

Appeal Panel Hearing

Case of

Mr Alexander Banyard

On

Thursday 15 June 2017

At

RICS Parliament Square, London

Panel

Julian Weinberg (Lay Chair)

Ian Hastie (Surveyor Member)

Helen Riley (Surveyor Member)

Legal Assessor

Alastair McFarlane

RICS Representative

James Lynch

Introduction

1. This is Mr Banyard's appeal against a finding of liability to disciplinary action and against the sanction imposed by a Disciplinary Panel on 9 December 2016. Mr Banyard appeared before the Appeal Panel and was represented by Mr Beaumont.

Preliminary Application to recuse the Legal Assessor

2. Mr Beaumont made an application to recuse the Legal Assessor on the basis that he was the Legal Assessor who advised the December 2016 Panel. His submissions in essence were that as the Legal Assessor had advised the December 2016 Panel on the law, it would give the appearance of bias if he acted as the Legal Assessor in this case.
3. Mr Lynch for RICS opposed the application and contended that there was no basis for the Legal Assessor to be recused.
4. The Panel determined to reject Mr Beaumont's application. It was satisfied that it was without merit. The Legal Assessor is neither the judge of fact or law and takes no part in any decisions made by the Panel. The Panel, as judges of law, are free to accept or reject the advice of its Legal Assessor, all of which is given in public. There was no issue of the Legal Assessor having any familial or other connection with the parties. For these reasons, it therefore considered there was no basis for the Legal Assessor to be recused. It was further satisfied that the informed observer, informed as to the status and role of a Legal Assessor, would not conclude that there was any possibility of bias or the appearance of bias or that this panel would be unable to conduct a fair hearing because the Legal Assessor had been the legal assessor to the December 2016 Panel.

Preliminary Application to admit new evidence

5. Mr Beaumont made an application pursuant to Rule 65 of RICS' Disciplinary, Registration and Appeal Panel Rules ("the Rules") to admit Mr Banyard's new statement. This was not opposed by RICS.

6. The Panel was satisfied that it was appropriate and fair in all the circumstances to admit this new evidence.

Burden and standard of proof

7. Under Rule 66 of RICS' Disciplinary, Registration and Appeal Panel Rules ("the Rules"), the burden is on the Appellant to satisfy the Appeal Panel that the order being appealed was wrong.

Background

8. Since 2013 RICS members are required to undertake a minimum of 20 hours Continuing Professional Development (CPD) each calendar year (January to December). Rule 6 provides: "Members shall comply with RICS' requirements in respect of continuing professional development."
9. At a hearing on 31 May 2016 a Disciplinary Panel found that Mr Banyard was in breach of Rule 6 for not recording his CPD activity for 2014 and 2015 online and found that he liable to disciplinary action and following the presumption set out in paragraph 21.1 of the RICS Sanctions Policy directed his expulsion from membership.
10. The 31 May 2016 Panel was inquorate and accordingly RICS convened a new hearing on 9 December 2016.
11. The 9 December 2016 Panel found the facts proved and that Mr Banyard was liable to disciplinary action and imposed a sanction of expulsion.
12. At paragraph 20 of its decision, the December 2016 Panel stated: "This decision supercedes all previous decisions in relation to the breach charged in this case; in particular, those arising from an earlier hearing, which, with the agreement of Mr Banyard, RICS had invited the Panel to disregard. The outcome of that hearing is accordingly to be treated as having been formally set aside."

Mr Banyard's submissions against Liability to Disciplinary Action

13. Mr Beaumont submitted that the December 2016 Panel's decision was wrong because:
 - a. The Appellant was already expelled when he was purportedly expelled for a second time;
 - b. The Panel did not have jurisdiction to revisit and purport to set aside the previous order of a panel of equivalent jurisdiction and that only an appeal panel could have done that;
 - c. The purported setting aside of the previous order at paragraph 20 of its decision was not done until after it had purported to determine liability to disciplinary action at paragraph 13 of that judgment and after it had purported to expel Mr Banyard in paragraph 19 of decision. Therefore the Panel's determinations of liability to disciplinary action and sanction were not valid and "fall to be quashed".
 - d. Further, the December 2106 Panel hearing was unfair because the Panel was aware of the expulsion decision of the May 2016 panel which, was "egregiously prejudicial conduct by the prosecutor" which "infected" the panel with knowledge that it should never have had.

