BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 54

READT 007/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	TREMAIN REAL ESTATE (2012) LIMITED and EDWARD COX Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 403) First Respondent
AND	VINH CHI LY Second Respondent (Not participating in appeal)
On the papers	
Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Mr N O'Connor, Member
Submissions received from:	Mr T Rea, on behalf of the Appellants Ms N Copeland, on behalf of the Authority
Date of Decision:	5 October 2018

DECISION OF THE TRIBUNAL

Introduction

[1] In a decision dated 6 October 2017 ("the substantive decision"), Complaints Assessment Committee 403 made findings of unsatisfactory conduct against Tremain Real Estate (2012) Limited ("the Agency") and Mr Cox, a salesperson engaged by the Agency. In a decision dated 29 January 2018, the Committee ordered the Agency to pay a fine of $5,000. The Committee did not make any orders against Mr Cox.

[2] The Agency and Mr Cox have appealed against the Committee's substantive decision. The Tribunal is asked to review the Tribunal's decision in an earlier case: *Advantage Realty v Real Estate Agents Authority (CAC 303)* ("*Advantage Realty*"), issued by the Tribunal on 30 November 2015.[1]

Factual background

[3] The vendor of a property in Hastings listed it for sale with Mr Cox on 7 April 2016. The listing agreement recorded that the Agency had appraised the property at $300,000 to $375,000. Mr Cox then provided the vendor with an appraisal, dated 13 April 2016, which recorded the "current market value" of the property as being $300,000 to $340,000. The listing agreement was renewed on 8 July 2016. Both listing agreements recorded a commission calculation based on the appraised value and a sale price of $340,000.

[4] The property was marketed as a "deadline" sale with a closing date in August 2016. Buyer feedback was between $295,000 and $305,000. No offers were received by the closing date.

[5] Twelve days after the closing date, a conditional offer of $300,000 was submitted by a company HB Land Development Co Ltd ("HBL"). The directors and shareholders of HBL were Mr Cameron Ward and Mr Simon Tremain, who were also directors of the Agency. This offer was not accepted but a second conditional offer offer of $312,500 was accepted. The sale and purchase did not ultimately proceed as the conditions were not declared to be satisfied.

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1 *Advantage Realty Limited v Real Estate Agents Authority (CAC 303)* [2015] NZREADT 83.

[6] The vendor complained as to a potential conflict of interest arising from the directors of HBL's position as directors of the Agency. The vendor also complained as to the entry of, and subsequent amendment to, the "provisional value" amount stated on the form on which he gave consent to the transaction.

Consent required for the transaction

[7] As directors and shareholders of HBL, and directors of the Agency, Mr Ward and Mr Tremain were "related to"[2] Mr Cox, and required to obtain the vendor's consent to the transaction, pursuant to s 134 of the Real Estate Agents Act 2008 ("the Act") which provides, as relevant:

> **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 in that land or business.
>
> (2) 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.
>
> (3) The client may cancel any contract–
>
> (a) made in contravention of subsection (2); or
>
> (b) brought about by estate agency work carried out in contravention of subsection (2).
>
> …
>
> (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 any real estate agency work for that client
>
> …

[8] Section 135 of the Act sets out provisions as to the valuation required to be given to the vendor client, as relevant to this case:

> **135 Client to be provided with valuation**
>
> (1) For the purposes of s 134(3), the licensee must give the client a valuation made at the licensee's expense.

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[2] As defined in s 137(2) of the Real Estate Agents Act 2008.

(2) The valuation must have been made by–

(a) a registered valuer; or

…..

(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 s 134 without the valuation being supplied to the client in accordance of 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 supplied in the prescribed form of consent as the provisional valuation.

[9] The terms "provisional valuation" and "provisional value" are not defined in the Act.

[10] The "prescribed form" referred to in s 134(2)(a) is set out in the Schedule to the Real Estate Agents (Duties of Licensees) Regulations 2009 ("the Regulations') as "Form 2" ("the Form 2 consent"). The first section of Form 2 sets out "important information" for vendors, and the second section is the consent form required to be completed. The following provisions are particularly relevant to this appeal:

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 (**licensee**); or

(b) a person related to that licensee (**related person**).

…..

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.

…..

