BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 3

READT 111/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**TINA LOUISE RAE**
	Applicant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 10057)**
	First respondent
AND	**TERRENCE BURCH**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr J Gaukrodger - Member

PART-HEARD at WELLINGTON on 8 October 2012 (with subsequent written submissions)

DATE OF THIS DECISION 18 January 2013

APPEARANCES

The appellant on her own behalf
Mr S Wimsett – counsel for the first respondent Authority
Mr T Burch on his own behalf

DECISION OF THE TRIBUNAL

The Issue

[1] The appellant has appealed against a decision of Complaints Assessment Committee 10057 of the Authority to take no further action in respect of the appellant's complaint against Mr T Burch then a licensee for an alleged misrepresentation to her, when a prospective property purchaser, as to location of boundaries.

[2] In an interim decision of 25 June 2012 we set out the basic facts as follows:

> *"[2] The appellant bought a cross lease property unit in Paraparaumu in 2005 and in late 2010 found that about half her garden shed had been built on her neighbour's land in the adjoining unit. She alleges that in 2005 the second respondent indicated to her that the shed was part of the property she was purchasing and that the established fences properly represented the boundaries of that property and the adjacent property.*
>
> *[3] The appellant complained to the Authority against the second respondent in respect of his alleged misrepresentation to her.*
>
> *[4] The Committee found that there was insufficient evidence to show that he had misrepresented the boundaries of the property to the appellant and there was nothing to put him on notice that the relevant land was not part of the property being purchased by the appellant.*
>
> *[5] Essentially, her complaint against the second respondent is that he misrepresented to her the location of the boundary of the property she purchased in 2005, and that misrepresentation caused her loss because she will have to buy half the land on which the shed stands from her neighbour.*
>
> *[6] The second respondent denies making any such representation about boundaries and has stated "I have not advised any buyer on boundaries or fences. In the companies I have worked for, it has always been a strict company policy not to do so". In July 2005 he was a real estate agent with over eight years experience.*
>
> *[7] The Committee takes the view, from the papers, that there is insufficient evidence to show that the licensee misrepresented the location of the boundary of the property and, inter alia, that one cannot tell from an aerial photograph of the property, or from a copy of the title, that the garden shed encroached on the adjoining property, and that there is no reason for the licensee to have thought otherwise. The Committee opined that there is no evidence to suggest that the licensee misrepresented the boundary of the property to the complainant nor that the actions taken by the licensee could be considered unsatisfactory or fall within the definition of misconduct under the Act. On that basis the Committee decided to take no further action on this complaint. We observe that there would appear to be oral evidence available from the appellant to support her stance. Presumably, that would be refuted by the oral evidence of the licensee so that the issue would be one of credibility for us to decide. However, the onus of proof is on the appellant and the standard of proof is that of the balance of probabilities."*

[3] At the part-hearing of 8 October 2012 all parties were present and we were able to clarify the problems the appellant is facing in terms of certain survey issues at her Paraparaumu home. Towards the end of that hearing, the appellant collapsed, seemingly with a type of stress attack, so that we adjourned. She does not now wish to add to her evidence and submissions nor respond to final submissions from the other parties.

[4] Very simply put, it seems that her north-eastern boundary as fenced is two feet in from the survey boundary and part of her rear boundary may protrude onto land of her neighbour under a cross lease system so that her substantial garden shed may not have been erected on her land. Certainly, in terms of the cross-lease aspect of her property, the boundaries on her title do not match up with those of her neighbour, and quite substantial survey and legal work seems required to settle the boundary situation between her and her adjacent cross lessee. On the other hand, it must be that a neighbour to her north-east is using about a two foot strip of her boundary land.

[5] Her complaint is that in January 2005 Mr Burch was the real estate agent who handled the sale to her on behalf of vendors of this property and she asked him where the boundaries lay and he told her that they were as fenced. They are not as fenced although, until a surveyor is retained to clarify matters we cannot be certain where the boundaries should be.

[6] Mr Burch simply denies having ever commented on the boundary situation to the appellant.

