BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision No: [2012] NZREADT 60

Reference No: READT 92/11, 93/11, 94/11, 97/11, 18/12, 29/12

IN THE MATTER OF	consolidated appeals under s.111 of the Real Estate Agents Act 2008
BETWEEN	**KAISU HERMAN, JOYCE WANG, JACK HOWATT, SAU LI, IAN THORNHILL, PHILIP GILCHRIST, PAUL BARNAO, JUDITH WATSON**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10100)**
	First respondent
AND	**PAUL JACKMAN**
	Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 29 August 2012

DATE OF DECISION 2nd October 2012

COUNSEL

Mr T D Rea and Mrs M Cowan for appellants
Ms J Pridgeon for Authority
No appearance for second respondent (who withdrew, by consent, in course of proceedings)

DECISION OF THE TRIBUNAL

The General Issue

[1] Were all eight licensee/appellants guilty of unsatisfactory conduct in the various circumstances referred to below? A Committee of the Authority has found that they were. Broadly, the conduct in issue relates to advertising property for sale as architect designed when no New Zealand registered architect was involved.

[2] These eight appeals have been consolidated by consent.

The Stance of the Second Respondent Complainant

[3] In the course of the prehearing procedures, the second respondent elected to withdraw on the basis that we well understand his concerns from previous cases arising out of his complaints (as Chief Executive) on behalf of the New Zealand Registered Architects Board. Simply put, he complains that advertising of the above type is misleading and adds market value to a property.

[4] On 31 October 2011 we determined appeals on a fairly similar issue in *Jackman v CAC & Cussen & Hale*, *Jackman v CAC & Anderson, and Jackman v CAC & Raos* at [2011] NZREADT 29, 30, and 31 respectively. Those were appeals by Mr Jackman from CAC decisions finding no evidence of unsatisfactory conduct under the Act. We confirmed those findings. In each of those cases, we considered the issue as:

> *"[56] [of Raos] ... the essential issue ... 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."*

[5] The *Raos* case is our more detailed decision of those three cases issued on 31 October 2011. They differ from all but one of the present cases where only one of the *"architects"* has a university degree in architecture (from Germany) and the others are merely architectural designers.

[6] In the present cases there has been particular reference to an affidavit which Mr Jackman swore on 14 September 2011 in relation to *Jackman v CAC v D Cussen & W Hale*, which we issued on 31 October 2011 as [2011] NZREADT 29. Mr Jackman was acting as Chief Executive of the NZ Registered Architects Board and noted that case related to licensees describing a person as an *"architect"* when the person had a degree in architecture but was not registered as an architect. That is a different situation from all but one of the cases now before us.

[7] Mr Jackman then, very helpfully, deposed about the statutory basis of registration in New Zealand for architects, the role of academic qualifications, the required work experience, the interactive assessment, and the consequences of registration.

[8] Simply put, the Board is required to exercise judgment as to whether an applicant is able to practice competently. It generally requires that an applicant for registration as an architect in New Zealand must have a recognised academic qualification and a required amount of work experience. Mr Jackman emphasised that the person who is a holder of an academic qualification is not, by reason of that qualification only, able to be registered as an architect. He emphasised that the heart of the registration process is a long interview between the applicant and two senior architects acting as registration assessors. Written case studies need to be presented. A registered architect is subject to the NZRAB code of ethics and can be held accountable under the Board's complaints and disciplinary processes. Every five years there is a quality assurance process to ensure that the architect still maintains the requisite competencies.

[9] Mr Jackman noted that Parliament has perceived that architects need to be regulated, and one of the reasons for this is because they potentially impose involuntary risks on the public. In *Jackman v CAC v D Cussen & W Hale*, Mr Jackman particularly emphasised that a university degree, which may or may not qualify, simply means that the person attended university and was able to pass particular exams and that is a completely different matter from registration as an architect in New Zealand by the NZ Registered Architects Board.

[10] One can only endorse the wisdom of that evidence from Mr Jackman.

A Summary of the Facts Concerning each Licensee Appellant

Paul Barnao

[11] Mr Barnao is a salesperson working for Barfoot & Thompson Ltd in Auckland. On 28 February 2011 Mr Jackman complained that the licensee was an agent for a townhouse property advertised for sale in Auckland where an advertisement of February 2011 described the townhouse as *"... architect designed by Paterson Cullen"*.

[12] The complainant says that Paterson Cullen is not an *"architect"* and this can be confirmed by a search of the NZA register.

[13] The complaint is that such a false reference to an architect shows that the licensee sees it as adding lustre and, therefore, market value to the property in order to enrich the agent and the vendor at the expense of the buyer. It is put that such 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 to a customer or client.

[14] Mr Barnao accepts that Paterson Cullen is not a firm of architects but says that the vendors told him and his sales assistant that they had owned the home from new and it had been designed by architect Brian Cullen of Paterson Cullen. A Google search showed *"Paterson Cullen"* coming up with at least three examples of the name being associated with the word *"architect"*. One article referred to *"architect: Brian Cullen, Paterson Cullen Irwin"*. Also *"Paterson Cullen Associates"* are listed under *"architecture"* in the White Pages.

