

## **Disciplinary Panel Hearing**

### **Case of**

**Oakhouse Commercial LLP**  
**Lincoln, LN6**

### **On**

Wednesday 02 November 2016

### **At**

RICS, Parliament Square, London

### **Chairman**

Helen Riley

### **Members**

Andrew Winscom (Surveyor Member)  
Chris Boothman (Lay Member)

### **Legal Assessor**

Rosemary Rollason

### **RICS Representative**

Vicki Buckley

### **Relevant Firm's Representative**

Glenn Tyrell, Counsel.

## **Introduction**

Oakhouse Commercial LLP [ ("the Firm") appear before the RICS Conduct Panel in connection with the following allegations:-

1. Oakhouse Commercial LLP (formerly known as Hodgson Elkington LLP (the firm)) did not at all times avoid actions or situations that were inconsistent with its professional obligations in that on 14 December 2015 it was convicted of an offence under the Health and Safety at Work etc. Act 1974 in respect of a failure to ensure the health and safety of persons using the West End Arcade in Long Row, Nottingham for which the firm was managing agent

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

2. Oakhouse Commercial LLP (formerly known as Hodgson Elkington LLP (the firm)) a firm regulated by RICS, and managing agents of commercial premises known as West End Arcade, Nottingham, did not carry out its professional work with due skill care and diligence and with proper regard for technical standards expected of it in that
  1. it did not have in place an adequate system of inspection and maintenance of an escalator in the premises that it knew was old and worn
  2. its conduct in 1 above led to a serious injury to a member of public using the said escalator
  3. its conduct in 1 above exposed members of the public to risk of personal injury

**Contrary to Rule 4 of the Rules of Conduct for Firms 2007**

**Response**

The Firm admitted Charges 1 and 2.

**Summary**

Oakhouse Commercial LLP ("the Firm") has been registered for regulation by RICS since 2007. A record from Companies House in the papers before the Panel indicated that the company was incorporated under the name Hodgson Elkington LLP and on 28 May 2016, changed its name to Oakhouse Commercial LLP. The Firm was therefore operating under the latter name at the time of the events which are the subject of this hearing. The Firm has five member principals and the contact officer is Simon Elkington.

In December 2015, the Firm informed RICS by way of its Valuation Registration Return for 2016 that it had been the subject of a criminal conviction for an offence under Sections 3 and 33(1)(a) of the Health and Safety At Work etc. Act 1974. The Firm was convicted by Nottingham Magistrates Court on 27 October 2015 and committed to Nottingham Crown Court for sentencing. The sentence imposed on 15 December 2015 was a fine of £75,000 and the Firm was also ordered to pay a victim surcharge of £15.00 and prosecution costs of £50,000.

RICS Regulation investigated the matter and obtained copies of press reports about the incident by BBC News, The Mail Online and ITV News at the time of the sentencing hearing. RICS also obtained a copy of the sentencing remarks of His Honour Judge Hamilton from Nottingham, Crown Court.

The incident concerned an escalator at a shopping arcade named "West End Arcade" in Nottingham of which a company, B Limited, was the proprietor. The Firm was contracted by B Limited as the managing property agent for the property. The Panel had sight of the agreement between B Limited and the Firm relating to properties including West End Arcade entitled " Commercial Property Management: Conditions of Engagement – Service Charges".

On 15 March 2012, a member of the public, a Mr R, a young man in his twenties, boarded the escalator and his foot became trapped in a gap which resulted from a riser plate being missing from one of the escalator steps. The accident was a serious and traumatic one for Mr R who suffered serious injury in that his toe was amputated and his other toes were injured as a result of his foot being trapped.

