Regulation

Disciplinary Panel Hearing

Case of

Clifford Dann Management Ltd (a Firm)

Lewes, East Sussex

On

Wednesday 8 and Thursday 9 November 2017

At

Blake Morgan offices, 6 New Street Square, London

Panel

Helen Riley (Surveyor Member Chair)
Carolyn Tetlow (Lay Member)
Gillian Seager (Lay Member)

Legal Assessor

Fiona Barnett

RICS Representative

Mr Ian Perkins, Counsel of Browne Jacobson Solicitors

Firm's Representative

Mr Jonathan Harvey, Counsel, instructed by Adams and Remers Solicitors
Mr James Groves attended on behalf of Clifford Dann Management Ltd ("the Firm")

Audio Technician

Jamie Kim

Hearing Officer

Emma Jones

The Charges:

Clifford Dann Management Ltd failed to preserve the security of clients' money entrusted to its care in the course of its business contrary to Rule 8 of the RICS Rules of Conduct for Firms (4 June 2007 version 5) and/or failed to carry out its work with proper regard for the standards of customer care expected of it contrary to Rule 5 of the RICS Rules of Conduct for Firms (4 June 2007 version 5) by:

1. Withdrawing the sum of £10,622.77 from the "Clifford Dann Management Ltd Corsica Hall, Seaford Clients Account" on or around 27 April 2015:

   a) Withdrawing the sum of money referred to in charge 1 above although these were not service charge fees nor fees owed to the Firm with respect to the management of Corsica Hall;

   b) Withdrawing the sum of money referred to in charge 1a above without the permission of its clients;

   c) Withdrawing the sum of money referred to in charge 1a above despite repeated requests from its clients not to withdraw the sum of £10,622.77.

Clifford Dann Management Ltd is therefore liable to disciplinary action under Bye-law 5.3.2(c).

Response

1. Mr Groves, on behalf of the Firm, denied the charge and denied that the Firm is liable to disciplinary action.

Background

2. Corsica Hall is a Grade II listed building which is divided into apartments and must be refurbished every five to seven years in accordance with the terms of the lease. The freehold is owned by Eagle Estates Limited, ("the Freeholder") and Corsica Hall Steering Group acts on behalf of the leaseholders. At the time of the matters in dispute, the managing agents were Park Lane Residential Managing Agents, which is a trading name for Clifford Dann Management Ltd, "the Firm".

3. The Steering Group and the Freeholder requested that the refurbishment works be carried out in two phases. The Firm instructed a surveyor from Clifford Dann LLP, (a partnership of which Mr Groves was also a member), to write specifications for both phases of the

refurbishment works, which were treated as Section 20 major works. The specifications were written by Mr Richard Blake, who is now deceased. The Steering Group and Freeholder were not satisfied with the specification for phase two and ultimately instructed an alternative surveyor. On 28 June 2013, Clifford Dann LLP submitted an invoice for Mr Blake's work in connection with phase two in the sum of £10,662.77 The Freeholder and the Steering Group considered this fee to be excessive and disputed the invoice amount, offering £2,500 plus VAT in settlement. No agreement was reached about the disputed invoice.

4. It is alleged that in April 2015, the Firm withdrew the full amount of the invoice from the Corsica Hall service charge account without permission of the Freeholder and despite requests not to do so.

Evidence

5. The Panel had before it the RICS solicitor's bundle of documents, running to 135 pages, and two bundles of documents produced on behalf of the Firm running to 172 and 71 pages respectively.

6. The Panel heard oral evidence from Mr Daniel Parkinson, who was called to give evidence by the RICS representative. Mr Parkinson is the repairs manager at Coastal Management Ltd, a company which acts on behalf of the Freeholder.

7. The Panel also heard evidence from Mr James Groves of the Firm, who was called by Mr Harvey to give evidence on behalf of the Firm. Mr Groves is a Director of the Firm.