Decision of the Committee dated 27 September 2011

[7] At the time, Mr Burch was working for Villa Real Estate Ltd which traded as Re/Max. The Committee saw the complaint as about the conduct of the licensee in that, allegedly, he misrepresented to the complainant the location of the boundary of the property (64B Bluegum Road, Paraparaumu) and that the misrepresentation has caused loss to the complainant *"being half of the land under her shed which does not belong to her and she will have to pay to own the land from the neighbours again"*.

[8] To date, the appellant seems to have spent $4,000 to $5,000 on legal fees mainly trying to resolve this boundary discrepancy but without success so far.

[9] The Committee put the material facts as:

> *"2.1 Prior to July 2005 the licensee showed the complainant the property, 64B Bluegum Road, several times. 64B Bluegum Road has a cross lease title at 64 Bluegum Road. The licensee allegedly told the complainant that the shed on the property belonged to 64B Bluegum Road and that the fences were exactly where the boundary lines were.*
>
> *2.2 On 22 July 2005, the complainant entered into an agreement to purchase the property at 64B Bluegum Road. After settlement on 5 August 2005 the licensee had to get a key cut for the shed as the previous owner had lost it.*
>
> *2.3 Around the end of 2010, beginning of 2011 the complainant discovered that half of the land under her shed did not belong to her."*

[10] The Committee both noted the licensee's response and set out its consideration of the complaint as follows:

> *"**Licensee's Response***
>
> *4.5 The licensee has denied making the comments as stated in the complaint about the boundaries. He stated "I have not advised any buyer on boundaries or fences. In the companies I have worked for it has always been a strict company policy not to do so".*
>
> *4.6 He stated that in July 2005 he was a real estate professional with over eight years' experience. He noted that the garden shed is listed as a chattel on the sale and purchase agreement and the chattel page was initialled by both the purchaser and vendor. He agrees that he arranged for a key to be cut for the shed (at his own expense).*
>
> ***Consideration of the Complaint***
>
> *4.7 In the Committee's view there is insufficient evidence to show that the licensee misrepresented the location of the boundary of the property at 64B Bluegum Road.*
>
> *4.8 The Committee has examined the sale and purchase agreement and agrees with the licensee in noting that the garden shed is listed as a chattel. The agreement was signed by both parties.*
>
> *4.9 The Committee also compared the title of the property at 64B Bluegum Road with the aerial photograph of the property. The title appears to confirm that the garden shed and the land beneath it forms part of the property at 64B Bluegum Road.*
>
> *4.10 In the Committee's view there was no reason for the licensee to have doubted that the garden shed, and therefore the land beneath it, did not belong to the property at 64B Bluegum Road.*
>
> *4.11 In the Committee's opinion there is no evidence to suggest that the licensee misrepresented the boundary of the property to the complainant nor that the actions taken by the licensee could be considered unsatisfactory or fall within the definition of misconduct under the Act. On this basis the Committee has decided to take no further action on this complaint.*
>
> ***5. Decision***
>
> *5.1 The Committee met to consider the complaint and has determined, pursuant to section 79(2)(a) that the complaint alleges neither unsatisfactory conduct nor misconduct and dismisses it accordingly."*

Further Background

[11] There is no dispute that in 2005 the appellant purchased the property at 64B Bluegum Road, Paraparaumu, which had been marketed for sale by the

licensee. The property is subject to a cross lease with a neighbouring property, 64A Bluegum Road (adjacent property).

[12] The appellant alleges that the licensee indicated to her that a shed at the address (and the land it sat on) was part of the property and that the established fences properly represented the boundaries of the property and the adjacent property. The licensee denies making any such representation.

[13] In 2010 the adjacent property was sold to Michael Patterson. The licensee handling that sale was Rose Hu, a salesperson with the same firm as the licensee (Villa Real Estate Limited, trading as Remax Villa Real Estate).

[14] Mr Patterson subsequently became aware that the two titles, i.e. for his property and for the adjacent property, appear to be inconsistent. Both titles appear to include the benefit of restrictive covenants over a square area on the northern boundary, but the shed used by the appellant overlaps that area. Mr Patterson instructed solicitors to resolve the title issue with the appellant.

[15] This led the appellant to make a complaint against the Mr Burch, in respect of his alleged misrepresentation, and against Rose Hu, alleging that Ms Hu had sold the adjacent property to Mr Patterson knowing that the titles of the two dwellings at the address were inconsistent and without disclosing that fact.

