

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 82

READT 056/14

UNDER THE REAL ESTATE AGENTS ACT 2008
IN THE MATTER OF AN APPEAL UNDER SECTION 111 OF
THE ACT
BETWEEN H GAO AND MARTIN SIMONS
Appellants
AND THE REAL ESTATE AGENTS AUTHORITY
(CAC 20005)
First respondent
AND HAYDEN BROADBELT AND ADRIEEN
GOOCH
Second respondents

Hearing: At Auckland on 15-16 February 2016 and 24 June 2016

Tribunal: Ms K Davenport QC – Chairperson
Ms C Sandelin – Member
Mr J Gaukrodger – Member

Appearances: Ms H Gao and Mr M Simons in person
Ms K Lawson-Bradshaw for the first respondents
Ms K Burkhardt for the second respondents

Decision: 23 December 2016

DECISION OF THE TRIBUNAL

[1] Ms Gao and Mr Simons are owners of a property at 1285A Dominion Road, Auckland. Ms Gao bought this property at an auction held by Ray White Mt Eden. Ms Gao was a telephone bidder at the auction. She was the successful purchaser but considers that she paid too much for it for circumstances which will be set out below.

[2] Ms Gao made a complaint against Mr Broadbelt [the auctioneer] and Ms Gooch, [an agent]. Ms Gooch is the principal of Village Estate Agency who were sold the property.

[3] Ms Gao complained that she opened the bidding at \$700,000 through a telephone bid. This was the highest bid and the only bid. The auctioneer invited more bids and asked the floor "*How about \$710,000?*". Ms Gao says the auctioneer then came to the phone and asked Ms Gao directly "*Can you put in a higher bid?*" and she said "*\$720,000*". Ms Gao claims that there had been no announcement from the auctioneer that the auction was paused or the property passed in. Ms Gao says that once Mr Broadbelt had received this offer he did not present the bid to the public on the auction floor, he simply said he needed to talk to the vendors. He then left the phone and (Ms Gao assumes) spoke to the vendor. He returned with a price of \$760,000. Ms Gao said that she was misled into believing that her \$720,000 bid had not reached the reserve price and so offered \$750,000. Mr Broadbelt went back to the vendors and came back with an offer of \$755,000. Ms Gao accepted this offer. Mr Broadbelt told her that if there were no higher bidders she would buy the house at that price. The price was then put to the auction floor at \$755,000. There were no other bidders and Ms Gao purchased the property at \$755,000. However after the auction Ms Fincham (the vendor's mother and an agent) told Ms Gao that the reserve price of the property had been \$715,000. Ms Gao claims that she was misled into bidding \$35,000 more than she needed to for this property. The agents subsequently denied that Ms Gao had ever made an offer of \$720,000 and it was not for many weeks after the complaint was made that there was an acknowledgement by Mr Broadbelt that an offer of \$720,000 had been made.

[4] Ms Gao complained also about Ms Gooch the principal of Ray White Mt Eden, and that she displayed great reluctance in confirming the bid of \$720,000 or the reserve price of \$715,000.

[5] Mr Broadbelt's initial statement dated 18 October 2012 omitted the fact that Ms Gao had made an offer of \$720,000. He stated that he had not had an initial offer from Ms Gao of \$720,000. After reviewing his statement and the evidence, Mr Broadbelt confirmed that this was an error and he had received an offer of \$720,000 on the phone

from Ms Gao. He said that the omission had been an oversight and not deliberate on his part.

[6] Mr Broadbelt and Ms Gooch say that the offer of \$720,000 was made at the time the auction was paused and was not regarded by any of them as a bid but simply as part of the negotiations between the vendor and Ms Gao. Mr Broadbelt also gave evidence that the vendors initially had a reserve price \$715,000 but they increased it twice during the auction, first from \$715,000 to \$760,000 and then after discussion with Mr Broadbelt it was changed to \$755,000. These were verbal changes made to the reserve price. The CAC commented “*we are somewhat sceptical of this claim in that in the heat of the auction the vendor had the presence of mind to formally change the reserve, although accept that it effectively happened ...*” with each counteroffer from the vendors. Notwithstanding this, for reasons we will explain, we do not see this as relevant to the complaint.