[11] The second section sets out two alternatives for the Form 2 consent. "Statement A" is for "consent based on valuation". "Statement B" is for "consent based on provisional valuation". We set out both alternatives (as relevant to the present case), and note that "Statement B" was selected:

Statement A (consent based on valuation)

I/we confirm that, before signing this form, I was/we were provided, at the licensees' expense, with–

(a) A valuation of the land described above, made by an independent registered valuer:

…

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

(b) I/we have given me/our consent 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:

…..

[12] Mr Cox prepared a Form 2 consent which he submitted to the vendor with HBL's offer. He specified the provisional value as $300,000; that is, the amount offered by HBL. When he presented the second offer of $312,500 on 26 August 2016, he amended the provisional value to $312,500. As the transaction did not proceed further, an independent valuation was not obtained.

The Committee's substantive decision

[13] The Committee referred to the Tribunal's decision in *Advantage Realty,* as to the appropriate figure to be entered as the provisional value in "Statement B" of the Form 2 consent. It noted the Tribunal's statement in that decision that the provisional value should be the "existing appraised value from the agent". It found that Mr Cox had not

entered the appraised value, but had incorrectly entered the offer price, then the agreed sale price, as the provisional value. The Committee found that in doing so, Mr Cox had engaged in unsatisfactory conduct.[3]

[14] However, as Mr Cox was following the Agency's policy and guidelines in completing the Form 2 consent, the Committee exercised its discretion to take no further action against him, other than to make a finding of unsatisfactory conduct.[4]

[15] The Committee found that the Agency became aware (at its Napier office) of the *Advantage Realty* decision on 11 July 2016, having received a "News Update" published by the Authority, commenting on the decision. However, this was not passed on to the Agency's Hastings office, and Mr Cox in particular. The Agency did not implement any office policy or direction as to the Form 2 consent until October 2016.

[16] The Committee found that the Agency failed to ensure that Mr Cox had a sound knowledge of the correct provisional value to enter on the Form 2 consent. It found that given that the Form 2 consent in this case related to two directors of the Agency as purchasers, the Agency should have exercised greater care and diligence in supervising Mr Cox, and ensuring that he understood how to complete the form correctly. The Committee found that the Agency's failure was unsatisfactory conduct.[5]

[17] The Committee subsequently ordered the Agency to pay a fine of $5,000.[6]

Appeal issues

[18] The Tribunal is required to determine whether the Committee was wrong to find that:

[a] (as a result of following the Agency's practice as to setting the provisional value), Mr Cox incorrectly entered the offer price, then the agreed sale

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3 Committee's substantive decision, at paragraph 4.17.
4 At paragraph 4.17.
5 At paragraph 4.26 and 4.27.
6 Committee's penalty decision, at paragraph 2.1(a).

price, as the provisional value of the property in the Form 2 consent signed by the vendor;

[b] the Agency:

[i] failed to advise Mr Cox of the Tribunal's *Advantage Realty* decision when advised of it by the Real Estate Agents Authority;

[ii] failed to implement a change of the Agency's policy until after the transaction ended,

[iii] by those failures failed to ensure that Mr Cox had a sound knowledge of the Act, regulations, and rules (in particular the Tribunal's *Advantage Realty* decision); and

[iv] failed to ensure that Mr Cox understood how the Form 2 consent should be completed correctly; and therefore had engaged in unsatisfactory conduct.

[19] The Tribunal is also required to consider whether, in finding that the amount to be entered on the Form 2 consent as the provisional value is the licensee's appraisal value for the property, the Tribunal correctly interpreted that term in *Advantage Realty*.

1. The appeals by Mr Cox and the Agency

Factual background

[20] The property was first listed by Mr Cox on 7 April 2016. His appraisal of the current market value was $300,000–$340,000. The listing agreement, and the appraisal, were renewed on 8 July. HBL's first conditional offer (at $300,000) was made on 18 August. Mr Cox entered this as the provisional value on Form 2. HBL's second conditional offer (at $312,500) was made on 26 August. Mr Cox amended Form 2 to show the provisional value as $312,500. This offer was accepted, but HBL cancelled the contract on 2 September.

[21] It is evident that the offers made by HBL were within the range of Mr Cox's appraisal. As no independent valuation was obtained, there is no evidence as to whether either the valuation, or the agreed sale price, would have been greater or less than the provisional value entered on the Form 2 consent.

Mr Cox

[22] Mr Cox entered the price offered by HBL as the provisional value, then amended it to the agreed sale price. This was contrary to the Tribunal's direction in *Advantage Realty*, pursuant to which he should have entered the appraised value. In doing so, he followed the Agency's internal policy on the completion of Form 2. Ms Copeland accepted that this was also in accordance with the verifiable training he had received in late 2015.

