

Disciplinary Panel Hearing

Case of

Mr Komani Mfuni BSc, MRICS

On

Tuesday 25 September 2018

At

55 Colmore Row, Birmingham

Panel

Sally Ruthen (Chair)
Catherine Brown (Lay Member)
Justin Mason (Surveyor Member)

Legal Assessor

Alastair McFarlane

The Formal Charge is:

That between 1 January 2017 and 1 February 2018 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 on the RICS CPD portal

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

And that you are therefore liable to disciplinary action under Bye-law 5.2.2(c).

Preliminary matters – Hearing on the papers

1. The case of Mr Mfuni, the Relevant Person, had been referred for consideration on papers in the absence of the parties, pursuant to Rules 4(d) and 43a of the Disciplinary, Registration and Appeal Panel Rules 1 April 2009 (Version 7, 1 January 2017) (“the Rules”).
2. The Panel first considered the issue of service of the Notice of Hearing. The Legal Assessor reminded the Panel that:
 - The case had been referred to the Disciplinary Panel under Rule 4(d) for consideration in accordance with Rule 43(a), that is at a hearing on the papers;
 - Rule 43a(a) requires that not less than 28 days’ notice of a paper hearing be given;
 - Rule 23(e) provides that in cases referred to the Panel under Rule 4(d), the Notice must require the relevant person to indicate within 7 days whether he requires an oral hearing;
 - Rule 43a(d) provides that there will be no oral hearing of the case unless an application has been made under Rule 23(e), or unless the Panel decides that it is necessary in the interests of justice or in the public interest to refer the case for an oral hearing.
3. The Panel received a witness statement from Ms M Choudhury, Regulatory Tribunal Executive for RICS, dated 11 September 2018. The statement confirmed that the Notice of Hearing had been sent to the Relevant Person, to his email address held on RICS’ system on 24 August 2018. The email was exhibited to the statement of Ms Choudhury. The Panel also had sight of an email delivery receipt confirming delivery of the email sending the Notice of Hearing.
4. The Panel noted that the Notice of Hearing gave the required notice of the hearing date and informed the Relevant Person of the right to request an oral hearing within 7 days.
5. The Panel was satisfied that the requirements of the Rules for the case to be heard on the papers were satisfied. The Panel was satisfied that the matter could properly be dealt with on the papers and that it was not necessary to refer the case for an oral hearing.

Response

6. The Relevant Person indicated in an email dated 5 September 2018 that he is not a practicing quantity surveyor and does not intend to practice quantity surveying in the future but would like to remain affiliated with RICS. He stated that he has not operated as a professional quantity surveyor since July 1993 when he studied an MBA degree in the Netherlands and then pursued a career in investment banking. He states that he would like to remain affiliated with RICS and "stays close" to the real estate sector as an investment asset class and attends many conferences that the RICS and the South African QS body organise.

Documents

7. The Panel received the hearing bundle prepared by RICS numbered pages 1 – 33.

Summary

8. All RICS members are required to undertake a minimum of 20 hours Continuing Professional Development (CPD) each calendar year (January to December).
9. Rule 6 provides: “Members shall comply with RICS’ requirements in respect of continuing professional development.”
10. CPD requirements for members are set out in RICS’ document “CPD Requirements and obligations”.
11. Members must complete at least 20 hours CPD and must record their CPD activity on line by 31 January through the RICS portal.
12. The Panel had sight of a witness statement of Mr Joe Poole, dated 24 August 2018, which confirmed that on inspection of the CPD records relating to the Relevant Person, no CPD hours had been recorded by or on behalf of the Relevant Person for the year 2017 by 31 January 2018. Print outs of the Relevant Person’s CPD record were exhibited to the witness statement.

Liability to Disciplinary Action

13. RICS submitted that it implemented a system in relation to CPD requirements. The requirement was reasonable and designed to ensure consistent standards within the profession. Members are required to maintain up to date knowledge in their area of expertise and, crucially, to demonstrate their compliance by completion of the CPD record. RICS submitted that the CPD scheme is in the interests of the maintenance of professional standards and of public protection.
14. RICS submitted that it had introduced a system for dealing with breaches of CPD obligations and that breaches must be treated as serious by RICS as the Regulator and by its disciplinary panels.
15. By his failure to comply, the Relevant Person had disregarded a clearly expressed rule and a requirement imposed by his regulator. As a member of RICS he had accepted the obligation to

comply with RICS' Rules, guidance and Bye-laws and also that he may be liable to disciplinary action if he failed to do so.

16. RICS submitted that a single breach of the requirements was sufficient to give rise to a liability to disciplinary action.

17. RICS submitted that the Relevant Person was liable to disciplinary action under Bye-law 5.2.2(c).

Legal Advice

18. The Panel received and accepted the advice of the Legal Assessor. The Panel was mindful that the burden of proof of facts in RICS proceedings is upon the RICS, which brings the charges. The standard of proof in RICS disciplinary proceedings is the civil standard, that is the balance of probabilities, meaning that before finding a fact proved, the Panel must be satisfied that it is more likely than not that it occurred.

19. The issue of whether there was liability to disciplinary action was a matter for the Panel's own judgment rather than the legal standard of proof. Before finding liability established, the Panel should be satisfied that the failings in question were of a serious nature and fell far short of the standards expected of RICS members.

