

Disciplinary Panel Hearing

Case of

Mr A Wellington MRICS [1102408]
London, SE12

On

Wednesday 10 October 2018 at 1000 hours BST

At 55 Colmore Row, Birmingham, B3 2AA

Panel

Gillian Seager (Lay Chair)
Patrick Bligh-Cheesman (Lay Member)
Ian Hastie (Surveyor Member)

Legal Assessor

Ben Kemp

Representatives for the parties

Christopher Geering (Barrister, 2 Hare Court) appeared on behalf of RICS

Hearing Officer

Jae Berry

The formal charges against Mr Wellington are;

1. You received an "Unemployed/seeking work" concession to your 2016 and / or 2017 membership fee, to which you were not entitled, or to which you ceased to be entitled following a change in circumstance.

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

2. Your conduct at 1 was:
 - a. dishonest in that you knew you were receiving or had received a discount to which you were not or were no longer entitled,
 - b. lacked integrity in that you were reckless as to whether you were entitled or continued to be entitled to the discount you claimed.

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

3. You failed to cooperate in an appropriate and / or timely manner with RICS' investigation into the allegations set out at 1-2 above.

Contrary to Rule 8 of the Rules of Conduct for Members 2007

You are therefore liable to disciplinary action under RICS Bye-law 5.2.2(c)

Service and Proceeding in Absence

1. Mr Wellington was neither in attendance nor represented. Mr Geering, on behalf of RICS, made an application to proceed with the hearing in the absence of Mr Wellington.
2. The provisions as to service set out in Rules 23(b) and 23A(a) of the Disciplinary, Registration and Appeal Panel Rules 2009 version 7 (the Rules) have been complied with, as the notice of the hearing, with other documents required to be supplied, were sent by email and special post to Mr Wellington on 28 June 2018, so giving more than the required 56 days' notice of this hearing. RICS has produced a witness statement from its Regulatory Tribunal Executive, Mrs Jae Berry, speaking to evidence of service, including an appropriate signed delivery receipt, also produced.
3. The Panel has considered whether it is appropriate to proceed in the absence of Mr Wellington. It has received, and accepted, advice from its legal assessor and recognises that any such decision would need to be exercised only with great caution, having regard to the primary importance of fairness to Mr Wellington. It has had regard to the principles set out in the relevant caselaw to which it was referred, including in particular *R v Jones*, [2003] AC 1, HL and *GMC v Adeogba* [2016] EWCA Civ 162.
4. Mr Wellington has not completed or returned the listing questionnaire, as he had been invited to do. There has been nothing else from Mr Wellington, prior to the date of the hearing, to indicate whether or not Mr Wellington intends to attend the hearing, or as to his position for the purposes of the hearing.

5. The Panel has received a telephone message from Mr Wellington on the morning of the hearing. This indicated that Mr Wellington had on the day of the hearing to attend a funeral. He had been advised to put this in writing, by email. The start of the hearing was delayed in order to allow Mr Wellington the opportunity to set out his position. He has not done so. Further attempts have been made, without success, to contact Mr Wellington by telephone and email on the morning of the hearing. Mr Wellington was invited to confirm whether he was seeking an adjournment of the hearing. He has not done so.
6. The Panel is mindful of the critical importance of ensuring fairness to Mr Wellington. It also has regard to the public interest in enabling regulatory proceedings to proceed with appropriate expedition. It is not satisfied that a sufficiently compelling and timeous explanation has been provided by Mr Wellington as to the reason for his non attendance. It is not satisfied that he would be likely to attend an adjourned hearing on another date. The Panel notes that Mr Wellington has not to date engaged in any substantive way with these proceedings. It concludes, on balance, that the interests of justice favour proceeding in the absence of Mr Wellington.
7. In doing so it accepts advice from its legal assessor to the effect that it should proceed with particular care, ensuring so far as possible that it has appropriate regard to the case and position of Mr Wellington, or which might have been put by or on behalf of Mr Wellington, had he been in attendance. The Panel proceeds upon the basis that all of the charges are denied by Mr Wellington.

Background

8. Mr Wellington is and was at all times relevant to these proceedings a member of RICS. He is the sole director and principal of Albert D Wellington Limited (the Firm).
9. By application dated 15 March 2016, Mr Wellington applied for and was granted by RICS a membership subscription concession because he was, he stated, “unemployed/ seeking work”. This concession entitled Mr Wellington to a 90% reduction in his RICS annual membership fee. In support of his application, a copy of which was produced, Mr Wellington stated that he had been unemployed since February 2016. Mr Wellington made a further such application, also granted by RICS, dated 16 January 2017, for the following subscription year, stating in support that he had been out of work since October 2016.
10. RICS’ position and case (charges 1 and 2) is that these assertions were not in fact consistent with the facts. It says, in short, that Mr Wellington was undertaking at the relevant time remunerated work and that he was not in fact entitled to the concessions for which he applied, and that this was something of which he was, or reasonably ought to have been, aware. Mr Wellington’s applications were, it says, improper, at the time he made them and in any event as his circumstances changed (and he obtained work) while still (improperly) obtaining the benefit of the subscription concession. It points to the specific obligation on Mr Wellington, contained within RICS’ relevant terms and

conditions, also produced, to keep RICS updated as to any relevant change in his circumstances.