[23] The Agency failed to make Mr Cox aware of the *Advantage Realty* decision, which was issued four months before the property was listed, and communicated to the industry in the Authority's "News Update" on 29 June 2016, before he completed the Form 2 consent on 18 August 2016.

[24] Ms Copeland submitted that in the circumstances, it would have been open to the Committee to take no further action in respect of Mr Cox and submitted that his appeal against the finding of unsatisfactory conduct should be allowed.

[25] We accept Ms Copeland's submission. Mr Cox's appeal will be allowed.

The Agency

[26] We accept Ms Copeland's submission that the Committee did not err in making a finding of unsatisfactory conduct against the Agency. Despite knowing about the *Advantage Realty* decision in June 2016, it did not advise its salespersons (in particular, Mr Cox) at the time, and did not update its internal policies until October 2016. We note Ms Copeland's submission that this was after the complaint in this case was received. The Agency's failure to ensure that Mr Cox had a sound knowledge of

the legislation, rules, and regulations applying to his real estate agency work, including decisions of the Tribunal, constituted unsatisfactory conduct.

[27] We also accept Ms Copeland's submission that the Agency failed to to manage and supervise Mr Cox's real estate agency work. This was of particular significance given that the ss 134 and 135 obligations, and the need to complete a Form 2 consent, were triggered by the fact that the offers to buy the property were made by two directors of the Agency. The Agency's failure to manage and supervise Mr Cox, so as to ensure that he completed the form correctly, constituted unsatisfactory conduct.

[28] We reject Mr Rea's submission that because (in his submission) the Tribunal was wrong in *Advantage Realty*, neither Mr Cox nor the Agency should have been found to have engaged in unsatisfactory conduct. The Tribunal had clearly set out its conclusion as to the correct manner in which Form 2 was to be completed, and the Authority had advised the industry of the decision. The Agency should have followed the Tribunal's and Authority's direction.

[29] The Agency's appeal will be dismissed.

2. The Tribunal's decision in *Advantage Realty*

Introduction

[30] Counsel made submissions as to whether the Tribunal was correct in *Advantage Realty* to find that the amount to be entered on Form 2 as the provisional value is the licensee's appraised value for the property. It is necessary to set out the factual background in that case, and the decisions of the relevant Complaints Assessment Committee and the Tribunal.

Factual background

[31] Two salespersons engaged by Advantage Realty had the listing of a property in Tauranga. An offer to buy the property was made by the mother of another salesperson at the agency ("the purchaser"). This conflict of interest was disclosed, and the vendors signed a Form 2 consent before the offer was made. An independent valuation

had not been obtained, and Statement B of Form 2 was completed, recording the provisional value as $569,000, which was the vendors' original asking price.

[32] The purchaser made a conditional offer of $505,000. The vendors counter-offered at $565,000, and a sale price of $546,500 was agreed on.

[33] In accordance with Statement B in Form 2 (and as required by s 134 of the Act) an independent valuation was then obtained. This valued the property at $560,000. This was $13,500 more than the agreed sale price, but $9,000 less than the provisional value entered on Form 2.

[34] The effect of the independent valuation being lower than the provisional valuation was that the vendors had no right to cancel the contract with the purchaser, notwithstanding that it was higher than the price at which they had agreed to sell. The purchasers complained to the Authority that they had been financially disadvantaged by the agency having used their asking price as the provisional value.

Complaints Assessment Committee decision

[35] A Complaints Assessment Committee accepted that it was standard industry practice to use the agreed sale price as the provisional value for the Form 2 consent. It rejected, as "nonsense", Advantage Realty's submission that the vendors' asking price (which the agency submitted was the only "known value" for the property) should be used as the provisional value. It found that in using the asking price as the provisional value, Agency Realty had engaged in unsatisfactory conduct.

Tribunal decision

[36] The vendors and Advantage Realty both appealed to the Tribunal. The Tribunal heard expert evidence from witnesses called by Advantage Realty and the Authority. The evidence of Mr Abbott (called by Advantage Realty) was that there was no standard industry practice as to the source of the provisional value for Form 2. His opinion was that there was confusion in the industry, and the better course would be

for Form 2 to be amended so as to require use of the agreed sale price as the provisional value.