Panel decision on facts

20. The online CPD print out record was attached to the charge. The Panel noted the evidence of Mr Poole, a RICS CPD Administrator, which confirmed that if no entry appeared in the CPD print out for any particular year, this indicated that no CPD had been recorded for that year. The Panel examined the record for Mr Mfuni and was satisfied that it showed that he had not recorded the requisite hours of CPD for the year 2017 and that Mr Mfuni did not have any relevant concessions for 2017.

21. The Panel found the factual allegation proved based on the documentary evidence produced by RICS.

Panel decision on liability to disciplinary action

22. At this stage, the Panel considered a further hearing bundle prepared by RICS, numbered pages 1- 84. The Panel concluded that the Relevant Person's failure to comply with the CPD requirements and Rule 6 of the Code of Conduct for Members amounted to a serious falling short of his professional obligations. The Panel was satisfied from the statement of Hayley Moore, RICS' Global Workflow Team Manager that the Relevant Person had been sent explicit reminders of the requirements from RICS.

23. In any event, it was the Relevant Person's responsibility to ensure he was aware of and complied with his professional obligations regarding CPD. The Panel was concerned that the failure to record CPD tended to undermine public confidence in the profession.

24. In the circumstances, the Panel was satisfied that Mr Mfuni was liable to disciplinary action.

Sanction

25. At the sanction stage, the Panel considered a further hearing bundle prepared by RICS, numbered pages 1-25.

26. The documents presented included a further statement from Mr Poole, dated 24 August 2018, which informed the Panel of the Relevant Person's CPD history. He confirmed that he was issued with a Caution for non-compliance with CPD requirements for the year 2015, when he recorded no hours. He was issued with a Caution and a fine for the year 2016, when no hours were recorded. A statement from Ms Moore, Global Workflow Team Manager, further confirmed that having checked RICS' systems, it was evident that the Relevant Person had been sent notification of the 2016 decision on 9 March 2017.

27. The Panel's attention was directed to RICS' Sanctions Policy in respect of CPD breaches. Paragraph 21.1 provides that policy is as follows:

- the appropriate order for a single breach is a Fixed Penalty (Caution);
- for a second breach within 10 years of receipt of a Caution, a Fixed Penalty (Caution and fine);
- and for a third breach within 10 years of receipt of a Caution, referral to Disciplinary Panel with a presumption of expulsion.

Decision on Sanction

28. The Panel bore in mind that the purpose of a disciplinary sanction is not to be punitive, though that may be its effect. The purpose of a sanction 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.

29. The Panel paid careful heed to the advice of the Legal Assessor and to RICS' sanctions guidance. It considered carefully whether any mitigating or aggravating factors were present in this case. The Panel considered the issue of proportionality in weighing up the most appropriate response.

30. The Panel identified the following mitigating factors.

- The Relevant Person has engaged and has applied for a concession for 2018

31. The Panel considered that the following aggravating factors were present:

- The Relevant Person had previously been sanctioned in respect of CPD breaches on two occasions, namely a Caution for 2015 and a Caution and Fine for 2016.
- He appears to have only limited insight into the importance of recording CPD so as to enable the Regulator to ensure public protection
- There has been no apology or remorse for his failure

32. RICS is a professional membership organisation and sets standards for its members as a condition of membership. It is not difficult to record CPD online. Compliance is not optional.

33. The Panel first considered whether to impose a sanction. The Panel concluded 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.

34. The Panel went on to consider a Caution, but concluded that the failure could not be described as minor. It concluded that a Caution would not reflect sufficiently the seriousness of the case, recognising the cumulative pattern of non-compliance over two previous years and the fact that a Caution had already been imposed for the years 2015 and 2016. The Panel did note that the Relevant Person has now secured a non-practicing/unemployed member concession for 2018. It considered that its concerns in this case including the risk to the public would be adequately addressed by the imposition of a reprimand accompanied by a fine and conditions. The Panel was mindful of the fact that the Relevant Person does not appear to recognise the importance of recording CPD. Recording is necessary so RICS can ensure that members comply with the requirements and this promotes professional standards and enables RICS to protect the public.

35. 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. However, the Panel considered that to go beyond a Reprimand, fine and condition would be excessive and disproportionate in the circumstances having balanced the aggravating and mitigating factors.

36. The Panel's decision was to impose a Reprimand, and a fine of £1,000 and to impose a Condition in the following terms:

- Failure to pay the fine by 31 December 2018 will result in automatic expulsion from membership, without further reference to a Disciplinary Panel.

Costs

37. RICS applied for costs in the sum of R6,964.11 pursuant to Supplement 2 to the Sanctions Policy. The Panel noted that a schedule of costs had been provided to Mr Mfuni with the Notice of Hearing.

38. The Panel directed that Mr Mfuni pay the costs of RICS in the sum of R6,964.11.

Publication

39. The Panel considered the policy on publication of decisions, The Sanctions Policy Supplement 3 - Publication of Regulatory Disciplinary Matters. This decision will be published on the RICS website and in the RICS Modus.

Appeal Period

40. Mr Mfuni has 28 days, from the service of the notification of the decision, to appeal this decision in accordance with Rule 59 of the Rules.

41. 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.