Mr Banyard's submissions against Sanction

14. Mr Beaumont contended that the sanction of expulsion was wrong as it was disproportionate, particularly given that a lesser sanction has been imposed for numerous similar cases. He also emphasised that Mr Banyard, is a 64 year old building surveyor, who earns a modest salary and that the loss of his RICS status would cost him his job.

RICS' submissions regarding the Appeal to Liability Disciplinary Action in response

15. RICS contended that the May 2016 Panel decision stood "until a body with the power to reconsider the decision" did so. It relied, inter-alia, on the fact that the Panel is not expressly prohibited in the Rules from reconsidering such a decision; that the time limit for appeal

under the Rules and for Judicial Review of the decision had long passed by December 2016; that the decision to refer all the many inordinate decisions to panels for re-hearings with the respondent able to adduce new evidence was "a pragmatic solution to the procedural difficulties faced, given the exploration of the relevant appeal limits". Further, Mr Banyard had consented to the matter being reheard by the December 2016 Panel.

16. In addition, RICS submitted that the December 2016 Panel expressly stated that their decision superceded all previous decisions and relied upon a previous decision of RICS v Jonathan White, where these jurisdictional issues were raised and the Disciplinary Panel determined that it could hear the case.
17. RICS rejected Mr Beaumont's contention that the second hearing was unfair. Their submissions included that as the December 2016 Panel were being asked to set aside the May 2016 decision they were properly informed of the matter.

RICS' submissions regarding the Appeal to Sanction

18. In the light of a large number of CPD rehearing cases since December 2016 which were dealt with by way of a condition that the member complies with their 2016/2017 CPD obligations, failing which they are automatically expelled, RICS did not contest Mr Banyard's appeal against sanction.

Appeal Panel's Decision

19. The Panel carefully considered all of the evidence before it, as well as the submissions of Mr Beaumont for Mr Banyard and of Mr Lynch for RICS.
20. It was not persuaded by any of Mr Beaumont's arguments against the December 2016 Panel's decision on liability to disciplinary action. It was satisfied that the December 2016 Panel had jurisdiction to re-determine Mr Banyard's CPD case. It adopts the approach set out in the case of RICS v Jonathan White. It is satisfied that the May 2016 decision, which

expelled Mr Banyard remained in force until it was expressly superceded by the decision of the December 2016 Panel. Mr Banyard was given an opportunity to attend the December 2016 hearing and submit any evidence he wished. The procedural irregularity with the May 2016 decision led to a whole series of cases being re-referred to a new disciplinary panel. Mr Banyard consented to his matter being re-heard. The Panel considered that the process adopted by RICS was a fair solution to the problems that it encountered with the May 2016 hearings and ensured that the member had the opportunity to re-argue his case, despite the expiry of any appeal period and the period within which to make an application for judicial review.

21. Further, the Panel rejected Mr Beaumont's argument that knowledge of the May 2016 hearing and sanction in any way compromised the ability of the December 2016 Panel to ensure a fair hearing for Mr Banyard. As the December 2016 Panel was being invited by RICS to re-consider Mr Banyard's CPD case and set aside the May 2016 decision, it was inevitable that they should be informed of it.
22. The Panel has carefully considered the decision of the December 2016 Panel in relation to liability to disciplinary action and is satisfied that there is no basis for it to determine it to be wrong. It was satisfied that the May 2016 decision remained voidable until the December 2016 Panel directed that its decision superceded it. There was no error of law or fact on which it could conclude that its decision as to the facts and the finding of liability to disciplinary action was wrong. The December 2016 Panel was entitled to rely upon the evidence submitted to it and, in particular, the attendance note of Ms Christine Broome confirming her telephone conversation with Mr Banyard on 29 January 2015 as to his 2014 CPD obligations.
23. In relation to the appeal against sanction, the Panel noted Mr Beaumont's submissions and the concession made by RICS.
24. The Panel was satisfied in the light of the information available to the December 2016 Panel, particularly in relation to lack of insight, that it was appropriate for it to have made an order of expulsion. However, in the light of the new evidence, the Appeal Panel was satisfied that Mr Banyard did have insight at the time and that the sanction was therefore disproportionate and wrong. Therefore, the Appeal Panel allowed this aspect of the appeal

and exercised its power under Rule 69 to vary the sanction imposed. It determined to consider the issue of sanction afresh.