[37] The evidence of Mr Crews (called by the Authority) was that the standard industry practice was to use the agreed sale price as the source of the provisional value: initially, the offered price is entered as the provisional value, it is changed during the course of negotiations, and ends with the agreed price once negotiations are concluded.

[38] The Tribunal said that it was disturbed that a practice could have evolved of licensees using a vendor's asking price as the provisional value. It said that it should be obvious that this would negate the basic point of s 135, which is to protect vendors where there has to be an independent valuation, but the parties wish to contract with each other, subject to an appropriate adjustment if recommended by independent valuer. The Tribunal said that to take a high figure (such as a vendor's asking price) as the provisional value would abrogate from a vendor's chance of being able to withdraw when the independent valuation is higher than the provisional value.[7]

[39] The Tribunal said:[8]

> 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.

[40] The Tribunal said further:[9]

> … Parliament could not have intended that, for a provisional value, the highest figure mentioned should be used as, obviously that deprives the vendor of the protection to be given under s 134. That is simply common sense.

Application to recall

[41] The Authority applied to the Tribunal to recall its decision. It submitted that the Tribunal had inadvertently referred to the existing appraised value as being the provisional value, rather than the agreed sale price. The Authority submitted that the Tribunal had appeared to accept the expert evidence that the agreed sale price should

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7 *Advantage Realty*, at paragraph [57].
8 At paragraph [58].
9 At paragraph [59].

be used as the provisional value, and its reference to the appraised value was inconsistent with that approach.

[42] Advantage Realty submitted that to use the appraised value as the provisional value would give greater assurance as to a property's fair value than would any offer that is currently live at any one time. Counsel submitted that using the appraised value would not be inconsistent with the purposes of the Act, as the licensee who prepared the appraisal had a duty to ensure that it was a reasonable market value, and fair to the vendor. Counsel also submitted that it made little sense to use the current offer as the provisional value, as an offer is not a "value".

[43] The Tribunal declined the application to recall. In a decision issued on 28 January 2016, it rejected the submission that it had made an accidental slip or omission in referring to the appraised value.[10] The Tribunal said:[11]

> … there has been no clerical mistake or accidental slip or omission on our part. We meant our paragraph [58] to read as it does.
>
> …
>
> 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 the 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).

The Authority's advice to the industry

[44] The Authority issued a "News Update" to the industry on 29 June 2016, headed "What is the "provisional value" in Form 2?" The Authority stated:

> … In November 2015, as part of a complaint, the Tribunal considered the definition of the provisional value. The Tribunal said the provisional value is "the existing appraised value from the agent". This means that the most recent appraisal price that the licensee has given to the client. The provisional value is not the agreed sale price.

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10 *Advantage Realty Limited v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 6.

11 At paragraphs [5] and [7].

> Where the appraised value is a range, we suggest that you use the lowest value in the range. For example, an appraised range of $450,000–470,000 would mean a provisional value of $450,000.
>
> Read the decision.

Submissions as to the Tribunal's interpretation of "provisional value" in Advantage Realty

[45] Mr Rea first submitted for the Agency that the Tribunal's statements as to the figure to be inserted in Form 2 as the provisional value were *obiter dicta*; that is, those statements were not required to determine the issue before it (which was whether Advantage Realty was wrong to use the vendor's asking price as the provisional value on Form 2). As such, he submitted, the Tribunal's consideration of the approaches of "offered/agreed sale price" and "appraised value", while persuasive, were not binding on the Committee in the present case.

[46] Mr Rea submitted that the Tribunal's definition of "provisional value" in *Advantage Realty* was wrong. He submitted that it is logical to follow the approach of entering the offered price as the provisional value, then amending it as negotiations proceed, because the offer amount, in the absence of other offers, would ordinarily reflect market value. He submitted that the Tribunal was silent as to the practice of licensees amending the provisional value (the offered price) during the period of negotiations.

[47] He submitted that the opinions expressed by Mr Abbott and Mr Crews in *Advantage Realty* reflected the approach advised to the industry prior to the Tribunal's decision, and subsequently. That is, that the provisional value is the offered price, amended during negotiations to the price eventually agreed by the parties. He referred the Tribunal to the Authority's Continuing Education material for 2017, which contains statements to the effect that the provisional value is the purchaser's offer price.

