

Decision No: [2011] NZREADT 21

Reference No: READT 078/10

IN THE MATTER OF s 91 of the Real Estate Agents Act 2008

BETWEEN **DIANE WRIGHT**

Appellant

AND **COMPLAINTS ASSESSMENT
COMMITTEE 10056**

AND **MIKE AND JO WOODS**

Second Respondents

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

APPEARANCES

Mr P Hunt for the appellant
Mr L Clancy for First Respondent
Mr Keall for Second Respondent

DECISION

Introduction

[1] Ms Wright appeals against the decision of the Complaints Assessment Committee 10056.

[2] The issues in this case concern two matters arising out of the purchase by Mr and Mrs Woods of a property in Woods Bay Road, Titirangi, Auckland. Ms Wright was the licensee who acted for the vendor. The Woods complained about two matters:

- a. Incorrect information as to location of the boundaries of the property;
- b. Incorrect information about the severity of the leaks in the roof.

[3] On 19th November 2010 the CAC found Ms Wright had engaged in unsatisfactory conduct in terms of s 72A of the Act. They said:

“Whilst there is no evidence to suggest that the licensee deliberately attempted to deceive the complainants and indeed would seem to have tried to help them identify boundary pegs and pointed out the stains in the ceiling, it is the opinion of the committee that more care should have been taken. By trying to help locate the boundaries the licensee may have provided some assurance to the complainants on which they seem to have relied in their purchase decisions. In both cases, ie the location of the boundary pegs and the question of the roof, the question should be asked as to why the licensee did not approach the vendor to seek clarification and ensure that the complainants had adequate information on which to make a purchase decision.”

[4] At the hearing of the appeal, Ms Wright and her business partner Mr Darroch, gave evidence. Ms Wright said that she attended the initial appraisal with Craig Darroch and met with vendors Rowen and Wain Burt. Ms Wright said that the Burts showed them the house and that Ms Wright noticed that the ceiling had recently been plastered. The Burts told them that there had been a leak that had been repaired. Ms Wright said that the roof was clearly in a poor state and that there were some repair marks on the outside of the roof which were obvious to anyone coming down the stairs from the road side of the property but they were obviously not recent repairs. The Burts told Ms Wright that the roof was asbestos. The boundaries were also discussed with the Burts telling Ms Wright and Mr Darroch that the driveway and parking pad were not on the boundary and were part of the Titirangi road side reserve. Ms Wright commented that this was clear from the aerial picture. They also told her that not all of the grass on the side of the property (which appeared to be a large grassed area) belonged to the property but were vague as to the exact boundary details.

[5] Ms Wright said that she showed the Woods (the complainants) around the property on Sunday 11th April. They saw the property twice on this day. She affirmed that the aerial photograph (bundle of documents appellant page 101) was available at the viewing.

[6] She said that she told the Woods that she did not know where the boundary was but that the car pad and driveway were on council land. She asserted that she told the Woods that not all of the grass on the right hand side of the house was part of the

property. She said that she told them that she was not sure where the boundary was. She said that she walked across the grass area and went to an area which she marked with a red circle on page 61 of the bundle of documents (right hand corner of property). She said that she searched around in some bushes with Mrs Woods but neither of them found a peg. She asserted that she would never have said that "this was where the boundary is" without finding a peg. She said that Mr and Mrs Woods did indicate that they would like to build onto the property. Ms Wright said that she suggested to the Woods that if they wanted to do this then they would need to go to the Waitakere City Council and discuss it with them. She said that she told them that this could be done when they went to view the property bag at the Waitakere City Council. The Woods made an offer the following day (12th April 2010) The offer was conditional upon the Woods receiving a building report, a LIM report and the council property bag search. The contract was due to become unconditional on or about 21 April. Ms Wright said that she suggested these conditions to the Woods to address the issues of leaks (in the ceiling) and the question of the boundaries and any alterations.

