

Case of

Mr Norman Russell MRICS, [0049059]

**Russell Brothers [010807]
NEWTOWNARDS, County Down, BT23**

Held on

Wednesday 23 September 2015

At

RICS, Parliament Square, London

Panel

Paul Housego (Chair)
Carolyn Tetlow (Lay Member)
Helen Riley (Member)

RICS Representative

Vicki Buckley

Relevant Persons Representative

Dr Austen Morgan

Legal Assessor

Sarah Ellson

The formal charges against Mr Norman Russell are:

1. On 27 September 2014 as a principal of the regulated firm Russell Brothers you authorised and made a bank transfer of £18,870 from the firm's client account to the bank account of a car dealership in England to enable your wife to complete the purchase of a car
2. You made the transfer of client funds without entitlement or consent knowing that you were not entitled to use client funds for your own purposes
such that your conduct was (a) dishonest and or (b) a failure to comply with professional obligations

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

The formal charges against Russell Brothers ("the firm") are:

1. On 27 October 2014 a regulatory review of the accounting systems and controls in use by the registered firm Russell Brothers identified risks to the security of client money:
 - from misuse of client funds;
 - as a result of incomplete information in reconciliations of client accounts;
 - as a result of client money not being kept separately from that belonging to principals

in particular:

- A payment of £18,870 was made by a principal of the firm from the general client account to fund the purchase of a personal item;
- Reconciliations of the client accounts included undated reconciling items making it difficult to identify errors and mistakes;
- Principals of the firm were listed as clients and money belonging to them was held in the client account

as detailed in full in the report of the review visit which demonstrated that the adequacy of the accounting systems and controls in operation was not sufficiently robust to preserve the security of clients' money entrusted to the care of the firm in the course of its business.

Contrary to Rule 8 of the Rule of Conduct for Firms 2007

Response

At the outset of the hearing Mr Alfred Russell, referred to as Mr Norman Russell, denied the charge as alleged. On his behalf it was admitted that on Saturday 27 September 2014; in circumstances explained in paragraph 13 of the Amended Skeleton Argument he transferred £18,870 out of the client account to a car dealer on behalf of his wife; knowing that she was a client of the firm but without ascertaining whether or not that sum was credited to her name.

The Firm, through the person of Mr Alan Russell, denies the misuse of client funds but admits that client accounts included undated reconciling items making it difficult to identify errors and mistakes and that principals of the firm were listed as clients and money belonging to them was held in the client account.

Summary

The underlying facts of the case are not disputed. On Saturday 27 September 2014 as a principal of the regulated firm Russell Brothers Mr Norman Russell authorised and made a bank transfer of £18,870 from the firm's client account in Northern Ireland to the bank account of a car dealership in England to enable his wife to complete the purchase of a car. Mr Russell has explained that this was due to problems his wife experienced with her intended payment method.

The £18,870 was re-imbursed to the client account in full on Monday 29 September 2014.

The issues in this case concern Mr Norman Russell's entitlement to use client funds for this purpose and whether doing so was dishonest and/or a failure to comply with professional obligations or in the firm's case whether this was a misuse of client funds.

In relation to the firm there is a regulatory review visit report prepared by Mr Bellis, on behalf of RICS, which brought this payment to light and which raised three questions:

- the adequacy of the accounting systems and controls in operation at the firm which enabled this funding of a purchase of a personal item
- an alleged absence of full and complete information to enable reconciliations of client accounts; and,
- client money not being kept separately from that belonging to principals.

Burden and standard of proof

The RICS is required to prove the allegations to the civil standard; that it is more likely than not that any event material to those allegations occurred. That is a single unwavering standard of proof, though the more unlikely an allegation the more cogent the evidence that the Panel might require to prove it. There is no requirement for Mr Norman Russell or the firm to prove anything. The Panel has in mind throughout its deliberations that the right to practise a profession is involved in these proceedings and proceeds upon the basis that the Human Rights Act 1998 will apply. It bears in mind in particular Mr Norman Russell's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as incorporated within UK law by that Act. The question of whether or not any facts admitted or found proved gave rise to liability to disciplinary action is a matter for the Panel's judgment.

Evidence

The Panel has perused the RICS solicitor's two bundles of documents, running to 31 and 45 pages respectively. It has also read the Chronology and Amended Skeleton Argument prepared on behalf of Mr Norman Russell and the Firm. The Panel heard oral evidence from Mr Bellis called by the RICS presenting solicitor. The panel also heard evidence from Mr Alan Russell as the contact officer of the Firm and from Mr Norman Russell.

