

Disciplinary Panel Hearing

Case of

**Foster Maddison Property Consultants Limited (the Firm) [038431]
Northumberland, NE46 1PQ**

On

Wednesday 13 September 2017

At

Blake Morgan Solicitors, 6 New Street Square, London, EC4A 3DJ

Panel

Helen Riley (Chair)
Christopher Pittman (Surveyor Member)
Christopher Boothman (Lay Member)

Legal Assessor

Margaret Obi

RICS Representative

Annabel Joester

Firm's Representative

Mr Peter Mant, Counsel,
Emma Wherry, Solicitor, RPC

Mr Neil Foster appeared before the RICS Conduct Panel on behalf of the Firm.

Preliminary Matters

Application to Amend

1. Ms Joester made an application, on behalf of RICS, to amend the charge against the Firm by withdrawing the allegation that the Firm's conduct amounts to a breach of Rule 3 of the Rules of Conduct for Firms 2007. She informed the Panel that the alleged breach is of Rule 8 alone.
2. Mr Mant did not oppose the application.
3. 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 and therefore the application to amend the charge was granted.

Charge (as amended)

4. The formal charge against the Firm is:

Between 1 September 2012 and 12 January 2016 Foster Maddison Property Consultants Limited ('the Firm') failed to preserve the security of clients' money entrusted to its care during the course of its business because the adequacy of the firms accounting systems and controls were not sufficiently robust to preserve the security of clients' monies.

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

Particulars

5. *The particulars of the charge are:*
 - a) *Non-principals were able to make changes to the payee details and sort code on the online banking system with no authorisation from a principal.*
 - b) *The Firm's cash controls were weak.*
 - c) *There was no, or insufficient, separation between the employee taking the cash payments and the employee who completed the financial records.*
 - d) *There was no, or insufficient, security of the hard copy financial records.*

e) *There was no, or insufficient, controls over the financial records stored on the IT system.*

Response

6. Mr Mant, on behalf of the Firm, admitted the charge. On the basis of the admission the Panel found the allegation proved.

Summary

7. In advance of the hearing the Panel was provided with two RICS bundle's consisting of a witness statement from Mrs Cherry Leeder (RICS Professional Assurance Accountant) and documents relevant to its presentation of the case. In addition, prior to the hearing, the Panel was provided with a witness statement from Mr Foster outlining the background and the mitigating circumstances on behalf of the Firm and on the day of the hearing itself a further witness statement outlining the Firm's financial position. The background to the allegation, as set out in the RICS hearing bundle, is as follows:

- Foster Maddison is a medium sized property management firm based in Northumberland. It operates three offices, in Jesmond, Hexham and Durham. The firm offers residential and commercial agency services, property management, lettings and survey and valuation services. Until January 2016 the firm employed an accountant, Michelle Raper, in the Hexham office.
- On 12 and 13 January 2016 the firm had a pre-arranged Client Money Regulatory Review Visit from Mrs Leeder of RICS. Ms Raper was not present for the visit, having been on leave for the previous week. She did not return from leave, and during the visit emailed her resignation to the firm.
- On the second day of the visit it was discovered that Ms Raper had removed numerous financial records from the firm, including the petty cash receipt books, postal log books, paying in books, bank statements, cheque receipt logs, internet transfer documents and reconciliations. She had also deleted the client accounting records stored on her computer and on the office storage drive. The theft of the items was reported to the police, RICS and to the firm's insurers.

- Mrs Leeder's report on the visit made several findings in relation to the firm's handling of client money, the most serious of which were that non-principals were able to make changes to payees' details and sort codes without a principal's authorisation and that the accounting records had been misappropriated. However, Mrs Leeder was unable to complete a full review of the accounting system because of the recently discovered misappropriation of the records. In addition, because of the theft of the records, the firm were unable to confirm if clients' money was secure. Mrs Leeder rated the firm's client money handling as 'unsatisfactory'.
- Following Mrs Leeder's visit and the discovery of the misappropriation of the records the firm continued to correspond with RICS, and a further visit was arranged, to take place in June 2016. In the interim period the firm employed a consultant to recreate the missing records. He found that:-

'upon my appointment by FMPC it was immediately apparent that all data stored on Miss Raper's computer was worthless being either incomplete or simply a work of fiction. Additionally all paper based records which remained were also either incomplete or unreliable. Essentially record keeping for your clients was a total loss.'