Panel decision on facts

8. In reaching its decisions on the disputed facts, the Panel reminded itself that where the facts are in dispute, the burden of proof rests on RICS. RICS is required to prove the allegations to the civil standard, in other words, that it is more likely than not that the events occurred as alleged. The Panel considered all the oral and documentary evidence before it.

9. At the outset of its deliberations, the Panel noticed that there was an error in the charge in relation to the amount of the invoice. This was written in the charge as £10,622.77, when it was clear from the documentation before the Panel that the correct amount of the invoice was £10,662.77. The Panel decided that for clarity, accuracy and for the avoidance of any doubt, it should amend the charge so that the invoice amount was written as £10,662.77 as reflected in the documentation. This amendment, which was correcting a typographical error, would cause no injustice to either party.

10. The Panel accepted the Legal Assessor's advice, which was, that in addition to deciding the facts set out in paragraphs a, b and c of the charge, it should decide two further disputed matters. These are:

    i) Whether RICS has proved that the fee agreement was as stated by Mr Parkinson in his evidence, that is that a fee of £640 plus VAT was agreed? Or does the Panel accept that the proper fee chargeable and payable was £10,622.77? And,

    ii) Has RICS proved that the Firm needed the express permission of its client to deduct the invoice amount from the service charge account?. Or does the Panel accept that the Management Agreement gave the Firm permission to take the invoice monies from the service charge account?

11. The Panel first considered point i above. It had regard to the evidence of Mr Parkinson who told the Panel that there was no written fee structure for the phase two work. He said that he witnessed a verbal agreement at a meeting in or around February 2013 between the Freeholder and Mr Blake. He said it was agreed at that meeting that if Mr Blake did not oversee the project, he, (Mr Blake), would be paid only for his work in writing the specification, which was, *"…mentioned to be approximately £640.00 plus VAT and definitely less than £1000.00".*

12. RICS relied solely upon Mr Parkinson's oral evidence on this issue. The Panel's view, however, was that when he was cross-examined, his evidence was equivocal, lacked clarity, and was neither convincing nor compelling. He said when questioned, that with hindsight, it might have been better not to have made reference to the £640 at all in his witness statement. Further, Mr Parkinson's assertion about the informal agreement was wholly uncorroborated, and whilst there were many subsequent documents in which fees were discussed, the figure of £640 plus VAT was not referred to elsewhere. There were no meeting minutes, notes, memos, or emails, contemporaneous or otherwise, in support of his account that an agreement for this fee had been reached. The Freeholder had apparently been present at that meeting and RICS could have called him as a witness to corroborate Mr Parkinson's account but they did not do so.

13. In contrast, the Panel found Mr Groves to be a credible and compelling witness. Mr Groves had not been present at the meeting, but he told the Panel that he did not believe there was such an agreement about the fees.

14. The Panel carefully considered the documents. It was satisfied that, whether or not Mr Parkinson had been aware of it, there was clear evidence of an established fee structure for Clifford Dann LLP's fee. This fee structure had been used for the phase one work, and had been reiterated and continued in relation to the phase two work. In particular, there was a detailed letter dated 6 June 2013, from Mr Blake to the Freeholder, which set out full details of the tenders received for the phase two work, and clearly set out the fee scale for his work for phase two. This fee structure, which was based on percentage costs of the works to be done, would explain the amount of the subsequent invoice for £10,662.77.

15. The Panel therefore did not accept Mr Parkinson's evidence, which was unsupported and inconsistent with the documentary evidence. It was not satisfied that there was an agreement for Clifford Dann LLP to be paid only £640 plus VAT if Mr Blake did not oversee the work. It found that the invoice submitted by Clifford Dann LLP for £10,662.77 was the proper fee chargeable in accordance with the continuing fee structure, and that this amount was payable for the phase two work.

16. The Panel next considered the issue set out at point ii above. In so doing, it gave careful consideration to the terms of the Management Agreement (dated 24 June 2008), and the evidence of Mr Groves.

