

Disciplinary Panel Hearing

Case of

Mrs Nicola Horner MRICS [0000138857]

On

Tuesday 22 and Wednesday 23 January 2019 and 04 March 2019

At

RICS, 55 Colmore Row, Birmingham on 22 and 23 January and by telephone on

Chair

Carolyn Tetlow

Members

Nicholas Turner (Surveyor Member)

Sally Ruthen (Lay Member)

Legal Assessor

Rosemary Rollason

RICS Representative

Ben Rich, Counsel

Relevant Person

Mrs Horner attended the hearing and was represented by Jonathan Goodwin, Solicitor-Advocate.

Hearings Officer

Maria Choudhury

The formal charges are:

Member

The formal charges against Nicola Horner MRICS are that:

1. On one or more occasions in May 2017 you copied, downloaded or transferred confidential data belonging to Scott Fraser Ltd and/or clients of Scott Fraser Ltd, and you retained the said data in your personal control after leaving Scott Fraser Ltd, and your actions were:
 - a. In breach of your professional obligations,
 - b. In breach of confidentiality,
 - c. Dishonest in that:
 - i. You knew you were not allowed to copy, download, transfer or retain confidential data and /or
 - ii. You intended to use the confidential data to obtain a commercial advantage, or allow Savills to obtain a commercial advantage,
 - d. In the alternative to 1(c) above, lacked integrity in that you were reckless as to the appropriateness or otherwise of copying, downloading, transferring or retaining confidential data.

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

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

2. Following a letter sent on behalf of Scott Fraser Ltd dated 11 July 2017, in which you were asked to account for every item of confidential information taken from Scott Fraser Ltd, you did not disclose details of all the confidential information taken during May 2017, and your actions were:
 - a. In breach of your professional obligations,
 - b. Dishonest in that:
 - i. You knew you had taken further confidential information not yet known to Scott Fraser Ltd and you attempted to hide this from Scott Fraser Ltd, and/or
 - ii. You knew the representations made on your behalf, which represented and/or implied that no other confidential information had been taken, were untrue or misleading,
 - c. In the alternative to 2(b) above, lacked integrity in that your conduct demonstrated a lack of openness and/or cooperation when Scott Fraser Ltd were attempting to discover what confidential information had been copied, downloaded, transferred or retained.

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

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

Introduction

1. Mrs Nicola Horner ("Mrs Horner") appears before the RICS Disciplinary Panel in connection with the allegations set out above.

Response

2. Mrs Horner accepted charges 1(a), (b) and (d) of the allegations. She denied charge 1(c). She denied charges 2(a), (b) and (c). In relation to all the charges, Mrs Horner denied that she had acted dishonestly.
3. Mrs Horner accepted that she is liable to disciplinary action in respect of heads 1(a), (b) and only. In respect of the remaining heads, she did not accept liability to disciplinary action.

Background

4. Mrs Horner was employed by Scott Fraser Ltd ("Scott Fraser"), a commercial and residential estate agency, for approximately 10 years from 2007. By 2017 she had been made an Associate Director. Mrs Horner left the company on 26 May 2017 to work for Savills Estate Agents ("Savills"). She commenced employment at Savills in early June 2017.
5. Several weeks after Mrs Horner's departure, when Scott Fraser changed its computer servers in around July 2017, it discovered that a number of previously deleted emails had been re-populated. Amongst these were emails which had been sent by Mrs Horner to her personal email address on the last day of her employment at Scott Fraser. She had deleted these emails after sending them. These were found to include information which Scott Fraser concluded was confidential and client-related.
6. Scott Fraser instructed solicitors who wrote to Mrs Horner on 11 July 2017 and reminded her of the terms of the contract of employment which she had signed on 4 August, 2007. The contract contained clauses relating to confidentiality which stated that as an employee Mrs Horner would have access to and be entrusted with information concerning the company, business development and concerning its clients which was or may be confidential. It provided that as an employee, except in the proper

performance of her duties, Mrs Horner was not permitted during or at any time after her employment to divulge or make use of any trade secret or any confidential information concerning the business or finances of Scott Fraser or its clients.

7. The solicitor's letter itemised the emails which had been found and alleged that Mrs Horner had breached the provisions of her contract. The letter explained:

"The majority of the above emails relate to development sites and clients which will have a direct correlation with your new role at Savills. Some of the emails relate to contacts and development sites with which you had no involvement whilst employed by our client. They include sites and contacts our client has been working on and with for some years. They include addresses relating to land or building adjacent to sites that are currently being handled there and could be particularly advantageous to Savills".

