

Disciplinary Panel Hearing

Case of

**Mr David Davies MRICS
Aberaeron, Ceredigion, SA46 0DY**

On

Wednesday 25 April 2018

At

Priory Rooms, Birmingham

Panel

Helen Riley (Surveyor Chair)
Nick Hawkins (Lay Member)
Ian Hastie (Surveyor Member)

Legal Assessor

Alastair McFarlane

RICS Presenting Officer

Christopher Geering

Mr Davies Representative

Aled Owen

Hearing Officer

Jae Berry

The formal charges is:

1. When corresponding with BB and WPD between 08 March 2012 and 30 July 2012 you failed to avoid any actions or situations that were inconsistent with your professional obligations and you were dishonest,

Or in the alternative

2. When corresponding with BB and WPD between 08 March 2012 and 30 July 2012 you failed to act with integrity and avoid any actions or situations that were inconsistent with your professional obligations,

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

Particulars

- a. Between the dates of 08 March 2012 and 30 July 2012 you engaged in correspondence with BB and WPD in relation to a personal dispute and/or in relation to a dispute with your wife's business JB.
- b. You misrepresented your status by suggesting that you were instructed in your professional capacity via your employers Morgan and Davies ("the Firm") when in fact you were not.
- c. You failed to disclose your interest in the JB business to BB and WPD
- d. Within that correspondence, you purported to claim the Firm's costs from a third party, calculated on the Firm's hourly rate and using the Firm's letterheaded paper, even though the Firm had no contractual basis to do so.
- e. You relied upon this improper claim for costs in an attempt to reach a more favourable and/or prompt settlement from the other side.

Mr Davies is therefore liable to disciplinary action under RICS Bye-law B5.2.2

(a) or (c)

DETERMINATION

Representation and Service

1. RICS was represented by Mr Geering and Mr Davies was represented by Mr Owen. The Notice of Hearing was sent by RICS to the Firm by post and by e mail on 23 January 2018.
2. The Panel has before it two bundles of documents from RICS. Bundle One was numbered pages, 1-130 and Bundle 2 was numbered pages 1-390. Additional pages numbered 131-135 were added to Bundle One. It also received a witness statement from Mr Davies and supplementary documents from Mr Owen, numbered pages 1-21. In addition, it received skeleton arguments from both sides.

Preliminary Application

3. At the outset of the hearing RICS made an application under Rule 41h to amend particular c of the charge by deleting the word "business" and inserting the word "property". This was on the basis that it more accurately reflected the case. This was not opposed by Mr Owen. The Panel accepted the advice of the Legal Assessor and was satisfied that the amendment should be made and could be made without injustice and therefore granted the application.

Background

4. **Mr David Davies (referred to as "Mr Davies") has been a professional member of RICS since January 1998. He was employed by an estate agency firm called Morgan & Davies ("the Firm") from 1995 until 2016. The**

Firm was owned by three equity partners – Mr Andrew Morgan and Mr Dylan Davies (no relation to Mr David Davies) and a limited company. It had two offices in Wales – one in Lampeter run by Mr Morgan and the other in Aberaeron run by Mr Dylan Davies. Mr Davies was based at the Lampeter office.

5. It is not disputed that the relationship between Mr Davies and the Firm broke down acrimoniously in 2016. The Panel had been provided with documentation relating to this breakdown by way of background, but the relevant issue to the charge related to Mr Davies' actions between March and July 2012 when he was corresponding with Balfour Beatty ("BB") and Western Power Distribution ("WPD").
6. Mr Davies and his wife jointly owned a property at 4 Market Street, Aberaeron. Mrs Davies conducted a retail clothing business from their property. Her business traded as 'Ji Binc' ("JB").
7. In 2012 BB, while undertaking works for WPD, allegedly caused damage at the Market Street property and Mr Davies on his and his wife's behalf commenced an insurance claim for damages with BB and WPD. For example, he wrote a letter to BB dated 19 April 2012 on the Firm's headed notepaper.
8. It is agreed evidence that in all correspondence and emails dealing with this dispute Mr Davies represented that the Firm were acting on a professional basis on behalf a "client" or "clients" and at no stage did Mr Davies declare either his interest in the property or his wife's interest in the business, JB. It is agreed that the correspondence suggested that the Firm was instructed as agents on behalf of the property owners. Mr Davies corresponded with Balfour Beatty and Western Power Distribution using Morgan & Davies

letterhead. He made no reference to him being a joint owner of the property or that JB was his wife's business.

