

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2015] NZREADT 83

READT 089/14

**IN THE MATTER OF** an appeal under s 111 of the Real Estate Agents Act 2008

**BETWEEN** **ADVANTAGE REALTY LIMITED**

Appellant

**AND** **REAL ESTATE AGENTS  
AUTHORITY (CAC 303)**

First respondent

**AND** **VINCENT and KATHLEEN  
GAMBINO**

Second respondents

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AUTHORITY (CAC 303)**

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**AND** **ADVANTAGE REALTY LIMITED**

Second respondent

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Mr G Denley - Member  
Ms C Sandelin - Member

**HEARD** at TAURANGA on 12 August 2015 (with subsequent series of typed final submissions)

**DATE OF THIS DECISION** 30 November 2015

**REPRESENTATION**

Mrs P Fee and Mr L Fraser, counsel for appellant licensee  
Ms N Copeland, counsel for the Authority  
Mr and Mrs Gambino on their own behalf

**DECISION OF THE TRIBUNAL****The Issue**

[1] The purchaser of 3 Norton Road, Otumoetai, Tauranga happened to be the mother of an agent employed by the appellant real estate agency (i.e. of Advantage Realty Ltd). Accordingly, the proprietors and management of the appellant became anxious to comply with s 135 of the Real Estate Agents Act 2008 (set out below). Their method of doing that, which apparently is not uncommon in the real estate industry, was to take the vendors' asking price as the interim value of the property. Those vendors are the complainants and second respondents in one appeal and are cross appellants in the other. In doing that, the vendors lost their option to reconsider the sale if the formal valuation as required by s 135(5)(b) is higher than the price negotiated between the parties for the sale of the property.

[2] The basic issue is whether Complaints Assessment Committee 303 was correct to find the appellant agency guilty of unsatisfactory conduct in terms of the above issue and the facts as we outline them below and, if so, the appropriateness of the penalty orders that the Committee imposed on the appellant agency. As well as the appeal by the appellant agency, the complainant vendors cross-appeal against those decisions of the Committee.

**Background Facts**

[3] In December 2011, the complainants listed their above property with the agency. The salespeople at the agency who obtained the listing were Mr and Mrs Ashdown.

[4] After viewing the property in September 2013, Mrs Elva Boyd ("the purchaser") made an offer to buy it. She is the mother of Ms Robyn Boyd a salesperson at the agency. This conflict of interest was disclosed and written consent was obtained from the complainants prior to the offer being made.

[5] The complainants signed Form 2, a client consent for licensee to acquire interest in property which is set out in the Schedule to the Real Estate Agents (Duties of Licensees) Regulations 2009 as follows:

“Form 2  
Client consent for licensee to acquire interest in property

Section 134, Real Estate Agents Act 2008

(Front page)

**Important information for clients**

- 1 This form has legally binding consequences. You may wish to seek legal advice before signing it.
- 2 This form is required by the Real Estate Agents Act 2008. The licensee must ask for your consent, using this form, if any of the following people want to acquire an interest in your land\* or business:
  - (a) an agent†, branch manager, or salesperson (**licensee**) who is working for you; or
  - (b) a person related to that licensee (**related person‡**).

\*Note that land is defined in section 4 of the Real Estate Agents Act 2008 to include a number of different types of property and interests in property—including, for example, your house.

†Note that an agent includes, if the agent is a company, every officer and shareholder of that company.

‡For the definition of related person, see below.

- 3 The licensee must give you this form **before** you agree to grant, sell, or otherwise dispose of your land or business, or an interest in your land or business, to the licensee or related person. If the licensee gives you this form **after** that, do not sign it.
- 4 The licensee must give you a valuation\* of the land or business at his or her own expense. The licensee must give you the valuation either—
  - (a) before seeking your consent; or
  - (b) with your agreement, within 14 days after obtaining your consent.

If the valuation provided under paragraph (b) turns out to be higher than the provisional valuation specified in this consent form, you are entitled to cancel the contract for the grant, sale, or other disposal of the land or business.

\*Note that a valuation of land (which includes, for example, your house) must be made by an independent registered valuer, and a valuation of a business must be made by an independent chartered accountant.

- 5 If you have **not** given your consent by signing this form, or you did **not** receive a valuation, you are entitled to—

- (a) cancel the contract for the grant, sale, or other disposal of the land or business; and
- (b) recover any commission you may have paid to the agent.

### Meaning of related person

A **related person** is defined in section 137 of the Real Estate Agents Act 2008 to mean any 1 of the following:

- (a) a partner of the licensee under a partnership agreement:
- (b) an employee of the licensee:
- (c) a branch manager or salesperson engaged by the licensee:
- (d) the licensee's spouse or civil union partner:
- (e) the licensee's de facto partner:
- (f) a child, grandchild, brother, sister, nephew, or niece of the licensee or of any person referred to in paragraph (d) or (e):
- (g) any other child who is being, or is to be, cared for on a continuous basis by the licensee or any person referred to in paragraph (d) or (e):
- (h) a grandparent, parent, uncle, or aunt of the licensee or of any person referred to in paragraph (d) or (e):
- (i) an entity that has an interest in the licensee or an entity in which the licensee has an interest (except where either interest is in quoted financial products within the meanings given for those terms in section 6(1) of the Financial Markets Conduct Act 2013).

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- 1 I/We\*, [full name(s), address(es)], the client(s), signed the agency agreement with [full name, address], the agent, in respect of a transaction relating to the following land†/business\*: [address and/or legal description of land or business to which agency agreement relates].

\*Select one.

†Note that land is defined in section 4 of the Real Estate Agents Act 2008 to include a number of different types of property and interests in property—including, for example, your house.

- 2 I/We\* consent to [full name(s)], the licensee(s)/related person(s)\*, acquiring, directly or indirectly, the following interest(s) in the land/business\* described above: [nature of interest(s) to be acquired].

