

Disciplinary Panel Hearing

Case of

**Mr Mark Szafran MRICS [0081713] and;
Bowood Commercial (the Firm)
Battersea, London, SW11**

On

Tuesday 22 August 2017

At

RICS, Parliament Square, London

Panel

John Anderson (Lay Chair)
Chris Boothman (Lay Member)
Chris Pittman (Surveyor Member)

Legal Assessor

Margaret Obi

RICS Presenting Officer

Annabel Joester

Relevant Person's Representative

Marc Beaumont

Introduction

1. Mr Mark Szafran appeared in person before the RICS Disciplinary Panel in connection with the following charge:

Between 2 December 2011 and 19 June 2015 Mark Szafran failed to avoid a conflict of interest and/or failed to adhere to his professional obligations in his operation of the client account of Bowood Commercial.

Contrary to Rule 3 of the Rules of Conduct for Members 2007 and is liable to disciplinary action under Bye-law 5.2.2 (c).

Particulars

During the above period you borrowed monies totalling £330,205.50 from the Firm's client account known as 'M Szafran t/as Bowood Commercial Clients' Rent Account'. These monies were in a general client account operated by you, and you authorised the transfers that were made to yourself or your Firm's office account without the prior written authorisation of the client.

2. The charge against the firm was as follows:

Between 2 December 2011 and 19 June 2015 Bowood Commercial ("the firm") failed to preserve the security of client monies entrusted in its care in the course of its business because the adequacy of the Firm's accountancy systems and controls were not sufficiently robust to preserve the security of the client monies.

Contrary to Rule 8 and Rule 3 of the Rules of Conduct for Firms 2007 and is liable to disciplinary action under Bye-law 5.3.2 (c).

Particulars

- a. The client accounting records were incomplete.
- b. The principal of the firm borrowed money totaling £330,205.50 from the firm's client account.
- c. The firm was not producing three-way reconciliations.
- d. Bank charges were charged to the general client account and refunded on a monthly basis.
- e. Cheques were not being stored securely.
- f. Monthly reconciliations did not include supporting documentation.

- g. Payments were made out of the client accounts when insufficient funds were held for that client.

Preliminary Matters

Application to Amend and Partially Discontinue

3. Ms Joester made an application to amend the charge against the firm and to discontinue the charge against Mr Szafran.
4. Ms Joester provided the Panel with a copy of the proposed amendment, revised particulars and an agreed statement of facts. She submitted that the proposed amendment to the charge against the firm accurately reflects the loan arrangement between Mr Szafran and Client A and the conflict of interest.
5. In response to a Panel question in relation to the application to discontinue the charge against Mr Szafran, Ms Joester submitted that there is at present no specific rule, as there is for other professions, prohibiting surveyors from accepting loans from clients and there is no suggestion in this case of any dishonesty or lack of integrity.
6. She informed the Panel that the essence of the amended charge is that the loan arrangement was not properly recorded and there was insufficient control of client money on the part of the firm.
7. Mr Beaumont confirmed on behalf of Mr Szafran and the firm that the proposed amendment reflects the agreement with RICS.

Panel's Approach

8. The Panel accepted the advice of the Legal Assessor. The Panel took into account rule 41(h) of the Disciplinary, Registration and Appeal Panel Rules 2009, which states:
'Where it appears to the Panel at any time that the charge sent to the Relevant Person...should be amended and the amendment can be made without injustice, after hearing the parties and consulting with the legal assessor, the Panel may amend the charge.'
9. The Panel also considered, (i) whether RICS had provided proper grounds for making the proposed amendments and an objectively justified explanation and, (ii) whether the new charge represents 'under prosecution'.

10. In respect of the application to discontinue the Panel took into account, (i) the explanation provided, (ii) the issue of 'under prosecution', (iii) whether there is a realistic prospect of establishing a liability to disciplinary action and, (iv) the viability of the remaining charge.

