

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2023] NZREADT 5

Reference No: READT 009/2022

**IN THE MATTER OF**

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

**BETWEEN**

**KM**  
Appellant

**AND**

**THE REAL ESTATE AGENTS AUTHORITY  
(CAC 2102)**  
First Respondent

**AND**

**SC**  
Second Respondent

Hearing on the papers

Tribunal:

D J Plunkett (Chair)  
P N O'Connor (Member)  
F J Mathieson (Member)

Representation:

The appellant: Self-represented  
Counsel for the first respondent: S A H Bishop, J L Schwarcz  
Counsel for the second respondent: H Bowering-Scott, R B Hern

**SUBJECT TO NON-PUBLICATION ORDER**

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**DECISION**  
**Dated 20 March 2023**

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## INTRODUCTION

[1] The appellant, KM, was co-vendor of a property, along with her husband. The breakup of their marriage led to the sale of the property by auction. It was bought by an investment company, which in due course nominated the husband as one of the purchasers. The appellant says that the licensee, SC, the second respondent, conspired with the successful bidder to conceal from her the name of that bidder (and hence the interest of her husband). She further alleges that the licensee disclosed confidential information to the bidder, namely the reserve price.

[2] The appellant complained against the licensee to the Real Estate Agents Authority (the Authority), the first respondent. Complaints Assessment Committee 2102 (the Committee) did not find any evidence of a breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) and decided on 28 April 2022 to take no further action on the complaint. The appellant appeals against the Committee's decision.

## BACKGROUND

[3] The licensee is a licensed salesperson who worked for DS Ltd (the agency) at the relevant time.

[4] The property comprising two separate houses on one section is situated in Auckland.

[5] As a result of the breakup of the marriage between the appellant and her husband, collectively the vendors, they sought to sell the property. The appellant initially met the licensee in September 2020 and told the latter she wanted \$1.2M to \$1.4M for the property.<sup>1</sup> However, a Code Compliance Certificate was needed for some alterations, so there was a delay while this was attended to.

[6] A marketing proposal was prepared by the licensee (14 January 2021) incorporating comparable sales and showing an "appraisal range" of \$1.28M to \$1.4M.

[7] The vendors and the agency signed an agency (listing) agreement between 20 and 28 January 2021. It recorded an appraised value for the property of \$1.3M. Marketing duly commenced.

[8] The auction was scheduled for 1 April 2021 at 6:30 pm.

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<sup>1</sup> See the licensee's file note (28 September 2020) at 194 of the Appeal Bundle.

[9] An Auction Reserve Authority (1 April 2021) signed by the vendors set a reserve of \$1.4M.

[10] It would appear that immediately before the auction, TI (the bidder) tried to telephone the licensee. The licensee responded at 5:03 pm by text to say she could not take his call and asked him to send a text.

[11] At 5:05 pm, the bidder sent a text to the licensee:

Sorry, know you will be flat tack. I want to register for tonight. Can't be there as I'm driving back from [Location]. How can I make this work??

[12] The licensee rang the bidder who confirmed he was interested in bidding on the property. She then emailed the "auction agreement" to him and another person.

[13] The bidder did arrive at the auction and completed the following documents at about 6:31 pm:

1. Bidding registration form (1 April 2021) in the name of "CCI &/or nominated party". There is no signature or name of a signatory.
2. OIA Purchaser Acknowledgment Form (1 April 2021). The purchaser's name given was "CCI &/or nominated party" and it bore the name of the bidder, together with his signature.

[14] Both the appellant and her husband signed an auction variation agreement in favour of CCI immediately before the auction. It described "CCI &/or nominated party" as a vendor (it is, in fact, the purchaser). They authorised a bid on the basis of a certain deposit and a certain settlement date specified by CCI.

[15] The bidder was successful at \$1.4M. He and the auctioneer signed a Memorandum of Contract (1 April 2021), also known as a sale and purchase agreement. The purchaser was named as "CCI &/or nominated party". The bidder initialled the Particulars and Conditions of Sale of Real Estate by Auction (1 April 2021) as "TI".