Findings of fact

The Panel accepts the account of Mr Norman Russell that on Saturday 27 September his wife had travelled to England to purchase a car from a dealer in Twickenham. She had taken his personal debit card to pay for the vehicle, that bank account containing sufficient money to pay for the car. Despite an earlier indication that the card would be accepted, the dealership in fact refused to accept such payment. Mr Norman Russell's wife contacted him and he called his bank and was advised that they would only transfer £10,000 from his personal account. He did not have internet banking on that account and so drove to his office and, knowing that there was insufficient funds in the office account, logged on to the firm's Danske Bank client account and arranged a transfer of £18,870 to the dealership in England. Mr Norman Russell told the Panel that on that day he wrote a cheque for this amount from the personal account containing the money that was to be used to pay for the car. He placed the cheque in the cash box for client account so that it would be paid in by staff on the following Monday. It became clear in the course of the evidence that the money was paid into the firm's Santander client account, the credit appearing on the bank statement on Monday 29 September, which was the date the debit entry showed on the Danske Bank client account statement.

The Panel finds the entirety of the charge against the Firm proved. It is satisfied that there was a misuse of client funds when this payment of £18,870 was made by a principal of the firm from the general client account to fund the purchase of a personal item.

The Panel notes that the personal item was not directly for Mr Norman Russell, it was a car for his wife but it understands that the payment was paid in lieu of money that Mr Norman Russell was otherwise expecting to pay personally for the car.

The Panel finds the charge against Mr Norman Russell proved except for the allegation that he was dishonest. Mr Russell's evidence was that, when he made the payment, he knew that the credit on his wife's client ledger was considerably less than £18,870. Although the charge was denied at the outset, in closing it was accepted that the facts were admitted, again on the understanding that the reference to "for your own purposes" was in relation to the purchase of a car for his wife. The only part denied was dishonesty.

The Panel does not find Mr Norman Russell to have been dishonest.

Discussion and conclusion

RICS alleged that Mr Norman Russell was dishonest. The Panel accepted the advice of the legal assessor that this question involves the two stage test set out in Twinsectra Ltd -v- Yardley & Others [2002] UKHL 12, subject to the observations of Longmore LJ made in Hussain -v- GMC [2014] EWCA Civ 2241 and Mr Justice Popperwell in the case of PSA v HCPC and David [2014] EWHC 4657 (Admin). The Panel considered whether it was satisfied on the balance of probabilities that:

1. what was done in transferring the funds from client account to pay for his wife's car for the period between Saturday 27 September and Monday 29 September 2014 was dishonest by the standards of reasonable and honest people and/or reasonable and honest Chartered Surveyors; and;
2. that (again on the balance of probabilities) Mr. Russell realised that what he was doing was dishonest by those standards.

The Panel notes that the RICS Presenting Officer did not put the express question to Mr Norman Russell as to his dishonesty, as she perhaps should have. However the Panel notes that the position taken by RICS was clearly, and quite properly, set out in the charge and in correspondence to which Mr Norman Russell has responded. His representative was specifically able to address the Panel on the issue and submitted that Mr Russell should not be considered to have been dishonest.

The Panel is satisfied that the bare facts of the case do indicate dishonesty. It is satisfied on the first limb of the test; that the transfer of funds from client account of a sum which Mr Norman Russell knew exceeded the amount held to his wife's benefit would be considered dishonest by ordinary people and by reasonable and honest Chartered Surveyors. Client account money was used for Mr Russell's personal benefit.

However, having heard the evidence of Mr Russell and read the evidence and submissions, the Panel is not satisfied that Mr Russell realised what he was doing was dishonest by those standards. In the Panel's view he has shown a remarkable and lamentable lack of insight as to his actions and that what he was doing when he sought find a way of transmitting the money to pay for his wife's car was in fact a misuse of the client funds, and involved taking from client account money which did not belong to his wife and thereby involved the use of funds properly held for other clients of the firm. Mr Russell had the money to pay for the car, but could not transmit it to the dealer in England that day, his wife being at the garage to collect the car. The Panel accepts that his intention was to replace the money in client account at the same time as he used the client account to transmit the money to England. He wrote the cheque on his personal account (that contained the money to reimburse client account) at the same time as he made the transfer. This was done on a Saturday, and he correctly predicted that the bank statements would not show a shortfall of £18,870 at any time, since both transactions were shown as processed on Monday's bank statements. However, this is to drive a coach and horses through the rules, as client money is sacrosanct.

Having found proved the misuse of client funds and noting the admissions as to other breaches of the accounting systems and controls identified by Mr Bellis in his regulatory review visit, the Panel finds the firm to have breached Rule 8 of the Rules of Conduct for Firms 2007.

Similarly, the Panel finds proved a failure by Mr Norman Russell to comply with his professional obligations which amounts to a breach of Rule 3 of the Rules of Conduct for Members 2007.

On the basis of the facts found the Panel had to decide whether or not Mr Norman Russell and/or the Firm are liable to disciplinary action. This question is one for the Panel's judgment. The Panel decided that both are indeed liable for disciplinary action. The use of funds from the firm's client account breached Mr Norman Russell's obligations to act at all times with integrity, as set out in Rule 3.

