

Disciplinary Panel Hearing

Case of

Derek John Porter MRICS [0048578]
Wokingham, Berkshire RG41

On

Thursday and Friday 11th and 12th October 2018 at 1000 hours BST

At 55 Colmore Row, Birmingham, B3 2AA

Panel

Gillian Seager (Lay Chair)
Patrick Bligh-Cheesman (Lay Member)
Helen Riley (Surveyor Member)

Legal Assessor

Ben Kemp

Representatives for the parties

Kelly Sherlock, Solicitor-Advocate appeared on behalf of RICS

Graham Porter attended in order to provide assistance to the Respondent in the presentation of his case

Hearing Officer

Maria Choudhury

The formal charges against Derek John Porter FRICS are that;

1. He acted dishonestly in sending an email to Wokingham Borough Council on 29 September 2016 which contained representations that he knew were false and/or misleading contrary to Rule 3 of the Rules of Conduct for Members 2007.
2. He acted with a lack of integrity in terms of the content and/or purpose of his email contact with Wokingham Borough Council (the "Council") between 29 September 2016 and 07 October 2016 in one or more of the following ways:
 - (i) He utilised knowledge that he had obtained during the preparation of a confidential report on building survey to disclose to the Council the existence and status of two rear extensions at [a Property] when he had no legitimate reason to do so;
 - (ii) Following the receipt of information that he requested from Wokingham Borough Council, he expressly referred to the lack of planning permission and invited the Planning Enforcement Officer to investigate the matter when he had no legitimate reason to do so.

This is contrary to Rule 3 of the Rules of Conduct for Members 2007

In light of either or both of the allegations set out above Mr Porter is liable to disciplinary action under RICS Bye-Law 5.2.2(a) or 5.2.2(c).

Service

1. Mr Porter (the Respondent) was in attendance at the hearing, assisted by his brother, Mr G. Porter.
2. The provisions as to service set out in Rules 23(b) and 23A(a) of the Disciplinary, Registration and Appeal Panel Rules 2009 version 7 (the Rules) have been complied with, as the notice of the hearing, with other documents required to be supplied, were sent by email and special post to Mr Porter on 02 August 2018, so giving more than the required 56 days' notice of this hearing. RICS has produced a witness statement from its Regulatory Tribunal Executive, Emma Jones, speaking to evidence of service, including an appropriate signed delivery receipt, also produced.

Background

3. Mr Porter was admitted to membership of RICS on 01 October 1974. He is currently, and was at all times relevant to these proceedings, a Fellow member of RICS, trading as a sole practitioner under the name of DJ Porter.
4. On 18 April 2016, Mr Porter produced a Report of a Building Survey (“the Report”) in respect of a residential property (“the Property”). The Report was prepared for the benefit of the prospective purchasers of the Property, JG and JB (“the Purchasers”).
5. On 06 September 2016, the Purchasers completed their purchase of and moved into the Property. Shortly thereafter, heavy rainfall led to the roof of the Property leaking, causing significant damage to the Property. The Purchasers raised concerns with Mr Porter, asserting that he ought in the survey he had conducted in April 2016 to have identified the structural defects which gave rise to the rain damage. The Purchasers escalated their concerns in the form of a formal written complaint dated 26 September 2016 which was sent to Mr Porter on 27 September 2016.
6. On 29 September 2016, Mr Porter sent an email to Wokingham Borough Council in relation to the Property. There followed a sequence of emails between Mr Porter and Wokingham Borough Council, between 29 September and 14 October 2016.
7. The matters charged in this case relate entirely to the content of these particular emails; more specifically, to emails sent by Mr Porter to Wokingham Borough Council between 29 September and 07 October 2016. The actual survey conducted by Mr Porter and the Report of that survey are relevant only insofar as they provide the context in which this sequence of emails occurred.