[7] She said that she told the Woods that the roof was asbestos and that there had been a leak in the dining room where the ceiling had been repaired and that the vendors had told her that this leak had been fixed. She said she was unaware of any other leak. She also said that she suggested to the Woods that due to the age of the house that the Woods should get a building report.

[8] She said that once the LIM arrived on 13th April she made a colour copy of it and gave it to the Woods. During her evidence she said that included in the LIM was a document (exhibit 2) which showed the outline of the house marked on the LIM in comparison to the boundaries. She produced as exhibit 1 a copy of the email sent to the Woods enclosing this LIM report.

[9] She said that she attended at the property on 15th April with the builder who looked at the house including the roof and told the Woods there were buckets in the ceiling apparently to catch water but no evidence of water in them or around them. The builder also took moisture readings which showed no evidence of high moisture readings. The Woods received the building report. They then took steps with their solicitor to have the Burts' fix some problems identified in the building report but this did not include anything to do with the roof.

[10] Ms Wright said that on 20th April 2010, in response to a further request from the Woods about the boundary, she sent them by e-mail an aerial photograph (document 101 in the bundle) in which she said "*Here is an aerial photograph. This should help you work out the boundaries*".

[11] Ms Wright's evidence was that the photograph showed that the roadside boundary was very close to the front of the property.

[12] When cross-examined by Mr Keall, counsel for the Woods, she denied that she indicated where the boundary was to the Woods or that by looking in the bushes for a

peg that she was giving the Woods the message that was where the boundary was to be located. She reiterated that she did tell the Woods that not all of the lawn was part of the property. She said she used words such as "*not all of the grass belonged to the house*".

[13] Mr Keall also pointed out that the tree shown in the aerial photograph was, by the time that the Woods saw the property, simply a stump and asked whether Ms Wright had drawn this to the attention of the Woods when she sent the aerial photograph. She said that she did not draw this to their attention.

[14] Mr Darroch then gave evidence and he confirmed that the vendor had told them that not all of the lawn was within the boundaries of the property. He said that he and Ms Wright were business partners and that they always took an aerial photograph to any open home and to the appraisals. He said the owners Mr and Mrs Burt were rather vague in their discussions about the boundary. He personally had no dealings with Mr and Mrs Woods. He told the Tribunal Ms Wright was very meticulous and detailed in her dealings with purchasers and in her appraisals.

[15] The Woods then gave evidence. They had filed a joint brief of evidence and spoke to it.

[16] Mrs Woods gave evidence first and told the Tribunal that this was the third property that she and her husband had purchased, the second one in the Titirangi area. She confirmed that they knew that the carport and driveway were on council reserve land but said that she had never walked in the bushes with Ms Wright to check for the boundary peg. She confirmed however that Ms Wright did attempt to locate the boundary peg. Her evidence was that Ms Wright said that the boundary peg was somewhere (but unlocated) in the bushes where she had been looking. She denied that there was any suggestion that half or part of the lawn was not included in the property.

[17] She said that when they got the aerial photograph and the LIM report and document 70 from the property bag (being a council approved plan for extension by a previous owner) they did not look at the boundaries too closely. They found that the boundaries were confusing and felt that exhibit 70 was incorrect as it showed the driveway being on the property when they knew it was not. They also found the aerial photograph confusing. They said that they did not notice that the LIM had the outline of the house printed on it. Mrs Woods referred to a document in the bundle of documents at page 30 which does not show any outline of the house on the plan and felt sure that this was what she saw. She said that they relied upon what Ms Wright had told them as to where the boundary was and were very shocked when they discovered after a survey that the boundary for the property was literally in the middle of the grassed area (as shown in the photographs taken by Mr Woods at document 132 and 131). Mrs Woods said that prior to purchase they were worried about where the boundary was and had asked Ms Wright but in the end she said "*we risked it*" or rather (she corrected herself) "*we made the best decision we could based upon the information that we had*". She also confirmed that they did not discuss the boundary issue with their solicitor.

