
Real Estate

Continuing Professional Development

Tender and auction

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Learning outcomes

At the end of this topic, you will be able to:

- describe the key considerations when offering property or land through tender or auction
- describe tender and auction processes and best practice
- explain the responsibilities of the auctioneer
- explain the implications of buying through auction to prospective purchasers or bidders
- describe mortgagee sales and the difference to non-mortgagee sales
- explain the Real Estate Agents Act 2008 (REA Act) and the Real Estate Agents Act (Professional conduct and client care) Rules 2012 (the Rules) in relation to tender and auctions sales
- describe your requirements under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act).

Key considerations when offering property or land through tender or auction

Property or land listed for sale by an agent through tender or auction should be sold under a sole agency agreement to ensure that one agency has control of the process required by either method of sale.

Regardless of sales method, you must make client vendors aware of the various possible methods of sale and how the chosen method could impact on the benefits you may receive (Rule 10.5). This is especially significant in auction sales where commission splits may occur.

Your obligation to client vendors under rule 9.1 also means that the method of sale selected must be in the best interests of your client, but also in accordance with the client's instructions. So, if the client instructs you to sell the property in a way that you don't think is in the best interests of the client, you still have to follow that instruction. You should however, explain to the client why the particular method of sale would not necessarily be in their best interests.

Buying and selling by tender

When a property is being sold by tender, prospective purchasers (the tenderers) submit confidential written offers for a property to the agent before a set deadline.

Unlike an auction, where prospective buyers can hear other people's offers, tenderers do not know what other people are offering in advance of the tender. Selling by tender allows details about the sale to stay confidential and allows all potential purchasers the same opportunity to make an offer.

Each tenderer prepares their best offer and submits it in a sealed envelope for the vendor to consider. Tenders can be accepted anytime up to the closing date and time.

Tenders are opened in front of the client or the client's lawyer and the Branch Manager or supervisor, usually after the tender closes.

A property can be sold before the tender date but must be advertised '*for sale by tender (unless sold prior)*'. All marketing material and tender documents must make this clear.

Sale by tender is commonly used to sell commercial property, and rural real estate (including farms) and residential property.



Key Point

Each tenderer submits their tender in a sealed envelope – the tender submitted is their best offer and is unknown by the licensee.

Tenders are opened in front of the client or the client's lawyer, and the Branch Manager or supervisor, usually after the tender has closed.

Tenders can be considered before the tender date if the property has been marketed as '*For sale by tender (unless sold prior)*'.

Key points about the tender process

- A property offered through tender can be sold before the tender date (though this practice is discouraged). For this to happen, the property must be advertised as '*for sale by tender (unless sold prior)*'. All marketing material and tender documents must make it clear that this is the case.
 - If a property is offered for sale before the tender date, potential purchasers can register their interest and ask to be informed if someone else makes an offer.
- Tenderers will be asked to fill in a legally binding agreement known as *The Particulars of Sale of Real Estate by Tender* (available from ADLS or REINZ) which includes the tendered price, deposit amount, settlement dates and any conditions attached to the offer. The vendor may also add conditions and delete standard clauses from the sale and purchase document.
- Tenderers must pay a deposit which is usually 10% of the offered price stated in the tender, but this can be negotiated. The deposit is returned to the tenderer if their tender is not successful
- Following the tender deadline, the licensee provides the tender offer(s) to the vendor. The vendor considers the offer(s) and decides which, if any, they wish to accept (based on price offered and any conditions).
- All tendered offers must be kept by the agent for 12 months (Rule 10.12 – refer to Appendix 1).
- If a tender is accepted by the vendor, the licensee must let the successful tenderer know. The successful tenderer is then in contract with the vendor, and the process of working through any conditions towards settlement begins.
- If a tender is rejected, the tenderer is under no legal obligation and is free to pursue other purchase options. Their tender offer and deposit should be returned to them as soon as is practicable.
- If none of the tenders reflects the price the vendor is willing to accept, or the conditions are unacceptable to them, the vendor can reject all tenders, and all deposits are returned.
- The vendor may choose to negotiate further, through the licensee, with any tenderer to the exclusion of any others after the tenders are opened.
- The licensee should follow the agency's policies and procedures for multiple offers if a multiple-offer situation occurs.

Read the following scenario and answer the question below.

Scenario 1

A licensed salesperson negotiated a sale by tender of a family home where the vendors were a separated couple. The successful tender offer (which was the highest) was accompanied by a post-dated cheque which was accompanied by a handwritten note saying *"overseas funds to cover this cheque will be in the a/c next week. If this is not acceptable, then please reject our tender"*.

The licensed salesperson explained to the vendors the terms of the tender and the associated risk of accepting the tender with a post-dated cheque. The licensed salesperson gave reassurance that she knew the tenderers and that they *'seemed to be a nice, regular, late middle-aged couple with grandchildren'*.

The vendors proceeded with the tender; the post-dated cheque was banked and, although originally honoured, the bank later said it made an error and stated the cheque would not be honoured.

