THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2011] NZREADT 31

READT 060/11 and 066/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PAUL JACKMAN**
	Appellant
AND	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 10100)**
	First respondent
AND	**MARIE RAOS**
	Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at WELLINGTON 13 October 2011

DATE OF THIS DECISION 31 October 2011

COUNSEL

Mr B A Corkill QC, for appellant
Mr M J Hodge, for first respondent
Mr L W Divers, for second respondent

RESERVED DECISION OF THE TRIBUNAL

The Issue

[1] Was Mrs Raos (the licensee) guilty of unsatisfactory conduct under s.72 of the Real Estate Agents Act 2008 ("the Act") in terms of the facts we list below?

Background Facts

[2] Mrs Raos is a licensed salesperson under the Act and works for Mountfort Estate Agents Ltd, a licensed agency trading as part of the Ray White Real Estate Group. On 28 January 2011 she placed an advertisement on the Internet with regard to the sale of a residential property at Cockle Bay near Howick, Auckland, for a Mr

and Mrs Murphy as vendors. There is no dispute that the property had been designed for the vendors in 2005 by a Mr Kim Veltman who, at all material times, was a qualified architect in that he held a bachelor's degree in architecture, but he was not a registered architect under the Registered Architects Act 2005.

[3] The advertisement placed on the Internet to facilitate a sale of the property listed the licensee's name as the person for the public to contact in respect of the sale and described the property as *"It's the look we love right now a fresh take on casual comfort, and designed by acknowledged local architect, Kim Veltman, this near new home ..."*.

[4] The concern of the appellant, presumably, on behalf of the registered architects of this country, is put as that Mr Veltman is not an *"architect"*. The appellant is Chief Executive of the New Zealand Registered Architects Board. It is argued for the appellant that describing the property as designed by an architect is an effort to add market value to the property and is the use of misinformation to enrich both the vendor and the licensee (real estate agent) at the expense of a buyer. It is put that the 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 customers or clients, or providing false information, or withholding information which should by law or fairness be provided a customer or client.

[5] It is accepted that at the time the property was listed on the Internet by the licensee, she had been informed by the vendors that the home had been architecturally designed by Kim Veltman and they required the property to be promoted on that basis. Accordingly, she had checked the plans of that house and the website of Mr Veltman to check that he was an architect. The plans refer to *"Kim Veltman Architects"* and his website states he has a *"B.Arch"*. He is listed in the telephone book as *"Kim Veltman Architects"*. She checked the business white pages and found that a telephone number is listed for Kim Veltman Architects and she also perused their website which stated that Kim Veltman had a Bachelor of Architecture degree and implied he was practicing as an architect. At that time, she was unaware of the ability to check the register of architects on line.

[6] We observe that, on receipt of the complaint, the licensee amended the advertising to the satisfaction of the appellant. The licensee denied that she used the fact that Mr Veltman is known as a local architect to embellish the property's value for sale and put it that she was simply stating the fact that he is an architect and he designed the property. She regarded it as her responsibility as the listing agent to advance the appeal of the property on behalf of the vendors to achieve maximum value and so composed her advertisement to contain what is set out above.

[7] Among the exhibits there is a letter of 9 February 2011 from the vendors stating that Mr Veltman was recommended to them as a highly regarded local architect after they bought the property and were looking to rebuild on it. They noted that Mr Veltman's business card referred to his degree in architecture and that the plans he prepared for the erection of the house had the words *"Kim Veltman Architects"* stamped on each page; so that they understood him to be an architect in every sense. Accordingly, they told the licensee that the property was *"architecturally designed"*.

[8] Inter alia, it is put for the appellant that the licensee did not know the difference between an architectural designer and a registered architect and that a real estate agent should have understood that difference. Mr Veltman holds a Bachelor of Architecture degree but is not registered under the provisions of the Registered Architects Act 2005.

