

## **Disciplinary Panel Hearing**

### **Case of**

**Mr Noel Kelly BSc MRICS [0070641]**

**Middlesex, UK**

### **On**

Thursday 5 September 2019

### **At**

By Telephone conference

### **Panel**

Angela Brown (Lay Chair)

Rosalyn Hayles (Lay Member)

Justin Mason (Surveyor Member)

### **Legal Assessor**

Chris Hamlet

### **RICS Representative**

This was a paper hearing, with written representations prepared on behalf of RICS.

### **The formal charges are:**

The charge against Mr Kelly is:

‘Between 1 January 2018 and 1 February 2019 you have failed to comply with RICS’ requirements in respect of Continuing Professional Development (CPD) in that you have not completed and recorded, or caused to be recorded, at least 20 hours of CPD on the RICS CPD portal.

**Contrary to Rule 6 of the Rules of Conduct for Members 2007 version 6.’**

Mr Kelly is therefore liable to disciplinary action under Bye-law 5.2.2.

## Notice/Proceeding in Absence

1. Mr Kelly was given notice by Special Delivery and email of 1 August 2019 that this case was to proceed by way of written representations ie: a paper hearing, in accordance with Rules 4d and 43a of the Disciplinary, registration and Appeal Panel Rules version 7 (the “Rules”).
2. The Panel received advice from the Legal Assessor as to the Rules regarding service in respect of paper hearings. It concluded Notice had been properly served in accordance with R43a(a).
3. The Panel next considered whether to proceed in the absence of Mr Kelly. The Legal Assessor’s advice was sought and accepted. The Panel was referred to the case of R-v-Jones [2002] UKHL 5, which Tait v The Royal College of Veterinary Surgeons (RCVS) [2003] UKPC 34 states is also applicable to professional conduct proceedings. The Panel were further referred to the case of GMC v Adeogba and GMC v Visvardis [2016] EWCA Civ 162, in which the Court of Appeal ruled that the regulator’s responsibility was to communicate the Notice of Hearing to the address provided by the Registrant and no more.
4. The Panel in this case took account of the fact, confirmed by the statement of Ms Emma Jones dated 27 August 2019, that Mr Kelly has been emailed and served by post the Notice and bundle of evidence in accordance with the Rules, to his preferred email and postal addresses as notified to RICS, but he has not responded. The Panel noted that the Notice appeared to have been signed for as received by Mr Kelly on 2 August 2019.
5. The Panel duly concluded it was appropriate to proceed in his absence.

## Evidence

6. The Panel received a bundle containing material relevant to each stage of the proceedings. On advice from the Legal Assessor, the Panel initially took account of the material only insofar as it was relevant to its decision on the charge and liability to disciplinary action. This included a Case Summary produced on behalf of RICS and statements from Mr Joe Poole, RICS CPD administrator, dated 7 May 2019 (of which account was taken only in respect of the failure to record CPD for the year 2018).

## Burden and standard of proof

7. 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 careful an examination of the evidence might be required before a Panel find it proved. There is no requirement for Mr Kelly to prove anything.
8. The Panel has in mind throughout its deliberations that the right to practice a profession is involved in these proceedings and proceeds upon the basis that the Human Rights Act 1998 will apply. It bears in mind in particular Mr Kelly’s right to a fair trial and respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as incorporated within UK law by that Act. 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.

## Facts

9. The Panel had regard to the evidence produced that Mr Kelly, as a matter of fact, had not completed and recorded any CPD between 1 January 2018 and 1 February 2019. That evidence comprised a print out of Mr Kelly's CPD record and the statements on behalf of RICS referred to above.
10. It was noted that there is no evidence that Mr Kelly has applied for any RICS Exemption or Concession which would have allowed him to avoid that requirement.
11. The Panel concluded that as a matter of fact the charge was made out.

