

**ROYAL INSTITUTION OF CHARTERED SURVEYORS  
APPEAL PANEL HEARING**

**Case of**

**Mr Albert Wellington [1102408]**

**London SE12**

**On**

Thursday 20 June 2019 at 11.00 hours

**At**

55 Colmore Row, Birmingham B3 2AA

**Panel**

Sir Michael Burton (Lay Chairman)

Nicholas Turner (Member)

Rosalyn Hayles (Lay Member)

**Legal Assessor**

Rosemary Rollason

**Appellant**

Albert Wellington (in person)

**RICS Representative**

James Lynch, Solicitor, RICS.

**Appeal Hearing**

1. The Appeal Panel considered an appeal by Albert Wellington (“the Appellant”) against a decision of an RICS Disciplinary Panel following a hearing which took place on 10 October 2018.

**Decision of the Disciplinary Panel 10 October 2018**

2. The Disciplinary Panel found the following charges proved:

(1) *You received an “Unemployed/seeking work” concession to your 2016 membership fee to which you were not entitled or to which you ceased to be entitled following a change in circumstances.*

*Contrary to Rule 3 of the Rules of Conduct for Members 2007*

(2) *Your conduct at 1 was dishonest in that you knew were receiving or had received discount to which you were not or were no longer entitled.*

*Contrary to Rule 3 of the Rules of Conduct for Members 2007.*

*You are therefore liable to disciplinary action under RICS Bye-law 5.2.2(c).*

3. The Disciplinary Panel found the Appellant liable to disciplinary action. The Panel excluded the Appellant from membership of RICS. He was ordered to pay RICS' costs in the sum of £5,500 and the decision of the Disciplinary Panel was to be published.

## **Background**

4. The Appellant has been a member of RICS since December 2009. As an individual undertaking 'Red Book' valuations, he was required to register on RICS' Valuer Registration (VR) scheme. This was applicable to his work at all material times in 2015-2017.

5. In January 2016, the Appellant declared to RICS that his company, AD Wellington Ltd., did not have sufficient professional indemnity insurance (“PII”) to cover such work and his VR licence was administratively removed on 4 February 2016. This led to an investigation into allegations that the Appellant had (a) failed to register his company with RICS (b) failed to put in place appropriate PII and (c) failed to implement a complaints handling procedure.

6. That investigation was closed with advice following the registration of the firm, but it became apparent during the course of the investigation that the Appellant had been in receipt of an unemployed member concession for the period from 4 February 2016 until mid-2017. These concessions were granted following applications by the Appellant dated 15 March 2016 and 1 January 2017.

7. A disciplinary panel hearing was convened on 10 October 2018 to consider the charges set out at (2), above.

8. In the period leading up to the hearing date, the Appellant did not file a listing questionnaire and did not submit any evidence in support of his defence.

9. On the morning of the hearing, the Appellant did not attend the hearing and was not represented. Approximately twenty minutes before the scheduled start time, the Appellant telephoned the RICS contact centre stating that he was at a family funeral and could not attend

the hearing. He was advised that the RICS employee to whom he spoke, Ms W, would pass the message to the relevant team, but that he should also email the regulation inbox with his message. The Disciplinary Panel received the message, Ms W having passed it via 'Skype' to the hearing officer.

10. No email from the Appellant was subsequently received by RICS and there was no further contact from him on that day. RICS made an application to the Disciplinary Panel to proceed with the hearing in the absence of the Appellant. The Panel agreed to that request.
11. The Disciplinary Panel found charge 1 proved in respect of the 2016 concession application, but not the 2017 concession ("the 2017 charge"). The key findings were that the Appellant was not entitled to a concession in 2016 because (a) there was evidence in the form of the Appellant's email of 9 March 2016 to RICS that he had undertaken a valuation on 7 March 2016; and (b) he had admitted being employed by a company, "E", between 12 July 2016 and 14 October 2016, again in his email to RICS dated 23 June 2017.
12. The Disciplinary Panel found that the Appellant had acted dishonestly, as stated in its decision at paragraph 22, "*...having regard to the false statement made by Mr Wellington in his 2016 concession application, and his ongoing failure, in relation to the same 2016 application, to disclose to RICS the work he subsequently undertook*".
13. Having found that the Appellant was liable to disciplinary action, the Disciplinary Panel's decision was to exclude the Appellant from membership of RICS.
14. That decision of the Disciplinary Panel was served on 14 October 2018. The 28-day deadline to appeal was 12 November 2018. The Appellant first indicated an intention to appeal by way of email dated 13 December 2018, although he did not submit his grounds of appeal until 15 March 2019. He applied for permission to appeal the decision substantially out of time and that permission was granted by Sir Michael Burton, the Chairman of the Appeal Panel, on 10 April 2019, although on terms that in the circumstances the likelihood was that even if his appeal were successful he would be liable for the costs of the appeal. The Chairman gave RICS permission to cross-appeal if so advised in respect of the Disciplinary Panel's decision to dismiss the 2017 charge, but RICS did not do so. In those circumstances we have been unable to consider the facts of the 2017 charge, which might have involved other considerations.