\*Select one.

- 3 For this paragraph select the statement that applies.

Statement A (consent based on valuation)

I/We\* confirm that, before signing this form, I was/we were\* provided, at the licensee's expense, with—

- †(a) a valuation of the land described above, made by an independent registered valuer:
- †(b) a valuation of the business described above, made by an independent chartered accountant.

\*Select one.

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†Select the subparagraph that applies.

Statement B (consent based on provisional valuation)

I confirm that—

- (a) the licensee has informed me/us\* that the land/business\* described above is provisionally valued at \$[provisional value]; and

\*Select one.

- (b) I/we\* have given my/our\* agreement to the licensee providing to me/us\*, within 14 days after the date of this consent,—

†(i) a valuation of the land described above, made at the licensee's expense by an independent registered valuer:

†(ii) a valuation of the business described above, made at the licensee's expense by an independent chartered accountant.

\*Select one.

†Select the subparagraph that applies.

Date:

Signature(s):

(client(s))

[6] That form recorded the provisional value of the property as \$569,000, which was the complainants' asking price, because the vendors selected the procedure in Statement B (consent based on provisional valuation) in that Form 2.

[7] In accordance with the consent form, a valuation had to be provided to the vendors in 14 days. If the valuation was higher than the provisional value then the complainant vendors had an option to cancel the sale agreement.

[8] The complainants did not seek any independent legal advice before signing the consent form.

[9] Mrs Elva Boyd offered \$505,000 conditional on the sale of her home, a satisfactory builders' report, and her solicitor's approval of the title and the form and content of the agreement. The agreement included an escape clause for the complainants whereby, if they received a better offer, they could end the agreement by giving Mrs Boyd 10 working days' notice. The complainants counter-offered at \$565,000 and after some negotiations the parties agreed on \$546,500 as the sale price of the property.

[10] However, the valuation assessed the value of the property at \$560,000. This was \$13,500 more than the agreed sale price with Mrs Elva Boyd, but not higher than the original asking price which was the provisional value on Form 2.

### **The Committee's Decision of 29 July 2014**

[11] We summarise the Committee's approach.

## Misconduct

[12] The Committee determined to take no further action against Mr and Mrs Ashdown being satisfied that they were following the instructions of the agency's principal officer and therefore there was no wilful or reckless contravention of the Real Estate Agents Act 2008 ("the Act").

[13] The Committee found that the agency held a genuine belief that its policy of using the asking price of a property as the provisional valuation, was correct; so that a finding of misconduct should not be made in that respect. However, it found that the agency's conduct fell short of the requisite standard for the protection of a consumer and amounted to unsatisfactory conduct.

## Incorrect Provisional Value

[14] The Committee agreed with the complainant vendors that standard industry practice is to use the agreed sale price as the provisional value. It also agreed that Form 2 is unclear about what the provisional value should be. However, it found that the agency should have considered the intention of the requirement and the safeguard it provided for the client vendors. The Committee continued:

“4.8 Secondly, the agency submits the Form must be complete before the sale and purchase agreement is presented, therefore the only known figure is the asking price. The Committee agrees the form must be presented to the client prior to the sale agreement but it is nonsense to suggest the only “known value” figure is the asking price. An asking price for a property is just an invitation to treat in our view. The known value is what a purchaser is prepared to pay for the property.

4.9 The Committee accepts the agency's belief was genuine but does not consider this error to be insignificant. As the complainants correctly point out, this error entirely negates the purpose of section 135 of the Act, and affects the ability of the client to void the agreement where the valuation exceeds the price paid for the property.

### Option to obtain valuation prior to accepting offer.

4.10 Form 2 has two options in regard to the time when the valuation can be presented to the client. The first option is prior to accepting the offer and the second option is within 14 days of accepting the offer.

4.11 The Committee finds this is not the case. It is standard industry practice for the purchaser to elect when the valuation will be provided. The Committee believes it would be unusual in these circumstances for a purchaser to pay for a valuation on a property before they had consent to take the interest. However, it was an option for the complainants to reject the offer on that basis. The Committee will take no further action on this particular arm of the complaint.”

[15] The Committee was satisfied that the complainants were aware, or should have been aware, they could seek legal advice at the time they were presented with the contractual documents.

[16] While the Committee was of the view that the complainants did lose their ability to cancel the agreement, it did not consider that the complainants, in this instance, had proven any financial disadvantage.

#### The Agency's Handling of the Complaint

[17] The Committee noted that the agency refunded \$3,000 of the commission in recognition of its error regarding the provisional valuation, sought clarification from the Real Estate Agents Authority, and amended its policy on the acquisition of client's property. The Committee considered this when determining penalty on 16 September 2014 as follows:

#### **4. Decision**

- 4.1 The Committee has determined to make the following orders pursuant to section 93(1) of the Act.
  - 4.1.1 Licensee Advantage Realty Limited is censured under s 93(1)(a).
  - 4.1.2 Licensee Advantage Realty Limited is ordered to refund fees in the sum of \$5,000 to the complainant within 21 working days from the date of this decision. The agent licensee must provide evidence to the Authority of having completed this order.
  - 4.1.3 Licensee Advantage Realty Limited is ordered to pay a fine of \$1,500 under section 93(1)(g) within 30 days from the date of this decision.
  - 4.1.4 Licensee Advantage Realty Limited is ordered to pay the complainants the sum of \$500 costs under s 93(1)(i) within 21 working days from the date of this decision. The licensee must provide evidence to the Authority of having completed this order.
  - 4.1.5 No other orders are considered appropriate."