8. The letter went on to state that to avoid the need for further legal proceedings, it required full and frank answers to its questions and confirmation that Mrs Horner would comply with a number of undertakings and warranties, including a requirement to destroy the confidential information held and to make no use of it.
9. On 13 July 2017, solicitors instructed on behalf of Mrs Horner replied stating that she accepted having sent all the emails in question except one, and she accepted that it had not been appropriate for her to do so. Mrs Horner confirmed by this letter that she did not hold any other confidential information concerning Scott Fraser on any computer or other device or on any internal or external storage. She also confirmed that any information which was confidential in nature had not been used and that she had deleted the emails in their entirety. A number of warranties were given, including that she would inform Savills of the restrictions in her contract and would not use or pass on the information and she signed the letter in confirmation.
10. Subsequently, Scott Fraser found a further email which Mrs Horner had sent to herself. This contained three Excel documents with substantial confidential data, described as *"including entries for over 300 properties, the contact details of clients, and details of future business opportunities it is pursuing"*. Scott Fraser's solicitors wrote on 19 July 2017 concerning this additional material and stated as a result it could not trust the warranties and assurances given by Mrs Horner and was therefore obligated to contact her new firm, Savills, directly and to report the matter to RICS.

11. In a letter from her solicitors on 24 July 2017, it was stated that Mrs Horner accepted that she did not highlight the email referred to. It was said that she thought it had already been included in the screenshot of emails from Scott Frasers' solicitors' first email. It was stated that her aim had been simply to delete all confidential information as directed. The letter further stated that Mrs Horner now understood that it was important to provide a clear description of any confidential information which was in her possession and then set out a number of further emails and documents which she had removed from Scott Fraser, including valuations and reports. It also stated that she had downloaded a number of documents onto a USB stick, including emails and documents relating to reports and valuations. It was further confirmed that Mrs Horner had scanned copies of pages from her day book "*which may have included some details on planning applications*". It was further stated that certain information had been saved onto Mrs Horner's personal drive at her new firm, Savills but it was asserted that other Savills employees could not access this. The letter stated that neither Mrs Horner nor Savills had benefitted from this confidential information.

12. Following the referral of the complaint to RICS, RICS' solicitors wrote to Mrs Horner seeking her responses in respect of various issues. Mrs Horner was now represented by Jonathan Goodwin, Solicitor Advocate, who responded on her behalf. It was stated that Mrs Horner accepted that her actions had been wrong in that she "*transferred certain materials which she believed may have been of assistance in the future for her personal know-how and in respect of which she was already aware from her own knowledge and recall*". It was stated that she had no intention of deriving any commercial benefit. She had not used, nor intended to use, the data and there had been no actual breach of confidentiality. She was very sorry and accepted her actions had been inappropriate. She denied she had acted dishonestly.

Documents

13. The Panel received a bundle of documents prepared by RICS, comprising 66 pages. The Panel also received a bundle of 8 pages comprising the completed listing questionnaire and further character reference letters submitted on behalf of Mrs Horner.

Evidence of RICS

14. RICS did not call any witnesses to give oral evidence. Mr Rich referred the Panel to the documentary evidence contained in the RICS bundle and relied upon the admissions made by Mrs Horner.

Evidence of Mrs Horner

15. Mrs Horner gave oral evidence, was cross-examined by Mr Rich and questioned by the Panel.
16. Mrs Horner maintained she had not acted with any dishonest intention in taking the information when she departed from her former employment at Scott Fraser. She now recognised with hindsight that her actions had been inappropriate and she apologised. She stated she had taken the information in order to follow through the projects she had been involved with or had an interest in. Although she accepted having reviewed her original contract of employment from 2007, and “probably” having read the clauses relating to confidentiality, she had not recognised at the time that her actions contravened the contractual provisions on confidentiality.
17. Mrs Horner maintained that she removed the information for her own curiosity and know-how. She had had in mind the good terms on which she had left Scott Fraser and the possibility which had been discussed of her returning to the firm in the future, or working jointly with the firm in her new firm, and she therefore wanted to keep in touch with ongoing progress of the projects. She said it had never been her expectation or intention that the information would be passed to Savills for commercial use by Savills. Much of the information was in the public domain or relatively easily obtainable.
18. In stating through her solicitors in their letter of 13 July 2017 that she did not hold any further information, Mrs Horner stated that her focus at the time had been to delete all the information she held as soon as possible; in the light of the letter from Scott Fraser’s solicitors she wanted genuinely to be able to state that it had been destroyed and reassure Scott Fraser that she no longer held any confidential information. She now recognised and accepted that Scott Fraser required to know in precise terms what information she had taken and she accepted she had not addressed that issue with adequate care. Mrs Horner stated that she had not had any intention deliberately to try to conceal that she had taken further information.
19. In answer to questions from the Panel, Mrs Horner explained that as an Associate Director at Scott Fraser she had oversight of the branch activities, undertook market appraisal valuations and was responsible for generating new business. Her role at Savills was different, in that it related exclusively to developing business from new homes and potential development opportunities for new homes.
20. Mrs Horner was asked to describe the content of the documents/information she had removed. In relation to the list of over 20 emails set out in the initial letter from Scott Fraser’s solicitors dated 11 July 2017, she explained that these in summary related to individual contacts and projects she had