[16] Shortly after the auction, at 9:50 pm on the same evening, the office administrator at the agency sent an email to the vendors' solicitor, copied to the licensee, noting the settlement date and purporting to attach the signed "auction agreement" (presumably the sale and purchase agreement) and what was described as an unconditional notice. The sale and purchase agreement was not attached. The Solicitor Notification Unconditional Sale form (1 April 2021) sent identified the vendors but the purchaser's name was left blank. At the appellant's request on 6 April 2021, the licensee purported

to email the sale and purchase agreement to her that day but the appellant told the Tribunal the buyer's report was sent instead.

*Complaint to the licensee*

[17] The appellant appears to have first raised her discontent in an email to the licensee on 6 April 2021 stating that the latter "knew all along".

[18] The licensee replied to the appellant on 7 April 2021. She said she had no communication with the bidder during the campaign, who did not visit the open home. She received the first communication from him at 5:05 pm. He arrived at the auction rooms and completed the registration forms moments before the auction began. There was only one other registered bidder who stopped at \$1.36M.

[19] In an email to the licensee on 9 April 2021, the appellant noted that the WhatsApp group was not updated when the bidder registered at 5:05 pm. It was alleged that the licensee was not transparent as she was aware of the bidder's relationship with her husband. Furthermore, she had arranged for the auctioneer to sign the documents so that the appellant could not see who the bidder was.

[20] The licensee sent an email to the appellant later the same day. She said that due to the tension between the appellant and her husband, she suggested that the auctioneer sign the documents on her behalf. It was often done in such situations.

[21] On 16 April 2021, the appellant sent an email to the licensee querying why there were no purchaser details on the two attachments to the 1 April email. She wanted to know the name of the purchaser.

[22] The licensee replied on the same day stating that she had asked the office administrator as she did not know why.

[23] On that day, 16 April 2021, the administrator sent an email to the vendors' solicitor saying it had been brought to her attention that the purchaser's name had been left off the unconditional notice sent out on 1 April. She said it was an oversight as they were training a new administrator. A new form with the purchaser identified (CCI) was attached. This email was copied to the licensee and the appellant.

[24] Later that day, the licensee sent an email to the appellant identifying the purchaser as CCI.

[25] On 19 April 2021, CCI was incorporated as CCI 2021 Ltd. The bidder and one other person (not being the husband) were the directors and shareholders.

[26] On the same day, the agency sent an invoice to the vendors' solicitor which showed the agency's commission was deducted from the deposit, leaving a balance of \$24,000.

[27] The unconditional notice form was duly signed by the vendors' solicitor on 23 April 2021.

[28] On 13 May 2021, the purchaser's solicitor advised the vendors' solicitor that the purchaser had nominated "CCI 2021 Ltd" and the husband to complete the purchase. The title showed CCI 2021 Ltd to have a two thirds share and the husband to have a one third share in the property.

[29] On 19 May 2021, the property was transferred from the vendors to CCI 2021 Ltd (as to a two thirds share) and the husband (a one third share).

[30] The appellant obtained a retrospective valuation of the property on 29 July 2021. It gave a value of \$1.415M as at 1 April 2021.

## **THE COMPLAINT**

### *The appellant's allegations*

[31] In the meantime, on about 20 April 2021, the appellant had complained to the Authority against the licensee.

[32] The appellant alleged that she was informed at the last minute before the auction that a bidder had registered. The licensee did not update the WhatsApp group, as she was aware the bidder was known to her and her husband. The bidder was kept out of camera by the licensee. Nor did the letter sent to the solicitor state the name of the purchaser. At the end of the auction, the licensee made a big fuss of the auctioneer signing on her behalf, so she would not see the winning bidder.

[33] According to the appellant, she had received several phone calls from people known to the bidder who had confirmed that the licensee had been working with him for a number of months prior to the auction. CCI was owned by the family of the bidder's wife. There has been gross misconduct in the handling of the sale by the licensee, who had not been transparent or honest.

[34] The appellant sent further information to the Authority on 27 and 28 May 2021. She noted that the licensee had sold the bidder's property a few years earlier and it was the bidder who had recommended the licensee to the appellant and her husband. The licensee had plenty of time to update the WhatsApp group at 5:05 pm, but she did not,

so the appellant remained unaware of his identity. There were only two bidders at the auction. She was able to see the first bidder, but not the new bidder.