In allowing:

- a principal of the firm to misuse the general client account;
- reconciliations of the client accounts with undated reconciling items and
- having principals of the firm as clients and money belonging to them held in the client account,

the Firm failed to preserve the security of clients' money entrusted to its care in the course of its business, contrary to Rule 8

Mitigation

The Panel was informed that there have been no previous disciplinary findings against Mr Norman Russell or the Firm.

Mr Morgan spoke in mitigation and had set out in the skeleton argument the long and unblemished professional history of Mr Norman Russell. He invited the Panel to have regard to the "incidental nature of the event", Mr Russell's cooperation with RICS and remorse. The Panel has been told that the Firm took prompt remedial action to address two of the matters raised on the regulatory review visit report.

Decision as to sanction

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 the RICS as its regulator and to protect the public. Sanctions must be proportionate to the matters found proved.

The Panel paid careful heed to the indicative sanctions guidance of the RICS. It considered carefully the mitigating and aggravating factors of this case.

The Panel had decided that Mr Norman Russell and the Firm were 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 sanction is not appropriate does it move to the next level of sanction. Having arrived at a sanction that is minded to impose, the Panel then reviews the next sanction above so as to satisfy itself that this would be too severe a sanction.

The Panel bears in mind that more than one sanction may be imposed. If conditions are to be imposed they must be proportionate, workable and address the issues raised in these proceedings.

The Panel considered that the following mitigating factors were present:

- the most serious matter was an isolated single event;
- there was prompt reimbursement of the client account monies;
- there was remedial action in relation to the other failures identified in the regulatory review;
- there was no actual loss to clients; and
- there was no financial gain to Mr Norman Russell

The Panel considered that the following aggravating factors were present:

- as already stated, there was a remarkable and lamentable lack of insight;
- it has not heard any apology or meaningful expression of remorse;
- this was a large sum of money taken from client account in breach of the Rules when the principal was aware of the insufficiency of funds;
- Mr Norman Russell knowingly flouted the Rules, putting his own interests and personal convenience above the interests of his clients

The Panel considered the matters far too serious for no sanction to be imposed. This was a misuse of client account funds and a failure to preserve the security of clients' money. For the same reason the Panel rejected the submission that this case might be suitable for a caution or reprimand – the breaches here were not minor and there was a risk of public harm.

Accordingly the Panel orders:

The firm:

1. should be fined £6,000
2. should have its registration made subject to two conditions which are:
 - a. to submit to a further Regulatory Review Visit by or on behalf of the Institution not later than 31 December 2015. The costs of a Regulatory Review Visit to be borne by the Firm.
 - b. it must ensure that both principals attend a client money workshop course run by RICS by the end of March 2016, the next two dates being 3 December 2015 and 8 March 2016 and submit to the Regulatory Department of RICS evidence that they have attended.

Mr Norman Russell:

1. should be fined £12,000
2. should be subject to a condition that he must within 6 months personally attend the RICS course in Conduct Rules, Ethics and Professional Practice and submit to the Regulatory Department of RICS evidence that he has successfully completed this course.

In the event that the conditions are not complied with then the Firm and/or Member may be liable for further disciplinary action.

The Panel considers that these are appropriate and proportionate sanctions that will uphold public confidence in regulation and make clear the standards expected of Firms subject to regulation, and Members of RICS when dealing with client money.

The size of the fines reflects the seriousness of the charge concerning the protection of client money, and the courses that the principals are required to attend are to address the lack of insight. The further Regulatory Review Visit will enable RICS to check that remedial action has been taken and that there are no further issues with client account money.

Publication and Costs

The Panel considered the guidance as to publication of its decisions. The guidance provides that it is usual for the decisions of the Panel to be posted on the RICS website, published in Modus, and in a newspaper local to the practice. Mr Morgan highlighted that publication will have a punitive effect on the business and reputation of the firm and Mr Russell in a local area. 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.

The Panel orders that this decision be published on the RICS website, in Modus and in a newspaper local to Mr Russell and the Firm.

The RICS presenting solicitor asked for costs, and had provided a schedule to Mr Russell and the Firm in advance of the hearing. On behalf of Mr Russell and the Firm it was said that it might have been preferable for the matter to have been dealt with consensually. The Panel noted that the charges were not admitted in full and involved serious breaches of the Rules relating to client money.

The Panel considered carefully the costs sought. The figure for the hearing is the average cost of a hearing day and the costs have been divided between the Firm and Mr Norman Russell personally, and the Panel has no reason to doubt it. No objection was made to the amount sought.

The Panel was not addressed on the means of Mr Russell or the Firm but had regard to the turnover as reported in the Firm's annual return. It concluded that it was fair to make a costs order in this case. Otherwise the costs of the proceedings fall on the profession as a whole.

The Panel orders that Mr Norman Russell pay to RICS costs of £2,710.00.

The Panel orders that the Firm Russell Brothers pay to RICS costs of £2,677.50.

Both Mr Norman Russell and the Firm have a right to appeal this decision within 28 days of today's date under Rule 59 of the Disciplinary, Registration and Appeal Panel Rules.