ROYAL INSTITUTION OF CHARTERED SURVEYORS

APPEAL PANEL HEARING

Case of

Mr Philip Antino

On

Tuesday 7 May to Friday 10 May 2019

At

RICS, Parliament Square, London

Panel

Sir Michael Burton (Lay Chairman)

Ian Hastie MRICS (Surveyor Member)

Nicholas Hawkins (Lay Member)

Legal Assessor

Rosemary Rollason

Appellant

Philip Antino attended and was represented by David Mayall, Counsel, instructed by Ashley Bean, Solicitor.

RICS Representative

Christopher Geering, Counsel, instructed by James Lynch, Solicitor for RICS.

Background

1. We considered an appeal by Mr Philip Antino ("the Appellant") against a decision of an RICS Disciplinary Panel following a hearing which took place on 4-11 June 2018, 13-18 June 2018, 12-16 and 23 November and 12 December 2018.

Findings of the Disciplinary Panel

2. The Disciplinary Panel found the following charges proved as to facts and as to liability to disciplinary action:

Complaint made by Mr and Mrs B

"Charge 1(d)"

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

   (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)

"Charge 2"

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)

"Charge 4"

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

"Charge 6"

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. (*not proved*)
   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)

Complaint from Mr R

"Charge 9"

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).

3. In the light of its findings in respect of the charges, the Disciplinary Panel determined that Mr Antino should be expelled from membership of RICS and that he must pay RICS' costs in the sum of £75,000. It further determined that the decision of the Disciplinary Panel should published.

The Appellant's Grounds of Appeal

4. The Appellant appealed against the findings of the Disciplinary Panel on the following grounds:

    1. The Disciplinary Panel erred in law in finding that Party Wall Surveyors do not have judicial immunity (relating to Charges 2, 4, 6 and 9);

    2. Admission of inadmissible/prejudicial material: the judgment in ***Mills v Savage (Claim No B20 CL103 in the Central London County Court)***. This ground was relevant to Charge 9 and was argued with it;

    3. Prejudice caused by the Disciplinary Panel overruling RICS' agreement on facts. This ground was relevant to Charge 1(d) and, in the event, did not feature at the hearing;

    4. Procedural unfairness as a result of the Appellant not being reminded at the hearing that he could make an opening submission and/or by RICS being permitted to make a closing address. At the appeal hearing the Appellant did not pursue this ground.

5. The Appellant also appealed against the findings in respect of each of the individual charges found proved by the Disciplinary Panel, namely **Charges 1(d), 2, 4, 6 and 9**.

6. At the appeal hearing, the Appellant put forward a further ground of appeal, which would apply in the event that some or all of the grounds were allowed, against the penalty of exclusion from membership of RICS.

7. RICS, as the Respondent to the appeal, opposed each of the grounds of appeal.

Documents

8. We received written Grounds of Appeal from the Appellant and a Response from RICS. We also heard oral submissions from both parties.

9. We considered the written determination of the Disciplinary Panel and the redacted Case Summary prepared by RICS. We considered documents and relevant extracts from the transcript of the disciplinary hearing. We received relevant case law authorities submitted by the parties. We viewed a video recording of the incident which was the subject of Charge 1(d).

DETERMINATION

The Appeal Panel's approach

10. We were reminded by the Legal Assessor that under the provisions of the Disciplinary Registration and Appeal Panel Rules (01 April 2009, Version 7, with effect from 01 January 2017) ("the Rules") the burden at an appeal hearing is on the Appellant to satisfy the Appeal Panel that the order being appealed was wrong.

11. Rule 64 provides that an appeal is a review of the decision of the Disciplinary Panel, rather than a re-hearing de novo. Accordingly, only where the Appeal Panel considers that the decision of a Disciplinary Panel was plainly wrong should it allow the appeal. We were referred to guidance given by the Supreme Court in ***Henderson v Foxworth Investments [2014] UKSC 41***, in which it was stated that "plainly wrong" in this context signifies that *"the decision of the trial judge cannot reasonably be explained or justified. It follows that, in the absence of some other identifiable error such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with findings of fact*

made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

12. ***In SRA v Good [2019] EWHC 817 (Admin)*** the judgment of the High Court referred to the numerous authorities to the effect that "*an appellate court should exercise particular caution and restraint in interfering with the findings of a lower court or tribunal, particularly where that court or tribunal has reached those findings after seeing and evaluating the witnesses…".*

13. We accepted that the bar for interfering with the factual findings of the Disciplinary Panel on appeal was therefore set high.

14. Rule 69 provides that where the Appeal Panel allows an appeal it may:

    (a) vary the Disciplinary Panel's finding that the Relevant Person was liable to disciplinary action;
    (b) vary the penalty imposed by the Disciplinary Panel to one of greater or lesser severity;
    (c) *[applies to Registration decisions];*
    (d) refer the matter back to a Disciplinary Panel for a new hearing.