[7] The CAC found on the basis of its expert advice that an auctioneer did not have to announce that the property was on the market following Ms Gao’s bid of \$720,000. The CAC commented that:

“In our view it is a different requirement from having to say that the property has gone over its reserve price. The Committee’s expert advice ... is that an auctioneer does not have to until he is ready disclose that they have exceeded the reserve price.”

[8] The complaint was considered by the Complaints Assessment Committee (CAC) who dismissed the complaint. Ms Gao and Mr Simons’ appealed this decision.

[9] The CAC found that Mr Broadbelt had paused the auction when he spoke to the complainant, which should have been apparent to Ms Gao as there was clearly a change in the auction situation, and if she had been physically present then she would not have been as disadvantaged by not realising this as she appeared to have been by being on the phone.

[10] The CAC then considered whether or not Mr Broadbelt misled the complainant. They referred to a typewritten record of a telephone interview with Mr Broadbelt in which he refers to asking the complainants for a “*further bid*”. The CAC noted that if he did that that was unfortunate and had the potential to mislead the complainants.

Further if he took the offer of \$720,000 and said “*I will see if I can get the property on the market*”, when he knew the reserve was \$715,000 then this could be misleading conduct.

[11] The CAC commented that Mr Broadbelt could not do his best for the vendors at the expense of misleading the complainant, but stopped short of finding he did mislead the complainants.

[12] Mr Broadbelt also said to the CAC that he had changed the reserve by increasing the amount during the time the auction was paused.

[13] The CAC commented that it is not usual to raise reserves but often they are decreased during an auction. However the CAC concluded that an auctioneer does not need to disclose a property is ‘on the market’ and that the reserve had been met until the auctioneer determines it is appropriate to do so and therefore whether the reserve was raised or lowered is irrelevant.

[14] The CAC found that Ms Fincham knew the reserve, disclosed it to the complainants and lied to the CAC. They found that she had engaged in unsatisfactory conduct. The complainants do not appeal this finding.

[15] In relation to Ms Gooch the CAC found that her signing of Mr Broadbelt’s initial evidence as true and correct was careless rather than a deliberate attempt to deceive the CAC and they decided to take no further action against her.

[16] Ms Gao and Mr Simons appealed against these findings. They submit:

- (i) Mr Broadbelt is guilty of misconduct and they sought compensation under s 110(2)(g) for loss suffered by reason of the licensee’s misconduct.
- (ii) The CAC chose Mr Broadbelt’s version of events over Mr Gao’s, despite his credibility having been proven to be in doubt.
- (iii) The CAC chose to ignore the expert opinion of Mr John Ward, a former CEO and Chairman of the Auctioneers Association.

- (iv) There is an independent witness to the auction that may be able to assist the Tribunal in determining the actual sequence of events.
- (v) It will be in the public interest for the ethical conduct and procedures pertaining to real estate at auctions to be clarified by the Tribunal.
- (vi) Ms Gooch is guilty of misconduct by actively assisting in the concealment of Mr Broadbelt's actions.

[17] The Tribunal heard a lot of evidence over the three days of hearing. They heard from Mr Broadbelt, Ms Gooch, Mr Abbott, Ms Peacock and Mr Valentine. Mr Simons and Ms Gao also gave evidence.

[18] Mr Simons and Ms Gao did not make any further submissions to the Tribunal saying the facts spoke for themselves.

[19] The appellants presented in evidence from Mr John Ward who unfortunately died before the hearing. Mr Ward was a general auctioneer who also managed a real estate business from 1968 to 1995. His view was that if Mr Broadbelt described the offer to pay \$720,000 as being a bid and this exceeded the reserve, then he is stuck with this price.

[20] Ms Gao and Mr Simons were very distressed at the contents of Mr Broadbelt's first statement which denied any offer/bid had been made at \$720,000. They were also concerned at their correspondence with Mr Waymouth, then counsel for the second respondents. They considered that Mr Broadbelt had lied and Mr Waymouth's correspondence was also unhelpful and inflammatory. The Tribunal has no role in commenting or deciding on the propriety or motives of any lawyer's letter. The Tribunal's role is only to determine whether Ms Gao made an offer/bid of \$720,000. All parties now agree that such an offer was made.

[21] The second respondents deny that this is the position. They have submitted that this is an appeal against the Committee's decision to take no further action and thus is an appeal against a discretion pursuant to s 89(2) of the Act. The Tribunal agree that this is the correct approach.

