

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. W141/2010

APPLICANT	Eftichia Karagiozakis
FIRST RESPONDENT	Mark Karagiozakis
SECOND RESPONDENT	Margo Karagiozakis
WHERE HELD	Melbourne
BEFORE	Judge Harbison, Vice President
HEARING TYPE	Hearing
DATE OF HEARING	13 July 2015
DATE OF ORDER	13 July 2015
CITATION	Karagiozakis v Karagiozakis (Building and Property) [2015] VCAT 1082

ORDER

- 1 The applicant have leave under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* to reopen the order of His Honour Judge Macnamara made 30 June 2105.
- 2 The order of His Honour Judge Macnamara dated 30 June 2015 is set aside
- 3 The Principal Registrar is directed to accept the offer to purchase the land at Lot 5, Ballan Road Wyndham Vale, being the offer contained in a contract of sale naming Ibrahim Asaad or nominee as purchaser (and signed by Ibrahim Asaad) and signed by Mark Karagiozakis and Margo Karagiozakis as vendors, and providing for a purchase price of one million dollars with settlement due on 12 March 2016.
- 4 The costs of this application be reserved
- 5 The Tribunal notes that the applicant has advised of her current contact details. In order to avoid confusion, she has advised that her address for service of all documents served on her by post is either of the following three addresses - PO Box 1421 Bairnsdale, or by post to the street address of 430 Clebyarra Rd Goonnure, or by email to the email address of eftichiatemp3@bigpond.com.

Judge Harbison
Vice President

APPEARANCES:

For Applicant

Ms Eftichia Karagiozakis in person with Mr
Butcher

For Respondents

Mr A. Blogg, solicitor

REASONS

BACKGROUND

- 1 In about 2010, Eftichia Karagiozakis first made application to this Tribunal. The application was at one point withdrawn, but reinstated in 2013. The application was for an order under s 225 of the *Property Law Act* 1958 for sale or division of land at Ballan Road, Wyndham Vale which was held by herself as a co-owner with the respondents to the application, her brother Mark Karagiozakis and his wife Margo Karagiozakis.
- 2 The proceeding was finally resolved after a contested hearing by orders made by Senior Member Eric Riegler on 12th August 2014. He ordered under s 228 of the *Property Law Act* 1958 that the property be offered for sale by public auction and he set out in those orders detailed conditions under which the auction was to be conducted.
- 3 There are two orders of particular importance to the application before me. The first is an order that the reserve selling price would be \$1.650m or such other price as the parties may agree upon, or where the parties cannot agree, to be determined by the real estate agent. The second is that if the property was not sold at public auction it should be offered for sale by private treaty at the best price available as determined by the real estate agent but not less than the reserve price. There were other orders made to cover various eventualities, and the Principal Registrar of this Tribunal was empowered to execute all documents as might be necessary to give effect to those orders.
- 4 Pursuant to those orders, an auction of the property was conducted on Friday 12th June 2015. The auctioneers appointed pursuant to the orders of Senior Member Riegler were Biggin & Scott Land Pty Ltd, and the auctioneer was Frank Nagle, a director of that company with 25 years experience in selling real estate.
- 5 Immediately prior to the auction Mr Nagle had a conversation with the applicant and a representative of the respondent in respect of the appropriate reserve price for the auction.
- 6 The applicant told Mr Nagle that she wanted the reserve price to be \$1.65m.
- 7 He advised both her and the respondents' representative that it was his view that a reserve set that high was unrealistic. His view was that the reserve price should be set at \$1m. Having been given the authority under the orders of Senior Member Reigler to set the reserve price, he then proceeded to conduct the auction on that basis.
- 8 Although there were about 30 people present at the auction, only one party made a bid. That party was Ibrahim Asaad. The bid which he made was \$700,000. There being no further bids, Mr Nagle put a vendor bid of \$1m

and there being no further bids the property was passed in on the vendor bid.