## **The Appellant's grounds of appeal**

15. The Appellant's first ground of appeal was that the Disciplinary Panel was wrong to proceed with the hearing in his absence.
16. The Appellant submitted that his reasons for not attending, as explained in his telephone conversation on the morning of the hearing, had been "lost in translation" and the full message was not conveyed to the Disciplinary Panel, as the Panel was not provided with a transcript of the conversation.

17. The Appellant further submitted that the principles from the authorities referred to, *R v Jones (Anthony) [2003] 1 AC 1* and *GMC v Adeogba & GMC v Visvardis [2016] EWCA Civ 162*, had been wrongly applied by the Disciplinary Panel, since he did not accept that he had voluntarily absented himself from the hearing, but had informed the Panel he was unable to attend due to having to attend his aunt's funeral. He submitted that the decision to hear the case in his absence infringed natural justice and his Article 6(1) ECHR right to a fair hearing.
18. The Appellant submitted that given the mitigating circumstances of his attending his aunt's funeral on that day, the Disciplinary Panel should have shown compassion and empathy and agreed to defer the hearing and fix a new date and time.
19. The Appellant's second ground of appeal concerned the substantive findings of the Disciplinary Panel. The Appellant submitted that when he was unable to renew his PII in January 2016, he informed RICS. In fact, he was covered under the umbrella PII cover provided by the company he was working for at the time, "WHS". However, his VR licence was suspended by RICS with effect from 4 February 2016. It was RICS who informed WHS of the suspension. On 15 March 2016, WHS informed the Appellant that they had decided to stop giving him any instructions.
20. In relation to the application for the unemployment concession on 15 March 2016, the Appellant accepted that he had entered the date of February 2016 on the form as the date from which he had been unemployed. He said he had entered this date because this was when his VR licence was suspended. He accepted that this could be considered erroneous, as he had undertaken the valuation in question on 7 March 2016, as he himself later informed RICS. He should have put 14 March as his last date of employment, which it was.
21. In respect of the second period which formed the basis of the finding of the Disciplinary Panel, the Appellant said that in May 2016, he secured an appointment to undertake work for a company, "E", with effect from 12 July 2016. The Appellant said that RICS was aware of this because he had so informed them in a telephone call on 24 June 2016 (as in fact recorded on the RICS file) during communications regarding the reinstatement of his VR Licence. He needed confirmation that the licence was to be restored in order to start to work for "E".
22. When asked why, once he returned to work and was no longer entitled to the unemployment concession, he did not contact RICS to pay balance of the full annual fee, the Appellant said that he had been willing to comply, but had not realised that he was supposed to contact RICS. He assumed that RICS would automatically take the fee due from his account.
23. In summary, the Appellant's submission was that throughout his various communications with RICS, he had been fully transparent about his employment circumstances. He acknowledged that he had been "sloppy" in his actions in relation to the 2016 unemployment concession, but maintained that the Disciplinary Panel was wrong to find that he was dishonest.

## **RICS' response to the appeal.**

24. RICS opposed each of the grounds of appeal.

25. In relation to the ground concerning proceeding in absence, RICS submitted that:

- it was clear from the written determination that the Disciplinary Panel was made aware of the salient facts, namely that the Appellant was attending his aunt's funeral on that day, and the Panel accepted that position. RICS accepted that no transcript of the telephone call was given to the Panel, but it was not clear what additional benefit would have been gained from this;
- the Appellant could therefore only advance this ground on the basis that the Disciplinary Panel had incorrectly applied the law, or that its decision "*fell outside the bounds of what the tribunal could properly and reasonably have decided*";
- the Disciplinary Panel correctly considered and applied the principles from the relevant case law, in particular the decisions in *GMC v Adeogba* and *R v Jones*;
- the Appellant had been given 105 days' notice of the hearing by RICS, rather than the requisite 56 days. Notwithstanding this, he had not engaged with RICS prior to the day of the hearing;
- the details of his aunt's funeral must have been known to the Appellant at some point prior to 10 October 2018, but he took no steps to seek an adjournment prior to the morning of the hearing;
- the Panel was entitled to find that the Appellant had voluntarily absented himself from the hearing. It was entitled to conclude that an adjournment was unlikely to secure the Appellant's attendance at a later date and that the interests of justice favoured proceeding in the absence of the Appellant.

