

UNDER THE HAMMER

STUDY NOTES prepared by Frank Davis

Subject Areas: Real Estate and Property Studies, Conflict Resolution, Psychology, Legal Studies

Levels: Upper Secondary, Tertiary and of course all home buyers, property developers and real estate agents

Synopsis

Sydney, Australia is the only place in the world where the majority of homes are sold at auction. It's an extraordinary, emotionally-charged event: for some exhilarating as prices soar on the auction floor; for others fraught with fear and anxiety as their homes and lives go under the hammer.

Under the Hammer follows the lives of buyers, sellers and real estate agents from week to week in the process of buying and selling their homes. The stories unfold through observational sequences and interviews with the main players at critical points in the drama. The filmmakers have gained extraordinary access to the characters and the decision-making processes, and chose to film over an extended period of time to allow the stories to develop.

What motivates the real estate agents in matching buyers and sellers? In *Under the Hammer*, the agents, often seen as mysterious and inaccessible, allow us to watch as they candidly discuss and apply their tricks of the trade. We see the tension and manipulation involved in closing the deal, as well as the highly-sophisticated techniques used in selling by auction.

For buyers and sellers the auction system is often a perilous journey into uncharted waters. For them, there's more than bricks and mortar at stake - it's their dreams, their memories and the single biggest investment in their lives. *Under the Hammer* is there with them at the dinner table, at the open house, at the meeting with the agent and of course just prior to, during, and after the auction. "*Under the Hammer* is about who we are in the '90s," says director Susan Lambert. "It's about our values and our relationships to our homes and to money." This is a series which captures not only intimate emotional moments but the displays of bravado, happiness, shock and disappointment as the hammer goes down.



For information about Film Australia's programs, contact:
National Film and Sound Archive of Australia
Sales and Distribution | PO Box 397 Pyrmont NSW 2009
T +61 2 8202 0144 | F +61 2 8202 0101
E: sales@nfsa.gov.au | www.nfsa.gov.au

The video is broken up into four distinct episodes which consist of:

The Squeeze

Going behind the scenes of the highly-competitive real estate business, this episode follows agents as they prepare for an auction. It's a comedy of errors as the boss turns up the heat on his agents to get more listings and sellers make them compete to lower their commissions. Watching the pressure mount, this is an unusually candid look at the frustrations and foibles of the real estate auction business.

The Split

This episode is about every couple's worst nightmare - having to sell a home after a separation and divorce. As auction night approaches, the battle between the sellers escalates while the beleaguered agents just wants to close the deal. This drama leaves viewers on the edge of their seats until the very last moment when the hammer goes down.

The Crunch

This episode looks at the sellers - a young couple with an inflated view about how much their home is worth, and an elderly man and wife who can no longer manage to live independently. On auction night both are under mounting pressure from agents to sell - even if the price falls below their expectations. This episode is alternatively humorous and emotionally moving as their homes and lives go under the hammer.

The Hunt

In the home auction system there are often too few homes for sale and too many people wanting to buy. This episode follows three families attempting to buy a home at auction - a young couple from England who feel they've landed on another planet, an extended family of six who are just learning how to play the game, and a wealthy couple who simply can't find what they want for less than a few million dollars. Uncertain of their futures and feeling manipulated by agents, frustrations build as each buyer attempts to come to terms with the harsh reality of buying a home at auction.

Executive Producer: Chris Oliver

Producers: Stefan Moore & Susan Lambert

Director/Writer: Susan Lambert

Year of Production: 1997

Duration: 4 x 30 minute programs

Background

Whilst *Under the Hammer* is based in Sydney's Eastern Suburbs and Inner West, the basic auction system is the same throughout Australia, a nation where home ownership is a fundamental value.

Under the Hammer follows characters - buyers, sellers, and real estate agents - from week to week in the process of buying and selling homes. The stories unfold through observational sequences and interviews with the main players at critical points in the drama. The filmmakers have gained extraordinary access to the characters and the decision-making processes, and chose to film over an extended period of time to allow the stories to develop.