Preliminary Applications

Application for Adjournment

8. Mr Porter initially invited the Panel to adjourn the hearing. He referred in support of this application to a complaint which he had made to the Solicitors Regulatory Authority (SRA) about the conduct of one of the Purchasers, JG. Put short, the substance of Mr Porter’s complaint about JG related to the fact that JG had used, inappropriately in Mr Porter’s contention, the email account and signature of his employer at the material time, a firm of solicitors, for the purposes of personal correspondence with Mr Porter regarding the Property. In the event that the SRA upheld his complaint, and made a finding against JG, this would, Mr Porter contended, have a negative bearing on JG’s reliability and credibility as a witness in the present case before this Panel. Moreover, Mr Porter asserted, the complaint about Mr Porter which JG had brought to RICS was fundamentally tainted, because JG did not come to these proceedings ‘with clean hands’.

9. Having heard submissions from both parties, and received and accepted advice from its legal assessor, the Panel refuses this application. The SRA has not made an adverse finding against JG, nor is there any basis for surmising that it will do so. The evidence produced by Mr Porter suggested that the SRA was in fact still at a preliminary stage in its consideration of his complaint. That is a matter for the SRA. Moreover, and in any event, the present case is brought not by JG, but by RICS, as Mr Porter's regulatory body. JG is a witness in the case. The weight to be attached to his evidence will be a matter for the Panel's judgement, taking account of its assessment of his reliability and credibility.

Application to have Evidence excluded

10. Mr Porter then made a further application, to the effect that certain documentation in the RICS bundle is prejudicial and should be excluded from the evidence in the case. In particular, Mr Porter argued that the said sequence of emails between him and Wokingham Borough Council between 29 September and 14 October 2016 should be excluded because of the manner in which it had been obtained by JG. The evidence suggested that these emails had been produced to JG by Wokingham Borough Council in response to a written request submitted by JG under the Freedom of Information Act. Mr Porter contended that Wokingham Council had improperly produced the emails in full, when it should have protected Mr Porter's identity, presumably by redaction of his name. Mr Porter took no issue with the authenticity of the emails. He asserts however that the emails, insofar as they bear his name, have been improperly obtained, and should not therefore fairly be admitted as evidence in this case.
11. The Panel, having heard submissions from both parties, and again received and accepted the advice of its legal assessor, also rejects this application. Whatever the merits of Mr Porter's complaint, it is more properly directed to Wokingham Borough Council. It is not for this Panel to determine what it should or should not have produced in response to a Freedom of Information request. The Panel nonetheless observes that Mr Porter in the email correspondence did present himself as "acting for" the Purchasers. That being the case, one could envisage that Wokingham Borough Council might not have considered it necessary to conceal Mr Porter's identity from his own purported clients.
12. Regardless, the question for this Panel is rather whether allowing the emails into evidence in any way endangers the safety or fairness of these proceedings. Mr Porter does not dispute their authenticity or that he sent and received the emails in question. The Panel concludes that there is no basis upon which this evidence should be excluded. It considers that it would be counter to the public interest to do so. The evidential weight to be attached to the emails will again however be a matter for the Panel's judgement having heard all of the evidence in the case.

Response to Charge

13. Mr Porter denied both charges.

Hearing

14. The Panel has had the benefit of documentary bundles produced in advance by both RICS and Mr Porter, as well as an additional bundle produced by Mr Porter and admitted at the outset of the hearing. These include written statements produced by JG and Mr Porter, the Report and related correspondence, including the sequence of emails between Mr Porter and Wokingham Borough Council, referred to. In addition, a written response from Mr Porter to JG's claim arising from the water ingress at the Property was produced and admitted, with the consent of both parties, during the hearing.
15. Both JG and Mr Porter gave live evidence at the hearing, and the Panel has heard submissions from both parties. It has received and accepted advice from its legal assessor.