The deposit was eventually refunded, and the sale did not proceed.

One of the vendors complained to the REA alleging, amongst other matters, that the licensed salesperson failed to explain the risks involved in accepting the tender, and the subsequent mishandling and misrepresentation of the post-dated cheque.

The allegations were passed to the Complaints Assessment Committee (CAC) which decided that no further action should be taken against the licensed salesperson.

The licensed salesperson's submission to the committee included remarks that the vendor's separation had been *'acrimonious'*. He went on to make disparaging remarks about one of the vendors, saying the vendor *'had lied to his wife'*, was *'in serious financial difficulties'* and sole custody of the children had been granted to his wife due to his *'mental state and his actions'*.

The vendor at the centre of the remarks appealed the *'no further action'* finding (by the CAC) to the Tribunal, alleging, amongst other matters, that the salesperson's remarks in their submission to the CAC amount to unsatisfactory conduct.

Case: [2017] READT 82

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

One of the key issues that the Tribunal needed to ascertain was whether the licensed salesperson's submission (a letter) to the CAC that contained the disparaging comments about the vendor constituted real estate agency work. If this was not the case, then a finding of unsatisfactory conduct under section 72 of the Real Estate Agents Act 2008 would not be available in respect of the letter. In that event, the letter would need to reach the higher threshold of disgraceful conduct under section 73(a) to be actionable under the Act.

Buying and selling by auction

An auction is an open sales process where prospective purchasers (bidders) bid against one another to buy a property.

Fair Trading Act 1986 and its impact on the auction process

The Fair Trading Act 1986 (FTA) **Section 36X** defines an auction as:

'a process in which property of any kind (including goods, services, and interests in land) is offered for sale by an auctioneer on behalf of a vendor, and—

- (a) bids for the property are placed with the auctioneer in real time, whether in person, by telephone, via the internet, or by any other means; and
- (b) the property is sold when the auctioneer so indicates.'

The FTA further clarifies when an auction starts and ends, in section 36ZA:

Section 36ZA Start and end of auction

- (1) An auction starts when the auctioneer invites the first bid from potential participants.
- (2) An auction ends when the auctioneer makes it clear that bidding is closed.
- (3) However, property that is offered for sale by auction must be treated as having been sold at auction, even if the bidding ceased without the property being sold, if—
 - (a) the auctioneer accepts a subsequent offer from a person who attended the auction, and
 - (b) that offer is accepted before the end of the first working day following the day of the auction.



Note

Online auctions such as 'TradeMe' or 'eBay' generally fall outside the FTA definition because property is usually sold directly by a private seller to a winning bidder and not through an auctioneer (who is 'in trade'). Such sites are usually just portals for members to buy and sell property.

Note that **Section 36ZE** of the FTA clearly states:

'Any bid at an auction may be withdrawn before the end of the auction'.



Note

Any closing bid made 'at the fall of the hammer' (when the auctioneer makes it clear that bidding has closed (section 36ZA(2)) may not be withdrawn.

The auctioneer's responsibilities

Under **Section 36ZB Notice to participants**, it is the auctioneer's responsibility to:

- display the terms of the auction and make all terms readily available to view by all participants attending in person
- ensure that the terms of the auction have been available to view both before and during the auction on a readily accessible website.

The notice of terms required by Section 36ZB must include the following information:

- Whether there is a reserve price.
- Whether vendor bids are permitted.
- Whether the vendor of the goods is selling the goods in a trade as a supplier (within the meaning of the Consumer Guarantees Act 1993) if the auction involves 'goods of a kind ordinarily acquired for personal, domestic, or household use or consumption.'

Vendor bids

Section 36ZD covers vendor bids:

36ZD Vendor bids

- (1) An auctioneer must not accept a vendor bid unless—
 - (a) the terms of the auction specify that vendor bids are permitted; and
 - (b) the auctioneer identifies each vendor bid as it is given; and
 - (c) the property is offered for sale with a reserve price and the vendor bid is less than the reserve price.
- (2) In this section, vendor bid means a bid made by the vendor or any person (including an auctioneer) acting as agent for the vendor.

A vendor bid means a bid made by the vendor, or any person (including an auctioneer) acting on behalf of the vendor.

A vendor bid has been traditionally used by the auctioneer to:

- start the bidding
- keep the bids moving
- to persuade bidders to raise their bids so they are closer to the reserve price.

However, in some cases vendor bidding has confused genuine bidders who did not understand that a vendor bid was in place or what its purpose was.

Under the **Fair Trading Act 1986 Section 36ZD** auctioneers cannot accept vendor bids unless the following requirements are met:

- The terms of the auction specify that vendor bids are permitted.
- The auctioneer identifies each vendor bid as it is given.

If the vendor, their agent or anyone else makes a vendor bid, they must identify themselves. As best practice and to avoid any confusion, the auctioneer should state 'This is a vendor bid' and avoid industry jargon such as 'The bid is with me'.