[9] In a clear and comprehensive decision dated 9 June 2011, the first respondent Committee did not think that the licensee had *"got it wrong"* and did not agree *"that the difference between a person with a degree in architecture and a person with a degree in architecture who is registered is "basic", or even for that matter that the Licensee got the distinction wrong"*. The Committee's formal finding was *"The Committee has determined under s.89(2)(c) of the REAA 2008 that it has not been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct. The Committee determines to take no further action with regard to the complaint or allegation or any issue involved in the complaint or allegation"*.

[10] The practical issue argued before us was that, given that s.7 of the Registered Architects Act 2005 prohibits a person who is not a registered architect from describing themselves as a registered architect or architect, was the licensee in this instance in breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules 6.2 and/or 6.3 and/or 6.4) by referring to Mr K Veltman in an internet advertisement dated 28 January 2011 as an *"architect"* when he was not registered as such?

[11] The appellant has brought this appeal under s.111 of the Real Estate Agents Act 2008 which provides that an appeal is by way of rehearing; that after considering the appeal the Tribunal may confirm, reverse or modify the determination of the Committee; and if reversing or modifying, it may exercise any of the powers the Committee could have exercised. In his Notice of Appeal the appellant submitted that the Committee has proceeded on the basis of a: *"substantial misunderstanding of what an architect is. In New Zealand holding a degree in architecture does not entitle a person to be an architect. In reality an application for registration must meet much more rigorous requirements in which having a recognised academic qualification is only one part"*. The Notice of Appeal also referred to s.7(2) of the Registered Architects Act 2005 which provides that a person may not use the title *"architect"* unless he or she is a registered architect.

Relevant Statutory Provisions

Real Estate Agents Act 2008

[12] Section 3 provides:

> *"**3 Purpose of Act***
> *(1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.*
>
> *(2) The Act achieves its purpose by—*
>
> *(a) regulating agents, branch managers, and salespersons:*

(b) raising industry standards:
(c) providing accountability through a disciplinary process that is independent, transparent, and effective."

[13] Section 72 provides:

> ***"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."*

[14] Unsatisfactory conduct must relate to the carrying out of *"real estate agency work"*. Real estate agency work or agency work is defined in s.4 of the Act, and means any work or services provided, in trade, on behalf of another person for the purpose of bringing about *"a transaction"*.

[15] The word *"transaction"* is also defined in s.4 to relate to the sale, purchase, or other disposal or acquisition of freehold or leasehold estates or interests in land, transferable licences, occupation rights, and businesses.

[16] It is not in dispute that the placing of the said advertisement comes within the definition of *"real estate agency work"*.

The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009

> *6. Standards of professional conduct*
> *6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.*
> *6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.*
> *6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.*

The Registered Architects Act 2005

[17] Section 4 provides:

> *"**registered** means registered under section 10.*
> ***Registered architect** has the meaning set out in section 6."*

[18] Section 6 provides:

> *"**6. Title of registered architect***
> *A person is a registered architect if he or she –*
>
> *(a) is registered; and*
>
> *(b) holds a current certificate of registration."*

[19] Section 7 provides:

> *"**7 Protection of titles registered architect and architect***
> *(1) No person, other than a registered architect, may use in connection with his or her business, trade, employment, calling, or profession—*
>
> *(a) the title "registered architect" ; or*
>
> *(b) any words, initials, or abbreviations of that title that are intended to cause, or that may reasonably cause, any person to believe that the person using those words, initials, or abbreviations is a registered architect.*
>
> *(2) No person who designs buildings, prepares plans and specifications for buildings, or supervises the construction of buildings may use the title "architect" unless he or she is a registered architect.*
>
> *(3) Despite subsections (1) and (2), a person may use the title "registered architect" or "architect" (or words, initials, or abbreviations of those titles), in accordance with the rules, in representing qualifications or titles awarded by overseas agencies.*
>
> *(4) A person who contravenes subsection (1) or subsection (2) commits an offence, and is liable on summary conviction to a fine not exceeding $10,000."*

[20] Section 10 provides:

> *"**10 Board to register applicant or decline application***
>
> *(1) If the Board is satisfied that an applicant is entitled, under section 8, to be registered as a registered architect, the Board must—*
>
> *(a) register the applicant; and*
>
> *(b) notify the applicant that he or she is registered; and*
>
> *(c) issue to the applicant a certificate of registration; and*
>
> *(d) enter the applicant's name in the register.*

(2) If the Board is not satisfied that the applicant is entitled to be registered as a registered architect, the Board must—

(a) decline the application; and

(b) notify the applicant of its decision and the reasons for it; and

(c) notify the applicant of his or her right of appeal against the decision.

