

Disciplinary Panel Hearing

Case of

**Mr Xishun Song [6426138]
China**

On

Tuesday 4 December 2018

At

RICS, 55 Colmore Row, Birmingham, B3 2AA

Panel

John Anderson (Lay Chair)
Gillian Seager (Lay Member)
Christopher Pittman (Surveyor Member)

Legal Assessor

Margaret Obi

The formal charge is:

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 on the RICS CPD portal.

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

Service

1. Mr Xishun Song did not attend the hearing.
2. The Panel was provided with a copy of the Notice of Hearing and a witness statement from a Regulatory Tribunal Executive confirming that the notice, dated 4 September 2018, had been sent to Mr Xishun Song's registered address by special delivery post. The postal delivery receipt showed that the notice and enclosures were delivered on 17 September 2018.
3. The Panel was satisfied that Notice had been properly served in accordance with Rule 23 as it:
 - (i) was sent by Special Post;
 - (ii) confirmed the charge;
 - (iii) confirmed the date, time and venue of the hearing;
 - (iv) enclosed the Disciplinary, Registration and Appeal Panel Rules 2009 (as amended);
 - (v) invited Mr Xishun Song to confirm that he would be attending the hearing by telephone so that he could be provided with the relevant conferencing details.
4. The Panel was satisfied that the requisite period of notice had been given in accordance with Rule 43(a) Disciplinary, Registration and Appeal Panel Rules, 1 April 2009, as amended from 1 January 2017, (the Rules) and that the notice was properly served.

Proceeding in Absence

5. Ms Sherlock made an application for the hearing to proceed in Mr Xishun Song's absence.
6. The Panel determined that it was fair, reasonable and in the public interest to proceed in Mr Xishun Song's absence for the following reasons:
 - a) Mr Xishun Song has not engaged with the regulatory process despite reasonable efforts being made to make contact with him and despite being put on notice of the serious consequences of a third breach of the CPD requirements. The Panel noted

that the Notice of Hearing invited Mr Xishun Song to return the Listing Questionnaire and any documents that he intended to rely on. There was no response. In these circumstances, the Panel was satisfied that it was reasonable to conclude that Mr Xishun Song has chosen not to engage with these proceedings. Therefore, the Panel was satisfied that his non-participation was deliberate and demonstrated a voluntary waiver of his right to submit written submissions or to attend an oral hearing by telephone conference.

- b) There has been no application to adjourn and no indication from Mr Xishun Song that he would be willing to attend on an alternative date and therefore re-listing this hearing would serve no useful purpose.
- c) There is a strong public interest in ensuring that substantive hearings take place as expeditiously as possible.

Background

7. RICS members are obliged to complete and record 20 hours CPD activity by 31 December of each calendar year.
8. Rule 6 provides: **“Members shall comply with RICS requirements in respect of continuing professional development.”**
9. 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.
 - All members must record the CPD activity online.
10. The CPD requirements confirm that for a first breach the member would receive a caution which will remain on the member’s disciplinary record for a period of 10 years. A second breach will result in a further caution and a fixed penalty of £150 or equivalent.

Non-payment of the fixed penalty fine within 28 days of notification will lead to the fine being increased to £250. A third CPD breach is likely to result in a referral to a Disciplinary Panel.

11. For the convenience of the RICS' China members and in recognition of the occasional difficulties in accessing the website due to occasional disruptions caused by the Chinese government firewall, China members may record their CPD via excel spreadsheet. Members email the spreadsheet to RICS who then upload the entries onto the RICS system. There is a dedicated regulatory officer on the China team to assist members with this process. Consequently, the same standards apply to members in China and that even a single failure to complete and record CPD may give rise to a liability to disciplinary action.

