

Disciplinary Panel Hearing

Case of Mr Luo Feng MRICS [6205033]

China

on

Monday 17 December 2018

In Birmingham, UK

And by Telephone Conference

Panel

Alison Sansome (Lay Chair)

Angela Brown (Lay Member)

Joshua Askew (Surveyor Member)

Legal Assessor

Ben Kemp

The formal charge:

Between 1 January 2016 and 1 February 2017 you have failed to comply with RICS' requirements in respect of Continuing Professional Development (CPD), in that you have not completed and recorded, or caused to be recorded, at least 20 hours of CPD activity on the RICS CPD portal.

Contrary to Rule 6 of the Rules of Conduct for Members 2007, version 6.

DETERMINATION

Representation

1. Mr Luo was neither present nor represented at the hearing. The Panel noted that he had been offered the opportunity to participate in the hearing by conference facility. He had not responded to this invitation, or otherwise engaged with RICS in relation to these proceedings. In particular, he had not indicated to RICS whether or not he wished to attend.

Service

2. Notice of this hearing together with the RICS documentary bundle and listing questionnaire were served by letter dated 04 September 2018, sent by courier to the postal address notified by Mr Luo to RICS.
3. The postal address used was the preferred address held on the RICS system, which Mr Luo has indicated is his preferred address for correspondence with RICS. A written statement produced by Maria Choudhury, a RICS employed officer, spoke to notice having been served upon Mr Luo. RICS had produced the relevant postal delivery receipt. This was in electronic form and the relevant screenshot was produced. The delivery receipt was written in Mandarin Chinese. It had been translated into English by Tony Hong, also a RICS employee, who had produced a written statement for the purposes of these proceedings. Mr Hong's statement stated that he is fluent in speaking and writing in both English and Mandarin Chinese. It stated further that the annotations he had added in English to the copy delivery receipt represented a true and accurate translation of the original Mandarin Chinese. The delivery receipt, as translated into English by Mr Hong, states that the RICS service letter was received and signed for by the 'recipient himself' on 17 September 2018. The Panel noted an apparently minor typographical discrepancy in the English translation of Mr Luo's name in Mr Hong's translation of the delivery receipt. The Panel was satisfied that this was a typographical error in the English translation, and not therefore material. It was Mr Luo's Mandarin name which had been used for the purposes of delivery in China, and this had not presented any difficulty. The Panel noted in particular that the address recorded in the delivery receipt, as translated, was consistent with the address to which the letter was to be served. It was sufficiently clear that the RICS letter of service, and accompanying bundle, had been served upon the Respondent, Mr Luo, and signed for by him in person.
4. The Panel was accordingly satisfied that service had been properly undertaken in accordance with Rules 23 and 23A(a) of the RICS Disciplinary Panel Rules (the Rules), notice and service having been provided not less than 56 days prior to the date of this hearing.

Decision whether or not to Proceed in the Absence of Mr Luo

5. The Panel has considered whether it is appropriate to proceed in the absence of Mr Luo. It has received, and accepted, advice from its legal assessor and recognises that any such decision would need to be exercised only with great caution, having regard to the primary importance of fairness to Mr Luo. It has had regard to the principles set out in the relevant caselaw to which it was referred, including in particular *R v Jones*, [2003] AC 1, HL and *GMC v Adeogba* [2016] EWCA Civ 162.

6. Mr Luo has not completed or returned the listing questionnaire, as he had been invited to do. There has been nothing else from Mr Luo, prior to the date of the hearing, to indicate whether or not Mr Luo intends to attend the hearing, or as to his position for the purposes of the hearing. Further, RICS had attempted to reach Mr Luo by telephone on the morning of the hearing, with no response.
7. The Panel is mindful of the critical importance of ensuring fairness to Mr Luo. It also has regard to the public interest in enabling regulatory proceedings to proceed with appropriate expedition. There is nothing to suggest that Mr Luo would be likely to participate in an adjourned hearing on another date. The Panel notes that Mr Luo has not to date engaged in any way with these proceedings. It concludes that Mr Luo has voluntarily absented himself from these proceedings and that the interests of justice favour proceeding in his absence.
8. In doing so it accepts advice from its legal assessor to the effect that it should proceed with particular care, ensuring so far as possible that it has appropriate regard to the case or position which might have been put by or on behalf of Mr Luo, had he been in attendance. The Panel proceeds upon the basis that the charge is denied by Mr Luo.

Burden and standard of proof

9. The burden of proof is on RICS and the standard of proof is the balance of probabilities.

Background

10. From January 2013 RICS members were obliged to complete 20 hours CPD activity by 31 December of each calendar year.
11. Rule 6 provides: *“Members shall comply with RICS’ requirements in respect of Continuing Professional Development.”*
12. CPD requirements for members are: –
 - Members must complete at least 20 hours CPD, of which at least 10 hours must be formal CPD.
 - All members must maintain a relevant and current understanding of RICS’ Professional and ethical standards during a rolling three-year period. Any learning undertaken in order to meet this requirement may count as formal CPD.
 - All members must record (or cause to be recorded) the CPD activity online by 31 January.

