purchaser says he has witnessed other auctions, so he has an expectation as to how the process runs. This auction did not run as he had encountered them before. When auctions stall, the auctioneer remains at the lectern and the agents approach bidders. The auctioneer's approach here took him by surprise, as did the call of a bid of \$2M just 18 seconds before the hammer fell. He did not understand his statement to be a bid. There was no negotiation and no agreed position from him. All of this took him aback and left him ruminating as to what had happened.

[44] The purchaser says he completed the paperwork as he felt obligated, but he had a "huge unease at what had just happened". The conduct of the auctioneer was deeply troubling. He felt unable to withdraw the bid. In a packed room with a confident and loud auctioneer (using a microphone) and not understanding how the situation had progressed to where it had or why his private conversation had been misconstrued, he

did not have the presence of mind to think of withdrawing. He signed the sale and purchase agreement because he was “just carried along in the process”.

[45] According to the purchaser, he had been put under extreme pressure. He had only 18 seconds to undertake the drastic measure of withdrawing. He was overwhelmed and did not speak because the auctioneer used highly irregular means of extracting a maximum price from him.

[46] As for the misrepresentation concerning the location of the property, it did not have a waterfront presence. Even the Committee in its decision confirms his complaint as it states the property is set back from the shoreline behind several properties. The Committee contaminated a clear written representation of the location. The maps, photographs and his viewing occasion are sideshows. The inescapable truth is that the advertisement states it has a presence on the waterfront, when it most definitely does not.

[47] As for the misrepresentation concerning the number of bedrooms upheld by the Committee, the penalty submission process was improperly conducted. His email of 14 June 2022 to the Authority was a casual email and not a submission. The Tribunal should revisit the penalty which has been trivialized in the process. It was not a trivial matter.

[48] In his submissions (3 August 2023) in reply to those of the other parties, the purchaser reiterates that his honest revelation of his maximum price to the auctioneer was solicited in an unguarded moment outside the formality of the auction, utilised by the auctioneer’s opening remark, “... just wanted a private chat”. The auctioneer never mentioned the word “bid” as he was committing a subterfuge to wheedle a number from the purchaser unwittingly.

[49] The display of the words “Currently Negotiating” means exactly that, it was a negotiation and not an auction. The auction was paused when the auctioneer left the lectern. The auctioneer could not take a bid as the auction was suspended.

[50] The purchaser states that he has made no complaint regarding being under stress or pressure. His complaint is that the auctioneer wrong-footed and deceived him, turning an exchange into a bid. He paid too much for the property, not because of pressure, but because he had been hoodwinked.

[51] As for the location of the property, his viewing of the property is irrelevant to what the advertisement stated. The focus is not on whether a person has been misled. There is no direct line of sight from the shoreline to the house, or vice versa.

Submissions of the Authority

[52] In her submissions (21 July 2023) on behalf of the Authority, Ms Farnell records the Authority's neutrality. It abides the decision of the Tribunal. Nonetheless, it is submitted that the Committee's decisions were well reasoned and followed a comprehensive investigation. The Authority does not consider that the purchaser has shown that the Committee's decision was wrong, so the appeal should be dismissed.

[53] It is noted that the purchaser contends that due to extreme pressure, he did not withdraw his "bid" and felt obliged to sign the paperwork. The threshold for demonstrating undue and unfair pressure is a high one.

[54] Furthermore, while the purchaser says he was unguarded by the auctioneer asking him for a private chat, by the time the bid was verbally announced and displayed on screen, the purchaser could have been under no misapprehension as to the nature of his bid. He had approximately four minutes and eight seconds after the bid was visually and verbally announced to withdraw his bid, before the property was sold.

[55] In relation to the advertising as to the property's location, the focus is not on whether a person has been misled. There is no requirement for reliance on the misleading words. The question is whether the statement is capable of misleading a customer. If the transgression is not sufficiently serious to attract a disciplinary response, no further action may be taken despite a breach of r 6.4. The Authority submits that the purchaser has failed to show that the Committee's decision is wrong. In all the circumstances, the location of the property was abundantly clear in all the marketing materials. The sentence being challenged was not misleading.

[56] The purchaser's argument (that he was not aware his submissions would be provided to Mr Boswell) on penalty is not correct. He was advised on multiple occasions that his submissions would be provided to Mr Boswell for comment. The penalty orders made by the Committee were within range and appropriate.