[15] Mr Barnao states that there was no intention to mislead; and no intent to add lustre or market value to the property; and that reasonable research was carried out to ascertain that Paterson Cullen were entitled to be described as architects.

[16] The vendors state that they understood Paterson Cullen was an architect and they passed this information on to Mr Barnao. They say they proof-read and approved the wording of the advertisements prepared by Mr Barnao and that they instructed him to advertise the house as *"architect designed by Paterson Cullen"*.

[17] That licensee has had previous dealings with the late Robert Paterson, a founding partner of that firm, who was apparently an architect in his own right. The licensee had no reason to question that firm would not be registered architects. The licensee supplied a copy of part of the list of former architects from NZRAB which shows that Robert Paterson was a registered architect. Although the licensee did not check the list of architects on the NZRAB at material times, he says that had he done so he would have been able to confirm that Robert Paterson of Paterson Cullen had been an architect, and he points out that his reference in the advertising was always to the firm and not an individual partner. On that basis, he asserts that the facts in the advertisement were correct.

[18] Apparently, upon receiving the above explanations the complainant sought to withdraw his complaint but the Committee was not prepared to permit that. It reasoned that Mr Paterson, who died in 1989, would most likely have been the lead designer of the house which was completed in about 1998 but that the house is not *"architect designed"*. In the course of thorough decisions the Committee stated:

> *"4.18 Referring to rule 6.4 and relevant provisions under the Registered Architects Act, Mr Jackman suggested that real estate agents needed to check before placing advertising claiming that a named person was an architect. Mr Jackman referred to the website, and the ability to check current and former architects.*
>
> *4.19 He warned that real estate agents should take the matter seriously, ...*
>
> *4.21 The licensee states that "we did receive the REINZ Journal for the months of July 2009, May 2010 and March 2011.*
>
> *4.22 In September 2010, Complaints Assessment Committee 10040 found a licensee, Robert Mosen, guilty of unsatisfactory conduct for describing a property as "architect designed" when it was not. The decision received widespread print and voice media coverage. The licensee was asked by the Authority's investigation whether he was aware of V Mosen decision, and the publicity that followed it. In reply, he has stated that that issue is addressed in a 3 June 2011 response made on his behalf by Mr House, the Customer Relations Manager for the agency. While the decision is referred to by Mr House, he does not advise whether the licensee knew about it.*
>
> *4.23 In March 2011, the REINZ published in its journal "the Hub" an e-mail dated 17 February 2011 from Angela Sutton, Advisory Services Manager*

of the REINZ. In light of media publicity on 16 February 2011, following this Committee's decision to enquire into a large number of complaints that Mr Jackman had already laid against licensees, she offered advice to members on the use of the words "architect" and "registered architect" in any advertising. The e-mail stated that prohibitions on the use of the words "architect" and "registered architect" extended to the misuse of those terms in marketing and advertising material. Ms Sutton referred to the July 2009 article published in the Journal, which touched on the issue and set out the position, quite clearly. The full text of the July 2009 article was attached to a link. Ms Sutton concluded by saying:

> *'In the meantime if you are intending to describe the building in terms involving use of the word "architect" in any form, we strongly recommend that you first check that the designer of the building is named on the NZRAB register – see the link above.'*
>
> *.....*

Conclusion

5.1 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.

5.2 In terms of section 72(a) 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 "yes".

5.3 The Committee notes that it would have come to the same conclusion whether or not the licensee was aware of the July 2009, May 2010 and March 2011 articles by the REINZ.

5.4 In terms of section 72(b), does the conduct contravene any rules made under the Act? Again, the Committee considers that the answer is "yes", for the reasons set out in the previous section of this decision.

5.5 The advertisement is misleading; and it also provides "false information" about the status of the person who designed each of the homes. That is a breach of rule 6.4.

5.6 The Committee also considers that this is conduct which is likely to bring the industry into disrepute, a breach of rule 6.3. This is 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 tend to lower the standing and reputation of

the industry. See for example, in a different professional context, Complaints Assessment Committee of the Canterbury District Law Society v W (CIV 2007-485-2648, Wellington High Court, 13 October 2008, at paragraph [91].

5.7 Is there a breach of rule 6.2? The licensee was not aware, when the advertisement was published, that Paterson Cullen, or Mr Cullen, was not an architect. The Committee accepts that this was an inadvertent error, and definitely not an attempt to mislead. There is no breach of rule 6.2

5.8 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.

5.9 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 considers that agents of good standing would regard an advertisement stating that a property was designed by an architect, when it was not, as "unacceptable".

5.10 The licensee had an obligation to ensure the advertisement was accurate. It was not. A breach of section 72(d) of the Act has also been established."

[19] After detailed and careful reasoning the Committee found that it had been proved on the balance of probabilities that the licensee, Paul Barnao, had engaged in unsatisfactory conduct arising out of the above facts. After later separate consideration of penalty, he was reprimanded and fined $500.