- As a result of the work completed by the consultant it became evident that client monies had been stolen by Ms Raper, a fact which she had attempted to conceal by manipulation of the records kept by her and the eventual theft of the majority of those records. At the time of Mrs Leeder's second visit the loss had not been completely quantified, but Ms Raper had by that time admitted to stealing client funds. The shortage in the client account was estimated at £45,524,97.
- Mrs Leeder's further report details the position in June 2016 in relation to the reconstruction of the financial records, the theft from the client account and the controls that were put in place to preserve the security of client's monies. Unfortunately, she concluded that the firm's rating for its client money handling should remain 'unsatisfactory' because of the incomplete records and the fact that the firm had not paid monies into the client account to cover the loss of client's funds.

- The firm continued to correspond with RICS, who had commenced an investigation as a result of Mrs Leeder's firm's report and resulting concerns about a possible breach of Rule 8 of the RICS Rules of Conduct for Firms. The consultant employed by the firm concluded his reconstruction of the firm's records, and a copy of his report was produced to RICS. The report concluded that the total amount of the theft was £75,992.04. All monies had been replaced by the firm by the end of October 2016.
- The 'Assessment of Alleged Employee Theft' report by Burns Accounting, dated 8 August 2016, concluded that the theft had occurred over three 'categories' of Ms Raper's work; firstly from security deposits; secondly from fees due to the firm and lastly from rent due to be received by the firm when acting for landlords. Ms Raper appears to have used various methods to cover up the resulting losses. These methods are detailed in Burns Accounting's report. Ms Raper has now been convicted of theft by employee and false accounting.

Liability to Disciplinary Action

Submissions

8. Ms Joester submitted that the Firm should be found liable to disciplinary action. She outlined the background circumstances and acknowledged, on behalf of RICS, that the Firm has been the victim of a theft by a former employee. She submitted that RICS had no reason to doubt that, since the discovery of the theft, the Firm has taken remedial action, including repaying the monies to the client account. She submitted that although it is not believed that any client has lost money as a result of the theft and false accounting, it was made possible because of the weakness in the Firm's accounting system, as identified in Mrs Leeder's report and as particularised in the charge. She invited the Panel to conclude that the Firm's failure to ensure the security of client's money is serious and that as a consequence it is liable to disciplinary action.
9. Mr Mant conceded, on behalf of the Firm, that it is liable to disciplinary action. However, he made it clear that the acknowledgement of liability did not equate to a concession that a sanction should be imposed.

10. The Panel accepted the Legal Assessor's advice that liability to disciplinary action is a matter of judgement.

Panel Decision

11. 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 there was sufficient control over the accounting records for a sustained period of time, namely four years, and it was within this context that the Firm's former employee was able to steal a significant amount client monies. In particular the Panel noted that:

- a) An employee was able to change the payee details so that payments were made either to themselves or third parties and this would not necessarily be detected.
- b) In the Jesmond office, the Firm, on at least one occasion, accepted cash without completing the duplicate receipt book properly. There was no evidence with regards to the other offices as the cash books for the other offices were either destroyed or stolen.
- c) The absence of sufficient separation of function/dual authority over the handling of cash and the banking or recording of payments in the accounting record was a vulnerability which Ms Raper was able to exploit. If appropriate controls were in place the thefts would have been less likely to have occurred, or would have been detected earlier.
- d) Ms Raper was able to erase hard copy and electronic accounting records belonging to the Firm, which demonstrated that it had no, or insufficient controls over the IT system.

12. The Panel was satisfied that, although client money was misappropriated from the client account, no client suffered a permanent loss. However, the Firm's lack of control exposed clients to unwarranted risk of financial loss which amounted to a serious departure from Rule 8 of the RICS Rules of Conduct for Firms 2007.

