

## **Disciplinary Panel Hearing**

### **Case of**

Mr Alan Fulford BSc FRICS [0059587]

and

Alderney Estates (the Firm)

Guernsey GY9

### **On**

Thursday 4 October 2018 at 10.00

### **At**

RICS, 55 Colmore Row, Birmingham

### **Chair**

Sally Ruthen

### **Members**

Helen Riley (Surveyor Member)

Gregory Hammond (Lay Member)

### **Legal Assessor**

Rosemary Rollason

### **RICS Representative**

Christopher Geering, Counsel

### **Relevant Person**

Mr Fulford participated in the hearing by telephone link and represented himself and the Firm.

### **Hearings Officer**

Maria Choudhury

**The formal charges are:**

**Member**

The formal charge against Alan Fulford BSc MRICS is that:

1. As Director of Alderney Estates, he failed in his professional obligations to comply with the decision of the Ombudsman Service.

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

**Alan Fulford is therefore liable to disciplinary action under RICS Bye-law 5.2.2(c)**

**Firm**

The formal charge against Alderney Estates is that:

1. Alderney Estates failed in its professional obligations to comply with the decision of the Ombudsman Service.

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

**Alderney Estates is therefore liable to disciplinary action under RICS Bye-law 5.3.2(c)**

2. At the time of the complaint made by Mr B, Alderney Estates failed to have in place any or any adequate Complaints Handling Procedure.

**Contrary to Rule 7 of the Rules of Conduct for Firms 2007**

**Alderney Estates is therefore liable for disciplinary action under RICS Bye-law 5.3.2(c)**

## **Introduction**

1. Mr Alan Fulford (“Mr Fulford”) and Alderney Estates (“the Firm”) appear before the RICS Disciplinary Panel in connection with the allegations set out above.
2. **Response**
3. Mr Fulford and the Firm accepted the allegations.

## **Background**

4. Mr Fulford qualified as an RICS member on 15 December 1981. He is one of two Directors of Alderney Estates (“the Firm”). The Firm registered with RICS on 19 August 2016. The Firm was obliged to choose an Alternative Dispute Resolution (“ADR”) provider in order to register. It selected the Ombudsman's Service: Property (“OS:P”).
5. Between September 2016 and December 2016, Mr B had business dealings with the Firm. He was dissatisfied with its service and attempted to raise a complaint at a local level. On 3 January 2017 Mr B requested a copy of the Firm’s Complaints Handling Procedure (CHP). The Firm advised him to submit his complaint via email but did not provide a copy of its CHP.
6. On 10 January 2017 Mr B submitted a written complaint. On 13 January 2017 the Firm emailed its response rejecting Mr B’s complaint. No CHP was provided and the response made no reference to the availability of an ADR scheme.
7. Mr B contacted RICS on 13 January 2017 as he remained unhappy with the Firm’s response. He was advised that the Firm’s records showed that the Firm had selected the OS:P on its Annual Returns as its ADR provider.
8. The OS:P opened an investigation into Mr B’s complaint. Mr Fulford wrote to the OS:P on 13 April 2017 questioning its competence to deal with issues relating to Alderney law, and its

jurisdiction. The OS:P responded on 27 April 2017 rejecting this criticism. On 20 June 2017 the OS:P made the award in Mr B's favour of £185. Mr Fulford and the Firm refused to pay it and the OS:P referred the matter to RICS.

9. As part of its investigation, RICS wrote to Mr Fulford on 14 March 2017. At this stage the investigation only concerned the potential failure to have an adequate complaints procedure in place. Mr Fulford was asked to provide a copy of the CHP and to confirm it included provision for ADR. He spoke to the RICS investigator on 5 April 2017. Mr Fulford stated that RICS had forced him to use the OS:P and that they did not have jurisdiction. He stated he could not afford the current level of regulation RICS imposed.

10. Mr Fulford sent a letter dated 2 May 2017. In respect of the CHP he stated:

*"It is not... true to say that we had no proper complaints handling procedure; we did receive the complaint; we did consider it carefully; we did communicate the outcome of that consideration to Mr [B]. Whilst there may not be a prescriptive and formulated process it is, nevertheless a procedure which, I would contend, is entirely appropriate to a firm of our size and standing; proportionality should be taken into account here"*

11. He challenged the fairness of RICS requiring a firm to inform the complainant of the OS:P procedure. He submitted the OS:P had no jurisdiction. On 20 July 2017 RICS responded and explained RICS bye-laws defined the UK as including the Channel Islands. The rules required that firms have provision for ADR and recommended he cooperate with the OS:P. RICS repeated its request for a copy of the Firm's CHP.