been following or involved with in the most recent 4-5 months, i.e. since her return to work from her maternity leave in early 2017. In relation to the three Excel documents attached to her email and brought to her attention by Scott Fraser's solicitors in their letter of 19 July 2017, she explained these were: a database concerning "portfolio landlords" i.e. landlords who let three or more properties and which Scott Fraser let and managed; a second spreadsheet related to potential business opportunities, involving longer term projects and information about planning applications in relation to projects in respect of sites where Scott Fraser were not yet instructed, but were monitoring potential long-term future opportunities; the third spreadsheet related to details of property addresses and sites. These were documents she had kept on her desktop and referred to on a daily basis. Mrs Horner accepted that some of the information was commercially valuable, for example the portfolio landlord database could have been sold, but she had had no such intention because of her close relationship with her former employers.

21. When asked why she had deleted the emails after sending them to herself, Mrs Horner said this had been quite open and not an attempt to conceal. She was undertaking "house-keeping" on her inbox, deleting out of date and irrelevant material and reorganising her in box ready for her departure from her employment at Scott Fraser. This was done when other employees were in the office, including the partner she worked with. She said she was well aware her email account could be examined and was likely to be monitored after her departure. Mrs Horner also stated that during her employment there, Scott Fraser had itself utilised a database brought to the firm by a new employee and that her actions may have been influenced by observing this.

Evidence of George Cardale

22. Mr Cardale had provided two letters in support of Mrs Horner, the first dated 3 November 2017 and a second, updated, reference dated 17 December 2018. Mr Cardale is a member of RICS and a Director of Savills, Mrs Horner's current employer. He stated that he was providing the reference in his personal capacity and not on behalf of Savills.
23. Mr Cardale gave evidence by telephone and confirmed the content of his letters. He had known Mrs Horner for 18 months and knew her prior to her joining the company. He said he considered Mrs Horner to be an honest person with high morals. She was well regarded in the local market and he considered her to be entirely professional and was aware that she was proud of her RICS membership.
24. In cross-examination on behalf of RICS, Mr Cardale confirmed that Mrs Horner had informed him of the RICS case against her. She had told him it concerned her having taken information from her former employer which she thought might be useful to her in her new role and which he understood

her to say was in the public domain. Mr Cardale said he was not aware that any of the information had been uploaded onto Savills' systems. He said that Savills has high standards and would not condone the use of a rival company's information, nor would it ask for that to happen. Mr Cardale confirmed he had not been aware originally that the information included a list containing some names and contact details of landlord clients of Scott Fraser, although he had subsequently been made aware.

RICS' application to admit further evidence

25. Mr Rich applied to adduce a further item of evidence which had been obtained from Scott Fraser about the nature of certain of the information taken by Mrs Horner. This information had been provided to Mrs Horner and her representative on 4 January 2019.
26. Mr Goodwin, on behalf of Mrs Horner, objected on the basis that the new information was provided outside the time limits set out in the Rules for service of RICS' evidence, a point accepted by Mr Rich. Mr Goodwin set out the lengthy chronology of the case, referring to delay on the part of RICS in bringing the case to a hearing, and submitted that RICS had had ample opportunity to obtain all relevant information in good time; it was now unfair and prejudicial to Mrs Horner for RICS, as the regulator, to bring forward new information at such a late stage.
27. The Panel considered the application taking account of the fairness of the proceedings and any prejudice caused to Mrs Horner. The Panel was mindful that the information had been in the possession of the Respondent for two weeks. She had been aware of it when answering questions from Mr Rich in cross-examination. The Panel noted that it had not been argued that she was caused prejudice in terms of her ability to respond to the evidence, rather that it was unfair simply by reason of lateness. Taking account of its overriding duty to act in the public interest, the Panel considered it was relevant and fair for it to accept the item of information.
28. Mr Rich and Mr Goodwin agreed a form of words setting out the information which was then given to the Panel, and which was to the effect that when Scott Fraser were asked for further detail about the material taken, they stated through their solicitors that *"what she [Mrs Horner] took was all the landlords' portfolios and their contact information"*.