17. Clause 3 of the Management Agreement sets out the services to be provided by the Managing Agent. The Managing Agent is required, in accordance with clause 3.5.1, to "*…arrange all contracts for the repair, maintenance, security, lighting, heating and cleaning of the property…..".*

18. It is clear from clause 3 as a whole, that there is an expectation that the Managing Agent (the Firm) will incur expense in providing the services set out in the agreement.

19. Clause 3.3.11a) states that,

    "From monies received by the Managing Agent on behalf of the Company:
    a) at any time properly or appropriately, to pay or reimburse the Managing Agent for any expense or other disbursements recoverable from the Company".

20. The word "**expense**" was not defined in the Management Agreement. The Panel therefore construed this broadly, as meaning any general expenditure incurred by the Managing Agent (the Firm) during the course of its obligations as set out in the Agreement.

21. The Panel decided that clause 3.3.11(a) means, in simple terms, that if the Managing Agent (the Firm) has to spend money in fulfilling its obligations under the agreement, and this money is recoverable from the Freeholder, then the Managing Agent is permitted to pay itself from monies it holds on behalf of the Freeholder.

22. Clifford Dann LLP's fee was necessary expenditure incurred by the Firm for the phase two work, which was recoverable from Eagle Estates. The Panel was satisfied that clause 3.3.11(a) entitled the Firm to pay itself for Clifford Dann LLP's fees from the money it held on behalf of the Company. No express permission would be needed from the freeholder.

23. Clause 3.1.11(c), states, that:

    "From monies received by the Managing Agent on behalf of the Company:

c. after termination of the agreement, to deduct the Managing Agent's outstanding remuneration and/or expenses due."

24. In the Panel's view, clause 3.3.11(c) would entitle the Managing Agent (the Firm) to take fees for expenditure incurred from client money held, even after the termination of the Management Agreement.

25. Mr Groves told the Panel that as a Managing Agent, the Firm must be in a position to instruct contractors and pay their bills. He said that if he did not do so, he could be repeatedly sued. He explained that even where a bill is in dispute, he will assess and investigate the situation, and make a decision as to whether that bill should be paid, even if the client may not be in agreement with that course. The Panel accepted his explanation, which it found to be credible and which made good sense. It was a matter of common sense that a Managing Agent must be in a position to spend money to provide necessary services on behalf of its client, and recoup this from monies it holds on behalf of the client. Failing this, the Managing Agent would not be able to operate effectively. The Panel was satisfied that the authority to recover the money for such expenditure, which included the fees for Clifford Dann LLP, was set out in clauses 3.3.11a and c, depending on whether expenditure was recovered during the course of the Management Agreement or after its termination.

26. Furthermore, the Panel also considered clause 5. 3. This states,

"The Company agrees to the following fees and expenses being charged by the Managing Agent and being deducted from the Service Charge Funds or Sale Proceeds whichever is applicable.

5.3 An additional fee of between 10% - 15% of the total cost of work requiring statutory S20 Notices or similar shall be payable to the Building Surveying Department."

27. The Panel was in no doubt that this clause expressly allows for additional fees/expenses to be charged for Section 20 (major works) and to be deducted from the service charge account and paid to the Building Surveying Department. Mr Groves confirmed in evidence that he perceived the "Building Surveying Department" as Clifford Dann LLP, or potentially another independent surveyor. The Panel found that this clause was unequivocal and gave Mr Groves the right to deduct Clifford Dann LLP's fees for the phase two work from the client service charge account. The Firm did not require express permission of the Freeholder, because it was entitled to do this whether the freeholder consented or not.

28. The Panel was therefore satisfied that the Firm did not need permission of its client(s) to deduct Clifford Dann LLP's fees from the client service charge account. The Firm was entitled to do so, either in accordance with clause 3.3.11a or 3.3.11c, or 5.3. Mr Groves had sent a letter to the Freeholder asking for permission to take the monies from the service charge account, however, he did not need that permission.

