

Disciplinary Panel Hearing by way of written representations

Case of

Topcon Construction Ltd
Grimsby, South Humberside, DN33

On

Thursday 30 March 2017

At

RICS' Offices, Surveyor Court, Westwood Way, Coventry, CV4 8JE

Panel

John Anderson (Lay Chair)
Christopher Boothman (Lay Member)
Andrew Winscom (Surveyor Member)

Legal Assessor

Alastair McFarlane

The formal charges are:

1. On 12 November 2014 Topcon Construction Ltd failed to act in accordance with its professional obligation to complete its annual return correctly.

Contrary to Rule 3 of the Rules of Conduct for Firms 2007 and is therefore liable to disciplinary action under Bye-Law 5.3.2(c).

2. Between 5 March 2013 and 11 November 2014 the firm has acted in a manner liable to bring RICS into disrepute.

The firm has therefore breached Bye-law 5.3.2(a) and is liable to disciplinary action under that Bye-law.

DETERMINATION

Representation and Proceeding on the papers

1. Mr Clark for Topcon Construction Ltd (“the Firm”) requested that the hearing proceed by way of written representations on a paper hearing and Ms Joester on behalf of RICS agreed to this and the parties have submitted a Statement of Agreed Facts which has been provided to the Panel.
2. The Panel was content, in those circumstances, for the hearing to proceed on the papers without either party present.

Agreed Facts

3. On the 12 November 2014, the Firm completed and submitted its Annual Return to RICS, answering “no” in response to the question "has your firm or any principles or professionals of the firm ever been convicted of a criminal offence of which RICS has not already been notified". However, the Firm had been convicted of offences under the Health and Safety at Work Act 1974 on 10 November 2014.
4. The particulars of the conviction were that in March 2013 the Firm was operating a site at Caistor Grammar School. Three of the Firm's workers used a manner of cropping reinforced concrete piles which caused danger to one, Mr N. The conviction on 10 November 2014 related to the provision of unsuitable work equipment to workers and failing to carry out the dismantling of part of a structure in a manner which prevented danger.
5. The Firm is a construction firm operating in the Lincolnshire area and Mr Clark is one of the directors and is an RICS member and contact officer for the Firm.
6. Charge 1 relates to the Firm's 2014 annual return to RICS. The Firm accepts that the failure to disclose the convictions to RICS on the annual return was an oversight and RICS accepts that there was no dishonesty on the part of the firm or anyone acting on its behalf in relation to the failure. It is noted that the Firm self-reported the conviction on its 2015 annual return.
7. Charge 2 relates to the system used to crop the piling at the Caistor Grammar School site. There were 3 workers on site: Mr S (the Site Manager) Mr N and the JCB operator Mr K. The

job that had to be completed was the 'cropping' of piling which was already in place. In order to do this a cropper had been ordered from a hire company. The Firm originally ordered the correct pile cropper for the operation, however the site supervisor without the knowledge of the Firm changed the cropper to an unsuitable cropper, using the name of a director to do so. Mr S confirmed to the HSE investigation that at the time of ordering he was 'unaware that it would not crop fully the tiles with the four bars in them.' On two occasions prior to the commencement of the job, after the initial order and on delivery, the hire company questioned the selection of the suitability of the croppers that had been ordered, pointing out that they were not suitable for cropping piles of the type that were on site. The firm were advised to hire either a multi-bar or power cropper. The Firm's senior representative on site, the site manager Mr S, was informed that the croppers were not fit for the purpose intended, and he confirmed that he intended to use the 'pile croppers' in preference to the recommended type.

Mr S employed a method for cropping the piles, which was reflected in the risk assessment and method statement that he produced. The method involved using the hydraulic pile cropper to 'nibble' the base of the pile so that the concrete would separate from the reinforcing bars. The bars were then being cut through by a disc cutter operated by Mr S, and were pushed uncontrollably to the ground. This method of dismantling the piles was referred to as akin to 'tree felling'. The method employed meant that after the concrete had been 'nibbled' away by the pile cutter the piles became top heavy and unstable. The correct method would have been to use a more powerful cropper, which could cut through all the reinforcing bars at one time, enabling the pile to be felled in a controlled manner.

An accident occurred at the site when a pile number 23 was being cut by Mr S with the disc cutter. At that time Mr N, the groundworker at the site, was guiding the cropper over pile 18a. Mr S tried to push pile 23 to the ground, but because he had failed to cut through all the bars the pile twisted and fell uncontrollably, striking Mr N and causing him injury.

8. The system used by the Firm was unsafe firstly because the incorrect equipment was used and secondly because the method employed and the risk assessments provided by the Firm were insufficient to control the hazards involved specifically ensuring that the fall zone was clear of workers whilst cropping piles. In these circumstances RICS submitted that the Firm's operation of the site at Caistor Grammar School was liable to bring RICS into disrepute by failing to ensure that the work being carried out on the site was being conducted safely. As a

result of the failure by the Firm resulting in the court case and media coverage RICS submit that RICS has been brought into disrepute.

9. The Firm admitted both charges 1 and 2 and agreed that it is liable to disciplinary action under bye-law 5.3.2 (c).

Findings of fact

10. The Panel noted that in the Agreed Statement of Facts there appeared to be a typographical error on the last page where a second admission by the Firm is made to Charge 1 as opposed to Charge 2. The Panel caused inquiries to be made of Ms Joester, who confirmed that it was a typographical error, and that the Firm had admitted both Charge 1 and 2 and liability to disciplinary action. The Panel accepted this and noted it was consistent with the contents of the Firm's Statement of Mitigation. The Panel was satisfied by virtue of the admissions, and on the evidence before it, that both Charge 1 and Charge 2 were proved.