Judith Watson

[20] In May 2011 Mr Jackman laid a complaint against the licensee Judith Watson regarding an internet advertisement which she placed in May 2011 describing a property as *"... designed by Eco-Architect Johann Bernhardt ..."*. Ms Watson is a licensee who, at material times, worked for Waiheke Real Estate.

[21] The complainant says that Mr Bernhardt is not an *"architect"* and this can be confirmed by a search of the NZA register. He puts it that such false references to an architect were to add lustre and therefore market value to the property and that the licensee was attempting to so use misinformation to enrich herself and the vendor at the expense of a buyer. He puts it that the advertisement is a breach of Rule 6.4 referred to above.

[22] There seemed to be no dispute that Mr Bernhardt is not registered as an architect under the provisions of the Registered Architects Act 2005 but was registered as an architect in Germany and remained so for a few years after he came to New Zealand, but he then allowed his German registration to lapse.

[23] The licensee accepts that Mr Bernhardt is not a registered architect but says that she was not aware of recent publicity surrounding the *Mosen* case and news

about that had not been conveyed to her by office management. She said that had she been so aware, she would have known to check that Mr Bernhardt was an architect before releasing the advertisement. She said that Mr Bernhardt holds an equivalent qualification in Germany, is well known in the building design field and, she speculates, that his qualifications may comprise a higher-class degree than a registered architect in New Zealand. She emphasises that when introduced on his company's website, Mr Bernhardt is described as an *"architect"*.

[24] She apologises for the oversight and states that she understands the seriousness of the issue and promises to take more care in the future.

[25] After full reasoning the Committee found it proven, on the balance of probabilities, that Ms Watson engaged in unsatisfactory conduct in the circumstances described and, after further consideration, she was reprimanded and fined $750.

Ian Thornhill and Sau Li

[26] Mr Thornhill and Ms Li are licensed salespersons working for Barfoot & Thompson Ltd in Auckland. On 10 February 2011 Mr Jackman complained against that as the agents for two townhouses advertised for sale in Auckland, they described the properties on the internet by an advertisement placed on 28 January 2011 as *"... designed by one of Auckland's leading architects Brian Cullen ..."*.

[27] The complainant puts it that Mr Cullen is not an *"architect"* as can be confirmed by a search of the NZA register. He also puts it that the fact that the licensees describe Mr Cullen as a *"renowned architect"* indicates that they saw this as adding lustre and therefore market value to the properties; and so are attempting to use misinformation to enrich themselves and the vendor at the expense of a buyer. Again, it was put that is a breach of Rule 6.4. Mr Cullen is an architectural designer and is not, and never has been, registered as an architect and does not have a degree in architecture.

[28] Mr Thornhill (and Ms Li) accept that Mr Cullen is not a registered architect. In their joint reply to the complaint they state that when they were listing the two properties, the owner mentioned to them that the two townhouses were *"architecturally designed"* by Brian Cullen. The owner showed them the approved plans and described them as *"very expensive"*. At the foot of the plans were stamps of Brian Cullen's company name, address, contact details and email address. They were surprised to receive Mr Jackman's complaint.

[29] The Customs Relations Manager for the agency states that the townhouses were described and represented as *"architect designed"* because that was the information provided by the vendors. There is a 1 March 2011 letter signed by the vendors saying that they told the licensee that the two townhouses were *"architecturally designed and that Brian Cullen was the architect"*. They said they gave the licensees that information as *"it was our firm belief it was correct and it was our understanding that we have built in an architecturally designed house"*. That vendor was very surprised to learn that Mr Cullen was not legally able to call himself an architect. He says that the licensee showed him the wording of the advertisements and that he agreed to that wording as he had no reason to think it was not correct.

[30] After full discussion, the Committee found it proved, on the balance of probabilities, that both licensees had engaged in unsatisfactory conduct in the manner described. They were each reprimanded and fined $500.

Philip Gilchrist

[31] The licensee Mr Gilchrist works for Holmwood Real Estate Ltd, an agency in Wanaka.

[32] He was complained about to the Authority on 9 February 2011 by Mr Jackman concerning an internet advertisement for the sale of a property in Wanaka earlier in February 2011. That advertisement described the property as *"... designed by award-winning local architect ..."*.

[33] The complainant says that he telephoned the licensee and was told that the architect was Steve Humpherson who, the complainant advises, is not an architect as can be confirmed by a search of the NZA register. In this case also, the complainant put it that there has been a false reference to an architect to add lustre and therefore market value to the property, and that the licensee was attempting to use misinformation to enrich himself and the vendor at the expense of a buyer. There was also reference to the advertisement being a breach of Rule 6.4.

[34] Mr Humpherson is an architectural designer and is not, and never has been, registered as an architect, nor does he have a degree in architecture. The licensee accepts that Mr Humpherson is not a registered architect.