- 9 Whilst still at the property after the auction, Mr Asaad made a further offer. He offered \$850,000. That bid was conveyed by Mr Nagle to the applicant and the respondents' representative and was rejected by each of them.
- 10 When he was driving back to Melbourne after the conclusion of the auction Mr Nagle received a telephone call from Mr Asaad. Mr Asaad said that he was prepared to pay a purchase price of \$1m provided settlement could take place in March 2016.
- 11 Mr Nagle told Mr Asaad that given that this was a Court ordered sale, he would not transmit that offer to the vendors unless he received that offer in writing.
- 12 Accordingly, arrangements were made for a meeting on the highway. Both Nagle and Asaad stopped their cars at a McDonald's store in Hoppers Crossing where Mr Asaad signed an unconditional contract of sale for the property specifying a purchase price of \$1m with a settlement on 12th March 2016.
- 13 This offer has subsequently been accepted on the respondents' behalf and they have also signed this contract of sale.
- 14 This first offer was as I have described it, made on the day of the auction, that is 12th June 2015.
- 15 On Monday 15th June 2015 Mr Nagle received another offer. This time the offer came through the post. It was in the form of a contract of sale in the standard form signed by Mark Karamicov as director for Zola Land Pty Ltd as trustee for Zola Land Trust and/or nominee. The sale price was \$1,150,000 and the settlement date proposed was 31st March 2017. The contract of sale was enclosed with a letter from Michael Dib, who described himself as Managing Director of Blue Earth Group. In the letter accompanying the contract the purchaser is described as 'TBA', those words presumably standing for 'to be advised'.
- 16 So within two days of the auction Mr Nagle was in receipt of two written offers to purchase the property. Mr Asaad's offer is clearly for \$150,000 less than Mr Karamicov's, but it provides for settlement 12 months earlier than Mr Karamicov's offer.
- 17 No further offers have been received in respect of the property.
- 18 Following the auction the Principal Registrar advised Senior Member Riegler of the unsuccessful auction and of the receipt of the two separate offers to purchase the property. He also advised Senior Member Riegler that the Mr Nagle had advised that the offer of 12th June 2015 was in his opinion the more favourable of the two offers, given that it contemplated a shorter settlement period.

- 19 Clearly, following on from the unsuccessful auction, an urgent decision needed to be made pursuant to s 228(1) of the *Property Law Act 1958* as to what further orders should be made to ensure a just and fair sale of the property occurred. Accordingly Senior Member Riegler made an order in chambers that unless either party advised the Principal Registrar to the contrary, the offer dated 12th June 2015, that is the offer from Ibrahim Asaad, should be accepted by him under the authority given to him by the orders of 12 August 2014. Both the applicant and the respondents were advised of that decision.
- 20 By email dated 23rd June 2015, the applicant advised the Principal Registrar that she did not agree with either offer. The Principal Registrar arranged for the matter to be listed for urgent hearing before Judge Macnamara.
- 21 Although notices of the hearing before His Honour Judge Macnamara appear to have been sent to each party, the applicant denied receiving any such notification.
- 22 The matter therefore proceeded before His Honour Judge Macnamara on 30th June 2015 with an appearance on behalf of the respondents but no appearance by the applicant. His Honour determined at that hearing to direct the Principal Registrar to accept the offer dated 12th June 2015 – that is the offer made by Mr Asaad.
- 23 It is from this order of Judge Macnamara of 30th June 2015 that the applicant has appealed.

THIS APPEAL

- 24 The applicant has appealed under s 120 of the *Victorian Civil and Administrative Tribunal Act 1998*. That section provides that in the event that an order is made in circumstances where a person who did not appear at the hearing was not represented at the hearing, that person may apply for review of the order. On the hearing of such an application the Tribunal newly constituted may hear and determine the application and if it thinks fit order that the order under consideration be revoked or varied.
- 25 This application was listed before me on 13th July 2015.
- 26 Given that the applicant is not represented by solicitors, and further given that she had asserted that she had no notice of the application listed before His Honour Judge Macnamara, I determined to give her leave under s 120 of the Act to re-open the order of His Honour Judge Macnamara. For the purpose of hearing this application I set aside that order.

THE MERITS OF THIS APPLICATION

- 27 This now brings me to the merits of the application under review. The crux of the argument by the applicant was twofold. She claimed firstly that neither of the offers was a genuine or legally valid offer, and secondly that neither of the offers reflected the true value of the property.

ARE THE OFFERS GENUINE AND LEGALLY VALID?