26. In respect of the appeal against the factual findings of the Disciplinary Panel, RICS submitted that:

- the Appellant had failed to produce any evidence to suggest that the factual findings made by the Disciplinary Panel were incorrect and to the contrary, the documents supplied by the Appellant confirmed that position;
- the Appellant appeared to claim that RICS has caused difficulties for him by virtue of revoking his VR licence during the course of its investigation into the PII issue, but this was irrelevant to the question of whether he was entitled to an unemployed concession and his knowledge as to that entitlement.

27. RICS submitted that the decision of the Disciplinary Panel should be upheld in all respects and the appeal on all grounds dismissed.

## APPEAL PANEL DETERMINATION

### Documents

28. We received written submissions from the Appellant and from RICS. We received an appeal bundle which included the written determination of the Disciplinary Panel, documents from the disciplinary hearing, the transcript of the disciplinary hearing and relevant case law authorities submitted by the parties. We received further documents from the Appellant in support of his appeal.

### The Appeal Panel's approach

29. Our attention was drawn by the Legal Assessor and in RICS' written submissions to the correct approach in considering an appeal.

30. Under the provisions of the Disciplinary Registration and Appeal Panel Rules (01 April 2009, Version 7, with effect from 01 January 2017) ("the Rules"), the burden at an appeal hearing is on the Appellant to satisfy us that the order being appealed was wrong.

31. Rule 64 provides that an appeal is a review of the decision of the Disciplinary Panel, rather than a re-hearing de novo. Accordingly, only where the Appeal Panel considers that the decision of a Disciplinary Panel was plainly wrong should it allow the appeal. We were referred to guidance given by the Supreme Court in ***Henderson v Foxworth Investments [2014] UKSC 41***, in which it was stated that "*plainly wrong*" in this context signifies that "*the decision of the trial judge cannot reasonably be explained or justified. It follows that, in the absence of some other identifiable error such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified*".

32. We accepted that the bar for interfering with the factual findings of the Disciplinary Panel on appeal is therefore set high.

33. Rule 69 provides that where the Appeal Panel allows an appeal it may:

- (a) vary the Disciplinary Panel's finding that the Relevant Person was liable to disciplinary action;
- (b) vary the penalty imposed by the Disciplinary Panel to one of greater or lesser severity;
- (c) *[applies to Registration decisions]*;
- (d) refer the matter back to a Disciplinary Panel for a new hearing.

## Decision

### *Ground 1 - Proceeding in absence*

34. The Appellant has accepted that he did not contact RICS to say that he would be unable to attend the hearing until very shortly before 10.00 on 10 October 2018, when the disciplinary hearing was scheduled to commence. It is clear from the Disciplinary Panel's determination that it received the message and was aware that the Appellant had said that he was attending an aunt's funeral on that morning.
35. From the written determination of the Disciplinary Panel it is apparent that it was correctly advised as to the relevant authorities, *R v Jones* and *GMC v Adeogba*. The Panel's decision confirms that it recognised that its discretion to proceed in absence was not unfettered and had to be exercised with the utmost care and caution, with the fairness of the hearing at the forefront of its mind. It was required to take account of fairness to the respondent, but also of the public interest in regulatory proceedings being dealt with in a reasonably expeditious manner.
36. The authorities state that a hearing panel must take account of the nature and circumstances of the respondent's absence in determining whether he has voluntarily absented himself from the hearing. In this respect, the Disciplinary Panel's decision shows that it took into account the Appellant's lack of engagement with RICS prior to the hearing. The only contact from the Appellant was a brief telephone call on the day of the hearing, when he had known about the hearing date for some time and must have known he would be attending the funeral for at least a few days in advance. The Appellant did not, as requested, send any email following his telephone call to RICS on the morning of the hearing. The Disciplinary Panel concluded from the Appellant's conduct that he would be unlikely to attend on a future occasion if the matter was adjourned. It was satisfied that he had voluntarily absented himself from the hearing and that the interests of justice favoured proceeding with the hearing.
37. In our view, the decision demonstrates that the Disciplinary Panel properly considered the nature and circumstances of the Appellant's absence based on the information available to it. We are satisfied that the decision to proceed was reasonable and was a decision which the Panel was entitled to reach. We do not consider that the Panel's decision was plainly wrong. We therefore dismiss the Appellant's appeal on the first ground.