11. RICS further alleges (charge 3) that Mr Wellington has failed to cooperate appropriately with the RICS investigation giving rise to these proceedings.

Preliminary Application

12. Mr Geering initially made an application on behalf of RICS to amend charge 3, which should he submitted refer to a breach of Rule 9 of the RICS Rules of Conduct for Members, rather than Rule 8. The Panel, having considered, refused this application. Mr Geering submitted, in support of his application, that the amendment proposed amounted to a technical correction, and that the substance of the charge was clear from the wording of the charge itself, as well as from related correspondence produced. The Panel was, on balance, not persuaded by this argument. The Panel considered that the specification of the Rule alleged to have been breached was material and, as a matter of fairness to Mr Wellington, the application came too late.
13. This application having been refused, Mr Geering elected nonetheless to proceed with charge 3, as unamended.

Hearing

14. The Panel has had the benefit of the documentary bundle produced by RICS, including written statements produced by Mary McCusker, a member of staff of and auditor for RICS, who spoke to the process by which the Firm had applied for and been granted RICS registration in 2016/ 2017.
15. Ms McCusker speaks to the fact that the Firm's licence was approved in August 2016, and the first full annual return completed on 23 May 2017.
16. RICS additionally relies on a written statement produced by Joan O'Toole dated 20 February 2018. Ms O'Toole was then a Regulatory Officer employed by RICS. She spoke to documentation, produced, pertaining to Mr Wellington's application for a concession on ground of unemployment in relation to his membership subscription. The applicable RICS terms and conditions, relevant to concession applications, were produced and spoken to by Ms O'Toole, as were Mr Wellington's membership concession applications of 15 March 2016 and 16 January 2017. Ms O'Toole additionally spoke to a Firm Registration form dated 17 March 2016 (received by RICS on 13 May 2016), Valuer Registration form dated 20 June 2016, as well as an 'Interim Return form' dated 02 August 2016 and an Annual Return form dated 23 May 2017, all pertaining to the Firm and produced as evidence of the work in fact being undertaken by Mr Wellington at the material time. In addition, Ms O'Toole spoke to relevant correspondence between RICS and Mr Wellington, including specifically an attendance

note of a telephone conversation on 24 June 2016 and email correspondence dated 23 June 2017.

17. The Panel has had regard to all of the documentation produced, together with the written and oral submissions of the RICS legal representative. It has had particular regard to correspondence received by RICS from Mr Wellington.

Findings of Fact

18. The burden of proof is on RICS and the standard of proof is the balance of probabilities.
19. The Panel is satisfied, having regard to the documentation produced, that Mr Wellington was not in fact entitled to the membership subscription concession for which he applied and was granted in 2016. Mr Wellington's application was dated 15 March 2016. In doing so he stated explicitly that he had been "unemployed since Feb '16". Various figures were referred to in the bundle evidencing income earned by Mr Wellington or the Firm broadly relevant to the period in question. There was insufficient evidence to establish whether this income had been earned or work done in the specific time period(s) relevant to Mr Wellington's 2016 concession application. That said, there was before the Panel specific evidence in the form of correspondence dated 09 March 2016, in terms of which Mr Wellington states that he undertook a valuation on 07 March 2016. This is clearly inconsistent with his concession application dated 15 March 2016, in which he asserted, falsely, that he had been "unemployed since Feb '2016". Moreover, by email to RICS dated 23 June 2017, Mr Wellington stated that he had carried out valuations on behalf of another company, 'E', between 12 July 2016 and 14 October 2016. This should properly have been disclosed to RICS at the time because it is incompatible with his continued membership concession status. Had he done so, RICS would have been entitled to remove the concession and restore Mr Wellington to full membership status.
20. This is sufficient to establish the facts relevant to Mr Wellington's 2016 subscription concession application and ongoing status.
21. The Panel is not however satisfied that sufficient evidence has been produced to establish, on the balance of probabilities, that the statement in the subscription concession application submitted by Mr Wellington for the following year, on 16 January 2017, was false or inappropriate. While there is again evidence of periods of employment the evidence is not sufficiently clear as to the timing of this work relative to the statement asserted in his 2017 concession application.
22. The Panel is satisfied, having regard to charge 2, that there is clear evidence of dishonesty, having regard to the false statement made by Mr Wellington in his 2016 concession application, and his ongoing failure, in relation to the same 2016 application, to disclose to RICS the work he subsequently undertook. In arriving at this conclusion,

the Panel has had regard to the relevant test for dishonesty, as set out by the Supreme Court in *Ivey v. Genting Casino* [2017] UKSC 67, and the guidance on integrity provided by the Court of Appeal in *Wingate and Evans v Solicitors Regulation Authority* [2018] EWCA Civ 366.