#### **Issues on Appeal**

[18] The parties identified the following current issues:

- [a] Whether the Committee erred when it decided that the agency's practice, which led to Mr and Mrs Ashdown completing the consent form in the way they did (for the vendors in respect of provisional value) fell short of the requisite standard expected by a consumer from a licensee and constituted unsatisfactory conduct.
- [b] Whether the Committee erred in finding that Mr and Mrs Ashdown were not themselves guilty of unsatisfactory conduct or misconduct and finding the agency company was not guilty of misconduct but guilty of unsatisfactory conduct.
- [c] Whether the penalty orders imposed were appropriate, including whether a full refund of the commission should have been ordered; and whether compensatory damages should have been ordered.

However, before us the focus was on [a] above rather than [b] so that we do not interfere with the CAC's finding in favour of Mr and Mrs Ashdown. It seems difficult to

exonerate Mr and Mrs Ashdown from the agency's practice but, for the reasons given by the CAC, we would take no further action against them.

### Relevant Statutory Provisions

[19] Sections 134, 135 and 137 read:

**“134 Contracts for acquisition by licensee or related person may be cancelled**

- (1) No licensee may, without the consent of the client for whom he or she carries out real estate agency work in respect of a transaction, directly or indirectly, whether by himself or herself or through any partner, sub-agent, or nominee, acquire the land or business to which the transaction relates or any legal or beneficial interest in that land or business.
- (2) No licensee may, without the consent of the client, carry out or continue to carry out any agency work in respect of a transaction if the licensee knows or should know that the transaction will, or is likely to, result in a person related to the licensee acquiring the land or business to which the transaction relates or any legal or beneficial interest in that land or business.
- (3) The client's consent is effective only if—
  - (a) given in the prescribed form; and
  - (b) the client is provided with a valuation in accordance with section 135.
- (4) The client may cancel any contract—
  - (a) made in contravention of subsection (1); or
  - (b) brought about by agency work carried out in contravention of subsection (2).
- (5) No commission is payable in respect of any contract of the kind described in subsection (4), regardless of whether the client cancels the contract.
- (6) The client may recover any commission paid in respect of any contract of the kind described in subsection (4) as a debt.
- (7) For the purposes of this section, a person who is the client of an agent in respect of a transaction is also the client of any branch manager or salesperson whose work enables the agent to carry out real estate agency work for that client.
- (8) This section and section 135 have effect despite any provision to the contrary in any agreement.

**135 Client to be provided with valuation**

- (1) For the purposes of section 134(3), the licensee must give the client a valuation made at the licensee's expense.
- (2) The valuation must have been made by—
  - (a) an independent registered valuer; or
  - (b) in the case of a business, by an independent qualified statutory accountant (within the meaning of section 5(1) of the Financial Reporting Act 2013).



- (3) The licensee must give the client the valuation either—
  - (a) before seeking the consent of the client; or
  - (b) with the agreement of the client, within 14 days after obtaining that consent.
- (4) Every consent given under section 134 without the valuation being supplied to the client in accordance with subsection (3) is ineffective.
- (5) Any contract to which the client is a party and to which the consent relates is voidable at the option of the client if—
  - (a) the client gives his or her consent in accordance with subsection (3)(b); and
  - (b) the valuation, when supplied, is greater than the valuation specified in the prescribed form of consent as the provisional valuation.

**137 Meaning of licensee and person related to licensee in sections 134 to 136**

- (1) In sections 134 to 136, **licensee** includes, in the case of an agent that is a company, every officer and shareholder of the company.
- (2) For the purposes of sections 134 to 136, a person is related to a licensee if the person is—
  - (a) a partner of the licensee under a partnership agreement:
  - (b) an employee of the licensee:
  - (c) a branch manager or salesperson engaged by the licensee:
  - (d) the licensee’s spouse or civil union partner:
  - (e) the licensee’s de facto partner:
  - (f) a child, grandchild, brother, sister, nephew, or niece of the licensee or of any person referred to in paragraphs (d) or (e):
  - (g) any other child who is being, or is to be, cared for on a continuous basis by the licensee or any person referred to in paragraph (d) or (e):
  - (h) a grandparent, parent, uncle, or aunt of the licensee or of any person referred to in paragraph (d) or (e):
  - (i) an entity that has an interest in the licensee or an entity in which the licensee has an interest”

**A Summary of the Expert Evidence Adduced to Us**

[20] There is no real evidential dispute as to the relevant facts. The main issue is whether a finding of unsatisfactory conduct can be made against the appellant agency in terms of the particular facts, and its knowledge and understanding. We

heard various witnesses but, in particular, there was expert evidence from two accepted experts, namely, Messrs J D Abbott and G L Crews.

### **The Evidence of Mr John David Abbott**

[21] Mr Abbott noted that he has been asked to provide expert evidence on whether prior to September 2013 there was a standard industry practice for the completion of Form 2 consent forms pursuant to s 134 of the Act. He then completed his evidence-in-chief as follows:

#### **“Consent for Sale to a Related Person**

9. I am familiar with the consent process that licensees must comply with when a sale may be made to a person related to that licensee.
10. The Real Estate Agents (Duties of Licensees) Regulations 2009 provides a form and memorandum to assist a licensee to seek and receive consent from a vendor in the required manner. The memorandum also has the benefit of ensuring that the vendor is fully informed and not totally reliant on the advice of the licensee with regard to the consent process.
11. Whilst the consent form provides a guidance for its completion there are areas within the form which require the licensee to exercise their own judgement.
12. A key example of this is the insertion of a provisional value.
13. To the best of my knowledge there were no guidelines for the completion of the consent form until the issue of the “form 2 and provisional valuation” document by the Real Estate Association on 28 October 2014.
14. In the period of time between the Act coming into power and the release of the 28 October 2014 guideline licensees were required to apply their best interpretation when completing the consent form.
15. I am aware that in its decision of 29 July 2014 the Complaints Assessment Committee No. 303 found that there was a standard industry practise to use the agreed sale price as the provisional value when completing the consent application. In my experience this is not correct.
16. In my experience as an auctioneer I am aware that consent forms are sometimes required by the relevant licensees. Prior to 28 October 2014 there were a range of values inserted into the provisional value section of Form 2, for obvious reasons these values could not equate to the agreed sale price.
17. A licensee is unable to value a property. As a valuation can only be done by a Registered Valuer, the industry used a various number of approaches to establishing provisional values.
18. Since this decision was brought to my attention I have raised the issue with a number of senior members of the industry and within open discussion during training sessions to confirm my view that there was no

standard practice as to what a Provisional Valuation was. Through this informal investigation it became very clear that not only was the industry practise not what was described by the CAC303 there was in fact no standard industry practice for the completion of consent form.