Findings of Fact

13. The Panel noted the witness statement of James Lynch, a solicitor employed by RICS. Mr Lynch had undertaken a review of the RICS CRM computer system and the records kept on that system relating to Mr Luo. Mr Lynch confirmed that no CPD was recorded for Mr Luo in 2016, as confirmed by the copy electronic CPD record produced. This is a matter of record. The Panel further had regard to a statement produced by Raquel Loll, Director of Professional Assurance and Corporate Affairs, Asia Pacific at RICS, who spoke to the RICS' CPD requirements and in particular explained the specific arrangements which had been put in place in relation to RICS members, including Mr Luo, based in China. The Panel understands from Ms Loll's evidence that there can be difficulties for members in China in accessing the RICS website (and therefore in recording CPD), due to occasional disruptions caused by the China Government firewall. Accordingly, arrangements had been put in place and communicated to members in China to allow them to submit their CPD record by Excel spreadsheet as an alternative to uploading them to the RICS website. RICS has a dedicated regulatory officer on its China team to assist members with this process. In Mr Luo's case he neither recorded any CPD on the RICS system for 2016, nor submitted his spreadsheet to be uploaded by RICS for this year, nor (a third possible option) his local professional body CPD certificate, in lieu of a detailed entry of his hours. Mr Luo had however previously submitted to RICS a spreadsheet detailing his CPD for a different compliance year, 2013. Ms Loll spoke further to the steps taken by RICS to remind Mr Luo of his obligation to record CPD, by email and SMS messaging. Relevant requirements were produced by RICS in both English and Mandarin Chinese.
14. The Panel was satisfied that RICS had taken appropriate and sufficient steps to ensure that Mr Luo understood the RICS' regulatory requirements, and the present charge. Although there was no formal evidence or certification to confirm the accuracy of the various English- Mandarin Chinese translations produced, it had no reason to doubt their accuracy.
15. Accordingly, the Panel finds the factual allegation proved, upon the basis of the evidence produced by RICS.

Liability for Disciplinary Action

16. The Panel was satisfied that Mr Luo had in 2016 breached Rule 6 of the Rules of Conduct for Members, and this was such as to render him liable to disciplinary action. Its reasons are as follows.
17. Liability to disciplinary action is a matter of judgment for the Panel. While not every breach of the rules amounts to liability to disciplinary action and each case is fact specific, the Panel's view was that Mr Luo's failure to comply with the CPD

requirements and his breach of Rule 6 of the Rules of Conduct for Members amounted to a serious failure to meet his professional obligations. The requirement to complete and record CPD is important to ensure that members keep their knowledge up to date and thereby to ensure public protection. The Panel's view was that the failure to fulfil professional obligations is likely to undermine public confidence in the profession. RICS has clearly communicated the importance it attaches to both the completion and recording of CPD, as set out in the CPD policy approved by its Regulatory Board. Non compliance is tantamount to ignoring an express and clear rule imposed by Mr Luo's professional regulator. Mr Luo has, in becoming a member, accepted that he is subject to RICS' rules, and that non-compliance may give rise to disciplinary action. The requirements to complete and record CPD, as imposed by RICS, are in the Panel's opinion legitimate and reasonable ones. In order to be meaningful, it is important that they are treated seriously, including if necessary and appropriate being subject to formal enforcement. In the circumstances, the Panel, having taken advice from its legal assessor, was satisfied that Mr Luo was liable to disciplinary action.

Sanction

18. The Panel next considered sanction. It had regard to RICS Bundle 2 at this stage and the RICS Sanctions Policy, bearing in mind the overriding principle of proportionality. It noted the presumption of expulsion for a third failure as set out in Rule 21 of the Sanctions Policy. It received and accepted advice from its legal assessor.
19. It noted that Mr Lynch's evidence shows that this was the third consecutive breach of the requirement to complete and record CPD by Mr Luo, since 2014. He had failed to record any CPD in 2014, 2015 and 2016. Mr Luo had however recorded 83.50 hours of CPD in 2013, demonstrating his awareness of the requirements, and in particular of the requirement and arrangements for recording.
20. Paragraph 21.1 of the Sanctions Policy provides that, for those members who fail to comply with the rules relating to CPD in the first year, the sanction imposed is a caution. For those who fail to comply for a second year within a ten year period, the sanction imposed is a further caution and a penalty of £150. For the third year within a ten year period, members are referred to a Disciplinary Panel, with a presumption of expulsion. A statement from Zoe Mobley, Head of Quality & Service for RICS, confirms that Mr Luo received a caution for his breach in 2014 and a caution and fine for his breach in 2015. While there is no obligation on RICS to send reminders to members, the Panel noted the statement of Margaret Wright, CPD Coordinator for RICS, confirming that Mr Luo was sent a series of reminders to his registered e-mail address about his CPD obligations. Copies of this correspondence were included in the documentation produced for the hearing. Additionally, a further letter was sent through the postal system in March 2017, to members in China, including Mr Luo, who had failed to log CPD in three of the four preceding years. A copy of this letter was produced, and invited these members to offer any information relevant to their position, before RICS considered whether or not to instigate disciplinary proceedings. Mr Luo had failed