23. The Panel accordingly finds charge 2a. established. Charge 2b was plead in the alternative, in the event that the more serious charge, 2a. were not upheld. There is no need therefore to deal further with charge 2b.
24. The Panel is not satisfied that charge 3 is established. It does not consider, firstly, that it is sufficiently clear as to what specific lack of cooperation is alleged such as to support a breach of Rule 8 of the Code of Conduct for Members. Moreover, and in any event, there is some evidence of cooperation in the form of correspondence between Mr Wellington and RICS (even if not such ultimately as to satisfy RICS). Accordingly the Panel does not find that charge 3 is made out.

Liability to Disciplinary Action

25. On the basis of the facts found the Panel has to decide whether or not Mr Wellington is liable to disciplinary action. In coming to its conclusion the Panel has accepted the advice of the legal assessor. This question is one for the Panel's judgment. The Panel has decided that the circumstances in this case, having regard to its findings in relation to charges 1 and 2, do give rise to a breach of Rule 3 of the Rules of Conduct for Members, in that Mr Wellington has not acted with integrity and avoided actions or situations that are inconsistent with his professional obligations. In this case the breach arises directly from the specific finding in this case of dishonesty.
26. That finding is a matter of some seriousness. The Panel considers in the circumstances that it has no option but to find Mr Wellington liable to disciplinary action.

Sanction

27. The Panel bears 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 RICS as its regulator and to protect the public. Sanctions must be proportionate to the matters found proved.
28. The Panel has paid careful heed to the advice of the legal assessor and to the indicative sanctions guidance of RICS. It has considered carefully submissions made on behalf of RICS and of the mitigating and aggravating factors of this case.
29. The Panel has decided that Mr Wellington is 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 that sanction is not appropriate does it move to the next level of sanction. The Panel bears in mind that more than one sanction may be imposed.

30. The Panel considers that its finding in this case is too serious not to impose any sanction. It recognises that any finding of dishonesty in professional regulatory proceedings is by definition a serious one, albeit that not all findings of dishonesty are equally serious. In this case, and in mitigation, the Panel notes that Mr Wellington has hitherto an unblemished disciplinary record. Moreover, there has been no harm or loss caused as such to clients or to the public. On the other hand, Mr Wellington has been found to have been dishonest in his dealings with his regulatory body, and to have done so such as to procure financial gain (a reduced membership subscription fee).
31. The Panel has considered carefully whether a caution, reprimand or the imposition of undertakings might be appropriate in this case. It is not satisfied that any combination of these would properly reflect the gravity of the conduct in question. That conduct, involving dishonesty, goes to the heart of the obligation of trust conferred upon professional people.
32. The Panel sees little purpose in the imposition of conditions, recognising the lack of engagement by Mr Wellington with these proceedings. The Panel has no basis for any confidence that such conditions would be actively complied with. It has taken great care to consider whether a monetary fine might be sufficient. The Panel is however concerned, not only at the seriousness of the conduct in this case, but also at the complete lack of any evidence to suggest appropriate reflection or insight on the part of Mr Wellington. It considers for this reason, with some reluctance, that it has no option but to regard Mr Wellington's conduct as being incompatible with his ongoing membership of RICS. The Panel accordingly imposes the sanction of expulsion in this case.

Publication

33. The Panel has considered the guidance as to publication of its decisions. It accepts the legal assessor's advice. The advice was, and the guidance provides, that it is usual for the decisions of the Panel to be published on RICS' website and in RICS Modus. The Panel sees no 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.
34. The Panel orders that this decision is published on RICS' website and in RICS Modus, in accordance with Supplement 3 to the Sanctions Policy 2008 version 6.

Costs

35. RICS has asked for costs in the total sum of £6,510. It has provided a costs schedule to Mr Wellington in advance of the hearing.
36. The Panel has considered carefully the costs sought and determined that they are reasonable and proportionate. The Panel orders Mr Wellington to pay RICS' costs, albeit restricted to the sum of £5,500, to reflect the fact not all of the charges brought resulted in adverse findings against Mr Wellington.

Appeal Period

37. Mr Wellington may appeal to an Appeal Panel against this decision within 28 days of notification of this decision, in accordance with Rules 58 – 70 of the Rules.
38. The Honorary Secretary of RICS may require a review of a finding or penalty imposed by a Disciplinary Panel within 28 days from service of the notification of the decision, in accordance with Rule 59 of the Rules.