- 28 I will deal first with the question of whether or not the offers were genuine or valid. The applicant pointed out that there were some discrepancies in the paperwork provided by Mr Nagle. Firstly, although Mr Asaad provided a cheque in payment of the 10% required under the contract, that cheque had not been signed. Mr Nagle was not able to satisfactorily explain why the cheque was not signed, although he pointed out that the cheque had not been banked and was simply being held on his file awaiting a decision as to whether that offer was to be accepted.
- 29 It was also pointed out there was some supposed inadequacies in the documentation. For instance, the contract document did not have the ACN numbers of the real estate agents or the conveyancers.
- 30 Further, the original auction authority given to Mr Nagle contemplated a 30 or 60 day settlement period whereas each of the offers that was received provided for settlement well outside that period.
- 31 The applicant also pointed out that the description of the purchaser on each of the proposed contracts of sale was at odds with the names of the persons who had contacted Mr Nagle. For instance, the cheque provided by Mr Asaad was drawn by a company described as Akalil Nominees trading as Convenience Store rather than being Mr Asaad's own name. The contract provided by the Blue Earth Group contained a name which was different from that of Mr Michael Dib, the owner or chief executive offer of the Blue Earth Group.
- 32 There were other errors in the documents provided by Mr Nagle. One of the most significant was that in a statutory declaration which he prepared for use in the application before me, he referred to the offer from Mr Michael Dib in paragraph 17 as being an offer of \$1.1m. The applicant confronted Mr Nagle with this paragraph and Nagle's explanation was that the reference to \$1.1m was a typographical mistake in that paragraph. It should have read \$1m.
- 33 The applicant suggested that the offers which were made did not comply with various Acts of Parliament.
- 34 The applicant was also very concerned about not having received notification of the referral of the matter to Judge Macnamara. She believes this was deliberate.
- 35 The conclusion that the applicant has drawn from all these issues which I have identified so far is that she has being deliberately misled about these offers. She believes that the offers are not genuine. She believes that the two offers were being "orchestrated" by the respondents in conjunction with the Registrar of this Tribunal, the solicitors for the respondents, and Mr Nagle. She said the purpose of doing so was in order for the respondents to be able to surreptitiously obtain her interest in the property at a bargain basement price.

- 36 She was fortified in this view by the use of the word 'or nominee' in each of the contracts of sale. It was her view that the use of that word was deliberately chosen by the respondents, the agent, or the conveyancer in order to allow either the respondents or their son to be substituted as purchaser for the property once one of these settlement offers had been accepted.
- 37 I do not need I think to say anything about the allegation of conspiracy involving the Registrar, the respondents and their solicitors, and the conveyancer, other than that it was completely far fetched and absolutely implausible.
- 38 There was not one scrap of evidence provided by the applicants to support such a theory. Had it been put forward by a legal practitioner in this way I would have considered it disgraceful conduct by such a legal practitioner.
- 39 However, I do acknowledge that the applicants are not lawyers and cannot be expected to understand or comply with the professional standards of integrity which are required of legal practitioners when such serious allegations are made.
- 40 Nevertheless I make it clear in these reasons that I find this allegation of conspiracy or unlawful conduct on the part of any of the persons named to be quite baseless and absurd.
- 41 I also do not accept that the offers were made in contravention of any acts of parliament, or in particular in any misleading or deceptive manner.
- 42 The matters which have so concerned the applicant – which I characterise as clerical or administrative errors of no consequence - are merely a reflection of the fact that the offers were obtained in haste in order to try to preserve the prospect of sale of the property for a sum close to the reserve, and then steps have been taken to obtain a speedy direction from the Tribunal in order that one or other of the offers be accepted before they are withdrawn. She is misguided and wrong in the conclusions she has drawn.
- 43 I am satisfied from the evidence before me that each of the offers was genuine and valid at the time it was made. I am unable to know however, whether either of the potential purchasers is still willing to proceed with the sale, given that it is now nearly a month since each offer was made.

ARE THE OFFERS A TRUE REFLECTION OF THE VALUE OF THE PROPERTY?

- 44 The second major objection which the applicant has to acceptance of either of these offers is that she says that the offers are not a reflection of the true value of the property.
- 45 The question of the true value of the property was squarely raised before Senior Member Riegler at the contested hearing which resulted in his orders of 12th August 2014. The application before me is not the occasion to relitigate those issues.