25. The Panel bore in mind that the purpose of sanctions is not to be punitive, though that may be their effect. The purpose of sanctions is to declare and uphold the standards of the profession, to safeguard the reputation of the profession and of RICS as its regulator and to protect the public. Sanctions must be proportionate to the matters found proved.
26. The Panel accepted the advice of the Legal Assessor and had regard to the Sanctions Policy of RICS.
27. The Panel was mindful that paragraph 21.1 of the Sanctions Policy states that expulsion is likely where there is a third breach of Rule 6 of the Rules of Conduct for members within 10 years of a receipt of a caution for breach of the same rule.
28. The Panel considered the following mitigation:
 - Mr Banyard recognised the importance of ensuring his CPD is recorded
 - Mr Banyard stated he had undertaken 23 hours CPD in 2016
 - Mr Banyard stated he had undertaken over 40 hours CPD for 2017 already of which over 11 are formal CPD hours
 - Mr Banyard has apologised and expressed remorse
 - Mr Banyard has shown insight and has demonstrated to the Panel that he recognises the importance of CPD for Members and ensuring that it is properly recorded and has accepted responsibility for his failure to do so
 - Mr Banyard gave an assurance that he will fully comply in future.
29. The Panel took into account the length of Mr Banyard's career and the other personal circumstances detailed in his witness statement and that he has also had to bear the impact of a lengthy period of expulsion to date.
30. The Panel considered the following to be an aggravating feature:

- The failure to record CPD was not isolated and happened over a sustained period of time;
31. The Panel considered the matters too serious for no sanction to be imposed. The Panel considered that the repeated failure to record CPD was serious and in the absence of exceptional circumstances imposing no sanction would be neither proportionate nor appropriate.
32. The Panel went on to consider a caution but considered the failure could not be considered as minor and concluded that a caution would not reflect sufficiently the seriousness of the case recognising the cumulative effect of non-compliance. The Panel took into account that cautions had already been imposed for the breaches in years 2013 and 2014.
33. It further considered the imposition of a reprimand but concluded that this was not appropriate or necessary having regard to the Sanctions Policy.
34. The Panel then considered whether to impose a fine and considered that a fine of £750 was appropriate to mark the seriousness of the repeated failings when coupled with an order for conditions. The Panel was mindful of the fact that Mr Banyard now recognises the importance of recording CPD online and has expressed an intention to comply in the future. The Panel decided that a condition was also appropriate and proportionate and adequately met the public interest.
35. The Panel therefore imposed a Condition in the following terms:
- As a condition of continuing membership Mr Banyard is directed to comply with the CPD requirements for the year 2017 by 31 December 2017.
 - Failure to comply with this condition will result in automatic expulsion from membership, without further reference to a Disciplinary Panel.

Publication and Costs

Publication

36. The Panel considered the guidance as to publication of its decisions. It noted that Mr Banyard was neutral on the issue of publicity. It accepted the Legal Assessor's advice. The advice was, and the guidance provides, that it is usual for the decisions of the Panel to be published on RICS' website and in RICS Modus. The Panel sees no reason for departing from the normal practice in this case. Part of the role of the Panel is to uphold the reputation of the profession, and publication of its decisions is an essential part of that role.
37. The Panel orders that this decision be published on RICS' website and in RICS Modus, in accordance with Supplement 3 to the Sanctions Policy 2008 version 6.

Costs

38. Both RICS and Mr Beaumont made applications for costs and submitted a breakdown of their respective costs, which were similar in total quantum. Mr Beaumont submitted the authorities of *Walker v RCVS* and *Bass v SRA*. The Panel accepted the advice of Legal Assessor and had regard to the guidance in Part F of the Sanctions Policy.
39. The Panel considered all the circumstances, including having specific regard to the history of the case; the fact that the Appeal was only successful in part and that Mr Banyard had failed to comply with his professional obligations. The Panel has borne in mind that the appeal against sanction was only allowed on the basis of new evidence that was not put to the December 2016 Panel. Carefully considering all arguments, the Panel was satisfied that the just and reasonable approach in this case was to make no order for the costs of either party.