(3) Subsection (2) does not limit section 28."

The Submissions for the Appellant

[21] Inter alia, Mr Corkill QC referred to the first respondent having considered the meaning of the word *"architect"* at paragraphs 4.3 to 4.5 of its decision as follows:

"4.3 It is clear that dictionary definitions of the word "architect" are less specific than the interpretation of the term "registered architect" in the Registered Architects Act. Consider, for example, this extract from Wikipedia:

*'An **architect** is a person trained in the planning, design and oversight of the construction of buildings, and is licensed to practice architecture. To practice architecture means to offer or render services in connection with the design and construction of a building, or group of buildings and the space within the site surrounding the buildings, that have as their principal purpose human occupancy or use. Etymologically, architect derives from the Latin architectus, itself derived from the Greek arkhitekton (arkhi-, chief + tekton, builder), i.e. **chief builder**.*

Professional, an architect's decisions affect public safety, and thus an architect must undergo specialised training consisting of advanced education and a practicum (or internship) for practical experience to earn a license to practice architecture. The practical, technical, and academic requirements for becoming an architect vary by jurisdiction (see below).

*The terms **architect** and **architecture** are also used in the disciplines of landscape architecture, naval architecture and often information technology (for example a software architect). In most of the world's jurisdictions, the professional and commercial uses of the term "architect", outside the etymological variants noted, is legally protected."*

4.4 The Committee has considered whether the word "architect" in the advertisements must be given an "ordinary or natural meaning", which is simply "a person who designs buildings". If "the public" uses the words "architecture" 'architecturally" and "architect" interchangeably, how can a licensee be in breach of professional standards by making the same type of error.

4.5 The Committee does not accept that the use of the word "architect" in an advertisement simply means that the respective properties were designed by people who design buildings. Nor does the Committee accept that a

> *licensee who confuses the words "architect" and "architecture" is somehow absolved from professional responsibility for doing so."*

[22] Mr Corkill then referred to the Committee having concluded at its paragraphs 4.31, 4.38 and 4.42 that it was correct to describe a person who has a degree in architecture as being an *"architect"* and that the hypothetical consumer would make little of the distinction.

[23] Mr Corkill then noted that the first respondent concluded that Mr Veltman was *"literally and technically"* an architect, but not a registered architect, that agents of good standing would not regard an advertisement that stated a property was designed by an architect, albeit one not registered under the RAA, as *"unacceptable"* and that *"the advertisement was accurate"*.

[24] The main submission of Mr Corkill for the appellant is that the first respondent erred in concluding that there was no relevant distinction between a person who has a degree in architecture, and a person who has a degree in architecture and who is registered under the RAA. Mr Corkill examined the structure of that regulatory statute and noted that under it the NZ Registered Architects Board has promulgated a comprehensive set of rules relating to registration and the maintenance of competence of registered architects.

[25] Mr Corkill referred to a number of case authorities including *Dentice v Valuers Board* [1992] 1NZLR 720 (HC) and then put it that *"In summary, Parliament has seen fit, so as to maintain proper standards in relation to activities that potentially can affect public health and safety to introduce mechanisms for ensuring high professional standards and competence are maintained. And it is against that background that the registration procedures described by the appellant have to be considered."*