13. The Panel took the view that the failings had the potential to seriously undermine public confidence in the profession and to bring the profession into disrepute. Although the Panel accepted that steps have been taken to rectify the shortcomings in the management of client monies, in view of the nature and extent of the breach, the Panel

concluded it is in the public interest that the Firm is made liable to disciplinary action. The Panel was satisfied that public trust and confidence in the profession and regulatory process would be seriously undermined if it did not make such a finding.

14. Accordingly, the Panel determined that the Firm's acts and omissions give rise to liability to a disciplinary action.

Mitigation

15. Mr Foster, on behalf of the Firm, gave evidence in mitigation. He expanded on his detailed witness statement and explained the procedures that were now in place to secure client monies. Mr Foster informed the Panel that on the basis of the recommendations that had been made by the previous RICS RRV, conducted in 2010, the Firm had implemented an electronic payment system which had to be authorised by a director, with a paper copy retained for authorisations.
16. Mr Foster went on to state that although Ms Raper did not steal any client funds by changing the payee details, either before or after it had been authorised by a principal, the Firm has reviewed its financial systems. He stated that a director's approval is now required to make changes to payee details as well as the payments themselves. Any changes to bank details must be verified by a director before the changes are accepted and once authorised a hard copy is kept in secure storage. Mr Foster informed the Panel that the main reason that Ms Raper was able to perpetrate the theft was because of her access to cash. He stated that the Firm no longer accepts administration fees, rent or deposits in cash. He explained that the Firm occasionally accepts its fees in cash and that for these payments there is now a sequentially numbered triplicate receipt book. This means that one copy can be retained on a dedicated file within the office which is kept in locked storage, one remains in the book and the other given to the client. With regard to separation of functions he informed the Panel that given the size of the Firm it is not possible to ensure that client funds are always banked by a different employee that received the money. He also informed the Panel that hard copy records continue to be kept in locked storage, but this is now not at the office where the reconciliations are compiled. Therefore, the employee responsible for completing the reconciliation does not have access to the signed hard copy.

17. In response to Panel questions, Mr Foster stated that the Firm's insurers had covered the losses, subject to the excess of a few thousand pounds.

Sanction

Submissions

18. Ms Joester, on behalf of the RICS, was neutral as to what sanction, if any, should be imposed.

19. Mr Mant, on behalf of the Firm, outlined the following mitigating factors:

- i) The Firm was the victim of a crime. The Firm did not benefit from the theft and did not act deliberately or recklessly.
- ii) There has been no direct impact on clients and the Firm has taken appropriate steps to ensure that the money was repaid in advance of the insurance pay-out by advancing directors loans' to the Firm and reducing drawings by the directors.
- iii) The Firm has been fully co-operative with the RICS. It reported the theft to the police, has welcomed the recommendations it has received and has taken the opportunity to learn and develop best practice.
- iv) It is not the case that there were no controls. The key issue was that there was insufficient separation, security and control of the financial records.
- v) The issues have now been addressed and there is no on-going risk.
- vi) There is no public interest in imposing a sanction beyond a Caution.

20. Mr Mant's primary submission with regard to sanction was that no action would be appropriate and proportionate. He referred the Panel to the Firm's financial circumstances and stated that a Fine would cause undue hardship. He also submitted that a Reprimand would have an unquantifiable reputational impact.

Panel's Approach

21. The Panel bore in mind that the purpose of sanctions is not to be punitive, though they may have that effect. The purpose 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.

22. The Panel took into account and accepted the advice of the Legal Assessor and had regard to the Sanctions Policy of RICS. It considered the submissions made by both parties, the aggravating factors of this case and the mitigating factors as set out by Mr Mant on behalf of the firm.

Sanction Decision

23. The Panel identified the following aggravating factors based on the admitted charge:

- The on-going breaches of Rule 8 persisted for a sustained period of time and only came to light having been triggered by the RICS RRV.
- There was a significant delay by the Firm in reimbursing the misappropriated monies.
- The breach cannot be described as an isolated incident or one off failure.
- Significant amounts of client monies were exposed to unwarranted risk of financial loss.

