

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

Case of:

Warwick Estates Property Management Ltd

On

Wednesday 25 July 2018

At

RICS, Parliament Square, London

Panel Members

Sir Michael Burton (Lay Chairman)

Mr Chris Pittman (Surveyor Member)

Mr Richard Bayly (Lay Member)

Legal Assessor

Ms Margaret Obi

RICS Representative

Mr James Lynch

Firm's Representatives

Mr Mant of Counsel, 39 Essex Chambers, Emma Wherry, solicitor for the Firm and Karl Arden, Director of the Firm

Audio Technician

Jamie Kim

Hearing Officer

Ms Jae Berry

Background

1. The Firm has been regulated by RICS since August 2012.
2. There are eight principals of the Firm. Four of the principals, Karl Ardern, Nicholas Rich, Craig Stephens and Abigail Teece are associate members of RICS (AssocRICS). The other four principals are not members of RICS.
3. The Firm was appointed as Managing Agents for Marsden House, a mixed use residential and commercial building in Bolton, in February 2012.
4. On 30 August 2014, Mr Craig Jones, a resident of Marsden House, was returning to his flat on the 9th floor. Mr Jones and a friend, Mr Stedford, were travelling in the lift when it suddenly stopped between the 4th and 5th floors. Mr. Jones pressed the emergency button. A recorded message then played in the lift instructing the occupants not to panic and stating that the emergency services would be contacted. However, due to software problems with the emergency contact system in the lifts, the emergency call-out service was not activated. Mr Jones told Mr Stedford that this was a regular occurrence and that he had had to self-rescue on a number of occasions in the past.
5. Mr. Jones pushed open the internal lift doors, revealing the top 18 inches of the 4th floor landing. He attempted to lower himself through the gap and onto the 4th floor landing. Mr. Jones slipped and fell into the lift shaft where he was impaled on a ladder that was kept there for maintenance purposes. Realising what had happened, Mr Stedford had to lower himself through the same gap to try and obtain help for Mr. Jones. Mr Jones died in hospital later that day.
6. A coroner's inquest ruled that this was an 'accidental death'. However, the Firm was subsequently prosecuted for a failure to discharge its duties imposed under S3(1) of the Health and Safety at Work Act 1974 (extract at page 23), which reads:

"It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

7. Mr Peter Smith, one of the non-Member principals, pleaded guilty to the charge on behalf of the Firm at an early stage in proceedings. The Firm was convicted on 27 June 2016 and the sentence hearing took place at Bolton Crown Court on 23 December 2016.
8. H H Judge Clayson in his sentencing remarks made the following observations:

'...taking into account all the evidence...and bearing in mind the reports referred to in the engineer's breakdown reports, I find that the problems with the lift breaking down and passengers being trapped happened quite often between in the period 2012 to 2014 whilst the problem with the auto-dialler is in my judgment described as intermittent. Sadly, the overall picture is one in which a serious accident was waiting to happen. ...The defence concedes ...that the defendant company failed to query the absence of receipt of thorough examination reports relating to the lifts at Marsden House produced by Zurich Management Services on five occasions. Had this been done serious faults in the lifts operation would in my view have been identified and expert investigation and recommendations sought.

Secondly, it's conceded that Mr Lamb [an employee of the Firm] ought to have had a more precise description of his duties and responsibilities such that it would have been clear to him that it was necessary to report to the defendant any incident of self rescue of which he was aware. I have noted that no submissions were made regarding the reports produced by Ark Elevators. It's apparent therefore that the receipt of those maintenance reports and the references to (a) the auto-dialler not working and (b) the persons being trapped in the lifts and self rescuing were not acted upon by the defendant.

The defence thus concede that the essential features of the prosecution case but none the less argue that had the defendant company been fully aware of the problems with the lifts no defect or defects were so serious as to render the lift dangerous to users but that accordingly rectification of the problems would not have prevented the incident involving Craig Jones.