Submissions on behalf of RICS

29. RICS submitted in respect of Charge 1 that Mrs Horner only had the right to access the information whilst she was an employee of Scott Fraser. By removing it and retaining it after her employment ceased, she had breached confidentiality and data protection requirements. Further, she had uploaded some of the information onto the server of her new employer which placed the data under control of that company, a third party. RICS alleged she did so with the intention of using the information to gain a commercial advantage in her new employment. In both respects, RICS submitted that Mrs Horner had acted dishonestly because she must have known that she was not permitted to remove the data. This was a breach of her obligations to her employer and its clients. RICS' submitted that this would be considered dishonest by the standards of reasonable people.
30. RICS submitted that Mrs Horner's explanations that she had taken the information for personal curiosity or know-how were not credible, in that the information included Excel spreadsheets with entries for over three hundred properties and as described by Scott Fraser "*information concerning contacts and developments sites with which she had had no involvement whilst employed at Scott Fraser.*" Her taking the information without permission and deleting the sent emails was further evidence of dishonest intention. In the alternative, it was RICS' case that Mrs Horner's reckless disregard towards her professional obligations showed a lack of integrity and placed her own interests above her obligations to her former employer and the clients.
31. In relation to Charge 2, RICS submitted that Mrs Horner had deliberately concealed the full extent of the documentation when clearly required by Scott Fraser's solicitors to confirm all the confidential information she had removed. The reply sent on 13 July 2017 repeated the information referred to in Scott Fraser's solicitors' original letter and did not reveal the USB stick or additional Excel spreadsheets. RICS submitted this was dishonest behaviour or, in the alternative, her lack of candour and failure to cooperate with the solicitors' enquiries lacked integrity.
32. Mr Rich submitted that whilst not every breach of the Rules of Conduct crosses the threshold required to justify disciplinary action, Mrs Horner's actions were of a severity which met this requirement. Her dishonest conduct and/or lack of integrity went to the heart of the issue of public trust in the profession.

Submissions on behalf of Mrs Horner

33. Mr Goodwin submitted that the Panel should find Mrs Horner to have been a credible, honest and measured witness who made appropriate concessions. She now understood and accepted, with the

benefit of hindsight and legal advice, that her actions in respect of Charge 1 had been inappropriate and wrong. Mr Goodwin emphasised, however, that in accordance with the test for dishonesty in ***Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67***, the Panel must consider Mrs Horner's knowledge and belief at the time of the events. If it accepted that her belief that she was not acting dishonestly at the time was genuinely held, then the first element of the ***Ivey*** test would not be met. Mr Goodwin also drew attention to the exact wording of the second element of the test, where it referred to applying the standards of "ordinary decent people", not "reasonable" or "honest" people.

34. Mr Goodwin submitted that as dishonesty was alleged, then, as per the case of ***Donkin v Law Society [2007] EWHC 414 (Admin)***, because Mrs Horner's credibility was in issue, the Panel should take account of her previous good character. He referred the Panel to the testimonial letters submitted on her behalf. These, he said, showed that Mrs Horner was a person who was held in high regard and confirmed that she did not have a propensity to act dishonestly.
35. In respect of Charge 2, Mr Goodwin asked the Panel to accept that it was inherently unlikely and not credible that, having accepted in response to Scott Fraser's complaint that she had wrongly taken confidential material, Mrs Horner would then knowingly seek to conceal further confidential information from them, or instruct her solicitors to make such representations on her behalf. Mr Goodwin invited the Panel to find that the issue in Charge 2 was simply an error on Mrs Horner's part.
36. In relation to liability to disciplinary action, Mr Goodwin confirmed that Mrs Horner admitted this in respect of Charge 1 but did not accept liability in respect of Charge 2.

Legal Advice

37. The Panel was reminded that RICS is required to prove the factual allegations to the civil standard of proof; that it is more likely than not that any fact alleged occurred. The burden of proof is upon RICS, which brings the charges, and it is not for Mrs Horner to prove her innocence.
38. Dishonesty was alleged in charges 1(c) and 2(b). The Panel was reminded of the test relating to dishonesty is as set out by the Supreme Court in the case of ***Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67***. The judgement stated as follows: "*When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual*