Findings of Fact

16. The burden of proof is on RICS and the standard of proof is the balance of probabilities.

Charge 1

17. Charge 1 relates to the content of the first email in the sequence referred to. That email, dated 29 September 2016, was from Mr Porter to Wokingham Borough Council, in the following terms:

"Dear Sir or Madam

I am acting for the purchaser of the above property and as part of my survey I am trying to establish the history regarding any planning applications that may have been made regarding the rear extensions (two storey and single storey). I would be grateful if you investigate this matter and let me have the records of any applications that may have been made and also the decisions given by the Council on such applications.

Best wishes

Derek Porter FRICS"

18. RICS submits that this email was false and/or misleading in a number of respects (charge 1). Firstly, Mr Porter was not, it says, acting for the Purchasers by this point in

time. His survey had long since been completed and the Report produced (in April 2016). His substantive work was complete. By September 2016, Mr Porter was the subject of a complaint/ claim made by the Purchasers about the work he had completed in April 2016. It follows, RICS asserts, that it was not true that Mr Porter was, as he states in this email, still acting for the Purchasers.

19. RICS submits that this email was also inaccurate in stating that his inquiry to the Council was made “*as part of [his] survey*”, when this was, it says, plainly false, his survey and the Report having been completed in April, prior to the now completed purchase of the Property.
20. RICS says that this email was for these reasons dishonest.
21. Mr Porter accepts in response that the wording of this email was ‘clumsy’, but does not accept that it was false or misleading. He denies dishonesty.
22. Mr Porter maintains that he did have an ongoing client relationship with the Purchasers at the point at which he sent this email. There was correspondence with the Purchasers in September 2016, and subsequently, following the Purchasers raising their concerns about the Report, and Mr Porter as a result undertook a reinspection of the Property, on 20 September 2016.
23. Mr Porter, in the course of his evidence, provided a number of explanations for his decision to contact Wokingham Borough Council (in the terms set out above). He stated that he needed to address a concern which had been raised by the Purchasers about the condition of the roof of a recent extension to the Property. Mr Porter stated that he believed that the integrity of the roof would be confirmed by the approval for the extension granted in January 2016 by Local Authority Building Control. Mr Porter separately suggested that he wanted to establish whether planning permission had been granted for each of the two extensions to the property, in anticipation that the Purchasers’ complaint might (in due course) extend to criticism of his failure to address the planning position. Somewhat inconsistently, Mr Porter suggested later in his oral evidence that he was in fact seeking to assist the Purchasers in identifying an anticipated irregularity in the planning position.
24. No question about planning had in fact been raised by the Purchasers and the matter of planning had in any event been addressed by Mr Porter in the Report, in April 2016, in the following terms:

“The property has been extended in such a way as to require Planning Permission, and Building Regulation Approval would have been required for the work. These aspects should be investigated by your solicitor and copies of the relevant approval notices obtained as part of the searches.”

Your legal adviser should make formal enquiries with the existing owners to find out if any other guarantees are applicable to the property.”