[35] According to the appellant, the acquaintance of a friend and a real estate agent, told her that the licensee and the bidder had been in contact regarding purchasing the property for months prior to listing. The licensee was aware of the connection between the bidder and both the appellant and her husband (the bidder and her husband were the coach and manager respectively of the rugby team of the vendors' son).

[36] On 25 June 2021, the appellant sent an auction live stream video to the Authority with a time schedule showing the sequence of events.

[37] Three similar statements were provided by or on behalf of the appellant to the Authority:

1. NI (3 September 2021) said that the bidder's children were employed by the licensee to drop real estate flyers in letterboxes. Furthermore, the licensee kept in contact with the bidder to let him know of properties of interest in the area.
2. NT (3 September 2021) said she was aware of the bidder's children dropping flyers for the licensee, of the licensee staying in contact with the bidder concerning properties (including the appellant's property), and that the licensee had gifted wine to the bidder (late 2019) and tickets to a bowls event (late 2019).
3. ND (6 September 2021) said that the licensee employed the bidder's children to drop flyers. Furthermore, the licensee stayed in touch with the bidder regarding potential investment properties. The licensee had also gifted tickets to a bowls night to the bidder. The witness had attended, as had the appellant's husband. The bidder had often spoken of his intention to purchase the property. The bidder's wife had informed the witness that the bidder was working with a mortgage broker and that the husband did not know of the intention to purchase it.

[38] The appellant sent a further email to the Authority on 12 September 2021. She stated that the email (1 April 2021) from the administrator was missing the contract and the attached solicitor's letter was blank as to the purchaser's name. She set out how she came to know her husband had bought the property. The appellant said that the licensee knew the bidder was known to her. The licensee drove down the reserve price for the benefit of the purchaser. She was working for the purchaser and not the vendors.

[39] The appellant provided additional information to the Authority on 19 September 2021:

1. The bidder positioned himself at the auction so he could not be seen from where she was.
2. The licensee and auctioneer failed to state on the contract the name of the bidder.
3. The contract was left off the email sent by the administrator on 1 April 2021 at 9:50 pm, which showed deliberate concealment by the licensee and the agency. The administrator had worked for the agency for many years and was not being trained on the auction night.
4. The licensee concealed the name of the bidder in her email of 16 April.
5. There was evidence that the licensee knew her husband and the bidder were friends as she had provided tickets to a named bowling club.
6. Responding to the Authority's email stating that there was no evidence to show the licensee told the bidder of the reserve price, the appellant said that the purchaser declined access for a retrospective valuation.

[40] On 14 March 2022, the appellant sent further information to the Authority. She said the investigation had not addressed a number of issues, including the licensee's relationship with the bidder (employing his children, gifts). It was clear the relationship was more than a business one. It was false that the licensee was not aware of the close relationship between the bidder and her husband, as she told the licensee of this prior to the listing. According to the appellant, the bidder and her husband were not being truthful in stating that her husband was offered the property after the auction. Furthermore, the licensee withheld from her the licensee's ongoing business relationship with the bidder.

*Explanation from the licensee*

[41] On 10 September 2021, the licensee explained to the Authority the omission of the appellant from the addressees receiving the office administrator's email of 1 April 2021 (which had sent the signed contract to the vendors' solicitor). According to the licensee, it was sent to the husband but not to the appellant.<sup>2</sup> This was an unfortunate

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<sup>2</sup> There is evidence the email was copied to the licensee, but there is no evidence before the Tribunal it was copied to the husband; see the Appeal Bundle at 216.

human error by a trainee administrator. This was also why the purchaser's name was left off the unconditional notice.

[42] On 20 December 2021, the licensee sent a statement to the Authority formally responding to the complaint. She said that on about 28 September 2020, the appellant approached her about selling the property. She met the appellant for the first time at the property. The appellant contacted her again on 12 January 2021 to say that the property was ready to sell. She met with the appellant and her husband at the agency's office on 14 January 2021. This was the first time she had met the husband. The property was appraised in the range of \$1.28 – \$1.4M.

[43] The licensee said she created a WhatsApp group, including the appellant, her husband, the licensee and other agents assisting with the sale.

[44] The bidder did not attend the open homes or express any interest during the campaign. It was not uncommon for investors or developers to purchase property sight unseen. The vendors set the reserve at \$1.4M and authorised the auctioneer to sign the sale if the bidding reached the reserve. The auction was due to take place at 6:30 pm on 1 April 2021 and at 5:05 pm that evening, she received a text from the bidder indicating he would like to register as a bidder. She knew him in a professional capacity and had been involved in property transactions with him. It was her understanding that the bidder and his wife were family friends of the vendors. She did not know the extent of that relationship.