state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

39. In charges 1(d) and 2(c), RICS alleged, in the alternative to dishonesty, there was a lack of integrity. The Panel was referred to the guidance given in the case of ***Wingate & Evans v SRA, SRA v Malins [2018] EWCA Civ 368***. At paragraphs 96 to 103, the Court of Appeal said that integrity is a separate and broader concept than dishonesty. It refers to the higher standards which society expects from a professional person and which the professions expect from their members. Integrity connotes adherence to the ethical standards of the profession and applies not only to what professionals say, but what they do. It is linked to the manner in which the particular profession professes to serve the public.
40. The Panel was reminded that, given the nature of the charges, it should take into account Mrs Horner’s unblemished good character prior to the matters which are the subject of this case and the character references presented on her behalf. In determining the issue of dishonesty, it should consider the evidence of Mrs Horner’s motivation and also look at alternative explanations for her conduct than dishonesty.
41. The question of whether or not any facts admitted or found proved would give rise to liability to disciplinary action was a matter for the Panel’s judgment. Not every factual finding or breach of the rules of conduct would automatically result in liability to disciplinary action – the falling short of required standards must be serious.

Findings of fact

42. The Panel carefully considered all the evidence it had heard and read. It considered the detailed submissions of both advocates.

Charge 1

43. In respect of Charge 1, the Panel accepted the factual admissions made by Mrs Horner in respect of 1(a), (b) and (d). The Panel was also satisfied that the evidence presented supported the admitted facts. The Panel was satisfied that each admitted factual allegation was proved to the required civil standard.

44. The Panel went on to consider 1(c), which alleged dishonesty and which Mrs Horner denied. The Panel considered the test to which it had been referred in the Supreme Court decision in **Ivey**. Mrs Horner had given oral evidence to the Panel. The Panel was mindful that she accepted with the benefit of hindsight that her actions had been inappropriate and misguided. However, she maintained that at the time, she had not acted with any dishonest intention. The Panel took account of her previous good character and the character references which described her as an honest person. Overall, the Panel found Mrs Horner's evidence to be credible and accepted her assertion that she did not act with dishonest intention. The Panel found her to be a truthful witness – it observed that she had been frank and open, and on occasions made concessions in her evidence which were not necessarily in her interests.
45. In respect of Charge 1(c)(i) and (ii), the Panel considered the first element of the **Ivey** formulation. The Panel accepted at the time in question, Mrs Horner did not know that she was not allowed to copy, download, transfer or retain the confidential data as alleged. The Panel concluded, that although misguided, she believed there was nothing wrong with removing the data: she thought that given the nature of her close and amicable relationship with Scott Fraser, they would not object. Mrs Horner said in evidence *"it wasn't something I felt was shameful"*. She said she had in mind that she may one day work for or with the company again. Integral to this issue was the strong assertion made by Mrs Horner during her evidence that she never intended to pass the information to her new employers for commercial benefit, or to sell or give it to anyone else – she had accepted that she had taken it for her own interest and that it may be useful to her in her future role, for example, by helping her to carry out market appraisals more quickly and conveniently, but she drew a clear distinction between providing information to her new employers or any other person for commercial gain. Mrs Horner had also given evidence that she was aware of a previous situation at Scott Fraser when a new employee had brought with them a database of information from a previous employer and this had been used by the firm. She explained that it was part of her thinking that this was normal practice and this had an influence on her at the time. However, she now accepted it was wrong.
46. The Panel considered the factors identified in Mr Rich's submissions which he said indicated a dishonest mind. The Panel accepted Mrs Horner's explanation that she had gone to the office on the Sunday before she resigned to take her personal data and information, which included personal photographs and CPD information as well as the data in question, fearing that if put on gardening leave once she resigned, she would not have an opportunity to do so. When she forwarded emails in the office during working hours and when other staff were present, she had been open and had not sought to conceal what she was doing. In relation to the deletion of the "sent" emails, the Panel heard and accepted as reasonable her explanation that this was not an attempt to conceal her actions, but part of a wider "house-keeping" exercise in respect of her email account prior to her departure. She was

well aware that her email account could be monitored and investigated upon her departure from her employment.

47. Overall, the Panel accepted Mrs Horner's account of her actions and was not satisfied that RICS had proved to the required civil standard that at the time of her actions, Mrs Horner knew that she was not allowed to remove the data. The Panel found her belief to be genuinely held at that time, and so the Panel concluded her conduct would not have been regarded as dishonest by the objective standards of ordinary decent people.
48. In respect of 1(c)(ii), the Panel concluded that Mrs Horner's removal of the data for her own interest or use may have assisted her in her new role at Savills, in that it may have enabled her to access information more quickly or to appear to be effective. However, the Panel was not satisfied this use by Mrs Horner amounted to using the confidential data to obtain a "commercial advantage". The Panel further accepted that she had no intention of providing the data to enable Savills to obtain a commercial advantage and thus the Panel did not find dishonesty in accordance with the *Ivey* test to be made out.
49. In respect of Charge 1 (d), the Panel accepted Mrs Horner's admission that her actions lacked integrity. It was mindful of the guidance given in the *Wingate & Evans* case, as set out under "Legal Advice", above. By failing to apply her mind fully and properly to issues of her employer's and clients' confidentiality and to data protection issues, and also by failing to seek consent from her employer to her taking the data, she had not acted with the high level of scrupulous accuracy expected of a professional person and had not adhered to the ethical standards required of members of the surveyors' profession.