19. There are no guidelines in the Real Estate Agents Act 2008 with regard to what figure should be inserted in Form 2 as a Provisional Valuation.
20. There are no guidelines in Form 2 itself (Client consent for licensee to acquire interest in property) with regard to what figure should be inserted as a Provisional Valuation.
21. As at July 2014 there were no guidelines provided by the Real Estate Agents Authority as to what figure should be inserted in Form 2 as a Provisional Valuation.
22. In my opinion Statement B of Form 2 (consent based on provisional valuation) should be changed from "I confirm that –  
(a) the licensee has informed me/us that the land/business described above is provisionally valued at \$[provisional value]" to simply stating that the 'agreed sale price' be inserted.
23. The Real Estate Agent Authority issued on Industry Update on 29<sup>th</sup> October 2014 advising that the agreed sale price should be used as the Provisional Valuation on Form 2. The fact that the REAA deemed it necessary to clarify their view of proper process indicates their awareness of confusion within the industry surrounding this issue prior to this sale."

[22] The effect of Mr Abbott's cross-examination was that he confirmed that Statement B in Form 2 should simply require use of the agreed sale of price. He runs seminars as continuing education for the real estate industry but they have not covered this Form 2 issue.

### **The Evidence of Mr Graham Leslie Crews**

[23] After covering his qualifications in the usual way, Mr Crews set out substantive evidence-in-chief in terms of the issue before us as follows:

#### **"Providing a provisional valuation as required under Section 135(5) of the Real Estate Agents Act (2008)**

9. Providing a provisional valuation is required under Statement B of the prescribed Form 2 (consent based on provisional valuation). Form 2 is prescribed in the Forms Schedule of the Real Estate Agents (Duties of Licensees) Regulations 2009. Statement B refers to consent given by the client for a licensee to acquire an interest in that client's property when an independent valuation has not been made available prior to consent but will be made available within fourteen days.
10. The option of providing a provisional valuation prior to consent is not new. The option was introduced with the passing of the Real Estate Agents Act 1976 and was prescribed as part of Forms 13 and 14 of the Real Estate

Agents Regulations 1977. The requirement was carried over with introduction of the Real Estate Agents Act 2008. There is little difference between the two Acts as to the necessity to provide a provisional valuation prior to consent if a registered valuation has not been made available to the client.

11. The 1976 Act, regulations and Forms 13/14 were silent on prescribing the source of a provisional valuation. The 2008 Act, regulations, Form 2 and the Code of Conduct also remain silent on the source. Based on my knowledge and experience however, the establishment of provisional valuations since the 1976 Act was promulgated has traditionally followed standard industry practice, i.e. the provisional valuation is sourced from the verbal 'meeting of minds' between the transacting parties. This is the agreed price that will be confirmed in writing once the consent form (now Form 2 under the 2008 Act) is prepared, explained and signed. Initially the offered price is entered on the consent form before signing, changed during negotiation, and ending as the agreed price when negotiations are concluded.
12. Policies and procedures in most agencies also call for the licensee acquiring an interest in a client's property withdraw from any negotiations concerning the transaction and the supervising agent, branch manager, or other independent licensee to manage the entire process, including the preparation of Form 2 and entry of the provisional valuation. The licensee would also withdraw if a person related to that licensee was taking an interest. These policies and procedures are regarded in the industry as a necessary part of "arms-length" management of any actual or perceived conflicts of interest under Section 134/135 of the Act.
13. Notwithstanding, it is necessary to provide a provisional valuation if an independent valuation of the licensee's expense has already been supplied to the client before acquiring an interest in a client's property (Statement A of the current Form 2). In my experience, this option is less commonly pursued in the real estate industry.
14. Despite the silence of Form 2 in prescribing the source of the provisional valuation, in my opinion standard industry practice (using the agreed price) is based on an understanding of the purpose of both Sections 134/135 of the Act and Form 2. In my view this purpose is particularly well understood by most agencies and supervising agents. The purpose is to ensure that any conflict that might arise between an agency's/licensees fiduciary duty towards the client, and the interests of that agency/licensee is fully disclosed and managed. Agencies are also aware of their fiduciary duty to the client and the requirement to fully disclose any conflicts of interest which might arise, including conflicts when a licensee is taking an interest in their client's property. In addition Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 requires that a "licensee must not mislead a customer or client nor withhold information that should by fairness be provided to a customer or client". Agencies would be aware of the possible inequity arising if a higher figure, such as a listed or asking price, was entered on Form 2 as the provisional valuation. The higher figure may exceed the registered valuation, thus

denying the right of the client to void the contract if he/she is not happy with the agreed sale price when making a comparison with the registered valuation, i.e. a right which standard industry practice would retain in accordance with the purpose and spirit of Section 135(5) of the Act.

