Disciplinary Panel Hearing

Case of
Mr Philip Antino

On
4 –11 June 2018, 13 -18 June 2018, 12-16 and 23 November 2018, 12 December 2018

At
RICS Parliament Square

Panel
Carolyn Tetlow (Lay Chair)
Helen Riley (Surveyor member)
Ron Barclay-Smith (Lay member)

Legal Assessor
Christopher Hamlet
Rebecca Vanstone (on 12 December 2018 only)

RICS Presenting Officer
James Lynch, Solicitor

Respondents' Representative(s)
Mr David Mayall, Counsel

Hearing Officer
Jae Berry

Introduction

1. This case was referred to the Disciplinary Panel after complaints were made with regard to the Respondent's conduct in relation to the discharge of his functions as a Party Wall Surveyor between October 2014 and December 2017.

Charges

2. The following charges were referred to the Disciplinary Panel:

Complaint made by Mr and Mrs B

1) You failed to act in a manner befitting a member of RICS when on 19 October 2014, during a site visit to the home of Mr and Mrs B, you made one or more of the following comments, or words to the same effect, to Mr B and/or Mr B Jr:
   a) "I've got a photo of your 'woggos' and I'm going to report them to immigration".
   b) "I love people like you, you make me so rich".
   c) "Go on big boy, go on big boy, you like it don't you".
   d) "I'm your worst nightmare.

   You are therefore in breach of Bye-Law 5.2.1(a) and are liable to disciplinary action in accordance with Bye-Law 5.2.2(a)

2) You failed to take appropriate steps to manage or avoid an actual or perceived conflict of interest when on 20 October 2014 you accepted an appointment as a party wall surveyor for Ms D in relation to a dispute with Mr and Mrs B, despite having been engaged in the confrontation referred to at charge 1 the day previous.

   Contrary to Rule 3 of the Rules of Conduct for Members 2007
   You are therefore liable to disciplinary action in accordance with Bye-Law 5.2.2(c)

3) You failed to act with integrity in that as the adjoining owner's surveyor appointed by Mr and Mrs D under the Party Wall etc. Act 1996 (hereafter referred to as "the Act"):
   a) On 23 December 2014, in conjunction with the building owner's surveyor Mr S, you served a party wall award, on Mr and Mrs B.
   b) You knew or ought reasonably to have known that the content of that award was likely to be contentious.
   c) You were aware that there was statutory 14-day deadline in which to appeal that award.
   d) You delivered the award on this date in a deliberate attempt to frustrate Mr and Mrs B's ability to appeal that award within that timeframe.

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

You are therefore liable to disciplinary action under Bye-Law 5.2.2 (a) or (c)

4) On 09 May 2017 you sent a letter to Mr and Mrs B containing a notification under S10(7) of the Act. Some or all of the issues raised in that letter related to Mr and Mrs B's complaints and/or claims against you and did not relate to the dispute between Mr and Mrs B and Ms D. You knew or ought reasonably to have known that it was not appropriate to resolve these by way of a party wall award. By misrepresenting your ability to resolve those complaints and/or claims by way of an award pursuant to S10(7) of the Act, you failed to act with integrity.

Contrary to Rule 3 of the Rules of Conduct for Members 2007
You are therefore liable to disciplinary action under Bye-Law 5.2.2 (a) or (c)

Complaint made by Mr and Mrs W

5) You failed to act in a manner befitting membership of RICS when, in direct response to an unfavourable Google review from Mr W dated 20 November 2015, you encouraged Mr G to refer a matter to you in your capacity as agreed surveyor, in circumstances where you knew or ought reasonably to have known that the costs in dispute were not 'works pursuant to the Act' and were not therefore recoverable under the Act.

You are therefore in breach of Bye-Law 5.2.1(a) and are liable to disciplinary action in accordance with Bye-Law 5.2.2(a).

6) As agreed surveyor purportedly appointed by Mr G and Mr and Mrs W under the Act, you made a party wall award dated 23 December 2015 in respect of matters that were not 'matters arising out of or incidental to the dispute'. You did so to penalise Mr and Mrs W for leaving a negative Google review dated 20 November 2015:

Particulars:

a) Mr G referred this matter to you to consider whether the costs of £480 in respect of your invoice of 04 December 2012 were properly recoverable against Mr and Mrs W.
b) You determined that Mr G was not entitled to claim the sum of £480 in respect of your costs as they related to costs incurred in obtaining party wall advice prior to service of notice under the Act.

c) You proceeded to award Mr G a sum of £330.54 in respect of costs that had allegedly been incurred prior to the making of the award of 29 January 2013 but had not been included in that award.
d) No documentary evidence was included to support the assertion that those fees had been incurred.
e) No good reason was provided for why these costs were not considered at the time of making the first award despite those costs allegedly being incurred prior to making the award.
f) A further sum of £200 was awarded in respect for the inconvenience and time included in the referral, notwithstanding the fact that Mr G had made no such assertion.
g) The total sum of £530.54 was intended to penalise Mr and Mrs W by effectively compensating Mr G for the sum of £480 that he was unable to recover as per particulars (a) and (b) above.
h) Your award included provision that Mr and Mrs W paid to you the sum of £350 + Vat in respect of your own costs in making this award.

Contrary to Rule 3 of the Rules of Conduct for Members 2007
You are therefore liable to disciplinary action under Bye-Law 5.2.2(a) or (c)

7) You failed to act with integrity in that as a surveyor purportedly appointed by Mr G and Mr and Mrs W:
a) On 23 December 2015 you served a Party Wall Award on Mr and Mrs W.
b) You knew or ought reasonably to have known that the content of that award was likely to be contentious.
c) You were aware that there was statutory 14-day deadline in which to appeal that award
d) You delivered the award on this date in a deliberate attempt to frustrate Mr and Mrs W's ability to appeal that award within that timeframe.

Contrary to Rule 3 of the Rules of Conduct for Members 2007
You are therefore liable to disciplinary action under Bye-Law 5.2.2 (a) or (c)

8) You failed to act with integrity when:
a) On 12 April 2016 you made a Party Wall Award requiring Mr and Mrs W to pay your costs in challenging an award that you knew did not relate to 'matters arising out of or incidental to the dispute 'as per charge 7 above; or
b) On 12 April 2016 you made a Party Wall Award requiring Mr and Mrs W to pay a sum that related entirely to your costs in dealing with their service complaint against you.

Contrary to Rule 3 of the Rules of Conduct for Members 2007
You are therefore liable to disciplinary action in accordance with Bye Law 5.2.2(a) or (c)

Complaint from Mr R

9) You failed to act with integrity when making and/or delivering an award dated 24 September 2015 in that:
   a) You made an ex-parte award requiring the building owners to pay your fees totalling £17,990.94 plus interest.
   b) You posted the award to 59 Manor Road.
   c) You knew that this address was a building site at the time and any post sent to that address was unlikely to be received at all or in a timely manner.
   d) You sent this award by post only, despite related correspondence with Mr O and Mr R taking place via email.
   e) You were aware that there was statutory 14-day deadline in which to appeal that award.
   f) You made no reference to the award in email correspondence between 24 September 2015 and 12 October 2015.
   g) You did not make reference to the award until you met with Mr R in person on 13 October 2015, after the deadline to appeal that award had expired.
   h) You behaved in the manner described at particulars (a)-(g) above in an attempt to frustrate the building owner's ability to challenge the award.

Contrary to Rule 3 of the Rules of Conduct for Members 2007
You are therefore liable to disciplinary action in accordance with Bye Law 5.2.2 (a) or (c)

10) You failed to co-operate fully with RICS staff in that you did not respond promptly, substantively or at all to any or all of the following letters from RICS
   a) Letter dated 17 August 2016
   b) Letter dated 08 September 2016
   c) Letter dated 21 September 2016
   d) Letter dated 04 October 2016
   e) Letter dated 12 October 2016
   f) Letter dated 20 October 2017

g) Letter dated 24 October 2017
h) Letter dated 06 November 2017
i) Letter dated 08 November 2017
j) Letter dated 20 December 2017

Contrary to Rule 9 of the Rules of Conduct for Members 2007
You are therefore liable to disciplinary action under Bye-Law 5.2.2(c)

Preliminary issues

Application to amend the charges:

3. Mr Lynch, on behalf of RICS, made an application to amend the charges as follows:

    a. Charge 3 from "…the adjoining owner's surveyor appointed by Mr and Mrs Dodosh." to "…the adjoining owner's surveyor appointed by Ms Dodosh…"

    b. Charge 3 from "…(a)…you served a party wall award…" to "…(a) you made and served a party wall award…"

    c. Charge 7 from "…(a)…you served a party wall award…" to "…(a) you made and served a party wall award…"

4. Mr Mayall, on behalf of the Respondent, consented to the amendments. The Panel duly allowed the amendments.

Application to hear the case in Private

5. Mr Mayall made an application that all aspects of the hearing pertaining to Charge 1 should be heard in private session. He submitted that the allegations were serious and would cause significant reputational damage to the Respondent were they to be heard in public.

6. Mr Lynch resisted the application. He submitted that there was a strong public interest in justice being seen to be done in order to maintain public confidence and uphold the reputation of the profession.

7. Having received advice from the Legal Assessor, the Panel rejected the application. It did not consider that there were exceptional circumstances that justified departing from the principle of open justice. The Panel was mindful of the fact that should the charge be found not proved, that finding will be clearly set out in the public determination. That this charge was a serious allegation which could, if proved, amount to a criminal offence did not, in itself, justify hearing it behind closed doors. As such, the balance was firmly in favour of public consideration of the charge.

Application to exclude family members of Mr and Mrs B

8. Mr Mayall submitted that members of the B family, who were attending the hearing as members of the public, ought to be excluded from the hearing. He submitted that since they were hearing and taking notes on the submissions made and evidence heard, there was a significant risk that they would discuss the case and thereby contaminate the evidence of the B family who were due to be called as witnesses for RICS.

9. Mr Lynch resisted the application.

10. The Panel, having received advice from the Legal Assessor, concluded that having determined that it was in the public interest to hear the case in public, it would be inappropriate and undesirable, in the absence of exceptional circumstances, to exclude a specified class of members of the public. The Panel was unconvinced, in any event, either of the actual risk of contamination of evidence by members of the B family, or that such risk would be ameliorated by excluding the family from the proceedings, as opposed to all members of the public. Finally, it considered that since Mr AB and Mr HB had already provided statements to RICS, any contamination of their evidence arising from the scenario described by Mr Mayall could be identified and addressed in the course of their oral evidence.