[26] Mr Corkill particularly referred to the words of s.7(2) of the RAA which are set out above and mean that no one doing architectural work may use the title *"architect"* unless he or she is a registered architect. Mr Corkill is probably correct in regarding the effect of s.7(1) and (2) of that Act as that an aspect of meeting the objects of the Act is that the term *"registered architects"* or *"architect"* is protected. He cited a number of well known cases which reinforce the significant importance attributed to the protective provisions of regulatory statutes, particularly with regard to the use of name of a profession. He then submitted that the first respondent, in its said decision of 9 June 2011, did not consider the objects of the Registered Architects Act 2005; nor the processes of registration and maintenance and competence; nor the importance of the name protection provisions; nor the public interest issues which these processes are designed to uphold. He then submitted that the first respondent had been completely wrong to conclude that the *"hypothetical consumer"* would make little of a distinction between a registered person and an unregistered person (albeit, one who has a university degree); that no agent of good standing would regard the statement made in this case by the real estate agent/licensee as *"unacceptable"*; and that the advertisement in issue was *"accurate"*.

[27] Mr Corkill emphasised that the distinction between a registered architect and an unregistered architect is a very significant distinction and it exists in the public interest and is required by statute. He emphasised the standard-setting role of this

Tribunal which is required to protect the public and ensure the maintenance of standards within the real estate profession.

[28] As Mr Corkill said, there is no dispute that the work of the licensee now in question was *"real estate agency work"*. He submitted, with regard to threshold issues for the purposes of the elements of *"unsatisfactory conduct"*, that in terms of s.72(a) of the Real Estate Agents Act 2008 having regard to the name protection provisions of the RAA and the importance of the regulatory regime of that statute, a reasonable member of the public is entitled to know whether a person who is involved in the design of a property is a registered architect or not, when considering a purchase; and that, in its standards setting role, this Tribunal should conclude that a reasonable member of the public is entitled to expect accuracy on such a point from a reasonably competent licensee; that with regard to s.72(b), the licensee's conduct contravenes Rule 6 in that a licensee must not mislead a customer or client, nor provide false information and that such conduct would be likely to bring the industry into disrepute; and with regard to s.72(c) the issue of negligence or incompetence is raised, namely, that failure to check on the website, given the various advance statements published to the real estate industry, shows that; and with regard to s.72(d) that agents of good standing would recognise the importance of accuracy, and recognise the importance of not providing false and misleading information of the kind provided by the second respondent.

[29] We appreciate that Mr Corkill also seemed to be putting it that if a person is unable to call himself or herself an architect, then it cannot be right that someone else can; and to do so is to undermine the objects of the RAA. However, we do not think that has much to do with the Real Estate Agents Authority. In any case, in New Zealand third parties are able to call a non-registered architect an architect.

The Submissions for the First Respondent

[30] Mr Hodge referred to the issue as whether the statements made by the licensee were misleading and, if so, did her conduct amount to unsatisfactory conduct under the Act. The first respondent has found that the statements were not misleading.

[31] Mr Hodge referred to Rule 6.4 set out above and to s.72(b) and (c) of the Act. He submitted that a licensee who misleads a customer or client unintentionally is guilty of unsatisfactory conduct under the Act, but that a licensee who innocently acts merely as a conduit, in purporting to do no more than pass on information from another, or who can otherwise show he or she took all reasonable steps to ensure the client or customer was not misled, may not be guilty of unsatisfactory conduct. He submitted that the appellant must meet a high threshold. He accepted that these requirements are consistent with the purpose of the Act to promote and protect the interests of consumers in respect of transactions which relate to real estate, and to promote public confidence in the performance of real estate agency work, and all that is also consistent with applicable principles under the Fair Trading Act 1986 which he fairly briefly referred to.

[32] We agree with Mr Hodge that the focus of the complaints and discipline provisions of the Act is on the conduct of the licensee. As he said, whether a misleading statement is relied on, and whether that reliance caused loss to a customer or client, may be relevant but it is the conduct of the licensee in making the statement which is determinative of liability under the Act.

The Submissions for the Second Respondent

[33] Mr Divers emphasised his agreement with submissions made by Mr T D Rea as counsel for the second respondents in two other cases which, by consent, were heard simultaneously with the present case because the issues are identical and the facts only slightly different. Mr Divers' submissions were structured to support those of Mr T Rea. I shall incorporate the submissions for all those second respondents into the discussion below. Mr Rea's comprehensive submissions focused on the above issues in some detail as did the supporting submissions of Mr Divers.