- The property is offered for sale with a reserve price, and the vendor bid is less than the reserve price.

The auctioneer (or anyone else acting for the vendor) will not be able to make a vendor bid at or over the reserve price. To do so will be a false or misleading representation under Section 14A(2) of the Fair Trading Act 1986 (discussed on the next page).

Vendor bids have been used to artificially inflate the price that is reported if a property is passed in at auction. (It does not sell because it does not meet the reserve price).

Reporting a final vendor bid (rather than genuine bid) can inflate the price expectations for a future auction, although there are no genuine bids at that price.



Note

If the property is unsold at the end of an auction, a vendor bid cannot later be referred to as the amount at which the property was passed in. To do so would be a false or misleading representation under section 14A(4) of the Fair Trading Act 1986 (refer to section below).

When vendor bids are misrepresentations under the Fair Trading Act 1986

Fair Trading Act 1986

14A When vendor bids are misrepresentations

- (1) This section applies where property (being goods, services, or an interest in land) is offered for sale—
 - (a) by auction (as defined in section 36X); or
 - (b) by any other bidding process in which all bids are disclosed.
- (2) The vendor of the property makes a false or misleading representation with respect to the price of the property if the vendor, or any agent acting on behalf of the vendor, makes a vendor bid for the property.
- (3) However, subsection (2) does not apply if—
 - (a) there is a reserve price for the property; and
 - (b) the bid is made before the reserve price is reached and is clearly identified as a vendor bid.
- (4) If property is unsold at the end of an auction or other bidding process referred to in subsection (1), any subsequent reference to a particular bid as being the amount at which the property was passed in is a false or misleading representation with respect to the price of the property if the bid was a vendor bid.
- (5) In this section, **vendor bid** means a bid made by the vendor or any person (including an auctioneer) acting as agent for the vendor.

You must comply with **section 14A** of the Fair Trading Act – “**When vendor bids are misrepresentations**” (see above).

This relates to where a property is unsold at the end of an auction or another bidding process where the bids are disclosed, and the end bid was a vendor bid.

If the price at which the bidding ended was a vendor bid, any reference to this price as being the actual price the auction was ‘passed in’ at is a false or misleading representation and a breach of section 14A.

Shill bids

Shill bids (also known as dummy bids, or phantom bids) are made by people who act as though they are genuine bidders but are bidding on behalf of the vendor to persuade genuine bidders to raise their bid. People making shill bids never intend to purchase the property at auction. This type of bidding has never been allowed and remains a breach of the Fair Trading Act.

Implications for prospective purchasers or bidders

- Some agencies require prospective purchasers who are considering buying at auction to register their intention to bid.
- You need to ensure all pre-sale legislative obligations have been met. For example, all prospective purchasers must have been provided with a copy of the NZ Residential Property Sale and Purchase Guide.
- You need to ensure the parties considering entering into the auction agreement are aware that if they win the auction, they are committed to purchasing the property and must pay the purchase deposit on the auction day.
- It is a good idea to ensure that the bidders have financial pre-approval.
- The Overseas Investment Act 2005 (OIA) limits the types of property that can be purchased by people who are not 'ordinarily resident in New Zealand' and some agencies require overseas buyers to obtain pre-approval before they can bid at auction.
 - It is sensible to ensure that ALL bidders have been identified and that there is no issue of exclusion due to Overseas Investment Office (OIO) consent requirements. If necessary, the bidders should have a letter from their lawyer stating they meet OIO requirements.
- The OIA also requires all purchasers to complete a Residential Land Statement.
 - It is sensible to ensure that ALL bidders have completed their Residential Land Statement before the commencement of the auction.
- Auction sales and purchases are unconditional.
 - If a bidder wants to change anything in the agreement or put any conditions on the sale, they must arrange this with a variation before the auction.
 - At the fall of the hammer, when the winning bid is accepted, and the auctioneer has closed the auction, the sale is unconditional, and the successful bidder is legally committed to buying the property.
- The agreement used is the latest version of the *Particulars of Sale of Real Estate by Auction* form (available from ADLS or REINZ) or a similar legal document.
- When a property is 'passed in' at auction, the vendor may agree to negotiate with any prospective purchaser who attended the auction, usually the highest bidder.
 - If a prospective purchaser attended the auction, entered into negotiations with the vendor, and the auctioneer accepted an offer *before the end of the first working day following the day of the auction*, the property is deemed to have been sold by auction. The '*Particulars and Conditions of Sale of Real Estate by Auction*' document will be used

- However, if a prospective purchaser attended the auction but wished to negotiate with further terms of sale (i.e. make a conditional offer), the current ADLS *Agreement for Sale and Purchase of Real Estate* should be used
- Where a multiple-offer situation occurs, you should follow the agency's processes and procedures for multiple-offers.
- If a side variation is signed before the auction, for example, about the deposit or the settlement date, it is best practice to make this option available to all bidders.
- The successful bidder will be required to pay the deposit immediately. The deposit is usually 10%.
- A bid accepted on the day is unconditional, so potential purchasers should get a title search, builders report and Land Information Memorandum (LIM) report before auction day. Sometimes some of this information, for example a LIM, is provided by the real estate agency.
- Bidders will also need to arrange any mortgage and finance in advance and consult appropriate parties for any legal and technical advice before the day of the auction.
- Auctions are often used to market higher value real estate, and conversely, mortgagee sale auctions where a quick sale may be required.