Findings of the Appeal Panel

15. In considering our findings, we carefully considered the detailed oral and written submissions on behalf of both parties.

Ground 1 - Judicial Immunity

16. The Appellant submitted that the Disciplinary Panel had erred in law by not finding that Party Wall Surveyors have judicial immunity. His appeal on this ground applied to all the charges found proved by the Disciplinary Panel, with the exception of Charge 1(d). The Appellant submitted that if his appeal on this legal ground was upheld, then it would follow that the appeal must be upheld in relation to all these individual charges.

17. We were referred to a number of decided authorities presented by the parties.

18. The Appellant's starting point was to rely on ***Arenson v Casson Beckman Rutley [1975] 3.W.L.R 815*** for the proposition that any formulated dispute submitted to a third party for a neutral decision is an arbitration (or quasi-arbitration, only because it is not an arbitration under the Arbitration Act 1996).

19. In ***Arenson****,* Lord Simon of Glaisdale stated (at 424):

"…in my view the essential prerequisite for him to claim immunity as an arbitrator is that, by the time the matter is submitted to him for decision, there should be a formulated dispute between at least two parties which his decision is required to resolve."

20. There was a similar statement by Lord Wheatley (at 428):

"*The indicia are as follows: (a) there is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called upon to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision".*

21. However, we also note Lord Simon's statement (at 419):

"It is in my view, wrong in principle to freewheel by analogy from the arbitrator's immunity, as if it were not exceptional, and as if the primary rule were not one of responsibility".

22. It is also significant that *Arenson* followed the earlier House of Lords decision in ***Sutcliffe v Thackrah and Others [1974] 2 W.L.R 295****,* in which Lord Reid said (at 735):

"*The reason* [for immunity] *must, I think, be derived at least in part from the peculiar nature of duties of a judicial character. In this country, judicial duties do not involve investigation. They do not arise until there is a dispute. The parties to a dispute agree to submit the dispute for decision. Each party to it submits his evidence and contention in one form or another. It is then the function of the arbitrator to from a judgment and reach a decision."*

23. In the same case, Lord Morris said (at 752):

"*In summarising my conclusions I must preface them by the observation that each case will depend on its own facts and circumstances and upon the particular provisions of the relevant contract. But in general, any architect or surveyor or valuer will be liable to the person who employs him if he causes loss by reason of his negligence. There will be an exception to this and judicial immunity will be accorded if the architect or surveyor or valuer has by agreement been appointed to act as an arbitrator*."

24. We noted in particular the statement of Lord Salmon in **Sutcliffe** (at 759):

"I suspect that the heresy that such valuers and architects are to be regarded as being in the same position as judges and arbitrators rests on the fallacy that since all judges and arbitrators must be impartial and fair, anyone who has to be impartial and fair must be treated as a judge or arbitrator".

25. At 763 Lord Salmon commented that Cockburn CJ in ***Re Hopper*** "*was in effect saying that the question as to whether anyone was to be treated as an arbitrator depended upon whether the role which he performed was invested with the characteristic attributes of the judicial role".*

26. Mr Mayall, for the Appellant, referred us to ***Gyle Thompson and Others v Wall Street (Properties) Ltd. [1974] 1 W.L.R. 123****,* in which Brightman J stated (at 463):

    "*Those [Party Wall] surveyors are in a quasi-judicial position with statutory powers and responsibilities. It therefore seems to me important that the steps laid down by the Act should be scrupulously followed throughout and short cuts are not desirable".*

27. However, that does not decide whether such Party Wall surveyors are acting judicially or even quasi-judicially. In this regard, we note the House of Lords decision in ***Trapp v Mackie [1979] 1 W.L.R 377*****,** the leading case on absolute privilege, and the important words of Lord Diplock (at 379) when laying down the indicia of a judicial function:

    "*So, to decide whether a tribunal acts in a manner similar to the courts of justice and thus is of such a kind as will attract absolute, as distinct from qualified, privilege for witnesses when they give testimony before it, one must consider first, under what authority the tribunal acts; secondly, the nature of the question into which it is its duty to enquire; thirdly the procedure adopted by it in carrying out the inquiry and fourthly the legal consequences of the conclusion reached by the Tribunal as a result of the inquiry."*

28. Lord Diplock expanded further on this at 383, from which it is clear that a significant number of the indicia to which he referred are absent in the case of a Party Wall surveyor.

29. We refer most succinctly in this regard to the Court of Appeal decision in ***Heath V Commissioner of Police of the Metropolis [2004] EWCA Civ 943***, in which Auld LJ, summarising Lord Diplock's comments in ***Trapp v Mackie***, concluded at [45]:

    "…*the essential features of the disciplinary hearing rendered it closely analogous to a judicial proceeding before a court of justice*".