- 9. On 09 July 2012, Mr Davies, from his work email address wrote to BB as follows: "I have spoken to our clients who we confirm have refused your offer".**
- 10. In addition it is agreed that Mr Davies also sought to make a claim for costs against Western Power, commenting:**
 - a. 19.04.2012 – "[we] confirm that our fees in the matter are £100.00 per hour, on a quantum merit basis, and would like to confirm, to date, we have spent 3 hours on this claim"
 - b. 25.06.2012 – "Unless agreement is made for payment of the original claim in full plus our fees in addition (which are based on an hourly rate of £110 per hour as are agreed with other utility companies)..."
 - c. 28.06.2012 – "Our original claim is for £1,093 plus our costs which now stand at 4 hours @ £100 per hour"
 - d. 10.07.2012 - "Obviously, the more time we spend in dealing with this, and the extra legal costs and Court fees incurred, will add to the claim."
 - e. 10.12.2012 – "One of the issues in dispute is the fees of Morgan & Davies".
11. The central issue of this case is whether Mr Davies was authorised to have pursued JB's claim against BB and WPD on behalf of the Firm.
12. Mr Davies contended that Mr Morgan was aware that he was conducting this claim on behalf of the Firm; that he was a specialist in such disputes; that Mr Morgan consented to him so acting and that he discussed the settlement with Mr Morgan who waived the Firm's claim to any costs.
13. RICS contend Mr Morgan did not authorise Mr Davies to represent the Firm; that Mr Davies engaged in the correspondence misrepresenting that the Firm was instructed

in a professional capacity when it was not and sought to use an improper claim for costs in an attempt to reach a more favourable and prompt settlement. RICS contended that this behaviour was dishonest. In the alternative, RICS contended that the conduct amounted to a failure to act with integrity.

Findings of fact

14. The Panel carefully considered the evidence it received. This consisted of the large volume of documentary evidence (although parts of this related to other aspects of the dispute between the Firm and Mr Davies and were not relevant to this allegation). It received oral evidence from Mr Dylan and Mr Morgan called on behalf of RICS and from Mr Davies on his own behalf. Mr Davies also submitted a witness statement from Mr Jones a Manager of WPD.
15. The Panel reminded itself that the burden of proving the charges were on RICS alone and that the standard of proof was the ordinary civil standard, namely the balance of probabilities. The Panel accepted the advice of the Legal Assessor. It is noted that Mr Davies was of good character and put this into the balance in his favour.
16. The Panel noted that Mr Dylan's evidence was largely limited to detailing the Firm's investigation, and he could not give direct evidence as to the central issues. There was, however, a direct conflict of evidence between the principal witnesses, Mr Morgan and Mr Davies as to what occurred between them at work in the first half of 2012. It was therefore necessary for the Panel to undertake an assessment of their respective credibility. The Panel had the benefit of seeing and hearing both witnesses give evidence before it. The Panel considered that both witnesses did their best to assist it with their

recollection. The Panel made due allowance for both witnesses for the number of years that have passed since these events and the subsequent acrimonious fracturing of their relationship. However, overall, it considered that Mr Morgan's recollection of events was more likely to have been accurate than Mr Davies and, accordingly, the Panel could place more reliance upon his evidence, where their accounts differed. Its reasons for this are as follows.