Findings of Fact

12. The Panel was provided with a hearing bundle which included a CPD printout from RICS' online system held for Mr Xishun Song and a witness statement from the Director of Professional Assurance and Corporate Affairs. The Panel also took into account the submissions made by Ms Sherlock on behalf of RICS.
13. The Panel accepted the written evidence of the Director of Professional Assurance and Corporate Affairs that Mr Xishun Song submitted a spreadsheet detailing his CPD to RICS to be uploaded in 2014, suggesting that he was aware of the requirement to complete and record CPD and how to do so. The Panel noted that if the printout does not contain an entry for a particular year that indicates that no CPD was recorded for that year. There was no entry on Mr Xishun Song's CPD printout for the years 2015 and 2016. However, there was a record of 56 hours relating to 2014. In these circumstances the Panel concluded that Mr Xishun Song:
 - (i) Did not record any CPD hours for 2015 and 2016;
 - (ii) Recorded 56 hours of CPD for 2014.
14. Accordingly, the Panel found the factual allegations proved, based on the documentary evidence produced.

Liability to Disciplinary Action

15. The Panel was satisfied that the RICS requirement to complete and record CPD is reasonable and that Mr Xishun Song's failure to comply with those requirements is sufficiently serious to give rise to a liability for disciplinary action. In reaching this conclusion the Panel took into account the fact that the CPD policy has been approved by the Regulatory Board and is an expressly stated RICS rule. In addition, the Sanctions Policy makes it clear that even a single breach of the CPD requirements is sufficient to give rise to liability to disciplinary action. The Panel noted that the purpose of the CPD requirements is to ensure that there are consistent standards within the profession and that members maintain up to date knowledge in their area of expertise in the interests of protecting the public and the wider public interest. The Panel also noted that all members agree to adhere to the RICS Rules, Regulations and Bye-Laws and accept that they may be subject to disciplinary action if they fail to do so. The Panel was satisfied that Mr Xishun Song was given every opportunity to comply with the CPD requirements.

16. Accordingly, the Panel was satisfied that Mr Xishun Song was liable to disciplinary action.

Sanction

Panel's Approach

17. The Panel took into account the submissions of Ms Sherlock, on behalf of RICS, the RICS Sanctions Policy and Mr Xishun Song's disciplinary history which is as follows:

2013 – Caution

2015 - Caution and fine.

18. The Panel noted that 56 hours of CPD were recorded in 2014. However, there was no CPD recorded for the year 2016.

19. The Panel bore in mind that the purpose of sanctions is not to be punitive, although it may have that effect. The purpose of sanctions 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 breach and all the circumstances, and a decision should be reached having taken into account any mitigating and/or aggravating factors.

Decision

20. 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 and additional options are given to members in China. Compliance is not optional. The CPD requirements are not dependent on the RICS sending reminders to its members. However, the Panel noted that RICS telephoned Mr Xishun Song on 7 February 2017. The telephone attendance note of the conversation that took place states that, *'Mr Song said he couldn't feel benefits of being an RICS member, RICS has never contacted him except asking for money, besides he has problem reading English. [RICS employee] explained RICS rules and persuaded him to maintain RICS membership. He said he would consider and will let [RICS employee] know of this decision in next couple of days (sic).'* The Panel noted that there has been no further communication from Mr Xishun Song and no response to the emails reminders that were sent to him, which included an email sent on 23 February 2017, informing him that he would be referred to Disciplinary Panel and that there is a presumption that he would be expelled from RICS membership. An email sent to Mr Xishun Song on 9 March 2017, stated that the Head of Regulation would be considering whether to refer his case to a disciplinary panel as a result of this third breach of the Rules. Although a RICS CPD co-ordinator confirmed in her witness statement that the email advising Mr Xishun Song of the caution and fine was not opened, the Panel was satisfied that he had been put on constructive notice of the consequences of non-compliance.

21. The Panel was unable to identify any mitigating factors.

22. The Panel considered that the following aggravating factors were present in this case:

- Mr Xishun Song has been registered since 12 July 2013 and clearly understands the process of recording CPD as 30 hours were recorded in 2014;
- There has been no engagement from Mr Xishun Song despite frequent reminders.

23. The Panel first considered whether to impose any 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. In reaching this conclusion the Panel noted that Mr Xishun Song had been sent numerous reminders by RICS. However, whether Mr Xishun Song received these reminders or not, it remained his responsibility to ensure that he complied with his CPD obligations. Furthermore, Mr Xishun Song recorded 56 hours of CPD for the year 2014 and there was no evidence before the Panel that he had contacted RICS regarding any subsequent difficulties in recording his CPD online.