Submissions of the auctioneer and the agent

[57] In her submissions (6 July 2023), Ms Burkhart submits that the Committee's decisions should be upheld.

[58] The auctioneer acted appropriately during the auction and did not place any undue pressure on the purchaser. He held a manager's licence, as well as an auctioneer's licence. He was therefore permitted to carry out real estate agency work under the Act. It is common practice for auctioneers to leave the lectern to speak to the

parties if the bidding stalls. It would have been obvious to all those present that he was negotiating. The auction process was not unorthodox.

[59] The auctioneer says he used the word, “bid”. The screen showed “\$2,000,000” next to “Currently Negotiating”. The auctioneer had not spoken to any other bidder. The purchaser did not raise any issue. There is no requirement that bidding progress by certain specified increments or that they cannot be changed during the auction.

[60] The purchaser was an experienced buyer who had bought a number of properties at auction. He had the ability to withdraw from the process if he felt pressured, but he did not do so even when he signed the sale and purchase agreement.

[61] The agency’s website advertising stated that the property had a “waterfront presence”. This does not represent that it is located directly at the waterfront.

[62] The purchaser viewed the property during daylight hours and spent a considerable time on the deck looking out at the sea. He had videos, photos, the LIM report and an aerial map which show the property in relation to the shoreline. There has been no misrepresentation of the location.

[63] The process for imposing penalties was properly conducted. Mr Boswell’s conduct was at the low level on the scale of offending. His breach was innocent and unintentional. There is limited information about the actual loss or harm suffered by the purchaser. The Committee appropriately imposed the least restrictive penalty suitable in the circumstances.

[64] At the Tribunal’s request, counsel for the auctioneer and the agent sent a site plan and marketing photographs to the Tribunal on 13 July 2023.

JURISDICTION AND PRINCIPLES

[65] This is an appeal pursuant to s 111 of the Act.

[66] The appeal is by way of a rehearing.⁹ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.¹⁰ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.¹¹ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.¹²

⁹ Real Estate Agents Act 2008, s 111(3).

¹⁰ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] and [83].

¹¹ Real Estate Agents Act, s 111(4).

¹² Section 111(5).

[67] A hearing may be in person or on the papers.¹³ A hearing in person may be conducted by telephone or audiovisual link.

[68] This appeal is against the determination of the Committee under s 89(2)(c) to take no further action. It is a “general appeal”. The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee’s determination is wrong.¹⁴ An appellant has the onus of showing on the balance of probabilities that their version of the events is true and hence the Committee is wrong.¹⁵

[69] The appeal in relation to the penalty is an appeal against the Committee’s exercise of a discretion. This requires an appellant to establish that the Committee made an error of law or principle, took into account irrelevant matters or failed to take into account relevant matters, or that the Committee’s decision on penalty is plainly wrong.¹⁶

Rulings and directions from the Tribunal

[70] The Tribunal issued a Ruling (4 April 2023) declining the purchaser leave to file evidence not produced to the Committee. It issued two procedural Minutes (16 November 2022 and 4 May 2023).

[71] We record that we have viewed both the marketing video and the auction video.

DISCUSSION

The auction process

[72] The purchaser contends that the conduct of the auctioneer at the auction was highly irregular and deeply troubling. He left the lectern in the middle of the auction, approached the purchaser, took him to another room and in a private conversation extracted a price of \$2M, which the purchaser says was not a bid. According to the purchaser, the auctioneer did not use the word, “bid”. There was no negotiation. It was a brief encounter. The auctioneer later returned and asked him to add another \$50,000, which he refused. The “bid” of \$2M was formally called (after the auctioneer returned to the lectern) and 18 seconds later the hammer fell. It is preposterous to state that a \$300,000 change in bid could be made.

¹³ Sections 107 and 107A.

¹⁴ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16] and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

¹⁵ *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22], citing *Stichting Lodestar*, above n 14, at [4]–[5]; and *Scandrett*, above n 14, at [112].

¹⁶ *WM v Real Estate Agents Authority (CAC 1906)* [2022] NZREADT 7 at [56].