Charge 2

50. Mrs Horner denied the entirety of Charge 2.
51. The Panel considered all the evidence relating to Charge 2. The facts of the stem were not in dispute, namely that in the response sent by Mrs Horner's solicitors to the letter from Scott Fraser's solicitors dated 11 July 2017, details of all the confidential information removed by Mrs Horner were not disclosed. The Panel concluded overall that this was not a deliberate concealment or attempt by Mrs Horner (through her solicitors) to thwart the enquiries of Scott Fraser. The Panel was mindful that the correspondence was at one remove, in that it was drafted by Mrs Horner's lawyers, albeit on her instructions. The primary focus was the suggested civil litigation. The Panel accepted Mrs Horner's account that her main focus, once she became aware of Scott Fraser's serious concerns about her

removal of the information, had been to delete the confidential information immediately so that she could satisfy Scott Fraser that she no longer held it.

52. In respect of Charge 2(a), the Panel was satisfied that this amounted to a breach of Mrs Horner's professional obligations to her former employer and as a member of the surveyors' profession: in the face of the serious concerns raised in Scott Fraser's letters, she should have given careful and thorough consideration to what information she held, and addressed her mind, and instructed her solicitors, so that a careful and thorough response was provided. This, the Panel concluded, she did not do.

53. In respect of Charge 2(b) (i) and (ii), the Panel considered the **Ivey** test. It accepted Mrs Horner's evidence as to her state of mind at the time. The Panel was not satisfied she knew she had taken other confidential information which she deliberately attempted to hide from Scott Fraser or that she instructed her solicitors to put forward untrue or misleading representations on her behalf. The Panel accepted Mrs Horner's evidence as to her state of mind at the time in question and concluded that ordinary decent people would not consider that she had acted dishonestly. The Panel found Charge 2(b)(i) not proved.

54. In respect of 2(b)(ii), the Panel concluded that this allegation was not made out, as again it was premised upon there having been a deliberate attempt by Mrs Horner to conceal the position from Scott Fraser. Whilst indicating that, as found in 2(a), this indicated a failure to comply with her professional obligations, it did not in the Panel's view amount to dishonesty as defined by the **Ivey** test.

55. In respect of 2(c), the Panel considered whether Mrs Horner's conduct amounted to a lack of integrity. The Panel considered that in relation to the lack of cooperation, that is diligently assisting with, and responding to, Scott Fraser's investigations, Mrs Horner's conduct did not meet the standards expected of a member of the surveyors' profession as set out in the guidance in **Wingate & Evans** (above) and in the view of the Panel, lacked integrity.

Liability to disciplinary action

56. On the basis of the facts found proved, the Panel considered whether Mrs Horner was liable to disciplinary action. The Panel accepted the advice of the Legal Assessor. The Panel bore in mind that this is a matter for the Panel's judgment. Not every falling short of RICS' standards or breach of RICS' rules will give rise to disciplinary action: the falling short in question must be of a serious nature.

57. The Panel was satisfied the charges found proved represented serious breaches of RICS' Code of Conduct and Bye-law 5.2.2 (c). The findings of lack of integrity and breach of Mrs Horner's

professional obligations were not trivial, but represented serious fallings short of the standards expected of the profession and as such, clearly gave rise to liability to disciplinary action.

58. The Panel was satisfied that there was liability to disciplinary action under Byelaw 5.2.2(c) in respect of Mrs Nicola Horner.

Sanction, costs and publication

60. Following an adjournment of the hearing on Wednesday 23 January 2019, the Panel resumed consideration of the case on Monday 4 March 2019 to consider applications in respect of sanction, costs and publication in the absence of the parties. This procedure had been agreed by both parties.
61. The Panel had given directions for a sequential exchange of written submissions between the parties prior to the resumed hearing date. These written submissions were provided to the Panel in advance of the resumed hearing date.

