

Disciplinary Panel Hearing

Case of

Mr Thomas Turton MRICS

and

Borron Shaw & Co Ltd

On

Thursday 27 September 2018

Panel

Alison Sansome (Lay Chair)

Helen Riley (Surveyor Member)

Jonathan Green (Lay Member)

Legal Assessor

Mark McConochie

The formal charges against Thomas Turton MRICS are that:

1. As contact officer and / or Principal of Borrton Shaw & Co Ltd (The Firm) you completed the Firm's annual return dated 28 November 2016. In that return you wrongly stated the Firm had Public Indemnity Insurance in place when in fact it did not. Your actions:
 - a. Constituted a failure to meet your professional obligations,
 - b. Were dishonest in that you knew the information submitted was wrong, OR lacked integrity in that you were reckless as to the truth or otherwise of the information submitted.

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

Thomas Turton is therefore liable to disciplinary action under RICS Bye-law 5.2.2(c)

2. On or after 23 March 2016 you did not inform RICS and / or your clients in a timely manner or at all that the Firm no longer had insurance in place. Your actions:
 - a. Constituted a failure to meet your professional obligations, and
 - b. Were dishonest in that you knew you should provide this information and deliberately failed to do so, OR lacked integrity in that you demonstrated a recklessness towards meeting your professional obligations.

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

Thomas Turton is therefore liable to disciplinary action under RICS Bye-law 5.2.2(c)

3. Between 23 March 2016 and 31 December 2016 you permitted the Firm to provide services without having Professional Indemnity Insurance in place and / or did not ensure run off cover was in place when the Firm ceased trading on 31 December 2016. Your actions:
 - a. Constituted a failure to meet your professional obligations, and

- b. Demonstrated a lack of integrity in that you exhibited a recklessness towards exposing RICS and / or your clients to risk.

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

Thomas Turton is therefore liable to disciplinary action under RICS Bye-law 5.2.2(c)

4. During the course of the RICS investigation you failed to co-operate adequately with RICS in respect of information and explanations requested.

Contrary to Rule 9 of the Rules of Conduct for Members 2007

Thomas Turton is therefore liable to disciplinary action under RICS Bye-law 5.2.2(c)

The formal charges against Borron Shaw & Co Ltd are that:

1. The Firm completed an annual return dated 28 November 2016. In that return it wrongly stated the Firm had Public Indemnity Insurance in place when in fact it did not. Its actions:
 - a. Constituted a failure to meet its professional obligations,
 - b. Were dishonest in that it knew the information submitted was wrong, OR lacked integrity in that it was reckless as to the truth or otherwise of the information submitted.

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

Borron Shaw & Co Ltd is therefore liable to disciplinary action under RICS Bye-law 5.3.2(c)

2. After 23 March 2016 the Firm did not inform RICS and / or its clients in a timely manner or at all that the Firm no longer had insurance in place. Its actions:
 - a. Constituted a failure to meet its professional obligations, and

- b. Were dishonest in that it knew it should provide this information and deliberately failed to do so, OR lacked integrity in that it demonstrated a recklessness towards meeting its professional obligations.

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

Borron Shaw & Co Ltd is therefore liable to disciplinary action under RICS Bye-law

5.3.2(c)

3. Between 23 March 2016 and 31 December 2016 the Firm provided services without having Professional Indemnity Insurance in place and / or did not ensure run off cover was in place when the Firm ceased trading on 31 December 2016. Its actions:
 - a. Constituted a failure to meet its professional obligations, and
 - b. Demonstrated a lacked integrity in that it exhibited a recklessness towards exposing RICS and / or its clients to risk.

Contrary to Rule 3 and / or 9 of the Rules of Conduct for Firms 2007

Borron Shaw & Co Ltd is therefore liable to disciplinary action under RICS Bye-law

5.3.2(c)

4. During the course of the RICS investigation the Firm failed to co-operate adequately with RICS in respect of information and explanations requested.

Contrary to Rule 15 of the rules of Conduct for Firms 2007.