25. The Panel is satisfied, having regard to all of the evidence, that Mr Porter was well aware that, in contacting Wokingham Borough Council, he was not acting for the Purchasers. He did not consult the Purchasers or otherwise make them aware in any way of his intention to contact Wokingham Borough Council, let alone seek their instructions before doing so. Even if, as Mr Porter contends, he was entitled to make this initial approach to Wokingham Borough Council on behalf of the Purchasers without first seeking their instructions, the fact that he did not make the Purchasers aware of this or subsequent emails and the response(s) received, is sufficient to demonstrate that Mr Porter was not acting on the Purchasers', but rather on his own, behalf. Moreover, Mr Porter, at this stage in his professional relationship with the Purchasers, had no legitimate basis to assert that he was still acting for them. The work for which he had been instructed was long since complete (the Report, completed in April 2016, for which he had been paid his professional fee). Moreover, the Purchasers had completed their purchase of the Property, in reliance upon his Report. Mr Porter suggested that his further engagement with the Purchasers in September 2016, provided evidence to support his position that he was at that stage still acting for the Purchasers. But this is to mischaracterise the quite different capacity in which Mr Porter and the Purchasers were then engaging, which was by then in the capacity of opposing parties to an increasingly adversarial dispute.
26. The Panel found JG in his oral evidence before the Panel to be a credible witness. Whether or not his compensation claim against Mr Porter is well conceived is not a matter for this Panel, but he presented his recollection of the Purchasers' relevant communications with Mr Porter in a straightforward and credible way.
27. Mr Porter's evidence was less credible. He accepted that the wording of the 29 September 2016 email was 'clumsy' but his various explanations as to his motivation in sending that email were inconsistent. On the balance of probabilities, the Panel finds that Mr Porter was not acting for the Purchasers in this and his subsequent email correspondence with Wokingham Borough Council. It further finds that Mr Porter was well aware that he was not acting for the Purchasers. He would otherwise have made the Purchasers aware of this correspondence, if not beforehand (as he plainly should), then certainly afterwards. Mr Porter did neither. On any sensible and credible view of the 29 September 2016 email, read alongside the subsequent emails in the same exchange (see below) and the evidence as a whole, Mr Porter was plainly acting in his own interests in the context of an increasingly acrimonious dispute with the Purchasers. He was not acting for them or in their interests, as he was quite aware. Nor was Mr Porter acting "*as part of [my] survey*". The survey, and his Report thereon, had been completed and submitted some five months earlier, as Mr Porter confirmed in oral evidence.
28. The Panel does not find credible Mr Porter's explanation that his words in this email were simply 'clumsy'. He was clearly seeking information to serve his own interests and

agenda. Mr Porter sought to obtain information about the adverse planning position pertaining to the Property, and to bring that position to the attention of the Council, in order specifically to cause detriment and/or inconvenience to the Purchasers. By asserting, falsely, that he was acting for the Purchasers in relation to the survey, and stating his RICS credentials, Mr Porter clearly sought to bring credibility to his inquiry, in the eyes of the Council.

29. The Panel is satisfied, having regard to charge 1, that Mr Porter acted dishonestly in relation to the 29 September 2016 email, representing falsely that he was acting for the Purchasers and that his inquiry was, “part of [his] survey”. These representations were, as Mr Porter was aware, false and/ or misleading, and moreover dishonest, applying the objective standard of ordinary, decent people. In arriving at this conclusion, the Panel has had regard, as advised by its legal assessor, to the relevant test for dishonesty, as set out by the Supreme Court in *Ivey v. Genting Casino* [2017] UKSC 67.
30. The Panel accordingly finds charge 1 proved.

Charge 2 (i) & (ii)

Charge 2(i)

31. Further to Mr Porter’s email of 29 September 2016, Wokingham Borough Council responded on 03 October 2016, providing a copy of the “history” it held for the Property. Mr Porter persisted with his inquiry, replying the same day in the following terms:

“I thank you for your reply to my enquiry. I would advise you that the property has a two storey rear extension across the full width of the house, and a single storey rear extension which is also across the full width of the house. The latter was only signed off by Building Control in January 2016. Do these extensions both have Planning Permission?”

Regards,

Derek Porter FRICS”

32. The Council responded on 07 October, providing “*decision notices for two extensions*” at the Property. Mr Porter again responded the same day:

“I thank you for your reply but you have already sent me those notices. If there are no other notices, does this mean that the two storey and the single storey extensions were built without planning permissions, assuming that they would have required planning permission because of their size and using up of PD [permitted development] rights? Perhaps the Enforcement Officer might like to look into this matter and advise me of the outcome of his/ her investigations.

Regards

Derek Porter FRICS

33. For completeness, the Council responded on 14 October 2016, this time from its Planning Enforcement Department, to which Mr Porter's correspondence had been forwarded. This confirmed further that, *"there are no planning applications apart from previously sent to you by my colleague"*. The Council's email concluded:

"I will be raising an Enforcement investigation into these works and the Enforcement Officer will be in touch with you accordingly."

