

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2011] NZREADT 30

READT 061/11

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

BETWEEN **PAUL JACKMAN**

Applicant

AND **COMPLAINTS ASSESSMENT COMMITTEE (CAC 10100)**

First respondent

AND **DAVID ANDERSON**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

HEARD at WELLINGTON on 13 October 2011

DATE OF DECISION: 31 October 2011

COUNSEL

Mr B A Corkill QC, for appellant
Mr M J Hodge, for first respondent
Mr T D Rea, for second respondent

RESERVED DECISION OF THE TRIBUNAL

The Issue

[1] Has Mr D Anderson (the licensee) been guilty of unsatisfactory conduct under s.72 of the Real Estate Agents Act 2008 (“the Act”)?

Background Facts

[2] The second respondent (the licensee) is a licensed agent under the Real Estate Acts 2008 (“the Act”) and works for Whangamata Real Estate Ltd, a licensed agency. Mr Jackman, the appellant and complainant, is the Chief Executive of the New Zealand Registered Architects Board.

[3] On 11 December 2010 the licensee placed an advertisement (for the sale of a residential property) on the internet which listed the licensee's name as the person whom the public should contact in respect of the sale. The advertisement included the statement: "*Brendon Gordon Architect designed the home ...*"

[4] The appellant complained that Brendon Gordon is not an "*architect*" and this can be confirmed readily and easily by a search of the New Zealand Architects' Register. The appellant argues that the fact that the licensee describes the property as designed by an architect indicates that the licensee saw this as an adding lustre and therefore market value to the property and that, thereby, the licensee is attempting to use misinformation to enrich himself and the vendor at the expense of a buyer.

[5] It is put for the appellant/complainant that the said advertisement is a breach of Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which prohibits licensees from misleading a customer or client, or providing false information, or withholding information that should by law or fairness be provided to a customer or client.

[6] It is accepted that Mr Gordon is not an architect who is registered under the provisions of the Registered Architects Act 2005, but he has a Bachelors Degree in Architecture from Auckland University.

[7] At the time the property was listed for sale, the vendors had informed the licensee that the home had been designed by the architect Brendon Gordon. To confirm that, the licensee did a Google search which came up with the name of Brendon Gordon Architecture Ltd. The website states that company was established in 1996 by Mr Gordon following his completion of a Bachelor of Architecture degree, started at Victoria University, and completed at Auckland University. The licensee gave evidence that he has often had builders and owners of property referring to Mr Gordon as an architect and that at all material times he, the licensee, also believed Mr Gordon to be an architect.

[8] When he became aware that Mr Gordon was not entitled to call himself an architect, the licensee immediately removed any reference to Mr Gordon as an architect from marketing material and advertising. Also, he alerted his sales team to the issue and has made them aware of the difference between a Registered Architect and an Architectural Designer.

Discussion

[9] A consistent point made by Mr Jackman is that when advertisements are describing houses as designed by an "*architect*", a simple search of the NZRAB would enable a licensee to determine whether an individual is or has been an architect.

[10] Mr Jackman puts it, his complaints have been made on the basis of legislation and the Code of Ethics covering real estate agents, not architects. We accept that would be a proper approach. In our view, there may well be situations where the real estate agent should check the NZRAB register to ascertain whether a person is a registered architect, but this is not such a situation.

[11] Inter alia, Mr Jackman stated to the first respondent committee that when a licensee describes a house as "*architect designed*", that is a representation that the individual who designed the house was a "*registered architect*" so that, before making such a claim, the

licensees should get their facts right which can be done rapidly and easily by searching NZRAB. We consider that to be a representation only that the designer is an architect; and that, sometimes and possibly often, the licensee should check the NZRAB.

[12] We accept that agents are not expected to be the “*enforcement arm*” of the NZRAB.

[13] The stance of the appellant is that agents are expected to know the law and should know the legal status of key players in their sector so that they can comply with the Real Estate Agents Code of Ethics about honesty towards clients and potential buyers and that, accordingly, Mr Anderson ought to be held to account.