[45] The bidder came to the auction in person. The licensee helped him to complete the registration forms. He bid through his investment company. The licensee said she was not aware at the time that the investment company had not been incorporated. She informed the appellant and her husband of the registration before the auction began, the purchaser being listed on the auction variation agreement as "CCI &/or nominated party". The appellant and her husband signed this form ahead of the auction.

[46] There was only one other unconditional bidder, who stopped bidding at \$1.36M. The purchaser signed the contract as "CCI &/or nominated party" and initialled throughout as "TI" (the bidder). On the evening of the auction, a junior office assistant emailed the appellant the unconditional sale notice but accidentally did not attach the contract.

[47] The appellant subsequently found out that the owners had become the investment company (two thirds) and the husband (one third). Neither the licensee nor the agency were aware of the husband's nomination or of any intention for him to be nominated. It was an entirely normal and above-board sale of a property at auction. The



licensee believed that the appellant felt deceived by her husband and that this grievement was being misdirected at the licensee.

[48] The licensee accepted that she did not inform the appellant of the bidder's identity, but she did not conceal the name of the investment company. The bidder was not the purchaser. As for failing to update the WhatsApp chat group, the appellant and her husband were in the next room so it made sense to tell them in person, with the accompanying documentation, rather than to update them via a WhatsApp message. Furthermore, it was completely standard practice for auctioneers to sign on behalf of parties, where there was clear tension between the co-owners.

[49] The licensee categorically denied providing any of the vendors' confidential information to the bidder. She did not inform him of the reserve price in order to ensure he paid the minimum purchase price. She recognised that would be a blatant breach of her obligations.

*Evidence to the Authority from the husband and the bidder*

[50] The husband sent an email to the Authority on 28 February 2022. He said he was approached by the investment company one week after the auction and invited to become a part-owner. At the time of the auction, there was no intention for him to purchase the property. The reserve price was nominated by the appellant. He did not discuss the reserve with the bidder.

[51] The bidder sent an email to the Authority on 1 March 2022. He said that he and the husband had tried to purchase the property in October 2020, but the appellant was then asking for \$1.4M which was higher than the valuation (\$1.18M). He investigated multiple options for purchasing the property, including registering a company with a good friend. They were only able to register for the auction on the day of the auction itself. This was not discussed with the licensee or with the husband prior to 1 April.

[52] According to the bidder, the intention was originally to offer the husband the opportunity to rent the front house (his family home) and put the back house on the rental market. After the auction, he had a conversation with his business partner and the husband about the potential for the husband to reinvest in the property by way of a partnership. This was agreed. He did not prohibit the licensee from disclosing to the appellant that he was a director of the investment company. The only time he spoke to the licensee was on his arrival, one to two minutes before the auction. He was not aware of the reserve price, but he knew the appellant had demanded \$1.4M from the outset, so when the bidding stopped at \$1.36M, he straight away offered \$1.4M.

*Decision of the Committee*

[53] On 28 April 2022, the Committee decided to take no further action.

[54] As for the allegation that the licensee deliberately kept secret the identity of the bidder, the Committee could find no evidence supporting this allegation. It was noted that he had registered right before the auction. The fact that the appellant could not see the bidder through CCTV did not mean that the licensee deliberately tried to obscure or hide his identity. The licensee did not put his name on the WhatsApp page as the vendors were in the room next door. While it was not common practice for an auctioneer to sign on behalf of a vendor, that was not a highly unusual practice. There was no evidence that r 5.1 (skill and care) or r 6.4 (must not mislead) of the Rules had been broken.

[55] As for the reserve price, the appellant had produced no evidence that the licensee had told the bidder. He said he did not know the reserve price but he had previously tried to purchase the property in October 2020 with the husband and knew at that time that the appellant was seeking \$1.4M. It was noted by the Committee that the property had been sold at auction and therefore the market had a chance to set the final price. The appellant had not been financially disadvantaged as the reserve price had been met. There was no evidence that r 9.16 (use of confidential information) or r 9.17 (disclosure of confidential information) had been broken.