15. In my twenty five years of real estate compliance teaching and training I have always taught standard industry practice, i.e. the source of the provisional valuation is the agreed price. I reiterate that the figure may be varied during offer and counter offer but will ultimately be the agreed price. The Massey University real estate agency curriculum embodied that principle.
16. With reference to Statement B on Form 2 the words – “the land/business described above is provisionally valued at \$(.....)”, convey an implied expectation that, in my view, a reasonably competent licensee would understand, i.e. the provisional valuation is a “proxy” valuation for the registered valuation which is to be made available within fourteen days. ...
17. Finally, for the purposes of confirming that standard industry practice, as outlined above, is still current, I undertook the following research during the period 10<sup>th</sup> April-24<sup>th</sup> June 2015:
  - (i) phone interviews with nineteen licensed supervising agents, compliance trainers and/or senior practitioners.
  - (ii) open forum discussions on 23<sup>rd</sup> April, 8<sup>th</sup> May, 21<sup>st</sup> May, 27<sup>th</sup> May, 11<sup>th</sup> June, 18<sup>th</sup> June and 24<sup>th</sup> June with audiences of licensed supervising agents, branch managers and salespeople. Total number of licensees attending was estimated at four hundred and thirty.

With reference to (i) above – phone interviews. A response was requested to the question “with reference to client consent for a licensee to acquire an interest in property what, in your opinion, what would be the source of the figure for provisional valuation if required under Statement B of the prescribed Form 2?”

Fourteen respondents answered the question with “the agreed price”. Six of those respondents also referred to commencing with the offered price, which might change during negotiation and end with the agreed price. Four respondents answered “the appraised price”. Two of these respondents added the caveat that the appraisal would need to have been carried out by an “arms-length” licensee and not by the licensee who was taking an interest (or whose related person was taking an interest). One respondent was unable to answer the question but stated that, before proceeding, they would seek advice from the Real Estate Agents Authority or the Real Estate Institute.

The respondents were questioned further about whether they would use a higher price, such as the listed or asking price, if that was higher. Two respondents could not answer but stated they would ask for advice. The remaining seventeen respondents variously stated that using any higher price would be a breach of fiduciary duty, would not be in the interests of

the client and/or may unfairly restrict the client's right to void the contract at the agreed price. In that event this would occur if the registered valuation was not higher than the price, for example the listed price, entered as the provisional valuation.

With reference to (ii) above – open forum discussions. The discussions took place as part of 2015 REAA verifiable training sessions. ... When questioned further, the majority of salesperson licensees were in disagreement about whether the source should be the agreed price, the appraised price of the Rateable Value. However, when prompted, very few agreed that, where the listing or asking price was higher than their selected “proxy”, it would be appropriate to adopt it as the provisional valuation.”

[24] It seems that Mr Abbot considers that there is no standard industry practice but that Mr Crews expects the agreed price to be taken as the provisional valuation and they both accept there were clear guidelines about the use of Form 2 at times material to this appeal. It is common to use the price offered but some agents use their appraised value as they are keen to get Form 2 completed at a stage where a formal valuation has not yet been obtained.

### **The Submissions for the Authority**

[25] Ms Copeland put it that s 134 prohibits a licensee, or a person related to the licensee (as defined in s 137), from purchasing a property from a vendor client for whom that licensee carries out real estate agency work, which means both the listing and selling agents on a transaction must comply (assuming they are not one and the same person), unless the client's consent is given in the prescribed form; and the client is provided with an independent registered valuation in accordance with s 135.

[26] In respect of the figure to be used as the provisional valuation for Form 2, the Authority submits that this appeal will turn on what expert evidence regarding common industry practice we prefer. It is submitted that this is an important consumer issue, and that Mr Crews' evidence should be preferred.

[27] Ms Copeland puts it that, otherwise, where the asking price is used as the provisional valuation, a vendor will lose the protection afforded in s 135(5) to void the contract where the valuation is less than the provisional valuation (often the asking price) even though the formal valuation is greater than the actual sale price agreed upon. It is submitted that would not be consistent with the consumer protection purpose of the Act, nor in accordance with a licensee acting in the best interests of the client.

[28] The Authority accepts that neither the 1976 Act nor the 2008 Act, and their relevant consent forms, clearly stipulated what the “provisional value” of a property should be. However, the Authority submits that since the introduction of the 1976 Act, a common practice has been to use the offer price (meaning the vendors' asking price) as the initial provisional value before Form 2 is signed on the basis that this will then be changed during the negotiation and end as the agreed price when negotiations are concluded.

[29] Ms Copeland noted that counsel for the agency contends that the use of the original (vendors') offer (to sell) as the provisional value is inconsistent with the provisions and/or the intention of the Act and that it would create a situation in which it is highly likely that a licensee will have to act in breach of s 134(2). She was referring to the following from the detailed submissions for the agency, namely:

"66. It is submitted that:

- (a) The use of the original offer as the "provisional value" is inconsistent with the provisions and/or the intention of the Act.
- (b) The Committee was incorrect in its finding on standard industry practice. The Committee did not have before it any expert evidence on industry practice and the evidence is that there was no clear industry practice supporting the use of the purchaser's offer as the provisional value.
- (c) In the absence of a clear statutory definition or industry guidelines, the appellant's interpretation was one reasonably open to it and did not constitute unsatisfactory conduct."

#### Related Persons

[30] Ms Copeland noted that counsel for the appellant contends that Mrs Elva Boyd was not a related person to the agency, as defined in s 137, and consequently there was no requirement to seek the complainants' consent pursuant to s 134. She referred to the definition of 'related person' defined in s 137(2) set out above.

[31] In that respect Ms Copeland submitted as follows. The property was listed with the agency and Mr and Mrs Ashdown were the listing agents. In many cases the listing agents introduce prospective purchasers to their vendor client's property. However, it is often another salesperson from within the same agency, and sometimes from a different agency, who identifies and introduces a prospective purchaser to the vendor's property. This introducing salesperson is, directly or indirectly, carrying out real estate agency work and will get a portion of the commission paid by the vendor, even though they will typically have no direct communication with the vendor client. Further, the introducing salesperson will have access to client information on an agency's database which could be used to unfairly advantage the 'related person'. Sections 134-137 were enacted to mitigate that risk by providing for an independent valuation.