17. The Panel concluded that Mr Morgan gave considered, reflected evidence and had, where appropriate, made concessions when questioned. For example, he readily accepted that he may have opened a letter dated 8 March 2012 at page 55 of Bundle one which was addressed to "Mr D Davies" explaining that he may have done this because this was the name of his partner, Mr Dylan Davies. Further, Mr Morgan accepted, when cross-examined, that he did permit Mr Davies to take on new clients without permission.

18. In relation to Mr Davies, the Panel noted that there were some inconsistencies and inaccuracies in his evidence that, in the Panel's judgement, adversely affected his reliability. For example, Mr Davies contended that he told Mr Morgan that he was conducting his wife's utility claim. However this account does not appear in his original interview with his employers in 2016. Further, in his witness statement, Mr Davies said that he spoke to Mr Jones at WPD at an early stage, but Mr Jones, in his statement, confirmed Mr Davies did not speak to him initially. Then on questioning, Mr Davies was unable to give a date of any conversation with Mr Jones and conceded in evidence it was not at the beginning. The Panel considered that his oral evidence was less reflective than Mr Morgan's, and despite making due allowance for the stress of attending before his professional body, concluded that he was a less reliable witness. For example, Mr Davies explanation that he was previously unaware of "the

rugby incident" concerning Mr Morgan and Mr Jones, was in the Panel's judgment, in the small community in which they lived and worked inherently unlikely and therefore lacked credibility.

19. Accordingly, the Panel considered Mr Morgan's assertion that at no stage had Mr Davies approached him for permission to conduct the JB claim through the Firm more likely than not to be accurate. The Panel did not consider that Mr Davies had been deliberately untruthful in his evidence, but rather, given the time and events and that have occurred since 2012 in his relationship with the Firm, that he may have convinced himself that the conversation took place, whereas the Panel is satisfied, on the balance of probabilities, that it did not.
20. Having reached this assessment on the credibility of the witnesses, the Panel firstly considered the individual Particulars of the allegation that are common to both Charge 1 and the alternative Charge 2.
 - a. *Between the dates of 08 March 2012 and 30 July 2012 you engaged in correspondence with BB and WPD in relation to a personal dispute and/or in relation to a dispute with your wife's business JB.*
21. This was admitted by Mr Davies at the outset and the Panel find it proved by virtue of his admission.
 - b. *You misrepresented your status by suggesting that you were instructed in your professional capacity via your employers Morgan and Davies ("the Firm") when in fact you were not.*
22. It was not disputed by Mr Davies that between those dates he engaged in correspondence with BP and WPD in relation to JB's claim for damages. He did this on the Firm's headed notepaper, or on the Firm's email and the

Panel had no hesitation in concluding that the correspondence suggested that he was instructed in a professional capacity via the Firm. Mr Davies case had been that he had express authority from Mr Morgan to do this and therefore was not misrepresenting his status. Given, its findings on the disparity in evidence between Mr Morgan and Mr Davies, the Panel was satisfied, for the reasons stated above, that there was no express authority for Mr Davies to have so represented himself in this case.

23. The Panel went on to consider whether RICS had proved that Mr Davies also did not have any implied authority to so represent himself. The Panel noted Mr Morgan's frank acceptance that Mr Davies could and did sometimes take on clients without his or the Firm's express permission, but accepted his assertion that in circumstances involving family matters or conflicts of interest, he would have expected Mr Davies to approach him "for authorisation because he was acting for himself". It also noted Mr Morgan's comment that had Mr Davies brought this matter to him he might well have suggested that he, Mr Morgan, undertake the work himself. The Panel was satisfied given the circumstances that RICS has established that in fact Mr Davies had misrepresented his status because he was not expressly or impliedly authorised to Pact to act in the Firm's name in this dispute in which he had a direct personal interest and a conflict of interest. Accordingly, particular b is proved.