Discussion

[34] We accept the issues before us as put by counsel, namely:

[a] Whether or not Mrs Raos breached Rules 6.2 and/or 6.3 and/or 6.4 on the facts of the complaint against her; and

[b] If so, whether she was guilty of unsatisfactory conduct as defined in s.72 of the Act; and

[c] If so, whether this Tribunal, pursuant to s.111(5) of the Act ought, in its discretion, to exercise the first respondent's power under ss.80(2) and 89(3) to take no further action having regard to all the circumstances of this case.

[35] However, the broad issue is whether Mrs Laos is guilty of unsatisfactory conduct as a real estate agent.

[36] The three cases were appeals by Mr Jackman against the dismissal of his complaints by the first respondent. His complaints to the Real Estate Agents Authority related to the advertising of properties as having been *"architect-designed"* (or something similar) in circumstances where the house designer was not registered as an architect under the Registered Architects Act 2005 or its predecessor the Architects Act 1963.

[37] The essence of Mr Jackman's complaint is that it is incorrect and misleading for agents to advertise house properties as having been designed by an architect when the designer was not a registered architect and the agent could, allegedly, easily have established that by reference to the register of registered architects maintained by his employer, the New Zealand Registered Architects Board. Apparently, the register is readily available on the Internet. Mr Jackman asserts that the first respondent misunderstands what it is to be an architect. He puts it that holding an architecture degree, and carrying on the business of an architect (by designing buildings, preparing plans and specifications for buildings, and supervising the construction of buildings) is not enough to make a person an architect which can only be so if the person is registered.

[38] There has been much reference by analogy to other professions, to relevant legal cases regarding various professions, and to legislation in other commonwealth countries regarding the regulating of professions and the scope of professionals. While all that is rather helpful, we prefer to focus on the facts of this case and law applicable to those facts.

[39] The Registered Architects Act 2005 does not specify that certain work can only be carried out by a registered architect. It does not place restrictions on who may carry out architectural work in New Zealand. Also it is directed at restrictions on persons using the title architect in relating to their own business, trade, employment, calling or profession. It does not make it an offence for a person to represent that somebody else is an architect if that person is not registered as an architect. The purpose of the RAA is not to prescribe areas of work which shall be the exclusive domain of licensed architects. The predominant purpose of the Act is to provide for a registration system for persons who wish to be registered architects, to set up a Code of Ethics and a complaints and disciplinary process to apply to registered architects, and to establish a statutory body to carry out those functions.

[40] The absence of an offence provision relating to representing someone else as an architect does not necessarily provide a defence to Mrs Raos in respect of a complaint of unsatisfactory conduct. However, the focus of Mr Jackman and the Architects Registration Board seems to be more upon real estate agents representing someone to be an architect than upon unregistered designers representing expressly or impliedly that they are architects.

[41] The first respondent concluded that the person who designed the house which Mrs Raos was marketing was an architect. It was noted that he had Bachelor of Architecture degree, and was in the business of designing buildings and preparing plans and specifications for those buildings. Of course, because he was not registered under the RAA, Mr Veltman was unable to refer to himself as an architect. The first respondent concluded that the *"hypothetical consumer"* would make little of the distinction between Mr Veltman, with his degree in architecture, and an architect with a degree in architecture who had also registered under the RAA.

[42] The first respondent also took into account that Mrs Raos had stated that she was unaware of the Register of Architects when she placed the advertisement complained of on the Internet, and that she said from the information supplied to her by the vendors, and from her own enquiries, she had every reason to believe that Kim Veltman was an architect. He described himself as such, and referred to himself as such on the plans of the house provided to her, and there was the entry in the telephone book and on the website. The first respondent concluded that, in the absence of knowledge of the register, she took all reasonable steps to ensure her information was accurate and, indeed, when she was advised that it was not, she immediately took steps to correct the advertising relating to the property concerned.