What motivates the real estate agents in matching buyers and sellers? In *Under the Hammer*, the agents, often seen as mysterious and inaccessible, allow us to watch as they candidly discuss and apply their "tricks" of the trade. We see the tension and manipulation involved in closing the deal, as well as the highly-sophisticated techniques used in selling by auction.

For buyers and sellers the auction system is often a perilous journey into uncharted waters. For them, there's more than bricks and mortar at stake - it's their dreams, their memories and the single biggest investment in their lives. *Under the Hammer* is there with them at the dinner table, at the open house, at the meeting with the agent and of course just prior to, during, and after the auction. This is a series which captures not only intimate emotional moments but the displays of bravado, happiness, shock and disappointment as the hammer goes down.

Before Watching

Before looking at individual episodes we will look at the Australia-wide system of selling residential real estate by auction. Whilst there may be different legislative provisions from state to state, the auction system is basically the same. This is confirmed by the case histories provided with this material.

Activities and Questions

Residential real estate has been selected because this is where there is the most consumer protection and anti-gazumping provisions.

1. Is residential real estate defined in any legislation in your State?

Resource Materials

Your resource materials will be the video and these notes. It will assist you if you have a copy of:

- a standard sales inspection report and selling agency agreement.
- a standard contract for the Sale of Land.

The Listing

A listing generally begins with a free appraisal of the market value of the property. As you will see from the first episode real estate is highly competitive, following the credo "List and Last".

An appraisal is not a valuation which can generally only be carried out by registered valuers.

2. Is there such a provision in your State and does a notation to this effect appear on any of the listing documents?

A vendor may obtain an appraisal from a number of agents and it is often suggested some agents may inflate the appraisal in order to obtain the listing. In a rising market the appraisal price may be achieved or they may be able to convince the owner to reduce the reserve.

3. Is this practice ethical and can it lead to claims for negligence?

As well as competition by way of different appraisals there is often strong competition regarding fees and who pays for advertising costs.

List and last is a catch phrase in the industry and simply means you must have something to sell. Competition between agents is fierce and commission must be by negotiation. For example an agent in Sydney sought to advertise very low commissions and it was suggested to the newspaper that agents might withdraw their advertising in protest. It was referred to the Australian Competition Consumers Commission (ACCC).

The ACCC wrote to the Real Estate Institute of NSW and agents in the area advising that such action could be in breach of the secondary boycott provisions of the Trade Practices Act. Agents also risked breaching the ban on anti-competitive conduct if they reached an understanding to lessen competition in the marketplace.

Individuals convicted of anti-competitive conduct under the Trade Practices Act face fines of up to \$500,000. Corporations can be fined up to \$10 million. So the message is clear. Attempts to noble the competition could prove very expensive indeed (Source: Department of Fair Trading Newsletter).

4. Is there any legislation in your State regarding fees negotiation and is it shown on any of the listing documents?

Irrespective of any state legislation, fees cannot be fixed or there be any agreement between agents on fees as this would be anti-competitive. (a breach of the Trade Practices Act, 1974).

The Agreement

When fees and reimbursement of other expenses have been agreed upon it is put in writing so it is on a contractual basis. (Selling Agency Agreement).

5. Are there any legislative requirements as to the form such agreement must take and any penalty for not meeting these requirements?

Gazumping

Brief reference has already been made of anti-gazumping provisions in respect to residential land.

6. Is there any anti-gazumping provision in your State and how as they work?

Pre-Auction

The pre-auction period, from listing to auction, is negotiated with the agent and the whole advertising schedule will be intended to maximise interest towards the auction date. This will include signs on site, window displays by agent, media advertising and open-house inspections.

During this period offers may be made and these must be relayed to the vendor. This is where the skill by the agent comes into play. In advising the vendor on acceptance or not the agent must weigh up the advantage to the vendor of an immediate exchange against the price offered and movements in the market. Can the agent be sure the prospect will bid at the auction? Many buyers are auction adverse.

One of the most neglected areas in real estate appears to be advising both vendors and prospects of the procedures at auction.