c. You failed to disclose your interest in the JB property to BB and WPD

24. The Panel concluded that it was clear on the face of the documentation before it that Mr Davies did not disclose his interest in the JB property as co-owner nor his wife's ownership of the JB business to BB and WPD. The Panel accepted Mr Jones's evidence, served on behalf of Mr Davies, that "initially" he had no indication of any connection between Mr Davies and property, but that before the matter was settled he became aware – he did

not know how – “that Mr Davies and the owner of the property were in fact husband and wife”. The Panel also noted that Mr Davies accepted he did not tell BB and repeatedly stated in evidence that he wished he had added a line to the correspondence informing BB and WPD of his interest in the property. The Panel was satisfied that there was a clear conflict of interest and Mr Davies ought to have disclosed his interest. He therefore failed to do so and, accordingly, particular c is proved.

d. Within that correspondence, you purported to claim the Firm’s costs from a third party, calculated on the Firm’s hourly rate and using the Firm’s letterheaded paper, even though the Firm had no contractual basis to do so.

25. The Panel was satisfied on the face of the correspondence before it that Mr Davies sought to claim the Firm’s costs. Given its earlier findings, set out above, that Mr Davies was not authorised to act on behalf of the Firm in this case, and that there was no contractual basis for him to claim the Firm’s costs, particular d is proved.

e. You relied upon this improper claim for costs in an attempt to reach a more favourable and/or prompt settlement from the other side.

26. **The Panel considered that this particular added little to the factual matrix. It was satisfied that the claim for costs was "improper", as alleged, as there is no contractual basis for the Firm to be able to claim costs. The Panel was of the view that his was a negotiating tactic to reach a prompt settlement. Accordingly, particular e is proved.**

Dishonesty.

27. **The Panel applied the test for dishonesty as set out by Lord Hughes at paragraph 74 of the decision of the Supreme Court in *Ivey v. Genting Casinos (UK) Ltd* [2017] 3WLR 1212.**

28. The Panel was satisfied that at the time of the events Mr Davies genuinely believed that he did have implied authority to pursue this claim in the Firm's name. The Panel reached this conclusion having regard to the specific facts of this case. These included: the context of the Firm's practice; this was a small office in a local community firm practising in what the Panel accepted was described as a fairly "laissez-faire" approach to formal policies and procedures. The Panel considered it significant that there was no evidence that Mr Davies was pursuing anything other than a fair claim, that was not inflated and using normal methods of pursuing such a claim. However, it was satisfied that he had not informed his employer or BB or WPD of his personal interest and he had not been transparent. Having found that this was Mr Davies genuine belief as to the facts, it was satisfied that his conduct would not be dishonest by the objective standards of ordinary decent people. Accordingly, Charge 1 was not proved.

29. The Panel therefore went on to consider the alternative charge, based on the same particulars, of failing to act with integrity, as set out in Charge 2.

30. The Panel was mindful of the approach adopted by the Court of Appeal in *Wingate v. The Solicitors Regulation Authority* [2018] EWCA Civ 366 to the meaning of integrity and the basis on which RICS put its case on this charge, namely that Mr Davies was reckless as to the accuracy of his statements regarding both his relationship with the client and the basis on which costs were accruing.

31. The Panel had no hesitation in concluding that in pursuing this claim while purporting to be acting for the Firm in a professional capacity when he did not have actual or implied authority, was reckless conduct. He had a duty to disclose his connection with JB and his co-ownership of the property and, despite his genuine but erroneous belief that he had implied authority, he was in breach of basic ethical standards of the profession and a mounted therefore to a failure to act with integrity. Accordingly, Charge 2 is proved.

Liability for Disciplinary Action

32. RICS submitted that as Mr Davies had been found to have failed to have acted with integrity in breach of Rule 3 of the Rules of Conduct for Members 2007 that this was self-evidently sufficiently serious to render him liable for disciplinary action.
33. Mr Owen conceded on Mr Davies's behalf that the failure was sufficiently serious to render him liable for disciplinary action.
34. The Panel accepted the advice of the Legal Assessor. It reminded itself that liability to disciplinary action was a matter for the judgment of the Panel. It was satisfied that Mr Davies' conduct amounted to a serious falling short of his professional obligations and had no doubt that that it was sufficiently serious to render him liable to disciplinary action.

