BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 6

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

READT 091/14

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**VINCENT and KATHLEEN GAMBINO**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 303)**
	First respondent
AND	**ADVANTAGE REALTY LIMITED**
	Second respondent

MEMBERS OF TRIBUNAL

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

DATE OF SUBSTANTIVE DECISION 30 November 2015 [2015] NZREADT 83

DATE OF THIS RULING 28 January 2016

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

RULING FROM THE TRIBUNAL

The Application

[1] The Authority has applied that we recall our 30 November 2015 decision herein *Advantage Realty Ltd v REAA and Gambino* [2015] NZREADT 83 on the basis that we inadvertently referred to using the appraised value, rather than the agreed price, for the provisional value in Statement B of Form 2. That form is a Schedule to the Real Estate Agents Act 2008 as a client consent for a licensee to acquire an interest in the property in compliance with ss 134 and 135 of the Act.

[2] More specifically, the Authority submits that in our paragraph [58] of that decision we should be referring to *"the agreed sale price"* and not to *"the existing appraised value from the agent"*.

[3] Counsel for the Authority, Ms N Copeland, then sets out relevant principles in respect of recall. She then addresses her submission that we have made an inadvertent error in our decision.

The Stance of the Other Parties

[4] The second respondents endorse the approach of the Authority but counsel for the appellant Agency firmly oppose the application for recall. Portions of the submissions of counsel for the appellant read as follows:

> *"3.3 It is for the Tribunal to decide whether in fact there was a 'slip' in [58], as contended, or whether the Tribunal decided (as it was fully entitled to) that the appraised value represented a figure which had greater assurance, in terms of whether it represented the property's fair value, than whatever offer was currently 'live' at any one time. Consequently, until such time as there is an agreed price, the appropriate provisional value to use is the appraised value. This was a view of the legislation that was reasonably open to the Tribunal. In the absence of a registered valuation, the 'next best thing' (in terms of evidence the property's valuation) is the appraised value.*
>
> *3.4 Contrary to the submissions of the REAA, there is no evidence to support the REAA's submission that use of the appraised value would be inconsistent with the consumer protection purpose of the Act or in the interests of the client. A real estate agent will be fully aware of his or her duty to ensure that an appraised value is reasonable, based on market value analysis and fair to the vendor. An appraisal given by a valuer is subject to professional scrutiny by the REAA and the Tribunal, following a complaint by a client.*
>
> *3.5 The REAA appears to be attempting to use the recall application to obtain validation for the position it has taken in terms of interpretation of the Act. The REAA issued an industry Update in October 2014 which stated that a purchaser's initial offer ought to be used as the provisional value; this value*

should then be amended with any counter-offer to reflect the negotiations. As submitted by counsel for ARL at the hearing, equating the provisional value to whatever the latest offers is makes little sense; an offer is not a 'provisional value'. If the REAA guidelines do not reflect the best and proper interpretation of the Act then the guidelines ought to be reviewed."

Our View

[5] It seems to us that, if Ms Copeland had been correct in concluding we had made such an inadvertent error, then the said paragraph [58] of our decision could be readily corrected in terms of slip rule as covered in 11.10 of the High Court Rules. However, there has been no clerical mistake or accidental slip or omission on our part. We meant our paragraph [58] to read as it does.

[6] We consider that if any party finds our said 30 November 2015 decision unacceptable, it is for that or those parties to appeal it to the High Court. We do not resile from our views expressed in that decision and in paragraph [58] in particular. Whether or not we could have applied the slip rule or have power to recall is academic in this case because we did not make any inadvertent error.

[7] We take the view that the valuation process required by ss 134 and 135 is for the protection of the vendor in the situation of the licensee having the perceived conflict of interest outlined in s 134. Prior to that situation arising, the vendor received an appraisal and was aware of the contents of that when negotiating what became the agreed sale price. Accordingly, it seems logical to us that the appraisal figure be the touchstone for comparison with the independent valuation when it eventually comes to hand. Only if that independent valuation exceeds the appraised value, as distinct from the agreed price, should the vendor be able to cancel the contract in terms of s 135(5).

[8] The Application for Recall is dismissed.

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Judge P F Barber
Chairperson

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Mr G Denley
Member

_____
Ms C Sandelin
Member