[35] In a 7 March 2011 reply to the complainant, the licensee said that he made a genuine mistake and takes full responsibility for his actions and he apologised profusely to the complainant and members of the NZRAB. The licensee accepts that the advertisement should have read *"designed by award-winning local architectural designer"* but asserts that at no time did he seek to mislead, and that he has learned from this experience. He explained that he viewed plans for the property and saw the name *"Sorted Architecture"* on them and assumed that Mr Humpherson, who was named on the plans, was an architect but the licensee did nothing to check whether that was correct.

[36] Once the complaint had been laid, the licensee spoke to his manager and was advised an email about this issue had been sent out to the industry. However, this was the first the licensee knew of that. Also, he had never heard of the NZRAB register (of architects) until then.

[37] After full discussion and reasoning, the Committee found this licensee, Philip Gilchrist, guilty of unsatisfactory conduct on the balance of probabilities. Later, he was reprimanded and fined $500.

Juehui (Joyce) Wang and Jack Howatt

[38] The above licensees are salespersons working for Barfoot & Thompson in Auckland. Mr Jackman's 27 January 2011 complaint about them is that, as agents

for a property advertised on 15 January 2011 for sale in Auckland, they stated that *"well-known architect Mark Dowling designed this ... stylish home"*.

[39] The complainant says that Mr Dowling is not an *"architect"* and this can be confirmed by a search of the NZA register. He argues that the fact that the licensee so described Mr Dowling as a *"well known architect"* indicates that this was to add lustre and market value to the property, and was an attempt to use misinformation to enrich the licensees and the vendor at the expense of a buyer. There was also reference to that being a breach of Rule 6.4.

[40] Mr Dowling is an architectural designer but is not, and never has been, registered as an architect, nor does he have a degree in architecture.

[41] The licensees accept that Mr Dowling is not a registered architect. They state, in their 3 March 2011 reply to the complainant, that when they were listing the property, the owners described the designer of the house to them as an architect and that he was well known and had won some awards. The owners gave the licensees the name of *"the architect"*, and the licensees used that name in the said advertisement which was approved by the vendors.

[42] The licensees state that they were not aware of the existence of the NZAB at material times, and that when they wrote the advertisement they thought that any person who designed and created the plans for any building could be described as an architect. Indeed, they have used the word *"architect"* or *"architectural"* in advertisements in the past simply to express the fact that the design of the house was, in their opinion, different and outstanding in its difference, but they had no intention to mislead. They say that as soon as they received the complaint they contacted the successful purchasers who were not at all concerned that Mr Dowling was an architectural designer and not an architect.

[43] Their customs relations manager says that the property was described and represented as *"architect designed"* because that is the information provided by the vendors who have provided a 3 March 2011 letter confirming that they told the licensees that their property was *"architecturally designed"*. They also stated that they had always thought of Mr Dowling as an architect and were unaware that there was a difference between an architect and architectural designer.

[44] In a fully reasoned decision on 13 June 2011 the Committee found it proved, on the balance of probabilities, that the licensees had engaged in unsatisfactory conduct in the circumstances described and, later, reprimanded them and fined them $500 each.

Kaisu Herman

[45] Ms Herman is a licensed salesperson also working for Barfoot & Thompson in Auckland. On 15 December 2010 Mr Jackman laid a complaint about her on 19 October 2010 advertising on the internet a property for sale in Auckland and describing the home as *"... designed and built 41 years ago by local architect Neils Neilsen ..."*.

[46] The complainant puts it that Mr Neilsen is not an *"architect"*, which can be confirmed by a search of the NZAR, and that the licensee knew that because, when he emailed her to find out who the architect was, she replied by 26 October 2010 email that Mr Neilsen was *"a draftsman"*.

[47] Mr Jackman puts it that the fact that the licensee described Mr Neilson as an architect indicate that she saw this as adding lustre and therefore market value to the property and, in that way, was attempting to use misinformation to enrich herself and the vendor at the expense of a buyer. He also put it that the advertisement is a breach of Rule 6.4.

[48] Mr Neilsen is an architectural designer and is not, and never has been, registered as an architect. He studied design papers at night-school in Denmark.

[49] The licensee accepted that Mr Neilsen is not a registered architect and she forthwith removed the word *"architect"* from the internet advertisement. She states that the word *"architect"* did not appear in any flyers, sign, window card, or Property Press advertising; and that at no time did she seek to mislead potential purchasers, that this was all a genuine mistake, and she will be most careful in the future to get her facts right.

[50] A customs relations manager for that agency emphasised, in a 9 March 2011 letter to the Authority, that the property was so described and represented as *"architect designed"* because this is the information provided by the vendors; and that was what the licensee relied on.

[51] Also, a 7 March 2011 letter from the vendors was provided saying that, when they had bought the property, they met Mr Neilsen and that *"whilst perhaps the word architect may not have been mentioned, we were under the impression that he was the designer/architect"*. They had never checked whether he designed and built the home, or if his name was on the working drawings. They said that the licensee showed them the wording of the advertisement and they agreed to it as they had no reason to believe it was not correct.

[52] In a fully reasoned decision the Committee found it proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct; and, in the usual way, a few months later gave reasons for reprimanding the licensee and fining her $500.