Key points about the auction process

- A vendor choosing to sell by auction should have a sole agency agreement with an agent and must agree on a marketing plan with the licensee.
- The licensee should establish a reserve price with the vendor before the auction. This is the lowest price the vendor is willing to accept for the property.
- Properties offered through auction can be sold before the advertised auction date if the auction terms and conditions allow it. If this is the case, all marketing material should make it clear that offers will be considered before the auction.
- When an offer is received before the auction date, the vendor must be made aware of the offer and decide whether to accept the offer and cancel the auction or continue with the auction, in which case, the offer as the first bid.
- Potential purchasers should be encouraged to register their interest and ask to be informed if a 'pre-auction' offer is made.
 - If a pre-auction offer is made, and the vendor accepts the offer and wishes to continue with the auction process, the auction will proceed (possibly at an earlier date than originally advertised)
- Bidding usually starts below the reserve price. If bids reach or exceed the reserve, then the highest bidder will win the auction and be immediately legally committed to buying the property upon the fall of the hammer

- As stated above, Section 36ZA(2) of the FTA states that *'An auction ends when the auctioneer makes it clear that bidding is closed'*.
 - The FTA states in section 36ZE:
'Any bid at an auction may be withdrawn before the end of the auction.'
 - However, a bid cannot be withdrawn once the hammer has fallen
- A vendor can withdraw the property at any time before the fall of the hammer.
 - If bidding does not reach the reserve price, the auctioneer will pause the auction and ask the vendor for further instructions.
 - If the vendor does not wish to sell below their reserve price, the auctioneer will conclude the auction without the property being sold; for example, declare the property is 'passed in.'
 - If the vendor wishes the auction to continue and bidding stops close to the reserve price, and the vendor agrees to accept the last bid, the auctioneer may say the property is now 'on the market'. This means the reserve price no longer applies.
 - The auctioneer will continue from that point and accept the highest bid that is made when the auction resumes, even if the reserve price is not reached.
 - Where a sale is not concluded, the vendor may ask the licensee to approach the highest bidder after the auction to negotiate a sale.

Mortgagee sales by auction or tender

Notice by mortgagee

It is common practice for a mortgagee, for example, a bank, to approach a real estate agent to conduct a mortgagee sale. These are usually sold by auction but may also be sold by tender. The property is usually marketed for four weeks and is clearly advertised as a mortgagee sale.

A mortgagee sale usually occurs when the mortgagor (the registered owner/proprietor) has failed to meet their obligations under the terms of their mortgage, for example, if they failed to meet mortgage repayments.

Section 119 of the Property Law Act 2007 (refer below) sets out specific requirements a mortgagee must follow when dealing with a mortgagor in default.

The mortgagee is required to serve notice to the mortgagor of the default (s119(1)(a)) and inform the mortgagor that upon expiry of the notice if the default has not been remedied (s119(1)(b)) the following powers will become exercisable:

- The mortgagee's power to enter into possession of the land (s119(2)(a)) and take over as the landlord.
- The receiver's power to manage the mortgaged land or demand and recover income (s119(2)(b)).
- The mortgagee's/receiver's power to sell the mortgaged land (s119(2)(c)).

119 Notice must be given to current mortgagor of mortgaged land of exercise of powers, etc

- (1) No amounts secured by a mortgage over land are payable by any person under an acceleration clause, and no mortgagee or receiver may exercise a power specified in subsection (2), by reason of a default, unless—
 - (a) a notice complying with section 120 has been served (whether by the mortgagee or receiver) on the person who, at the date of the service of the notice, is the current mortgagor; and
 - (b) on the expiry of the period specified in the notice, the default has not been remedied.
- (2) The powers are—
 - (a) the mortgagee's power to enter into possession of mortgaged land:
 - (b) the receiver's power to manage mortgaged land or demand and recover income from mortgaged land:
 - (c) the mortgagee's or receiver's power to sell mortgaged land.
- (3) Subsection (1) is subject to sections 125 and 126.
- (4) A notice required by this section may be given in the same document as a notice under section 118.

Notice must be given to the mortgagor using the prescribed form as set out in section 120 of the Property Law Act 2007 and the following information must be included:

- The nature and extent of the default (s120(1)(a)).
- The action required to remedy (if possible) (s120(1)(b)).
- The period within which the default must be remedied which must not be less than 20 working days after the date of service (s120(1)(c)).
- The consequence if default is not remedied (s120(1)(d)).