[18] In respect of their claim about the roof, she said that they trusted Ms Wright to identify any further leaks that were in the roof. Both Mr and Mrs Woods were asked why they put their faith in Ms Wright and not in the building report that they obtained and both said that they were more concerned about other aspects raised by the builder such as the structural safety of the deck.

[19] Mr Woods told the Tribunal that it was part of their long term plan to replace the roof (which they knew was old and made of asbestos) but they were going to do it when they altered the property. However, because of the difficulties that they experienced after purchase with the roof leaking, they had to replace it much earlier than they thought. In fact, it was replaced in August 2010 for a total cost of \$7,925.

[20] Mr Woods said that initially they thought about extending the property out to the right of the property and then came up with a plan of extending the property up towards the roadway. They obtained a survey plan as a result of their discussions with an architect about the extensions. He said that they discovered to their horror that in fact the boundary was almost right at the front of the property and half way through the grassed area. This, Mr Woods said, significantly affected their ability to extend the property. However, they are now almost at the point of having building approval for a more modest alteration out on the right hand side of the property.

[21] Mr Woods said that while the builder had identified visible patches on the roof in his building report, in reality you could not see the patches from the approach down the pathway to the house. The patches were on the other side of the house and not clearly visible.

[22] The Woods were both asked about why they did not ask their solicitor about finding the boundary and said that they felt that there was little they could do before owning the property. They said that they had been quite insistent about attempting to find the boundary on several occasions with Ms Wright and in the end decided to accept what Ms Wright had told them.

[23] Mr Woods also said that he did not remember seeing the outline of the house on the LIM report that they received. He said they did not receive the aerial photograph until 20th April and they felt after looking at the aerial photograph that it was clearly wrong. He also said that doc 70 was also clearly wrong so they did not consider the boundaries show on this.

[24] The Woods said that felt that they should have been told more about the bad state of the roof and that they trusted Ms Wright to give them the right information.

Submissions

[25] In his final submissions, counsel for Ms Wright submitted that her actions did not amount to unsatisfactory conduct.

[26] In respect of the roof, he said that Ms Wright had identified with the vendors only one issue which was that there had been a repaired leak as evidenced by the repair in the ceiling. He submitted that the recommendation by Ms Wright of a building report was to address any issues of concern for the purchasers as to the construction of the house including its weathertightness. He submitted she had discharged her obligation under Rule 6.5.

[27] In respect of the boundary, he submitted that Ms Wright explained that she was not sure where the boundary was, that the Woods were aware that she did not locate the boundary peg, that there was no point in checking the boundary with the vendors as they had been vague regarding the location of the right hand side of the boundary. He submitted that Ms Wright had complied with her obligations under Rule 6.5 by informing the Woods that she was not aware of the boundary location, taking all reasonable steps to allow the Woods to obtain expert advice by making the contract conditional upon a LIM and inspection of the council property bag, suggesting that they talk to the council about their intended renovations and sending a copy of an aerial photograph to the respondents in response to a question about the boundary.

[28] He submitted further that Ms Wright had acted as a competent licensee as she disclosed the general condition of the roof including known defects and recommended a building report. He submitted that this discharged her obligations.

[29] In respect of the boundary, he submitted that Ms Wright also discharged her obligation for the reasons set out above. He said that the complainants were aware that there was an issue regarding the boundaries on which they elected to make their own decision.

[30] In reply Mr Keall for the Woods submitted that as Mrs Wright had admitted that she did not know where the boundary was she could not fulfil her obligations under Rule 6.5(a) and thus had to focus on her obligations under Rule 6.5(b).

[31] He also submitted that the Woods' evidence as to the whereabouts of the boundary should be preferred as the Woods' evidence was "*firm and unequivocal*" on this point, whereas Ms Wright's evidence was, he submitted, "*hesitant*" and "*equivocal*" – especially over the claim that she searched for a peg in the middle of the lawn. He also submitted that she had not raised the issue of all the lawn not forming part of the property in her correspondence with the CAC, thus making her evidence more unreliable and less plausible.

