

Disciplinary Panel Hearing

Case of

David Ager MRICS

On

Wednesday, 22 August 2018

Paper hearing

By telephone

Panel

Dr Angela Brown (Lay Chair)
Rosalyn Hayles (Lay Member)
Christopher Pittman (Surveyor Member)

Legal Assessor

Tony Woodcock

The formal charge is:

On or around 26th July 2017, you were convicted of fraud and money laundering and were sentenced to 36 months imprisonment.

You are therefore liable to disciplinary action in accordance with Bye-law 5.2.2(d)

Response

- 1 Mr Ager responded to the RICS Listing Questionnaire on 20 July 2018 and admitted the charge. Mr Ager also wrote to the RICS in May 2018 indicating that he would “plead guilty” and expressing considerable remorse.

Service and Proceeding by way of a paper hearing

- 2 A notice of the hearing on 22 August 2018 was sent to Mr Ager on 17 July 2018. The notice was sent by email to Mr Ager’s preferred email address and by Special Delivery to his current location as identified by the Prisoner Location Service. A copy of the notice was exhibited together with a witness statement from Mrs Jae Berry of the RICS Regulatory Tribunal Team as to service.
- 3 Rule 23 of the Disciplinary, Registration and Appeal Panel Rules (Version 7) (the Rules) confirms that good service requires RICS to:

- set out the charge;
- confirm the date, time and venue of the hearing;
- enclose the Disciplinary, Registration and Appeal Panel Rules 2009 (as amended);
- invite the Relevant Person to indicate whether he wishes to request an oral hearing.

4 Rule 43a of the Rules, which relates to the paper hearings, states:

- The Head of Panel Management will give the Relevant Person notice of the hearing which shall not be less than 28 days from the date of the letter.
- The Relevant Person and RICS will submit documents on which they intend to rely and written representations to the Disciplinary Panel no later than 14 days before the date of the hearing.

5 The Panel was satisfied, having regard to the date of the notice and the date of the hearing and the statement of Mrs Berry, that service was proved and that the RICS had complied with Rule 23 and Rule 43a. The Panel considered whether to proceed with the paper hearing or adjourn in order to conduct an oral hearing.

6 The Panel determined that it was fair, reasonable and in the public interest to proceed with a paper hearing, in Mr Ager's absence, for the following reasons

- The case fell within the provisions allowing paper hearings
- In the RICS Listing Questionnaire, Mr Ager indicated that he did not require an oral hearing.
- There is a strong public interest in ensuring that substantive hearings take place as expeditiously as possible and the Panel saw no disadvantage to Mr Ager in proceeding.

Background

7 Mr Ager was employed as a quantity surveyor by the construction company McAlpine between 2004 and 2015. In his role he was permitted to provide one of the two approvals required to make payments to sub-contractors.

8 In a period of approximately two and a half years between 2012 and 2014, Mr Ager arranged for several fraudulent payments to be made to companies either owned by him or his co-defendant.

9 Mr Ager benefitted personally to the sum of approximately £862,000 and the overall gain from the fraud was £1,264,140.00 when his co-defendant's gain was taken into account.

10 Mr Ager was arrested at the end of 2014 and dismissed from his job in 2015. Mr Ager pleaded guilty to fraud and money laundering in respect of a thirteen count indictment.

Mr Ager was sentenced to 36 months' imprisonment.

- 11 In his sentencing remarks, the Judge described the offences as “complex, planned frauds, committed in breach of a position of trust held by Mr Ager”. He went on to say that Mr Ager was “motivated by greed and committed these offences simply because the opportunity presented itself”, that he entered into the fraudulent arrangements “with open eyes”, and accepted that the actions throughout “were dishonest”.
- 12 The Panel reminded itself that the burden of proving the facts rest on the RICS. Mr Ager did not have to prove anything, and the formal charge could only be found proved if the Panel was satisfied, on a balance of probabilities, that the Member had committed the alleged breach.
- 13 The Panel was not provided with a Certificate of Conviction, but it was provided with a duly authenticated transcript of the Judge's Sentencing Remarks. The Panel's attention was drawn to Rule 41d of the Rules, which provides that a finding of a court in the UK shall be admissible as prima facie evidence of the facts found. The Panel was satisfied that the Judge's comments were admissible. The Panel had Mr Ager's plea of guilty, and his response to the Listing Questionnaire and his letter of May 2018 admitting the breach on the basis of the documents sent to him by the RICS for the purposes of these proceedings.

Decision

Liability to Disciplinary Action

- 14 Pursuant to Bye-law B5.2.2(d), a Member may be liable to disciplinary action where he has been convicted of a criminal offence which could result in a custodial sentence. Mr Ager clearly fell within that provision.
- 15 The Panel considered that the case was extremely serious notwithstanding the remorse which Mr Ager had expressed to the Court and the remedial actions he had taken. Large sums were stolen over a lengthy period and in breach of trust. The Panel concluded that Mr Ager is liable to disciplinary action.

