

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2011] NZREADT 29

READT 59/11

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

BETWEEN **PAUL JACKMAN**

Applicant

AND **COMPLAINTS ASSESSMENT COMMITTEE (CAC 10010)**

First respondent

AND **DIANA CUSSEN and WILLIAM HALE**

Second respondents

MEMBERS OF TRIBUNAL

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

HEARD at WELLINGTON on 13 October 2011

DATE OF DECISION: 31 October 2011

COUNSEL

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

RESERVED DECISION OF THE TRIBUNAL

The Issue

[1] Have Ms D Cussen and Mr W Hale (the licensees) been guilty of unsatisfactory conduct under s.72 of the Real Estate Agents Act 2008 (“the Act”).

Background Facts

[2] The licensees work for Barfoot & Thompson Ltd an Auckland Real Estate Agency. The complainant/appellant is the Chief Executive of the NZ Registered Architects Board.

[3] On 11 November 2010 the licensees placed an advertisement for sale of a residential property in the Papakura Courier which listed their names as the licensees whom the public should contact in respect of any sale. The advertisement commenced to describe the property advertised as *“Renowned New Zealand architect ‘Mark Tatton’ & the craftsmen at Pukekohe Builders have artfully designed and built a striking, contemporary yet functional family home ...”*.

[4] The concern of the appellant is his view that Mark Tatton is not an *“architect”* and this can be confirmed by a search of the NZ Architects Register. The appellant argues that by describing the property as *“architect designed”* the licensees are adding lustre and therefore market value to the property and so attempting to use misinformation to enrich themselves and the vendor at the expense of buyers.

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

[6] It is accepted that Mr Tatton is not an architect who is registered under the provision of the Registered Architects Act 2005, but he has a Bachelor’s Degree in Architecture.

[7] When they were going through the process of selecting a designer for their house 10 years or so ago, the vendors of the property had Mark Tatton recommended to them as an architect by a friend. Accordingly, when they instructed the second respondents to sell the house, they told them the house was designed by an architect.

[8] At the time the property was listed for sale by the licensees, they were informed by the vendors that the home had been designed by the architect Mark Tatton. They were provided with copies of plans of the house being marketed by them which they said *“had Mark Tatton as the architect”*. The plan supplied to the first respondent shows that all drawings and designs for the house were the property of *“MTD Architecture”*. The evidence of the licensees is that until they were advised otherwise by the appellant, they had no doubts that Mr Tatton was an architect.

[9] The first respondent also accepted as evidence from a Mr House, the Customer Relations Manager of Barfoot & Thompson Ltd, that the advertisement composed by the licensees was based on Mr Tatton’s representations, and he is described in the National Business Review of 28 February 2011 as an architect; and as the architect of Nautilus Apartments; and as an architect who designs Linear weatherboard homes; and as an architect consultant for the Tauranga City Council. Mr House put it that, with such information available, why would the licensees suspect that Mr Tatton might not be an architect? He also put it that the information in the advertisements was that which the licensees were advised by the vendors, and they used their

wording in good faith thinking it correct. The first respondent had also noted the view of Mr House that it was not the responsibility of licensees to check the NZRAB register to ensure Mr Tatton's credentials were correct, and that real estate agents should not be the enforcement arm of the NZRAB.

[10] Mr House disagreed that the status of the designer is easily determined and puts it that a search of the number of firms of architects listed in the Yellow Pages show "*no match*" on the NZRAB register.

[11] The first respondent committee noted the reply views of Mr Jackman. He put it that agents are expected to be professional people who know how their sector is organised and ignorance is no excuse. He put it that the status of a designer is easily determined and agents ought to know how to make such a check as a matter of habit.

Discussion

[12] We agree that agents are not expected to be the "*enforcement arm*" of the NZRAB. A consistent point made by Mr Jackman is that when advertisements are describing houses as designed by an "*architect*", a simple search of the NZRAB would enable a licensee to determine whether an individual is or has been an architect. He feels that the Yellow Pages listing of "*architects*" are full of inaccuracies which represent the view of the advertiser and are not "*some sort of official document*".

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

[14] Inter alia, Mr Jackman stated to the first respondent committee that when a licensee describes a house as "*architect designed*", that is a representation that the individual who designed the house was a "*registered architect*" so that, before making such a claim, the licensees should get their facts right which can be done rapidly and easily by searching NZRAB. We consider that to be a representation only that the designer is an architect; and that, sometimes and possibly often, the licensee should check the NZRAB.

[15] We consider that the first respondent has clearly and fully set out its reasons for decision in its said decision of 14 June 2011 regarding Diana Cussen and William Hale. For present purposes, we record the following paragraphs from that decision namely:

"4.28 If the licensees had checked the NZRAB website, they would have discovered that Mark Tatton was not registered as an architect in New Zealand, and had never been so registered.