Borron Shaw & Co Ltd is therefore liable to disciplinary action under RICS Bye-law

5.3.2(c)

Service and Proceeding in Absence

1. Neither Mr Turton or any representative of Borron Shaw and Co Limited ("the Firm") attended the hearing. RICS invited the Panel to proceed in their absence.

2. A Notice of Hearing dated 26 July 2018 confirming the date, place and time of the hearing had been sent to Mr Turton and the Firm in accordance with Rule 23 of the Disciplinary, Registration and Appeal Panel Rules giving the required 56 days' notice of the hearing. The Notice was sent by postal delivery and email to the addresses held on the RICS contact records for Mr Turton and the Firm. A copy of the Notice, and postal delivery receipts for Mr Turton and the Firm, were exhibited to a signed witness statement dated 21 August 2018 from Mrs Jae Berry, Regulatory Tribunal Executive at RICS, as proof that the respective notices had been sent.
3. The Panel was satisfied that notice had been properly given to Mr Turton and the Firm in accordance with Rule 23 of the Disciplinary Registration and Appeal Panel Rules 2009.
4. Having determined that Notice of the Hearing had been properly given in accordance with the Rules, the Panel went on to consider whether to exercise its discretion to proceed in the absence of Mr Turton and the Firm.
5. The Panel considered all of the circumstances and was mindful of the need to consider very carefully whether the case could be conducted fairly without Mr Turton or the Firm being able to present their case, or give evidence, in person, or through a representative, taking into account the nature of the charges against Mr Turton and the Firm which included allegations of dishonesty. The Panel bore in mind as a general principle that a Member or Firm who is facing a disciplinary allegation has the right to be present and represented at a hearing.
6. The Panel also considered the strong public interest in ensuring that regulatory proceedings take place as expeditiously as possible and with a minimum of delay.
7. Having considered all of the circumstances and received advice from the legal assessor, the Panel decided to proceed in the absence of Mr Turton and the Firm. Mr Turton had been aware of the RICS investigation since RICS wrote to him about it on 18 July 2017 and both the Firm and Mr Turton had been given proper notice of the hearing and had chosen not to attend. In a letter dated 18 September 2018, Mr Turton had asked for the hearing to

be adjourned but in the absence of any good reason, that application was refused. The Panel had before it a copy of an email from Mr Turton to Mrs Jae Berry dated 26 September 2018 in which Mr Turton confirmed that he was content for the Panel to proceed in his absence.

8. The Panel therefore considered that in all of the circumstances Mr Turton and the Firm had voluntarily waived their right to attend the hearing and that an adjournment would be unlikely to result in Mr Turton or the Firm attending on another occasion and would therefore serve no useful purpose. The Panel therefore decided to proceed in the absence of Mr Turton and the Firm.
9. In deciding to proceed in absence the Panel bore in mind the importance of ensuring that the hearing was conducted fairly taking into account that they would not be able to hear from Mr Turton or the Firm in relation to the case against them and not to infer any culpability on their part on account of their absence.

Decision as to the Charges

10. Neither Mr Turton or the Firm had completed and returned a listing questionnaire indicating whether or not the charges were admitted. The Panel therefore proceeded on the basis that the charges were not admitted.

Charges against Mr Turton

Based on the evidence in the RICS bundle of documents, the Panel made the following findings in relation to the charges against Mr Turton:

Charge 1

11. Mr Turton completed the Firm's annual return dated 28 November 2016 indicating that the Firm had professional indemnity insurance "in place". Mr Turton accepted in his email dated 3 January 2018 at page 121 of the RICS bundle of documents that the statement about the

insurance position on the Annual Return was – with hindsight – inaccurate. In his email dated 12 December 2017 at page 113 of the RICS bundle, Mr Turton confirmed that the Firm’s professional indemnity insurance cover ended on 23 March 2016.