34. The Council did not revert to Mr Porter, nor did Mr Porter engage with the Purchasers in relation to this correspondence or the likelihood of a Planning Enforcement investigation. The Purchasers remained unaware of the emails and investigation until they were approached directly by the Council. There followed, as confirmed by the evidence of JG, a formal investigation by the Council, including a Council Enforcement Department site visit to the Property, with associated stress and anxiety experienced by the Purchasers until the planning position was resolved. This was ultimately achieved by way of full retrospective planning permission, which was required to be obtained in respect of one of the two extensions, and the granting of a Certificate of Lawful Use, required in respect of the other.
35. There was some debate during the hearing as to the extent to which Mr Porter, in the course of this correspondence, divulged information which was confidential to the Purchasers. Mr Porter maintained that he was entitled, as would be any member of the public, to inquire of the Council in relation to the planning and building control history of a property.
36. This may be so, but Mr Porter clearly utilised information, to which he applied his expert judgement as a member of RICS, which he had acquired in the context of his professional relationship with the Purchasers. This was information moreover, including the existence, size and likely planning status of the extensions to the Property, which would not have been readily available to an ordinary member of the public.
37. Moreover, Mr Porter was not in the position of an ordinary member of the public. He had been instructed as the Purchasers' professional advisor. That brings with it an important obligation of confidentiality and trust, one which continues moreover even after work instructed is completed and the surveyor ceases to act. By contacting Wokingham Borough Council in the way he did, disclosing information obtained in the course of producing his confidential Report for the Purchasers, Mr Porter abused that trust. As found in relation to charge 1, Mr Porter had no legitimate reason for raising and pursuing this matter with the Council in the way he did; it was not his business to do so. He did so in pursuit of his own agenda and, in so doing, Mr Porter lost sight of his professional duty to his (former) clients.

Charge 2(ii)

38. The correspondence relevant to charge 2(ii), Mr Porter's final email to Wokingham Borough Council, dated 07 October 2016, is referred to and set out above. Mr Porter suggested in his evidence before the Panel that he did not 'encourage' the Council to investigate the planning position in relation to the Property. The Panel does not find his position in this respect to be credible. This was, on any reasonable interpretation, plainly the import and intent of the words, "*Perhaps the Enforcement Officer might like to look into this matter and advise me of the outcome...*"
39. These words do not lend themselves to any reasonable ambiguity. Mr Porter was plainly seeking to instigate an investigation of the planning position in relation to the Property, outside the Purchasers' knowledge and without their consent.

Conclusion (charge 2)

40. For the reasons set out above, the Panel finds charge 2 to be proved, in both parts (i) and (ii). It is satisfied that Mr Porter's conduct, in respect of both (i) and (ii), clearly demonstrated a lack of integrity in respect of the content and/ or purpose of his said email correspondence with Wokingham Borough Council. In reaching this conclusion, the Panel has had regard, as advised by its legal assessor, to principles from relevant caselaw on the concept of professional integrity, including those recently set out by the Court of Appeal in *Wingate and Evans v Solicitors Regulation Authority*, [2018] EWCA Civ 366.

Liability to Disciplinary Action

41. On the basis of the facts found the Panel has to decide whether or not Mr Porter is liable to disciplinary action. In coming to its conclusion the Panel has accepted the advice of the legal assessor. This question is one for the Panel's judgement. The Panel has decided that the circumstances in this case, having regard to its findings in relation to both charge 1 and 2, do give rise to a breach of Rule 3 of the RICS Rules of Conduct for Members, in that Mr Porter has not acted with integrity and avoided actions or situations that are inconsistent with his professional obligations. In this case the breaches arise directly from a specific finding of dishonesty (charge 1) and a lack of professional integrity (charge 2).
42. The Panel has found that Mr Porter has acted dishonestly, and with a lack of professional integrity, matters of some seriousness. It considers in the circumstances that it has no option but to find Mr Porter liable to disciplinary action in respect of both charges, individually and collectively.