Sanction

35. The Panel next considered sanction. It noted the submissions of RICS and Mr Owen. It accepted the advice of the Legal Assessor. It had regard to RICS Sanctions Policy and bore in mind the overriding principle of proportionality.
36. 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 RICS as its regulator and to protect the public. Sanctions must be proportionate to the matters found proved.
37. RICS confirmed Mr Davies did not have any previous disciplinary record. On behalf of Mr Davies, Mr Owen made submissions on mitigation.
37. The Panel considered carefully the mitigating and aggravating factors of this case as well as the issue of proportionality in weighing up the most appropriate response.
38. The Panel considered that the following mitigating factors were present:
- Mr Davies had no previous disciplinary record.
 - There were impressive and supportive testimonials.
 - He was contrite and aware of his failings.
 - The Panel was satisfied that he had learned his lesson and that this had been a salutary experience for him.
 - Consequently the risk of repetition was very low.
 - Although the conduct constituted a course of action, it was one isolated case (over a relatively short period) that occurred over six years ago.
 - Whilst the Panel was mindful that each professional is responsible for his own professional obligations, it noted that his conduct took place in a culture where it was accepted the firm had no written policies or handbook.

- Mr Davies made no personal financial gain and had not inflated the claim against the third party.
- He had fully co-operated with his regulator, RICS.

39. The Panel considered that the following aggravating factor was present:

- The conduct amounted to serious misleading admissions in relation to basic professional obligations.

Decision

40. The Panel reminded itself that acting with integrity is a fundamental tenet of the profession and that the reputation of the profession is more important than the fortunes of any individual.

41. The Panel considered the matters are too serious for no sanction at all to be imposed. They considered the sanctions in ascending order of restrictiveness.

42. The Panel considered that a Caution was insufficient to mark the seriousness of the behaviour and to adequately maintain the reputation of the profession and the failings could not be described as "minor".

43. Bearing in mind the significant mitigating factors as well as the seriousness of the failing, the Panel was satisfied that a Reprimand was an appropriate and proportionate sanction in the circumstances.

44. The Panel did consider whether to impose a Fine in addition to the Reprimand. It had regard to Supplement 2 to the Sanctions Policy in relation to Fines. It reminded itself that the purpose of any sanction is not to be punitive and noted that the submissions made about Mr Davies limited means. Considering all the circumstances, including

Mr Davies's ability to pay, it did not consider that it was appropriate to impose a financial penalty in addition.

45. The Panel would add that it was mindful that lack of integrity cases can result in the expulsion of a member, but was satisfied there were sufficient extenuating circumstances in this case that would make such a sanction disproportionate.

Publication

46. The Panel noted the competing submissions of the parties on the issue of publication. It did not consider that Mr Owen's arguments as to the possible effect of publication on Mr Davies in his small West Wales community outweighed the public interest in RICS's regulatory decisions being published and were not a sufficient basis for departing from the presumption of publication. The Panel considered the policy on publication of decisions, The Sanctions Policy Supplement 3 - Publication of Regulatory Disciplinary Matters. Accordingly this decision will be published on the RICS website and in the RICS magazine Modus.

Costs

47. RICS made an application for costs in the sum of £11,700. Mr Owen did not submit a critique of the individual costs claimed, but limited his submissions in contending what was a reasonable and fair amount bearing in mind Mr Davies's ability to pay.
48. The Panel bore in mind all the circumstances including Mr Davies's limited means and concluded that it was fair and reasonable to direct that Mr Davies pay RICS's costs in the sum of £10,000.

Appeal Period

49. Mr Davies has 28 days, from the service of the notification of the decision, to appeal this decision in accordance with Rule 59 of the Rules.

50. In accordance with Rule 60 of the Disciplinary, Registration and Appeal Panel Rules, the Honorary Secretary of RICS has 28 days, from the service of the notification of the decision, to require a review of this Decision.