Content of the RICS bundle

11. In advance of the hearing, the Panel received six lever arch files of material. The parties clarified at the preliminary stage that files 1-3 represented the RICS bundle and 4-6 were produced on behalf of the Respondent.

12. Mr Lynch made an application to remove the documents produced by the Defence at bundle 5 from the bundle. He submitted they comprised complaints made by the Respondent against a number of other surveyors as well as employees of RICS and were irrelevant to the matters under consideration.

13. Mr Mayall resisted the application. He submitted that the material was admissible in order to challenge the credibility of one of the RICS witnesses, Mr R, who had proffered an opinion as to the integrity of the Respondent in relation to some of the charges in this case. In addition, it was submitted that the defence needed the material in Bundle 5 in order to respond to RICS' general and specific assertions regarding the Respondent's lack of integrity. Further, it was submitted that the material was admissible as evidence of an inconsistent approach to the standard of integrity being applied by RICS.

14. The Panel, having received further advice from the Legal Assessor, concluded that those parts of Mr R's statement that offered an *opinion* on the Respondent's integrity, being paragraphs 11-13, which the Defence intended to challenge by the production of File 5, were inadmissible in any event. The integrity of the Respondent was an issue for the Panel's independent judgment. Further, the Panel considered that since the balance of Mr R's statement was factually uncontroversial between the parties it followed that it was unnecessary to admit File 5 to challenge Mr R's credibility on those issues. As regards the submission that the material was relevant to respond to RICS' allegations of a lack of integrity, the Panel determined that the admission of File 5 would not, given its content, conceivably bolster the Respondent's credibility nor did it contain material that was otherwise relevant to the charges under consideration. Finally, as regards the submission that the material was relevant as evidence of an inconsistent approach by RICS to the standard of integrity, the Panel considered that it was convened to consider the allegations against the Respondent alone. The details of other complaints and RICS' responses to them are irrelevant to the discharge of that function.

15. The Panel therefore allowed RICS' application and excluded the content of File 5 from the evidence under consideration.

Submissions received on the content of RICS' Case Summary

16. In advance of the RICS opening address, the parties and the Panel were furnished with a copy of the RICS Case Summary. It became evident in the course of preliminary submissions that the content of that Case Summary was controversial as between the parties. The Panel therefore directed that Skeleton arguments be produced by both Counsel in support of their respective positions.

17. The Panel, after receiving advice from the Legal Assessor, highlighted that this did not represent an opportunity to address matters of factual dispute between the parties, to which there would an opportunity for the Respondent to respond in due course. The purpose of hearing arguments on the RICS Case Summary at this stage was to identify any factual errors and clarify RICS' position on the charges where necessary.

18. Following discussions between the parties certain sections of the RICS Case Summary were redacted by agreement.

Admissibility of *Mills v Savage*

19. The Panel heard a further application on behalf of RICS that, in accordance with R41(d) of the Rules, the Panel should receive a copy of the judgement in *Mills v Savage* and *Mills v Sell*, a June 2016 decision of the Technology and Construction Court concerning a dispute between adjoining owners of party walls. The decision, which involved consideration, inter alia, of Mr Antino's role as a party wall surveyor, was originally intended by RICS to be produced to the Panel by Mr R, a witness to these proceedings, in support of assertions Mr R made about the nature of Mr Antino's conduct in this case. However, the references by Mr R to that case have since been ruled inadmissible by the Panel as opinion evidence.

20. Mr Lynch, on behalf of RICS, submitted that a copy of the *Mills v Savage* judgment should nonetheless be admitted since the facts tend to suggest Mr Antino "…has a propensity to act in the manner alleged" with regard to Charge 9. He submitted that

RICS was not alleging a lack of integrity by Mr Antino in the *Mills v Savage* case but contended that it could be "evidence of a pattern of behaviour rather than an oversight".

21. Mr Lynch further submitted that the case was relevant to Charge 2. He submitted that Mr Antino, having confirmed his position in that case that there were no circumstances in which a Party Wall Surveyor could rescind his appointment, short of incapacity to act, he had a heightened duty to ensure there was no potential conflict of interest before any such appointment was accepted.

22. In response, Mr Mayall submitted *Mills v Savage* concerned an entirely different case, founded on different facts and had no relevance to this case. He further submitted that Mr Lynch's 'concession' that the case was not indicative of a lack of integrity on the part of Mr Antino resulted in it failing the test of relevance by way of propensity to act with a lack of integrity as alleged in this case. He invited the Panel to conclude that the case was not relevant and ought not to be admitted.

23. The Panel received advice from the Legal Assessor that although these were not criminal proceedings, the application by RICS was akin to a 'bad character' application in accordance with s101 of the Criminal Justice Act 2003. This provided, in essence, that evidence of a defendant's bad character is admissible through one or more of the seven 'gateways' under s101, of which 'propensity to commit offences of the kind with which he is charged' is one. The Panel was advised that where a defendant has 'made an attack on another person's character' that is another potential route to admitting bad character.

24. The Panel was reminded that they had a broad discretion to receive any relevant evidence in accordance with Rule 41a of the Rules, whether or not it would be admissible in civil (or indeed criminal) proceedings. However, the Panel was advised to have regard to the provisions of the CJA in this context, and in particular to the issue of whether the admission of the *Mills v Savage* judgment would have an adverse effect on the fairness of the proceedings, before reaching a decision on its admissibility.

25. The Panel was mindful of the submission made by Mr Mayall that in order for the judgement to be admissible it must point to a *propensity* to act that is relevant to the charges. However, the Panel did not accept the submission that the case must point to a propensity to act in a way that expressly or inherently lacked integrity.

26. On a review of HHJ Bailey's comments in *Mills v Savage*, it was evident to the Panel that the judge had identified aspects of Mr Antino's conduct in his role as a Party Wall Surveyor that were strikingly similar to those alleged by RICS in the Particulars of Charge 9. Specifically, the Panel observed that HHJ Bailey had identified two occasions where Mr Antino, in corresponding with the parties in that matter, had omitted any reference to the fact that he had already issued a Party Wall Award, in circumstances where it would have been reasonable and expected that he would do so (see paras 73 and 112-113). The Panel considered that this conduct was strikingly similar to the factual allegations at charge 9.

27. The Panel was reminded by the Legal Advisor that there were two broad aspects to its task in relation to Charge 9: the determination of each of the factual elements alleged on the one hand, and the judgment as to whether those facts, if proved, were indicative of a lack of integrity on the other. The admission of the *Mills v Savage* judgment may *assist* in determining whether those aspects of the factual allegations that are similar in nature are proved but would neither be determinative of those facts nor of the wider issue of whether they were the product of a lack of integrity.

28. In light of that, the Panel concluded that the *Mills v Savage* judgement did tend to demonstrate a propensity on Mr Antino's part to serve Party Wall Awards by post only, in the context of other correspondence being routinely exchanged by email, and to omit reference to the award in subsequent correspondence. The judgment was therefore considered relevant and admissible, but not determinative either of the facts alleged, or the issue of lack of integrity.

29. The Panel notes that RICS is not alleging the *Mills v Savage* judgment is itself reflective of a lack of integrity on the part of Mr Antino. However, it does conclude that the facts

therein, taken together with the allegations in this case, could demonstrate a pattern of behaviour that is relevant to its determination as to whether the matters alleged at Charge 9 are indicative of a lack of integrity. Accordingly, the Panel exercises its discretion to receive that document under Rule 41a, being satisfied that it is necessary to discharge its regulatory functions and ensure a fair hearing.

30. The Panel was less persuaded by the necessity to admit *Mills v Savage* in support of Charge 2, since Mr Antino's position regarding the power of a party wall surveyor to rescind their position is in any event expressly set out in correspondence from Mr Antino contained within the bundle.

Mr Birrell Report

31. The Panel heard a submission on behalf of the Respondent to the effect that RICS is seeking to place improper reliance upon both a 'draft' expert report and a final report, both by Mr Birrell. Mr Mayall, on behalf of the Respondent conceded that the 'draft' report should remain in the bundle of material before the Panel, but contended that no reference should be made to it in the RICS opening submissions. He contended that any references to the expert opinion ought to be drawn from the 3 October 2017 report.

32. Mr Lynch, on behalf of RICS, submitted that Mr Birrell's report of 26 September 2017 was an initial report, not a draft. He stated that whilst there were minor differences between this and the subsequent report of 3 October 2017, RICS placed reliance on both. He suggested that any concerns on the part of the Respondent with regard to those reports could be addressed when Mr Birrell was called to provide evidence.

33. The Panel was primarily concerned with fairness. It was mindful that Mr Mayall's objection appeared to focus on selective references to Mr Birrell's report of 26 September 2017 in the RICS opening, rather than its inclusion in the bundle. It concluded that the Respondent would have a full and proper opportunity to respond to

Mr Lynch's opening remarks in due course and to challenge any inconsistencies between Mr Birrell's reports by way of cross examination.

34. The Panel concluded that there was no unfairness in allowing Mr Lynch to open the case as proposed with respect to Mr Birrell's reports.

Response to the charges

35. The Respondent formally denied charges 1a, 1b, 1c, 2, 3b, 3d, 5, 6a, 6d, 6e, 6f, 6g, 7b, 7d, 8a, 8b, 9c, 9h and 10. He admitted 1d, but denied that it represented a breach of the relevant Bye Law. He admitted charge 3a, 3c, 4, 7a, 7c, 9a, 9b, 9d, 9e, 9f and 9g but denied that they represented a lack of integrity. He admitted 6b, 6c (subject to the word 'allegedly') and 6h, but denied that this was to penalise Mr and Mrs W, and/or that it was in breach of the Rules.

Status of the RICS Bundle

36. In the course of the RICS opening address, Mr Mayall raised concern as to the status of the RICS bundle of material. He referred to correspondence received by Mr Lynch on the Friday before the case began which indicated that Mr Lynch no longer considered that certain documents contained within the bundle were relied upon in support of RICS' case. Mr Mayall submitted that having provided advance notice of their reliance upon Files 1-3 in accordance with the Rules, RICS was not at liberty to withdraw that reliance in relation to any documents within that bundle. The effect of that reliance, he submitted, was that RICS had accepted all material and all accounts of events within that material as being "accurate and true" and could not call evidence or bring a case that undermined that.