[14] The first respondent dealt clearly and comprehensively with the issue in a decision dated 14 June 2011 with which we agree. We set out the following paragraphs from the reasoning of the first respondent:

“4.27 While the Committee considers that it would be contrary to the consumer protection purpose of the Act to allow properties to be advertised as ‘architect designed’, when the design of such properties had nothing to do with work done by an ‘architect’, that is not the position that applies in this case.

4.28 If the licensee had checked the NZRAB website, they would have discovered that Mr Gordon was not registered as an architect in New Zealand, and had never been so registered.

4.29 But would it have been the end of the matter, given that Mr Gordon in fact had a degree in architecture? While Mr Gordon may not be able to describe himself as an architect, that does not necessarily mean that there is a breach of the rules of conduct that bind licensees under the Real Estate Agents Act 2008, when a licensee describes a person with a degree in architecture as an architect.

4.30 There may be any number of reasons why a person who might be able to obtain registration under the Registered Architects Act does not apply for registration. Financial considerations may apply: perhaps Mr Gordon could not afford the registration fee. Perhaps he considered that registration under the Registered Architects Act 2005 did not provide him with benefits that matched the cost of the registration. All of this, of course, is speculation on the Committee’s part.

4.31 The issue here is whether or not this house, designed by Mr Gordon who has a degree in architecture, is properly described as designed by Brendon Gordon, architect. The Committee considers it is. The ‘hypothetical consumer’, in the Committee’s view, is going to make little of the distinction between Mr Gordon, with his degree in architecture, and an architect with a degree in architecture who happens to be registered under the Registered Architects Act 2005.

4.32 The Committee wishes to make it clear that it does not consider there is any evidence that suggests an intention by the licensee to mislead any members of the public.

...

- 4.35 *But on the facts of this case, the Committee does not consider that this advertisement by the licensee is misleading.*
- 4.36 *Unsatisfactory conduct which attracts professional discipline, even at the lower end of the scale, must be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purposes of protecting the public. A finding of 'unsatisfactory conduct' is not required in every case, even where error is shown. The question is not whether error was made, but whether the conduct in question was an acceptable discharge of professional obligations.*
- 4.37 *In terms of section 72(a) of the Act, does the conduct of the licensee fall short of the standard of conduct that a reasonable member of the public would expect from a reasonably competent licensee? In this case, the Committee considers that the answer to that question is 'no'.*
- 4.38 *In terms of section 72(b), does the conduct contravene any rules made under the Act? Again, the Committee considers that the answer is 'no', for the reasons set out in the previous section of this decision.*
- 4.39 *The advertisement is not misleading; and it does not provide 'false information' about the status of the person who designed each of the homes. Mr Gordon is, literally and technically, an architect. He has the degree to prove it. But he is not a registered architect. There is no breach of rule 6.4.*
- 4.40 *It follows that the Committee does not consider that this is conduct which is likely to bring the industry into disrepute, so there is no breach of rule 6.3 This is not conduct which, if known by the public generally, would lead them to think that licensees should not condone it or find it to be acceptable. Acceptance that such conduct is acceptable would not tend to lower the standing and reputation of the industry. ...*
- 4.41 *The Committee does not consider that there is any evidence suggesting the licensee is either incompetent or has acted negligently. There is no breach of section 72(c) of the Act.*
- 4.42 *That leaves section 72(d). A licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that would reasonably be regarded by agents of good standing as being unacceptable. The Committee does not consider that agents of good standing would regard an advertisement stating that a property was designed by an architect, albeit one not registered under the Registered Architects Act, as 'unacceptable'.*
- 4.43 *The licensee had an obligation to ensure the advertisement was accurate. Somewhat accidentally, it transpires the advertisement was accurate. A breach of section 72(d) of the Act has not been established."*

[15] We respectfully endorse the above views and reasoning of the first respondent.