7. What is an Auction?

Auction is sale by public outcry to the highest bidder, subject to any reserve decided by the vendor. This is intended to prevent collusive practices.

8. Are there any specific legislative provisions in your State intended to prevent collusive practices?

Whilst some auctions are held on-site the majority are sold in auction rooms as part of a series of auctions. Care needs to be taken in preparing the schedule and the allocation of time-scales to each property.

The Auction

Auctions are conducted by licensed agents or auctioneers.

9. What is the specific provision in your State?

Terms and Conditions of Auction

At the fall of the hammer it is usual to immediately exchange contracts. The Auctioneer is authorised to sign the contracts (exchange) on behalf of both vendor and purchaser. You will see from the Argy case how critical it is that the two copies of the contract and any accompanying documents are the same. The contract plus the standard notices displayed at auctions are all part of the terms and conditions of an auction.

10. Are there any Statutory Terms and conditions for auctions in your State?

The Auctioneer after identifying the property will refer to the terms and conditions of the auction. A vendor may reserve the right to bid and the auctioneer must announce this fact and the number of bids so reserved. This is perhaps one reason why so many prospective purchasers are adverse to the auction system.

In a Victorian case there were 12 bids for a property. The judge held 11 of the bids were not genuine, with six bids being made on behalf of the vendor and 5 bids "invented" (see *Futuretronics International Pty Ltd v Gadzhis*).

Review of the Auction Process

Before proceeding to look at the individual episodes it may be opportune to briefly review the auction process.

Pre-auction

- The marketing programme (advertising and inspection days) is designed to generate interest with the main focus on a nominated time and place.
- It is in this period that both vendor and purchaser need to be educated. This takes into account that many properties are sold prior to the auction.
- There is a need to overcome the buyer resistance caused by many people not being comfortable with the auction system.

Few vendors and purchasers understand the law regarding fixtures and fittings. An estate agent was held liable for misrepresentation in making a negligent statement to a purchaser that an appliance was a fixture and thereby would be sold with the property. This could be overcome if a list was attached to the contract listing all items being sold with the property, irrespective as to whether at law they are fixtures or fittings. Often during the pre-auction period a vendor will decide to remove something. If there is any such change, it should be announced as a special condition at the auction.

Operational Conduct of Auction

- Both on site and in room auctions should be designed on a last look basis.
- The auction should be arranged to facilitate last minute inquiries and every attempt should be made to identify prospective bidders.
- Copies of the contract and essential documents should be readily available. All sets should be identical (Argy Case).
- The sales staff (spotters) should be clearly identifiable.

Notices and Conditions of Sale

- Any statutory warning notices must be displayed.
- Whilst there is no statutory requirement, it is usual for the terms and conditions to be read aloud by the auctioneer.
- The statutory notices must be printed in English, in letters that are clear and readily legible and exhibited in a conspicuous position so as to be clearly visible to any person attending the auction.

Contracts of Sale

- The contract forms part of the terms and conditions of the auction.
- The contract must be available for inspection before and during the auction.
- The auctioneer will identify the property being sold and any special terms and conditions, including signing of contract on fall of the hammer, paying the deposit and the period allowed for settlement.
- If any conditions of the contract are recited, the auctioneer should not attempt to paraphrase or summarise their effect or offer an opinion as to the meaning of conditions or clauses in a contract.

Vendor's Right to Bid

- If the vendor reserves the right to make more than one bid, this fact and the number of bids reserved must be announced by the auctioneer in a clear and precise manner prior to the auction.
- This is a particular area of concern to auctioneers and should an auctioneer become aware that a number of "puffers" are employed to bid on behalf of the vendor, a decision needs to be made as to whether such bids can be accepted.

Reserve Price

- If an auction sale is subject to a reserve price, this fact must be announced by the auctioneer in a clear and precise manner prior to the commencement of the auction of that lot.
- The reserve price should not be disclosed to any person. Once bidding has exceeded the reserve, it is "on the market". This does not have to be announced immediately by the auctioneer and is usually done at the first pause in bidding.