[32] Ms Copeland submits that, in this case, Ms Robyn Boyd is properly to be regarded as the introducing salesperson; and the prospective purchaser, her mother, was a related person under s 137(h). She puts it that while the agency does not have a direct obligation to disclose this conflict on its own behalf (i.e. Mrs Elva Boyd is not a person related to the agency as a company licensee), it is the agency's responsibility to have systems in place to manage conflicts of interest and wider duties to ensure that its licensees are complying with the Act and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 including as the agency's duties arising under s 50 of the Act.

[33] In this case, the agency recognised that Mrs Elva Boyd was related to the introducing salesperson and ensured the appropriate disclosure was made to the

vendor client through the listing agents. It would, of course, have been open for Ms Robyn Boyd to have made the appropriate disclosure herself. It is submitted for the Authority that the agency was correct to proceed as it did, with disclosure given.

#### Instructions Regarding Legal Advice

[34] In so far as the complainant vendors allege that the licensees did not recommend they seek legal advice at the time the offer was presented to them, Ms Copeland accepted that is a matter of fact to be determined by us.

[35] Counsel for the Authority notes, for completeness, that the Committee went on to say that there is a 'warning' statement (in very large print) on the Agreement for Sale and Purchase about the parties obtaining professional advice prior to signing.

[36] She noted that Rule 9.9 of the Rules provides:

“When inviting signature of an agency agreement or a sale and purchase agreement, or other contractual document, a licensee must ensure that a prospective client, client, and/or customer is aware that he or she can, and may need to, seek legal, technical, or other advice and information, and allow the prospective client, client, and/or customer a reasonable opportunity to do so.”

[37] Ms Copeland submits that the onus falls on licensees to ensure that vendors are made aware of their entitlement to seek legal advice prior to signing a sale and purchase agreement; that licensees cannot simply rely on the warning statement recorded on the Sale and Purchase Agreement to fulfil their obligations under Rule 9.9 of the Rules; and it will be a matter for us, having heard the facts, to determine whether this rule was breached.

#### The Complainants' Appeal

[38] Ms Copeland notes that the complainants raised a number of issues as set out above, and that the Committee considered the complainants' submission that the licensee's and agency's conduct represented misconduct under s 73(c)(i) and (iii) of the Act but determined not to lay charges. As Ms Copeland submits, in order for us to allow the appeal, the complainants must demonstrate that the Committee:

- [a] Made an error of law or principle; or
- [b] Failed to take into account a relevant consideration; or
- [c] Took into account irrelevant considerations; or
- [d] Was plainly wrong.

[39] On the present facts, the Authority submits that there is no conduct here that would meet threshold for misconduct and that these grounds cannot be made out.

[40] In respect of penalty Ms Copeland observed that the decision of *Quin v The Real Estate Agents Authority* [2012] NZHC 3557 precludes complainants being awarded compensation. The High Court held that committees (or this Tribunal on appeal about unsatisfactory conduct) cannot order licensees to pay complainants money as compensation for errors or omission (compensatory damages) under



s 93(1)(f) of the Act. Instead, as the Authority submits, licensees can only be ordered to do something or take actions to rectify or “put right” an error or omission, s 93(1)(f)(i) of the Act. If the licensee can no longer “put right” the error or omission, they can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission. Any expenses incurred by the licensee as a result of doing what he/she is ordered to do must be borne by the licensee.

[41] Ms Copeland observes that the matter of complainants seeking a refund of the commission paid to the licensees is for us to determine having heard the facts.

### **A Summary of the Submissions for the Licensee Agency**

[42] Ms Fee emphasised that, in terms of the issue before us, the key evidence is that given by the two expert witnesses, namely, Mr Abbott called by the appellant agency and Mr Crews called by the Authority. As Ms Fee remarked, there is no denying that both are experts and senior in their field and that there was considerable overlap or agreement in their evidence. She helpfully analysed their evidence but we have set it out in detail above.

[43] Ms Fee covered that the complainant vendors consider that their interests were harmed by the agency’s interpretation of the provisional value but puts it that the contemporaneous documents contradict that assertion. Ms Fee referred to the property having been on the market for three years without any offer being made, including an unsuccessful sale by auction but over a period when the market had been very flat.

[44] She noted that the Sale and Purchase Agreement at \$546,500 was subject to the purchaser obtaining a satisfactory building report but the report commissioned for that purpose identified that the property needed a new roof estimated to cost \$15,000. By the time that report came to hand Mr and Mrs Gambino had engaged a solicitor and they, with knowledge of all material facts particularly in relation to the builder’s report, negotiated (as vendors) a price for the sale of the property at \$541,500 which was \$5,000 less than the original price agreed.

[45] Ms Fee observed that, at that point of the builder’s report coming to hand, the purchaser was entitled under the contract to walk away from the purchase in light of the roof problem disclosed in the building report. However, both complainants accepted before us that they negotiated the reduced price in order to keep the contract alive so that there was a willing buyer and a willing seller.

[46] At that point Ms Fee put further thoughtful submissions in terms of the issue before us, namely:

“23. The nature of the client consent process is to guard against the risk that a transaction with a related party will be entered into which is disadvantageous, by reason of the inherent conflict of interest in which the agency is placed. The best approach for an agency to minimise this risk is to use values which are independent, not created by the agency itself. This would preclude the use of any appraisal that may have been completed on the property.