[16] The Committee upheld the complaint against Rose Hu finding her guilty of unsatisfactory conduct and ordering that she apologise to the appellant and pay a fine of $750.

[17] In respect of the licensee Mr Burch, the Committee found there was insufficient evidence to show that he had misrepresented the boundaries of the property to the appellant, and that there was nothing to put him on notice that the relevant land was not part of her property.

Jurisdiction on Appeal

[18] The Committee stated that its decision to take no further action on the appellant's complaint was made under s.79(2)(a) of the Real Estate Agents Act 2008 which gives it power to dismiss. However, its decision was akin to a determination under s.89(2)(c) of the Act (to take no further action) given that the Committee enquired into the complaint and made an assessment of the sufficiency of the evidence for a finding of unsatisfactory conduct.

[19] We have previously held that general appeals from factual determinations will be subject to a wider approach on appeal than appeals from discretionary decisions. That approach is consistent with principles articulated by the Supreme Court in *Kacem v Bashir* [2010] NZFLR 884:

> *"[32] ... for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for*

a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

[20] The Authority accepted that, in the present case, the appellant is entitled to judgement in accordance with our opinion based on all the material before us and we need not show that the narrower criteria, applicable on an appeal from a discretionary decision, apply.

Issues on Appeal

[21] We must determine from the evidence the key factual issue in dispute, namely, whether or not the licensee made the alleged misrepresentation.

[22] If we find, as a matter of fact, that the licensee did incorrectly describe the boundary of the property to the appellant, we must then determine whether that conduct amounts to unsatisfactory conduct as defined in s.72 of the Act. That section and s.73 of the Act read:

*"**72 Unsatisfactory conduct***

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that –

(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or

(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or

(c) is incompetent or negligent; or

(d) would reasonably be regarded by agents of good standing as being unacceptable.

73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct –

(a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or

(b) constitutes seriously incompetent or seriously negligent real estate agency work; or

(c) consists of wilful or reckless contravention of –

(i) this Act; or
(ii) other Acts that apply to the conduct of licensees; or
(iii) regulations or rules made under this Act; or

(d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee."

[23] In *LB and QB v Real Estate Agents Authority and Li*, [2011] NZREADT 39, we emphasised the importance of accuracy in any representations made by licensees to purchasers as to the legal characteristics of property being marketed.

[24] Where there is evidence that a misrepresentation was made intentionally or recklessly, a finding of misconduct will often be warranted. Where a misrepresentation was unintentional, a licensee's conduct will, usually, nevertheless be unsatisfactory subject to the licensee demonstrating that he or she took all reasonable steps in the circumstances to verify the information provided to the purchaser.

[25] In *LB*, we held that it will not usually be sufficient for licensees to simply rely, without further enquiry, on the accuracy of information provided by vendor clients:

> *"[20] ... we observe that acting merely as a conduit from seller to purchaser may not exonerate a licensee from blame. We do not think that a licensee should place sole reliance and credence on advice or assurances from a vendor, even though given in good faith."*

[26] In the present case, it will be a matter for us, should we conclude that a misrepresentation was made, whether the licensee took all reasonable steps to verify any information provided to the appellant.

Conduct Prior to the Commencement of the Act

[27] The relevant conduct in this case took place prior to the Act coming into force on 17 November 2009. Therefore, s 172 of the Act applies, which provides:

> *"**172 Allegations about conduct before commencement of this section***
> *(1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—*
>
> *(a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and*
>
> *(b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.*
>
> *(2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not*

> *have been made against that person at the time when the conduct occurred."*

[28] In summary, in cases in which the licensee was licensed or approved under the Real Estate Agents Act 1976 (the 1976 Act) at the time of the conduct alleged, and where the licensee has not been dealt with under the 1976 Act in respect of that conduct, s.172 creates the following three step process (see *CAC v Dodd* [2011] NZREADT 01 at [65] to [67]:

> Step 1: Could the licensee have been complained about or charged under the 1976 Act in respect of the conduct?
>
> Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?
>
> Step 3: If so, only orders which could have been made against the licensee under the 1976 Act in respect of the conduct may be made.