[73] The purchaser says he was unable to withdraw what was wrongly taken to be a bid and later signed the agreement as he was overwhelmed and got carried along in the process, having been put under extreme pressure. In a packed room with a loud and confident auctioneer, and not understanding how the situation had progressed from a private conversation to a bid, he did not have the presence of mind to withdraw.

[74] The purchaser's scenario, in explaining how he came to ultimately sign a sale and purchase agreement for \$2M when he says his bid was \$1.7M, is so improbable as to be implausible.

[75] The first improbable feature is that the purchaser did not realise he was making a bid of \$2M when the auctioneer first approached him. He was the highest (indeed only) bidder and the approach occurred during the middle of an auction, albeit when it was paused. The screen said "Currently Negotiating", so the purchaser knew the approach was part of negotiating. Just after speaking to the purchaser, the auctioneer returns to the auction room and calls "Two million" which is put up on the screen. The purchaser must have understood that call to have been a bid and to have come from him. This is even accepting his evidence that the auctioneer never used the word "bid" and that his discussion with the auctioneer was brief (the purchaser says it was a maximum of 28 seconds).

[76] We dismiss the purchaser's contention that a so-called paused auction process, with the auction screen showing "Currently Negotiating", is somehow not part of the auction process. An auction starts when the auctioneer invites the first bid from potential participants and ends when the auctioneer makes it clear that bidding is closed.¹⁷ What is paused is the public bidding, not the auction process. The negotiating phase where bids are privately solicited by the auctioneer or agent before being publicly called, is common, legitimate and part of the auction.

[77] The second event at the auction involving the purchaser was when the auctioneer returned to ask him to add \$50,000. By then the auctioneer had already called a bid of \$2M and placed it on the screen. When the auctioneer returned, it is improbable that the purchaser did not by then realise that his earlier advised maximum "price" had been taken by the auctioneer to be a bid. Yet, on the return of the auctioneer, the purchaser did not immediately correct the auctioneer's mistake or withdraw his price/bid.¹⁸

[78] The third improbable event in the purchaser's narrative is his reason for signing the sale and purchase agreement. He says he was overwhelmed and got carried along

¹⁷ Real Estate Agents Act, s 48(3); and Fair Trading Act 1986, s 36ZA.

¹⁸ Fair Trading Act, s 36ZE. Even if the purchaser had made a bid, it could be withdrawn.

in the process. Even if the purchaser was too embarrassed or shy to make a scene in front of the other prospective buyers present, it is unfathomable why he signed the agreement at the end of the process. This would have been done privately with the agent. At that point, any reasonable person (who had not made a bid) would exclaim just that and refuse to sign.¹⁹ Yet, he made no comment at all about the alleged misunderstanding, merely commenting on the high price paid.²⁰

[79] It is not unprofessional for an auctioneer to ‘descend into the arena’ and solicit higher bids, provided the auctioneer’s process is clear to all participants, as it was here. Indeed, it is fairly common when bidding stalls. We note that the auctioneer held a manager’s licence so he is permitted to conduct negotiations.

[80] According to the purchaser, the core of the underhand activity by the auctioneer was the covert call he made surreptitiously of the purchaser’s price of \$2M.²¹ It was made without context from the midst of the audience. The screen displayed “Currently Negotiating”, so there should have been no modification. We do not accept this submission. The auctioneer’s call of \$2M is clear in the auction audio. The screen then also displayed, “Two million”. There was nothing underhand about the auctioneer’s call of the purchaser’s bid.

[81] The purchaser says that no bid increments were called and that it is preposterous that a change of \$300,000 can be a bid. As the bidding advances, there is no legal requirement for increments of any specific amount, even if the auctioneer has called for increments of a certain amount. A bidder may even shout out a new bid, without reference to any increments the auctioneer is using. Provided the auctioneer is clear as to the process and where the bidding has reached and all those present have a fair opportunity to participate, as occurred here, the auction is lawful.

[82] The purchaser initially contended on appeal that he was placed under “real pressure”, “undue pressure” and “extreme pressure”.²² He gave this as the reason he did not have the presence of mind to withdraw his “bid”. Curiously, in his reply submissions (3 August 2023), he states the he has made no complaint regarding being under stress or pressure. His complaint is that he was wrong-footed as a result of the auctioneer’s deception. In case we have misunderstood his reply submissions, we will additionally deal with the contention he was put under undue pressure, an allegation

¹⁹ The rule concerning withdrawing bids in s 36ZE of the Fair Trading Act is not material on the purchaser’s narrative, as he says he never made a bid.