12. In the Panel’s view, based on the ordinary and natural meaning of the words used in the question about professional indemnity insurance on the annual return, it was clearly asking whether or not the Firm had insurance in place at the time the form was completed. At the time the form was completed Mr Turton has admitted that the Firm did not have insurance in place and the Panel therefore found that Mr Turton did wrongly state that the Firm had insurance in place when in fact it did not, as alleged.

13. The Panel went on to consider whether Mr Turton knew that the information he had provided to the RICS about the Firm having professional indemnity insurance in place was incorrect.

14. Mr Turton has stated in correspondence that he misunderstood the question on the form. In an email dated 2 March 2017 at page 23 of the RICS bundle Mr Turton stated:

“Returns are based on Companies Trading year which ends April annually”.

and in an email dated 12 June 2017 at page 89 of the bundle he stated:

“I think perhaps there is some confusion because the company’s trading year does not coincide with the PI cover year.

“As a consequence the last return covers a period in transit, part being insurance covered and part not.”

And in an email dated 31 March 2016 at page 29 of the bundle stated:

“ I have taken the forthcoming year to mean this current trading year. My trading year ends 30 April”

15. Based on the evidence in these statements from Mr Turton, and with no evidence from RICS to specifically support their assertion that Mr Turton knew the question to be asking about the current insurance position of the Firm as at 26 November 2016 when he completed the Firm’s annual return, the Panel found that Mr Turton’s belief at that time was that the question was asking about whether the Firm had insurance in place during the Firm’s last accounting period. The Panel noted that the question about insurance on the Annual Return appeared immediately below a question about the Firm’s annual turnover *“in the last completed accounting period”* which lends support to Mr Turton’s position.
16. However, the Panel found that Mr Turton would still have known the answer he gave when he completed the annual return on 28 November 2016 to be incorrect as the Firm’s insurance ran out on 23 March 2016. Mr Turton knew this as he had received an email from his insurance broker on 22 March 2016, which is found at page 44 of the RICS bundle, confirming that the Firm’s insurance expired at midnight on 23 March 2016. Mr Turton also confirmed this to be the case in his email dated 12 December 2017 to the RICS at page 113 of the RICS bundle.
17. The Panel went on to consider whether, in knowingly submitting incorrect information to his regulator, Mr Turton had acted dishonestly as alleged.
18. The Panel accepted the advice of the legal assessor about the two stage test it should apply when considering dishonesty and having established what Mr Turton’s knowledge was at the material time when completing the annual return, the Panel went on to consider whether, according to the standards of ordinary and decent people, Mr Turton had acted dishonestly. The Panel found, in their collective judgment, that ordinary and decent people would consider that a surveyor was acting dishonestly in submitting information to his

regulator which he knew to be wrong and therefore found this aspect of the charge proved. The Panel also considered this be a failure by Mr Turton to meet his professional obligations contrary to Rule 3 of the Rules of Conduct for Members relating to ethical behavior.

Charge 2

19. Mr Turton accepted in his email dated 3 January 2018 at page 121 of the bundle that he did not advise clients that the Firm did not have professional indemnity insurance in place after the previous insurance policy ceased on 23 March 2016 and there is no evidence before the Panel that he did so. The Panel found, based on the evidence in the RICS bundle, that the RICS only became aware that the Firm's insurance had ceased on 23 March 2016 when Mr Turton submitted an application for de-registration of the Firm dated 20 December 2016, received by RICS on 2 February 2017.
20. The Panel therefore found that Mr Turton did not inform RICS in a timely manner about the Firm's insurance position and did not inform his clients that the Firm no longer had insurance in place after 23 March 2016, thereby failing to meet his professional obligations in Rule 3 of the Rules of Conduct for Members. Mr Turton, in failing to notify RICS and his clients, had effectively allowed RICS and his clients to be misled about the insurance position and that the lack of insurance exposed clients of the Firm to risk; a risk about which they were entirely unaware.
21. RICS allege that Mr Turton made a conscious and deliberate choice not to inform RICS or his clients about the insurance position and in so doing had acted dishonestly. RICS's case is that whilst there is no specific notification provision in the Rules relating to professional indemnity insurance, it is an inherently obvious professional obligation which could be read into the Rules.
22. However, whilst the Panel accepts that Mr Turton was under a professional obligation to notify as RICS suggest (even though the Rules are silent on this point), the Panel was not presented with any specific evidence upon which it could make a finding Mr Turton knew that he should have provided the information about the Firm's insurance ending on 23

March 2016 to RICS and to the Firm's clients. Therefore, the Panel did not find that Mr Turton had acted dishonestly in this regard as alleged in Charge 2.