120 Form of notice under section 119

- (1) The notice required by section 119 must be in the prescribed form and must adequately inform the current mortgagor of—
 - (a) the nature and extent of the default; and
 - (b) the action required to remedy the default (if it can be remedied); and
 - (c) the period within which the current mortgagor must remedy the default or cause it to be remedied, being not shorter than 20 working days after the date of service of the notice, or any longer period for the remedying of the default specified by any term that is expressed or implied in any instrument; and
 - (d) the consequence that if, at the expiry of the period specified under paragraph (c), the default has not been, or cannot be, remedied,—
 - (i) the amounts secured by the mortgage and specified in the notice will become payable; or
 - (ii) the amounts secured by the mortgage and specified in the notice may be called up as becoming payable; or
 - (iii) the powers of the mortgagee or receiver specified in the notice will become exercisable; or
 - (iv) more than 1 of those things will occur.
- (2) A notice required by section 119 may specify that the action required to remedy the default includes the payment (whether to the mortgagee or receiver) of a specified amount, being the reasonable costs and disbursements (whether of the mortgagee or receiver) in preparing and serving the notice.

Terms of a mortgagee sale

A mortgagee sale has different terms and conditions from non-mortgagee sales. For example, most mortgagee sales:

- are not offered for sale with vacant possession
- do not include chattels (because it cannot be warranted that they are unencumbered)
- do not include warranties, for example, building permits, Code of Compliance, clarity around boundaries
- do not include insurance on the fall of the hammer
- State whether vendor bids are permitted.

Full details of sale conditions are usually contained in associated documentation, for example, auction particulars and conditions of sale, or tender documents. Licensees should ensure they are familiar with the terms and conditions of the sale document.



Note

Licensees should ensure that any prospective purchaser is provided with any associated documentation that is available from the agency engaged to carry out the mortgagee sale and to carry out their own 'due diligence' on the property. They should also be advised to seek independent legal and technical advice, and fully satisfying themselves of all aspects of the property.

Reserve at mortgagee auction

The reserve is set by the mortgagee before the auction and is confidential to the mortgagee and the auctioneer.

Withdrawing a mortgagee sale

Up until the point of sale, a mortgagor has the right to repay any outstanding mortgage, in consultation with agreed terms of the mortgagee. If this happens, the property is withdrawn from sale.

Tenanted property

When a landlord is in default of their mortgage repayments and the mortgagee exercises their right to serve notice to the mortgagor, they have certain legislative requirements to meet. These include giving the mortgagor:

- a minimum of four weeks' notice explaining the nature and extent of the default
- the date by which the mortgagor must remedy the default
- information about the implications if the default is not remedied in the specified time (for example, to sell the property).

If the default isn't remedied the mortgagee, for example a bank, can repossess the property and becomes the landlord. Upon taking possession of the land, the mortgagee is then bound by the Residential Tenancies Act 1986 and any tenancy agreement. Tenants will be required to make rent payments directly to the mortgagee.

Any bond held by Tenancy Services will remain and the mortgagee has 10 working days to notify Tenancy Services they have taken possession. Tenancy Services will then replace the mortgagor with the mortgagee on the bond record. If the property is put up for sale, the same obligations required by a landlord applies to the mortgagee. When the property is sold, at settlement the purchaser becomes the new landlord and inherits the existing tenancy agreement in its entirety.

The mortgagee has special rights when dealing with a fixed-term tenancy. They are entitled to give notice to end the tenancy as if it were a periodic tenancy unless an alternative agreement was made. The same rights apply to the tenant to give notice to end the fixed-term tenancy as if it were a periodic tenancy.

Source:

[tenancy.govt.nz](https://www.tenancy.govt.nz) - mortgagee sale section under 'Ending a tenancy'.

Read the following scenario and answer the question.

Scenario 2

During a mortgagee auction (where the mortgagee was in possession) the domestic partner of the mortgagor (the registered owner) issued a trespass notice against the agency and the licensed salesperson.

Factual background:

A New Zealand bank instructed the agency on a mortgagee sale of a property in Queenstown. During the listing period, the registered owner of the property advised the licensed salesperson of the existence of a lease on the property, but no lease document was produced.

The prospective purchaser (one of the complainants) viewed the property which was intended initially for rental until the prospective purchaser and her husband could relocate to Queenstown from Tauranga.

Before the auction, the licensed salesperson emailed the *Auction Particulars and Conditions Agreement* form to the prospective purchaser and advised them to seek independent legal advice. The salesperson also advised that vacant possession was not guaranteed.

The auction sale proceeded but was paused when the domestic partner of the registered owner arrived, demanding the auction be stopped, and stating it was illegal. He then handed the licensed salesperson a form of trespass notice, forbidding the agency or any of its members from entering the property.

Concerned about disclosure issues, the agency immediately sought advice from the mortgagee who, in turn, consulted with their solicitors. The legal advice was that the trespass notice was in-effective and instructions were given that the auction should proceed.

The auction proceeded and resulted in a sale of the property.