12. In further correspondence Mr Fulford did not address this request. Instead, on 19 December 2017 he commented in an email:

*"as far as the complaints procedure is concerned, the regulated business consists of two working Directors - no staff - who are also partners who share all aspects of our working and professional lives. When this complaint came in it was considered seriously by both of us; the complainant was subsequently told that we had considered his complaint but rejected it as*

*being wholly unfounded. Just because we did not have some bureaucratic tick box / process chart to show complaints are dealt with does not mean that we do not have a 'procedure'."*

### **Burden and standard of proof**

13. RICS is required to prove the factual allegations to the civil standard of proof; that it is more likely than not that any event material to those allegations occurred. The burden of proof is upon RICS, which brings the charges. The question of whether or not any facts admitted or found proved give rise to liability to disciplinary action is a matter for the Panel's judgment.

### **Evidence**

14. The Panel received a bundle of documents prepared by RICS, comprising 226 pages. RICS did not call any witnesses.

15. Mr Fulford gave oral evidence on behalf of himself and the Firm. He did not submit any documentary evidence.

### **Evidence of Mr Fulford**

16. Mr Fulford said that he admitted the charges. He said he had not intended matters to escalate to the level of this hearing, but he had found himself in this situation because of the failure of the OS:P and RICS to recognise the unique circumstances in which he and his firm operated in Alderney. He said that Alderney is an independent jurisdiction. There is no legal entity of The Channel Islands: Alderney has its own statutes and government, and UK law does not apply there. However, Mr Fulford said he understood that as an RICS member, he is bound by its rules.

17. Mr Fulford explained that Mr B was a UK resident who, with his siblings, had inherited the property on Alderney. Mr B did not understand the Alderney property market and its conventions. He said that in his view there was no substance to Mr B's complaint. If he believed he had let the client down, he would have held his hands up.

18. Mr Fulford said that the OS:P had not understood that the issue was competence: in his view the OS:P had no competence to make judgements in a foreign jurisdiction. Alderney was an alien property market with its own conventions and the OS:P service had made no attempt to understand this. He described the property market on Alderney as small, involving only around 40 transactions a year, and “dysfunctional”. There were only two estate agents, including himself, on the island. There were no lawyers on the island and, by convention, the estate agents undertook most of the conveyancing functions.
19. Mr Fulford explained his frustration that all his efforts to speak and explain the issue to senior officers at RICS had failed. He felt nobody at the OS:P or RICS would engage with him. He said he now recognised that the mistake he had made was to opt in to the OS:P Scheme when registering with RICS. He accepted that having done so, he was subject to RICS’ jurisdiction and bound by the regulations.
20. Mr Fulford contended that the OS:P had made a “unilateral” decision without any defence to the complaint from him. He said he believed there was no natural justice in the OS:P process so he had boycotted the process. He now accepted, in view of how matters had escalated, that he should probably have paid the sum due.
21. Mr Fulford said his firm did have a process for dealing with complaints and they had followed it in Mr B’s case. Alderney Estates was a small firm. All he had not done was tick the box of having a written complaints procedure.
22. Mr Fulford said he had been in practice for 37 and a half years. He had never been the subject of a complaint before or since Mr B’s complaint. He believed he had contributed significantly to RICS as President of the Building Surveyors Division in 1995/6 and as a member of the General Council for 2-3 years. He asked not to be expelled from membership of RICS as this was his livelihood. He said he was considering de-registering the Firm as he now recognised that it could not comply with the “regulatory straitjacket” of RICS registration.

23. In cross-examination by Mr Geering, Mr Fulford accepted it had been his choice not to put forward a submission to the OS:P. He said he had lost confidence in the service. He accepted that the OS:P had stated it would not deal with the conveyancing matters as these were beyond its remit. The shortfalls the OS:P's decision identified were shortfalls in the client service provided to Mr B.
24. In questions from the Panel, Mr Fulford said the OS:P award of £185.00 in favour of Mr B remained unpaid. He had not instigated a complaints handling procedure. He said he would now be prepared to do both if so directed by the Panel. He informed the Panel that he is currently the subject of a bankruptcy order in the UK which will be discharged in April 2019.