The Firm pleaded guilty to the criminal offences under the Health and Safety At Work etc. Act 1974. The Judge's sentencing remarks indicated that the riser plate had been missing from the escalator for a day or two before the incident. It was accepted by the Firm that the escalator had been in place for a number of years. A report of two years earlier had described the escalator as very old and worn and advised that the best and safest option may be removal and replacement with stairs. It was said that supervision was required so that problems were reported immediately to the managing agent i.e. the Firm. A further report shortly afterwards made further recommendations but, the Judge said, "*basically the report described the escalators as past their useful life*". The Judge stated that the Firm remained responsible for the escalator thereafter and modest maintenance work was done, but nothing of any significance had been done for 17 months prior to the incident. A month and a half before the incident, another company was asked to look at general maintenance reported that various work needed to be done, but nothing was done.

The Judge said that the Firm did nothing although they knew the escalator was beyond its sell-by date and there was no system of daily inspection. The cleaners simply turned the mechanism on and off each day. The Judge concluded there was no system in place to prevent the incident involving Mr R which took place on 15 March 2012.

The Judge noted that the Firm managed over 1500 properties in the Nottinghamshire area and that it accepted that it was its responsibility to manage those properties so that members of the public were safe. He also noted that the Firm was a member of RICS and referred to RICS guidance which provides that a key role for the property manager is overseeing health and safety and fire safety in the property and ensuring the property is managed to comply with all legal obligations. He commented that the Firm should have made efforts to put proper inspection arrangements in place in respect of the old escalator, but it did not do so. He commented that the risk of entrapment upon an escalator is well recognised and easy to foresee. In deciding upon penalty, the Judge described the matter as an extremely serious incident involving a member of the public which could have resulted in a much more serious injury. He described the event as "*truly traumatic*" and "*life changing*" for Mr R. He noted that the Firm had pleaded guilty, accepted full responsibility and accepted that it had failed in its duty. He accepted that the Firm had apologised and shown genuine remorse. The Judge stated that the public needed reassurance that such matters would be dealt with properly now and in the future and that the financial penalty must represent the concerns of the public when high standards were not met as they should be.

During its investigation, RICS invited the Firm to submit a response and the Firm did so by a letter dated 2 March 2016.

### **Burden and standard of proof**

The burden of proof in RICS disciplinary proceedings is upon RICS and the standard of proof applied is the civil standard, the balance of probabilities. In this case, Charges 1 and 2 were admitted by the Firm.

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.

### **Preliminary matters**

No preliminary issues were raised by the parties.

## **Evidence**

The Panel had perused the RICS solicitor's bundle of documents, running to 98 pages, and the bundle of documents produced by Mr Tyrell on behalf of the Firm, running to 251 pages. The Panel received and considered a written skeleton argument from Mr Tyrell. The Panel considered the oral submissions of both representatives..

## **Findings of fact**

The Panel considered the documents in the hearing bundle. RICS did not call any witnesses to give oral evidence.

The Panel accepted the Firm's admissions to Charges 1 and 2. In respect of the conviction, the Panel had sight of a copy of the Memorandum from Nottingham Magistrates Court showing the entry dated 27 October 2015 and a copy of the Certificate of Conviction from Nottingham Crown Court relating to the sentencing hearing on 14 December 2015, providing evidence confirming the criminal conviction and the sentence. The Panel also had reference to the documents presented in RICS' bundle, which in its view supported the facts as alleged.

The Panel was therefore satisfied that the facts of the Charges 1 and 2 were proved on the balance of probabilities.

## **Submissions by RICS presenting solicitor**

Mrs Buckley submitted that RICS expects the highest standards of ethical and professional behaviour from its registered firms. The criminal conviction showed that the Firm had fallen seriously below those standards. She further submitted that the case had attracted widespread press coverage which is damaging to RICS' reputation and to public confidence in RICS.

Mrs Buckley also submitted that the Firm's failings in relation to the management and maintenance of the escalator indicated that it had not carried out its professional work with due skill, care and diligence and with proper regard to the expected technical standards. She submitted that members of the public were exposed to risk to their health and safety as a result and that a member of the public had suffered serious injury as a result. Mrs Buckley drew the Panel's attention to the guidance note issued by RICS entitled "Commercial Property Management in England and Wales – 2<sup>nd</sup> Edition" at paragraph 4.13.1 under the heading "Health & safety and fire safety" which provides that:

"A key role for the property manager is overseeing health and safety in the property, ensuring it is managed to comply with all legal obligations. Keeping the building safe and ensuring compliance with relevant legislation will require the establishment of systems and procedures to ensure statutory inspections are in place and systems monitored..."