After the auction, the successful purchaser became aware of the trespass notice and complained to the REA based on non-disclosure of the notice either by the agency or the licensed salesperson before the auction.

Case: [2015] NZREADT 79

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

The original case was heard by a CAC which found the licensee had breached their disclosure duty by not informing the purchaser of the 'purported lease' and trespass notice. The licensee was found to have engaged in unsatisfactory conduct and was censured and fined \$1,500.

The licensee appealed the findings to the Tribunal which overturned the CAC decision.

Note the Tribunals comments:

- [para 79] 'We take the view that the conduct of the licensee in the context we have detailed above cannot be faulted.'
- [para 81] 'Having said all that, we generally agree with the Authority, and its counsel, that particularly at mortgagee sales, agents must be careful to disclose any material fact or issue to all prospective purchasers. However, we find that on the particular facts of this case it was not necessary for the events relating to the [domestic partner] and his purported trespass notice to be disclosed.'
- [para 82] 'Accordingly this appeal is allowed, and the finding of unsatisfactory conduct decision and penalties against the licensee salesperson of the Committee **are hereby quashed**, and we find that no further action is to be taken on the relevant complaints.'

Vendor selling goods in trade as a supplier

Under section 36ZB of the Fair Trading Act 1986, a vendor who is 'selling goods in trade as a supplier' within the meaning of the Consumer Guarantees Act 1993 must provide notice of this in the notice of the terms of the auction.

For example, this would apply to sales of residential real estate by a developer where chattels are included in the sale.

Developers selling at auction, therefore, need to consider the warranties under the Consumer Guarantees Act about any chattels included in the sale and introduce clauses excluding the chattels if appropriate.

In the case of a private sale, the vendor would not be a supplier (in trade) under the Fair Trading Act / Consumer Guarantees Act.

Where the Consumer Guarantees Act would normally apply, the vendor 'in trade' may exclude the application of that Act if the property is purchased by a person who is also 'in trade'. However, they can only do this if the notice of auction terms clearly states that this exception applies (Section 36ZC).

Disciplinary Tribunal - guidance on auction best practice

Read the following scenario and answer the questions about the rules. (Refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012).

Scenario 3

A Complaints Assessment Committee laid a charge of misconduct before the Tribunal under section 73(b) of the Real Estate Agents Act 2008. The CAC alleged that the licensee's conduct constituted seriously negligent or seriously incompetent real estate agency work.

Summary of the case:

A prospective purchaser of a property being sold at auction complained to the Real Estate Authority (REA) about the conduct of the listing salesperson.

The prospective purchaser viewed the property with the listing salesperson and intimated an interest in the property, stating a budget of \$1.2million and a desire to purchase the property 'cheaply'. He also stated that he wanted to bid under a false name by phone.

An *Authority to Bid by Phone* form was duly completed and signed by the prospective purchaser and was approved by the vendor.

The prospective purchaser was known to another licensee from the same agency, and the purchaser instructed the listing salesperson to keep his interest in the property confidential from the other licensee. There is uncertainty around whether either party agreed to this request.

The listing salesperson spoke with the other licensee, who expressed concern about the prospective purchaser. From these discussions, and further discussions with the branch manager, the listing salesperson formed the impression that "*he did not see the complainant [prospective purchaser] in the running*". However, at no time before the auction did the listing salesperson seek clarity with the prospective purchaser about his willingness or ability to complete the purchase if he was the successful bidder.

A reserve price of \$1.2M was set at the reserve meeting with the vendor.

At the auction, the listing salesperson spoke with the prospective purchaser on the phone as agreed and placed seven bids on his behalf, up to a bid of \$1.1million.

The branch manager then spoke with the prospective purchaser and placed two more phone bids, up to a bid of \$1.15million.

The bidding stalled at \$1.16million. The listing salesperson spoke with the prospective purchaser at that time and promised to call him back when the property was on the market.

The reserve was reduced to \$1.16million, and the property was announced as being on the market.

The listing salesperson then called the prospective purchaser, and a discussion took place during which the prospective purchaser indicated that while reluctant, he could go higher; a top bid of \$1.17million. At this point the listing salesperson entered a discussion with the prospective purchaser, outlining his concerns and stating that his reputation with the agency was “*not really the best*” and inferred that his discussions with the other licensee within the agency did not hold him in a positive light.

During this conversation, the auctioneer gave all bidders the opportunity to place further bids, before calling the property three times and then calling it as sold to another purchaser for \$1.16m.

Case: [2018] NZREADT 11

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Admission

The listing salesperson admitted that his conduct in not placing a bid beyond \$1.16M on behalf of the prospective purchaser “*constitutes seriously incompetent or seriously negligent real estate agency work and is therefore misconduct...*”

[para 12] ‘The Tribunal accepts that [listing salesperson’s] admission is appropriate. His failure to tell the complainant that the auctioneer was giving prospective purchasers a last opportunity to place bids, and his failure to obtain instructions as to whether to place a further bid or bids, constitutes seriously incompetent or seriously negligent real estate agency work.’