Sanction

The Panel's Approach

- 16 The Panel took into account the RICS Sanctions Policy and the overriding principles. The Panel was mindful that the purpose of any sanction is not to punish Mr Ager again for the same offence, but to protect the public and the wider public interest. The public interest includes maintaining public confidence in the profession and RICS as its regulator and upholding proper standards of conduct and behaviour. The Panel applied the principle of proportionality by weighing Mr Ager's interests with the public interest and by considering each available sanction in ascending order of severity.
- 17 The Panel took into account its factual findings and its determination that Mr Ager is liable to disciplinary action.

Decision

- 18 In determining the appropriate sanction, to impose the Panel first identified what it considered to be the mitigating and aggravating features of the case.
- 19 The Panel identified the following mitigating factors:
- Mr Ager's previous good character and the absence of any previous disciplinary findings;
 - Mr Ager's co-operation throughout both the police and the RICS investigations;
 - Mr Ager's guilty pleas to the criminal charge;
 - The significant remorse which Mr Ager had expressed to the Court, to his victims – described by the Judge as “extraordinary” – and to the RICS;
 - Mr Ager's good conduct since the beginning of the criminal investigation up to the point of his imprisonment;
 - The remedial steps Mr Ager had taken and his repayment of much of his criminal gain;
 - Mr Ager's securing of employment subsequent to his arrest up until his sentence with an employer who was fully aware of his conduct and who provided a positive character reference to the Court;
 - The presentations Mr Ager had made subsequent to his arrest and prior to his imprisonment to increase fraud awareness in the construction industry.
- 20 The Panel identified the following aggravating factors:
- The frauds were substantial, premeditated and lasted over a period of two and a half years;
 - The offences were committed in flagrant breach of trust and motivated by greed;
 - There was substantial loss;
 - The gravity was marked by a significant prison sentence notwithstanding the pleas of guilty and the strong mitigation accepted by the Judge.
- 21 The Panel first considered taking no action. The Panel concluded that, in view of the nature and seriousness of Mr Ager's criminal behaviour, to take no action would be wholly inappropriate.
- 22 The Panel then considered a Caution and a Reprimand. The Panel noted paragraph 15.1 of the Sanctions Policy which states: *'A caution is likely to be given in circumstances where the breach is minor and is unlikely to be repeated'* and paragraph 16.1 which states, *'A reprimand may be given where there has been/is a*

risk of harm. Mr Ager's case clearly did not fit within these criteria. With regard to a caution, the breach could not be described as "*minor*". With regard to a Reprimand, the Panel took the view that it would fall substantially short of meeting the wider public interest in terms of declaring and upholding proper standards or maintaining public confidence in the profession.

- 23 The Panel went on to consider Undertakings and Fines. Beyond undertaking not to commit fraud (which would plainly be otiose), the Panel found it difficult to see what undertakings could usefully be sought in these circumstances. The Panel also concluded that a financial penalty, either on its own or in combination with another sanction, would be insufficient to reflect the nature of the offences, to uphold professional standards and to deter others from similar conduct.
- 24 The Panel considered conditions. As with undertakings, the Panel did not believe there were any meaningful conditions which could be applied in a case such as this and, in any event, conditions could not adequately meet the wider public interest.
- 25 Having determined that conditions would be insufficient the Panel determined that Mr Ager should be expelled from RICS membership. In reaching this conclusion the Panel took into account paragraphs 20.1 of the Sanctions Policy which states that in the absence of extenuating circumstances the following types of cases are likely to result in expulsion:
- Conviction of a serious criminal offence (an offence for which the penalty could be a custodial sentence).
- 26 The Panel noted that expulsion is the sanction of last resort. However, the Panel concluded that there was no other way to adequately protect the public and the wider public interest and to deter other Members. The Panel concluded that Mr Ager put his own interests above his professional obligation to uphold the highest standards of personal conduct and behaviour at all times. Given the gross breach of the high standards expected of RICS members and that Mr Ager had brought the profession into disrepute, the Panel did not consider that there was any way to protect the public other than through expulsion. Furthermore, it is the Panel's view that the public would consider Mr Ager's behaviour to be so serious that it must be marked by imposing the ultimate sanction. Any sanction short of expulsion would fail to declare and uphold proper standards and would fail to maintain public confidence in the profession and RICS as its regulator.
- 27 Accordingly, the Panel determined that expulsion is the appropriate, necessary and proportionate sanction in this case.
- 28 The Panel had regard to the impact expulsion may have on Mr Ager and all the mitigating circumstances. It was particularly mindful of his extraordinary remorse and the steps he had taken to demonstrate that remorse. However, the Panel concluded that this was a case of such gravity that those considerations had to come second.

Publication

- 29 The Panel has considered the 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.

Costs

- 30 RICS applied for costs of £600.00
- 31 The Panel considered carefully the issue of costs. The costs figure represents a contribution towards the costs incurred by RICS in preparation for the hearing and the hearing itself. The Panel had no reason to doubt that the costs applied for were fair and reasonable.
- 32 The Panel concluded that it was appropriate for Mr Ager to contribute towards the costs of bringing this case. Otherwise the full cost of these proceedings would fall on the profession as a whole.
- 33 The Panel ordered Mr Ager to pay to RICS costs in the sum of £600.00

Appeal Period

- 34 Mr Ager has 28 days, from the service of the notification of the decision, to appeal this decision in accordance with Rule 59 of the Rules.
- 35 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.