To my mind this proposition is on the evidence wholly unsustainable. Investigation into this case has produced a wealth of evidence demonstrating that the lifts at Marsden House were prior to 30th August 2014 exhibiting serious problems. It's axiomatic that an intermittently faulty auto-dialler system together as it happens with poor mobile telephone signal strength within the lifts would give rise to a high risk that passengers trapped within the lifts floors would, in the absence of assistance, attempt self rescue involving exposing themselves to the open shaft. Further, a

significant number of changes to the lift operation system relevant to this case were required by the Health and Safety Executive after their investigations following Craig's accident, thus demonstrating what could and should have been done prior to that date. Had those improvements been made, it is in my view likely that the incident with which this case is concerned would not have happened.'

9. HHJ Clayson imposed a financial penalty of £120,000 plus costs of £45,000 and a victim surcharge of £120, payable by way of 12 equal monthly instalments. The penalty reflected the Judge's conclusion that the degree of culpability was 'medium', the initial harm category was Category 1 as 'a very substantial number of people being residents of or visitors of Marsden House were exposed to the risk of harm arising from the [Firm's] breach' and the breach amounted to a significant cause of Mr Jones' death.
10. On 21 February 2018 the Firm was found by a Disciplinary Panel of RICS to be in breach of Rule 4 of the Rules of Conduct for Firms 2007, having admitted the following charges:
 - "a. *On 23 December 2016, the Firm pleaded guilty to and was subsequently convicted of a single charge of failing to discharge the duty imposed by section 3(1) of the Health and Safety at Work Act 1974 to ensure so far as reasonably practicable that persons were not exposed to risks to their health and safety.*"
 - "b *The Firm failed to provide focused training concerning its specific work duties to the building caretaker Mr Lamb, to enable him to understand who specifically should be notified in the event of a lift failure or emergency.*"
11. The Firm also admitted a liability to disciplinary action and the sanction imposed by the Disciplinary Panel was a Reprimand and a £20,000 fine.
12. Following publication of the decision, RICS received a letter, dated 6 March 2018, from a member of the public which requested that the Honorary Secretary consider referring the decision for review.
13. The Honorary Secretary determined that the matter should be referred to an Appeal Panel for a review of the decision on sanction and a Notice of Appeal was submitted by RICS within the 28-day time limit.

Preliminary Jurisdictional Issue and Grounds of Appeal

14. Bye-Law 5.5.2 states '*The Honorary Secretary may require the Appeal Panel to review a finding or penalty imposed under B5.4 as provided by the Rules if he believes that the penalty concerned is unduly lenient.*' Rule 59 of the Disciplinary, regulation and appeal panel rules states, 'in accordance with the Bye-Laws the Honorary Secretary of RICS may require a review of a finding or penalty imposed by a Disciplinary Panel.'
15. Mr Lynch responded to the written submissions, made on behalf of the Firm, that the Appeal Panel had no jurisdiction to hear the appeal. Mr Lynch had drafted a summary of the Honorary Secretary's grounds for referral which stated, '*Given the absence of full reasoning associated with these two points, the Honorary Secretary believes that there is a risk that the sanction is, or could be viewed as, unduly lenient.*' During his oral submissions, Mr Lynch acknowledged that his terminology was 'loose' but invited the Appeal Panel to conclude that it is implicit that the Honorary Secretary believed that the sanction imposed by the Disciplinary Panel is unduly lenient, otherwise the referral would not have been made.
16. Mr Lynch went on to address the merits of the appeal itself. He submitted that the Disciplinary Panel's analysis did not include reference to some of the material facts, or sufficient detail to demonstrate what consideration had been given to the seriousness of the findings by the Judge, and what weight, if any, had been given to the respective aggravating and mitigating factors. For example, there was no reference to the harm that Mr Jones' death could have upon the reputation of the profession, particularly as it occurred, at least in part, as a result of failures by the Firm.
17. Mr Lynch further submitted that although reference was made to the Firm's new systems reducing the risk of repetition, the Disciplinary Panel did not explain how much weight was afforded (if any) to that mitigating feature when determining that a £20,000 fine and reprimand was the appropriate sanction. Although Mr Lynch did not take issue with the advice given to the Disciplinary Panel that it should consider the sanction options in ascending order 'from the bottom up', he submitted that the Disciplinary Panel should have considered removal of registration, as the death of Mr Jones was so significant that it is the sanction which the public would have expected. He invited the

Appeal Panel to conclude that, by failing to take account of material information, the Disciplinary Panel did not uphold the overriding principles outlined in the Sanctions policy, namely:

- a It was not proportionate to the breach and all the circumstances; and/or
- b It did not demonstrate to society and to other Member or Firms that RICS takes firm action in order to protect the public interest; and/or
- c It did not serve to protect the public, the reputation of the profession, nor did it declare and uphold proper standards; and/or
- d It did not serve to deter the Firm or other Member or Firms from future non-compliance.