Relevant Statutory Provisions

[53] Section 72 of the Real Estate Agents Act 2008 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."*

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

[55] There has been reference above to Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. We set out Rules 6.2, 6.3 and 6.4 as follows:

> *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."*

Relevant Law

[56] Because the Registered Architects Act 2005 does not define what it is to be an *"architect"* as distinct from a *"registered architect"*, in our said *Raos, Anderson and Cussen & Hale* decisions, we adopted the definition of *"architect"* as accepted by the Kings Bench in *R v Architects Tribunal, ex p Jaggar* [1945] 2 All ER 131 (KB) at 134, namely:

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

[57] Also, in those cases we pointed out that the Registered Architects Act 2005 does not prohibit persons who are not registered architects from actually carrying out the activities of an architect. What it does is to place restriction on people who conduct architectural activities from describing themselves as an *"architect"* unless they are registered. We said that *"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 restrictions on how third parties may describe them".* We stated our view (*Raos* at [54]; *Cussen* at [24]; *Anderson* at [23]) as:

> *"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."*

[58] In all of our said decisions, there was no evidence that the relevant *"architect"* did not possess the necessary skill or knowledge to perform the work undertaken. Each person had a degree in architecture and worked as an architect. We were of the view that absence of registration under the Registered Architects Act 2005 was not proof that a person failed to possess the necessary knowledge and skill to enable that person to perform the services in fact provided. Therefore, in those cases we found that none of the licensees were found to have breached any rules contained in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 or to be guilty of unsatisfactory conduct within the meaning of s.72 of the Act. Their conduct was not misleading.

[59] In the cases now before us, the so-called *"architects"* were merely architectural designers except for one who had been a registered architect in Germany.

[60] The said Rule 6.4 is set out above and speaks for itself.

[61] Section 72(b) of the Act provides, among other things, that a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work which contravenes a provision of the Rules. Section 73(c) of the Act provides, among other things, that a licensee is guilty of misconduct if the licensee's conduct consists of a wilful or reckless contravention of the Rules. A licensee who inadvertently misleads a customer or client will nevertheless usually be guilty of unsatisfactory conduct under the Act subject to the *"mere conduit"* principles discussed below. This is 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. It is also consistent with applicable principles under the Fair Trading Act 1986.

Fair Trading Act 1986

[62] Section 14 of the Fair Trading Act 1986, which prohibits the making of false or misleading representations in connection with the sale or grant of an interest in land in trade, makes no distinction between intentional and unintentional misrepresentations.

[63] In *Auger Specialities Ltd v Classic Creations Ltd* (HC Auckland AP135-SW/00, 7 December 2000) the High Court considered the meaning of the term *"false"* under the Fair Trading Act. The Court held that the District Court Judge had been wrong to consider as relevant the question whether the defendant had an honest opinion as to the correctness of a representation. *"False"*, as used in the Fair Trading Act, meant *"incorrect"* or *"contrary to fact"* and it was not necessary to prove a wilful or dishonest falsehood.

[64] In *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) the Court of Appeal considered s.9 of the Fair Trading Act, which prohibits persons from engaging in conduct that is misleading or deceptive in trade. Cooke P, as he then was, held as follows:

> *"There is no difficulty in accepting that an innocent agent who acts merely as a conduit and purports to do no more than pass on instructions from his principal does not thereby become responsible for anything misleading in the information so passed on ...*
>
> *On the other hand, an agent who does not merely purport to pass on what he has been told, or who passes it on inaccurately or in some way adopts it as his own or adds to it, may himself thereby engage in misleading conduct."*

[65] In *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492, the Supreme Court held that to be a *"mere conduit"*:

> *"[38] ...the conveyor of misleading or deceptive information must have made it plain to the recipient that he or she is merely passing on information received from another, without giving it his or her own imprimatur – that is, making it appear to be information of which the conveyer has first-hand knowledge. Unless it must be obvious to the recipient that information is second-hand only (hearsay), the conveyor who does not make that clear must accept the risk that he or she will reasonably be taken by the recipient to have spoken from personal knowledge."*

Our Focus is on Conduct of the Licensee

[66] The focus of the complaints and discipline provisions of the Real Estate Agents Act 2008 is on the conduct of the licensee. Whether a misleading statement is relied on and whether that reliance caused loss to a customer or client may be relevant, particularly to the question of penalty; but it is the conduct of the licensee in making the statement which is determinative of liability under the Act. As we held in *Wright v CAC 10056 & Woods* [2011] NZREADT 21 at [41]:

> *The emphasis [under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009] is on the conduct of the licensee. The Rules provide that licensees must ensure that they are open and honest with purchasers 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."*

Discussion

[67] As indicated above, these appeals are fairly similar to appeals already considered by us. The main difference with these present appeals is that all but one of them involve *"architects"* who do not possess a degree in architecture.

[68] We need to decide whether the conduct of the licensees in these cases was in fact misleading, and if so, whether findings of unsatisfactory conduct are warranted. The nature of these appeals to us is that of a rehearing.

