



LAND AUCTIONS: WHAT HAPPENS IF NOBODY PLACES A BID?

Johnathan H.Y. Tsang

28.05.2022



What happens if nobody places a bid at the auction? This was the overarching question before the Lands Tribunal in the case of *Pacific Base Holdings Ltd & Ors v Lee Hop Biu & Ors* – 2017, heard in September 2021.

The case began life as an application under the Land (Compulsory Sale for Redevelopment) Ordinance, Cap. 545, where the Tribunal, after trial, granted an order directing the subject lots to be sold at a public auction, defined as the Sale Order. Events ensued, including subsequent appeals, which meant that the Sale Order was stayed and eventually extended by the Tribunal to expire in September 2021, with the auction held on 27 July 2021. Nobody placed a bid at the auction and the lots were unsold. The Applicant then went back to the Tribunal seeking directions to refix the reserve price and an order to further extend the validity of the Sale Order by three months. At a substantive hearing in September, the Tribunal, in a short oral decision, refused to grant the application.

There were two key questions faced by the Tribunal. First, can the validity of a sale order be extended under the Ordinance so that a new auction could be held? And second, can the reserve price or “redevelopment value” (RDV) be refixed for the purposes of the new auction? On the first point, the starting point is section 5(4) of the Ordinance, which provides that, where the lot subject of a Sale Order is not sold within three months following the date the Sale Order was made, or within such further period of three months as the Tribunal may specify, then the Sale Order shall be immediately deemed to be cancelled by the Tribunal. Therefore, the Ordinance appears to expressly provide for the situation of an unsuccessful auction, and indeed reserves to the Tribunal the power to extend the Sale Order. The Applicant may also have been

assisted by the fact that the Sale Order, as is usually the case, expressly provides for there to be “liberty to apply”.

It is nevertheless open to argument whether section 5(4) of the Ordinance allows an Applicant to perpetually extend the Sale Order, or whether this section only allows the Tribunal to extend the Sale Order once, given that the Chinese version of the section reads³. This argument would however seem to be inconsistent with dicta found in a previous decision of the Court of Appeal (*Intelligent House Ltd v China Superior Ltd* – 2008) saying the Court may grant more than one period of extension. No clear answer emerged from the decision. It is expected that the Tribunal may again be faced with these same questions when a similar case comes before it.

Which leaves us with our second question: can the reserve price be refixed for the purposes of the new auction? It would appear as if the Tribunal does have the power to refix the reserve price under the Sale Order notwithstanding that a trial had already taken place before the Tribunal. This follows from the Court of Final Appeal’s decision in *Sin Ho Yuen v Fineway Properties Ltd* – 2011 where Bokhary PJ observed the following:

“15. Suppose a significant fall in property prices occurs after a reserve price has been set (whether by consensus or upon evidence). Strictly speaking, there would be no need to ask the Lands Tribunal to reopen the agreed reserve price and set a lower one, for neither the would-be redeveloper nor anyone else would bid up to the reserve price. The Lands Tribunal would then have to exercise its statutory power to set a new and lower reserve price for a fresh auction. There is, however, no need to go through the pointless exercise of holding an unsuccessful auction. The parties could simply return to the Lands Tribunal and ask it to set a new reserve price. If the Lands Tribunal is satisfied that an auction at the existing reserve price would be unsuccessful, the proper course for it to take would be to set a new reserve price.

16. Now suppose instead that a significant rise in property prices occurs after a reserve price has been set (whether by consensus or upon evidence). Then the proper course to take depends on whether or not other bidders are likely. If they are, there may be no need to increase the reserve price, since bidders will bid beyond the existing reserve price. Where, as in the present case, other bidders are unlikely, not reopening the reserve price would enable the would-be redeveloper to acquire the property at a price which would result in something less than fair and reasonable compensation for the minority owner.

17. In such a case it is to be observed that there will have been no error of law in fixing the reserve price (whether by consensus or upon evidence). So it would not be a matter of the minority owner appealing and seeking a stay pending appeal. He should simply apply to the Lands Tribunal, under the implied liberty to apply, to reset the reserve price on evidence of a material change of circumstance. It is immaterial whether the reserve price was fixed by consensus or upon evidence, since in either case the reserve price is fixed by reference to the value of the land (found or agreed) as at the date of the order, and is subject to a subsequent change of circumstance.”

In short, Bokhary PJ’s view is that the parties may apply to the Tribunal, which has the power to reset the reserve price provided that there is evidence of a “material change of circumstance”. The example given by Bokhary PJ is either a significant fall or rise in property prices after a reserve price has been set. In the

instant case, the Applicant did not provide any evidence of a material change of circumstance and this may have been a factor in the Tribunal's decision. But what Bokhary PJ said above is strictly obiter dicta, as the case had been settled before it came to be heard by the CFA and the appeal was therefore dismissed, although the views expressed by the Court of Final Appeal also appear to be supported by previous decisions (e.g. *Intelligent House Ltd v China Superior Ltd* – 2008)

Whether the decisions should be applied, and how they should be applied, is a question the Tribunal may again be faced with in the near future. The instant case will certainly not be the only one of its kind. In fact, it was reported in the news that a

There are lots of unanswered questions following on from the Decision. For example, what precisely is a “material change of circumstance” and what is the extent of the evidence required to demonstrate this? If parties are allowed to refix the reserve price, can it not be argued that parties can also similarly apply to refix the “existing use value” or “EUV” (bearing in mind this will affect the share of the sale proceeds a minority owner can receive)? Furthermore, if parties were allowed to return to the Tribunal to have the reserve price refixed, would this power be subject to abuse?

It is hoped that clear answers will emerge from the Tribunal so that clarity and certainty can be injected into this extraordinary regime, which attempts to balance the need for redevelopment with the protection of private ownership of property.