Firm's Response

18. Mr Mant submitted that the Appeal Panel had no jurisdiction to consider the merits of the appeal as the purported referral has no basis in law. He submitted that the expressed basis for bringing the appeal is a perceived "risk" that the decision "may" be unduly lenient, and there has been no application for it to be amended out of time. He submitted that there is no ambiguity in the wording of Bye-Law 5.5.2 and that it is apparent from RICS' grounds that the Honorary Secretary did not reach a concluded independent view that the sanction is wrong. Furthermore, nowhere in the grounds is it asserted (or even suggested) that the sanction imposed falls outside the range of sanctions that could reasonably have been imposed having regard to the material facts. Mr Mant further submitted that RICS was looking to the Appeal Panel to provide a second opinion and reassurance to a particular member of the public that all relevant matters have been taken into account, which is not a proper or lawful basis for an appeal.

19. Mr Mant submitted that it is wholly wrong that the Firm should face the costs, administrative burdens and adverse publicity of an appeal, in circumstances where the Honorary Secretary of RICS, whose officers prosecuted the case before the Disciplinary Panel and heard all the evidence, does not consider that the decision was (or necessarily was) wrong. He stated that the Honorary Secretary has no power to require a review for want of reasons alone (whether for the purposes of securing a second opinion or providing reassurance to the public or otherwise), and the Appeal Panel would be acting outside its powers if it agreed to entertain his purported referral.

20. Mr Mant went on to address the merits of the appeal itself. He submitted that it is well-established in regulatory proceedings that a panel should consider the available sanctions by starting with the least restrictive until it reaches a sanction which meets its public interest objectives, and referred the Appeal Panel to the case of **Giele v GMC** [2005] EWHC 2143 (Admin). However, he conceded that in **Giele** the GMC had regulations and guidance not present in this case, and that there is nothing in the Rules or in case law to suggest that a panel should, as he put it in his Skeleton argument, ‘*stop there*’ and not go on to consider the appropriateness of a more onerous sanction. Indeed he accepted that paragraph 26 of **Giele** makes it clear that that would not be the right course.
21. Mr Mant submitted that the appeal should fail for the following reasons: (i) an appeal can be allowed only if a decision was wrong; (ii) the burden is on RICS to establish that the decision was wrong; and (iii) their grounds do not set out any basis on which they say positively that this was the case.
22. Mr Mant submitted that RICS’ case amounts to no more than an assertion that the Disciplinary Panel should have given fuller reasons. He invited the Appeal Panel to conclude that the absence of reasons, or inadequacy of reasons, may be a proper basis for allowing an appeal in other jurisdictions, where the court has power to allow an appeal on grounds of “procedural irregularity”, but the Appeal Panel here has no such power. Its jurisdiction is expressly limited to allowing an appeal only where it determines that the decision under appeal was “wrong”. He further submitted that RICS’ assertion, in its grounds, that the Disciplinary Panel’s decision was “wrong” because the reasons were inadequate is misconceived as the appeal lies against a finding or penalty; not against the reasons given for making that finding or imposing that penalty.