24. The duty to the purchaser would also make it inappropriate for an agency to use an arbitrarily low figure as the provisional value.
25. While using independent values are the best protection for both vendor and purchaser, in this case there was no independent value. ARL was faced with a circumstance where there was no known offer value, nor was there any other value available that was known to be acceptable to the vendors other than the asking price.
26. Indeed the submissions as filed on behalf of the REAA accept at [5.10] that in the absence of an offer price a licensee could enter the asking price as the provisional value. The REAA then notes that the asking price would need to be amended throughout negotiations until it reflected the concluded sale price. So, it would seem that REAA contends that ARL's only error was in failing to amend the provisional value throughout the negotiation process.
27. As noted earlier, making the provisional value the purchaser's offer (and then amending it during the negotiation process) has difficulties for an agent.
  - 27.1 The use of the last offer by the purchaser as the provisional value is inconsistent with the word "value" in the phrase "provisional value". An offer will never be a value. It is merely what a particular purchaser is prepared to pay for the property.
  - 27.2 Many vendors would be offended (and possibly suspicious) should an agent specify as the property's provisional value on offer which the vendor has no intention of accepting.
  - 27.3 While there was agreement between the experts that the appropriate final provisional value should be the agreed price (once that is known) the form itself does not contemplate it. Uncertainty will exist until such time as the agreed price is known.
  - 27.4 The uncertainty is made more severe as a result of s 134 of the Act, which requires a consent form to be completed at the time or before a purchaser is likely to acquire an interest in a property. The penalties for not obtaining consent include that the agent is not able to carry out any work for the vendor, so that the reasonable agent will attempt to procure a consent sooner rather than later.
  - 27.5 When an offer is made by a purchaser it is not known whether the vendor will accept the offer. If the offer approaches what the vendor will take for the property so that it is "likely" that the vendor will accept the offer then, on acceptance the purchaser acquires an interest in the property. The difficulty is that an agent will not know whether a vendor will or will not accept an offer. That knowledge only comes after the vendor has accepted the offer and, by then, a breach of the Act has occurred. If consent is not sought until there is an agreed price then the licensee would be in breach of the Act, since he or she has acted as agent at a time when an offer likely to be accepted has been made without obtaining prior consent.

28. The difficulties with the purchaser's offer being the provisional value are not put forward to suggest that this is not the better interpretation, but to emphasise the uncertainty in interpreting the Act's requirements whichever approach is taken. This in turn supports the difficult place ARL found itself and the reasonableness of what it did."

[47] Ms Fee then made helpful submissions about the law in interpreting s 72 of the Act which defines "unsatisfactory conduct".

[48] She then submitted that the licensee we have referred to as employed by the appellant agency does not come within the definition of "related person" under s 137 of the Act and she put it:

"34. It is accepted by ARL [the agency] that the purchaser was a related person to Ms Boyd, however it is noted that pursuant to s 137 of the Act the purchaser was not a related person to either ARL or the Ashdowns. ARL does not deny that it had duties to manage conflicts of interest which arise with its agency and to ensure that its licensees comply with both the Act and Rules.

35. However, as a matter of strict statutory interpretation, s 134 of the Act did not oblige ARL to obtain the vendor's consent. Section 134 requires that, no licensee may, without the consent of the client, carry out agency work in respect of a transaction which is likely to result in a person related to the licensee acquiring the property. As the purchaser was not a related person to either ARL or the Ashdowns, ARL was not subject to a specific statutory requirement to complete a client consent form arising from the sale of the complainant's property to the purchaser. If there is a fault, which is denied, it was in failing to manage the client consent process which arose in respect of Ms Boyd."

[49] Similarly, Ms Fee made submissions that the conduct of the agency does not come within the definition of misconduct as defined in s 73 of the Act.

[50] She also made submissions about the appropriateness of the penalty imposed by the Committee and we deal with that below.

[51] Ms Fee also detailed the dedicated efforts which Mr and Mrs Ashdown implemented to achieve the sale of the property for the complainants, and the carefulness with which they sought to comply with the law in terms of Ms Boyd's mother seeking to purchase the property. Ms Fee emphasised that they had explained these procedures and their purpose throughout to the complainants and advised them of their right to seek legal advice.

[52] Ms Fee concluded by submitting that we ought to dismiss the complaint against the agency and the cross appeal of the complainants in respect of the agency and Mr and Mrs Ashdown on the basis that their conduct did not fall short of the standard to be expected of a reasonably competent real estate agent. Ms Fee concluded her written final submissions as follows:

"51. While ARL's use of the asking price as a provisional value may not be in accordance with guidelines which were subsequently released by the REAA, at the time there was a vacuum of information as to how to

interpret this phrase. There was no consistency among the industry as to what provisional value meant. Consequently, no black mark ought to be placed against ARL's name as a result of placing a reasonable interpretation on an uncertain statutory provision.

52. Mr Ashdown was, as the Committee found, not responsible for any error in the provisional value, as he merely followed ARL's procedures by referring it to Mr Martin.
53. The complainants secured a sale of their home at a price they were willing to accept following several years of marketing. They received generous reductions in commission and advertising fees. It is submitted that the Tribunal ought to find that no prejudice has been suffered by the complainants due to the actions of ARL and the Ashdowns."

### **The Submissions from Mr and Mrs Gambino**

[53] The stance of Mr and Mrs Gambino is clear from the above. Essentially, they submit that the agency and its licensees breached, as they put it, "a fiduciary duty of utmost care, integrity, honesty, and loyalty" in dealing with them over the above transaction and that, as such, the agency and its licensees had a duty to act primarily for the benefit of Mr and Mrs Gambino as vendors and they failed to do that.

[54] The complainants submit that if the agency had entered a provisional value on the said Form 2 which was lower than what they refer to as the registered value then, when that registered value (meaning the value of the independent private valuer) was made available to them, they would have cancelled the contract and opted to wait for an offer closer to the independent valuation, and that no commission would have been paid to the agency. The complainants also submit that, when there is a breach of a fiduciary duty, commission should not be an entitlement to the agency or any agent and in this case should be fully refunded. They seek a refund of all commission which they paid in their said sale together with interest. Also, they seek that we award them compensatory damages.