[16] We incorporate and adopt into this decision our reasoning in the somewhat similar case of *Paul Jackman v Complaints Assessment Committee and Marie Raos* issued today

simultaneously with this decision. A copy of that decision is annexed hereto. Also, it sets out the general submissions of the parties and the relevant statutory provisions.

[17] Our focus is on whether the licensee is guilty of unsatisfactory conduct in terms of s.72 of the Act. We are much less interested in whether the word "*architect*" should be better protected than it is. On the particular facts of this case, we do not think that the licensee has fallen short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; nor that the real estate agency work in issue contravenes a provision of the Act or any of its regulations or rules; nor was incompetent or negligent; nor would reasonably be regarded by agents of good standing as being unacceptable.

[18] We consider that the licensee, in his understandable absence of knowledge of the NZRAB register, took reasonable steps to ensure that his information that Mr Gordon was an architect was accurate, and he immediately took steps to correct the advertising when advised that Mr Gordon was not a registered architect.

[19] We are satisfied that there is no evidence of any intention of the licensee to mislead any member of the public.

[20] We consider that Mr Gordon is literally and technically an architect who works as such and holds a university degree in architecture.

[21] It is not correct to assert that a person cannot in fact be an "*architect*" simply because legislation provides that they cannot call themselves an architect.

[22] If Parliament had wanted to define what an architect (as opposed to a "*registered architect*") is, it would have been easy for it to have done so, just as it has done with lawyers, real estate agents and health practitioners. The closest that the Registered Architects Act 2005 actually comes to defining "*architect*" is the reference in s.7(2) to a person who designs buildings, prepares plans and specifications for buildings, or supervises the construction of buildings. While s.7(2) prohibits such a person from calling themselves an architect, it does not, as a matter of fact or law, prevent a person from actually being an architect if they are not registered.

[23] An architect who holds an architecture degree and carries on the business of designing houses, preparing plans and specifications and/or supervising construction, is still an architect whether they are registered or not, just as an engineer is still an engineer, despite not being registered as a chartered professional engineer; an accountant who is not a chartered accountant is still an accountant; a builder who is not a licensed building practitioner is still a builder.

[24] Even if we were to accept the appellant's submission and find that the NZRAB register is determinative on the question of whether or not a person is an architect, this would be an appropriate case for the exercise of our discretion to take no further action in all of the circumstances. The licensee acted in good faith in reliance on information supplied to him by the vendors of the property who told him that the designer of their house, Mr Gordon was an architect. He is an architect but not a registered architect. The licensee made his own investigations as referred to above, and there was nothing in the circumstances which ought reasonably to have put him on enquiry that the property might not have been architect designed as he had been told by the vendors. We can understand

it not occurring to the licensee to check the NZRAB register to obtain conclusive confirmation as to the status of the building designer.

[25] There is no evidence that Mr Gordon did not possess the necessary skill or knowledge to perform the work that he actually undertook. There is no suggestion that the property he designed was not designed with proper regard to aesthetic or practical considerations. He has an architectural degree and works as an architect.

[26] The focus of this case is not on protecting the name or title of “*architect*”; but on the complained about conduct of the licensee as a real estate agent.

[27] The onus of proof to establish that Mr Gordon was not an “*architect*” (as opposed to not being a “*registered architect*”) lies with the appellant/complainant to the standard of the balance of probabilities. That onus and standard of proof have not been met.

[28] We accept that the stance of Mr Jackman, on behalf of his Board presumably, is highly commendable and desirable for the protection of the New Zealand public. However we are not so much concerned with the desires of the architectural profession to establish ownership of the concept of and extent of the word “*architect*”, but with the particular conduct of the licensee which has been complained about. We consider that his actions about ascertaining and concluding that Mr Gordon was an architect were reasonable and understandable in all the circumstances of this case.

[29] Simply put, we find that the conduct of Mr Anderson was not in breach of the Real Estate Agents Act 2008 so that the decision of the first respondent is hereby confirmed and the appeal is dismissed.

Judge P F Barber
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member