DETERMINATION

Appeal Panel’s Decision

23. The Appeal Panel determined that the appeal should be dismissed.

24. The Appeal Panel concludes that it does not have any jurisdiction to hear the appeal, because the referral has not been made within the Rules. The Honorary Secretary has a discretion to refer a case to an Appeal Panel, but is required, in accordance with Bye-Law 5.5.2, to confirm that he believes that the penalty imposed is unduly lenient. The Honorary Secretary did not express a belief that the penalty imposed on the Firm was unduly lenient and therefore wrong and as a consequence the Appeal Panel concludes that it does not have jurisdiction to determine the merits of the appeal.
25. Although the appeal is dismissed, as the Appeal Panel heard full legal argument, it went on to consider the merits of the appeal.
26. The Disciplinary Panel did not set out in its written determination all of the material facts which were highlighted by HHJ Clayson in his sentencing remarks. The Disciplinary Panel may have noted as an aggravating factor that the absence of the five Thorough Examination Reports from Zurich Management Services, who were engaged to examine the lifts at six monthly intervals, went unnoticed, but did not address the Firm's duty to ensure that it did receive these reports and that it acted upon them, nor the absence of any explanation for such failure. As for the ARC Elevators reports, although the Panel recorded, when setting out the RICS submissions, the almost verbatim record of the Judge's criticism that "*despite receiving these reports [the Firm] failed to investigate and seek to rectify the lifts operation in order to ensure that should persons become trapped in a lift there was a prompt and reliable system in place ensuring their rescue,*" the Panel made no reference, in its section on 'background', or in its determination on sanction, or as an aggravating factor, to such serious failure or to the lack of any explanation for it.
27. The Appeal Panel concludes that these matters, and indeed the conclusions of the Judge set out in paragraph 8 above, should have been referred to and addressed to by the Disciplinary Panel, and, had it done so, it is much more likely that it would have considered, and possibly ordered, removal of the Firm's registration.
28. The Appeal Panel notes that the Legal Assessor did not advise the Disciplinary Panel that it could not consider the full range of sanction options. The Appeal Panel takes the view that whether the Disciplinary Panel started at the top and worked downwards, or started at the bottom and worked upwards, it was required to consider all available options in determining whether the sanction it

proposed to impose was appropriate and proportionate, particularly in a serious case such as this. Thus, when it decided to impose a reprimand rather than order removal of the Firm's registration, the Disciplinary Panel should have given reasons why it did not consider removal of the Firm's registration to be an appropriate and proportionate sanction

29. The Appeal Panel is not impressed by Mr Lynch's submissions in relation to the fine, but does conclude that the option of removal of registration should plainly have been considered, and expressly addressed. Having itself considered the circumstances, and the aggravating and mitigating factors, the Appeal Panel is divided as to whether the sanction imposed by the Disciplinary Panel was wrong, or unduly lenient, although there was plainly a cogent case to that effect. However, particularly in these circumstances, if the Appeal Panel had jurisdiction to consider the merits of the appeal, it would have unanimously determined that it cannot be said that no reasonable tribunal would have taken the decision it did not to expel the respondent Firm.

30. The appeal is dismissed on those two grounds.

31. This case has raised some issues which are likely to recur. Therefore, the Appeal Panel takes the opportunity to provide guidance for future cases:

- (i) RICS must ensure that care is taken in future to comply with the Rules when referring a matter for appeal.
- (ii) There is no reason why RICS should not make submissions with regard to the appropriate sanction that should be imposed, and, in appropriate cases, such course is to be encouraged. In this case, had the RICS made such submissions, it is likely that the events which have occurred would have been avoided.
- (iii) In the Appeal Panel's judgment, the Disciplinary Panel ought to have set out more of the facts in its determination, particularly those found by the judge in his sentencing remarks, so that those reading the determination, and in particular members of the public and other members of the profession, could understand the seriousness of the matters before them

and the consequences of the negligence of the Firm, and be sure that they had been fully taken into account.

- (iv) For whatever reason, perhaps because of a misunderstanding or a misapplication of **Giele**, the Disciplinary Panel did not expressly address the question of whether there should be removal of the Firm's registration. In serious cases, such as this, removal should be expressly considered. A decision as to whether a sanction is proportionate cannot be arrived at without considering all other sanctions, since an important part of the concept of proportionality is the consideration of alternatives.

Publication

32. The Appeal Panel acknowledged that it is usual for decisions to be published and was unable to identify any reason for departing from the normal practice in this case.

33. The Panel ordered that this decision is published on RICS' website and in Modus.

Costs

34. Mr Mant made an application for costs. The application was opposed by Mr Lynch on behalf of RICS.

35. The Appeal Panel took into account Rule 34 of the Disciplinary, registration and appeal panel rules which states:

'A Panel may make such order for costs against the Relevant Person or RICS as it considers fair and reasonable...'

36. Although RICS' appeal was dismissed, the Appeal Panel did not conclude that it was or would have been wholly without merit. The Appeal Panel decided not to exercise its general discretion to award costs in favour of the Firm.