[43] In its decision, the first respondent also made it clear that it did not consider there was any evidence to suggest an intention by Mrs Raos to mislead any member of the public and, inter alia, it gave consideration to the concept of *"unsatisfactory conduct"*. It did not consider that Mrs Raos' conduct fell short of the standard of conduct that a reasonable member of the public would expect from a reasonably competent licensee nor that her conduct contravened any rules made under the Act. The first respondent considered that the advertisement in issue is not misleading and does not provide false information about the status of Mr Veltman. The first respondent considered that he is literally and technically an architect with a degree to prove that, even though not a registered architect; so that there could be no breach of Rule 6.4. It followed that the first respondent did not consider that Mrs Raos' conduct was likely to bring the industry into disrepute so that there is no breach of

Rule 6.3. Nor did the first respondent consider that there was any evidence suggesting that Mrs Raos is either incompetent or has acted negligently, nor that her carrying out of real estate agency work was unacceptable.

[44] We consider that the first respondent was correct to find that, in New Zealand, a person can be an architect as a matter of fact regardless of whether or not that person is a registered architect. Even though a person may not call himself or herself an architect, that person may still be in fact an architect. We do not think that Mrs Raos provided any incorrect information as alleged, nor did she breach any of the said rules in terms of her conduct. Because of that view it is not necessary for us to consider whether, in any case, we should determine that no further action would be warranted, but we would have come to that conclusion had we found unsatisfactory conduct on the part of Mrs Raos.

[45] The Registered Architects Act 2005 does not define what it is to be an architect (as distinct from a *"registered architect"*), nor does it contain any provision that deems a person to be an architect if they carry out certain activities, nor does it prohibit people who are not registered from actually carrying out the activities of an architect. The Act simply places a restriction on people who conduct architect's activities from describing themselves as an architect unless they are registered. The Act does not determine what people actually are if they hold architects' qualifications and carry on business as architects without being registered, nor does it place any restrictions on how third parties may describe them.

[46] The first respondent was correct to find that the register is not determinative and that a person can be an architect, as a matter of fact, whether they are registered or not.

[47] As indicated, pursuant to s.80(2) of the Read Estate Agents Act 2008, there is a discretion available to the first respondent to take no further action on a complaint even if it considers that an unsatisfactory conduct finding could be available. This discretion may be exercised at any time by virtue of s.89(2) of the Act, and this Tribunal has the power to exercise this discretion on the appeal under s.111(5) of the Act if it chooses to modify a determination of the Committee.

[48] Even if the Tribunal had accepted Mr Jackman's argument that the register is determinative of the question of whether or not a person is an architect, and modify the first respondent's determination to that extent, in the circumstances of this case we would have directed that no further action should be taken on the complaint.

[49] Mr Jackman's complaint relies entirely on the assertion that a person is only an architect if they are registered as an architect pursuant to the provisions of the Registered Architects Act 2005 (or were registered at the relevant time under that Act or previous legislation). If Parliament had intended this to be the effect of the Act, then a provision could easily have been inserted to provide for a definition of *"architect"* in the Act, or for a deeming provision of the nature included in legislation governing the regulation of other professions.

[50] All that the Act does is prevent people, who may otherwise carry on all of the activities of architects, from describing themselves as registered architects, or architects, unless they are registered; but it does not mean the person is not an architect. That is clear from a careful perusal of s.7 of the RAA (set out above). The

use of the title *"registered architect"* or *"architect"*, to describe themselves, is confined to persons who are registered architects. The provisions of s.7 do not prescribe what a person actually is who carries on the business of an architect and holds an architect's qualifications but happens not to be registered. Nor do they proscribe how that person may be identified by others.

[51] In contrast with legislation governing each of the professions with which Mr Jackman sought to draw an analogy (real estate agents, lawyers and doctors), the Registered Architects Act 2005:

[a] Contains no definition of *"architect"* (although it does define *"registered architect"* as a person who is registered and holds a current certificate of registration);

[b] Contains no provision that deems any person to be an *"architect"* in any circumstances;

[c] Does not prohibit any person from carrying out architect's services in any circumstances.

[52] 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.

[53] 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.

[54] 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.

