

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 1

READT 089/11

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

BETWEEN **GUOMIN GUO**

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY**

First Respondent

AND **PAUL JACKMAN**

Second Respondent

MEMBERS OF TRIBUNAL

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

BY CONSENT HEARD ON THE PAPERS

DATE OF DECISION: 11 January 2013

REPRESENTATION

The appellant on his own behalf
Ms J Pridgeon, counsel for the Authority
No appearance for second respondent (who withdrew, by consent, in the course of proceedings).

DECISION OF THE TRIBUNAL

The General Issue

[1] Was the appellant guilty of unsatisfactory conduct in the circumstances referred to below? A Committee of the Authority found that he was. Broadly, the conduct in issue relates to advertising property for sale as architect-designed when a registered architect was not involved in designing the house on that property.

[2] The issues raised in this case have been covered by us in detail in *Jackman v CAC & Cussen & Hale*, *Jackman v CAC & Anderson*, and *Jackman v CAC and Raos*, being three decisions we issued on 31 October 2011 under [2011] NZREADT 29, 30

and 31 respectively; on 2 October 2012 we also issued *Herman & others v CAC & Paul Jackman* [2012] NZREADT 60. For some reason or other, Mr Guo's appeal was not included in the *Herman* consolidation of similar cases but was adjourned pending resolution of those appeals. Accordingly, we are now invited to deal with Mr Guo's appeal on the papers.

The Basic Facts

[3] The second respondent is the complainant and is the Chief Executive of the NZ Registered Architects' Board. Mr Guo, the licensee, is a salesperson working for Barfoot & Thompson Ltd in Auckland.

[4] On 9 February 2011 the licensee was named as the agent for a property advertised for sale in Auckland and the advertisement described the property as: "... designed by renowned architect Brian Cullen". The complainant maintains that Mr Cullen is not an "architect" and that the licensee is adding lustre and therefore market value to the property by describing Mr Cullen as a "renowned architect". The complainant also asserts that, in this way, the licensee is attempting to use misinformation to enrich himself and the vendor at the expense of a buyer and that, in particular, the advertisement is a breach of Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which prohibit licensees from misleading customers or clients, or providing false information, or withholding information which should by law of fairness be provided to a customer or client.

[5] There is no dispute that Mr Cullen is an architectural designer and is not, and never has been, registered as an architect; nor does he have a degree in architecture.

[6] The facts of this case are somewhat similar to those relating to two of the appellants in *Herman* (namely, Mr I Thornhill and Ms S Li). As agents for two townhouses advertised for sale in Auckland on 10 February 2011, 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 ...". A Committee of the Authority had found it proven, on the balance of probabilities, that both licensees had engaged in unsatisfactory conduct in the manner described and they were each reprimanded and fined \$500.

[7] In *Herman* we set out our reasoning in full and with regard to Mr Thornhill and Ms Li found they were misled and had referred to an architectural designer (Brian Cullen) not only as an "architect" but also as "renowned". We noted that although that situation is concerning in terms of the public interest, we accepted that those licensees acted in good faith and would not so transgress again. For the rather detailed reasons we set out in *Herman* we concluded that those licensees were not guilty of unsatisfactory conduct in terms of s 72 of the Act and we quashed the Committee's finding to that effect.

[8] In the present case, the appellant's explanation is that when he was listing the property, the owners mentioned to him that the designer of the house was Brian Cullen and that he was famous. Accordingly, the appellant went to the Auckland City Council and obtained a copy of the building plan which showed the house on the property was designed by Paterson Cullen Irwin Ltd. Also he *Googled* Mr Cullen's name and the result showed that Mr Cullen was an architect; so the appellant took it for granted that Mr Cullen was an architect. He also referred to various magazine references of Mr Cullen as an "architect" and particularly to articles in "Trends" magazine. The licensee accepts that he made a mistake and insists he will endeavour to be more vigilant in the future. There seems to be little doubt that the licensee referred to Mr Cullen as an architect, indeed a renowned architect, in good faith.

[9] One can understand Mr Jackman's response that agents are expected to be professional people who know how the real estate sector is organised, that ignorance is no excuse, and that the status of the house-designer could have been easily determined by the appellant licensee.

[10] In the course of the pre-hearing procedures, Mr Jackman elected to withdraw from this case (and other cases) on the basis that we well understand his concerns from previous cases (arising out of his complaints on behalf of the NZ Registered Architects' Board) that advertising of the above type is misleading and adds market value to a property. We certainly do understand, and respect, Mr Jackman's concerns and we have made that clear in our various said decisions.

[11] In the present case, the Committee analysed the evidence and issues in much detail and found it proven, on the balance of probabilities, that Mr Guo had engaged in unsatisfactory conduct; and, in a later penalty hearing, he was reprimanded and fined \$500.

Discussion

[12] The parties have left it to us to deal with this appeal of Mr Guo on a basis consequential to our above decisions where we explained, in much detail, why we disagreed with the Committee's findings of unsatisfactory conduct against the licensees involved in the *Herman* group appeal. That reasoning of ours also applies, precisely, to the present appeal from Mr Guo. We adopt our reasoning in the *Herman* case and incorporate it, *mutatis mutandis*, into this present appeal and we see little point in again setting out the detail of those views.

[13] In that decision we, of course, set out s 72 of the Real Estate Agents Act 2008 which defines "unsatisfactory conduct" and, particularly, referred to Rules 6.2, 6.3 and 6.4 of the said Professional Conduct and Client Care Rules; and we covered in some detail our views of the relevant law including reference to the Fair Trading Act 1986. Under our heading of "Discussion" in *Herman*, we set out our reasoning in quite some detail and explained that the nature of such appeals before us is that of a re-hearing. We now set out the following paragraphs from that *Herman* decision, namely:

[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.

...

[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 *Jaggat* 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.

...

[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.”

[14] Accordingly, we do not think that Mr Guo has been guilty of unsatisfactory conduct; and, even if we did, in all the circumstances we would have exercised the discretion available pursuant to s 80(2) of the Act to take no further action on this particular complaint.

[15] For the above reasons, this appeal is allowed and the decision of the Committee (finding Mr Guo guilty of unsatisfactory conduct in relation to the events we have described above) is hereby quashed.

[16] 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.

Judge P F Barber
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member