### **Submissions on behalf of the Firm**

The Firm disputed that it was liable to disciplinary action in respect of Charge 1 and Charge 2.

Mr Tyrell referred to the submissions of the Firm in its letter to RICs of 2 March 2016. These submissions indicated that the Firm was contracted to manage West End Arcade by B Ltd. All landlords' expenditure required prior authority from B Ltd and the Firm was prohibited from incurring any expenditure in excess of the credit balance held in the landlords client account. The Firm had ensured that competent contractors were appointed to undertake the regular maintenance of the escalator in question. The latest at the time of the events were P Ltd, who were appointed in March 2011 to carry out 6 maintenance inspections per year. The Firm had also appointed Bureau Veritas to undertake LOLER certification inspections on an annual basis and representatives of the Firm attended the site weekly, speaking with tenant and identifying any issues. A cleaning company was responsible for turning the escalator on and off at the beginning and end of each day.

The Firm had undertaken an in-depth study of the whole of the premises prior to the accident looking at the possibility of a full refurbishment, including the escalators, as B Ltd had not invested in the property for a significant period of time. It was submitted that the Firm had indicated to B Ltd. that the escalator was coming to the end of its useful life and that in due course a permanent solution would need to be found, but no funds were made available to the firm by B Ltd for replacement of the escalator.

In relation to the investigation into the incident in which Mr R was injured, it was emphasised on behalf of the Firm that the Local Authority had accepted that the missing riser plate was not a result of a failure to maintain the escalator, but that some external force had been used to remove it or cause it to become detached. Although it was unclear exactly when this had occurred, the Local Authority accepted that it was very close to the date of the incident and so it was submitted that the public had not been exposed to risk for a long period of time. The Firm had received no warning that there was any problem with the escalator in the period leading up to the incident.

Mr Tyrell said that The Firm pleaded guilty to the criminal charges on the basis that the inspection system it had in place should have been more thorough. The Firm accepted with hindsight that it would have been prudent to train a representative of the cleaning company to carry out a detailed inspection of the escalator at the beginning and end of each day and accepted that such a system may have meant that the damage to the escalator was discovered before the incident. The Firm however believed at the time that the system it had in place was working.

The Firm also accepted that some maintenance issues had not been actioned in a timely fashion, but that these were mechanical rather than safety issues, the public were not left at risk by the repairs not being undertaken promptly and such issues were not the cause of the incident involving Mr R. The Firm also demonstrated that after the incident that funds to replace the escalator were withheld by B Ltd and on 28 February 2014, B Ltd went into receivership and no longer traded.

## **Discussion and conclusion**

On the basis of the charges found proved, the Panel considered whether or not the Firm is liable to disciplinary action. In coming to its conclusion the Panel accepted the advice of the legal assessor. This question is one for the Panel's judgment.

The Panel had taken account of and acknowledged the submissions of Mr Tyrell on behalf of the Firm. The Panel recognised that the documents showed the difficulties which the Firm faced in the management of West End Shopping Arcade. It was evident from the documents presented that for some time before the incident on 15 March 2012, various expert assessments reported that the

escalator was past its useful life. Expert technical advice had been sought and options explored by the Firm, but the costs of replacement or refurbishment were very significant. Importantly, in the period leading up to the incident on 15 March 2012, Pickerings Europe Ltd. ("Pickerings") were engaged to inspect the escalator six times a year and they had provided inspection reports in July 2011, September 2011, November 2011 which did not expressly raise any health and safety issues about the escalator. In their inspection report of 1 February 2012, 6 weeks before the incident, issues were identified which Pickerings said required urgent action. On 12 March 2012, a telephone call between a surveyor employed by the Firm and a Pickerings engineer resulted in a response from Pickerings that the urgent concerns related to both health and safety issues **and** maintenance – as recorded, "*a bit of both*". Nothing was done following this. It is not clear that this issue had any link to the removal of the riser plate which led to the accident to Mr R. However, the Panel noted that the expert reports had suggested that an incident involving force had actually caused the removal of the riser plate, probably quite shortly before the accident occurred.