Liability for Disciplinary Action

11. Although the Firm admitted it was liable to disciplinary action, this is nonetheless a matter of judgment for the Panel. The Panel was satisfied that Charge 1 amounted to a breach of Rule 3 of the Rules of Conduct for Firms 2007 rendering it liable to disciplinary action under Bye-law 5.3.2 (c) and that Charge 2 was a breach of Bye-law 5.3.2 (a) rendering it liable to disciplinary action. The Panel was satisfied that both the failure to declare the conviction and the circumstances of the Firm's failure to ensure that the work at the site was being conducted safely amounted to a serious falling short of the Firm's professional obligations. It had regard to the Firm's admission that these failings made it so liable. The Panel's view was that the failure to fulfil professional obligations is likely to undermine public confidence in the profession. In the circumstances, the Panel was satisfied that the Firm was liable to disciplinary action.

Sanction

12. The Panel bore in mind that the purpose of sanctions is not to be punitive, though that may be their effect. The purpose of sanctions is to declare and uphold the standards of the profession, to safeguard the reputation of the profession and of RICS as its regulator and to protect the

public. Sanctions must be proportionate to the matters found proved, having balanced the Firm's interests and the public interest.

13. The Panel accepted the advice of the Legal Assessor and paid careful regard to the Sanctions Policy Guidance of RICS. The Panel noted the submissions of RICS and the Firm set out in the Agreed Statement of Facts and the Firm's Statement of Mitigation.

14. The Panel considered the following were mitigating factors:

- It accepted that the non-disclosure in Charge 1 was a clerical mistake
- The Firm had admitted both Charges and that it was liable to disciplinary action
- The Firm had taken steps to remedy the failures and undertaken extensive training of all staff since the event
- The Firm disciplined the Site Manager and had given him training to ensure a similar breach would not occur again.
- Further, the Panel noted that the Firm had undertaken a rigorous training programme to improve the safety culture of the firm for all staff. The Panel considered that these courses were relevant to health and safety issues.
- The Panel noted that the Firm received a fine of £10,000 for the criminal offences and a compensation order of £10,000.
- There were no previous adverse disciplinary findings against the firm
- The firm has co-operated with the RICS investigation and the HSE investigation

15. The Panel considered the following were aggravating factors;

- Ensuring accuracy in the completing of Annual Returns is an important obligation on all Firms in ensuring public protection and maintaining the reputation of the profession
- The Firm was specifically warned on more than one occasion that this was the wrong type of pile cropper for the job
- The Firm used the inappropriate equipment despite having been so warned
- An employee sustained serious personal injury as a result of the Firm's failings.

16. In making its decision on sanction, the Panel reminded itself that RICS is a professional membership organisation, which sets standards for its members as a condition of membership. The Panel considered the matters are too serious for no sanction at all to be imposed. They considered the sanctions in ascending order of restrictiveness.
17. The Panel considered that a Caution was insufficient to mark the seriousness of the behaviour and to adequately maintain the reputation of the profession.
18. The Panel considered that a Reprimand in combination with an Order of Conditions were the appropriate and proportionate sanctions. There had been a risk of harm and the Panel was satisfied that the risk of future harm was adequately addressed by the imposition of these penalties. It considered the following condition was specific, measurable and workable:

The Firm is to submit to 2 inspections before 31 December 2018 to be carried out by a Health & Safety Consultant, appointed by RICS. The Consultant is to assess and report to RICS on the adequacy of the resilience, relevance and effectiveness of the Firm's health and safety governance. The first inspection is to take place by 1 October 2017 and the second inspection is to take place between 1 October 2018 and 31 December 2018. The cost of the inspections and reports are to be met by the Firm.

If the Head of Regulation considers either of the reports to be unsatisfactory, this may lead to further disciplinary action against the Firm.

19. The Panel also considered whether to impose a fine in addition and determined that it was not necessary or appropriate to do so. It had regard to Supplement 2 to the Sanctions Policy in relation to Fines. It reminded itself that the purpose of any sanction is not to be punitive and noted that the Court has passed a sentence dealing with the criminal offence. However, this Panel's function is different from that of the criminal court. A fundamental duty of the Panel is to maintain the reputation of the profession and to declare and uphold proper standards of conduct and behaviour together with public confidence in the profession. The Panel noted that it had no information provided by Mr Clark as to the size and financial status and current position of the firm, other than that the criminal penalty totalling £20,000 had had a severe impact on the turnover of the firm. In all the circumstances, the Panel was satisfied that the imposition of a Fine was not necessary in order to mark the gravity and seriousness of the failings and to uphold public confidence, given the other sanctions it has determined to impose.

20. The Panel also carefully considered whether it was necessary to withdraw the Firm's registration. It had specific regard to the factors listed at Paragraph 20 of the Sanctions Guidance and noted that the conviction was for a serious offence. Nonetheless, in the Panel's judgment, it considered that such a sanction would be disproportionate in this case, given the specific circumstances and steps taken since.
21. Accordingly, the Panel directs a Reprimand and a Condition on the Firm's registration as set out above.

Publication

22. The Panel has considered the policy on publication of decisions, The Sanctions Policy Supplement 3 - Publication of Regulatory Disciplinary Matters. This decision will be published on the RICS website, and in the RICS magazine, Modus.

Costs

23. RICS made an application for costs in the total sum of £2,200. The Panel considered the Statement of Means which was submitted by the Firm, and noted that it has power to award such costs as it considers fair and reasonable under Rule 34. The Panel had regard to paragraph 3 of Supplement 2 to the Sanctions Policy in relation to costs and determined that the sum claimed was fair and reasonable and ordered the Firm to pay £2,200.

Appeal Period

24. 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 Rules.
25. 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.