Panel Decision

11. The Panel concluded that collectively, the proposed amendment to the charge against the firm and the revised particulars, provide helpful clarification, more accurately reflect the information provided in the statement of Client A and avoids ambiguity.
12. The Panel took into account the agreement that had been reached by both parties and was satisfied that there was no injustice to the firm. The Panel was also satisfied that the amended charge, relating to the firm, did not constitute 'under prosecution.'
13. The Panel concluded that in respect of the application to discontinue RICS had provided an objectively justified explanation. The Panel was satisfied that in light of the contents of the witness statements that had been obtained on behalf of Mr Szafran, including the statement of Client A, it would not be in the interests of the public to pursue the charge against him.
14. The amended charge, revised particulars and statement of facts are as follows:

Amended Charge

Between 2 December 2011 and 19 June 2015 Bowood Commercial ("the Firm") failed to preserve the security of client the adequacy monies entrusted to its care in the course of its business because the Firm's accountancy systems and controls were not sufficiently robust to preserve the security of client monies.

The firm has therefore breached Rule 8 of the Rules of Conduct for Firms 2007 and is liable to disciplinary action under Bye-law 5.3.2 (c).

Particulars

- a) The client accounting records were incomplete, in that the firm did not maintain separate client ledgers and entries in the cashbook for the service charge reserve fund or tenant deposit clients, meaning that service charge reserve funds and tenant deposit clients were recorded in individual virtual client bank accounts within the Royal Bank of Scotland Client Money Services banking software but not within the firm's accounting system.

- b) The principal of the firm received loan advances from £5,000-50,000 and totalling £330,205.50 from Client A over 3.5 years with his consent, but did not record the loan in writing or as a separate detailed loan account in the client ledger.
- c) The firm was not producing three-way reconciliations.
- d) Bank charges were charged to the general client account and refunded on a monthly basis.
- e) Cheques were not being stored securely.
- f) Monthly reconciliations did not include supporting documentation.
- g) Office funds were held in the client account as agreed with RICS in 2008, to cover overdrawn client balances, however, the firm's records did not show that all overdrawn client balances had been covered by office funds.

Admission

- 17. The firm formally admitted the amended charge.

Statement of Agreed Facts

- 18. Mr Szafran is the contact officer for the firm Bowood Commercial. The firm is a RICS regulated firm, and has been regulated since 7 November 2007. Although the firm has a separate registration with RICS, in that it is registered for regulation with RICS, it is accepted that it is the vehicle through which Mr Szafran operates as a sole trader.
- 19. On 5 and 6 January 2016 a RICS accountant, Mrs Leeder, conducted a Regulatory Review Visit at the firm. She generated a report of her findings, which was contained in the bundle provided to the Panel. The firm cooperated fully with the investigation.
- 20. The firm has pleaded to an amended charge which has been put to them in its new form for the first time today. The firm accepts that, at the time of Mrs Leeder's visit there were shortcomings in the way in which it operated the T & H client accounting software, which are reflected in its plea to the amended charge.
- 21. Dealing with each allegation in turn:-
 - a) The firm were utilising virtual client accounts on the Royal Bank of Scotland banking software package, known as CMS. However, they were not maintaining separate client

ledgers and cashbook entries for a sector of clients (clients using the service charge reserve funds and the tenant deposit accounts). The RICS' 'Clients' money: General advice for firms' states that a firm should ensure that systems identify all receipts and payments to the client to which they relate; for example by way of client ledgers showing cash balances held on behalf of clients at all times. The firm's failings in this area meant that potential shortfalls or errors could be masked and may mean that the principal was not fully aware of the current position in relation to clients' affairs. There was also an increased possibility that misappropriations would not be recognised, albeit that there were none.

- b) The principal had a series of legitimate loans from Client A. The firm failed to ensure that these loans were recorded in writing and that they were evidenced in the accounting records as a separate loan account in the client ledger. This meant that an analysis of the accounts by RICS or a party unconnected with the firm would not immediately identify funds loaned to the Principal, the basis of the loan, or the loan terms.
- c) There were no global three-way reconciliations for the two general client accounts, meaning that, due to incomplete records the cashbook could not be reconciled to the client ledger balance and the two bank statement balances held at RBS. This meant that the system of checks and balances expected of a RICS firm handling client monies was not in place.
- d-g) It is accepted that these particulars are more minor points and would not of themselves have led to a referral to Panel. However, taken as a whole these failings demonstrate a further lack of controls around the protection of client money.

22. The firm has taken measures to rectify the issues set out in the charges and to fully utilise the T & H accounts software to provide controls over client money handling. At this point RICS have not reviewed these measures.