### **Discussion**

[55] There was a detailed series of submissions subsequent to the hearing but covered above.

[56] As also covered above, we see no need to reopen the Committee's finding that Mr and Mrs Ashdown were not themselves guilty in any way for the reason given by the Committee. Also, we confirm the Committee's finding that the complainants were aware, or should have been, they could seek legal advice at the time they were presented with the contractual documents.

[57] We are disturbed that the practice could have evolved since, apparently, as early as 1976, of real estate agents taking the vendors' asking price as the appropriate interim valuation in terms of compliance with s 135 of the Act as it now stands. It should be obvious that such an approach negates the basic point of s 135 which must be to protect vendors in a situation where there needs to be an independent valuation in terms of s 135 but the parties wish to contract with each other in the meantime and subject to an appropriate adjustment should that be

recommended by an independent valuer; but subject to further negotiations between buyer and seller. Obviously, taking a very high valuation as the interim valuation abrogates from the chance of the vendors being able to withdraw when the independent professional valuation comes to hand even at a higher figure than the price negotiated between the parties.

[58] We consider that every effort must be made by the vendor and purchaser to wait for an urgent independent valuation of the property, or that, otherwise the figure to be inserted in the said Statement B of Form 2 is the existing appraised value from the agent.

[59] For all that we have covered above, and especially the very helpful evidence of the two expert witnesses, Parliament could not have intended that, for a provisional valuation, the highest figure mentioned be used as, obviously, that deprives the vendor of the protection to be given under s 134. That is simply common sense.

[60] Ms Fee correctly submitted that Ms Robyn Boyd's mother is not a related person to Advantage Realty Ltd for the purposes of ss 134 and 137 of the Act. However, Ms Robyn Boyd was carrying out agency work to a sufficient extent as to be likely to result in her mother acquiring the property. In terms of s 134(1) of the Act Advantage Realty Ltd was not acquiring any interest in 3 Norton Road, Otumoetai, Tauranga. In terms of s 134(2) Ms Robyn Boyd is related to Advantage Realty Ltd because, in terms of s 137, she is an employee of that company or a salesperson engaged by it. However, Ms Robyn Boyd did not seek to nor purchase the property. The purchaser was Ms Boyd's mother. The prohibition formulated by s 134 does not extend to a person related to a related person of the licensee.

[61] However, Advantage Realty Ltd recognised that Ms R Boyd is a salesperson or licensee and a person related to her, i.e. her mother, was likely to acquire the property. For that reason Advantage Realty Ltd followed the Form 2 procedure.

[62] That issue about being a person related to the licensee was not raised before the Committee. Nor was the issue that there seems to have been a breach of s 50 of the Act which requires that an agent or branch manager must properly supervise and manage a salesperson in carrying out any agency work to ensure that it is performed competently and complies with the Act. Under s 51 it does not matter whether a salesperson is an employee or an independent contractor.

[63] There has been a breach of s 50 of the Act because Ms Robyn Boyd was not supervised and managed satisfactorily by the appellant in that the prescribed form in terms of s 134 was not properly completed. In terms of s 72 of the Act that is real estate agency work which falls short of a standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee. Also it contravenes various provisions of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 such as Rules 5.1 (skilled care and competence), 6.1 (fiduciary obligations to the vendor), 6.3 (not bringing the industry into disrepute), 6.4 (not misleading a vendor or withholding information), and 8.4 (ensuring that employees have a sound knowledge of the Act and the Rules).

[64] However, in this case the agency and its employee licensees acted in good faith and there is expert evidence to support the agency's interpretation of the law and appropriate practice at material times. Nevertheless, that conduct is unsatisfactory

for the reasons we have explained. Accordingly, we confirm the finding of the Committee that the agency is guilty of unsatisfactory conduct.

[65] In terms of penalty, this particular case of unsatisfactory conduct must be treated as at the low end of the scale because the agency and its employee agents thought they were acting in accordance with the law which they clearly intended to do. We find it difficult to believe that the agency and an expert witness could think that, but we accept that they did and do. They seem to have been acting in accordance with a standard practice in the industry.

[66] We have set out above the penalties imposed by CAC 303 in its careful decision of 16 September 2014.

[67] In the light of the vastly greater coverage of this issue before us than was available to the Committee, we comment on the ingredients of the penalty imposed by the Committee as follows:

- [a] We agree with the Committee that Advantage Realty Ltd be censured under s 93(1)(a) and confirm that censure penalty.
- [b] We note that the Committee ordered the agency to refund fees in the sum of \$5,000 to Mr and Mrs Gambino. We do not think that is warranted because the agency and its agents acted in accordance with their curious understanding of the law and in terms of an established industry practice. Although a professional valuer considers that the value of the property was higher than that obtained on the market, it does seem that Mr and Mrs Gambino as vendors obtained the then market price for their property. Accordingly, we revoke that order for refund of \$5,000 in fees.
- [c] We confirm the order of the Committee that the agency pay a fine of \$1,500 to the Authority. That is also, in effect, a contribution to the costs of the proceedings.
- [d] In terms of our above reasoning about there being no convincing argument for a refund of commission to the complainant vendors, we also take the view that they not be awarded costs against the agency so that the \$500 costs order is revoked.

[68] Having had a much fuller case presented to us than was before the Committee, although we agree with the Committee's approach and finding of unsatisfactory conduct against Advantage Realty Ltd, we reduce its penalty findings by the adjustments referred to above.

[69] Pursuant to s 113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s 116 of the Act.

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Judge P F Barber  
Chairperson

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Mr G Denley  
Member

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Ms C Sandelin  
Member