[32] He submitted that if the Tribunal accepted that Ms Wright failed to advise the Woods that not all the lawn was included in the property then a breach of Clause 6.4 and 6.5 was plainly established – for failure to disclose a known defect. He also submitted that searching in the bushes was itself misleading as it conveyed the impression the boundary was in that vicinity not 10m way in the middle of the lawn. He submitted further that the aerial photograph was "*too little too late*", and that to

discharge the obligations she needed to have disclosed the defect at the time “*the customer can act on it without undue time pressures*”.

[33] He submitted that the other documents in the possession of the Woods gave limited or no boundary measurements. He also drew an analogy with the Fair Trading Act, relying upon the decision of the Supreme Court in *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20. He submitted that the Woods do not have to show that they relied upon the conduct of Ms Wright, rather all they need to establish is that the misleading conduct is an effective cause (but not not sole) of their loss.

[34] In respect of the roof Mr Keall submitted that the Woods have consistently stated that Mrs Wright showed them the leak in the ceiling and told them this was the only leak. He submitted that advising the Woods to seek a building report did not excuse a breach of R 6.4 and R 6.5.

[35] The Complaints Assessment Committee submitted that the appellant knew that not all of the grass on the side of the property belonged to the house and that thus she was aware that the right hand boundary of the property ran somewhere down the lawn area, rather than the bush line as apparent from the natural boundary of the property. The CAC submitted that the complainants were clear that the appellant did not pass this information onto them. The CAC submitted that if the Tribunal accepted the evidence of the complainants that the information was not passed onto them then a finding of unsatisfactory conduct was warranted. The CAC also submitted that the fact that the appellant subsequently sent the appellants an aerial photograph and advised them to obtain a LIM report and view the Council property bag does not provide a defence to a finding of unsatisfactory conduct. The CAC submitted that the minimum required from Ms Wright was a clear indication as to the potential deceptiveness of the boundary location. In respect of the roof the CAC submitted that the Tribunal may feel, even on the appellant’s evidence that the information that she provided to the complainants was unsatisfactory. The CAC submitted that the Tribunal might find that Rule 6.4 imposes a higher duty of disclosure and that the appellant should in fairness have told the complainants that the repair was to the ceiling rather than the roof, but the last substantive repairs were done by the previous owners and that she had not clarified with the vendors whether or not the roof still leaked. Again, the CAC submitted, the appellant’s suggestion that the complainants obtain a builder’s report is not a defence to the underlying allegation of unsatisfactory conduct in failing to disclose a known problem. It was relevant only to the question of causation and penalty.

[36] In reply to both the CAC submissions and the submissions of the second respondents Counsel for Mrs Wright submitted there was no basis for asserting that Ms Wright knew about the issues with the roof which she failed to disclose. The vendors, he submitted, said disclosed only one issue so there was no basis to submit she knew of any further issues. Mr Hunt also drew the Tribunal’s attention to the context in which the issues relating to the roof were raised. He submitted that Ms Wright voluntarily disclosed the condition of the roof by expressly directing the Woods’ attention to the area of repair. He also submitted that the Tribunal should not make much of Ms

Wright's initial reply to the complaint (in not referring to the vendor's instruction that not all of the grass was within the property). In fact, he said, she was only responding to the Woods' complaint which was about the search for the boundary peg. He submitted that overall the Woods had enough information to know that there was an issue with the boundary and that clearly it was not in the area where Ms Wright searched. He submitted that while reliance is not a requirement under either Rule 6.4 or 6.5 in fact Mrs Wright told the Woods she did not know where the boundary was and suggested that they should find out themselves with the assistance of the information that she provided. Mr Hunt also advised the Tribunal that Mrs Wright has not appealed against the penalty decision given by the Complaints Assessment Committee.

Discussion

Relevant Legislation

"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 a 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".

[37] The principles applying to the exercise of appellate jurisdiction have been considered by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. According to the judgment, a Court considering an appeal from a lower Court is not obliged to defer to the reasons of the decision appealed from. Rather, the appellate Court has the responsibility of arriving at its own assessment of the merits of the case (paragraph [16]):

"[16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion".