Property Passed In

- If the bidding does not reach the reserve price, the property is passed in and the auctioneer will advise that the highest bidder will be given the first opportunity to negotiate under auction conditions (The Squeeze).
- The auctioneer's "spotters" also need to keep in touch with the other bidders who may also be prepared to negotiate.

Execution of the Contract

- Subject to any reserve price, the highest bidder is the purchaser.
- Immediately after the fall of the hammer, the purchaser is required to provide the auctioneer with their name and address, sign the contract, and pay the deposit as nominated in the contract.
- The auctioneer is authorised to sign the contract on behalf of the vendor and purchaser and, in situations where this may be necessary, this should be attended to without delay.
- Auctioneers need to have the vendor's approval on the acceptance of the deposit (bank cheque, cash, personal cheques, etc). As previously pointed out, this means educating vendors as to what can occur on exchange of contracts.

Bidding by Agents of Purchaser

- Where a person intends to bid on behalf of another person, they are required to provide a copy of written authority to this effect to the auctioneer prior to the auction.
- If no such arrangement is made, the bidder is deemed to be acting as a principal and the auctioneer completes the contract on this basis (The Hunt).
- In the case of a person bidding on behalf of a company, the bidder should produce written authority signed by at least two directors of the company prior to the auction under the company seal. If this has not been arranged, the auctioneer should have the contract completed in the name of the bidder.

Disputes

- The auctioneer may refuse to accept any bid, which in his opinion, is not in the best interests of the vendor.
- In the event of any disputed bid, the auctioneer shall be the sole arbitrator and his decision shall be final.

After Watching

The four episodes vary in the emphasis which is given to various aspects of the auction process. To get the most benefit from this material you need to have a list of the activities which may be involved in each auction. Hereunder is a checklist on which you can make notes.

- Pre Auction
- The Auction
- Operational conduct of auction
- Notices and Conditions of Sale
- Contracts of Sale
- Vendors Right to Bid
- Reserve Price
- Property Passed in
- Execution of the Contract
- Budding by Agents of Purchaser
- Disputes

It is as well to remember that these episodes are not intended to suggest an ideal auction process but rather what happens in the real world. This is the value of the *Under the Hammer* series.

Episode One - The Squeeze

To understand the highly competitive nature of real estate business you only have to read the advertising of your local agents. Do they complain of the deals offered by agents? Do they suggest that they refuse to enter into a bidding war to obtain listings? Have you seen claims of over 90 per cent clearance rates.

Q. Did you find any suggestion in this episode of unethical conduct?

Q. Apart from any statutory provisions do your real estate industry organisations have either Rules of Conduct or Code of Ethics for their members? How are they perceived?

This episode looks at various means of obtaining listings such as;

- letter - drops (perhaps least effective as is all junk mail)
- door - knocking (perhaps too intrusive to be effective)
- letters by mail (a question of costs versus results)

You should have noted the good venue and use of "spotters".

Episode Two - The Split

Auctions as a result of a divorce or Family Law Court Order can be a particular problem for auctioneers particularly if one of the parties wishes to purchase the family home. There have been cases where one party is determined the other is to pay a "high" price and have used "puffers" only to have the property knocked down to one of these fictitious bidders.

Often the parties will be in dispute and special care is needed by the agent.

You will have noted the agents were aware of the reserves before the actual auction. Is this a good practice?

Presumably the agent received instructions via the selling agency agreements. Of course either party could withdraw the property from sale. One could query giving advice to one party to use against the other.

If both parties had signed the selling agency agreement and the property was "knocked-down" and either or both parties refused to subsequently sign the contract prior to exchange, the auctioneer could sign on behalf of both parties.

Episode Three - The Crunch

This episode highlights the fact that agents are in the business of selling. Whilst many are concerned with their long term image some tend to be only concerned with not letting any sale fall-through. In a rising market it is purchasers who dislike agents and the auction system. On the other hand in a falling market it is the vendors who feel manipulated. Often this is caused by unrealistic expectations which have not been dampened by agents anxious to obtain listings.