- 46 Briefly, it appears that at one point it looked as if this property might be re-zoned. Had that re-zoning gone ahead the property may well have been extremely valuable. However not only has the property not been re-zoned as was hoped, but an overlay now exists on the property from the Federal Government. It is a Western Grasslands Overlay. The effect of this overlay, together with State planning restrictions which are presently on the land is that although the land is 47 hectares in size, the only use to which it can be put is the erection of one single residential dwelling or else the use of the land for grazing. The land cannot be subdivided. It cannot be developed in any way. This considerably diminishes the value of the land.
- 47 Mr Nagle gave evidence before me on the value of the land. He said that his company specialised in land purchases of this type. He said that it was very difficult to gauge the extent of public interest in land, as purchasers of land did not normally inspect the land in the presence of the agent. He said that he conducted a four-week public auction campaign in media on the web and by the erection of a billboard. He said he sent 1,700 email notifications to recipients who were already in the firm's database as being potentially interested in land of this description. He also sent hard copy brochures to another 700 to 800 contacts who were in the database.
- 48 He was not able to say whether there had been any individual contact to his office by potential purchasers arising out of that mail out.
- 49 He said that 30 people attended the auction but that ultimately there was only the one bid from Mr Asaad.
- 50 He stressed that he was not a valuer of property but in his experience he thought that although \$850,000 was too little for the property a figure in the region of \$1m was an appropriate price.
- 51 The applicant suggested that the fact that VicRoads proposed to build a six-lane freeway close to the land and that a rail line was being constructed adjacent to the land would significantly increase its value.
- 52 Nagle's evidence was that the presence of the VicRoads' freeway or the rail line - which he said was a freight line - would not affect his opinion.
- 53 He stressed that although there had been previously more favourable opinions given as to the value of the land, those opinions were conditional upon the land being re-zoned and re-developed, and on the lifting of the grasslands restriction which had been imposed under federal law. There was no reasonable prospect of that now happening.
- 54 He said that the most significant risk in relation to this property was the risk that either or both of the potential purchasers may have withdrawn their offer. As I have earlier pointed out, it is now a full month since those offers were made.
- 55 He was unable to give any estimate as to what the result would be of any further auction if these two offers were not accepted.

- 56 The applicant suggested that the auction had not been conducted properly by Mr Nagle. It was suggested that Mr Nagle had ignored her suggestions about marketing of the property. She said that the VicRoads project should have been emphasised. She said that the property should have been described as being unique and one of a kind. Although she did not say so in these terms, I understand her criticism to be that Mr Nagle did no more than a cursory advertising of the property for sale. This criticism of the marketing of the property and conduct of the auction is not accepted by the respondents, who paid \$15000 of their own money towards the advertising and auction expenses, and who make no such complaints.
- 57 The applicant suggested that the issue of the improprieties which she alleged in relation to the conducting of the auction and the obtaining of these offers should be further investigated by the Tribunal and that in the meantime she should be given the sole authority to act on behalf of the purchasers at a further auction to be held with a different agent.

CONCLUSION

- 58 My conclusion is that the evidence of Mr Nagle should be accepted. There is no evidence at all that the auction was carried out in an improper way or that the obtaining of the offers occurred through nefarious means. I see no merit in the suggestion that a further auction be conducted, whether by Mr Nagle or by alternative auctioneers. I accept that the auction conducted on 12 June 2015 revealed the true interest of the market in the property.
- 59 The real danger is that the parties will lose even further money if one or other of these offers is not accepted and the property is placed back on the market again.
- 60 The question then is, which of the two offers should be accepted. The respondents agree with Mr Nagle that Mr Assad's offers should be accepted. As I have said, they have already signed the contract.
- 61 I have determined that the offer of Mr Asaad should be accepted. It is true that it is significantly less than the second offer. However, settlement in respect of this offer is due in approximately eight months time. Mr Nagle gave evidence which I accept that there is a significant settlement risk if a very long settlement date is accepted. That settlement risk is the risk of the unknown. Of course there is a settlement risk with any offer for purchase of land. The most prudent course in my view is to accept the offer which carries least settlement risk. It is not view in the interests of any of the parties that the sale of this property should be delayed any further.
- 62 Accordingly, I made orders on 13th July 2015 that Mr Asaad's offer be accepted by the Principal Registrar.

Judge Harbison
Vice President