4.29 But would it have been the end of the matter, given that Mr Tatton in fact had a degree in architecture? While Mr Tatton may not be able to describe himself as an architect, that does not necessarily mean that there is a breach of the rules of conduct that bind licensees under the Real

Estate Agents Act 2008, when a licensee describes a person with a degree in architecture as an architect.

- 4.30 *There may be any number of reasons why a person who might be able to obtain registration under the Registered Architects Act does not apply for registration. Financial considerations may apply: perhaps Mr Tatton cannot afford the registration fee. Perhaps he considers that registration under the Registered Architects Act 2005 does not provide him with benefits that match the cost of the registration. All of this, of course, is speculation on the Committee's part.*
- 4.31 *The issue here is whether or not this house, designed by Mr Tatton who has a degree in architecture, is properly described as designed by Mark Tatton, architect. The committee considers it is. The 'hypothetical consumer', in the Committee's view, is going to make little of the distinction between Mr Tatton, with his degree in architecture, and an architecture with a degree in architecture who happens to be registered under the Registered Architects Act 2005.*
- ...
- 4.35 *But on the facts of this case, the Committee does not consider that this advertisement by the licensees is misleading.*
- 4.36 *Unsatisfactory conduct which attracts professional discipline, even at the lower end of the scale, must be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purposes of protecting the public. A finding of 'unsatisfactory conduct' is not required in every case, even where error is shown. The question is not whether error was made, but whether the conduct in question was an acceptable discharge of professional obligations.*
- 4.37 *In terms of section 72(a) of the Act, does the conduct of the licensee fall short of the standard of conduct that a reasonable member of the public would expect from a reasonably competent licensee? In this case, the Committee considers that the answer to that question is 'no'.*
- 4.38 *In terms of section 72(b), does the conduct contravene any rules made under the Act? Again, the Committee considers that the answer is 'no', for the reasons set out in the previous section of this decision.*
- 4.39 *The advertisement is not misleading; and it does not provide 'false information' about the status of the person who designed each of the homes. Mr Tatton is, literally and technically, an architect. He has the degree to prove it. But he is not a registered architect. There is no breach of rule 6.4.*
- 4.40 *It follows that the Committee does not consider that this is conduct which is likely to bring the industry into disrepute, so there is no breach of rule 6.3. This is not conduct which, if known by the public generally, would lead them to think that licensees should not condone it or find it to be*

acceptable. Acceptance that such conduct is acceptable would not tend to lower the standing and reputation of the industry. ...

4.41 The Committee does not consider that there is any evidence suggesting the licensees are either incompetent or have acted negligently. There is no breach of section 72(c) of the Act.

4.42 That leaves section 72(d). A licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that would reasonably be regarded by agents of good standing as being unacceptable. The Committee does not consider that agents of good standing would regard an advertisement stating that a property was designed by an architect, albeit one not registered under the Registered Architects Act, as 'unacceptable'.

4.43 The licensees had an obligation to ensure the advertisement was accurate. Somewhat accidentally, it transpires the advertisement was accurate. A breach of section 72(d) of the Act has not been established."

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

[17] We incorporate and adopt into this decision our reasoning in the somewhat similar case of *Paul Jackman v Complaints Assessment Committee and Marie Raos* issued today simultaneously with this decision. A copy of that decision is annexed hereto. Also, it sets out the general submissions of the parties and the relevant statutory provisions.

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

[19] We consider that the licensees, in their then understandable absence of knowledge of the NZRAB register, took reasonable steps to ensure that their information that Mr Tatton was an architect was accurate, and they immediately took steps to correct the advertising when advised that Mr Tatton was not a registered architect.

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

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

[22] 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.

[23] 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.

[24] 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.

[25] Even if we were to accept the appellant’s submission and find that the NZRAB register is determinative on the question of whether or not a person is an architect, this would be an appropriate case for the exercise of our discretion to take no further action in all of the circumstances. The 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 Tatton was an architect. He is an architect but not a registered architect. The vendors told the licensees that Mr Tatton was an architect and they showed them the plans identifying his firm as that and the licensees made their own investigations as referred to above, and there was nothing in the circumstances which ought reasonably to have put them on enquiry that the property might not have been architect designed as they had been told by the vendors. We can understand it not occurring to the licensees to check the register to obtain conclusive confirmation as to the status of the building designer.

[26] There is no evidence that Mr Tatton 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.

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

[28] The onus of proof to establish that Mr Tatton 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.

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

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

Judge P F Barber
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member