Sanction

43. The Panel bears 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.
44. The Panel has paid careful heed to the advice of the Legal Assessor and to the indicative sanctions guidance of RICS. It has considered carefully submissions made on behalf of RICS and the mitigating and aggravating factors of this case.
45. The Panel has decided that Mr Porter is liable to disciplinary action. Having done so it first has to decide whether to impose a sanction, and if it so decides the Panel commences at the lowest sanction, and only if it decides that that sanction is not appropriate does it move to the next level of sanction. The Panel bears in mind that more than one sanction may be imposed.
46. The Panel considers that its finding in this case is too serious not to impose a sanction. It recognises that any finding of dishonesty and lack of integrity in professional regulatory proceedings is by definition a serious one, albeit that not all findings of dishonesty/ lack of integrity are equally serious. In this case, and in mitigation, the Panel notes that Mr Porter has no previous disciplinary record. He has engaged with the RICS' investigation and with these proceedings, and is now, he says, at the point of retirement, following a long and otherwise unblemished career.
47. Moreover, Mr Porter has been found to have been dishonest and to have lacked integrity in his dealings in relation to (former) clients. The Panel does not consider in the circumstances that it would be appropriate and proportionate not to impose any sanction. It further considers that a caution, reprimand, undertakings or a fine would not adequately address the seriousness of the Panel's findings in this case, or be consistent with its obligation to uphold appropriate standards and protect the reputation of the surveyors' profession. The Panel has considered very carefully the possible imposition of conditions, but is not satisfied that these would be effective given the Panel's concern at the lack of insight demonstrated by Mr Porter throughout as to the reason and necessity for these proceedings.
48. Mr Porter's conduct in this case amounts to an abuse of his position as a professional person, and of the position of trust thereby conferred upon him. He actively acted against the interests of his (former) clients. The Purchasers were thereby denied the opportunity to address the planning issues themselves, and to decide for themselves how to appropriately handle those issues. Mr Porter instead took matters into his own hands, and sought actively to expose his own (former) clients to enforcement action. He was motivated in so doing not by the Purchasers' interests, or even by some sense of the 'public good', but by his own agenda in seeking to cause mischief for his (former) clients in the context of an increasingly acrimonious dispute. This may have been an isolated episode in the context of an otherwise flawless career, but it was one in which Mr Porter lost sight of his professional judgement to such an extent that he sought to undermine the interests of his own (former) clients. The responsibility to act professionally is not extinguished because of a dispute or disagreement. Mr Porter made a serious error of judgement, one moreover in relation to which he has

demonstrated a singular lack of insight. With reluctance, the Panel concludes that his conduct is of a seriousness such as not to be compatible with membership of RICS.

49. The Panel for these reasons directs Mr Porter's expulsion from membership of RICS, with immediate effect.

Publication

50. The Panel has considered the guidance as to publication of its decisions. It accepts the legal assessor's advice. The advice was, and the guidance provides, that it is usual for decisions of the Panel to be published on RICS' website and in RICS Modus. The Panel sees 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.
51. The Panel orders that this decision is published on RICS' website and in RICS Modus, in accordance with Supplement 3 to the Sanctions Policy 2008, version 6.

Costs

52. RICS has asked for costs in the total sum of £10,642.50. It has provided a costs schedule to Mr Porter in advance of the hearing. The Panel has had regard to submissions made by Mr Porter in relation to his financial position.
53. The Panel has considered carefully the costs sought and determined that they are reasonable and proportionate. The Panel orders Mr Porter to pay RICS' costs, albeit restricted to the sum of £9,000, in recognition of Mr Porter's expected imminent retirement and consequential financial position.

Appeal Period

54. Mr Porter may appeal to an Appeal Panel against this decision within 28 days of notification of this decision, in accordance with Rules 58 – 70 of the Rules.
55. The Honorary Secretary of RICS may require a review of a finding or penalty imposed by a Disciplinary Panel within 28 days from service of the notification of the decision, in accordance with Rule 59 of the Rules.