[55] As already indicated, 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 discretion to take no further action in all of the circumstances. The licensees acted in good faith in reliance on information supplied to them by the vendors of the property who told them that the designer of their house, Mr Veltman was an architect. This has been confirmed by the vendors themselves in evidence that was before the first respondent. Further, the vendors told Mrs Raos that Mr Veltman was an architect and they showed her the plans identifying him and his firm as that and she made her own investigations as referred to above, and there was nothing in the circumstances which ought reasonably to have put her on enquiry that the property might not have been architect designed as she had been told by the vendors. We can understand it

not occurring to Mrs Raos to check the register to obtain conclusive confirmation as to the status of the building designer.

[56] None of the authorities relied upon by the appellant touch upon the essential issue in this case, which is whether a person in New Zealand who holds an architecture degree and who carries out (entirely lawfully) the business of an architect – designing buildings, preparing specifications and/or supervising construction of buildings – is, as a matter of fact, an *"architect"*, or may properly be described by others as an architect.

[57] A case which includes judicial interpretation of what it actually is to be an architect is *R v Architects Tribunal, ex P Jagger* [1945] 2 ALL ER 131. This case required the Court to consider the meaning of *"architect"* where no definition was contained in the Architects (Registration) Act 1931. In that case, the proper definition of architect (in the absence of definition by Parliament) was accepted to be:

> *"An architect is one who possesses, with due regard to aesthetic as well as practical consideration, adequate skill and knowledge to enable him (1) to originate (2) to design and plan (3) to arrange for an supervise the erection of such buildings or other works calling for skill in design and planning as he might be in the course of his business, reasonably be asked to carry out or in respect of which he offers his services as a specialist"*.

[58] This remains an appropriate definition of what it is to be an architect in New Zealand in the present day, just as it was in the United Kingdom in 1945. It is also the only judicial interpretation of *"architect"* put to us.

[59] It is accepted that proof of registration as an architect under the Registered Architects Act 2005 (or prior legislation) would be a sufficient evidential basis to confirm that a person is, in fact, an *"architect"*. This is because in order to obtain registration the person would have needed to establish that he or she held the necessary skill and knowledge to enable that person to perform the services that he or she in fact provide. However, absence of registration is not evidence that a person fails to posses such skill and knowledge.

[60] There is no evidence that Mr Veltman 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.

[61] The focus of this case is not on protecting the name or title of *"architect*"; but on the complained about conduct of Mrs Raos as a real estate agent.

[62] The onus of proof to establish that Mr Veltman 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.

Conclusion

[63] For the above reasons, the appeal is dismissed and the Tribunal confirms the determination made by the first respondent.

[64] Despite the extensive submissions written and oral in terms of the evidence, we consider that Mrs Raos has not breached any of the said rules, and that her conduct as outlined above does not constitute unsatisfactory conduct within the meaning of s.72 of the Real Estate Agents Act 2008. Her conduct does not fall short of the standard of conduct that a reasonable member of the public would expect from a reasonably competent licensee. There is no incompetence or negligence on her part. Her conduct does not contravene any of the rules made under the 2008 Act. We also agree with the first respondent that agents of good standing would not regard Mrs Raos' advertisement stating that the property was designed by an architect, albeit one not registered under the Registered Architects Act 2005, as *"unacceptable"*.

[65] Generally speaking, we entirely agree with the reasoning and conclusions of the first respondent but, in the present context, we also note and agree with the following extracts from its decision namely:

> *"4.35 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 ...*
>
> *4.38 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 Veltman 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.*
>
> *4.39 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. Contrast for instance, in a different professional contest, Complaints Committee of the Canterbury District Law Society v W (CIV 2007-485-2648, Wellington High Court, 13 October 2008, at paragraph [91])."*

[66] 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 Mrs Raos which has been complained about. We consider that her actions about ascertaining and concluding that Mr Veltman was an architect were reasonable and understandable in all the circumstances of this case.

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

_____
Judge P F Barber
Chairperson

_____
Mr J Gaukrodger
Member

_____
Mr G Denley
Member