entirely to respond to any of this correspondence, had not engaged with RICS, and had not paid his previous fine (for 2015).

21. The Panel noted that some but not all of this correspondence was translated into Mandarin Chinese before sending in bulk to relevant members, including Mr Luo, in China. In particular, certain of the RICS correspondence post-dating the 2016 breach, anticipating the possibility of disciplinary proceedings, was issued only in English. It could have been that this correspondence, had it been translated, might have triggered a response from Mr Luo, even at this late stage. But the fact is that Mr Luo had failed entirely to respond to previous correspondence, including that translated into Mandarin Chinese, or to engage with these proceedings. He was, or reasonably ought to have been, aware of his obligations, with which he had managed to comply for one CPD year, in 2013.
22. The Panel considered that the following were aggravating factors:
 - This is Mr Luo's third consecutive CPD breach since 2014.
 - Mr Luo was clearly aware of and able in practice to comply with the requirements, as demonstrated by his full compliance in 2013.
 - Mr Luo has failed entirely to engage with RICS in relation to this matter.
23. The Panel considered the following were mitigating factors:
 - Mr Luo has been a Professional Member since 2012, with no other disciplinary record, save for that relating to CPD.
24. The Panel was mindful that, from the inception of the compulsory recording of CPD online, RICS has publicised its policy on sanctions for non-compliance. RICS is a professional membership organisation and sets standards for its members as a condition of membership. Specific arrangements have been put in place to support members, including Mr Luo, in China. Mr Luo has previously (in 2013) demonstrated his ability to comply. Compliance is not optional.
25. The Panel was satisfied that it was appropriate in the circumstances to impose a sanction in this case. It considered the sanctions available, starting with the least serious. Given all the circumstances, including the fact that this was the third consecutive failure in the last three years, it did not consider that a caution was proportionate or sufficient. Mr Luo has already received two cautions for past breaches of the CPD requirements. The Panel also considered that the imposition of a reprimand would not adequately address the issue of compliance in this case and the risk to the public. It considered that the imposition of a fine would not be adequate, recognising that a fine had previously been imposed by RICS in 2015, but had not proved effective in encouraging compliance. Given the lack of engagement in this case, it did not consider that there would be any useful purpose to be served in the imposition of

conditions. The Panel did not in any event consider that conditions would be likely to be effective.

26. The Panel was particularly troubled by the complete lack of engagement demonstrated by Mr Luo in this case. It takes the importance of CPD very seriously, serving as it does to reinforce the public interest commitment to ongoing professional competence. The Panel notes the presumption in the RICS guidance in favour of expulsion in respect of a third CPD breach. It recognises nonetheless that this is a matter for its judgment. RICS has given Mr Luo every reasonable opportunity to comply. He has singularly and persistently failed to do so for each of the last three years, or to provide any explanation as to why he could not comply. In the circumstances the Panel considers it necessary and appropriate in this case to direct the expulsion of Mr Luo from RICS, with immediate effect. It so orders.

Publication

27. The Panel has considered the policy on publication of decisions, The Sanctions Policy Supplement 3 - Publication of Regulatory Disciplinary Matters. This decision will be notified to Mr Luo, published on the appropriate part of the RICS website, and in the RICS magazine, Modus.

Costs

28. RICS made an application for a contribution to its costs arising from these proceedings in the sum of £1,925 sterling. A schedule of costs was produced, and had been served on Mr Luo by email, in advance of the hearing and in accordance with the Rules. No response had been received from Mr Luo, and the Panel accordingly has no information as to his financial means.
29. The Panel considers that it is appropriate to make an award of costs in this case. The costs of these proceedings, arising from Mr Luo's conduct, otherwise fall to be borne by the RICS membership at large.
30. The Panel considers the amount sought by RICS by way of costs to be reasonable. It directs Mr Luo to pay costs to RICS in the sum of £1,925 sterling, as sought.

Appeal Period

31. Mr Luo has 28 days, from the service of the notification of the decision, to appeal this decision in accordance with Rule 59 of the Rules.
32. In accordance with Rule 60 of the Disciplinary, Registration and Appeal Panel Rules, the Honorary Secretary of RICS has 28 days, from the service of the notification of the decision, to require a review of this Decision.