[69] The facts of each of the appeals are broadly similar. Each case involves the licensee advertising a property as designed by an *"architect"*. In Ms Watson's case, she advertised the relevant property as designed by an *"eco-architect"* Johann Bernhardt. It was he who has been registered as an architect in Germany. In Mr Barnao's case, he advertised the relevant property as designed by an architecture firm. For present purposes, those distinctions do not matter.

[70] The complainant Mr Jackman, the Chief Executive of the New Zealand Registered Architects Board, disputes that the relevant person was in fact an *"architect"* as that person was not registered as an architect under the Registered Architects Act 2005. He states that the licensees could have confirmed the position by searching the New Zealand Architects' Register. Mr Jackman argues that the fact that the licensees described the properties as designed by an *"architect"* indicates that the licensees viewed this as adding lustre and therefore market value to the properties. This, he says, is an attempt to use misinformation to enrich the licensee and vendor at the expense of buyer.

[71] As noted above, in each of the above cases, none of the persons referred to in the advertisements are registered under the provisions of the Registered Architects Act 2005. In fact, only one of the persons referred to as being an *"architect"* in those advertisements has a degree in architecture. The primary distinguishing feature of these appeals (from *Jackman v CAC & Cussen & Hale*, *Jackman v CAC & Anderson*, and *Jackman v CAC & Raos*) is that only one of the persons referred to as being an *"architect"* actually has a degree in architecture. That is the *"architect"* referred to in Ms Watson's advertisement, Johann Bernhardt, who has a master's degree in architecture from a university in Berlin. The cases previously before the Tribunal concerned advertisements referring to persons who had degrees in architecture, but who were not registered as architects under the RAA.

[72] The King's Bench definition of *"architect"*, set out above and accepted by us in previous cases, does not make a qualification such as a degree in architecture a necessary pre-requisite to being an *"architect"*. Furthermore, the Registered Architects Rules 2006 do not make a degree in architecture a requirement of obtaining registration.

[73] In all cases, there is no evidence to suggest that the persons referred to in the advertisements as *"architects"* did not possess the necessary skill and knowledge to perform the work that they actually undertook, nor is there any suggestion that the properties were not designed with proper regard to aesthetic or practical considerations.

[74] It is a matter for us whether, in those circumstances, it was misleading for each of the licensees to use the word *"architect"* in marketing the property. Despite our overall concerns expressed in this decision, we find that none of the appellants are guilty of unsatisfactory conduct but there could be a misleading element to their conduct as we explain below. Certainly we would take no action against any of them in all the circumstances. Simply put, the designers were, technically, architects so the public was not misled about that, but we feel that many of the public of New Zealand would expect an *"architect"* to hold a university degree in architecture and also be registered.

[75] The essence of Mr Jackman's complaints is that it is incorrect and misleading for agents to advertise properties as having been designed by an architect when the designer was not a registered architect, and that status could easily have been established by the agent referring to the register maintained by the NZRAB, which is accessible via the NZRAB's internet site.

[76] There has been reference to the discretion available to the Committee, pursuant to s.80(2) of the Real Estate Agents Act 2008, to take no further action on a complaint even if it considers that an unsatisfactory conduct finding could be available. It was noted by counsel that this discretion may be exercised at any time by virtue of s.89(2)(c) and (3) of the Act, and the Tribunal has the power to exercise this discretion on an appeal under s.111(5) of the Act if it chooses to modify a determination of the Committee. Inter alia, Mr Rea submitted for the appellants that even if we accept Mr Jackman's argument that the register is determinative of the question of whether or not a person is an architect, it is appropriate in the circumstances for us to direct that no further action be taken on the complaint.

[77] The variations in the circumstances relating to each appellant are minor. The common theme is that all the appellants relied in good faith on information supplied to them by vendors and, to varying degrees, they also made some further enquiries to verify the status of the designer as an *"architect"* in their view. The enquiries did not include a check of the NZRAB register. However, none of the appellants were aware of the register and, in any event, a check of the register would have been completely inconclusive as one does not need to be registered in order to be an architect.

[78] Mr Rea noted that, as we have already found in the said previous *Jackman* cases, a person does not need to be registered as an architect in order to be an architect. He now submits also that a person does not need to hold a tertiary qualification in architecture in order to be an architect. This proposition is supported by evidence given by Mr Jackman, in the prior appeals, confirming that a tertiary qualification is not a pre-requisite for registration as an architect. This is also the necessary conclusion reached on the application for the legal test accepted by us as being appropriate in New Zealand for determining whether or not a person is an architect.

[79] Mr Rea submits that the Committee failed to apply this test and, instead, has identified a definition of architect from *"Wikipedia"* in its various determinations. He put it that even in decisions issued after the release of [2011] NZREADT 29, 30 and 31 (the said *Jackman* appeals), the Committee's decisions have made no reference to the test applied by us in those cases. Curiously, that seems to be so.