[29] At the time of the conduct complained of, the licensee was an approved salesperson. The appellant could have complained about the licensee's alleged conduct under the 1976 Act. The licensee has not been *"dealt with"* under the 1976 Act in respect of the complaint. It was therefore open to the Committee (and it is open to us on this appeal) to consider the complaint.

[30] The key question is whether the conduct of the licensee amounts to unsatisfactory conduct (or a prima facie case of misconduct) under the Act and, if so, what the appropriate order should be.

The Orders Available on Appeal

[31] Section 111(4) of the Act provides that we may confirm, reverse, or modify the determination of the Committee on appeal. If we decide to reverse or modify the determination, we may exercise any of the powers that the CAC could have exercised (s.111(5)).

[32] The options available to us on this appeal (leaving aside the option of ordering the Committee to refer a misconduct charge to us) are therefore to either confirm the Committee's decision to take no further action, either for the reasons identified by the Committee or otherwise; or to reverse the decision of the Committee and make a finding of unsatisfactory conduct.

[33] Should we make a finding of unsatisfactory conduct, the issue of penalty arises.

[34] We have previously held that findings of unsatisfactory conduct, as distinct from findings of misconduct, are analogous to findings made by Regional Disciplinary Sub-Committees under the old statutory framework; *CAC 10024 v Downtown Apartments Limited* [2010] NZREADT 06 at [39] to [44]. The orders that could be made by Regional Disciplinary Sub-Committee (for breaches of the Real Estate Institute of New Zealand Rules) were a maximum fine of $750 and censure. However, these were orders available against an approved salesperson's employing agent rather than against the salesperson or branch manager personally.

[35] Accordingly, should we make a finding of unsatisfactory conduct in the present case, given that the licensee was an approved salesperson at the time of the conduct in question, no orders by way of penalty could be made.

[36] This means that the legislative framework prevents us from awarding the appellant the compensation sought, even in the event that her appeal is successful.

Viva Voce Evidence Before Us

[37] We have had the benefit of extensive evidence from the appellant and further evidence from Mr Burch, the second respondent former licensee. We now summarise the evidence of each of them.

The Evidence of the Appellant

[38] The appellant seemed to us to be honest, fluent, and very distressed that there is confusion about the boundaries to her home. As indicated above, her issue is that on a visit to the property with the second respondent licensee (as he then was – he is no longer in that industry) she asked him where the boundaries were. She was conscious that the concept of a cross-lease arrangement was something she did not quite understand. The second respondent replied, she asserts, that the boundary is where the fences have been erected. The appellant says that sounded likely to be correct to her. Also, she thought that real estate agents "*were required to understand measurements and the like*", and she had her finance arranged for the purchase, so she trusted and believed him.

[39] One of the Tribunal members asked her whether her lawyer had checked the title and had some regard to boundaries. She said that her lawyer at the time simply looked at the shape of the title to her land but did not compare it with the shape of the co-owner's title and told her that her title was "*all right"*. Apparently, he was also preparing a will and setting up a trust for her and she felt he was more interested in progressing those matters than in checking her title. Since then, she seems to have had quite a number of lawyers, including at least one being funded by legal aid, to try and sort out this title mess for her but without success apparently in all cases. Now, she only has sufficient monies to maintain her mortgage payments and cannot afford further legal assistance. As it happens with the voluntary help of Mr Wimsett in particular, that lack looks like being overcome soon.

[40] It seems that the appellant did not fully understand the issues regarding her boundaries until her adjoining co-owner decided to sell in late 2009. They had a good neighbourly relationship and the appellant understood that vendor neighbour would arrange a land swap to overcome the boundary problem. However, that did not happen and the property was sold to a developer whom the appellant regards as most uncooperative and who, apparently, has changed the fenceline to suit himself to the appellant's detriment.

[41] The appellant takes the view that someone is responsible for her boundary issues and that she has not contributed to them. One can only agree with that but, for our purposes, the issue is whether the licensee has contributed to that boundary mess in any way.

