

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 6

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 Waalkens

Counsel for the second and
third respondents:

K Burkhart, R Bingham

SUBJECT TO NON-PUBLICATION ORDER

RULING ON APPELLANT'S APPLICATION TO FILE FURTHER EVIDENCE
Dated 04 April 2023

INTRODUCTION

[1] NQ, the purchaser of a residential property and the appellant before the Tribunal, has sought leave to produce evidence to the Tribunal that was not before the Committee:

1. Audio recording of a telephone conversation between the purchaser and the auctioneer on 21 January 2021, along with a transcript of that recording.
2. Audio recording of a Google Meet video conference conversation between the purchaser, the auctioneer and the auctioneer's manager on 2 February 2021, along with a transcript of that recording.
3. Agency's guide to buying at auction.
4. Letter from an auction attendee, dated 5 December 2022.

BACKGROUND

[2] The purchaser bought a residential property in Auckland.

[3] The second respondent was the auctioneer. He is a licensed branch manager under the Real Estate Agents Act 2008 (the Act) and at the relevant time was engaged by Barfoot and Thompson t/a Barfoot & Thompson Limited (the agency). The third respondent (the agent) was one of two listing agents for the property. He is a licensed salesperson and was also engaged by the agency.

[4] The purchaser's complaint concerns an alleged unorthodox auction process and misleading marketing.

[5] The online advertising text stated:

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.

[6] As for the bedrooms, it stated:

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

[7] Under "Property details", the number of bedrooms given was "5".

[8] There was an advertising video of the property. One still from the video had the caption "4 BEDROOMS" and another the caption "5th BEDROOM/STUDY".

[9] The purchaser was the sole bidder at an auction on 15 December 2020. He made an opening bid of \$1.7M and, after discussion with the auctioneer, purchased the property at \$2M. He signed the sale and purchase agreement at the auction.

Complaint made to agency

[10] The purchaser made a complaint to the agency by email on 17 February 2021. 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 \$2M. 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 the purchaser.

[11] 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.

[12] 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.

Complaint to the Authority

[13] The purchaser was not satisfied with the agency's response, so he made a complaint to the Real Estate Agents Authority (the Authority), the first respondent, on about 12 March 2021. He set out the content of his letter of complaint to the agency.

[14] An explanation was provided by the auctioneer to the Authority on 21 July 2021. We note that he says he called the purchaser's bid at \$2M while standing next to him (1:30:50 in the video).

[15] An explanation was also provided by the agent on 21 July 2021. We note that he says the purchaser viewed the property prior to the auction on 14 December 2020 at 7:45 pm (sunset 8:34 pm that night). There was adequate time for him to view the location, surrounds and sea views. The properties in front would have been clearly visible.

Decisions of the Committee

[16] The Committee relied on the following provisions of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012:

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.

...

[17] 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 at the auction, the purchaser was more likely than not to have understood that he had placed a bid of \$2M. It was not satisfied the process placed undue pressure on him. No further action would be taken against the auctioneer.

[18] In respect of the complaint that the proximity to the shoreline was misrepresented, the Committee found that 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 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.

[19] In respect of the complaint that the number of bedrooms was misrepresented, the Committee was satisfied that overall, the marketing information given to the complainant 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. The agent had therefore engaged in unsatisfactory conduct.

[20] In the penalty orders decision on 13 October 2022, the Committee censured the agent and fined him \$500.

Appeal to Tribunal

[21] Following the Committee's liability decision, the purchaser filed an appeal on 7 June 2022. He set out two reasons for appealing:

1. His complaint clearly set out the manner in which the auctioneer acted, yet the Committee omitted this critical information. The auctioneer departed from his lectern and visited him at the back of the room to extract another \$300,000. This is undue pressure. He has been clear as to the absurdity of a private chat being taken as a bid. The word "bid" was never used. He did not hear the bid of \$2M being called and he has two witnesses who did not hear it. The auctioneer "steamrolled" the process and he was unwittingly carried away. The Committee's dismissal of undue pressure on him is incorrect.
2. There was a very clear statement that the property has an impressive waterfront presence on the beautiful shoreline. The Committee chose to dilute the very clear words.

[22] In his submissions to the Tribunal (6 December 2022) on this application to admit new evidence, the purchaser states that there is a third issue on appeal, being the trivial penalty imposed on the agent.