[80] The secondary submission for the appellants (pursued in the alternative) is that even if we consider it established to the relevant standard, and on the relevant onus, that the designers were not architects (which is denied for the appellants), we should nevertheless determine that no further action would be warranted for the same reasons that we expressed that such a conclusion would have been reached in the other said appeals by Mr Jackman had we not dismissed them on substantive grounds. We agree and refer further to each appellant below.

[81] With regard to Mr Barnao, it can be argued that his conduct described above was at the lower end of the scale of *"unsatisfactory conduct"* because acceptable professional standards were departed from. We think that his situation is borderline but, certainly, a finding of guilt is not appropriate and there should be no sanction. The Committee accepted that Mr Barnao's error (or oversight) was inadvertent *"and definitely not an attempt to mislead"* nor is there any incompetence nor negligence. However, it considered Mr Barnao's conduct as *"unacceptable"*.

[82] Ms Watson was referring to a person who had been a registered architect in Germany. She, also, had been unaware of the *Mosen* case and the issue of concern to Mr Jackman in particular. She has apologised for her oversight and we believe will not so transgress again.

[83] Mr Thornhill and Ms Li were misled, as described above, and referred to an architectural designer not only as an *"architect"* but as *"renowned"*. The situation is concerning in terms of the public interest; but we accept that the licensees acted in good faith and will not so transgress again. Mr Gilchrist's predicament is similar to that of Mr Thornhill and Ms Li. Ms Wang and Mr Howart are in much the same situation, as is Ms Herman.

[84] We accept that it is not a degree which makes an architect. Theoretically, a person can be registered as an architect without holding a degree and, in such a case, the Committee, on the reasoning applied in its decisions, could accept that was sufficient evidence that the person is an architect.

[85] Registration is also not determinative. As we have already found, applying the *Jaggar* test, the real issue is whether the person is good enough at what they do to be properly described as an *"architect"*. There is no evidence that the designers, who were held out in advertising as architects by the appellants, were not good enough to be architects. The evidence is only that they are not New Zealand registered architects and do not hold New Zealand tertiary qualifications in architecture, nor qualifications or titles awarded by overseas agencies which might permit them to describe themselves as *"architects"* or *"registered architects"*.

[86] 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"*, because in order to obtain registration they would have needed to establish that they held the necessary skill and knowledge to enable them to perform the services they provide. However, absence of registration is not evidence that a person fails to possess such skill and knowledge; nor is the absence of a formal New Zealand tertiary qualification, nor of a particular status awarded by an overseas agency.

[87] Mr Rea also puts it that none of the decisions by the Committee, including decisions issued after the release of [2011] NZREADT 29, 30 and 31, has identified the legal test that was accepted by us in those cases as the appropriate definition to apply in New Zealand to determine whether or not a person is an architect in fact, as opposed to a registered architect. Our definition does not have as an element a requirement that the person must hold a formal New Zealand tertiary qualification, nor an overseas title or qualification which would permit them to use the title of *"architect"* or *"registered architect"*. These seem to have been the sole enquiries

pursed by the investigators engaged by the Committee. That approach is not only inconsistent with our previous decisions, but also with the evidence previously adduced by the second respondent, Chief Executive of the New Zealand Registered Architects' Board, to the effect that a formal tertiary qualification in architecture is not an essential pre-requisite to the granting of New Zealand registration.

[88] Mr Rea submits that there has been no evidence directed toward the central issue of whether or not the designers possessed *"adequate skill and knowledge"* in terms of the *Jaggar* test; and that the focus of the Committee has only been on: New Zealand registration; formal New Zealand tertiary qualifications; or current formal status awarded by overseas agencies.

[89] Inter alia, Mr Rea submits that no incorrect information was supplied by any appellant so that there is no proper basis for a finding of any unsatisfactory conduct; and even if there were (which is denied), we should uphold the appeals and exercise our discretion to take no further action in respect of any of the complaints to which the appeals relate.

[90] Mr Rea also made some specific submissions for Ms Watson. He put it that, like other appellants, Ms Watson relied in good faith on information supplied to her by the vendors as to the status of the designer of their property, where she would have had no cause to suspect that the designer, Johann Bernhardt, may not have been entitled to describe himself as an "architect". Mr Bernhardt was described in Ms Watson's advertising as a "leading eco-architect". When interviewed by the Authority's investigator, one of the owners of the property confirmed to the investigator that they would have been the source of Ms Watson's understanding that Mr Bernhardt was an architect.

[91] Various references are made in documents contained within the appeal bundle to the internet site of Mr Bernhardt, however, a printout of the internet site is omitted from the bundle, and a copy is, therefore, annexed to these submissions. The internet site records that Mr Bernhardt has: *"a masters degree (equiv) in architecture from Technical University Berlin, a PhD in urban development from Paris University VIII, and a lifelong interest in sustainability which was an integral part of his professional work as an architect, urban designer and researcher both in Berlin and internationally."* If Mr Bernhardt still held current German registration as an architect, it would have been lawful for him to have described himself as an architect in New Zealand as a consequence of the proviso in s.7(3) of the Registered Architects Act 2005, which provides: *"Despite subsection (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."* However, the investigator established (as recorded in the file note) that while Mr Bernhardt had previously been registered as an architect in Germany, he allowed that registration to lapse a couple of years after he decided to settle in New Zealand, some 15 years previously.