[38] In *Kacem v Bashir* [2010] NZSC 112 the Supreme Court has clarified that the principles in *Austin, Nichols* apply to Courts exercising jurisdiction over general appeals from lower Courts, not appeals from decisions made in the exercise of a lower Court's discretion. The distinction between general appeals and appeals from discretionary decisions is set out at paragraph [32]:

*"[32] But 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.** The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. (emphasis added)".*

[39] Section 89 of the Act confers on the Committee the power to make a determination on a complaint after it has inquired into it and conducted a hearing. Determinations

pursuant to s 89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s 89 would generally be regarded as 'general appeals' and the Committee submits the Tribunal in considering the appeal by way of rehearing, should apply the principles set out in *Austin, Nichols*.

[40] Rules 6.4 and 6.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 provide as follows:

“[6.4] A licensee must not mislead a customer or client nor withhold information that should by law or fairness be provided to a customer or client”.

“[6.5] A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Further, where it appears likely, on the basis of a licensee’s knowledge and experience of the real estate market, that land may be subject to hidden or underlying defects, the licensee must either —

(a) Obtain confirmation from the client that the land in question is not subject to defect; or

(b) Ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses”

Discussion on the Law

[41] The emphasis in Rule 6.4 and 6.5 is on the conduct of licensee. The Rules provide that a licensee must ensure that they are open and honest with a purchaser so that they are not misled in their decision to make an offer to purchase a property. There does not need to be any reliance by the purchaser on the statements (or lack of statements) by the agent and it is clear that a duty of utmost good faith is required from the agent. We also agree with submissions made by Counsel that, for example suggesting a building report should be obtained cannot avoid liability under Clause 6.4 or 6.5. However each case depends upon its factual circumstances and the relationship between agent and purchaser.

[42] There are few factual disputes in this claim. It seems clear that Ms Wright pointed out to the Woods that there had been a leak in the ceiling (as opposed to the roof) and told them that the vendors had assured her that this had been repaired. It seems to be generally agreed that all parties knew that the roof was old and made of asbestos. The first issue is whether or not Ms Wright had an obligation to point out to the Woods that there might be further leaks in the roof itself.

[43] A licensee must comply with R 6.4 and 6.5 and cannot turn a blind eye to problems with the property. However, it appears in this case, that it was common ground that the roof was old and needed to be replaced in time, that Ms Wright

suggested a building report and that the building report identified that there were buckets in the roof but limited moisture around them. Armed with all this knowledge, the Woods determined to proceed with the purchase. We therefore disagree with the conclusion reached by the CAC. We do not think that Ms Wright is guilty of unsatisfactory conduct as a licensee in respect of this aspect of the complaint. The CAC found that Ms Wright should have adequately warned the purchasers about the potential weathertightness issues with the roof. We do not consider factually that in this case this proposition has been made out. The licensee was required to point out the known defect with the ceiling which she did and then suggested a building report. She told them the roof was asbestos. She did not know of any other defect with the roof so could not be required to point out any problems. She clearly however advised the Woods to check the state of the roof by advising them to obtain a building report. This was accepted by the Woods who made the sale conditional upon this. The report identified the fact that the roof had been patched and had buckets in the roof space. We consider that the Woods had sufficient information on which to base their decision to purchase and that there was no misleading conduct or failure to disclose defects with respect to the roof breach (i.e. no breach of R 6.4 and 6.5).

[44] The issue relating to the boundary is more difficult because there is a clear conflict of evidence between the evidence of Ms Wright and the Woods. It seems common ground that Ms Wright attempted to find the boundary peg in an area of the property in some bushes. She did not locate it. The area of contention as to whether or not she said "*I am sure the boundary peg is in here somewhere*" and whether she indicated to the Woods that not all of the grassed area was on their property. The provision of information about boundaries is a potentially fraught situation for a licensee and every licensee must behave in a scrupulously honest way. There must be clearly no attempt to mislead or deceive the potential purchasers. The question therefore for the Tribunal is did Ms Wright's conduct fall short of Rule 6.4 and 6.5 in not clearly identifying where the boundaries were or trying to locate the boundary in an incorrect area or failing to pass on information that not all the grassed area was within the boundary of the property? We need to determine whether or not we find that Ms Wright encouraged the Woods to believe that the boundary was where she looked for it, and thus misled them.