[56] As for the allegation that the licensee had conspired with the bidder and the husband to buy the property, the licensee had said that she knew the bidder through previous real estate work and through the relevant suburb being a “small town”. She knew that the bidder and the husband knew each other, but did not know of their plans or the depth of their friendship. She had no special relationship with the bidder.

[57] The Committee could find no evidence that the licensee tried to conspire with bidder or the husband. The sale had been through a public auction and the appellant had obtained her reserve price. While it was understandable she was annoyed that her husband remained living in the property, she had not suffered financially and the Committee could find no evidence that the licensee had acted inappropriately. There was no evidence of a breach of r 6.2 (act in good faith) or r 6.4 (must not mislead).

[58] On about 7 May 2022, the appellant appealed to the Tribunal against the Committee’s decision.

## APPEAL

### *Bundle of documents*

[59] The Tribunal received from the Authority a paginated bundle of the documents provided to the Committee.

### *Submissions of the appellant*

[60] The appellant set out her grounds of appeal on 7 May 2022. She contends that the Committee failed to address the licensee's concealment of both the identity of the bidder (the licensee knowing of the relationship between the bidder and her husband) and the licensee's ongoing relationship with the bidder:

1. The licensee did not update the WhatsApp group at 5:05 pm.
2. The licensee did not notify the appellant of the late registration before the auction started. The licensee did not name him, even though she was aware he was known to her.
3. The licensee sent the buyer's report on 6 April when it was the sale agreement (contract) which the appellant had requested.
4. The licensee insisted on the auctioneer signing the contract.
5. The solicitor's letter was sent to herself with the purchaser's name blank (according to the appellant, the office administrator had worked there for many years).
6. The licensee had an ongoing relationship with the bidder, including employing his children and gifting tickets to a bowls event in December 2020.

[61] Furthermore, the Committee has not addressed:

1. The principle that the licensee was engaged to act for the vendors, not the bidder.
2. The purchasers moved into the property prior to settlement.
3. The low feedback during the campaign, which did not reflect the actual market conditions.

4. How the bidder knew the reserve price (he was not questioned by the Committee and her husband had stated that he did not tell the bidder).

[62] There are additional submissions (10 November 2022) from the appellant. It is contended there was concealment of the purchaser's identity:

1. The WhatsApp group was not updated to add a new bidder.
2. The licensee did not disclose the bidder as the late registrant, even though she was aware he was their friend and had recommended they use her as the agent.
3. The licensee and the bidder stayed outside the auction room until the bidder's offer was accepted. He was kept out of the live stream view.
4. The sale and purchase agreement was not signed and the bidder did not sign on behalf of CCI in the purchaser's details. The bidder squiggled illegible initials on each page of the sale and purchase agreement and identified a non-entity in the contact details.
5. It was the licensee's obligation to ensure that the person signing the agreement was a legal entity and a real person, this being required for anti-money laundering legislation.
6. The agency's tax invoice (19 April 2021) shows that the licensee was aware the company was not incorporated at the time of the sale. She could not invoice for her commission to be paid "to a non-entity" and was required to wait until the company was incorporated.
7. The witness statements show the relationship and collusion between the licensee and the bidder.

[63] It is further alleged by the appellant that the property was sold at an undervalue by hundreds of thousands of dollars, as shown by the evidence given to the Authority and the Tribunal.

[64] In reply to the submissions of the other parties, the appellant produced further submissions (20 January 2023). We note her list of the factors establishing, she says, that the licensee concealed the identity of the bidder at the auction. The appellant repeats submissions and her view of the events given previously. She repeats her contention that the property was appraised and sold at an undervalue, for the pecuniary benefit of the bidder, his business partner and her husband.

*Submissions of the Authority*

[65] There are submissions (22 December 2022) from the Authority. It is submitted that the Committee's findings were open to it on the available evidence. The decision had followed a comprehensive investigation. None of the heads of complaint disclose conduct that would have any prospect of being considered unsatisfactory conduct.

[66] The Authority says the Committee correctly found no evidence that the bidder had any contact with the licensee between 28 January 2021 (when the licensee was engaged) and the evening of the auction.