²⁰ Email auctioneer to Authority (21 July 2021) at 97 of the bundle.

²¹ Submissions of the purchaser (8 November 2022) at [1.7(g)].

²² Attachment to Notice of Appeal (4 June 2022) at pp 1 and 2; and Submissions of the purchaser (2 June 2023) at p 7.

rejected by the Committee.²³ The contention that he was wrong-footed has already been rejected.

[83] An auction is a pressured environment for the vendor and bidders alike. They have to make virtually instant decisions concerning a large part of their wealth. The purchaser says in his submissions that he had only 18 seconds to withdraw his bid before the hammer fell. This is a reference only to the short period at the conclusion of the auction when the auctioneer returned to the lectern. In fact, the purchaser had almost five minutes from the time the auctioneer called \$2M and the screen displayed that figure, to withdraw his bid.

[84] Real estate transactions are often stressful and customers will feel under pressure. Such stress and pressure will not generally lead to a disciplinary response. The threshold for demonstrating undue or unfair pressure is a high one.²⁴

[85] The purchaser has experience of auctions, having bought two properties (it is not known whether this includes the property in question) and sold five properties. He has some familiarity with such a process. The purchaser does not allege he has some abnormal vulnerability, let alone that the auctioneer knew and took advantage.

[86] There is nothing in the purchaser's description of the process or of the auctioneer's conduct which evidences "undue or unfair" pressure (r 9.2 of the Rules), beyond the usual pressure to be expected at any auction.

[87] We further take into account that the purchaser waited almost one month before he raised any concern about the process with the agency. The auction was on 15 December 2020, yet it was not until 12 January 2021 that the purchaser sought from the other listing agent the auctioneer's contact details to raise an issue with him. A complaint to the agency was not made until 17 February. Even allowing for the festive holiday, such delays are inexplicable, if the purchaser's narrative that he bought a property for \$300,000 more than he bid, was true.

[88] The purchaser's story is inherently improbable. We accept the Committee's finding that the purchaser was more likely than not to have understood that he had placed a bid of \$2M.

²³ Complaint No: C41368 (20 May 2022) at [3.12].

²⁴ *Davidson v Real Estate Agents Authority* [2021] NZREADT 16 at [88].

Misrepresentation as to location

[89] The online advertising text stated that the property had an “impressive waterfront presence on ... beautiful shoreline”. The Committee found that overall the advertising and information given about the property did not misrepresent its position. It considered that the photos and videos used in advertising clearly showed the property’s location in relation to the beach and surrounding properties and that it was set back from the shoreline behind other properties.

[90] The purchaser is correct in asserting that the property is not on the waterfront or shoreline. The property has superior water views and can be seen from the water, though the purchaser says it cannot be seen from the shore and a viewer will not see the shore from the property.²⁵ It is at least one property back from the esplanade reserve in an elevated position. We do not accept Ms Burkhardt’s submission that the statement “waterfront presence on ... shoreline”, does not represent to a reasonable person it is located directly at the waterfront.

[91] We accordingly accept the purchaser’s submission that the online text, on its own, is misleading. The text must, however, be considered together with the accompanying advertising material. It was not provided to the purchaser in isolation.

[92] The agency’s marketing video, accessible from the online advertising containing the challenged text, has been viewed by the Tribunal. It is clear on viewing the video that the property sits behind one or more other properties closer to the shoreline. There are also stills taken from the video, which have been produced to the Tribunal in the Authority’s bundle of documents and which were before the Committee. They plainly show it was not on the shoreline and was one property back.

[93] The marketing photographs show the property sitting behind another property which is closer to the shore.

[94] There is a Corelogic NZ site plan (dated 2020), accessible from the online advertisement, which shows the property sitting behind another property located next to the esplanade reserve.²⁶

[95] The online advertisement had attached to it the LIM report. The report contained a street map showing the property sitting behind another one bordering the esplanade

²⁵ The purchaser’s contention regarding the line of sight between the property and the shore is not consistent with a photograph produced to the Tribunal (at 168 of the bundle), but any inconsistency is not material.