### **Submissions on behalf of RICS**

25. Mr Geering submitted that it was no defence for Mr Fulford to assert that the Firm's limited size made the provision of a formal CHP with reference to an ADR procedure disproportionate. It was not accepted that the requirement of being signed up to an ADR provider is disproportionate. It is a requirement of RICS and by joining RICS the Firm agreed to be bound by its rules and bye-laws.
26. It was not in dispute that Mr Fulford and the Firm did not pay the OS:P award. Mr Fulford's observations in respect of jurisdiction were misconceived. He chose to join RICS. In doing so he entered into a contract with RICS, agreeing to be bound by its rules and regulations. Compliance with those rules does not change whether a member lives in England, Alderney or France. Those rules require that the Firm is a member of an ADR procedure. Mr Fulford knew this was a requirement and he chose to subject his Firm to the procedure run by the OS:P. Having joined the OS:P, he was obliged to honour its award. His failure to do so reflected upon the professionalism of both his Firm and him personally as one of the Directors.
27. Mr Geering submitted that whilst not every breach of the Rules of Conduct crosses the threshold required to justify disciplinary action, both the Firm's and Mr Fulford's actions amply meet this requirement. Their actions constituted a clear breach of their professional

obligations. In addition to reputational damage, Mr B had suffered a financial loss of £185 and ultimately it fell to RICS to indemnify him for it.

### **Submissions on behalf of Mr Fulford and the Firm**

28. Mr Fulford referred to the oral evidence he had already given. He said he accepted that he had become focused on the jurisdiction issue, but he still found the whole process unfair and said that matters had gone too far. He accepted that he was responsible and had not understood the seriousness of the position. He was now prepared to pay the sum due. He had wanted his “day in court”.

### **Findings of fact**

29. The Panel accepted the admissions made by Mr Fulford on behalf of himself and the Firm. The Panel was also satisfied that the documentary evidence presented was conclusive as to the facts. The Panel was satisfied that each factual allegation was proved to the required civil standard.

30. The Panel found the facts of charge 1 against Mr Fulford proved.

31. The Panel found the facts of charges 1 and 2 against the Firm proved.

### **Liability to disciplinary action**

32. On the basis of the facts found proved the Panel had to decide whether Mr Fulford and the Firm were liable to disciplinary action. The Panel accepted the advice of the Legal Assessor. The Panel bore in mind that this is a matter for the Panel’s judgment. Not every falling short of RICS’ standards or breach of RICS’ rules will give rise to disciplinary action: the falling short in question must be of a serious nature.

33. The requirements with which Mr Fulford and the Firm had failed to comply in this case existed to protect the public. Public confidence in RICS as the regulator would be undermined if it did not act against members and firms who disregarded its rules and obligations to which they had agreed.

34. In respect of the failure to have a complaints handling process in place, this failure put the public at risk and impacted adversely on the reputation of the profession and upon RICS.
35. In respect of the failure to comply with the decision of the OS:P, this was also a serious issue, albeit the amount of the award made was small. However, Mr Fulford and the Firm had agreed to join the scheme and, having done so, were obligated to comply with it. The issue arising from their failure to do so was that Mr B, as a member of the public, was not made aware of an alternative redress scheme and so was effectively deprived of access to the scheme.
36. The Panel had listened to Mr Fulford's evidence about the jurisdiction of the OS:P in relation to Alderney, its competence to deal with Mr B's complaint and his frustrations regarding communicating with both organisations. However, the position regarding these issues had been explained to him more than once. The Panel considered Mr Fulford's approach was entirely misguided and he was the author of his own misfortunes. By joining and registering his firm with RICS, he accepted the benefits of membership but had not been prepared to accept the corresponding obligations to which he had also signed up. It was of concern to the Panel that this matter had escalated to this level and it was evident that this was due to Mr Fulford's intransigent attitude towards the OS:P and towards RICS. The Panel was satisfied the charges were serious.
37. The Panel was satisfied that there was liability to disciplinary action under Byelaw 5.2.2(c) in respect of Mr Alan Fulford.
38. The Panel was satisfied that there was liability to disciplinary action under Byelaw 5.3.2(c) in respect of the Firm.

## **Mitigation**

39. Mr Geering confirmed that neither Mr Fulford nor the Firm were the subject of any previous disciplinary findings.

40. Mr Fulford referred to the mitigation evidence explained during his earlier oral evidence to the Panel.

### **Decision as to sanction**

41. The Panel bore in mind that the purpose of sanctions is not to be punitive, though that may be their effect. The purpose of sanctions is to declare and uphold the standards of the profession, to safeguard the reputation of the profession and of the RICS as its regulator and to protect the public. The Panel adopted a proportionate approach in considering the question of sanction.

