

Costs Application Hearing (Appeal Panel)

Case of

**Mr Joshua Kitsul [1291925]
Vancouver, Canada**

On

Listed for Tuesday 31 October 2017 (abandoned on Sunday 28 October 2017)

Via Telephone Conference

Panel

Catherine Audcent (Lay Chair)
Gillian Seager (Lay Member)
Christopher Pittman (Surveyor Member)

Legal Assessor

Margaret Obi

Background

1. RICS have made an application for costs against Mr Kitsul, following the withdrawal of his Appeal, which was due to be heard on 31 October 2017.
2. Mr Kitsul made an application to Appeal the decision of the Disciplinary Panel that imposed an interim order on his membership of RICS. In a letter, dated 29 August 2017, RICS provided Mr Kitsul with a Notice of Hearing, which confirmed that the appeal hearing would take place on 31 October 2017.
3. On 23 October 2017, 8 days before the hearing, Mr Kitsul sought RICS' agreement to an adjournment as he was seeking legal advice. RICS responded on the same day. RICS stated that they would adopt a 'neutral position' with regard to the proposed adjournment, but Mr Kitsul was informed that RICS would incur 'aborted hearing costs' which would 'range from £885-£1,770 depending on when notice of an adjournment is sent to the Panel'.
4. Mr Kitsul and RICS exchanged further correspondence on 27 October. Mr Kitsul requested 'a more detailed breakdown of the costs related to an adjournment'. RICS informed Mr Kitsul that the costs were £1,770 and related to the 'appeal panel and the legal adviser'. RICS also provided an estimate of costs should the matter proceed to a hearing.
5. On 28 October, Mr Kitsul informed the RICS Panel Management Team that he had withdrawn his Appeal.

RICS Application

6. RICS have made an application for costs of £1,770. These costs represent the costs of the aborted 31 October 2017 hearing only. RICS have confirmed that they do not seek preparatory costs.
7. Rule 62 of the Disciplinary, Registration and Appeal Panel Rules (Version 7, January 2017) states:

An Appellant may withdraw his notice of Appeal at any stage. In such circumstances the Appeal Panel may make an award for costs.

8. Rule 34 states:

A Panel may make such order for costs against the Relevant Person or RICS as it considers fair and reasonable, subject to the requirement that an estimate of costs incurred by a party shall be served on the other parties at least 24 hours before the hearing.

Response

9. In response to the RICS application for costs Mr Kitsul submitted that the Panel should take into account the principle of proportionality as the aborted hearing related to an Interim Measures hearing rather than a 'full disciplinary decision.'

10. Mr Kitsul accepted that he had been put on notice that the costs associated with 'standing down' the Panel would be £1,770. However, he submitted that this was in the context of an adjournment and not in the context of the withdrawal of his appeal. Mr Kitsul further submitted that Mr Lynch specifically indicated that the costs payable would be inclusive of the time and expense of a notice of adjournment which would have required actual representations and a decision of the Panel on the scheduled hearing date. He stated that as a consequence the costs should be substantially lower given that no Panel was required to be convened in order to hear the adjournment application. In addition Mr Kitsul disputed that 24 hours' notice of costs had been provided, in accordance with the Rules, given that the costs related to an adjournment application and not a withdrawal application.

11. Mr Kitsul submitted that his 'current financial circumstances are dire as [he is] currently struggling to find work.' He also stated that the 'cost of proper representation was simply beyond my financial means and, thus, required me to withdraw my appeal.' He invited the Panel to consider a costs award of £500.

Legal Advice

12. The Legal Assessor advised the Panel that as a preliminary matter it should determine whether Mr Kitsul has been served with proper notice of the costs application; it is only if he has been properly served that the Panel should go on to consider the merits of the application itself. She further advised that the general principle is that the unsuccessful party pays the costs. However, the Panel should take into account all of the circumstances of the case, including Mr Kitsul's submissions and his financial means.

Decision

13. The Panel accepted the advice of the Legal Assessor.

14. Mr Kitsul disputed that he had been served with proper notice. However, the Panel concluded that, for the purposes of a costs application, there was no material difference between an adjournment or a withdrawal of an appeal. The Panel was satisfied that it was the effect on the progress of the hearing that was relevant, not the terminology. Mr Kitsul was provided with a copy of the Rules in advance of the hearing and was subsequently informed that if the hearing did not go ahead RICS would make an application for costs in the sum of between £885 - £1,770. As there was no dispute that this information was provided at least 24 hours before the aborted hearing the Panel was satisfied that Mr Kitsul had been served with proper notice in accordance with Rule 34.

15. The Panel noted that RICS' application for costs was solely in relation to the wasted costs directly related to convening the Panel. There was no application for the preparation costs. As the 'appeal panel and legal adviser' costs are fixed costs the Panel concluded that the distinction between an Interim Measures appeal hearing and a Disciplinary Hearing was irrelevant. For the same reason the Panel also concluded that the RICS costs application for the hearing only would be the same whether the hearing was aborted at short notice or adjourned on the day.

16. Having determined the preliminary issues the Panel went on to consider the merits of the RICS application. The Panel noted that the costs requested represent the fixed costs associated with convening a panel and do not reflect any additional costs, however minimal,

which are likely to have been incurred. The Panel accepted that the amount requested was fair and reasonable. Mr Kitsul was put on notice of the appeal hearing approximately two months in advance yet the notification of withdrawal was not communicated to RICS until 28 October 2017, i.e. 3 days before the hearing. The Panel recognised that Mr Kitsul had a right to appeal the Interim Measure and had the right to withdraw his appeal. However, the Panel noted that the general principle is that the unsuccessful party pays the costs. As the application to appeal was withdrawn Mr Kitsul was the 'unsuccessful party' and the Panel was unable to identify any reason for departing from the general principle. The Panel noted that RICS' communication with Mr Kitsul could have made it clearer what the costs related to and the stage(s) at which greater costs are likely to be incurred. However, Mr Kitsul's notice withdrawal was at a very late stage. Accordingly, the Panel concluded that it was fair and reasonable to make a costs order in this case, otherwise the cost of the proceedings would fall on the profession as a whole.

17. The Panel noted Mr Kitsul's limited means. Although the Panel took his financial circumstances into account it concluded that the costs sought by the RICS should not be reduced.
18. The Panel orders that Mr Kitsul pays to RICS costs in the sum of £1,770.
19. The Panel anticipates that Mr Kitsul will be given the opportunity to enter into negotiations with RICS with a view to agreeing an appropriate payment plan.

Publication

20. The Panel considered the guidance as to publication of its decisions. It noted 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.
21. 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.