[92] The Committee addressed the issue of Mr Bernhardt's status in its decision on penalty dated 16 April 2012, with the following analysis set out in paragraph 3.5.1:

> *"The advertisement refers to Mr Bernhardt as an eco-architect, rather than a [New Zealand registered] architect. The Committee does not consider this a*

mitigating factor. It is the use of the term 'architect' which the Committee considers constitutes the misrepresentation. That term denotes someone with a degree in architecture. In previous decisions, the Committee has said that that degree in architecture must be a degree in architecture in New Zealand."

[93] While the Committee has purported to impose a requirement that, in order for a person to be described as an architect in New Zealand, they must hold a New Zealand university degree in architecture:

[a] This is contrary to the evidence adduced by Mr Jackman that an architecture degree is not an essential requirement for registration as an architect in New Zealand; and

[b] It is inconsistent with the test applied by the English High Court in Jaggar, accepted as the appropriate definition to apply in New Zealand at the present day by us.

[94] We accept that Mr Bernhardt holds a post-graduate university qualification in architecture equivalent to a Master's degree in architecture; he has practised as an architect, and he has been a registered architect in Germany; and if Mr Bernhardt had maintained that German registration, he would have been lawfully entitled to describe himself as an architect in New Zealand pursuant to s.7 of the Registered Architects Act 2005. That Act, of course, imposes no restrictions on how third parties may describe architects.

[95] Mr Rea submits that even if (which he does not accept) Mr Bernhardt cannot accurately be described by others as an "eco-architect", then Ms Watson must have at least as strong a case as any of the appellants for us to modify the Committee's decision and exercise its discretion to take no further action on the complaint. We agree.

[96] Mr Rea noted that it is fundamental that the onus of proof lies on the party making the allegation to be established. In the case of a complaint to the Real Estate Agents Authority, the party having the onus of proof is the complainant. A Complaints Assessment Committee undertakes an inquisitorial function pursuant to s.82 of the Real Estate Agents Act 2008, and will gather evidence and not be simply reliant on the evidence produced by the complainant. However, before the Committee the legal burden remains upon the complainant to establish unsatisfactory conduct. The standard of proof is the civil standard of the balance of probabilities. Before us, the onus of proof rests on the appellants.

[97] Mr Rea seemed to be putting it that the onus of proof to establish that the designers were not *"architects"* (as opposed to not being a *"registered architects"*, or the holders of formal New Zealand tertiary qualifications in architecture or equivalent foreign title or status) lay with the complainant; and that onus of proof is not discharged. That may have been the position before the Committee, but the appeals to us are rehearings with the onus of proof on the appellants.

Conclusion

[98] We have set out quite detailed reasoning because eight licensees are involved and our views differ from that of the Committee. Nevertheless, our view is entirely consistent with our findings in the *Jackman v CAC v Raos*, *Cussen & Hale*, and *Anderson* cases cited a number of times above.

[99] Having said all that, we are of a very like mind to Mr Jackman that, in terms of the real estate market in New Zealand, purchasers would expect a home described as *"architect-designed"* to have been designed by a person registered with the New Zealand Board of Architects as a qualified architect. It is very disturbing that people who are no more than architectural designers or draftspeople are being held out as prominent architects. This issue has been given quite some publicity over the past year or so and we expect real estate licensees to be aware of it and to be very careful in their representations about property designers. It is very concerning that members of the public, namely property purchasers, may not be buying what they expect about the design of buildings.

[100] It is worrying that members of the public may be induced into buying residential or commercial property on the basis of its particular architecture when the designer could be someone at a much lower level of prestige and status (and ability) than is to be expected from a person registered as an architect with the New Zealand Board of Architects. Such a misconception in the mind of a purchaser could lead to that purchaser paying a much higher price than otherwise for property and that type of possibility must be eliminated.

[101] It should be clear from our above coverage and analysis of the relevant conduct of the said eight licensees that we do not think that their respective conduct in issue amounts to unsatisfactory conduct in terms of s.72 of the Act. To date, a reasonable member of the public would understand that the advertisements in question did not mislead nor show incompetence or negligence or fall short of an expected standard nor would those advertisements be reasonably regarded by agents of good standing as unacceptable. The advertisements go close to breaching Rule 6.4 set out above as it could be regarded as misleading to a prospective purchaser to be led to believe that an architectural designer or draftsman is an architect in the full sense of that word and concept. However, in the circumstances we have covered above, we are not prepared to take any further action against any of the licensees and, as explained above, under *Jaggar "architect"* is a wide concept.

[102] It follows that the findings of the Committee, that all eight licensees are guilty of unsatisfactory conduct in relation to the events we have described above, is hereby quashed. In case any consequential matters are perceived to arise, we reserve leave to apply.

[103] 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

_____
Mr G Denley
Member

_____
Mr J Gaukrodger
Member