You will note the property was not sold the first time and the second agent was regarded as being more professional. Comments were made of agents talking the price down from the original appraisal.

At the auction the vendors were asked to put their property "on-the-market" below their reserve to stimulate bids. This did not work.

Episode Four - The Hunt

In some ways this episode suggests the advantages of auctions to vendors. Agents should not suggest possible price ranges to prospective purchasers in an effort to maximise attendance at the auction. Discuss.

An agent does not need to know the reserve and it is probably better if they make it clear the reserve is strictly confidential and is not given to the auctioneer until the actual auction. You will have noted one agent declined to nominate a price (reserve) stating "they won't tell until the day of the auction".

One prospect stated "auction is a real killer. You don't know who is bidding. Another stated, "I don't trust anyone (agents)".

At one viewing an agent referred to an offer of \$450,000 and the property sold for \$605,000. In respect the same property one prospect stated "if the agent tells you \$500,000 it means \$600,000".

References

Report on Argy Case (1990)

Argy Case - A.T.P.R. - 51.260 (1990)

A vendor had a waterfront property on the north shore for sale at around \$3m and it was placed in the hands of a local agent. The agent prepared extensive brochures on the land which included the statement "underdeveloped waterfront in prime location with unlimited potential". The land was described as "Residential 2A".

The solicitor for the vendor was asked to prepare a contract for the sale of land and the agent forwarded a copy of the section 149 Certificate which had been obtained to the solicitor. Unfortunately there were two copies of one page of the certificate and one page was missing. The court accepted that the agent had subsequently forwarded the original certificate to the solicitor.

The missing page which was originally not sent to the solicitor indicated part of the land was zoned "Regional Open Space Reservation Zone", in which area development was generally prohibited. It would appear that the original photocopying of the section 149 Certificate was so poor that the numbering was obliterated and the document could not be checked. It was eventually decided that the property should go to auction and further brochures were prepared along the line of the original brochures.

The property was sold at auction with the original of the contract constraining the complete section 149 Certificate being held by the agent and the duplicate with the one page of the certificate missing being held by the auctioneer. The contracts were signed by the respective parties thus effecting exchange.

The purchaser, Mr Argy, subsequently attempted not to proceed to settlement and claimed damages for misrepresentation. It was also claimed that in on-site discussions with staff of the agent he had indicated his intention to build a swimming pool on the land which was zoned "Regional Open Space Reservation Zone".

The Court was prepared to accept that the statement in the brochures "underdeveloped waterfront in prime location with unlimited potential" might have been seen as mere puff (a statement of praise with no legal consequences) but, combined with the statement regarding the zoning of the land, was a misrepresentation in accordance with section 52 of the Trade Practices Act.

It was further held that although the purchaser was a solicitor he could not be expected to check the original contract with the duplicate on signing and exchange. It was further held that the vendor's solicitor was responsible for preparing the contract and ensuring the accompanying section 149 Certificate was complete. As the absence of the missing but vital page was likely to mislead, the solicitor was held to have made a misrepresentation and be accordingly liable.

Report on Boulas v Angelopoulos Case (1991)

The vendor, Mr Boulas, put his property to auction with a reserve price of \$260,000. The property attracted a highest bid of \$226,000. The auctioneer accordingly asked the vendor if the property was "on the market", meaning if it was for sale without regard to the reserve price. Thinking the auctioneer meant the property was available for sale at the appropriate reserve, the vendor consented. The property was then sold at the low bid.

Immediately after the sale, and before contracts were signed, the vendor withdrew from the sale. The purchaser sued for specific performance and damages. The court held that as there had been no written contract of sale, the sale was void and prospective purchaser had no remedy. It is clear that the auctioneer had not authority to sell and emphasises the need for vendors and purchasers to be educated in the auction process.

Report on Madden v Wright Case (1991)

In this Queensland case, Mr Madden bid \$1,000,000 for property which was knocked down to him, but he left without signing a contract or paying a deposit. The agent resold the property to another bidder at a lower price and sued Mr Madden for the difference in price.