29. Having determined these additional matters, the Panel then considered paragraphs 1(a), (b) and (c) of the charge.

(a). Withdrawing the sum of money referred to in charge 1 above although these were not service charge fees nor fees owed to the Firm with respect to the management of Corsica Hall.

30. In relation to paragraph (a), it was not disputed by the Firm that the amount of £10,662.77 was withdrawn from the service charge account. The Panel has also seen a bank statement, addressed to the Firm, which showed the money leaving the service charge account on 27 April 2015. It was also clear from the evidence before the Panel that the money was for fees due for Clifford Dann LLP's work in relation to phase two. The precise nature of the work was set out in the invoice from Clifford Dann LLP dated 28 June 2013. In light of this, it was self-evident that the money withdrawn from the service charge account was not for service charge fees or for fees owed to the Firm with respect to the management of Corsica Hall. The Panel therefore found this proved as a fact.

(b). Withdrawing the sum of money referred to in charge 1a above without the permission of its clients.

31. The Management Agreement, which was dated 24 June 2008, was an agreement entered into between Eagle Estates Ltd (the Freeholder), and Park Lane Residential Managing Agent, (which was the trading name for Clifford Dann Management Ltd). The Panel therefore concluded that the Firm's "client" was the Freeholder, and Coastal Management Ltd, who acted on behalf of the Freeholder. The Management Agreement specifically stated, at clause 2.2, that "…*in relation to the property, the Managing Agent shall have no responsibility to any individual Lessee or any third party other than the Company".* It was clear therefore that the individual leaseholders, and/or the Steering Group, were not "clients" of the Firm within the terms of the Management Agreement.

32. The Panel considered a letter dated 12 April 2015 from Mr Parkinson to Mr Groves in which Mr Parkinson disputed the invoice for Clifford Dann LLP's fees. He said,

"The Freeholder of Corsica Hall and The Steering Group request that you do not deduct the balance of the disputed invoice from the Service charge as you have suggested to avoid a protracted legal case and hope to resolve the matter to both of our satisfaction."

33. Although the letter was phrased as a "request", the Panel's view was that it amounted to a clear withholding of permission on behalf of the client to withdraw the invoice amount from the service charge account. The Firm nonetheless did so on 27 April 2015. The Panel therefore found paragraph 1b proved, as a fact.

(c) Withdrawing the sum of money referred to in charge 1a above despite repeated requests from its clients not to withdraw the sum of £10,622.77.

34. In the letter dated 12 April 2015, (referred to above), a clear request was made on behalf of the Freeholder that the invoice amount should not be deducted from the service charge account. Whilst there was other correspondence which expressed dissatisfaction with Mr Blake's work and the amount of the invoice, the Panel could identify in the documentary evidence only this one actual request from the client not to withdraw the money from the service charge account. There was an email dated 14 April 2015 from the Chair of the Steering Group to Mr Groves in which it was stated that the Steering Group *"expressly forbid"* Mr Groves from taking the money from the service charge, however, the Steering Group was not a "client" of the Firm.

35. The Panel therefore found paragraph 1c proved as a fact on a limited basis, namely that the Firm withdrew the money from the service charge account despite one request from its client not to do so.

Failures to comply with Rule 8 and/or Rule 5 of the RICS Rules of Conduct for Firms.

36. Having found the facts proved, the Panel next considered whether, in the particular circumstances, the Firm had failed to comply with Rule 8 and/or Rule 5 of the RICS Rules of Conduct for Firms.

Rule 8

37. At the outset of its deliberations, the Panel decided that the invoice for the work carried out by Clifford Dann LLP was a proper invoice for work done by Mr Blake, that it was based on a continuing fee structure, and that the invoice amount was payable by the Firm to Clifford Dann LLP.

38. The Panel also decided, at the outset, that the Firm was permitted in accordance with the terms of the Management Agreement, to take the invoice monies from the service charge account and that it did not require the express permission of its client to do so.