[48] Ms Copeland referred to the judgment of the Court of Appeal in *Barfoot & Thompson v Real Estate Agents Authority*, which considered the obligations of a licensee when the licensee or a related person wishes to buy the property the licensee's

agency has been engaged to sell.[12] When discussing the provisions of ss 134 and 135, the Court said:[13]

> If the client gives a consent and the valuation turns out to be greater that the valuation specified in the prescribed form of consent as the provisional value, any contract relating to the consent to which the client is a party is voidable at the option of the client. We were informed that, where a provisional value is provided, it is generally equivalent to the anticipated sale price contained in the appraisal of land that must be provided by the licensee to a client …

[49] Ms Copeland submitted that there is a concern that using the appraised value as the provisional value is not independent. She submitted that while an appraisal should reflect market conditions, there is still a danger that it could be inflated for a number of reasons, inadvertently or otherwise, with the result that the "voidability" provision in s 135(5) of the Act is rendered nugatory. She submitted that such a result would not be consistent with the consumer protection purpose of the Act, nor in accordance with a licensee acting in the best interest of the client.

[50] Ms Copeland submitted that the correct interpretation of provisional value is that offered by the two expert witnesses in *Advantage Realty*: that is, initially the offer price and finally the agreed price. She further submitted that a licensee might enter the asking price as the provisional value, but this would (crucially) then need to be amended to the offered price then the agreed price, as negotiations are conducted and concluded.

Discussion

[51] We note Mr Rea's submission that the Tribunal's statements as to "provisional value" in *Advantage Realty* are *obiter dicta*. As Ms Copeland submitted that is, strictly speaking, correct. However, we accept her submission that there can be no room for any doubt, particularly after the Tribunal's decision declining the application for recall, that the Tribunal considered the appropriate figure to be entered as the provisional value in the Form 2 consent is the appraised value. The Tribunal's interpretation of "provisional value" in *Advantage Realty* is, at the least, highly persuasive – as

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12 *Barfoot & Thompson v Real Estate Agents Authority* [2016] NZCA 105.
13 At paragraph [14]

indicated by the fact that the Authority communicated the Tribunal's decision to the industry, without reservation.

[52] As recorded at paragraph [18], above, the interpretation of the term "provisional value" in the Form 2 consent has expressly been made an issue for determination in this appeal.

[53] As a preliminary matter, we must record our concern that contrary to the Tribunal's very clear statement in *Advantage Realty*, and the Authority's communication to the industry, the Authority's Continuing Education material has subsequently promoted the approach rejected by the Tribunal. In a set of written material headed "Real Estate Continuing Education 2017 (Knowing and communicating what you are selling): Topic 1: Disclosure remains an important issue", there are references to ss 134 and 135 of the Act, and Form 2.

[54] Appendix 2 to the material is headed "Disclosure of information as to transaction and conflicts of interest". A discussion of s 135(5) contains the statement:

> The provisional valuation will be the purchaser's offer.

[55] A discussion of Form 2 contains the following statements:

> A recent Disciplinary Tribunal decision stated that licensees should use the most recent appraisal amount for the property as the provisional value.

and

> Note: The Authority considers that in a sale by negotiation a licensee will still comply with the Act if they use the value of any offers made and then the agreed price as the provisional value in Form 2.

[56] To return to first principles, the purpose of ss 134/135 of the Act (as recorded by the Tribunal in *Advantage Realty*) is to protect the interests of the consumer. In the present case the consumer was the client vendor. The particular interest here is to ensure that where a property, or interest in a property, is acquired by the licensee, or a "related person to the licensee", the vendor knows about and consents to the acquisition, it is at a fair price, and the vendor is not taken advantage of.

[57] Thus s 134 requires the client's consent to be given in writing in the prescribed form, and that the client is provided with an independent valuation in accordance with

s 135. Section 135 provides (where the transaction concerns land) that the valuation must be made by a registered valuer (at the licensee's expense) before the client's consent is sought or, with the client's consent, within 14 days after obtaining that consent. Form 2 then prescribes the form in which that consent is to be given. If the client's consent is given before the independent valuation is provided, the licensee must provide the client with a "provisional valuation".

[58] The focus in ss 134 and 135 is on the independent valuation by a registered valuer. The option of obtaining the client's consent before the independent valuation is made requires the licensee to provide a provisional valuation. Given that focus, it is clear that Parliament's expectation was that if the the client agrees to sign the Form 2 consent before the independent valuation is provided, the provisional value will be as close as possible to the independent valuation. Hence the provision in s 135(5) that if the independent valuation when supplied is greater than the provisional value, the client vendor has the option of cancelling the contract.