24. The Panel went on to consider whether to impose a caution. The Panel concluded that a caution would not adequately reflect the seriousness of the case, recognising the cumulative pattern of non-compliance and the fact that a caution had already been imposed for previous breaches. The Panel also considered the imposition of a reprimand but concluded that similarly this did not reflect the seriousness of Mr Xishun Song's repeated failure to comply with the requirement to complete, record or cause to be recorded CPD on the RICS portal.

25. In considering whether to impose an undertaking the Panel took into account the mandatory nature of the CPD requirements. The Panel noted that the CPD requirements are designed to ensure that the skills and knowledge of RICS members is kept up to date and ultimately to ensure public protection. The Panel concluded that it would not be appropriate or proportionate, in the absence of exceptional circumstances, to impose an undertaking given that Mr Xishun Song should have been completing and recording his CPD online in any event. Even if an undertaking were to be combined with either a caution, reprimand or fine, the Panel concluded that imposing such a sanction would undermine public trust and confidence in the regulatory process.

26. The Panel then considered whether to impose a fine. The Panel was mindful that a fine was imposed on Mr Xishun Song for failing to record his CPD hours for the year 2015.

The Panel concluded that, in these circumstances, to impose a further financial penalty would serve no useful purpose as it had not resulted in compliance with the CPD requirements to date. Instead a further fine would undermine the need to uphold the standards expected of all members and the deterrent effect on other members of the profession.

27. The Panel went on to consider conditions. The Panel took the view that imposing a condition for non-compliance of the CPD requirements is appropriate in certain circumstances. However, to impose such a sanction the Panel would need to be satisfied that Mr Xishun Song has demonstrated a willingness to engage with the regulatory process and a willingness to comply with any condition imposed. As Mr Xishun Song has repeatedly failed to comply with the CPD requirements in the past and has failed to respond to written reminders to record his CPD, the Panel could not be satisfied that he would comply with conditions. Therefore, the Panel concluded that it would not be possible to formulate conditions which would be realistic or achievable. Furthermore, in the absence of any mitigation, remorse or insight the Panel concluded that Mr Xishun Song's non-compliance with the CPD requirements demonstrated a blatant disregard for the purpose of regulation and consequently undermines public trust and confidence and is fundamentally incompatible with continued membership.

28. Having determined that conditions would not meet the wider public interest the Panel determined that Mr Xishun Song should be expelled from RICS membership. The Panel recognised that expulsion is a sanction of last resort and should be reserved for those categories of cases where there is no other means of protecting the public or the wider public interest. The Panel decided that Mr Xishun Song's case falls into this category as he has repeatedly failed to comply with the fundamental requirement to record CPD and has failed to demonstrate that he has any intention of complying in the future. The Panel was satisfied that, in these circumstances, any lesser sanction would undermine public trust and confidence. In reaching this conclusion the Panel balanced the wider public interest against Mr Xishun Song's interests. The Panel had regard to the impact expulsion may have on Mr Xishun Song but concluded that his interests were significantly outweighed by the Panel's duty to give priority to the significant public interest concerns raised by this case. The Panel was also 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.

Publication

29. The Panel has considered the policy on publication of decisions, The Sanctions Policy Supplement 3 - Publication of Regulatory Disciplinary Matters. The Panel was unable to identify any reason to depart from the presumption that decisions will be published on the RICS website and in the RICS magazine Modus.

Costs

30. RICS applied for costs of £1,950.00. The application represented a request for a contribution towards the costs incurred by RICS in preparing for the hearing and the hearing itself.

31. The Panel concluded that it was appropriate for Mr Xishun Song to contribute towards the costs of bringing this case, otherwise the full cost of these proceedings would fall on the profession as a whole. However, as three cases were originally listed the Panel took the view that the hearing costs of £1,325.00 should be divided by a third and as the hearing itself only lasted one hour, the attendance costs should be reduced accordingly. The Panel was satisfied that the preparation costs were fair and reasonable.

32. Therefore, the Panel ordered that Mr Xishun Song pay to RICS costs in the sum of £1,183.33 or equivalent.

Appeal Period

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

34. 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.