[67] It is important to note that the appellant was informed of the purchaser's identity (CCI) prior to the auction. The imposition of a broader obligation would require licensees to have knowledge of all such relationships for all prospective purchasers and to identify and disclose the directors, officers and beneficial owners of prospective purchasers that are incorporated entities. Such an obligation would be incredibly onerous and even impossible to fulfil.

[68] As for the appellant's contention that the personal relationship between the bidder and the licensee shows that the latter provided the reserve price to the bidder, the Committee found no evidence of such conduct. It is submitted that there is no direct evidence. The bidder denies knowing the reserve price. He was aware from negotiations in 2020 that the vendors requested \$1.4M then. The appellant does not address these negotiations. There is evidence that the appellant was seeking \$1.2M to \$1.4M in September 2020 (see the licensee's file note on 28 September 2020).

[69] The conduct described by the appellant, namely providing information on properties for sale, gift baskets and tickets to a bowls club evening, is more consistent with efforts to engage potential purchasers rather than a close personal relationship.

[70] Furthermore, the appellant raises a number of other issues which were not part of the original complaint and are not properly the subject of this appeal.

[71] In conclusion, the Authority submits that the appellant has not discharged the onus of showing that the Committee was wrong to take no further action. The appeal should be dismissed.

*Submissions of the licensee*

[72] In their submissions (2 December 2022), counsel for the licensee submit that the Committee did not err in its decision not to take further action. There is no evidence that

the licensee concealed the bidder's identity, disclosed confidential information and/or conspired with the bidder and the husband for the latter to purchase the property.

[73] The appellant's submissions include a significant number of allegations about the licensee which are serious, pertaining to collusion, deceit and withholding information. However, she has not produced any evidence in support.

[74] The licensee was not aware of the extent of the bidder's relationship to the vendors. She had previously sold the bidder's family home. She was certainly not aware that he had previously expressed interest in purchasing the property with the husband. Both the bidder and the husband have confirmed they never discussed this with the licensee.

[75] In the absence of instructions from a client, there is no express requirement to disclose a purchaser's identity to a vendor.

[76] The evidence in this case confirms that the first communication the licensee received from the bidder about the property was at 5:05 pm on the night of the auction. The bidder corroborates this. The fact that CCI was named as the purchaser, not the bidder, was not cause for concern for the licensee. The vendors were in the next room, so the licensee told them of the prospective purchaser (CCI) and they signed the auction variation agreement.

[77] The licensee was not aware that CCI was not an incorporated company at the time of the auction. It is not correct, as submitted by the appellant, that the licensee was required to confirm the company structure in order to comply with the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. Agents only need to conduct due diligence on their clients, the vendors.

[78] There is no evidence to support the contention that the licensee provided confidential information to the bidder, including the reserve price. This is confirmed by the bidder. He was aware months earlier that the appellant wanted \$1.4M.

[79] There is no evidence to support the allegation that the licensee conspired with the bidder and her husband. The licensee had no knowledge of any plan for CCI to purchase the property and then nominate the husband. It was not until the complaint was made to the Authority that the licensee became aware of the nomination.

[80] While the situation is understandably distressing for the appellant, whose former husband now owns and lives in the property, the licensee was not involved in his nomination.

## JURISDICTION AND PRINCIPLES

[81] This is an appeal pursuant to s 111 of the Real Estate Agents Act 2008 (the Act).

[82] The appeal is by way of a rehearing.<sup>3</sup> It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.<sup>4</sup> After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.<sup>5</sup> If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.<sup>6</sup>

[83] A hearing may be in person or on the papers.<sup>7</sup> A hearing in person may be conducted by telephone or audiovisual link.

[84] 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.<sup>8</sup> 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.<sup>9</sup>

[85] The Tribunal issued Rulings on 21 and 28 September 2022 declining applications by the appellant to produce evidence which was not before the Committee.

[86] A Minute was issued by the Tribunal on 13 October 2022 directing that the appeal be heard on the papers and setting a timetable for submissions.

## DISCUSSION

[87] The appellant’s complaint to the Authority against the licensee concerned three matters:

1. Concealing the identity of the bidder.
2. Conspiring with the bidder and the appellant’s husband, so that the latter could become an owner.

<sup>3</sup> Real Estate Agents Act 2008, s 111(3).

<sup>4</sup> *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].

<sup>5</sup> At s 111(4).

<sup>6</sup> At s 111(5).

<sup>7</sup> At ss 107, 107A.