[22] The Tribunal's role when considering an appeal from an exercise of the discretion is limited to considering the grounds of appeal set out in the Court of Appeal decision of *May v May*¹ and the Supreme Court in *K v B*². In these cases the Court said that on an appeal from the exercise of a discretion the appellant must satisfy the Tribunal there has been an error of law or principle, or that the CAC considered irrelevant considerations, or failed to take account of relevant considerations, or the decision is plainly wrong.

[23] This does not mean that the Tribunal substitutes its own view but that the appellant must point out to the Tribunal an error of law or principle or that the CAC took into account irrelevant considerations, or that they failed to take into account relevant considerations, or that the decision is plainly wrong.

[24] Thus the appellants need to show that the CAC reached the wrong decision because of an error of law or was plainly wrong because Mr Broadbelt did not pause the auction, and/or he asked for a bid of \$720,000 and/or that he never discussed with the vendors increasing their reserve and that the expert evidence establishes that when a bid is made over the reserve the auctioneer is bound to put the property on the market, and then sell it at that price if there are no other bidders. The appellants can also show the CAC considered irrelevant matters or failed to consider others.

[25] There were two experts giving evidence for the respondents. Mr Abbott; an independent auctioneer at John Abbott International Sales Training had been an auctioneer since 1979 and had conducted 15,000 auctions in Australia and New Zealand. He concluded that Mr Broadbelt's actions in conducting the auction were entirely appropriate. He said as follows:

- (i) Mr Broadbelt received a bid of \$700,000 from Ms Gao and received no other bids. He then had three options:
 - (a) To pass the property in for failure to meet the reserve. or
 - (b) He could pause the auction and attempt to negotiate with the highest known bidder. or

¹ [1982] 1 NZFLR 165.

² [2010] (28 FRNZ 483).

- (c) He could place the vendor's bid between the bid of \$700,000 and the reserve price of \$715,000.

[26] Mr Abbott said that if Mr Broadbelt paused after the auction then the negotiations could have continued. Mr Abbott also felt a vendor's bid would have been inappropriate as was stopping the auction. Mr Abbott concluded that the best option was to pause the auction and to try and negotiate with the highest bidder. This enabled Mr Broadbelt to engage in private negotiations between Ms Gao and the vendor. Mr Abbott expressed the view that even if Ms Gao did not know that the auction was paused, [as she was not in the room or she did not hear Mr Broadbelt], then she must have realised that the auction had been paused when Mr Broadbelt began speaking directly and privately to her on the telephone. Once Mr Broadbelt had successfully negotiated a price of \$755,000 he reopened the auction, confirmed this bid and advised that the property was on the market.

[27] Mr Abbott concluded that Ms Gao's offer of \$720,000 was not a bid in the course of the auction because the auction had been paused, and at most it was an offer. He said that Mr Broadbelt had no obligation to sell to Ms Gao just because an offer exceeding the reserve had been made while the auction was paused. Mr Abbott said "*Mr Broadbelt had a fiduciary obligation to obtain the best possible price for his vendor. To suggest that a reserve price is to be disclosed to a purchaser would undermine the entire auction process.*"

[28] The expert evidence was also given by Richard John Valintine. Mr Valintine is an auctioneer at Bayleys Realty, and he had had an auctioneer's licence for approximately 40 years. He has been with Bayleys since 1995 and a full-time auctioneer for Bayleys since 1997. He also concurred that Mr Broadbelt had acted appropriately in the auction. He said that he had a duty to obtain the best possible price for the vendors and negotiating with the highest bidder was the best way to achieve this. He confirmed that an auctioneer is not required to announce that a property is 'on the market' once the reserve has been met and to sell it at that figure.

[29] Mr Valintine was given a copy of the REAA auction brochure. He commented that it did not appear to refer to circumstances such as the ones facing Mr Broadbelt and does not appear to record the fact that an auction could be paused or put into recess

whilst negotiations took place. Mr Valintine thought it needed updating, however the auction brochure on the Bayleys website does deal with these circumstances before Mr Broadbelt.

[30] In *Lake v Medical Council of New Zealand*³ the High Court held that where a disciplinary Tribunal receives expert evidence it can choose not to follow the evidence if it believes it is wrong, but cannot substitute its own views contrary to the expert evidence. Ms Burkhardt for the second respondents submitted that Mr Ward, the expert for the appellants, did not hold a real estate agent licence and therefore his evidence could not be compared to that of Mr Abbott and Mr Valintine, who gave evidence that the auction practice has changed over the years from that set out by Mr Ward and it is now quite normal to pause an auction and carry out private negotiations. Counsel for the respondent submitted that:

- The Tribunal can make a finding that a reserve can be changed, either up or down, during an auction.
- The Tribunal could find that the reserve did not alter, and as the negotiations took place in the context of a paused auction the only bid made during the auction over the reserve was the final bid of \$755,000.