The Panel concluded that the critical issue was that, had the Firm had a system in place for the daily inspection of the escalator and the reporting of any problems with it, the incident on 15 March 2012 might have been avoided. This was a failing in day to day management of the premises. The Panel was mindful of the RICS Guidance "Commercial Property Management in England and Wales – 2<sup>nd</sup> Edition" which at paragraph 4.13.1 under the heading "Health & safety and fire safety" provides that:

*"A key role for the property manager is overseeing health and safety in the property, ensuring it is managed to comply with all legal obligations. Keeping the building safe and ensuring compliance with relevant legislation will require the establishment of systems and procedures to ensure statutory inspections are in place and systems monitored..."*

The Firm has accepted that this was its responsibility and that it failed in this respect.

In the light of the above, in relation to liability for disciplinary action, the Panel concluded that by virtue of its conviction for a criminal offence relating to health and safety, as referred to in Charge 1, the Firm did not at all times avoid actions or situations that were inconsistent with its professional obligations and therefore did not adhere to Rule 3 of the Rules of Conduct for Firms.

In relation to its failings identified and admitted in Charge 2, the Firm failed adhere to Rule 4 of the Rules of Conduct for Firms, in that it did not carry out its professional work with due skill care and diligence and with proper regard for the standards expect of it.



Having considered all the circumstances of the case, the Panel considered that, in relation to both charges, the Firm had fallen seriously short of the standards expected of RICS registered firms.

As a result of the Firm's failures to meet its professional responsibilities, a member of the public suffered what was described by the Judge in the criminal case as a traumatic and life-changing injury and other members of the public were placed at risk of harm. The Panel considered this matter impacted upon the reputation of the surveyors' profession and was likely to undermine public confidence in the profession. This was further aggravated by extensive press coverage of the criminal proceedings in the public domain.

The Panel decided that the Firm was liable to disciplinary action in respect of both Charges 1 and 2.

### **Mitigation**

Mrs Buckley confirmed on behalf of RICS that the firm had no previous disciplinary history.

Mr Tyrell addressed the Panel and put forward mitigation, referring to the factors set out in his skeleton argument. He also referred to the remedial steps the Firm said it had had put in place in relation to the identified issues. The Panel took account of these points and they are set out in the Panel's decision in relation to sanction below.

### **Decision as to sanction**

In deciding on the issue of sanction, the Panel took account of the submissions made by Mr Tyrell on behalf of the Firm and accepted the advice of the Legal Assessor.

At this stage, the Panel was provided with information about the Firm's means in relation to RICS' application for costs. This information indicated that the Firm, Oakhouse Commercial LLP, was no longer trading. In the light of this information, the Panel resumed in public session to seek clarification of the Firm's current status, as this had not been brought to its attention in the course of submissions during the hearing up until this point.

Mr Tyrell informed the Panel that the Firm is no longer trading and has not traded since 29 April 2016. It has not traded since changing its name from Hodgson Elkington LLP in May 2016. Mr Tyrell informed the Panel that there is no intention that the Firm Oakhouse Commercial LLP will trade in the future and that Mr Elkington and Mr Shaw were now working in a different firm which had taken over their surveying practice. Mr Tyrell clarified that the remedial steps to which he had referred in his submissions had been put in place at the time when the Firm wrote its letter of submission to RICS on 2 March 2016.