DISCRETION TO ADMIT FURTHER EVIDENCE

The principles

[23] Section 111 of the Act provides that an appeal is by way of a rehearing. That is, the appeal is a reconsideration by the Tribunal of the evidence and other material that

was provided to the Committee.¹ The appeal is determined by reference to that material, the Committee's decisions and submissions made on behalf of the parties to the Tribunal.

[24] Pursuant to s 105(1), the Tribunal may regulate its procedures as it sees fit. The Tribunal may, on application, give leave for witnesses to be cross-examined and for evidence to be submitted to the Tribunal that was not provided to the Committee, if it considers it to be in the interests of justice to do so.

[25] An applicant for leave to submit evidence must set out the evidence to be submitted and satisfy the Tribunal that:²

1. It is credible.
2. It could not with reasonable diligence have been provided to the Committee.
3. It is cogent and would have an important influence on the outcome.

[26] The overriding consideration is the interests of justice. In addition to the above factors, the Tribunal will consider whether admitting the evidence would require further evidence from other parties and cross-examination.³ The discretion to allow further evidence to be filed is limited and the Tribunal should not be drawn away from the material that was before the Committee, unless the interests of justice require it. It is not permissible to give a party to an appeal the opportunity to run their case afresh simply because they wish to conduct it differently.

Submissions of the purchaser

[27] In his application (6 December 2022), the purchaser contends that the complaints process does not invite an exchange between him as the complainant and the Authority. He was not asked for supporting information. He had no indication from the complaint form that evidence could be filed.

[28] It is contended that the telephone and Google Meet conversations provide excellent corroboration that the auctioneer did not receive a bid from him. The agency's guide to buying has information pertinent to the buyer. In many respects, it is what it

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

² *Dragicevich v Martinovich* [1969] NZLR 306 (CA) at 308–309, *Moseley v Real Estate Agents Authority (CAC 1907)* [2021] NZREADT 19 at [59]–[60].

³ *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3 at [49] & [51].

does not say that is of great concern to him. As for the statement from the witness, that person, like himself, did not hear the alleged call of “two million”.

[29] In regard to the Committee’s statement that it was more likely than not that he appreciated having placed a bid of \$2M, the introduction of this fresh evidence is to loudly contest this finding and place firmly in the mind of the Tribunal that this finding is manifestly false.

[30] In his reply submissions (10 February 2023), the purchaser refers to the auction process set out in the guide (bid increments). It does not state that the process could be constituted by an auctioneer leaving the lectern and conducting negotiations, which was the procedure used by the auctioneer.

Submissions of the Authority

[31] In her submissions (27 January 2023), the former counsel for the Authority records that while it is neutral as to whether the Tribunal grants leave to admit the new evidence, it is the Authority’s view that it does not meet the threshold.

[32] It is accepted that all the new information is credible.

[33] As to whether it could have been provided to the Committee with reasonable diligence, the Authority contends that all of the new evidence would have been available to the purchaser at the time of his complaint in early 2021. It disagrees with his statement that he was not asked for supporting information. He was invited to provide additional information and/or comment on multiple occasions (as outlined in counsel’s submissions).

[34] Furthermore, the new evidence is unlikely to have an important influence on the outcome. As for the two audio recordings and transcripts between the purchaser and the auctioneer, they are relevant but unlikely to have an important influence. The guide to buying does not provide any crucial evidence in respect of the conduct of the auction. The witness’ letter is relevant, but the Committee’s finding that at the auction the purchaser was more likely than not to have appreciated he placed a bid of \$2M, was based on a number of contextual factors. This included that the Committee had the benefit of viewing a video of the auction. That is more reliable than a statement from one attendee as to what he heard.

Submissions of the auctioneer and the agent

[35] In her submissions (27 January 2023), counsel for the auctioneer and agent submits that the fresh evidence does not satisfy the test for admission. It is contended

that the purchaser has not adequately explained why any of the new evidence is cogent or why it would have an important influence on the outcome, nor why it was not readily available at the time of the complaint.

[36] As for the recordings, it is noted they were made without the knowledge or permission of the auctioneer or his manager. They were made before the complaint, so the evidence was available at the time of the complaint. Nor do they provide any new information which could advance the issues before the Tribunal. They do not provide any evidence as probable support for the conclusion that the auctioneer failed to conduct a proper auction. In fact, the recordings support the evidence of the auctioneer and agent already before the Committee. They set out the parties' respective positions on the issues. The recordings and transcripts would not have an important influence on the outcome.

[37] As for the guide, the purchaser does not explain why it is material to the issues or why it was not provided to the Committee as part of the complaint. The purchaser wants to make submissions on "what the document does not say", but does not explain how it is material.