<sup>8</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] & [16] and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

<sup>9</sup> *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22] and the higher court authorities cited therein at fn 9.

3. Disclosing the reserve price to the bidder.

[88] We will deal with these in turn.

1. *Concealing the identity of the bidder*
2. *Conspiring with the bidder and the appellant's husband, so that the latter could become an owner*

[89] The first and second heads of complaint can usefully be considered together. After all, according to the appellant, the purpose of the licensee in concealing the identity of the bidder from the appellant at the auction, was to enable the husband to become an owner. The concealment was part of their conspiracy to bring about the husband's ownership.

[90] The licensee accepts she did not identify the bidder to the appellant. She says that at the auction she disclosed to the vendors, including the appellant, that the prospective purchaser was CCI.

[91] The licensee was aware the bidder was behind CCI. It is submitted by both the licensee's and the Authority's counsel that she was not required to disclose to the appellant those behind CCI. She was only required to disclose the name of the prospective purchaser. This is correct.<sup>10</sup> The appellant does not cite any authority for contending otherwise. We are not aware of any authority for the requirement of a licensee to disclose those behind a corporate entity. The licensee therefore had no legal obligation to disclose the bidder's name to the appellant.

[92] The appellant cites the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. This legislation does not require an agent to conduct due diligence on prospective purchasers, only on their "customer", the vendors.<sup>11</sup> Had the licensee known there was no such entity, she would have been obliged to disclose the name of the bidder (who would be the purchaser). However, she did not know the investment company did not exist.

[93] As to whether the non-disclosure of the bidder was deliberate, the appellant has not discharged the onus of proving that it was. The appellant advances much circumstantial evidence of the concealment, as to which we agree with the Committee's reasoning. There are reasonable explanations from the licensee for these factors (such

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<sup>10</sup> The statutory requirements for disclosure of a purchaser in certain circumstances are not relevant here; see ss 134–136 of the Real Estate Agents Act 2008.

<sup>11</sup> See the Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Regulations 2011, cl 5B(1), "customer". It is noted this was not a cash transaction.



as the WhatsApp group, the auctioneer's signature on the Memorandum of Contract, the junior administrator's mishaps with documentation). We do not find it sinister that the auction live stream did not pick up the bidder, according to the appellant.<sup>12</sup>

[94] The relevant rules are:

6 Standards of professional conduct

...

6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

...

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.

[95] In terms of r 6.4, the failure to advise the appellant of the identity of the person behind CCI, in the absence of a request from the appellant to know, does not amount to misleading her. The bidder was not the purchaser. In terms of both rr 6.2 and 6.4, fairness does not require disclosure of the people behind corporate entities. While the licensee in this case did know who was behind the corporate purchaser, in most transactions the agents would not know all the directors of the corporate purchaser.

[96] It would be different if the licensee knew of any proposal at the time of the auction for the husband to become an owner. Any knowledge on the part of the licensee as to the involvement of the husband in the purchase would, in fairness, have to be disclosed to the appellant.

[97] It would also be different if the bidder directed the licensee not to disclose his identity. The need to inform the vendor of such a direction is discussed in *D v Real Estate Agents Authority (CAC 306)*.<sup>13</sup> However, the bidder denies any such direction and there is no evidence otherwise.

[98] This brings us to the allegation that the licensee conspired with the bidder and the husband to enable the husband to become an owner, unknown to the appellant. In our Ruling (21 September 2022) declining the appellant leave to file new evidence, we accepted that the bidder and the husband agreed prior to the auction as to the husband's

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<sup>12</sup> We note that the appellant's auction livestream timing schedule (25 June 2021) produced to the Authority has numerous references to the bidder being on camera, but perhaps these are from camera footage which could not be seen by the appellant at the auction; see schedule at 112–116 of the Appeal Bundle.

<sup>13</sup> *D v Real Estate Agents Authority (CAC 306)* [2015] NZREADT 19 at [15].

intended involvement.<sup>14</sup> However, as we note there, that is not evidence that the licensee participated in any such arrangement.