Submissions on sanction

62. The Panel considered the written submissions of Mr Rich on behalf of RICS dated 9 February 2019.
63. Mr Rich's submissions confirmed that Mrs Horner had not been the subject of any previous disciplinary findings. Mr Rich did not make submissions as to the appropriate sanction as this was a matter for the judgment of the Panel, but he drew the attention of the Panel to RICS' Sanctions Policy and its supplements and referred to the aggravating and mitigating features which RICS said were present. In relation to the issue of seriousness, he submitted that the lack of integrity issues found proved were towards the higher end of the scale.
64. The Panel considered the skeleton argument submitted by Mr Goodwin on behalf of Mrs Horner, dated 22 February 2019. As mitigating factors, Mr Goodwin reminded the Panel of the early admissions to Charges 1(a), (b) and (d), and that ultimately the Panel did not find the allegations that Mrs Horner had acted dishonestly proved. He reminded the Panel that it had not found Mrs Horner guilty of deliberate concealment, or of an attempt to gain a commercial advantage. He submitted that the Panel should take account of Mrs Horner's expressions of remorse and the insight she had shown.
65. Mr Goodwin's submissions set out the mitigating factors he said were present, which the Panel has considered in its decision, below. He reminded the Panel that although Mrs Horner had taken the

information for her own benefit, there was no intention to obtain a commercial advantage for herself or her new employers. He submitted that whilst two instances of lack of integrity had been found proved, there are degrees of lack of integrity and this case could “*fairly and properly be categorized as attenuated lack of integrity, rather than heinous want of integrity.*”

Legal advice and the Panel’s approach to sanction

66. The Panel received and accepted the advice of the Legal Assessor and referred to RICS’ Sanctions Policy and its supplements.

67. In respect of the Panel’s approach to sanction, it bore in mind that the purpose of a sanction is not to be punitive, although that may be its effect. The purpose of a sanction is to protect the public; to declare and uphold the standards of the profession; to safeguard the reputation of the profession, and of RICS as its regulator; and to demonstrate to the public and to RICS members that RICS takes firm action to promote regulatory compliance in the public interest and to deter other members and firms from future non-compliance.

68. The Panel must first decide whether to impose a sanction. The Panel was mindful that if it decided that a sanction was required, it must adopt a proportionate approach in determining the appropriate sanction. This means that the Panel commences at the lowest sanction, and only if it decides that sanction is not appropriate does it consider further sanctions. Having arrived at a sanction that it is minded to impose, the Panel then reviews the sanctions above, so as to satisfy itself that these would be too severe and disproportionate in the circumstances of the case. The Panel noted that more than one sanction may be imposed and that if it were to impose conditions, they must be specific, measurable, realistic, achievable and time bound. Any sanction must be proportionate and address the issues raised in these proceedings.

Panel’s decision on sanction

69. The Panel considered the submissions of both parties in respect of mitigating and aggravating factors.

70. The Panel identified the following mitigating factors:

- Mrs Horner’s previous clear disciplinary record;
- The supportive testimonials submitted from professional colleagues and personal contacts;
- Mrs Horner’s cooperation and engagement with the RICS investigation and proceedings;
- The admissions made to charges 1(a), (b) and (d);

- The absence of financial or commercial gain to herself or her new employers;
- Lack of dishonesty or deliberate intention to conceal her actions;
- The apology and insight demonstrated by Mrs Horner. In relation to insight, the Panel concluded that whilst Mrs Horner had been somewhat slow in developing insight, she did demonstrate at the hearing that she had now gained good insight into her past misconduct. It was also clear that the proceedings had had a salutary effect upon her, rendering any repetition of the behaviour very unlikely.

71. The Panel identified the following aggravating factors:

- Two separate aspects of lack of integrity had been found proved;
- Mrs Horner had acted recklessly in relation to the removal of the material (allegation 1(d));
- Financial loss was caused to her former employers in relation to the costs of instructing their solicitors to deal with the matter.

72. The Panel considered first whether any sanction should be imposed. The Panel had found proved allegations that Mrs Horner had breached her professional obligations and had breached confidentiality. The Panel had also found that Mrs Horner's actions lacked integrity in two different ways: by being reckless as to the appropriateness of removing the material in question, and by lacking openness and not cooperating when responding to the enquires of her former employer. These were serious findings for a professional person and a member of RICS. The Panel was mindful of the salutary effect that these proceedings have had on Mrs Horner, but nonetheless concluded it would be insufficient to conclude this matter without a sanction.

73. The Panel next considered imposing a caution, but took the view that this would not adequately mark the gravity of its concerns: this was not a minor matter for the reasons stated above, although the Panel has concluded the risk of repetition is low.

74. The Panel next considered imposing a Reprimand. The Panel concluded that this would be a proportionate response. Whilst the Panel was not concerned about any risk of harm to the public by repetition of Mrs Horner's past conduct, there had been a risk to the reputation of the surveyors' profession: public confidence in the profession would be undermined where a member breached confidentiality and data protection requirements and acted with a lack of integrity. The Panel considered that a Reprimand would publicly mark the gravity of the misconduct in this case and would provide the required deterrent effect.