37. Mr Lynch resisted Mr Mayall's interpretation that RICS had committed to accepting the entire content of the bundle as "accurate and true".

38. On the advice of the Legal Assessor, both parties were invited to produce more detailed Skeleton Arguments on the issue.

39. Mr Mayall, in his further submissions, referred to what was said by the parties in the course of preliminary submissions. Mr Mayall reminded the Panel that, on Day 1, he had referred to a verbal confirmation by Mr Lynch in advance of the hearing that he, on behalf of RICS, had accepted their bundle as being "accurate and true" and that Mr Lynch had expressly confirmed that to be correct. He asserted that Mr Lynch had made a 'deal' in relation to the status of the bundle to avoid having to make an application to the Panel to reverse his prior assurance that he relied on the whole bundle in accordance with Rule 23A(a)(i). Mr Mayall asserted that he should not now be entitled to resile from that position given the fact that the Respondent had relied upon it and opted not to call evidence in relation to that material. He submitted that where a deal had been entered into on an unambiguous basis, the Panel should not interfere with it, even if the outcome was "unusual and surprising".

40. Mr Lynch accepted that he could have been more precise in his choice of words but denied that the effect of placing reliance on the material in the RICS bundles and/or confirming that they were "accurate and true" was that RICS was unable to call evidence or bring a case that undermined that evidence. He submitted that bundles produced by RICS for the purposes of disciplinary hearings routinely contain material that does not go directly to proof of the charges brought but assisted the panel in determining the issues. He cited, in particular, cases where the Respondent is not present or not represented in which it would not be appropriate to produce a bundle "that told only one side of the story", given the Panel's duty to make due enquiry. Mr Lynch asserted that it would be perverse to interpret an indication of reliance upon this material as meaning it was endorsed wholesale as accurate and true since it contained accounts that directly undermined the RICS case, including from Mr Antino.

41. The Panel received legal advice that the issues it needed to determine in relation to this were as follows:

a) Was a deal struck to which RICS was committed?
b) What was the effect of that deal on the status of the RICS bundle?
c) Was Mr Lynch entitled to resile from such a deal?
d) Was it in the public interest to set aside any such deal in order to discharge the Panel's duty of making due enquiry?
e) Would proceeding substantively prejudice Mr Antino's defence?

42. Having carefully considered the Legal Advice given and the evidence presented to it regarding the parties' conduct, the Panel determined that Mr Lynch had, on day one of the hearing, on behalf of RICS, unambiguously endorsed the content of the RICS bundle as being true and accurate. However, the Panel considered that it had a power to set aside any 'deal' struck by the parties, which would have the effect of curtailing its ability to determine the serious allegations in this case and undermine, thereby, its duty to act in the public interest.

43. The Panel was conscious of its duty to ensure that due inquiry was made into the allegations and, where necessary, this imperative should override any agreement between the parties. In this respect, the issue of whether RICS was entitled to resile on such a 'deal' was irrelevant. The Panel concluded that the bundle received on behalf of RICS should be treated not as containing agreed facts between the parties but as material produced to assist the Panel in discharging its duty of inquiry and its public interest remit and which contains material relevant to and relied on by both parties.

44. The Panel was satisfied that in adopting this position, the Respondent remained well placed to challenge the evidence called by RICS, of which he had had notice for some time, and no substantive prejudice arose as a result.

Evidence

45. The Panel received three lever-arch files of material on behalf of RICS and three files on behalf of the Respondent. File 1 concerned the complaint by Mr and Mrs B. File 2 concerned the complaint from Mr W. File 3 contained material produced on behalf of the Respondent.

46. The Panel heard oral evidence from AB, HB and Ms D, in respect of charges 1 to 4, and from Mr W in respect of charges 5 to 8. In addition, the Panel received written and oral expert evidence from Stuart Birrell, called by RICS.

47. Mr Antino provided oral evidence in his defence. He also called two character witnesses.

Re-convened Hearing

48. The Panel reconvened on 12 November 2018 to hear the submissions from the parties on the facts. Both parties produced detailed written submissions, which were provided in advance.

Judicial Immunity

49. Before being invited to retire to consider the facts, the Panel received detailed written and oral submissions from the parties on the issue of judicial immunity. Mr Mayall, on behalf of the Respondent, submitted that a Party Wall Surveyor exercised a quasi-judicial role, which enjoyed absolute immunity from all acts conducted in the discharge of that function. He argued that public policy required such judicial immunity, and that as a result the Panel had no jurisdiction to consider the complaints under charges 2,3,4,5,6,7,8 and 9, and that it was also relevant to charge 10. Mr Lynch, on behalf of RICS, conceded that the role was quasi-judicial but resisted the submission that it attracted judicial immunity, drawing attention to the absence of any specific authority for that in case law or in the Party Wall Act 1996.

50. Having considered the submissions, including the parties' references to case law and statute, the Panel was of the view that the function of a Party Wall Surveyor does have a quasi-judicial flavour, in the sense that they are empowered by statute to interfere with the rights of property owners in discharging their duties.

51. The Panel was also satisfied, with reference to section 16 of the Party Wall Act 1996, that the awards made by Party Wall Surveyors are conclusive and can only be challenged by the process of appeal provided for in the Act, and/or by being declared invalid.

52. However, the Panel was not persuaded that the wording of s16, which protects the award itself from challenge, extends a wider form of judicial immunity to the Party Wall Surveyor's conduct in reaching that decision. The Panel was mindful of the ratio of *Trapp v Mackie [1979] 1 WLR 377*, referred to by both parties, and the distinctive process by which other tribunals, which did enjoy full judicial immunity, reach their decisions. By contrast, a Party Wall Surveyor, in determining an award, does not call evidence or receive submissions from the parties, and the process by which he reaches a decision lacks the protections of open justice associated with court proceedings. As such, the decisions of Party Wall Surveyors are *"sui generis"* and the overall impression of the Panel is that those decisions are closer in nature to an expert determination than a judicial ruling.

53. The Panel was not persuaded that the case law referred to by the parties regarding the common law concept of judicial immunity had direct application to Party Wall Surveyors.

54. Finally, and in that context, the Panel considered that if Parliament had intended to confer judicial immunity on the conduct of Party Wall Surveyors, as it has for example in respect of arbitrators, on the basis that it was necessary to the proper discharge of their function, it would have made specific provision for it in the Party Wall Act 1996.

55. The Panel therefore concluded that judicial immunity did not attach to the conduct of Party Wall Surveyors and insofar as they are alleged to have misconducted themselves in the course of discharging their function, they can be held to account by their regulatory body.

Determination of the charges:

Burden and standard of proof

56. The Panel received written advice from the Legal Assessor which covered this issue. The advice highlighted that RICS is required to prove the allegations to the civil standard; that it is more likely than not that any event material to those allegations occurred. That is a single unwavering standard of proof, though the more unlikely an allegation the more cogent the evidence that the Panel might require to prove it. There is no requirement for the Respondent to prove anything. 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, and it would the subject of separate consideration in light of any facts proved.

Witness evidence

57. The Panel analysed the oral evidence of each witness before considering the factual allegations.

58. With regard to Mr AB, the Panel considered he had provided his account in good faith but was concerned that it was inconsistent with Mr HB's on important details. These included the timing and location of the incident referred to in charge 1c, and how the Respondent followed them back to their home after the incident. The Panel observed additionally that AB had a tendency toward hyperbolic language and that he had amended details of his account in the course of cross examination. The Panel considered that his evidence was coloured by a strong perception of wrongdoing by the Respondent which was not justified on objective analysis of

other evidence, particularly the video. As such, the Panel had difficulty placing reliance on his evidence.

59. As regards Mr HB, the Panel was similarly concerned that his account was prone to exaggeration and hyperbolic language that was not reflected in the other evidence presented to the Panel. His assertion, in particular, that he was “in fear of his life” was not borne out by the rest of his account or the video taken, in which he appeared to approach the Respondent immediately after the alleged incident had occurred. The Panel was concerned that his account, whilst given in good faith, was influenced by his emotional response to the wider tensions between him, the other party to his boundary dispute and the Respondent. It was also possible that it had been affected by the passage of time. There were a number of significant inconsistencies between his own account and that of AB, as set out above, that left the Panel unable to place substantive reliance on it.

60. Ms D gave oral evidence which she stated was based primarily upon her prior written accounts rather than her recollection of events. In addition, she made reference to having subsequently seen the video taken by the Bs. Her oral evidence was consistent with her statement provided to RICS, and made reference to Mr B having approached the Respondent with a ‘raised hand’. The Panel recognised on this basis that Ms D had the impression that it was the Bs who had approached the Respondent in a threatening way, not the other way around. The Panel had no reason to doubt Ms D’s credibility, but exercised caution as to the weight that could be attached to her evidence because she was the other party to this boundary dispute and there was a possibility that this had had a bearing on her perception of events.

61. As regards Mr W, the Panel was mindful of the possibility raised by the defence that he had been the source of offensive emails sent to the Respondent and that this impacted on his credibility. However, in the absence of proof, the Panel felt unable to take account of this assertion. The Panel noted that during his oral evidence, Mr W withdrew his allegation that the Respondent had been “abusive and threatening”. The Panel considered his evidence was strongly coloured by the emotions arising from his dispute with his neighbour and appeared to be motivated to some degree by animosity towards the Respondent. The Panel was also alive to the fact that Mr W had been suffering from ill health when he gave evidence which, on his own admission, had affected his short-term memory. The Panel felt unable to dismiss the possibility that this may also have affected his perception of the events. Taking account of all these factors, the Panel felt unable to place reliance on his evidence.

62. Mr Birrell's expertise and independence was not challenged by the defence. The Panel considered he provided his evidence in good faith, impartially and in an effort to assist the Panel.

63. With regard to the Respondent, the Panel was assisted by his extensive oral evidence, although like other witnesses in this case, considered that his account of events was coloured by his continuing disputes with the parties concerned. The Panel considered his evidence was at times straightforward and direct and at others, evasive and lacking in credibility.

64. In conclusion, the Panel was of the view that there were material weaknesses in the accounts of all the factual witnesses in the case. These were in part the product of the passage of time, parallel proceedings and a strong sense of animosity between the parties. As such, the Panel was cautious in the weight it could attach to much of the oral evidence. It decided to attach greater weight to the documentary and video/photographic material produced.