Finding

The Tribunal found the listing salesperson guilty of misconduct under s 73(b) of the Act.

Discussion

The Tribunal agreed with the submission by the CAC that the listing salesperson should have addressed any concerns he had about the prospective purchaser in the period before the auction, rather than in the final stages of the auction, and stated:

[para 28] ‘...the [listing salesperson’s] failure to do so was a serious breach of his professional obligations.’

When making its orders, the Tribunal took into consideration the listing salespersons acknowledgement of wrongdoing and early guilty plea to the charge, stating the acknowledgement and guilty plea distinguished this case from other similar cases.

As such, the listing salesperson was censured and ordered to undertake further education.

Disciplinary Tribunal - precedent case

Read the following scenario and answer the questions about the rules. (Refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012).

Scenario 4

Appeal by complainants in a CAC case.

Background information:

A complaint was received by the REA from a purchaser who successfully purchased a property through phone bidding at an auction. The complaint was laid against the conduct of an auctioneer.

The complainant put in an opening bid of \$700,000. This was said to be the highest and only bid.

When no further bids were received, the auction was paused. At that time the auctioneer spoke directly to the complainant by phone and asked if she could put in a higher bid. She responded with an increased offer of \$720,000; the auctioneer said he needed to talk with the vendors.

Upon his return, he informed the complainant of a required price of \$760,000. The complainant responded with an offer of \$750,000 which was put to the vendors. Once again the auctioneer returned with a vendor price of \$755,000. This was duly accepted by the complainant who was then informed that \$755,000 would be put to the floor and if there were no higher bidders, she would buy the house at that price.

The auction proceeded, no further bids were offered, and the property was purchased at \$755,000.

After the auction had concluded, the complainant was informed by another licensee that the reserve for the property had been \$715,000 (*Note: the CAC found this licensee had engaged in unsatisfactory conduct by her actions (knowledge of the reserve and disclosing it to the complainants and lying to the CAC)*).

The complainant alleges that her initial increased offer of \$720,000 was not presented and that she had been misled into bidding \$35,000 more than needed.

The CAC dismissed the complaint, having preferred the version of events as provided by the auctioneer over that of the complainants.

The Tribunal, in considering the case, stated [para 21] 'the key focus was an appeal against the committee's decision not to find the licensee guilty of unsatisfactory conduct, and to take no further action...' and to ascertain if the CAC had reached the wrong decision.

Case: [2016] NZREADT 82

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Key comments noted from the CAC that the Tribunal endorsed are:

[para 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 [complainants] 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.'

Furthermore, the Tribunal stated:

[para 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.'

Expert evidence provided to the Tribunal included comments from Mr Abbott who concluded:

[para 26] '... that the best option was to pause the auction and to try and negotiate with the highest bidder...Once [the auctioneer] had successfully negotiated a price of \$755,000 he reopened the auction, confirmed this bid and advised that the property was on the market.'

[para 27] '...[the auctioneer] 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.'

The Tribunal also noted:

[para 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...we do not find that the CAC erred in finding that there had been no misleading conduct by [acutioneer]...'

The appeal was dismissed.

The Real Estate Agents Act and the Rules in relation to tender and auctions sales

Licensees have responsibilities when dealing with **all** types of real estate transactions and methods of sale, including:

- Professional conduct and competence standards
- Duties and obligations in terms of client and customer care
- Requirements of the Real Estate Agents Act and other legislation

Some of these responsibilities have particular significance when dealing with tender or auction sales.

Payment of auction proceeds

Although Section 36ZF of the Fair Trading Act 1986 prescribes the procedures that must be followed when making payment to auction vendors, note that 36ZF confirms that in the case of real estate auctions conducted by licensees, the provisions of the Real Estate Agents Act 2008 apply instead.

Sections 122 and 123 of the Real Estate Agents Act 2008 relating to receipt and holding of money must be followed in all real estate transactions regardless of the method of sale.

The relationship between a prospective client's choice about how to sell and licensee's benefits

Regardless of sales method, you must make client vendors aware of the various possible methods of sale and how the chosen method could impact on the individual benefits you may receive. This has particular significance in auction sales where licensees' commission splits are typically greater.

Your obligation to client vendors means that the method of sale selected must be in the best interests of the client and following the client's instructions (refer to rule 9.1). If your client instructs you to sell the property in a way that you feel isn't in the best interests of your client, you have to follow that instruction (but you should also explain to the client why the particular method of sale would not necessarily be in their best interest).

Under Rule 10.5, you must disclose any benefits to you that arise from selling by auction.

Because your client relies on your advice, it is important they can evaluate the information you give them and understand how you will benefit from the decisions they make about the property transaction.

The Overseas Investment Act 2005 in relation to tender and auctions sales

The Overseas Investment Act 2005 (OIA) regulates the ownership of sensitive land, significant business assets and the fishing quota by 'overseas persons'.