23. The charge against Mr Szafran is withdrawn. The amended charge does not allege a breach of Rule 3.

24. The firm accept that as a result of the behaviour alleged in the charge they are liable to disciplinary action.

25. RICS make no claim for costs in relation to this case.

26. The firm has no previous disciplinary history with RICS.

Liability to Disciplinary Action

27. On the basis of the admitted facts the Panel went on to decide whether the firm is liable to disciplinary action. In reaching its conclusion the Panel took into account the submissions from both parties and accepted the advice of the Legal Assessor that liability to disciplinary action is a matter of judgment.

28. The Panel was satisfied that the firm's duty to preserve the security of client's money is a fundamental obligation. The firm failed to ensure that the loans from Client A were recorded in writing and evidenced within the accounting records, that there were three-way global reconciliations and separate client ledgers and cashbook entries for a sector of clients. These failings together with the shortcomings relating to bank charges, storing of cheques, monthly reconciliations and overdrawn client balances demonstrated an inadequate level of control of client money.

29. The Panel concluded that the firm's lack of control exposed clients to an unwarranted risk of financial loss which amounted to a serious departure from Rule 8 of the RICS Rules of Conduct for Firms 2007. The Panel was satisfied that the failings had the potential to seriously undermine public confidence in the profession. In these circumstances, the Panel determined that the firm's acts and omissions give rise to liability to a disciplinary action.

Panel's Approach to Sanction

30. The Panel bore in mind that the purpose of sanctions is not to be punitive, though they may have that effect. The purpose of sanctions is to protect the public, declare and uphold the standards of the profession and safeguard the reputation of the profession and the RICS as its regulator. Sanctions must be proportionate and considered in order of severity starting with the least restrictive until a sanction which meets the public interest has been reached.

31. The Panel took into account and accepted the advice of the Legal Assessor and had regard to the Sanctions Policy of RICS. It considered carefully the aggravating factors of this case and the mitigating factors as set out by Mr Beaumont on behalf of the firm.

Sanction Decision

32. The Panel identified the following aggravating factors based on the admitted charge and agreed statement of facts:

- The firm's lack of financial control and under use of the software available to provide adequate control persisted for a significant period of time and could not be described as an isolated or one off failure;
- Significant amounts of client monies were exposed to unwarranted risk of financial loss;
- An analysis of the accounts by RICS, or an interested third party unconnected with the firm, would not have immediately identified the loan from Client A or the terms of the loan.

33. The Panel identified the following mitigating factors:

- The firm fully co-operated with the RICS investigation;
- No client money was lost as a result of the failures;
- The firm has a long and unblemished history; no previous adverse disciplinary findings have been recorded against the firm;
- The firm promptly made changes to its handling of client money procedures.

34. The Panel first considered taking no action. The Panel concluded that, in view of the nature and seriousness of firm's breach of Rule 8 to take no action on its registration would be wholly inappropriate. The Panel concluded that taking no action would be insufficient to protect the public, maintain public confidence and uphold the reputation of the profession.

35. The Panel next considered whether to impose a caution but considered this to be inappropriate to mark the seriousness of the failures.

36. The Panel next considered whether to impose a reprimand and considered that this was the appropriate and proportionate sanction. The Panel was satisfied that the risk of potential harm to clients required a formal admonishment to declare and re-affirm the standards expected of registered firms. The Panel was also satisfied that a reprimand would send a clear message to the wider profession and, in so doing, uphold public confidence in the profession.

37. The Panel concluded that an undertaking/conditions would be inappropriate and a financial penalty would be punitive in nature. Neither would adequately address the Panel's concern regarding the risk of harm to the public and public confidence in the profession.

Publication and costs

38. Ms Joester referred the Panel to the policy on publication and confirmed that there was no application for costs.
39. The Panel accepted the Legal Assessor's advice that it is usual for decisions to be posted on the RICS website and published in Modus. The Panel was unable to identify any reason for departing from the normal practice in this case. 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.
40. The Panel orders that this decision is published on the RICS website and in Modus.

Appeal

41. The firm has 28 days to appeal against this decision in accordance with Rules 59 of the RICS Disciplinary, Registration and Appeal Panel Rules 2009.
42. In accordance with Rule 60 of the RICS Disciplinary, Registration and Appeal Panel Rules 2009 the Honorary Secretary has 28 days from the service of the notification of this decision to require a review of this decision.