

11 November 2015

McCormack and McKellar Auctioneers Limited
PO Box 36423
Merivale
CHRISTCHURCH

Attention: Mr McKellar - Director

Via email mccormackandmckellar@xtra.co.nz

Cc Mr Richard Raymond – Barrister – via email

Dear Mr McKellar

Fair Trading Act 1986: Warning

The Commerce Commission has been investigating McCormack and McKellar Auctioneers Limited (McCormack and McKellar) under the Fair Trading Act (the Act). We have now completed our investigation and are writing to you to alert you to our concerns.

In summary, the Commission considers that McCormack and McKellar have breached section 9 of the Act by misleading customers as to who owned a Tom Esplin painting, and section 36ZB, because the notice for the auction failed to comply with the requirements under the Act.

The investigation

The Auction

At 12 noon on 21 October 2014 McCormack and McKellar conducted an on-site chattel auction at 143A Harewood Road, Christchurch. There were a total of 202 items listed in the auction catalogue, of which 130 were outside entries. McCormack and McKellar owned lots numbered 56, 57 and 180. Lot 57, the Tom Esplin oil painting, is the subject of this investigation.

The painting was auctioned by the late Mr John McCormack and purchased under the hammer for \$4000 exclusive of a buyer's premium of 15% (disclosed on the front of the catalogue) and GST. The total price paid by the purchaser was \$4600.30.

The auction was advertised at www.mccormackandmckellar.co.nz, by catalogue and in The Press newspaper.

The terms and conditions for the auction were displayed at the auction, on the front cover of the auction catalogue, and on the McCormack and McKellar website. Specifically, two terms of the auction stated:

“Limited outside entries have been accepted, some being trade members”

“McCormack and McKellar act as agents only and neither they nor the seller are responsible for any faults or defects in any lot or the correctness of statement of the authorship, origin date, age attribution, genuineness, provenance or condition of any lot.”

The purchaser of the painting claims that he only ever became aware that McCormack and McKellar were the owners of the painting as a result of a subsequent media approach.

McCormack and McKellar’s response

In explanation McCormack and McKellar admit being the owners of the painting and that it was entered into the auction with the knowledge and approval of the estate’s trustees. McCormack and McKellar advised that there were no vendor bids made by the auctioneer and cannot recall any specific verbal or written references being made to the ownership of the painting, either in the lead-up to the auction or at the auction itself. However it noted that the front page of the catalogue specifically recorded that there were outside entries in the auction and that some of those were in trade.

McCormack and McKellar also accept that the auctioneer did not make any specific reference to the painting being sold as part of the estate, or to the vendor of the painting. However McCormack and McKellar claim that, after the auction, the purchaser was made aware that the painting was not part of the estate.

McCormack and McKellar accept that, in this instance, it would have been preferable to delete the reference to it acting as agents as it appreciates that the statement could have conveyed the impression that it was not the owner of any items.

We note that McCormack and McKellar have subsequently taken legal advice and reviewed their practices. McCormack and McKellar have removed any reference to it acting as an agent and have amended the catalogue front cover so that items being sold by a vendor “in trade” are now identified by the reference “IT”. The reference, where applicable, then appears alongside items listed in the catalogue so that potential purchasers are put on notice that the item is being sold by a vendor in trade.

We also note that the buyer’s premium originally charged in this instance has now been refunded to the purchaser.

The Commission’s view

The Commission’s view is that the conduct was in breach of the Fair Trading Act. We have reached this view because:

- McCormack and McKellar created a misleading impression that they were not the vendors of the painting in breach of section 9 of the Act. This impression was created by:
 - Representing that the auction was an on-site chattel auction to be conducted from a residential address. That implied that the goods on offer were part of an on-site chattel auction only, when in fact 130 of 202 items listed in the auction catalogue were outside entries. No information was provided to identify which specific goods were being supplied by a vendor in trade or to suggest that the vendor was anyone other than the owners of the residential address;
 - Representing on the auction notice provided to bidders that McCormack and McKellar were “agents only”, meaning they were agents for the vendor; and
 - The fact that the painting was hanging in the lounge of a residential address led the purchaser to believe that it was being offered for sale by the owners of the address, when in fact the painting was an outside entry being offered for sale by a vendor in trade.

McCormack and McKellar have admitted that, in this instance, they owned the painting and do not dispute they were the vendors. However, the purchaser has assured the Commission that he was never made aware of this fact either at the time of the auction or immediately following the auction. In our view McCormack and McKellar have breached section 9 of the Act as they are in trade and have engaged in conduct that is likely to mislead.

- McCormack and McKellar have also failed to comply with the auction notice provisions set out in section 36ZB of the Act as they failed to give notice whether:
 - the vendor of the goods is selling the goods in trade as a supplier;
 - the sale was subject to a reserve price; and
 - vendor bids were permitted.

In our view McCormack and McKellar were in breach of section 36ZB of the Act. We acknowledge that McCormack and McKellar have subsequently updated its auction notice to comply with the requirements under section 36ZB.

However, we also consider that any goods offered for sale by any vendor in trade should be clearly identified. In our view the reference “IT” may not make it sufficiently clear to attendees that the owner of those goods is in trade. Not all consumers will be aware of the meaning of abbreviations used. While a glossary or footnote can help reduce this risk, where different terms apply to different lots, we think the phrase “in trade” should be stated in full to ensure that purchasers are clearly informed as to which goods are being offered by traders.

While we will not be taking any further enforcement action against McCormack and McKellar at this time, we will take this warning into account if this conduct continues or if it engages in similar conduct in the future.

This warning letter is public information and will be published on our website. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the Fair Trading Act. The Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the Fair Trading Act

Only the courts can decide if there has actually been a breach of the Fair Trading Act. The court can impose penalties where it finds the law has been broken. A company that breaches the Fair Trading Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.

You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

Further information

We have published a series of fact sheets and other resources to help businesses comply with the Fair Trading Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.

You can also view the Fair Trading Act and other legislation at www.legislation.co.nz.

Thank you for your assistance with this investigation. Please contact David Baker on 03 964 3455 or by email at david.baker@comcom.govt.nz if you have any questions about this letter.

Yours sincerely



Stuart Wallace
Consumer Manager
Competition Branch