²⁶ Online advertisement references to the site plan reproduced at 34 and 82 of the bundle.

reserve.²⁷ The LIM report had been emailed to the purchaser on 14 December 2020, together with a city council aerial map plainly showing the property behind another house.²⁸

[96] Despite the misleading text of the online advertisement, we agree with the Committee that overall the advertising and information given about the property did not misrepresent its position. Any reasonable person, viewing the totality of the advertising, would have understood that the property was not on the shoreline. The advertising, considered as a whole, was not misleading as to the property's location. There was no breach of r 6.4 of the Rules.

[97] Even if we were to find that taken in isolation the statement concerning the waterfront presence was misleading and the agent breached r 6.4, which we do not, we would not find this breach to amount to unsatisfactory conduct. This is because the purchaser was not misled. It must have been clear to him from his viewing of the property, combined with the other marketing material (the video, photographs, maps and plans) that the property was not on the waterfront. It is inconceivable that he relied on the incorrect text and bought the property believing it to be on the shoreline.

Penalty concerning misrepresentation as to bedrooms

[98] The online advertising text stated that the property had five bedrooms. It also stated that a separate study could double as a fifth bedroom. One still from the advertising video is captioned "5th BEDROOM/STUDY".

[99] The Committee found that the number of bedrooms had been misrepresented, since the study did not comply with the ventilation requirements for a bedroom set out in the Housing Improvement Regulations 1947. Since the ability of the study to be used as a bedroom was not qualified, the advertising was found to provide incorrect information in breach of r 6.4 of the Rules. This was unsatisfactory conduct on the part of the agent.

[100] This finding of the Committee is not contested. What the purchaser challenges is the penalty imposed by the Committee, namely censuring the agent and fining him \$500. The purchaser says the agent's unsatisfactory conduct has been trivialised and that the combined effect of both misstatements (as to the location and the number of bedrooms) affected his appreciation of the property and its true value.

²⁷ Auckland Council Unitary Plan Map (printed 24 November 2020) at 143 of the bundle.

²⁸ Auckland Council GEOMAPS (2018) at 170 of the bundle.

[101] We have already dismissed the purchaser's complaint concerning proximity to the shoreline. Turning then to the misrepresentation as to the number of bedrooms, the Committee accepted in the penalty decision (13 October 2022) that Mr Boswell was unaware the study did not conform to the bedroom criteria in the relevant regulations. The provision of the incorrect information was found to be unintentional. The severity of the conduct was regarded as low level. It further noted that the agent had had a long unblemished career of more than 20 years in the industry, that he had acknowledged his conduct and reported that in the future he would take steps to qualify information used in marketing.

[102] The purchaser takes issue with the Committee misconstruing his email to the Authority of 14 June 2022 as a submission, which it sent to Mr Boswell's counsel. It seems to us that the email was clearly intended as a submission on the penalty orders. The purchaser had been informed in two earlier emails from the Authority that day that the process involved him making a submission first, before the licensees got their chance. In his brief reply of 14 June 2022, the purchaser says he was not sure any submission from him would affect the outcome, but he was seeking compensation, publication of the agent's name and an apology. These were all dealt with by the Committee. He chose not to make any substantive submissions on penalty, but merely to set out what he sought from the process.

[103] The submissions process followed by the Committee was proper. It complied with the requirements of natural justice.

[104] We also agree with the penalty imposed by the Committee for the same reasons as the Committee. Mr Boswell's breach of r 6.4 was unintentional low-level offending. He has no disciplinary record. There is no evidence of loss or harm to the purchaser. We agree with Ms Burkhart that censure is not trivial to a licensee with an unblemished record. The penalty was the least restrictive appropriate in the circumstances and was fair, reasonable and proportionate.²⁹

OUTCOME

[105] The appeal is dismissed. The Committee's liability and penalty decisions are confirmed.

[106] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

²⁹ *Liston v Director of Proceedings* [2018] NZHC 2981 at [34].

PUBLICATION

[107] The Committee directed publication of its decision without the names of the purchaser and third parties (including the auctioneer), but stating the name of the agent and the agency.

[108] Having regard to the interests of the public in the transparency of the Tribunal and knowing of wrongdoing by licensees, as well as the privacy of the people involved, it is appropriate to order publication without identifying the purchaser or the auctioneer, but naming the agent and the agency.

D J Plunkett
Chair

G J Denley
Member

F J Mathieson
Member