75. The Panel concluded that this was not a case which was readily amenable to conditions or where conditions upon Mrs Horner's continued membership of RICS would serve a useful purpose in protecting the public. It reached the same conclusion in respect of undertakings.
76. The Panel considered whether to impose a fine. It concluded that a fine in combination with a Reprimand would appropriately mark the seriousness of the matter. In considering the appropriate amount of a fine, the Panel considered such information as it had in relation to Mrs Horner's financial means as referred to in Mr Goodwin's submissions. The Panel concluded that a fine of £4,000.00 would be proportionate in this case and would not have an inappropriately punitive effect.
77. Before concluding its decision, the Panel considered the further available sanction of expulsion from membership of RICS. The Panel was mindful that no dishonesty had been found proved. It was of the view that the lack of integrity issues were not at the higher end of the spectrum, albeit they were not minor. The Panel was however satisfied that Mrs Horner had now developed sufficient insight so that the risk of repetition of such conduct in the future was low. It did not consider that there was an attitudinal issue which was incompatible with continued membership of RICS. It considered that an order for expulsion of Mrs Horner from membership of RICS would be disproportionate to the findings made and in the light of the mitigating factors present in this case.
78. The Panel therefore determined to impose a Reprimand and a fine of £4,000.00 upon Mrs Nicola Horner.

Publication

79. The Panel considered Rule 39 and the guidance as to publication of its decisions in Supplement 3 to the Sanctions Policy. It accepted the Legal Assessor's advice.
80. The Panel considered the written submissions of the parties and noted that Mrs Horner did not seek to persuade the Panel against the usual presumption in favour of publication.
81. Part of the purpose of Panel decisions is to uphold the standards and reputation of the profession and to act as a deterrent to other members of the surveyors' profession. Publication of the Disciplinary Panel's decisions is an essential part of that role. In this case, the Panel saw no reason to depart from the usual presumption of the policy in favour of publication.

Costs

82. In accordance with Rule 34 of the Rules, the Panel may make such order for costs against RICS or the Relevant Person as it considers fair and reasonable. The Panel considered the matter of costs and referred to section 26 of the Sanctions Policy and Supplement 2 to that Policy which sets out guidance on costs at Section 3.
83. RICS had submitted a schedule of costs of the investigation and the hearing which had been provided to Mrs Horner in advance of the resumed hearing, as required by Rule 34. RICS applied for its costs in the sum of £9,928.60, which it submitted were proportionate.
84. On behalf of Mrs. Horner, Mr Goodwin did not challenge the amount of costs sought by RICS. However, he reminded the Panel of the financial impact of Mrs. Horner's impending maternity leave and indicated that Mrs Horner would wish to discuss with RICS arrangements for the payment of the costs by instalments over a reasonable timeframe.
85. The Panel observed that the figure claimed for the hearing represents the average cost of a hearing day, and the Panel has no reason to doubt it. The Panel was satisfied that the charges in this case were properly brought by RICS. The Panel identified no reason to reduce the amount of RICS' claim for costs.
86. The submissions on behalf of Mrs Horner indicated that she may wish to request that RICS agree terms for payment by suitable instalments, and over a suitable time period, and the Panel suggests that she or her representative should approach RICS to discuss this.
87. The Panel therefore decided to make an order for costs in favour of RICS in the sum of £9,928.60, to be paid by Mrs Horner by 1 May 2019, unless terms acceptable to RICS are agreed before that date.

Decision

88. In conclusion, the Panel imposes the following sanctions on Mrs Nicola Horner:
- a) A Reprimand
 - b) A fine of £4,000.00
89. The Panel orders that:
- a) Mrs Horner must pay RICS' costs in the sum of £9,928.00;

- b) This decision will be published in Modus magazine and on RICS' website in accordance with the publication policy;
- c) Mrs Horner must pay the sums due in respect of the fine and costs to RICS by 1 May 2019, unless payment terms acceptable to RICS have been agreed between RICS and Mrs Horner before 1 May 2019.

Right of Appeal

- 90. in accordance with Rules 58 and 60 of the RICS Disciplinary, Registration and Appeal Panel Rules 2009, Mrs Horner has 28 days from the service of the notification of this decision to appeal the decision.
- 91. In accordance with Rules 59 and 60 of the RICS Disciplinary, Registration and Appeal Panel Rules 2009 the Honorary Secretary has 28 days from the service of the notification of this decision to require a review of the decision."