[59] We agree with the statement made in *Advantage Realty*, that every effort must be made by the vendor and purchaser to wait for an urgent independent valuation of the property concerned before the client signs the Form 2 consent. As is evident in this case, that approach is not always followed.

[60] It follows from the focus on the independent valuation that the provisional value of a property should be the "next best thing" (as counsel for Advantage Realty put it in submissions on the Authority's application for recall of the Tribunal's decision) to the independent valuation.

[61] Several difficulties with the approach of using the purchaser's offer price, then (after negotiations) the agreed sale price, as the provisional value, were set out in the submissions made by counsel for Advantage Realty (recorded by the Tribunal in paragraph [27] of the Tribunal's decision. To these we would add that the amount of the purchaser's initial offer is inevitably the starting point for the negotiations that follow. The starting point may or may not have any relationship to the appraised value of the property.

[62] Secondly, and as pointed out by Mr Abbott in his expert evidence (recorded in paragraph [21] of the Tribunal's decision), this approach presents particular difficulties where the property concerned is being sold at auction.

[63] We have reached the same conclusion as stated by the Tribunal in its decision declining the application for it to recall the *Advantage Realty* decision: "the licensee's appraisal figure should be the touchstone for comparison with the independent evaluation when it eventually comes to hand". The appraised value, given at an early stage of the listing, should be "the nearest thing" to an independent valuation.

[64] We note Ms Copeland's reference to *Barfoot & Thompson v Real Estate Agents Authority* (set out paragraph [48], above). We refer, in particular, to the Court of appeal's statement that:

> We were informed that, where a provisional value is provided, it is generally equivalent to the anticipated sale price contained in the appraisal of land that must be provided by the licensee to a client …

While a record of what the Court was "informed" is not authority for the particular proposition, the fact that there is no indication of any challenge to the information provided to the Court means that it is of considerable assistance to the Tribunal.

[65] We also note Ms Copeland's submission that the licensee's appraisal could be "inflated", but it must be remembered that r 10.2 requires that:

> An appraisal of land or business must–
>
> (a) be provided in writing to a client by a licensee; and
>
> (b) realistically reflect current market conditions; and
>
> (c) be supported by comparable information on sales of similar land in similar locations or similar businesses.

[66] Further, r 10.6(a) provides that:

> 10.6 Before a prospective client signs an agency agreement, a licensee must explain to the prospective client and set out in writing–
>
> (a) the conditions under which commission must be paid and how commission is calculated, including an estimated cost (actual $ amount) of commission payable by the client, based on the appraisal provided under rule 10.2: …

[67] A licensee preparing an appraisal will, therefore, be aware of the need for the appraisal figure to support the estimate of the commission payable, required to be given to a prospective client. The licensee will be required to comply with licensees' obligations to "exercise "skill, care, competence and diligence at all times when carrying out real estate agency work" (r 5.2), to "comply with fiduciary obligations to the licensee's client" (r 6.1), to "act in good faith and deal fairly with all parties engaged in a transaction" (r 6.2), and "not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client" (r 6.4).

[68] If there is any doubt or concern that licensees' appraisals may be inflated, or manipulated in any way such that they do not not reflect current market conditions, supported by comparable information, then that doubt or concern should be addressed by careful education and training and, if necessary, disciplinary proceedings.

[69] Mr Rea raised as an issue the fact that appraisals are likely to be given in the form of a range of values, and that raises the question of where the provisional value should be set within that range. We do not consider it appropriate for the Tribunal to direct licensees as to what figure they should enter on Form 2 as the provisional value, if they have chosen to express their appraised value as a range. It is the licensee's obligation to set the provisional value.

[70] Licensees should bear in mind that the appraised value must realistically reflect current market conditions, and that in allowing licensees to enter a provisional value rather than wait for an independent valuation, the intent of s 135 is that the provisional value is "the nearest thing" to an independent valuation. They should also bear in mind that the written appraisal they are required to provide under r 10.2 must form the basis for the "estimated cost (actual $ amount)" of commission they must provide under r 10.6(a).

Outcome

[71] Mr Cox's appeal is allowed. The finding of unsatisfactory conduct is quashed.

[72] The Agency's appeal is dismissed. The finding of unsatisfactory conduct and subsequent penalty orders are upheld.

[73] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

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Ms N Dangen
Member

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Mr N O'Connor
Member