

Q&S CONVEYANCING UPDATE

ISSUE 7, 25 JUNE 2008

RESERVE PRICE AT AUCTION NOT ACHIEVED BUT AUCTIONEER ACCEPTS BID ANYWAY

We were recently contacted by a Seller whose property was knocked down at auction below the reserve price. The Seller didn't want to accept the lower price or complete the contract and wanted to know his rights. He maintained that at no time did he authorise a sale at the lesser price.

The Agent and Auctioneer were appointed by the Seller pursuant to a PAMD Form 22A (version 3) ("the Appointment") which stated in Part 4.2 that *"the Seller reserves the right to set the reserve price at a date prior to the auction."*

Clause 11 of the Standard Conditions attached to the Appointment deals with auctions and in particular provides that:

1. The reserve price is as set out in the Appointment or as instructed by the client in writing prior to the time of the auction; and
2. The conditions of sale shall be those set out in the Conditions of Sale by Public Auction (for) Real Property and the terms of the relevant REIQ Contract of Sale.

The Seller had signed a reserve letter prior to the auction confirming the reserve price for the property. Clause 2 of the relevant Conditions of Sale by Public Auction for Real Property stated that *"the highest approved bidder shall be the Buyer subject to the Sellers approval and the reserve price, if any."*

Another Condition authorised the Auctioneer to sign the Contract of Sale on behalf of the Buyer and the Seller after the Auction. The Seller was interstate and the Auctioneer signed the contract on the Seller's behalf.

From the facts above, we concluded the following:

1. That the Auctioneer had no authority to sell the property below it's reserve price;
2. The Contract of Sale executed by the Buyer and the Auctioneer (on behalf of the Seller) after the auction was not binding upon the Seller as the Seller had elected not to approve the highest bid by the Buyer.

The old English case **Fay -v- Miller, Wilkins and Company [1941] Ch 360** and subsequent Australian decisions shows that in circumstances similar to those above, a Contract is not be binding on the Seller who may cancel it.

If the Seller decides, like our client did, to cancel the contract the Auctioneer and the Agent are liable to the Buyer for damages for breach of an implied warranty of authority.



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Agents and Auctioneers should be careful on Auction day that they are not acting beyond their authority when selling a property at Auction.

If the Seller authorises a sale at a price less than the written reserve price prior to or on auction day then this amendment to the authority to sell should be immediately and adequately recorded preferably in writing.

Failure to do so may result in a waste of time, an unhappy and frustrated Buyer and the Agent and the Auctioneer may lose their entitlement to commission and open themselves up to be sued by the Buyer .

**Richie Muir,
Solicitor**

If you would like to ask any question about this or any other similar issue Richie may be contacted on 38212766 between 8.30am to 5pm Monday to Friday.

Quinn & Scattini Lawyers has offices in Brisbane, Beenleigh, Caboolture, Southport, Ipswich and Cleveland. In addition to residential and commercial Conveyancing services, our team of experienced lawyers practice in Business Law, Commercial Litigation, Property Law, Wills & Estates, Criminal Law and Family Law.

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