24. The Panel noted that the Firm was a victim of the crime perpetrated by Ms Raper and that it suffered financial loss. However, the Panel identified and applied the most weight to the following mitigating factors:

- The Firm admitted the charge.
- The Firm had taken responsibility for its failings and had promptly notified its insurers and the police as soon as the theft became apparent;
- The Firm fully co-operated with the RICS investigation;
- There was no direct impact on clients and the Firm had taken steps to ensure that there was no direct financial loss to clients;
- The firm has a long and unblemished history; no previous adverse disciplinary findings have been recorded against the firm;

- The Firm has made changes to its systems and controls for the handling of client money to avoid repetition.

25. 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.

26. The Panel next considered whether to impose a Caution but considered this to be inappropriate to mark the seriousness of the failures. The Panel accepted that in view of the steps implemented by the Firm since the theft was discovered, the conduct was unlikely to be repeated. However, the Panel concluded that the breach, which had occurred over a lengthy period and had resulted in a high-value theft was not "minor", nor could it be described as an isolated incident. Therefore, the Panel concluded that a Caution was not an appropriate and proportionate sanction.

27. 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.

28. The Panel went on to consider whether a Fine should be imposed in combination with the Reprimand. The Panel noted that the Firm has already suffered losses in terms of time taken to address and remedy the breach and associated costs. The Panel also noted that the Firm is currently in a difficult financial position. In the circumstances, the Panel concluded that a fine would be disproportionate, may cause undue hardship and would be punitive in nature. Furthermore a financial penalty would not adequately address the Panel's concern regarding the risk of harm to the public and public confidence in the profession.

29. The Panel next considered whether Conditions should be imposed on the Firm's registration in conjunction with the Reprimand. It carefully balanced all the aggravating and mitigating factors. It was mindful of the extensive steps taken by the Firm to ensure that no further breach of Rule 8 of the Rules of Conduct for Firms would occur. It also had regard to the RICS' position that it had no reason to doubt that the Firm had implemented the measures outlined by Mr Foster. In these circumstances the Panel took the view that neither Undertakings nor Conditions would be necessary or appropriate.
30. Accordingly, the Panel orders that the Firm be Reprimanded. The Panel is satisfied that this sanction is both appropriate and proportionate to protect the public, maintain confidence in the reputation of the profession and ensure proper standards of conduct are upheld, whilst taking account of the Firm's interests, and the extensive and compelling mitigation in this case.

Publication and costs

31. Ms Joester referred the Panel to the policy on publication. Mr Mant did not oppose publication.
32. 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.
33. The Panel orders that this decision is published on the RICS website and in Modus.

Costs

34. Ms Joester, on behalf of RICS, requested costs of £6,010.00, and had provided a schedule to the Firm in advance of the hearing. She stated that the investigation solicitor's costs had been capped.

35. On behalf of the Firm Mr Mant invited the Panel to consider no costs or reduced costs bearing in mind the Firms' co-operation with RICS and the hardship that would be caused to the Firm. He suggested that 10 hours preparation time was excessive. He also stated that the costs ought to be reduced because, due to an administrative error by RICS, Mrs Leeder arrived late, which resulted in a delayed start to the hearing. In response Ms Joester stated that the delay to the hearing was not entirely due to the late arrival of Mrs Leeder. She also stated that the fees were reasonable.
36. The Panel considered carefully the costs sought. It was satisfied that the case had been properly brought, the costs were fair and reasonable and there was no objective basis for reducing the costs. The Panel also noted that if the costs were not awarded the financial burden of bringing this case would fall on the profession as a whole. The Panel therefore ordered that the Firm pays costs of the RICS in the sum of £6,010.00. In determining that the Firm should pay the costs in full, the Panel took into account the fact that the Firm would be able to enter into negotiations with RICS to devise an acceptable payment plan.

Appeal Period

37. 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.
38. 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.