*Ground 2 – Appeal against Charges 1 and 2 and the finding of dishonesty.*

38. We observed that the evidence relied upon by RICS as proof that the Appellant had undertaken work and was not entitled to the 2016 unemployment concession was information provided by the Appellant himself in correspondence with RICS, particularly during its investigation regarding his PII and VR licence.
39. We accept the Appellant's explanation that in entering the date of February 2016 on the concession application as the date from which he was unemployed, he was referring to the date on which his VR licence was removed by RICS. Although arguably incorrect, we noted that the date entered made no difference to the amount of discount the Appellant would receive, as the discount on the membership fee is not pro-rata'ed across the year.
40. The Appellant contended that when he was aware that he was to receive instructions from "E" from July 2016, he informed RICS and they were thus aware of his forthcoming employment. We had sight of a telephone record from the original hearing bundle, referred to in paragraph 21 above, which showed the Appellant seeking to contact a Mr Lee, RICS' Professional Assurance Officer, and in his absence speaking to a Ms JG, on 24 June 2016. This referred to the Appellant confirming that he was "*starting a new job with ["E"] on Monday 27/6/16*" and seeking confirmation that his VR licence would be reinstated in order that "E" would allow him to commence the employment. His confirmation about his having carried out valuations during that period of June to October 2016, upon which the Disciplinary Panel rested its conclusion, was much later, in June 2017, but would have been inevitable once he had started work in his new job, as he had advised RICS he was doing in June 2016.
41. The Appellant's submission was, in effect, that he believed that he had been transparent throughout and had kept RICS informed of his employment circumstances. We concluded the documentary evidence available at the disciplinary hearing supported that contention.
42. On the issue of retaining the benefit of the concession once he obtained employment, the Appellant had said that he assumed that there would be internal communication of this fact within RICS and that his unemployment concession would be removed. He accepted that he had not taken pro-active steps to pay the full membership fee once he was no longer entitled to the concession, but said that he thought that RICS would automatically collect this from him.
43. We noted the submissions of Mr Lynch at this hearing and Mr Geering, representing RICS at the Disciplinary Panel hearing, to the effect that RICS is a large organisation with a number of divisions and, in short, informing one person in RICS is not akin to informing the organisation or the appropriate person. We acknowledge the point, but we also consider that the Appellant may not necessarily have appreciated this.
44. The Disciplinary Panel's task was not assisted by the approach the Appellant took to the disciplinary proceedings. The Panel did not have the benefit of oral or written submissions, or



evidence, from him. However, the finding of dishonesty against the Appellant is a very serious matter. We accept that the documents demonstrated that the Appellant was transparent in the information he provided to RICS. This did not, in our view, evidence a dishonest mind or an intention to conceal his employment from RICS in order to obtain, or retain, the benefit of the unemployment concession. As we have said, the very evidence of employment upon which RICS' case relied was provided to RICS by the Appellant himself. We have therefore concluded that the Disciplinary Panel's findings in respect of the 2016 concession, including the finding of dishonesty, were wrong.

45. We uphold the Appellant's appeal in respect of Charges 1 and 2 and, for the avoidance of doubt, in respect of its finding of dishonesty. The findings that the Appellant was in breach of Rule 3 of the Rules of Conduct for Members 2007 and was liable to disciplinary action under RICS By-law 5.2.2 (c) are therefore quashed.
46. We accordingly direct that the sanction of exclusion from membership of RICS is quashed and the Appellant, Mr Albert Wellington, shall be restored to membership of RICS.

## **Determination on Publication**

47. We are mindful that our primary function is to protect the public and the public interest, and that the presumption is in favour of publication unless there are good reasons not to publish. The publication of decisions of RICS' disciplinary and appeal panels is an important part of their role in upholding the reputation of the profession and maintaining public confidence in it.
48. In this case, we find no reason to depart from the usual position. We therefore direct that there shall be publication of this decision of the Appeal Panel in Modus and on RICS' website.

## **Costs**

49. RICS submitted that the Disciplinary Panel's order for costs to be paid by the Appellant in the sum of £5,500.00 should remain unchanged. RICS sought its costs of the appeal hearing in the sum of £5,350.00.
50. The Appellant accepted that he should pay a fair and reasonable sum in respect of RICS' costs. He submitted that the costs of the appeal should be reduced, as he had succeeded on the second ground of his appeal. He asked for twelve months to pay the costs, given that his ability to earn had been reduced during his period of exclusion from RICS membership.
51. We considered, pursuant to Rule 34, our power to award a fair and reasonable sum in respect of costs. We were satisfied that the Appellant should pay the costs of the disciplinary hearing as ordered by the Disciplinary Panel, as the hearing was wholly wasted by his delay and lack of involvement. As for the costs of the appeal he had already had the costs warning referred to in paragraph 14 above, he lost on his first ground, and he had to a large extent brought the charges

on himself by virtue of his own conduct. We determined that the Appellant should also pay RICS' costs of the appeal but in the reduced sum of £4,000.00 and that he should have reasonable time to pay.

52. We therefore order that the Appellant should pay RICS' costs in the total sum of £9,500.00. 50% of the sum shall be payable in 6 months and the full sum shall be paid in 12 months from the date when this decision is provided to the Appellant. He shall have liberty to apply to RICS if necessary.