[42] It emerged that the vendors to the appellant in 2005 were undergoing a marital split which had led the licensee to add into the agreement for sale and purchase form of offer, which the appellant signed, inter alia: *"this agreement is subject to and conditional upon the vendor arranging for a withdrawal of notice of claim within five working days of signing this agreement"*. That seemed to refer to a caveat which must have been placed on the property at material times by the wife vendor. The appellant's offer was also subject to finance and to a clause 16 which read: *"This offer and any contract arising herefrom is conditional upon the purchaser's solicitor searching and approving the title to the said property within five working days of acceptance hereof. This condition is inserted for the sole benefit of the purchaser."*

[43] The appellant seemed to be also criticising the licensee because, until late in negotiations in 2005, the appellant did not know that there was a caveat on the house and again she emphasised *"I trusted you. That is why I signed"*. A strong theme from the licensee is that the appellant has not been telling the truth about these matters.

[44] We are conscious that the two adjoining cross-lease titles conflict as to the siting of their common boundary and no one drew that to the appellant's attention at material times in 2005. She did not know of the problem until 2009. Also it seems that her northern fenceline, which involves another adjoining neighbour, is now shown as about two metres inside the actual fenceline so that, inter alia, it runs through the shed and means that the common fence is not nearly on the boundary line. The appellant seemed to be suggesting that her new co-owner had his lawyers correct the boundary situation electronically, as she put it, but that had not resulted in a new title for her. She is rather vague about this.

[45] At material times in 2005 the appellant did not obtain a LIM report concerning her proposed purchase. She now says that the licensee told her there was no need to as it would only relate to any flooding problem which could not possibly exist. He denies having said that. As we have already indicated she was unaware that the two titles to the two unit apartments conflicted until late 2009 when the co-owner placed her unit on the market for sale.

[46] There was no contact between the appellant and the licensee between 2005 after the purchase and early 2011 when the appellant was so upset with her discovery of her boundary problems that she rang the appellant. He expressed sorrow about the problem but felt he could not help in any way and he was then no longer in the real estate industry. He is an architect.

[47] The appellant seemed to think that the licensee was a genuine person but felt someone must be responsible to her. She again emphasised her allegation that in 2005, when she was considering purchasing the unit, he had told her that the fenceline is the boundary line. It seems that lawyers, surveyors, and the local Council have all resisted taking responsibility for this issue confronting the appellant.

The Evidence of Mr Burch

[48] In evidence and previous statements, the former licensee firmly asserts that he not only made no comment to the appellant at any time about siting of boundaries of her unit, but that it was the real estate company's policy to never advise about boundaries as fences were often sited off a boundary and only a surveyor could

know the precise boundary. He said he had no idea that the title to the appellant's unit was inconsistent with that of the other unit on the property and he felt that this was a Law Society issue rather than a Real Estate Authority issue.

[49] His attitude is that he is most sympathetic for the appellant but that he did not contribute in any way to the boundary problem and he is no longer in the industry. He said that he did not really understand the extent and nature of the boundary problem until during the course of the hearing before us. He said that in terms of his training as a real estate agent, he would never have commented on the siting of the boundary.

[50] The appellant put it to the licensee that he should have foreseen her problem and should have got a grip on the boundary situation at material times. He denied such an issue being raised.

[51] Under cross examination from Mr Wimsett, Mr Burch recalled that some of the queries to him about the unit purchased by the appellant came from the appellant's then partner. Mr Burch could not remember showing the appellant around the property and could certainly not remember talking to her about boundaries; but he readily conceded that he must have shown the appellant over and around the property at least once. He recalled that her problem at the time seemed to be to arrange finance for the purchase.

[52] As the licensee put it, these events took place about eight years ago. He asserted that it was the firm policy of his real estate employer company to always suggest getting a surveyor in response to any question about boundaries. He said his standard response to such questions had been that he did not know for sure where the boundaries lie but knew you could not rely on the siting of fences. He also said that he would not refer to certificate of title to a property because he did not have the expertise to understand it and would rely on lawyers or information from the local Council. He noted that, sometimes, one could get relevant information from rating rolls or government valuation. He said he only learned of the appellant's boundary problem in January 2011 when she telephoned him at home. He also insisted that he had not known the vendor to the appellant prior to being instructed in 2005 to sell the unit and it was untrue that he had a friendship with her.