Decision on the charges:

Complaint made by Mr and Mrs B

1. **You failed to act in a manner befitting a member of RICS when on 19 October 2014, during a site visit to the home of Mr and Mrs B, you made one or more of the following comments, or words to the same effect, to Mr B and/or Mr B Jr**
   a. **"I've got a photo of your 'woggos' and I'm going to report them to immigration".**

Not proved

65. The Panel noted that direct evidence in support of 1a) came from Mr HB alone. The allegation was not formally recorded by the Police until 17 December 2014, when Mrs B reported it, and then on 30 December 2014 when Mr B provided a statement. Whilst on the one hand that delay tended to undermine the credibility of the account, given that HB claimed to have reported it immediately, the Panel noted that the Police acknowledged that they had failed to take a statement on the day of the incident. Had they done so, it is possible this allegation would have been recorded immediately.

66. Having taken account of all the evidence, the Panel concluded that a confrontation of some sort had plainly taken place between the Respondent and HB. This occurred prior to the arrival of his son, AB, on the scene. The Panel was of the view that the specific allegation against the Respondent, that in the course of this confrontation he used words of a racist nature, is serious and would require cogent evidence before the Panel could be satisfied that it was proved. The Panel's conclusion was that whilst there was *some* evidence in support of the allegation, the quality of that evidence, taking into account the Panel's concerns as to the weight that could be attached to Mr HB's account generally, was not sufficient to find it proved on the balance of probabilities.

b. "I love people like you, you make me so rich"

Not proved

67. The evidence in support of 1b), which concerned a statement said to have been made by the Respondent during the same confrontation as that referred to in 1a), again derives from Mr HB alone. The Panel considered the words, if used, would have been inappropriate and unprofessional. However, once again, the Panel felt unable to place sufficient weight on the account of HB alone to support this charge and again found it was not proved on the balance of probabilities.

c. "Go on big boy, go on big boy, you like it don't you".

Not proved

68. Charge 1c) concerns a statement allegedly made after HB's son, AB, arrived on the scene. It was alleged to have occurred immediately prior to a video recording taken by the Bs and produced to the Panel. Both HB and AB gave accounts of the statement being made by the Respondent whilst he allegedly thrust his hips back and forth in a sexually suggestive manner.

69. The Panel noted however that HB and AB gave inconsistent accounts as to precisely when and where this particular incident occurred. Further, Ms D did not see it at all. The Panel was struck by the tension between HB and AB's oral evidence to the Panel on the one hand, regarding the impact this incident had had on them both, and the fact that neither appeared to

have reported it to the Police. In addition, the Panel considered that the parties' voices and demeanor, as reflected in the video recording, were not consistent with the incident they described having taken place immediately prior.

d. "I'm your worst nightmare"

Admitted as a fact and proved. Proved as a failure to act in a manner befitting a member of RICS

70. Charge 1d) was admitted as a fact only. In considering whether it represented conduct not befitting a member of RICS, the Panel took account of the context in which the statement was made. It noted that whilst the Respondent admitted uttering the words alleged at 1d), he gave different explanations at different times as to why he did so. The Panel considered his original explanation in October 2014 that he, in terms, could cause the Bs difficulties by using the Party Wall Act, to be the most credible. His subsequent explanations, given initially in December 2016 and also in his oral evidence to the Panel, to the effect that he was warning the Bs, that he was entitled to act in self defence to a perceived threat of violence by them, was inconsistent with his words and demeanour as reflected in the video provided to the Panel. The Panel noted from the video he was smiling, appeared to be calm and turned away from the Bs immediately after the threatening behaviour allegedly occurred.

71. The Panel rejected the Respondent's assertion that he felt under threat of a physical attack by the Bs at that time. It concluded that his motivation for referring to himself as being their "worst nightmare" was, as he originally stated in October 2014, for the purpose of drawing attention to his statutory powers under the Party Wall Act. The Panel recognised that the statement was made in the context of an unpleasant confrontation with the Bs. However, this did not justify the use of a threat by the Respondent to use his statutory powers to the detriment of the Bs. This was unprofessional, inappropriate and represented a failure to act in a manner befitting a member of RICS.

You are therefore in breach of Bye-Law 5.2.1(a) and are liable to disciplinary action in accordance with Bye-Law 5.2.2(a)

Found proved in respect of 1d. Liability to be determined separately.

72. It follows from the Panel's determination in relation to 1d) that the conduct represented a breach of Bye Law 5.2.1(a).

    2. You failed to take appropriate steps to manage or avoid an actual or perceived conflict of interest when on 20 October 2014 you accepted an appointment as a party wall surveyor for Ms D in relation to a dispute with Mr and Mrs B, despite having been engaged in the confrontation referred to at charge 1 the day previous.
    Proved

73. The Panel was mindful of the submissions made on the Respondent's behalf, as well as the opinion of Mr Birrell, in terms that whilst it was unfortunate that the incident had occurred with the Bs, it was essentially in the nature of the role of a Party Wall Surveyor that at least one of the parties might exhibit ill feeling toward them in the exercise of their statutory powers. That did not, in itself, give rise to a conflict of interest and one should not or *could not*, according to the Respondent, simply rescind one's appointment on that basis.

74. However, the Panel, which took an independent view of the issue, considered the circumstances of this case to be materially different to that scenario on two fronts. First, the Panel considered the incident went beyond what might be termed 'ill feeling' by one of the parties. There had been a face-to-face confrontation. The Respondent had issued a 'threat' to use the Party Wall Act to create a "nightmare" for the Bs. Both the Respondent and the Bs had contacted the Police. Secondly, this incident had occurred not after but *before* the Respondent had been appointed as Party Wall Surveyor by Ms D. The issue over rescinding that appointment did not therefore arise. Whilst it was important not to be "bullied" into refusing such an appointment the Respondent was, as Mr Birrell confirmed in his oral evidence, at liberty to decline it at that stage if a conflict, or potential conflict had arisen.

75. As to whether the Respondent took adequate steps to ensure no conflict of interest arose before accepting that appointment, the Panel noted from the Respondent's evidence that he did follow a process of conflict checking, including by reference to the relevant guidance issued by RICS: the "Party Wall Legislation and Procedure", 6th Edition, Guidance Note. The Respondent considered that it gave rise to no issue of conflict in this case. He felt he was required to act only for one party.

76. However, the Panel considered that the Guidance Note set out a clear duty on the Party Wall Surveyor to act impartially, and to consider the issue of conflict in the round. That necessarily gave rise to an obligation to take account of *both* parties' interests and to ensure, prior to accepting an appointment as Party Wall Surveyor, that no conflict arose. Paragraph 6.2, under the heading "Surveyor's duties", provides:

"When acting as a party-appointed surveyor they owe a duty of care to their own appointing owner, but will still continue to owe a duty to both parties to perform the obligations diligently and impartially."

77. The Respondent denied he had any such duty. In his evidence he stated: "*There was no duty. There was no conflict."* The Panel considered he had focused solely on whether he had acted for one of the parties before or whether any of the factors listed in Appendix 2 of the "hierarchy of conflicts" list in the Guidance applied. He appeared to dismiss entirely the relevance of the confrontation that had occurred with the Bs the day before he accepted his appointment.

78. Having rejected the Respondent's assertion that he had made the statement at 1d) in self-defence, the Panel considered that the circumstances of that confrontation, and the 'threat' issued by the Respondent, did give rise to an actual or perceived conflict of interest to which he had had insufficient regard. He had used words that clearly demonstrated an intention to use his powers under the Party Wall Act to the detriment of the Bs.

79. The Panel concluded that a fair-minded observer would consider there was a real possibility that the Respondent's ability to act impartially in that instance was compromised and that he ought to have recognised that point.

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

Proved

80. It followed that that failure was considered to be a breach of the Rules of Conduct.

You are therefore liable to disciplinary action in accordance with Bye-Law 5.2.2(c)

To be determined separately

3. **You failed to act with integrity in that as the adjoining owner's surveyor appointed by Ms D under the Party Wall etc. Act 1996 (hereafter referred to as "the Act"):**
    a. **On 23 December 2014, in conjunction with the building owner's surveyor Mr S, you made and served a party wall award, on Mr and Mrs B**
    Admitted and proved as a fact, but not as a lack of integrity

81. The Panel considered that this admission concerned non-pejorative contextual facts from which no lack of integrity could reasonably flow.

    b. **You knew or ought reasonably to have known that the content of that award was likely to be contentious**
    Proved as a fact, but not as a lack of integrity

82. The Panel noted that RICS did not challenge the validity of this award. Further, the Panel accepted the assertions by the Respondent that "all awards are potentially contentious". It was thus in the nature of Party Wall awards that they are made to resolve a dispute between adjoining property owners. It did not follow that a Party Wall Surveyor, knowing that one of the parties were likely to dispute an award, acted without integrity in making it.

    c. **You were aware that there was statutory 14-day deadline in which to appeal that award**
    Admitted and proved as a fact, but not as a lack of integrity

83. The Panel considered that this admission concerned non-pejorative contextual facts from which no lack of integrity could reasonably flow.

    d. **You delivered the award on this date in a deliberate attempt to frustrate Mr and Mrs B's ability to appeal that award within that timeframe**
    Not proved

84. The Panel took account of Mr Birrell's opinion that it would have been "more sensible" to deliver the award in the New Year, given that the parties were less likely to be able to consider their position as regards an appeal over the Christmas period. However, it noted that service was not deemed to have been effective until 28 December 2014 and therefore Mr and Mrs B had 14 days thereafter to appeal the award. Further, it noted that the Respondent was granted access to the site only on 17 December 2014, despite his prior efforts, and intended to go on a pre-planned holiday immediately after Christmas.

85. It follows that, in the Panel's view, the timing of the award was not considered to have been calculated in order to frustrate the parties' ability to appeal, but was made shortly after that site visit and served "forthwith" in accordance with the Respondent's obligations under the Act. Furthermore, it was noted that it was a joint award, made in conjunction with Mr S, the B's surveyor.

Contrary to Rule 3 of the Rules of Conduct for Members 2007
You are therefore liable to disciplinary action under Bye-Law 5.2.2 (a) or (c)

Not proved

4. On 09 May 2017 you sent a letter to Mr and Mrs B containing a notification under S10(7) of the Act. Some or all of the issues raised in that letter related to Mr and Mrs B's complaints and/or claims against you and did not relate to the dispute between Mr and Mrs B and Ms D. You knew or ought reasonably to have known that it was not appropriate to resolve these by way of a party wall award. By misrepresenting your ability to resolve those complaints and/or claims by way of an award pursuant to S10(7) of the Act, you failed to act with integrity.
Proved

86. The Panel noted the Respondent had formally accepted that he wrote the letter and should not have included reference therein to s10(7) of the Act. The Panel took account of the fact that the purpose of a s10(7) letter was to allow a Party Wall Surveyor to act *ex-parte* if an agreed surveyor had neglected to act for a set period. It followed that such notices should be served upon an appointed surveyor, not directly on the parties.