The issues

[31] In line with the decision of *May v May* and the Tribunal's limited role on appeal from the exercise of a discretion, the Tribunal must look at the issues set out below:

- (a) Was the auction paused?
- (b) Can the vendor raise the reserve figure at any time during the auction?
- (c) Must the auctioneer announce that the property is on the market as soon as the reserve has been met?
- (d) Whether Mr Broadbelt's conduct during the auction process was fair and not misleading.

³ Auckland High Court 123/96, 23 January 1998.

- (e) Whether Ms Gooch's conduct during the complaints process was fair and not misleading.

Issue (a): was the auction paused?

[32] The CAC said at [3.1] that the evidence points towards the fact that Mr Broadbelt did in fact pause the auction and speak to his clients prior to speaking to the complainant. This was confirmed by Ms Peacock who recorded the bids and by Charmaine Wood who was helping the complainant. The CAC found that the auction was paused.

[33] At the hearing the Tribunal heard from Ms Gao who claimed that she did not hear any statement from Mr Broadbelt that the auction was paused and because of the short lapse of time between Mr Broadbelt talking in the auction, she did not consider that Mr Broadbelt had had time to speak to the vendors prior to discussing the price with her.

[34] The Tribunal have evidence from Ms Peacock. Ms Peacock was recording the bids. Her evidence was that Mr Broadbelt did pause the auction and used the words to the effect "*I'm going to pause the auction*". She said she saw Mr Broadbelt go out of the room to speak to the vendor.

[35] The Tribunal did not hear from Ms Wood but we have a statement from her. Ms Wood was on the phone to Ms Gao. She said she heard Mr Broadbelt explain to those in the hall that he would pause the auction and take the bid to the vendor. He then spoke to the vendors, went back to Ms Wood, spoke to Ms Gao, went back to the vendors, then spoke to Ms Gao again, then he returned to the front of the room and said he left with a bid of \$700,000 and now had an offer of \$755,000. He asked if there were any further bids. There were no bids and it was sold to Ms Gao.

[36] The Tribunal accept on the balance of probabilities the evidence of Mr Broadbelt, Ms Woods and Ms Peacock.

[37] On this issue the Tribunal do not find that the Complaints Assessment Committee made an error of law or principle, took into account irrelevant considerations, failed to take into account relevant considerations or the decision was plainly wrong.

Issue (b): can the vendors raise their reserve price?

[38] The first question is whether as a matter of fact the vendors did raise their reserve price. The evidence given by the vendors Mr and Mrs Wykes is helpful. Mrs Wykes said that they had not formally gone back to Mr Broadbelt to say that they were raising the reserve but they said to him what figure they wanted to achieve during the auction. Mrs Wykes confirmed that during the auction they felt that while they had set the reserve at \$715,000 it was possible to reach a higher figure. Mr Broadbelt also told them that he felt that it would be possible to get some more money from Ms Gao, the potential purchaser. Mr Wykes said words to the same effect. Mrs Wykes said that:

“Hayden clarified very clearly to us regardless of what we placed as a reserve he would not put the property on the market unless we gave him permission to do so, and when he came out and ... he told us he had paused the auction, he went back in to get more money, he came back out ...⁴

She confirmed that they hoped that Hayden could achieve our figure of \$760,000 through negotiations.⁵”

[39] The CAC found at [322]:

“Given our view that the auctioneer does not need to disclose that the property is on the market and the reserve has been met until the auctioneer determines it is appropriate, the question of whether the reserve was raised or lowered is irrelevant to this decision.”

[40] On this point the Tribunal make a finding of fact that the Wykes were keen to get as much as they could for the property and supported Mr Broadbelt’s attempts to get more money. The Tribunal also concurs with the CAC and experts’ view that Mr Broadbelt did not have to disclose that the property is on the market until he and the vendors agree it is appropriate to do so. Therefore the Tribunal do not find any error of law or principle taking into account irrelevant considerations, failing to take account of relevant considerations or the decision being plainly wrong by the CAC.