[99] The licensee denies knowing of any such plan. Indeed, the evidence of Ms C, produced by the appellant, is contrary to the appellant's claim of a conspiracy involving all three people. ND says she was informed by the bidder's wife that the husband did not know of the bidder's intention to purchase the property. We dismiss as unreliable the appellant's hearsay evidence of the unidentified acquaintance of a friend (who is a real estate agent) stating that the licensee and the bidder had been in contact for months regarding the purchase of the property. Similarly, the several phone calls from unknown persons saying the same. While we find that the bidder and the husband did plan the purchase, there is not an iota of credible evidence that their plan involved the licensee.

[100] The appellant points to the relationship between the licensee and the bidder. She had previously sold the bidder's property, kept an eye out for prospective properties for him, gifted some tickets to a club event and apparently even employed his children. The Authority characterises this as consistent with efforts by an agent to engage potential clients rather than a close personal relationship. We agree. Despite apparently being in touch with him at some point in time over potential investment properties, we accept her evidence that the first communication she had with the bidder over the property in question (after the listing in January 2021) was at about 5:03 pm on 1 April.

[101] In conclusion on the first two matters raised on appeal, we dismiss the allegation of concealment of the bidder's identity. The appellant was not entitled to know the bidder's name. There is insufficient evidence to conclude that the omission to name him was deliberate. We further find that the conspiracy between the bidder and the husband to buy the property did not involve the licensee. She did not know of the husband's involvement in the purchase until after settlement. We agree with the Committee's decision to take no further action on these heads of complaint.

### 3. *Disclosing the reserve price to the bidder*

[102] The licensee denies informing the bidder of the reserve of \$1.4M set by the vendors. The bidder also denies being told by the licensee. He advances a credible explanation for his bid of \$1.4M, which happened to be the minimum meeting the reserve. The bidder knew from discussions in about October 2020 presumably with the appellant and/or her husband and/or the licensee at that time that the appellant was then "demanding" \$1.4M, so when the other bidder withdrew at \$1.36M, he offered \$1.4M.<sup>15</sup>

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<sup>14</sup> Ruling (21 September 2022) at [35] and [36].

<sup>15</sup> Bidder's email (1 March 2022) to the Authority.

[103] The appellant has said to the Tribunal that she did not inform the licensee in 2020 that she sought \$1.2M–\$1.4M.<sup>16</sup> This is not correct. There is evidence in the form of the licensee’s file note (28 September 2020) that this was the range of the vendors’ expectations in October 2020.<sup>17</sup>

[104] The appellant has not discharged the burden of showing that the Committee was wrong to take no further action on this head of complaint on the basis that the bidder had known (or assumed) the minimum price being sought from his earlier interest in the property.

#### *Other matters*

[105] On appeal, the appellant alleges the property was sold at an undervalue, for which she blames the licensee’s collusion with the bidder. She alleges the licensee set the reserve price too low. This is dealt with in our Ruling (28 September 2022) declining leave to file the new evidence of local sales. In particular, we note our finding that the documents sought to be produced were not cogent of the value of the property in the period January to April 2021. We also observed that the property was sold at auction, enabling the market to set the price and that the appellant’s own retrospective valuation gave a valuation only \$15,000 above the sale price at the time of the auction.

[106] The appellant argues that the date of the agency’s invoice (19 April 2021) shows the licensee was aware that the purchaser (CCI) was not incorporated at the time of sale. It is alleged the licensee could not invoice a non-entity for her commission and had to wait until 19 April when the company was incorporated.

[107] It is correct the invoice was issued on the same day the company was incorporated, but the invoice was addressed to the vendors’ solicitor and merely records that the commission was taken out of the deposit. We do not know who paid the deposit or when. Furthermore, as Ms Bowering-Scott observes, an agent is required to hold money for 10 working days.<sup>18</sup>

## **OUTCOME**

[108] The Tribunal confirms the Committee’s decision. The appeal is dismissed.

[109] 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.

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<sup>16</sup> The appellant’s submissions (20 January 2023) at p 3.

<sup>17</sup> At 194 of the Appeal Bundle.

<sup>18</sup> Real Estate Agents Act 2008, s 123.

**PUBLICATION**

[110] The Committee directed publication of its decision, without stating the names of the licensee and the agency.

[111] In light of the outcome of this appeal and having regard to the interests of the parties and of the public, it is appropriate to order publication without identifying the bidder, the purchaser, the property, the licensee or the agency.

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D J Plunkett  
Chair

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P N O'Connor  
Member

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F J Mathieson  
Member