In determining the question of sanction, the Panel reminded itself that the purpose of any sanction is not to be punitive, though it may have a punitive 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 bore in mind that its primary function at this stage is to protect the public, while reaching a proportionate sanction, taking into account the wider public interest and the interests of the Firm. The Panel took into account RICS' Sanctions Policy.

The Panel considered the mitigating and aggravating factors of this case. It applied the principle of proportionality, considering the sanctions in order beginning with the least serious sanction and imposing the lowest sanction which appropriately protected the public. The Panel bore in mind that more than one sanction may be imposed and that if conditions were to be imposed, they must be specific, measurable, achievable, realistic and timebound and must address the issues raised in these proceedings.

The Panel considered the following mitigating factors in this case:

- The Firm itself disclosed the conviction to RICS on its Annual Return
- The Firm has no previous adverse disciplinary history and no previous convictions
- In the criminal proceedings, the Firm pleaded guilty to the charges and accepted responsibility for its failings
- The Firm apologised and expressed remorse for the incident and the injury caused to Mr R.
- The Firm admitted liability in the civil claim
- The Firm co-operated fully with RICS' investigation and admitted the charges

- After the incident, and as at 2 March 2016, the Firm had put in place steps to minimise the risk of similar incidents in the future, which included:

- Introducing revised contractors' forms
- Appointing a commercial property administrator
- Appointing Alcumus as Health & Safety Risk Assessment adviser
- Introducing a quarterly review of procedures
- Introducing a new common parts inspection form
- Upgrading existing property management and accounts system

The Panel considered that the following aggravating factors were present:

- The Firm had been aware of the issues in relation to the escalator at West End Arcade since at least 2010
- The incident had caused serious injury to a member of the public
- There was a wider risk of harm to the general public
- The extensive press reporting of the matter added to the adverse impact on public confidence in the surveyors' profession.

The Panel then considered the issue of sanction.

#### No Further Action

The Panel concluded that the safety of the public and the wider public interest would not be protected if the Panel were to take no further action in a case of this seriousness.

#### Caution or Reprimand

A caution or reprimand would be insufficient to mark the seriousness of the Panel's findings and to protect the wider public interest.

#### Fine

The Firm had been ordered to pay a fine of £75,000 in the criminal proceedings and the Panel did not consider that the imposition of a financial penalty would serve a useful purpose.

### Conditions upon the relevant person continued membership /registration with RICS

The Panel concluded that, given that it had been informed that the Firm was no longer trading, the imposition of conditions would not serve any useful purpose.

### Removal of firms right to registration

The Panel was satisfied that there had been a serious breach of the standards of expected behaviour which adversely impacted the reputation of the profession and presented a risk to the public. In view of the information that the Firm was no longer trading, the Panel took the view mitigating factors were of less impact. In light of this, and given the gravity of the misconduct, the Panel concluded that the only appropriate sanction was removal of the Firm's right to registration and, in the circumstances, a lesser sanction would be insufficient to protect the public and uphold the wider public interest.

Accordingly the Panel orders that the right of the Firm, Oakhouse Commercial LLP, to RICS registration should be removed.

### **Publication and Costs**

The Panel considered the guidance as to publication of its decisions. It accepted the legal assessor's advice. The advice was, and 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 Tyrell on behalf of the Firm made no submissions opposing publication. The Panel saw 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 the Firm.

The RICS presenting solicitor asked for costs in the total sum of £4,405.00 and had provided a schedule to the Firm in advance of the hearing. On behalf of the Firm, there were no submissions in relation to costs, but the Panel took account of the information in its Statement of Means.

The Panel considered carefully the costs sought. The figure for the hearing is the average cost of a hearing day, and the Panel has no reason to doubt it. The other costs are reasonable and appropriate in the view of the Panel.

The Panel concluded that it was fair to make a costs order in this case. Otherwise the cost of the proceedings falls on the profession as a whole.

The Panel orders that the Firm pay to RICS costs of £4,405.00.

### **Appeal Period**

Oakhouse Commercial LLP (formerly known as Hodgson Elkington LLP (the firm)) 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.

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.