

ROYAL INSTITUTION OF CHARTERED SURVEYORS

DISCIPLINARY PANEL HEARING BY WAY OF WRITTEN REPRESENTATIONS

Case of

Derek Fox MRICS [1175971]

Doncaster, DN2

On

Thursday 21 April 2016

Via telephone conference

Panel

Helen Riley (Member Chair)

Carolyn Tetlow (Lay Member)

CHARGE HEARD

The Panel considered the following:

You have failed to comply with RICS' requirements in respect of continuing professional development ("CPD") in that you have not recorded your CPD activity for 2015 online **contrary to rule 6 of the Rules of Conduct for Members 2007 version 6.**

DETERMINATION

1. Service and proceeding in absence

By Rule 23 notice of a hearing must be given by "special post". In the Disciplinary Registration and Appeal Panel Rules the definition of special post is "special post means a method of delivery by which delivery of the post can be confirmed". "Post" is not a defined term.

The notice of the hearing was posted by email, special delivery and first class post, and such notice complies with the Rules. The service of the notice was evidenced by a signed Royal Mail proof of delivery form dated 22 March 2016 at 11.29am.

The Panel noted that the Relevant Person had responded to the notice by email on 1 April 2016. However, this was to tell RICS Regulation that he had informed RICS ME that he would not be renewing his RICS membership in 2016.

The Relevant Person had not responded to the notice on the matter of this hearing.

The hearing listed for today is a paper hearing and the Relevant Person was asked in the charge letter whether he wished to have an oral hearing, but has not so requested.

The Panel considered whether to proceed in the absence of the Relevant Person.

The Panel considered carefully the guidance in R v Jones [2002] UKHL 5 which approved the guidelines set out by the Court of Appeal below in paragraph 21 of that decision:-

"In our judgment, in the light of the submissions which we have heard and the English and European authorities to which we have referred, the principles which should guide the English courts in relation to the trial of a defendant in his absence are these:

1. A defendant has, in general, a right to be present at his trial and a right to be legally represented.

2. Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.

3. The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.

4. That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.

5. In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:

(i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;

(ii) whether an adjournment might result in the defendant being caught or attending

voluntarily and/or not disrupting the proceedings;

(iii) the likely length of such an adjournment;

(iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;

(v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence;

(vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;

(vii) the risk of the jury reaching an improper conclusion about the absence of the defendant;

(viii) the seriousness of the offence, which affects defendant, victim and public;

(ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;

(x) the effect of delay on the memories of witnesses;

(xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

6. If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits. In summing up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case."

The Panel bore in mind the guidance in the case of Adeogba v GMC [2016] EWCA Civ 162 "Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed." No good reason not to proceed has been given or is apparent to the Panel.

The Panel decided that the Relevant Person had voluntarily decided not to participate in the process and that no purpose would be served by an adjournment. Accordingly the Panel decided to proceed in the absence of the Relevant Person.

2. The burden of proof is on RICS and the standard of proof is the balance of probabilities.

Findings of fact

3. From January 2013 RICS members were obliged to complete 20 hours CPD activity by 31 December of each calendar year.
4. Rule 6 provides: “Members shall comply with RICS requirements in respect of continuing professional development.”
5. CPD requirements for members are: –
 - Of the 20 hours at least 10 hours must be formal CPD.
 - All members must maintain a relevant and current understanding of RICS’ professional and ethical standards during a rolling three-year period. Any learning undertaken in order to meet this requirement may count as formal CPD.
 - All members must record their CPD activity online.
6. The online CPD record was attached to the charge. It is a matter of record. The record for the Relevant Person for the calendar year 2015 does not show 20 hours CPD recorded. There are no submissions from the Relevant Person that the record is inaccurate.
7. Accordingly the Panel finds the allegation proved.

Sanction

8. The Panel next considered sanction. The RICS rules about CPD require members to undertake and to record online 20 hours CPD each year. For those who failed to comply with that rule, the sanction imposed was a caution. For those who failed to comply for a second year the sanction was a further caution and a penalty of £150. This is the third year of compulsory recording of CPD online. The Relevant Person is charged with failing to record CPD for the calendar year 2015, and had received the two cautions and paid the fine of £250 imposed last year (originally £150 but increased to £250 due to late payment).
9. From the inception of the compulsory recording of CPD online RICS has publicised its policy on sanctions for non-compliance. For a third failure the Sanctions Policy at paragraph 22 indicated that expulsion was the likely sanction.
10. The Relevant Person offered no explanation for the failure to record 20 hours CPD online during 2015 but told RICS that he would not be renewing his RICS membership in 2016. In an email to RICS ME dated 31 March 2016, the Relevant Person said “as previously informed” he would not be renewing his membership. RICS checked his membership file and confirmed that they had no record of any previous notification informing RICS ME of this intention, and therefore asked the Relevant Person if he could forward a copy of his earlier request. This was not forthcoming. Therefore the Panel noted that the only evidence of the Relevant Person’s request not to renew his membership was as at 31 March 2016. As the deadline for submission of CPD for 2015 was 31 January 2016, disciplinary

proceedings had already commenced by the time the request not to renew his membership was received. In accordance with Bye-Law 5 (Conduct section - B5.2.3): "A Member will not be entitled to resign from membership of RICS until all proceedings against him under this Bye-Law have been concluded other than in exceptional cases at the discretion of the Head of Regulation". With regard to the Relevant Person's failure to record CPD, no record or explanation was provided.

11. This is the third successive year the Relevant Person has failed to comply with the obligation to record 20 hours of CPD online in a calendar year. RICS is a professional membership organisation and sets standards for its members as a condition of membership. It is not difficult to record CPD online. There is no excuse for failing to comply with such a rule. Compliance is not optional.
12. The Panel also noted the Relevant Person's intention not to renew his membership and that he had not paid his subscription fees for 2016. In the event that no disciplinary proceedings were underway, RICS' normal course of action would have been to remove membership for non-payment of the subscription fee. In the Panel's view it is therefore likely that the Relevant Person's membership would have been terminated for non-payment of his subscription in any event. However, he has also failed to comply with the Rules in respect of his CPD, and those who do not comply with the Rules of RICS cannot expect to remain members of it. Accordingly the Panel decided to expel the Relevant Person for failure to record his CPD.

Publication

13. The Panel has considered the policy on publication of decisions, The Sanctions Policy Supplement 3 - Publication of Regulatory Disciplinary Matters. This decision will be published on RICS' website, in RICS' magazine Modus, but not in a local newspaper.

Costs

14. RICS asked for costs of £600, the standard charge for a paper hearing. This is a straightforward matter, and the standard fee is in excess of what may realistically be expected to be the costs incurred in bringing the charge. The Panel orders that the Relevant Person pay costs of £100.

Appeal Period

15. The Relevant Person has 28 days, from the service of the notification of the decision, to appeal this decision in accordance with Rule 59 of the Disciplinary, Registration and Appeal Panel Rules.
16. 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.