87. The Panel noted that the Respondent accepted that point, stating: *"..the only mistake I made here – and if I'd addressed it to Mr S rather than Mr and Mrs B – you wouldn't be making these allegations".*

88. The Panel rejected that explanation. Not only was the letter addressed to the Bs rather than their surveyor (though he was copied in), the content of the letter was purposely directed at the Bs and invited their responses to questions only they could answer. For example, *"do you still now continue to allege that there is a conflict of interest between myself and Mr S, your appointed surveyor?"* was a question that could not possibly have been intended to be directed to the surveyor, Mr S. Given that the Respondent considers himself to be an expert in this field, the Panel was not persuaded that this was a mistake.

89. Furthermore, in the Panel's view, only one question posed in the letter, question 9, concerned matters in dispute between the Bs and the Respondent. All other questions related to the complaint raised by the Bs against the Respondent and which, according to Mr Birrell, were not matters which were relevant to an award and would not therefore be appropriate for a s10(7) notice.

90. Similarly, the Panel rejected the Respondent's assertion that the reference to s10(7) in the letter was made in error. On the Panel's reading of the letter as a whole, it was a deliberate reference to the mechanism by which the Respondent was suggesting to the Bs that he could make a further award resolving the issues referred to therein. The Panel again took account of Mr Birrell's evidence that these matters were "not relevant" to a party wall award, but concluded that the Respondent's intention was to imply that they could be resolved by such an award.

91. The Panel considered that was a deliberate misrepresentation of his powers by the Respondent and, consequentially, the product of a lack of integrity.

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

Proved

92. It follows from the Panel's reasoning above that it considered the conduct to be in breach of Rule 3.

You are therefore liable to disciplinary action under Bye-Law 5.2.2 (a) or (c)

To be determined separately

<u>Complaint made by Mr and Mrs W</u>

5. You failed to act in a manner befitting membership of RICS when, in direct response to an unfavourable Google review from Mr W dated 20 November 2015, you encouraged Mr G to refer a matter to you in your capacity as agreed surveyor, in circumstances where you knew or ought reasonably to have known that the costs in dispute were not 'works pursuant to the Act' and were not therefore recoverable under the Act.
Not proved

93. The Panel had regard to the evidence that a review was placed on Google by Mr W on 20 November 2015 which made unfavourable comments about the Respondent. It was not in issue between the parties that the review was posted following Mr W's enquiry over the costs payable to the Respondent following his 2013 party wall award.

94. The Panel noted that there were subsequent exchanges online between the Respondent and Mr W. Then on 23 November 2015, the Respondent wrote to Mr G and Mr W stating that Mr and Mrs W were concerned that the claim *"should be dealt with under the Party Wall Act therefore within my jurisdiction".* It was expressly stated in the letter that that issue arose from a prior telephone conversation with the Ws *"..and the postings on the Google review page".* The Respondent went on in the letter to *"…invite Mr G to bring this matter to my attention if he so wishes."*

95. The Panel therefore concluded that the invitation to Mr G in this letter to refer the matter to him in his capacity as Party Wall Surveyor *was* in direct response to the Google review.

96. As to whether the Respondent knew or ought to have known that the costs in dispute were not recoverable under the Party Wall Act, the Panel took account of Mr Birrell's opinion that he would not have sought to have resolved the issue with an award. He considered the issue to be "outside the jurisdiction". Whilst he acknowledged that the Respondent disagreed, Mr Birrell's settled view was that those costs were not recoverable under the Act and would not have been pursued in that way by a reasonable body of surveyors.

97. However, the Panel took careful account of the Respondent's evidence that he had not, at that stage, accessed the relevant files. He stated in this letter *"I have not been made aware of the nature of this claim"*. In that context, the Panel was not persuaded that he knew or ought to have known, at that point, that the costs in question were not recoverable under the Act.

You are therefore in breach of Bye-Law 5.2.1(a) and are liable to disciplinary action in accordance with Bye-Law 5.2.2(a)

Not proved

6. As agreed surveyor purportedly appointed by Mr G and Mr and Mrs W under the Act, you made a party wall award dated 23 December 2015 in respect of matters that were not 'matters arising out of or incidental to the dispute'. You did so to penalise Mr and Mrs W for leaving a negative Google review dated 20 November 2015:
Particulars:

a. Mr G referred this matter to you to consider whether the costs of £480 in respect of your invoice of 04 December 2012 were properly recoverable against Mr and Mrs W.
Proved

98. This appeared to the Panel be a straightforward reflection of the content of Mr G's letter of 30 November 2015.

b. You determined that Mr G was not entitled to claim the sum of £480 in respect of your costs as they related to costs incurred in obtaining party wall advice prior to service of notice under the Act.
Admitted and proved.

99. This was found proved on the basis of the admission and the fact that this reflected the content of the award.

c. You proceeded to award Mr G a sum of £330.54 in respect of costs that had allegedly been incurred prior to the making of the award of 29 January 2013 but had not been included in that award.
Proved.

100. The Panel considered the substance of this charge was accepted by the Respondent and was simply a reflection of the content of the award, though the figure therein was expressed as "compensation" rather than costs.

d. No documentary evidence was included to support the assertion that those fees had been incurred.
Proved.

101. The assertion that the fees had been incurred is reflected in the invoice dated 29 November 2015 from Mr G for his expenses arising, which reflected the sum awarded. However, that entry in the invoice is not supported by any documentary evidence as to how those fees had arisen.

e. No good reason was provided for why these costs were not considered at the time of making the first award despite those costs allegedly being incurred prior to making the award.
Not proved.

102. The Panel considered that it was reasonable to infer that these costs had not been claimed by Mr G at the time of the first award. No criticism could be directed at the Respondent for that. Furthermore, the Respondent had given an explanation for this in the subsequent award, i.e. that Mr G may not have been aware of his ability to apply for compensation. As

such the Respondent had given an explanation as to why the costs had not been considered at the time of the first award.

f. A further sum of £200 was awarded in respect for the inconvenience and time included in the referral, notwithstanding the fact that Mr G had made no such assertion.
Proved.

103. The Panel observed that this sum was not requested by Mr G but was as a matter of fact included in the award.

g. The total sum of £530.54 was intended to penalise Mr and Mrs W by effectively compensating Mr G for the sum of £480 that he was unable to recover as per particulars (a) and (b) above.
Proved.

104. Whilst the Panel concluded at charge 5 that the Respondent was not, on 23 November 2015, in a position to know the detail of the case, by the time he made the award on 23 December 2015, he was expressly aware that the costs in question preceded his appointment as Party Wall Surveyor and were not recoverable under the Act. He stated in the award *"I have to agree that the adjoining owners [sic] is not entitled to recover this cost under the Act"*.

105. As to whether the final sum in the award of £530.54 was designed to penalise Mr and Mrs W, the Panel took account of the following sequence of events: On 23 March 2015, Mr G wrote to Mr W asking for £480 to cover the Respondent's fee from 2012. At that time, he stated that *"it has cost me in excess of £500...the major cost is Mr Antino's fee of £480…I have not quantified my other costs."* The Google review exchange occurred on 20 November 2015. On 23 November 2015 the Respondent then invited Mr G to refer the matter to him and on 29 November 2015 Mr G produced an invoice which included an additional £330.54 for research and administrative expenses, making a total of £810.54.

106. The Panel concluded that the Respondent at this stage *had* recognised that he could not recover the £480 costs on behalf of Mr G under the Act and instead chose to award £330.54 of newly-advised costs, together with a further £200 for "inconvenience" which Mr G had not sought. Whilst the Panel recognised that the award remains valid in law, as it has not

been challenged, it was of the view that these costs did not properly arise out or incidental to the dispute. The Panel considered that sum, particularly the £200 element for "inconvenience", *was* awarded by way of penalty against Mr and Mrs W.

h. Your award included provision that Mr and Mrs W paid to you the sum of £350 + Vat in respect of your own costs in making this award.
Admitted and proved.

107. In addition to the admission, the Panel noted that this charge simply reflects the content of the award.

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

Proved.

108. The Panel then considered whether the conduct proved under this charge represented a breach of Rule 3. Taking into account the Panel's reasoning in relation to Charge 5 and determination at Charge 6g, it followed that the award was made in order to penalise Mr and Mrs W for the negative Google review. This conduct, in the Panel's view, *was* contrary to Rule 3 of the Rules of Conduct.

You are therefore liable to disciplinary action under Bye-Law 5.2.2(a) or (c)

To be considered separately

7. You failed to act with integrity in that as a surveyor purportedly appointed by Mr G and Mr and Mrs W:
a. On 23 December 2015 you made and served a Party Wall Award on Mr and Mrs W
Admitted and proved, but not in relation to lack of integrity.

109. The Panel found this proved by admission and on the basis that it reflected the award.

b. You knew or ought reasonably to have known that the content of that award was likely to be contentious.
Proved, but not in relation to lack of integrity..

110. The Panel found this proved on the same basis as the rationale expressed in relation to Charge 3, which did not reflect a lack of integrity.

c. You were aware that there was statutory 14-day deadline in which to appeal that award.

Admitted and proved, but not in relation to lack of integrity.

111. The Panel found this proved by admission. The Panel noted that the statutory notice period starts to run from the deemed date of service, which in this case was 29 December 2015. No lack of integrity arose from this.

d. You delivered the award on this date in a deliberate attempt to frustrate Mr and Mrs W's ability to appeal that award within that timeframe.

Not proved.

112. The panel noted that the Act requires the award to be served "forthwith". The Respondent had informed the parties on 15 December 2015 that he was in a position to release the award and hoped to have the award "ready for service before the Christmas holiday". He stated on 16 December 2015 that he was "in a position to release my award" upon receipt of his fees. On 22 December 2015, he confirmed receipt of a cheque from Mr G to cover those fees. He issued the award the following day. Finally, the Panel noted that the Respondent departed on a planned holiday immediately after Christmas and he may not therefore have felt able to delay serving that award.

113. Furthermore, the Panel noted that the W's solicitor wrote to the Respondent on 5 January 2016 confirming they were intending to appeal the award. In the event they did not appeal it, but this reflected the fact that they had had a clear opportunity so to do.