Note

An individual is considered to be an '**overseas person**' when they are neither a New Zealand citizen nor ordinarily resident in New Zealand, or for companies, incorporated overseas; or they are companies, trusts or joint ventures 25% (or more) owned or controlled by an overseas person or persons. (refer section 7(1) of the OIA).

Full details of **Who are overseas persons** are stated in **Section 7** of the OIA available from legislation.govt.nz

The definition of *sensitive land* includes 'residential land' and refers to properties that are classified as 'residential' or 'lifestyle' for rating valuation purposes. This not only includes apartments, rental flats, and unit title carparks in residential buildings but also what may be considered commercial land — for example, bare development land for apartments or residential subdivisions, or retirement villages.

Consent must be obtained from the Ministers of Finance and Land Information New Zealand (LINZ) before overseas investment in sensitive land. Consent may be sought by applying in writing to the Overseas Investment Office (OIO), which is part of LINZ.



Note

Licensees working with a prospective purchaser who they believe may fall under the jurisdiction of the OIO requirements should ensure they advise the prospective purchaser to seek OIO consent before any auction they wish to bid at, or tender they wish to submit.

Anti-money laundering

Real estate agents are required to report suspicious activities.

Under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act), real estate agents are deemed to be reporting entities and are required to report suspicious activity to the NZ Police Financial Intelligence Unit (FIU).

What is suspicious activity?

AML/CFT Act Section 39A defines suspicious activity as:

- an **activity** undertaken where:
 - a person **conducts or seeks to conduct a transaction** through a reporting entity, or
 - a reporting entity **provides or proposes to provide a service** to a person, or
 - a person **requests** a reporting entity **to provide a service or makes an enquiry** ...in relation to a service; **and**
- the reporting entity has **reasonable grounds to suspect** that the **transaction or proposed transaction**...may be relevant to –
 - investigation of money laundering
 - breaches of law (Misuse of Drugs Act 1975; Terrorism Suppression Act 2002; Proceeds of Crime Act 1991 or Criminal Proceeds (Recovery) Act 2009;

So, Suspicious Activity Reports (SARs) apply to:

- transactions
- proposed transactions
- services
- proposed services
- inquiries.

Typical money laundering activities include:

- complex or unusually large transactions that are out of step with what you'd expect from the customer
- unusual patterns of transactions or activity that have no apparent business or legal purpose
- any other activity that appears to be related to criminal activity, for example, suspected terrorism, terrorism financing.

A transaction may have many factors that, when considered individually, does not raise suspicion, but, when considered collectively, suggests criminal activity. The challenge is making an objective judgement based on what might be deemed 'suspicious activity' and submitting the appropriate report.

Reporting requirements

You **must** submit a SAR report as soon as practicable after you have reasonable grounds for suspicion; and no later than three working days after you have gathered enough information to substantiate your suspicion. There are no monetary thresholds for SARs.



Key Point

It is important to note that you **must not disclose SAR information, or the existence of any SARs, to customers.**

This is to protect the identity of staff and reporting entities who submit SARs and ensure their safety. It also avoids alerting the customer to the possibility of an investigation.

The DIA has stated that:

'It is not a defence that you did not actually consider an activity to be suspicious in circumstances where you objectively should have'.

Source: refer page 20, DIA Guidelines – August 2018

Note: The FIU released a Suspicious Activity Reporting Guideline 2018. This is available from police.govt.nz under 'Publications and statistics'.

Prescribed transaction reports (PTRs)

Real estate agents are required to report certain prescribed transactions to the FIU.

The FIU explains a Prescribed Transaction Report (PTR) as a transaction conducted through a reporting entity in respect of:

- An **international wire transfer** of NZD\$1,000 and over (also known as International Funds Transfers or IFTs) where at least one of the institutions (i.e. ordering, intermediary or beneficiary institution) involved in the transaction is **in** New Zealand, and at least one is **outside** New Zealand
- A **domestic physical cash transaction of NZD\$10,000 and over** (also known as Large Cash Transactions or LCTs) which are transactions in New Zealand involving the use of physical currency (i.e. coin and printed money designated as legal tender, and circulates as, and is customarily used and accepted as a medium of exchange in the country of issue).

Source: search for 'prescribed transactions' at police.govt.nz.



Key Point

PTR reporting is designed to make it more difficult for criminals to use multiple small transactions, multiple senders or multiple recipients in order to avoid detection.

Wire transfers

Section 5 of the AML/CFT Act provides a definition of a wire transfer which, in summary, means transactions to transfer funds by electronic means (including instructions sent via the SWIFT network or by Internet-based systems).

Note that the requirement to make a PTR is triggered by an international wire transfer of NZD\$1,000 or more; not a domestic wire transfer (refer to section 27(7)).

The FIU has a fact sheet regarding wire transfers.

Source: search for 'wire transfers' at fma.govt.nz

Further reference material

REA provide information about Tenders and Auctions at rea.govt.nz

REINZ provides Best Practice Guides for tender and auction reinz.co.nz