23. However, in the Panel's view Mr Turton's conduct did clearly demonstrate a lack of integrity and a reckless disregard for his professional obligations as a surveyor contrary to Rule 3 of the Rules of Conduct for Members.

Charge 3

24. The Firm continued to trade after 23 March 2016 without having professional indemnity insurance in place until 31 December 2016 when it ceased trading. Despite some attempts by Mr Turton to arrange insurance cover, as evident from exchanges of correspondence between Mr Turton and potential insurers at pages 22 to 66 of the RICS bundle, there is no evidence before the Panel that Mr Turton had arranged appropriate insurance cover after 23 March 2016 when the previous policy expired or that he had arranged run-off over to apply when the Firm ceased trading on 31 December 2016. Mr Turton admitted this in his application to RICS to de-register the Firm dated 20 December 2016. The Panel therefore finds this aspect of the third charge proved.

25. It would have been open to the Firm to cease trading, or to Mr Turton to take more proactive steps to engage with RICS about cover through the ARP, rather than assume that did not apply. He did neither of these things.

26. A Firm continuing to trade in this way without professional indemnity insurance in place is a very serious matter which exposes clients to significant risk. Mr Turton, as sole Principal of the Firm, had a professional responsibility to ensure this situation did not arise and in not doing so had, in the Panel's view, demonstrated a lack of integrity and recklessness towards exposing RICS and the Firm's clients to risk in breach of Rule 3 of the Rules of Conduct for Members.

Charge 4

27. As a self-regulatory body, the RICS relies on the co-operation of Members and Firms in order to effectively regulate and protect the public. Despite some attempt to engage with RICS after submitting the Firm's annual return dated 28 November 2016, the Panel found this to be inadequate. The Panel took into account that Mr Turton was absent from work on account of minor surgery in May 2017 and was delayed when returning from a holiday in November 2017 on account of an accident. However, Mr Turton was often slow to respond to queries from RICS, often required chasing for information, and lacked sufficient detail and explanations in his responses.

28. In many cases Mr Turton's replies were cursory and failed to engage at the level of detail necessary or appropriate by a Member facing a disciplinary investigation by his regulator. It was not acceptable for Mr Turton to refuse to engage with his regulator until the insurance position on run off cover was clarified, as he stated in his email dated 23 January 2018. The Panel noted that no further response was provided after this date (until the letter of 18 September 2018 requesting an adjournment).

29. The Panel found based on the evidence that Mr Turton had failed to co-operate adequately with RICS in respect of information and explanations requested contrary to Rule 9 of the Rules of Conduct for Members, as alleged.

Decision as to the Charges Against The Firm

30. The Panel found that as Principal and sole Director of the Firm that Mr Turton's acts, knowledge and omissions could be imputed to the Firm as he was effectively the embodiment and controlling mind of the Firm. Taking this into account and based on the Panel's findings in relation to Mr Turton the Panel found the following charges proved against the Firm:

- i) Charge 1a

- ii) Charge 1b (in that the Firm had been dishonest in knowingly submitting false information);
- iii) Charge 2a
- iv) Charge 2b (to the extent that the Firm lacked integrity in that it demonstrated a recklessness towards meeting its professional obligations);
- v) Charge 3; and
- vi) Charge 4.