114. Taking into account all the circumstances, the Panel considered the timing of the award was reasonable, in accordance with the Respondent's duty to serve it "forthwith" and was not made in an attempt to frustrate the W's ability to appeal.

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

You are therefore liable to disciplinary action under Bye-Law 5.2.2 (a) or (c).

Not proved.

8. You failed to act with integrity when:

a. on 12 April 2016 you made a Party Wall Award requiring Mr and Mrs W to pay your costs in challenging an award that you knew did not relate to 'matters arising out of or incidental to the dispute 'as per charge 7 above; or
Not proved.

115. The Panel took account of Mr Birrell's evidence, when asked if it was appropriate to deal with the costs of dealing with a challenge to an award by way of another award, he responded "*By an award? No. You could refuse to correspond. The award is conclusive if it's not appealed."* Mr Birrell opined that Party Wall Surveyors ought to 'swallow' the costs of dealing with a challenge to a prior award. He suggested the correspondence ought to have been dealt with under the Respondent's complaints procedure, or he could have refused to respond.

116. However, the Panel noted that Mr Birrell conceded in his evidence that the Act could possibly be "stretched" to cover these costs in an award.

117. The Panel observed that the Respondent had made an award of £702 of which precisely half was for the costs of preparing and serving the award itself. Whilst the Panel was uncomfortable with that practice, given the purpose of the awards, it was not satisfied that it fell outwith the ambit of the Act, or if it did, that the Respondent ought to have known that.

b. on 12 April 2016 you made a Party Wall Award requiring Mr and Mrs W to pay a sum that related entirely to your costs in dealing with their service complaint against you.
Not proved.

118. The Panel was satisfied that the Respondent had not charged for his costs in dealing with the service complaint. The costs related purely to the dispute over the prior party wall issue. The Panel observed that insofar as Mr Birrell had expressed criticism of the Respondent for the inclusion of costs in an award, it had not been highlighted to Mr Birrell in the course of

his evidence that the costs of dealing with the service complaint had been removed by Mr Antino and were not, in fact, included in the award.

119. Whilst the Panel was concerned about the use of Party Wall Awards, as Mr Birrell put it, as "a very very powerful" debt-collection instrument, it recognised that the practice was possible under the Act and the Panel could not go behind that. As such, the Panel could not be satisfied that it reached the threshold for a lack of integrity.

Contrary to Rule 3 of the Rules of Conduct for Members 2007
You are therefore liable to disciplinary action in accordance with Bye Law 5.2.2(a) or (c).

Not proved.

<u>Complaint from Mr R</u>

9. You failed to act with integrity when making and/or delivering an award dated 24 September 2015 in that:

a. You made an ex-parte award requiring the building owners to pay your fees totalling £17,990.94 plus interest.
Admitted and proved.

b. You posted the award to 59 Manor Road.
Admitted and proved.

120. The Panel took careful account of the evidence and submissions on this issue. It noted that it was common ground between the parties that the Respondent had served the award on 59 Manor Road in compliance with the Act. The Panel noted that that award was served ex-parte and it was an award of fees to himself.

c. You knew that this address was a building site at the time and any post sent to that address was unlikely to be received at all or in a timely manner.
Proved.

121. It was common ground that the Respondent knew that this was a "levelled site with no premises now present", albeit with a site office, at the time the award was served. The Panel

was of the view that, in those circumstances, it is likely the Respondent knew that service of the award on that location, whilst likely to be received by the parties at some stage, was unlikely to be received in a timely manner.

d. **You sent this award by post only, despite related correspondence with Mr O and Mr R taking place via email.**
   Admitted and proved.
e. **You were aware that there was statutory 14-day deadline in which to appeal that award.**
   Admitted and proved.
f. **You made no reference to the award in email correspondence between 24 September 2015 and 12 October 2015.**
   Admitted and proved.
g. **You did not make reference to the award until you met with Mr R in person on 13 October 2015, after the deadline to appeal that award had expired.**
   Admitted and proved.
h. **You behaved in the manner described at particulars (a)-(g) above in an attempt to frustrate the building owner's ability to challenge the award..**
   Proved.

122. The Panel was concerned that the Respondent appeared to feel under no professional obligation at all, as a member of RICS, to take steps beyond the strict requirements for service under the Act, in order to bring the award to the attention of the parties. Whether or not the Respondent held a genuine belief that service of the award on 59 Manor Road was likely to be received in a timely manner, and the Panel concluded he did not, the Panel considered it was plain from the correspondence the Respondent received from Mr R after the award was made that the parties were unaware that an award had been made.

123. It was noted that the Respondent wrote three times to Mr R during the period between sending the s10(6) Notice to Mr O on 23 September 2015 and the expiry of the appeal period on 10 October 2015, but he did not mention the award. He acknowledged Mr R's appointment with effect from 30 September 2015 but despite this, did not send him a copy of the award which he had served on the previous surveyor, Mr O, or even mention it, although it was plain that Mr R was unaware of it. Specific enquiry was made by Mr R about the Respondent's fees on 24 September 2015 and 9 October 2015, which reflected that ignorance.

124. The Panel considered it would have been obvious and reasonable for the Respondent at that point to have clarified that an award had already been made. It was instructive that whilst the Respondent was actively corresponding with Mr R over that period, he did not address Mr R's enquiries regarding fees, or the fact of an award, until 13 October 2015, shortly after the appeal period had passed.

125. The Panel also noted that Mr R had written to the Respondent by email at 10:00am on 24 September 2015, offering to review his fees and requesting a breakdown. The Respondent did not respond but served the ex-parte award for his fees the same morning.

126. When asked in cross examination why he did not notify Mr R or the other parties that he had issued an award, the Respondent's answer was *"I don't see why I have to*". This response reflected, in the Panel's view, a very narrow focus on adherence to the requirements of the Act without any consideration of his wider professional and ethical obligations. The Panel considered the two considerations (strict adherence to the Act and ethical conduct) to be complementary, not mutually exclusive, professional obligations. Whilst a Party Wall Surveyor is minimally required to act only in accordance with their statutory obligations, a member of RICS is expected to meet public expectations of professional and ethical behaviour commensurate with membership, alongside their duty to act within the Party Wall Act.

127. The Panel concluded that the Respondent's conduct was calculated to frustrate the building owner's ability to challenge the award. It followed that that represented a lack of integrity.

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

128. The Panel considered, in view of these findings, that the Respondent's conduct was lacking in integrity, including the duty to be "open and transparent in the way that you work".

You are therefore liable to disciplinary action in accordance with Bye Law 5.2.2 (a) or (c).

To be determined separately.

10. You failed to co-operate fully with RICS staff in that you did not respond promptly, substantively or at all to any or all of the following letters from RICS:

a) Letter dated 17 August 2016

b) Letter dated 08 September 2016

c)) Letter dated 21 September 2016

d) Letter dated 04 October 2016

e) Letter dated 12 October 2016

f) Letter dated 20 October 2017

g) Letter dated 24 October 2017

h) Letter dated 06 November 2017

i) Letter dated 08 November 2017

j) Letter dated 20 December 2017

Not proved in relation to a) – j).

Contrary to Rule 9 of the Rules of Conduct for Members 2007
You are therefore liable to disciplinary action under Bye-Law 5.2.2(c).

Not proved.

129. The Panel began its consideration of this charge by reference to Rule 9 of the Rules of Conduct for Members:

9. Members shall co-operate fully with RICS staff and any person appointed by the Regulatory Board.

130. The Panel noted that this is a very broad obligation. RICS put its case on the basis that the Respondent failed to co-operate promptly, substantively or at all to the specified letters. The Panel had to be satisfied, as advised by the Legal Assessor, that an obligation to respond, as alleged, existed which the Respondent failed to meet.

131. The Panel took a preliminary view that there was a distinction between failing to respond at all to correspondence, which could be evidence of non-cooperation for the

purposes of Rule 9, and responding, but in a way that did not address all the enquiries raised, which may not.

132. The Panel was mindful of the fact that once a decision to begin an investigation is made, RICS is required to write to the Relevant Person under Rule 5 of the Disciplinary, Regulatory and Appeal Panel Rules:

a. Informing him of the allegation or information.
b. Providing him with copies of any documentation received or obtained by RICS which the Head of Regulation considers to be relevant.
c. Inviting him to provide a written response within a period specified by the Head of Regulation which will be no more than 28 days from the date of the letter.
d. Advising him that any response may be disclosed to the maker of the allegation (if any) for comment.

133. Three of the letters listed at Charge 10 were specified as Rule 5 letters. RICS noted from the wording of Rule 5 that the Relevant Person is "invited", not obliged to provide a response. Further, the Panel was mindful that a professional person has a general duty to co-operate with their regulatory body, including responding to requests for information in pursuit of an investigation against them. The Panel noted that Rule 9 includes a requirement to "cooperate fully". However, in the Panel's view this obligation did not necessarily extend to responding to each and every inquiry raised by the regulatory body, particularly if those enquiries had already been addressed, or the inquiries were unreasonable (in the context of that investigation).

134. The Panel carefully considered each of the letters referred to in Charge 10 and the responses. It noted that sub-particulars a)-e) related to a chain of correspondence regarding Mr W and sub-particular f) related to the Mr W and Mr and Mrs B matters. Sub-particulars g)-j) was a chain of correspondence relating to Mr R.

135. The Panel noted that, in respect of allegations 10a)-e), the Respondent informed RICS on 18 October 2016 that he was taking legal advice. Further, on 9 December 2016, the Respondent wrote to RICS through his then Counsel, to respond to the allegations as they were then drafted. Counsel also responded on the Respondent's behalf on 12 December 2016 in respect of charge 10f). The Panel considered that these responses were sufficient to fulfil the Respondent's requirement to cooperate with RICS staff.

136. Charge 10g)-j) concerned Mr R's complaint. The Respondent wrote to RICS by way of response to that matter to the effect that he could not respond, due to ongoing litigation in relation to a separate matter. Subsequently, when RICS informed the Respondent that Mr R had stated that litigation had been concluded in relation to that other matter and asked the Respondent for evidence to the contrary, no such evidence was supplied. However, the Respondent did respond to the effect that he felt unable to answer the inquiries due to non-disclosure by RICS.