42. The Panel accepted the advice of the Legal Assessor and referred to RICS' Sanctions Policy and its supplements.

43. The Panel had decided that Mr Fulford and the Firm were liable to disciplinary action. Having done so it first has to decide whether to impose a sanction, and if it so decides the Panel commences at the lowest sanction, and only if it decides that sanction is not appropriate does it consider further sanctions. Having arrived at a sanction that it is minded to impose, the Panel then reviews the sanctions above so as to satisfy itself that these would be too severe. The Panel bears in mind that more than one sanction may be imposed. If conditions are to be imposed they must be proportionate, workable and address the issues raised in these proceedings.

44. The Panel identified the following mitigating factors:

- Mr Fulford admitted the allegations;
- Mr Fulford's previous clear disciplinary record;
- His lengthy career as a surveyor for over 37 years, including his past contributions to RICS.

45. The Panel identified the following aggravating factors:

- The detriment caused to the client;

- Mr Fulford's intransigent attitude and persistent non-compliance with his regulatory obligations in these two matters;
- Lack of remedial action: the OS:P award has still not been paid and a CHP has not been put in place;
- Mr Fulford's lack of adequate insight into these issues: the Panel concluded during the hearing that Mr Fulford had now shown a limited degree of understanding of his obligations as an RICS member and that the escalation of matters to this level was a consequence of his own response to the issues. He had still not, however, taken the simple steps necessary to put them right before this hearing.

## **Penalty**

46. The Panel considered the matters proved in this case too serious for no sanction to be imposed. The Panel next considered imposing a caution, but took the view that this would not adequately mark the gravity of its concerns regarding Mr Fulford's failure to comply with the relevant requirements, to the detriment of the client and the wider public interest, as well as the attitude he had taken throughout the history of the matter.

47. The Panel considered that a proportionate penalty would be to impose a Reprimand upon Mr Fulford and upon the Firm. There was a risk of harm to the public in this matter. A Reprimand would publicly mark the gravity of the misconduct. This would be combined with Undertakings requiring Mr Fulford and the Firm to rectify the outstanding matters and that if they failed to do so within specified timeframes, they would automatically be referred to a Disciplinary Panel.

48. Before concluding its decision, the Panel considered the further available sanctions. It considered that a fine would not serve a useful purpose in this case. The further available sanctions of an order of conditions or expulsion from membership would be disproportionate to the findings made.

49. The Panel has therefore determined:

1. To impose a Reprimand on Mr Fulford and on the Firm Alderney Estates;

2. To impose an Undertaking upon Mr Fulford and upon the Firm Alderney Estates that by 31 May 2019, Mr Fulford and/or the Firm jointly and severally shall reimburse RICS in respect of the sum of £185.00 which RICS has paid to Mr B by way of reimbursement of the OS:P's Award;

and that failure to comply with this Undertaking shall result in automatic referral of Mr Fulford and/or the Firm to a Disciplinary Panel;

3. To impose an Undertaking upon the Firm Alderney Estates that by 30 November 2018 it shall have put in a place a complaints handling procedure which is compliant with Rule 7 of the Rules of Conduct for Firms and shall have provided a copy to RICS;

and that failure to comply with this Undertaking shall result in automatic referral of the Firm to a Disciplinary Panel;

## **Publication**

50. The Panel considered Rule 39 and the guidance as to publication of its decisions. It accepted the Legal Assessor's advice.

51. The Panel ordered that publication of its decision should be made in accordance with the Regulatory Board Policy, that is on RICS website and in Modus.

52. The Panel saw no reason to depart from the usual presumption of the policy in favour of publication. Part of the role of the Panel is to uphold the reputation of the profession, and publication of its decisions is an essential part of that role.

## **Costs**

53. Mr Geering applied for RICS' costs in the sum of £5,739.50. RICS had provided a schedule to Mr Fulford in advance of the hearing. Mr Fulford said that he considered the amount of costs claimed to be disproportionate to the case. He said he currently had no means of paying such

a sum. He asked whether, if an order for costs were made, he could defer payment until after April 2019 when his bankruptcy (in the UK) will be discharged.

54. The Panel decided to make an order for costs in favour of RICS.

55. Mr Fulford and the Firm Alderney Estates are ordered, jointly and severally, to pay RICS' costs in the sum of £2,900.00.

56. The Panel took into account that the amount of costs claimed by RICS in the sum £5,739.50, appeared to be a reasonable claim, but it has made a reduction in the light of Mr Fulford's statement in his oral evidence as to his current financial circumstances.

57. The Panel notes it is open to Mr Fulford to discuss with RICS whether a payment schedule can be agreed with RICS.