39. The Firm had set up two client accounts for the Freeholder; one was a service charge account and one was an account for payment of major works (including section 20 works). During oral evidence, Mr Groves explained that the two accounts had been set up to help distinguish between the two different types of expenditure, but explained that funds can move freely between the accounts as it is all client money. This was demonstrated by evidence in the documentation that other "major works" invoices had also been paid from the service charge account. The Panel heard evidence that Clifford Dann LLP's fees were considered "major works", yet the amount was deducted from the service charge account and not the major works account. Nonetheless, the Panel found this to be of no consequence, given that both accounts held client monies.

40. In the light of these findings, the Panel was not satisfied that the Firm failed to comply with Rule 8 of the RICS Rules of Conduct for Firms. The invoice was payable and the Firm was entitled, under the terms of the Management Agreement, to pay it directly from the service charge account. Mr Groves had tried to resolve the matter concerning the amount of the fee but without success, and had waited almost two years before he deducted the monies owed from the service charge account. The Firm had not failed in its obligation to preserve the security of clients' money entrusted to its care in the course of its business.

Rule 5

41. Mr Groves told the Panel that he had tried to negotiate with the client and that he hoped an agreement would be reached about the disputed invoice. The Panel accepted this and it was supported by the documentation. Eventually, when negotiations had not succeeded, Mr Groves gave his authority for the Firm to withdraw the monies from the service charge account. The client had made a request that this should not be done. However, a long period of time, (almost two years), had elapsed since the invoice was issued, and the matter remained unresolved with the invoice still unpaid. The Firm then withdrew the money from the service charge account, as it was entitled to do in accordance with the terms of the Management Agreement.

42. In the Panel's view, this was a protracted dispute about the amount of an invoice, but it did not constitute a failure by the Firm to carry out its work with proper regard for the standards of customer care expected of it contrary to Rule 5. The Firm had obligations as Managing Agents to pay suppliers for work done, and it did so in accordance with the terms of the Management Agreement.

43. The Panel therefore found the charge not proved.

Liability to disciplinary action

44. In the light of the Panel's findings, it did not go on to consider whether the Firm was liable to disciplinary action.

Costs

45. The RICS representative asked for costs in the sum of £14,779.63. He had provided a schedule of costs to the Firm in advance. He submitted that although the charge had not been found proved, RICS had acted properly in bringing the case and a costs order should therefore be made against the Firm.

46. Mr Harvey, on behalf of the Firm, submitted that as the charge had not been proved, the Firm should not be required to pay costs to RICS. He provided a costs schedule to the Panel, and invited it to make an order requiring RICS to make a contribution to the Firm's costs in the sum of £24,240.00.

47. The Panel heard and accepted advice from the Legal Assessor. It first considered whether RICS should be required to pay costs to the Firm. The Panel's view was that although the charge had not been found proved, RICS had acted properly in bringing the case in the public interest. There was no evidence or suggestion before the Panel of any bad faith by RICS. Whilst the Panel had power pursuant to Rule 34 to make a costs order against RICS, it reminded itself that in regulatory proceedings, there would need to be good reason to make a costs order against the regulator. It was not persuaded that there was any good reason to do so, and therefore decided not to make a costs order against RICS.

48. The Panel then considered whether the Firm should be required to pay costs to RICS. Although it accepted that the case had been properly brought, the Panel had not found the charge proved. In the circumstances, it decided that it would be neither fair nor reasonable to make a costs order against the Firm.

49. The Panel therefore refused both applications for costs and made no costs orders.

Publication

50. Mr Perkins invited the Panel to make a publicity order. Mr Harvey did not object to a publicity order.

51. The Panel therefore ordered that the decision be published in Modus and on the RICS website in accordance with the RICS Sanctions Policy Supplement 3.

Appeals

52. The Firm has 28 days from service of the notification of this decision to appeal this decision in accordance with Rules 58 and 60 of the Disciplinary, Registration and Appeal Panel Rules.

53. In accordance with Rules 60 of the Disciplinary, Registration and Appeal Panel Rules, the Honorary Secretary of RICS may require a review of a finding imposed by a disciplinary panel.