137. The Panel concluded that whilst the requests made by RICS in these letters raised reasonable inquiries, it was not persuaded that the Respondent had failed to respond to them such that he could be considered to have failed to cooperate for the purposes of Rule 9. He had responded to the letters, notwithstanding that RICS may have considered his responses to have been unhelpful.

138. The Panel also noted that the Respondent had attended a meeting with RICS, at his own request, in early 2017, to deal with the enquiries in relation to Mr W and Mr B. The Panel considered that reflected a genuine desire to tackle the issues in the case. It was concerned that RICS had been unable to provide a copy of the recording of that meeting to assist it with determining the degree to which the Respondent had or had not cooperated with those inquiries.

139. Overall, considering the number of letters sent to him by RICS, the number of separate matters that were being investigated and the fact that the Respondent did, through Counsel, provide substantive responses to many of the questions raised, the Panel was not satisfied that this charge was proved.

Liability to disciplinary action

140. The Panel heard further submissions from the parties on this issue. Mr Lynch submitted that the facts found proved, which included a lack of integrity, were at the most serious end of the misconduct spectrum. He submitted that, as such, the findings were sufficiently serious to render the Respondent liable to disciplinary action on the basis that action was required to protect the public and the reputation of RICS.

141. Mr Mayall resisted this. He submitted that unless specifically pleaded, the Panel was not entitled to conclude that the findings undermined the reputation of RICS. Further, he suggested that where a lack of integrity was not pleaded in relation to any of the charges found proved, no conclusion that they gave rise to liability to disciplinary action could reasonably be reached. He invited the Panel to conclude that the severity of all the matters found proved was not sufficient to render the Respondent liable to disciplinary action.

142. The Panel received further advice from the Legal Assessor on this issue. The advice was that a decision on liability to disciplinary action was distinct from a determination on the facts. It did not follow that liability arose automatically upon a finding of fact. The decision required an application of judgment as to whether the matters proved, individually and/or collectively, taken in the context of the circumstances at the time, necessitated, at least in theory, a disciplinary response.

143. The Panel was advised to consider Bye-Law 5.2.2 which sets out the grounds upon which a Member may be liable to disciplinary action. It involves consideration of the impact, or potential impact, of the conduct, in this case, both individually and cumulatively, on public protection and/or confidence in the profession. This necessarily included consideration of whether the findings of fact tended to damage the reputation of RICS and the profession as a whole.

144. The Panel took account of the fact that two of the charges proved were said to be the product of a lack of integrity (Charges 4 and 9), one charge gave rise to a conflict, or perceived conflict of interest (Charge 2), one charge reflected conduct unbefitting membership (Charge 1d) and four charges were in breach of Rule 3 (Charges 2, 4, 6 and 9). The Panel considered that whilst Charge 1d) might not, in isolation, give rise to liability to disciplinary action, when taken in the context of the finding at Charge 2, it suggested a motivation behind the comment that crossed the relevant threshold.

145. In that context, the Panel considered that the cumulative impact of all the findings was sufficiently serious to give rise to a liability to disciplinary action.

Decision as to sanction

146. The Panel heard further submissions from the parties as to sanction. RICS submitted that these were not isolated incidents, since there were five charges proved in relation to three separate complaints. They included findings of lack of integrity. The wrongdoing was intentional and the Respondent had benefitted financially. He had not accepted responsibility and demonstrated no insight into the effects on the reputation of the profession.

147. Mr Mayall invited the Panel to conclude that most of the mitigating features set out in Supplement 1 of the Sanctions Policy, and only one of the aggravating features (false/misleading statements), were present in this case. He addressed the Panel on the context in which each of the charges proved had occurred and invited the Panel to take careful account of the mitigation in relation to each.

148. In addition, oral evidence was provided from Mrs S, a former client of the Respondent and Mr B, the Respondent's solicitor. Both spoke positively of the Respondent's character and integrity.

149. The Panel paid careful heed to the advice of the Legal Assessor. It was reminded of the purpose of sanctions, as reflected at paragraph 6 of the Sanctions Policy, and of the need to consider the mitigating and aggravating factors of this case, as set out (non-exhaustively) at paragraph 7 and Supplement 1 to the Sanctions Policy. It was further reminded that personal mitigation carries less weight in regulatory proceedings where the primary purpose is to act in the public interest.

150. Finally, the Panel was advised that where a disciplinary history is present, it is entitled to have regard to that history in determining the most appropriate sanction, particularly if the matters concerned are similar in nature or theme such that they reflect a propensity to misconduct, and/or a failure to respond positively to disciplinary action.

151. The Panel took note of the fact that the Respondent had been the subject of disciplinary action in 2012, arising from conduct that took place in 2008 and 2009. The determination of that Disciplinary Panel had been appealed by the Respondent. The Panel was provided with copies of the determinations of the Disciplinary Panel in 2012 and the Appeal Panel in 2013. Having taken careful account of their content, the Panel was concerned that the underlying conduct reflected in the findings upheld by the Appeal Panel suggested a pattern of behaviour that echoed much of the misconduct before this Panel. In particular, the misconduct found by

the previous panel and upheld on appeal included a failure to avoid a conflict of interest, a misrepresentation of the Respondent's position, and exploitation of the Party Wall Act with a view to extracting payment of his fees.

152. Although the Panel recognised that the facts of that previous matter were distinct from those before it here, the repetition of similar conduct, which has already been the subject of disciplinary action and upheld on appeal, suggests that the Respondent is unable or unwilling to change his practice. It was concerned that the Respondent has not used the time that has elapsed to reflect upon his misconduct and/or seek to address it. The Panel noted that the matter concerning Mr and Mrs B arose less than 16 months after the previous appeal decision.

153. The Panel considered that the following aggravating factors were present:

- Previous disciplinary record of similar conduct.
- Conduct not isolated.
- Conduct arising from three complainants in respect of separate matters.
- Lack of insight/acceptance of misconduct.
- Risk of repetition.

154. The Panel considered that the following mitigating factors were present:

- Difficult personal/family circumstances at the time some of the misconduct occurred.
- Full engagement with these proceedings.

155. The Panel considered the matters too serious for no sanction to be imposed. The misconduct was not isolated, has not been remedied, and in view of the Respondent's lack of insight, is considered likely to be repeated. It follows that a Caution was considered to be wholly inadequate in addressing the misconduct given the Panel's conclusion that there is real risk of repetition. The Panel further took account of the four Reprimands issued by the Disciplinary Panel in 2012, upheld on appeal in 2013, and concluded that the Respondent was unlikely to respond positively to the imposition of a further Reprimand by this Panel.

156. The Panel went on to give careful consideration to the imposition of a fine. Once again, the Panel was mindful of the fact that the Respondent had previously been the subject of fines in relation to conduct of a similar nature and they have not had the deterrent effect intended.

157. The Panel next considered the imposition of Conditions. It had regard to paragraph 19 of the Sanctions Policy that Conditions should be '..specific, measurable, achievable, realistic and time bound'. The Panel concluded that conditions were inappropriate in principle, in view of the gravity of the misconduct, and the continued refusal to acknowledge it. Furthermore, the Panel considered conditions to be inappropriate in practice, since there are no conditions that could be devised properly to address misconduct of this nature, which included a lack of integrity.

158. In the Panel's view, the misconduct found proved demonstrates a continuing and deep-seated attitudinal problem inconsistent with continued membership of RICS. The Panel was mindful of the words of Sir Thomas Bingham, as he then was, in *Bolton v Law Society* that:

"The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

159. The Panel was concerned to underline that Party Wall Surveyors who are members of RICS are expected to adhere to the highest professional standards and to act at all times with integrity. Public confidence in the reputation of the profession and the RICS depends upon it.

160. The Panel therefore concluded that expulsion was the only means by which the Respondent's misconduct could be addressed. It was confident that in view of the wide-ranging concerns, the disciplinary history and the Respondent's continuing failure to acknowledge any misconduct, this sanction was appropriate and proportionate. It would serve to protect members of the public from a repetition of the same or similar conduct, restore public confidence in the profession and send out an appropriately robust message to the profession about the fundamental importance of acting, at all times, in accordance with the professional and ethical standards that are part and parcel of membership.

161. Accordingly, the Panel determined that the Respondent should be expelled from membership.

Further application to be heard in private / to exclude Mr B from the hearing

162. Mr Mayall made an application for the submissions on publication to be in private and in particular to exclude Mr B from that part of the hearing. Mr Mayall submitted that it would be

otiose to have a discussion about publication if Mr B remains within the hearing at this stage. Mr Mayall told the Panel that within 24 hours of the Panel making its decision on liability, details of the decision appeared on a website called Building Industry Watchdog. There was no suggestion that the 'leak' was attributable to Mr B.

163. Mr Lynch opposed the application and told the Panel that there was no reason for the hearing to be held in private at this stage as it has, to date, been in public. Mr Lynch told the Panel that if it subsequently chose not to publish the determination, it could give a direction to any members of the public not to disclose the details of the decisions.

164. The Panel bore in mind that the matter has been heard in public throughout. There is a presumption that the hearing will be heard in public. The Panel concluded that no exceptional circumstances exist to depart from the usual presumption. The Panel therefore considers that Mr B or any other observer should be permitted to hear the submissions on publication and the hearing should continue to be in public. The Panel recognised that, in any event, the issue of publication that it has to decide relates only to publication by RICS, and does not prevent publication by others.

Costs

165. The Panel recognised that the normal litigation costs rules do not apply to these proceedings and that costs do not automatically follow the event. The Panel bore in mind that the overarching principle is set down in Rule 34 which gives it a complete discretion to award those costs which it considers are fair and reasonable.

166. Mr Mayall submitted that the costs should be apportioned to reflect Mr Antino's success in this case. The Panel noted that it has imposed a sanction to expel Mr Antino from membership and it does not therefore agree that there are elements of 'success' and 'failure'. The Panel recognised that, at all times, it must apply the principles of proportionality, balancing Mr Antino's interests against the public interest, and that any costs awarded can only be those that are fair and reasonable.

167. The Panel considered each of the different areas of cost, on which it had received written submissions and had been addressed by the parties.

Hearing costs

168. The Panel's interpretation of the drafting of paragraph 3 of Supplement 2 to the Sanctions Policy, was that the hearing costs of £2,650 could not be intended to cover the costs of the entire hearing. The Panel did not consider it would be fair and reasonable to award RICS a figure of £2,650 for 17 days of hearing, which would be in the order of approximately £155.00 per day. It recognised that the guidance was silent as to whether the figure was a total figure, or a daily figure, but it considered as a matter of common sense that the costs including room hire, paying panel members and the legal assessor, are such that a total figure of £2,650 would not be reasonable. The Panel bore in mind its overall discretion to award costs which it considered were fair and reasonable. It considered that the total hearing costs sought by RICS of £42,400 for the 16 days claimed were fair and reasonable.