[53] The appellant put it firmly to the licensee that he was not being honest with us and that he did address the boundaries for the appellant. She felt that the appellant should have said to her at material times *"Do not buy this unit until we get the boundaries checked by a surveyor"*. The response of the licensee is that the appellant was a very keen purchaser and that, at this stage, she does not recall events accurately and he would not have pointed out any boundary to her but would have said he cannot advise her and *"we need a surveyor"*. He remarked that the property was *"an older property so that the boundary pegs were no longer obvious"*.

Discussion

[54] In his final submissions, Mr Burch put the issue before us as not what is wrong with the appellant's boundary but whether or not he told her in 2005 about the actual boundaries. He insists that he did not give her any advice about boundaries. He noted that the situation still appears confused as to where the actual boundaries in issue lie and he can understand her concern, but was totally unaware of any

boundary problem until she phoned him in early 2011. He questions the appellant's recall of what was ever said by him to her and stated *"I deny making the alleged statements and can honestly say that I have not advised any buyer on boundaries or fences. Real estate training and real estate companies regularly remind sales people not to comment on boundaries"*.

[55] The final submissions from Mr Burch contained much evidence but that was evidence he had already given. He continued *"From the commencement of my real estate career in 1997, I was taught not to make statements about boundaries because nobody but a surveyor can really say where the boundaries are. … I have always been conscious about not giving advice about boundaries and fences and the ramifications of giving advice such as that alleged".* Mr Burch then referred to Clause 5.1 of the relevant Agreement for Sale and Purchase providing that the vendor shall not be bound to point out the boundaries of the property. However, this case is about whether Mr Burch as a real estate agent at material times gave any advice to the appellant about the siting of the relevant boundaries. We are concerned with his conduct not with terms of contract between vendor and purchaser.

[56] Mr Burch also expressed deep regret at this case having been so stressful for the appellant. He noted that, one way or another, it had been dragging on for over 18 months with lots of delays, as he put it, caused by her unavailability and he too has found all that very stressful. He feels that, because the appellant has so far been unable to obtain a satisfactory resolution over her boundaries with her neighbours, she is looking for someone like him to blame when he gave no advice whatsoever to her about boundaries or fencing of the property. He appeared to also be putting it that she should be asking questions of her lawyer who handled the purchase transaction for her.

[57] Simply put, the stress for the appellant is that no official document, including her certificate of title of a half share of the freehold (and of a leasehold estate) with the owner of the neighbouring unit, relates in any way to the boundaries as they appear to be fenced. A number of lawyers have been unable to remedy matters for her and she no longer has any funds to pay a lawyer or surveyor. She sees the situation as that she relied on an experienced land agent and put her trust in him, namely the second respondent, and he and his company (Remax) failed her. It appears that she has sat real estate exam papers and has some knowledge of the industry.

[58] In our view, a real estate agent should always make reasonable endeavours to locate the boundaries to a property being marketed. Step one is to seek boundary pegs and, if they cannot be found, to at least confer with the vendor or the vendor's solicitor about that issue. If a boundary problem is put to the agent by a prospective purchaser then, unless there is a clear answer, the agent should advise the prospective purchaser to confer with a surveyor or a solicitor, although it is possible that someone at the relevant Local Council or Land Transfer Office might provide clarity.

[59] From the evidence before us, we do not know whether or not the second respondent gave the appellant any assurances about the siting of boundaries to the unit which he purchased in 2005. We well understand her distress and predicament that the boundaries are off line and her view that someone owed her a duty of care about their siting at the time of her purchase.

[60] We cannot be satisfied that Mr Burch, the second respondent (then) licensee, breached any duty to her. From the evidence overall, we cannot find on the balance of probabilities that Mr Burch was guilty of any unsatisfactory conduct as defined in s.72 set out above. Certainly, there can be no suggestion of misconduct as defined in s.73. In any case, because this situation arose before the current 2008 Act we have no jurisdiction or power to award compensation to the appellant against a licensee. At least it has come out of this situation that Mr Wimsett will take the initiative and endeavour to resolve these problems permanently for the appellant.

[61] For the above reasons we confirm the finding of the Committee of the Authority. This appeal is dismissed.

[62] 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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Ms J Robson
Member

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Mr J Gaukrodger
Member