The court ruled Mr Madden had no obligation because there was not note or memorandum binding him. The court confirmed the auctioneer can in the one transaction act as agent for both vendor and purchaser and sign the contract. Had the auctioneer done this, it would presumably have been an enforceable contract, giving rise to a notice to complete.

Report on Futuretronics International Pty Ltd v Gadzhis Case (1991)

Futuretronics International instructed Sweet & Finch-Freeman (Victoria) as joint agents to sell rented commercial and industrial premises in Oakleigh South, Victoria, by auction. Under the auction conditions contained in the contract for sale, the vendor reserved the right:

- a. to make one or more bid personally or by the Vendor's agent or representative;
- b. to refuse any bid; and
- c. To withdraw the said land at any time before it has been knocked down and without declaring the reserve price."

In an attempt to interest the tenant into buying the property, Sweet invited Gadzhis, a property developer and investor, to inspect the premises, to give the impression that he was interested in purchasing same.

On 9 August 1989 the auction was held. There were 12 bids for the property, of which the judge held 11 to have been not genuine bids, 6 bids made on behalf of the vendor and 5 bids "invented" by Sweet on behalf of the vendor. Finally, Gadzhis bid \$2,250,000 and the property was knocked down to him. Gadzhis refused to sign the contract, claiming that he was present only to help the vendor and that he did not make a genuine bid to purchase the property. The judge held that Gadzhis made a sudden decision to purchase the property and made a genuine bid.

The court held that the purchaser did genuinely intend to purchase the property when he made the bid and made the implied representation he would comply with the auction conditions, pay the deposit and sign the contract. The court held that he did not have reasonable grounds for making the representation and it must be taken to have been misleading.

Notwithstanding this finding of misleading conduct, the vendor failed, because the vendor did not reply on the misleading conduct, as there were no other genuine bidders and within a short time after the bidding the vendor was aware of the purchaser's unwillingness to proceed.

Further References

Webster, R.H, The Ancient Art of Auction, Third Edition,
Real Estate Institute of Australia Ltd. 1988

Davis F & Wills P, Applied Marketing Buying and Selling Real Estate,
Petfran Publications, PO Box 93, Broadway NSW 2007.
ISBN 0 9586493-1-6.

Davis F & Wills P, Applied Agency Practice,
Petfran Publications, Box 93, PO, Broadway NSW 2007.
ISBN 0 9586493-2-4.

Burson A, The Real Estate Book,
The Real Estate Institute of New South Wales.

Websites

Real Estate Institute of Australia Ltd <http://www.reia.asn.au>
The Australian Property Monitor <http://www.apm.com.au>

About the Author

Frank Davis, one of Australia's leading teachers in Property Services, has worked as a teacher in Real Estate/Valuation since 1981. A registered valuer, he holds a Graduate Diploma in Urban Estate Management and a Diploma in Education, as well as Technical and Further Education Certificates in Progress Payments, Valuation, Real Estate and Strata Property Management. Prior to joining the TAFE, he was employed as the Chief Property Officer for the Department of Environment and Planning. Frank is the author of a number of publications and conference papers in the areas of Applied Agency Practice, Property Management, Real Estate Marketing and Town Planning.

Since 1992 he has been employed as a teacher in property services for several major organisations and has designed and supervised a number of courses for Pacific Power and metropolitan and country councils. An affiliate member of the Real Estate Institute of NSW and its valuers chapter, he has also conducted several of its CPD training courses.

Film Australia wish to thank Frank Davis, Open Training Education Network, TAFE NSW for his involvement in the production of teacher/study notes

A Film Australia National Interest Program.
Produced with the assistance of the Australian Broadcasting Corporation.

For information about Film Australia's programs, contact:

National Film and Sound Archive of Australia

Sales and Distribution | PO Box 397 Pyrmont NSW 2009
T +61 2 8202 0144 | F +61 2 8202 0101
E: sales@nfsa.gov.au | www.nfsa.gov.au