169. Whilst not addressed by either party in submissions at this stage, the Panel takes account of the determination of the panel hearing Mr Antino's previous case. It notes that a hearing fee of £2,650.00 per day appears to have been awarded to RICS during that hearing. This Panel therefore considered that Mr Antino must have been aware of a previous interpretation of the policy, namely, that the hearing costs of £2,650 must represent a daily figure, rather than a total figure.

Investigation costs

170. The Panel considered that the costs of the investigation appear to have been properly incurred. In particular, as this was specifically raised by Mr Mayall, the Panel's view was that it was reasonable for RICS to claim £225.00 for reading counsel's advice, especially in light of Mr Lynch's explanation that the cost of obtaining the advice itself has not been claimed in an effort to keep the full amount of the claim proportionate. When considering the large volume of paperwork in this case, the Panel considered that total investigation costs of £5,205.00 were fair and reasonable.

Solicitors' costs

171. The Panel did not consider that the fact that 'visit' and 'solicitor's costs' appear within the same box at paragraph 3 of Supplement 2 to the Sanction's Policy, meant that there was an intention that the solicitors' fees related only to visits. Mr Lynch confirmed that solicitors do not attend visits as part of a regulatory review and, therefore, the Panel did not consider that these two categories were linked.

172. The Panel noted from Mr Lynch's submissions, and is aware from the written submissions it received during the hearing, that further work was conducted by RICS during the course of the hearing, for example, whilst preparing written submissions overnight. It notes that Mr Lynch on behalf of RICS, has not sought to claim these additional hours of preparation. It considers that this is further evidence that RICS has sought to maintain proportionality in making its application for costs.

173. The Panel took note of Mr Mayall's submission that the £200.00 solicitors' hourly rate cannot be indicative of the amount RICS pays Mr Lynch and that RICS should not make a profit from costs awards. However, the Panel recognised the fact that the £200.00 rate is a standardised rate, and that such a rate would encompass all of the overheads associated with the solicitor's role. It cannot simply be a case of RICS seeking to reclaim Mr Lynch's salary; the Panel considered that Mr Mayall's submission was too simplistic in this respect. The Panel is satisfied that the policy allows for £200.00 per hour to be awarded for solicitors' costs. In any event, the Panel bears in mind its broad discretion to award costs that it considers are fair and reasonable. In this case it considers that the claim by RICS for £39,200.00 solicitors' costs is fair and reasonable.

174. The Panel further considers that the costs incurred by RICS for the purposes of today's hearing, namely £2,200.00, are fair and reasonable. It considers that RICS notified the defence of these figures in good time within the written submissions on costs.

Disbursements

175. The Panel noted that the fees claimed by RICS for counsel's advice on the issue of judicial immunity are not disputed by Mr Mayall. The Panel considers that the costs of £1,200.00 for counsel's advice on 05 November 2018 are fair and reasonable. In line with the submissions made, it disallows the figure of £240.00 for VAT.

176. However, the Panel's view is that the evidence provided in support of Mr Geering's fee for further advice is insufficient. It is not possible to link the invoice produced to any work relevant to the case. The Panel would have expected to see further detail from counsel's chambers in support of such a claim. There is no detail provided of the hourly rate, or the nature of the advice provided. In the circumstances, the Panel is not satisfied that it would be fair and reasonable to allow RICS' costs of £4,800.00 (including VAT), for counsel's fees.

177. The Panel considered that the evidence of Mr Birrell was provided in good faith, was impartial and that his advice was given in an effort to assist the Panel. The evidence of Mr Birrell was of assistance to the Panel when considering the case overall, and the Panel took account of his evidence when determining some of the allegations. Mr Birrell also assisted the Panel with its general understanding of the Party Wall Act. The Panel therefore considers that Mr Birrell's costs of £3,080.00 (exclusive of VAT) are fair and reasonable. It disallows the sum of £616.00 for VAT.

178. The Panel is mindful that it has discretion on awarding costs, albeit it notes that the policy is silent with respect to costs of travel and accommodation. However, the Panel's view is that it is fair and reasonable, and proportionate in the context of the length of this case overall, to order that the costs of travel and accommodation (£1,506.00) for RICS' presenting officer to be paid.

179. The total costs of each of the areas that the Panel has considered as set out above totals £95,151.00. However, that is not the end of the exercise. The Panel takes the view that an adjustment is required in order to represent a fair and reasonable award overall.

Adjustment of costs overall

180. The Panel took account of the submission by Mr Mayall that at least a 50% reduction to RICS' costs was required in light of those matters that were found not proved. The Panel considered that there were 10 charges, rather than the 13 referred to by Mr Mayall. However, it acknowledged that the time spent in hearing evidence relating to charge 1 was far greater than the time spent in respect of the other charges. Notwithstanding that, the Panel considered that costs should not be apportioned using a strictly mathematical formula, and it needed to consider the totality of the case when considering the issue of costs. The Panel considered that the charges found proved, which included a lack of integrity, are serious charges and are some of the most serious that panels of this nature consider. The Panel was mindful that the charges found proved have resulted in the most serious sanction which can be imposed, expulsion from the membership. The Panel also notes that charges were found proved in respect of all three complainants; it does not therefore consider that it would be fair, reasonable or proportionate to reduce RICS' costs by 50%.

181. Furthermore, the Panel also took into account that, at a conservative estimate, at least two days of hearing time was spent hearing and determining preliminary arguments which

were made unsuccessfully by Mr Antino. The Panel considered that RICS was successful in this case overall in that Mr Antino has been expelled from the membership; therefore, RICS cannot be criticised, and should not be penalised, for bringing the case. However, the Panel considers that the fact that not all of the charges were found proved should result in some reduction of the overall costs awarded. The Panel therefore considers a fair and reasonable reduction of the costs overall is to reduce the figure from £95,151.00 to £75,000.00 to reflect those matters set out above.

Costs claimed against RICS by Mr Antino

182. Mr Mayall submitted that an order for costs should be made against RICS in favour of Mr Antino. The Panel bore in mind that whilst some of the charges were found not proven, all of the charges required investigation, and to be aired in an open forum, and it was in the public interest that this should have taken place.

183. The Panel considered that there was, prima facie, evidence for each of the charges that were brought. The fact that the Panel did not find any particular witness credible is not something that could have been foreseen by RICS in the circumstances of this particular case, prior to the hearing taking place.

184. The Panel did not consider that there was any element of bad faith, the allegations were not improperly brought and nor was there any dishonesty on the part of RICS. It did not consider that, as per settled law, the proceedings were a 'shambles from start to finish'. The Panel noted the agreement by Mr Lynch that the content of the RICS bundles was 'true and accurate', but the Panel did not consider that this amounted to any bad faith or a 'shambles'.

185. The Panel did not therefore consider that any of Mr Antino's costs should be borne by RICS. The Panel has considered Mr Antino's statement of means. It considers that the costs award set out above is fair in light of Mr Antino's means. It bears in mind that any costs not awarded to RICS will be borne by the profession overall.

186. Accordingly the Panel orders that Mr Antino should pay RICS' costs in the sum of £75,000.

Publication and receipt of the draft grounds of appeal

187. The Panel accepted the advice of the legal assessor that it should not have regard to the detail of the drafts grounds of appeal submitted on behalf of Mr Antino. The Panel was of the view that it was inappropriate for it to give consideration to the draft grounds of appeal at any time, and certainly not before the final determination in this matter had been handed down. Whilst Mr Mayall said orally that he was not asking the Panel to go behind its decision, the Panel considered that this was exactly what was being asked of it. The Panel recognised that in other forums, as referred to by Mr Mayall, such consideration of draft grounds of appeal may be given, but the Panel bore in mind that its function here was not to consider whether to grant leave to appeal, but purely to consider whether its determination should be published, and to decide the issue of costs. The draft grounds of appeal were submitted in support of Mr Mayall's argument that the determination should not be published. The Panel did not consider that these grounds of appeal were capable of assisting it with the issues it had left to decide. The Panel considered that its primary role was to protect the public and the public interest and that the presumption is in favour of publication, unless there is good reason not to do so.

188. Mr Lynch submitted that the decision should be published, in line with the usual policy, and the Rules. Mr Mayall opposed this. Mr Mayall told the Panel that the prejudice suffered by Mr Antino by the publication of the decision could not be undone if the findings of this Panel were subsequently overturned. The Panel bore in mind that the reputation of the profession is more important than the fortunes of any individual member. It has found serious allegations proved against Mr Antino, and has expelled him from membership. The seriousness of such a finding and sanction means that the public should be made aware of this immediately.

189. Mr Mayall further submitted that, due to Mr Antino's current work commitments, the prejudice suffered by him if the decision was made public was greater. However, the Panel considered that this was a factor in favour of publication, as members of the public currently working with Mr Antino should be aware of the seriousness of the findings made by this Panel. This must be in the public interest because of the seriousness of the allegations found proved and the severity of the sanction. The Panel has also found that, in light of Mr Antino's previous disciplinary history, there is a risk of repetition. That risk, coupled with Mr Antino's lack of insight, means that there are concerns for the protection of the public. Those concerns can be mitigated, in part, by the public being made aware of the Panel's findings. The Panel therefore orders publication of its decision.

Application to postpone the sanction

190. The Panel took note of the submissions made on behalf of Mr Antino and by Mr Lynch. It accepted the advice of the legal assessor that the sanction would commence at the conclusion of the hearing, unless it directed otherwise.

191. The Panel determined that there was a likelihood of repetition of the conduct found proved. It also took account of the lack of insight displayed by Mr Antino. It has already determined to expel Mr Antino from membership. The Panel had regard to its function to protect the public and uphold the public interest. The Panel did not consider that it would be upholding that function if it allowed a member who had been expelled from membership in the circumstances of this case, to continue to practise pending any appeal. The Panel therefore refuses the application to postpone the commencement of the sanction.

Appeal period

192. Mr Antino may appeal against this decision within 28 days of notification of this decision, in accordance with Rules 59-70.

193. In accordance with Rule 60 of the Disciplinary, Registration and Appeal Panel Rules 2009, the Honorary Secretary of RICS has 28 days from service of the notification of the decision to require a review of this decision.