Issue (c): Must an auctioneer announce that the property is on the market as soon as the reserve has been met?

⁴ Notes of evidence pp 66–67.

⁵ Notes of evidence p 68.

[41] The CAC found that an auctioneer does not need to disclose that the property is on the market and that the reserve has been met until the auctioneer determines it is appropriate.

[42] The Tribunal accept the evidence of the experts for the respondent in this matter, and that an auctioneer does not have to announce a property is on the market until he/she and the vendors wish.

[43] This also logically makes sense as the auctioneer's fiduciary obligation is to act in the best interests of the vendor and that must mean getting the most money possible for the vendor on auction day. To have a hard and fast rule that once a reserve price had been met there is automatically a requirement that the property be on the market would, in our view, be detrimental to a vendor and the auction process and lead to potentially unfair behaviour towards the vendors. However auctioneers must also be clear that they do not mislead the purchasers during this process. We deal with this under issue (d).

[44] The Tribunal do not find therefore any error of law or principle that the CAC took into account irrelevant considerations or took into account relevant considerations or that the decision is plainly wrong, in reaching this conclusion.

Issue (d): was Mr Broadbelt's conduct during the auction fair and not misleading as regards to Ms Gao?

[45] The CAC found at paragraphs 320–322 that because Mr Broadbelt did not need to disclose that the reserve had been met, the question of whether he misled the complainants about the reserve price going up or used the word “*bid*” in his telephone conversation with Ms Gao was not critical to their decision because of their conclusion that the auctioneer did not need to disclose that the reserve had been met. The CAC said say that if Mr Broadbelt asked the complainants for ‘a bid’ in negotiating with a complainants at the \$720,000 mark then it was “*unfortunate and had the potential to mislead the complaints*”.

[46] There is unfortunately a tension between the auctioneer's obligations to the vendor and the duty not to mislead the purchaser on some of these more marginal issues. An auctioneer must behave fairly and reasonably at all times. Ms Gao's

contention is that she heard the word 'bid' over the telephone. We have been unable to determine on the evidence whether or not she did hear the word 'bid' and thus on the balance of probabilities [with the onus on Ms Gao] we did not find that Mr Broadbelt said 'bid'. Further we consider that Ms Gao should have realised that there had been a change in the process when Mr Broadbelt came to speak to her on the telephone rather than continuing with the auction process and began to negotiate a price with her. Ms Gao appears to have been concerned about the way in which the auction was run because of her discovery that the reserve price had initially been set at a lower figure. We suspect that she was disadvantaged by not being in the room and not being able to actually see what was happening, which would have made the process clearer to her. Mr Broadbelt has an obligation not to mislead her. However we do not find that the CAC erred in finding that there had been no misleading conduct by Mr Broadbelt. Therefore the CAC has not made an error of law taking into account the irrelevant considerations, failed to take account of relevant considerations or that the decision was plainly wrong.

Issue (e): was Ms Gooch's conduct during the complaints process fair and not misleading?

[47] This relates to an allegation that Ms Gooch signed as true and correct Mr Broadbelt's first statement which contained an error in that he did not mention the offer of \$720,000 made after the auction was paused. Having examined all the evidence about what Ms Gooch understood of the auction, as she was not at the auction at the time, we accept that her signing this statement as being correct was not an attempt to lie to the Tribunal or the CAC. Mr Broadbelt did make an error in this first statement. This was unfortunate but there is no evidence at all to suggest he was deliberately lying to conceal the facts and that Ms Gooch was a party to this lie.

[48] The onus too is on the appellants to prove that Ms Gooch misled the complainants and we are satisfied that on the balance of probabilities this fact has not been made out. There is no error of law or principle or failure to consider relevant matters, or taking into account irrelevant matters nor was the decision plainly wrong.

[49] Therefore the Tribunal have not found that the CAC have erred in their exercising of the discretion not to find Mr Broadbelt and Ms Gooch guilty of unsatisfactory conduct. The appeal is accordingly dismissed.

[50] There was some delay in getting the transcript to the parties with the final closing submissions of the respondents being received by the Tribunal on 19 October 2016. The Tribunal apologise to the parties for the delay.

[51] The Tribunal refer the parties to the appeal provisions of s 116 of the Real Estate Agents Act 2008.

Ms K Davenport QC
Chairperson

Ms C Sandelin
Member

Mr J Gaukrodger
Member

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