Liability to Disciplinary Action

31. The Panel found both Mr Turton and the Firm liable to disciplinary action. Professional indemnity insurance is a very important public protection measure and it is a very serious matter for any Firm to continue to trade without having it in place. Members of the public can rightly expect surveyors to be covered by appropriate insurance when carrying out work for them and for members of the profession to be honest and open with them – and the regulator - if that is not the case. The Panel found both Mr Turton and the Firm to have acted dishonestly in knowingly providing false information to the RICS about the Firm's insurance arrangements – and to have demonstrated a reckless disregard for their professional obligations in ensuring RICS and the Firm's clients were appropriately and promptly informed. In these circumstances the Panel found the conduct found proved to be sufficiently serious to render both Mr Turton and the Firm liable to disciplinary action.

Sanction

32. The Panel bore in mind that the purpose of sanctions is not to be punitive, although they may have that 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. The Panel bore in mind that sanctions must be proportionate to the breach and all of the circumstances, and a decision should be reached having taken into account any mitigating and/or aggravating factors.

33. Having considered all of the circumstances of this case and received advice from the legal assessor, the Panel first considered whether to impose any sanction at all against Mr Turton

and the Firm. The Panel considered the very serious nature of the conduct found proved in this case to justify the imposition of a sanction against Mr Turton and the Firm.

34. The Panel went on to consider whether to impose a caution. The Panel concluded that a caution was not appropriate because it would not adequately reflect the seriousness of the conduct. The Panel considered that the breaches found proved could not in any view, be considered to be sufficiently minor so as to justify the imposition of a caution.

35. The Panel went on to consider whether to impose a reprimand. The Panel considered this would also not reflect the seriousness of the breaches of the Rules for Members and Firms found proved. Findings of a lack of integrity and dishonesty against a Member of Firm are very serious matters. Mr Turton and the Firm had been found to have knowingly and dishonestly misrepresented the Firm's insurance position to the RICS and had demonstrated a lack of integrity and recklessness towards ensuring clients of the Firm – and the RICS - were kept appropriately informed. The Firm had continued to trade without having appropriate insurance cover in place thereby exposing clients to significant risk, a situation that Mr Turton, as the Firm's principal and sole Director, had allowed to arise.

36. The Panel was mindful of the presumption in RICS guidance in favour of expulsion in relation to findings of dishonesty or a lack of integrity in the absence of extenuating circumstances. The Panel found no such extenuating circumstances to be present in this case. The Panel took into account the absence of any previous disciplinary findings against Mr Turton and the Firm but considered there to be a number of aggravating features present. There was a significant level of risk of damage to the public – and the reputation of the RICS – on account of Mr Turton's and the Firm's failings which were not representative of an isolated failure but over an extended period. The Firm's insurance ceased on 23 March 2016; it continued to trade until 31 December 2016; and it failed to inform clients or RICS of the position sufficiently promptly or at all. Mr Turton had not engaged or co-operated adequately with RICS in relation to its investigation and had not shown sufficient willingness to assist with their enquiries. In the Panel's view Mr Turton has not demonstrated the level of professionalism or accountability to be expected of a

professional person and has not been open and honest with his regulator at all times. These are very serious failings which in the Panel's view justify expulsion of Mr Turton from membership of the RICS and withdrawal of the firm's registration and the Panel so orders.

37. The Panel did consider whether a fine, conditions or an undertaking would be an appropriate and proportionate alternative to expulsion and concluded that they were not in light of all of the circumstances and the seriousness of the failings in this case.

Publication

38. The Panel considered the RICS policy on publication of decisions - The Sanctions Policy Supplement 3 - Publication of Regulatory Disciplinary Matters. The Panel was unable to identify any reason to depart from the presumption that decisions will be published on the RICS website and in the RICS magazine, Modus, and ordered publication accordingly.

Costs

39. RICS have applied for costs in the sum of £6,169.00. The Panel considered it fair, just and reasonable for Mr Turton to pay the costs of these proceedings rather than let them fall on the membership generally, but reduced the costs claimed to make allowance for the slightly shorter duration of the hearing itself. It therefore makes an order that Mr Turton pay RICS £6000.

Appeal Period

40. Mr Turton and the Firm have 28 days, from the service of the notification of the decision, to appeal this decision in accordance with Rule 59 of the Rules.
41. 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.