[45] We must consider this question in context on the basis of the legal standard of proof, that is the balance of probabilities. The question is, do we find it more likely than not that Ms Wright said that she was sure that the boundary peg was somewhere in the bushes? Did she fail to say anything about the grass area? If we find she did, then we must ask was this a breach of her obligations as a licensee or was this offset by the further information that was sent to the Woods being the aerial photograph, the LIM report and the information contained in the property bag?

[46] We find that on the balance of probabilities we cannot be certain that Ms Wright did say that she was certain the boundary was where she looked or that she did not mention the grass area. Further, even if looking in that area was deceptive, it was clear she did not find the peg and there were further and ongoing discussions between Ms Wright and the Woods about where the boundary was. The Tribunal can take from this

that the Woods and Ms Wright were therefore not convinced that the boundary was in the bushes where Ms Wright was looking or was misled by Ms Wright into thinking this. If they were, then there would be no need for any further enquiry or confirmation. The LIM report sent on 13th April (exhibits 1 and 2) does show that the outline of the house is very close to the front boundary. The aerial photograph also indicates this but neither document gives a completely accurate picture represented by the survey report. The Woods were concerned about this but seemed to have discounted as unreliable all information about the boundary other than the discussion with Ms Wright. Does this mean that Ms Wright misled them?

[47] The Tribunal considered Ms Woods' answer telling when she said "*we took a risk*" which she then corrected to say "*we made an informed decision on the basis of the information that we had relying on what Diane had told us*". We think that was an honest answer. We believe that the Woods were confused about where the boundary was and did appear to discount any documentary evidence as to the boundary because it did not fit with where they believed the boundary was or they believed it was unreliable.

[48] This does seem, from a human point of view, to be perfectly understandable. However, is Ms Wright responsible for this? Perhaps she could have done more in that she could have recorded in writing that the vendors had told her that not all of the grassed area was part of the property or this could have formed part of the material made available to purchasers when they marketed the property. This would have been a further protection for Ms Wright. However, Ms Wright does seem to have been at pains in her email of 20th April to point out to the Woods that the aerial photograph would help with the boundary identification, i.e. attempting to provide information about the boundary. She said that they should go down to the council to discuss with them their potential renovations. While reliance is not required, proof that the complainants were misled is. We do not consider that in this case the Woods could claim to have been misled by Ms Wright or that Ms Wright breached the other terms of R 6.4 and 6.5. We find that they were alerted to issues with the boundary and that in this case this discharged Ms Wright's obligations. We consider Ms Wright did enough to discharge her obligations under Rule 6.4 and 6.5.

[49] Having considered all of the evidence in this case, we do not consider that there was unsatisfactory conduct on behalf of Ms Wright in respect of the boundary. We have every sympathy for the Woods who have found that they have a more difficultly shaped section that they intended, but for the reasons set out above, reverse the decision of the CAC and find that there has been no professional misconduct by Ms Wright.

[50] For those reasons the Tribunal accordingly reverse the determination of the Committee pursuant to s 111 of the Act which provides as follows:-

"(3) The appeal is by way of rehearing.

- (4) *After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee”.*
- (5) *If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised”.*

[51] The Tribunal therefore sets aside the decision of the Complaints Assessment Committee and finds that there has been no professional misconduct by Ms Wright. The penalty decision is accordingly set aside.

[52] The Tribunal also draws to the attention of the parties the right to appeal this decision of the High Court pursuant to s 116 of the Act.

DATED at AUCKLAND this 26th day of August 2011

Ms K Davenport
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member