[38] The letter from the attendee does not meet the test for production because the evidence before the Committee included the auction video, so the Tribunal will be able to observe and hear what transpired. Contrary to the attendee's letter, the auctioneer's call of \$2M is clearly audible on the auction video at 1:30:51. The best evidence of what happened at the auction is the video.

[39] The purchaser argues that the complaints process did not invite an exchange of information between him and the Authority. However, there were a number of opportunities where he was invited to provide information, as detailed in counsel's submissions.

DISCUSSION

[40] The first issue for us is whether during the complaint process, the purchaser was given the opportunity to file evidence. He alleges he was not asked for supporting information.

[41] The respondents all say this is wrong and that the purchaser was invited on multiple occasions by the Authority to produce information or comment.

[42] The respondents are plainly correct:

1. The Authority's complaint form completed by the purchaser asked him to, "Collect all the details and evidence" and to send any documents supporting the complaint.⁴
2. The Authority wrote to the purchaser on 30 June 2021 to advise that the Committee had decided to inquire into his complaint. He was asked to provide any additional information.⁵
3. In the Authority's email of 24 August 2021 to the purchaser, he was informed that the investigation was complete and his case had been passed back to the Committee. He was asked to call the investigator if he believed he had any new and relevant information.⁶

[43] It follows that the purchaser could have provided all the evidence he now seeks to adduce to the Committee during its investigation. He has not exercised reasonable diligence, so all the new evidence cannot be produced to the Tribunal.

[44] However, we will additionally make some comment on the cogency of each item of new evidence.

1. *Audio recording of a telephone conversation between the purchaser and the auctioneer on 21 January 2021, along with a transcript of that recording*
2. *Audio recording of a Google Meet video conference conversation between the purchaser, the auctioneer and the auctioneer's manager on 2 February 2021, along with a transcript of that recording*

[45] We have reviewed the transcripts. Ms Burkhart is correct. In the conversations, the parties do no more than set out their respective positions. There was no concession by the auctioneer or his manager that the process was wrong. The recordings/transcripts would not have an important influence on the outcome.

[46] In his submissions (10 February 2023), the purchaser says it is critical that in the discussion on 21 January 2021, the auctioneer admitted the auction process could not have occurred as it did, had he been acting as an auctioneer. The purchaser refers to a specific passage in the transcript. We do not agree that, reading the passage as a whole,

⁴ Bundle of Documents at 063, 069.

⁵ Bundle of Documents at 094.

⁶ Bundle of Documents at 216.

the auctioneer makes any such admission. In any event, our conclusion in due course as to the validity of the auctioneer's conduct will depend on our view of the law regarding what an auctioneer can do, not the auctioneer's view of the law.

3. *Agency's guide to buying at auction*

[47] This is a brief information leaflet of one page with very basic generic information about an auction. There is information about process (bid increments), but that is given only as an example. The leaflet is not material. It could not conceivably have an important influence on the outcome of the appeal.

4. *Letter from an auction attendee, dated 5 December 2022*

[48] There is a letter (5 December 2022) from an attendee at the auction who says that at no time did he hear a call of "two million" from the auctioneer. The witness says he did see the figure of "\$2.0 million" (presumably on the screen).

[49] This evidence is of no assistance to the purchaser's case. While relevant, it would not have an important influence on the outcome of the appeal. Indeed, it would have no influence.

[50] It does not matter what one person in the room heard or did not hear, or more accurately, recalls now what they believe they heard or did not hear two years earlier. We agree with Ms Burkhart that the best evidence of whether a call of \$2M was made is the audio available with the auction video. According to counsel, the call of "two million" is clearly audible. In fact, the complainant appears to accept it is audible, though he says the call on the livestream video has no context and was made "surreptitiously".⁷ He adds that the call of two million was made amidst a babble of conversations. In due course, we will view the video and listen to the audio recording ourselves.

OUTCOME

[51] The interests of justice do not require the admission of any of this evidence. The application for leave to file new evidence is declined.

[52] 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.


⁷ Submissions (6 December 2022) addendum at [1.7](g).

PUBLICATION

[53] The Committee partially upheld the complaint against the agent. It published the orders decision without identifying the purchaser or auctioneer, but did name the agent and the agency. Having regard to the interests of the parties and of the public, it is proper to order publication of the Ruling of the Tribunal without identifying the purchaser or auctioneer.



D J Plunkett
Chair



G J Denley
Member



F J Mathieson
Member