

A lot of trouble

6 December 2013

Peter Taylor explores where auctioneers stand when a purported property owner turns out to be a fraudster

The case of *Greenglade Estates Ltd v Chana and another* [2012] 3 EGLR 99 has highlighted concerns of auctioneers that they may be liable for frauds committed by clients who allege they own property but do not.

In this case a third party fraudulently represented to Strettons, a well-known and respected firm of chartered surveyors and auctioneers, that he owned a property.

The property was put up for sale by auction, but the lot failed to reach its reserve price and was not sold. Immediately afterwards, a Mr Steinberg (as representative of a consortium unconnected with any fraud) approached the auctioneer with a view to purchasing the property by private treaty. The auctioneer, having referred to his apparent principal, agreed a sale of the property and a sale memorandum was completed, signed by the buyer and by the auctioneer as agent for the seller.

Auctioneers certainly carry out estate agency work. But their agency goes much further than that of an agent in a private treaty sale

A few days later the auctioneer wrote to the buyer saying:

"Since the auction a third party has alleged that he owns this property? and it should not have been offered for sale. This party has not provided any documentary evidence of identity or ownership but we are treating the allegations seriously and the matter has been reported to the police."

The true owner refused to complete the sale on the basis that he was not a party to the sale contract. The buyer served a completion notice and then sued for specific performance of the sale contract.

The proceedings against the true owner were dropped (the court accepting that Strettons' client was not the real owner) but the buyer had also sued the auctioneers for breach of warranty that it had authority to sell. The trial judge held that while Strettons was clearly the victim of fraud, the buyer was entitled to damages and the appropriate measure "is accordingly the value of the property less the agreed price".

Auctioneers' authority

So, what is the basis of this warranty of authority and can or should auctioneers seek to exclude liability?

The auctioneer is clearly the agent of the person giving them instructions. See the definition of 'Estate agency work' in the [Estate Agents Act 1979](#).

Auctioneers certainly carry out estate agency work. But their agency goes much further than that of an agent in a private treaty sale:

- within the scope of their instructions auctioneers represent the seller, and make decisions on the seller's behalf
- they actually sell the property for the seller ? they do not just introduce seller and buyer and leave the parties to exchange or not
- auctioneers will usually have express authority to sign the sale memorandum ? in Condition A2 of the [Common Auction Conditions](#) it is expressly provided that the auctioneer has authority to sell each lot and sign the sale memorandum.

Harvey and Meisel's *Auctions Law and Practice* suggests that auctioneers in any event have an implied warranty of authority.

In the Strettons' case, counsel cited *Collen v Wright* [1857], which states that the warranty exists: "whether the agent's authority is express or implied".

As a matter of common sense, auctions simply cannot work if the auctioneer does not have the power to sell the property. Whether the auction documents set out the auctioneers' powers or not, the sale contract is made on the fall of the hammer and the signing of a memorandum is evidentiary only. It is the auctioneer (not the seller) holding the hammer and it can only be the auctioneer's own contract.

Limiting liability

In its Common Auction Conditions, RICS provided at Conditions A4.1 and A4 that the auctioneer is not liable for information supplied by others. The auction advisory committee considered extending this to state that the auctioneer has not investigated the seller's title (i.e. the seller's right to sell the property) and makes no warranty that the seller owns what the seller purports to sell.

Additional wording of this sort might give rise to a defence for the auctioneer but unless made in a very clear statement it could well be struck down as an unfair contract term.

But can an auctioneer realistically claim:

"I am acting for X. I have X's authority to sell the lot even though X might not own it. I am not liable if X does not own it?"

What good is X's authority to sell if X does not own the lot? No good at all.

Even if such a qualification is feasible, such a statement would undermine the attractiveness of the whole auction process.

Getting protection

Property transactions are a team game ? each professional needs to work in conjunction with the others to get the right result.

Philip Waterfield of Strettons writes that:

"The sale of property by public auction relies on input from several parties, not least lawyers and auctioneers, and while both might go beyond the required usual diligence, this case has highlighted that if a fraudster wants to commit what is effectively a crime, the main fall guy in any dispute over ownership, and significantly the owner's authority to sell, will unwittingly be the auctioneer."

Unfortunately property fraud is an increasing risk. Open registers make it easier for fraudsters to 'prove' title (either by fraudulent transfers or by manufacturing proofs of identity) especially where property is vacant or let. More than 70% of the claims against the [Land Registry Compensation Fund](#) relate to property fraud.

Both solicitors and auctioneers are obliged to comply with money laundering regulations and carry out their own 'know your client' (KYC) due diligence

It is argued that one possible solution is for auctioneers only to accept appointments if the seller's solicitors confirm, in a manner on which the auctioneer can rely, that the instructing person actually owns the lot as described in the catalogue. Hardly a risk lawyers would want to assume. But whether or not solicitors know (let alone have a long-standing relationship with) a particular land owner, auctioneers cannot simply rely on confirmations given by solicitors.

Both solicitors and auctioneers are obliged to comply with money laundering regulations and carry out their own 'know your client' (KYC) due diligence. Auctioneers are required to verify the seller of the property and where the agent/attorney is acting for the seller the auctioneer must also verify that the instructing party has the authority to instruct.

Again, it is often argued that auctions are rushed and that catalogues must be prepared quickly.

The correct answer must be that if the auctioneer does not give themselves enough time to complete or is unable to complete their KYC, or has insufficient information regarding the seller and the property (from whatever source) to verify the statements in the catalogue then the auctioneer should either accept that risk (and insure against it) or withdraw the property from that auction.

In this market where professional indemnity premiums are increasing all the time and there is strong competition for work, both options are unattractive.

Peter Taylor is a Consultant in the real estate team at [Norton Rose Fulbright](#) and a member of the [RICS auction advisory committee](#)

Further information

Related competencies include: [T004](#)