## Liability to Disciplinary action

12. The Panel went on to consider whether Mr Kelly was liable to disciplinary action. In coming to its conclusion the Panel accepted the advice of the Legal Assessor. This question is one for the Panel's judgment. The Panel considered that failure to carry out a condition of membership which is there to ensure members retain current knowledge and skills, is serious.
13. Mr Kelly has provided no evidence of CPD activities having been undertaken over this period, which prevents RICS from monitoring his compliance with his professional obligations and tends to undermine public confidence in the profession.
14. The Panel took into account the fact that the CPD policy was approved by the Regulatory Board and is an expressly stated RICS Rule. The Panel noted that all members agree to adhere to the RICS Rules, Regulations and Bye Laws and accept that they may be subject to disciplinary action if they fail to do so.
15. It concluded that Mr Kelly was liable to disciplinary action.

## Sanction

16. Having found the charge proved and determined that Mr Kelly was liable to disciplinary action, the Panel referred to the written submissions on behalf of RICS regarding prior breaches of CPD obligations in 2014 and 2015 (which was recorded late), for which he received a Caution and a Caution and a Fine, respectively.
17. In addition, the Panel took account of statements from Ms Hayley Moore, Global Workflow Team Manager at RICS, confirming the mailings sent to Mr Kelly about his CPD obligations, including a postal reminder of the consequences of a further breach.
18. The Panel bore in mind that the purpose of sanctions is not to be punitive, though that may be their effect. The purpose of sanctions is to declare and uphold the standards of the profession, to safeguard the reputation of the profession and of RICS as its regulator and to protect the public. Sanctions must be proportionate to the matters found proved.

19. The Panel paid careful heed to the advice of the Legal Assessor and to the indicative sanctions guidance of RICS. It considered carefully the mitigating and aggravating factors of this case.
20. The Panel was advised that in determining what, if any sanction to impose on Mr Kelly, Rule 21.1 of the Sanctions Policy provides for a presumption of expulsion in the event of a third breach of CPD obligations within 10 years. However, this presumption is capable of being displaced if the circumstances permitted. The advice, in keeping with the approach of other regulators, was that any sanction imposed must be proportionate, and therefore ought to involve consideration of the lowest sanctions available first and only moving to the next level of sanction if it decides the lesser sanction is inappropriate or otherwise fails to meet the public interest. The Panel bore in mind that more than one sanction may be imposed. If conditions are to be imposed they must be proportionate, workable and address the issues raised in these proceedings.

## **Mitigating/Aggravating features**

21. The Panel took account of the fact that Mr Kelly has failed to provide any response to RICS correspondence regarding this issue, nor has he offered any explanation for the breaches.
22. The following features of the case were considered to aggravate the breach:
  - Prior cautions for similar breaches in 2014 and 2015
  - Receipt of a fine for the 2015 breach
  - Failure to engage with the proceedings
23. The Panel considered there were no mitigating features in this case.

## **Decision on Sanction**

24. The Panel considered the matter too serious for no sanction to be imposed. It took account of the guidance at paragraph 21 of the Sanctions Guidance which provides that a third breach of Rules regarding CPD within 10 years of receipt of a caution raises a presumption of expulsion.
25. The Panel considered that in the absence of any mitigating features, the presumption of expulsion should apply in this case. It gave careful consideration to the lesser sanctions available to them within the Sanctions Guidance but concluded that there was no public interest or other proper basis to impose a sanction other than expulsion.
26. Accordingly, the Panel orders Mr Kelly be expelled from membership.

## **Publication**

27. The Panel considered the guidance as to publication of its decisions. It accepted the Legal Assessor's advice. The advice was, and the guidance provides, that it is usual for the decisions of the Panel to be published on RICS' website and in RICS Modus. The Panel sees no reason for departing from the normal practice in this case.

28. The Panel orders that this decision be published on RICS' website and in RICS Modus, in accordance with Supplement 3 to the Sanctions Policy 2008 version 6.

## **Costs**

29. RICS made an application for costs in the sum of £400. The Panel acceded to that application in order that the costs of the hearing are not borne by the profession.

## **Appeal Period**

30. Mr Kelly may appeal to an Appeal Panel against this decision within 28 days of notification of this decision, in accordance with Rules 58 – 70 of the Disciplinary, Registration and Appeal Panel Rules 2009 version 7.

31. The Honorary Secretary of RICS may require a review of a finding or penalty imposed by a Disciplinary Panel within 28 days from service of the notification of the decision, in accordance with Rule 59 of the Disciplinary, Registration and Appeal Panel Rules 2009 version 7.