    He also approved at [54] the words of the Employment Tribunal in that case that *"the doctrine* [of judicial privilege] *has been extended to tribunals which exercise functions equivalent to those of an established court of justice".*

30. In ***Palacath Ltd. v Flanagan [1985] 2 All ER 16*****,** a case relating to a surveyor carrying out a rent review, Mars Jones J set out, at page 166, the following by reference to the words of Cockburn CJ in ***re Hopper****:*

    "As I understand it in the instant case, no oral hearing was contemplated at which the parties could put their respective cases through the mouths of witnesses, or to challenge each other's witnesses by cross-examination. Although there was no express provision for the

disclosure of any matters or reasons or valuation to the opposite party, this was in fact done in this case; and the parties made counter-submissions based thereon. The defendant carried out an inspection of the premises without any representative of the parties being present, but in his letter of 29 December 1982, the defendant indicated that he would not have been averse to a representative of the parties accompanying him. However, although the defendant acting under the terms of the second schedule followed some procedures which are typical of the judicial process, the ultimate test is: how was he to arrive at his decision? Was he obliged to act wholly or in part on the evidence and submissions made by the parties? Or was he entitled to act solely on his own expert opinion? If the answer to the question is the latter, then the defendant could not be exercising a judicial function, or a quasi-judicial function, if there is any such distinction.

'In the instant case the defendant was specifically enjoined in cl 8 of the second schedule to act as an expert, and was not to be limited or fettered in any way by the statement of reasons or valuations submitted by the parties but was entitled to rely on his own judgment and opinion. In the light of those express provisions it is impossible for me to hold that the parties intended that the defendant should act as arbitrator or quasi-arbitrator in determining the revised rent. I am satisfied that the provisions of cl 8 were not intended to set up a judicial or quasi-judicial machinery for the resolution of this dispute or difference about the amount of the revised rent. Its object was to enable the defendant to inform himself of the matters which the parties considered were relevant to the issue. He was not obliged to make any finding or findings accepting or rejecting the opposing contentions. Nor, indeed, as I see it, was he obliged to accept as valid and binding on him matters on which the parties were agreed. He was not appointed to adjudicate on the cases put forward on behalf of the landlord and the tenant. He was appointed to give his own independent judgment as an expert, after reading the representations and valuations of the parties (if any) and giving them such weight as he thought proper (if any). That being so, there can be no basis for conferring immunity on the defendant in respect of a claim for damages for negligence in and about giving that independent expert view."

31. This was followed in terms by Scott J in ***North Eastern Co-operative Society Ltd. v Newcastle upon Tyne City Council and another [1987] 1 EGLR 142***, another rent review case, when he said in particular at 146 (page 10):

"*Returning to the indicia, there was, of course, a dispute between the parties at the time in question in the sense that they could not agree on the amount of the yearly rent; but it was not a dispute in which each had formulated a view which was then placed for decision before the independent surveyor. The independent surveyor asked for their submissions in order to assist him in his task. He did not proceed on the footing that he was obliged to have their submissions. He was not appointed in order to arbitrate between £5,725 per annum on the one hand and £24,000-odd on the other hand. I am not clear, therefore, that there was a formulated dispute in quite the sense that, for instance, Lord Wheatley had in mind in the Arenson case. Second, to ask whether the dispute or difference was to be resolved by the*

independent surveyor in a judicial manner is to beg the question. If he was an arbitrator, he would have to resolve the dispute in a judicial manner: if he was simply a valuer, he would be able to call for such assistance as he might think desirable but would deal with that assistance and with the submissions and the evidence the parties might think fit to place before him as a valuer. He would not be bound to confine himself to that evidence. He could go beyond it and, of course could reject it. I am not clear that that indicium is satisfied in the present case".

32. It is not suggested that the role of a surveyor acting as a Party Wall Surveyor in a Party Wall Award is materially different from his role when resolving a rent review.

33. To similar effect are the words of HHJ Humphrey Lloyd QC in ***Chartered Society of Physiotherapy v Simmonds Church Smiles [1966] 12 Const. L.J. 117****,* a case relating to Party Wall Surveyors, where he concludes (at 122): "*An award under the Act is in my judgment sui generis and is more in the nature of an expert determination*".

34. We also noted the comments of HHJ Marshall QC, especially at paragraphs 74 and 77, in ***Manu v Euroview Investments Ltd [2008] 1 EGLR 165****.*

35. Finally, we noted a recent decision relating to a Party Wall Surveyor, ***Wilky Property Holdings plc v London & Surrey Investments Ltd.[2011] EWHC 2226 (Ch)****,* in which Richard Snowden QC (as he then was) referred to the words of Lord Esher MR in ***Re Carus-Wilson and Greene (1886) 18 QBD 7****,* which received approval in the Court of Appeal in ***David Wilson Homes Ltd. V Survey Services Ltd. [2001] 1 All ER (Comm) 449****,* and stated:

"It is quite clear from the fact that Lord Esher MR postulated a third, intermediate, category of cases involving the resolution of a pre-existing dispute that might, or might not, be an arbitration, that Lord Esher did not regard the fact that a process was designed to settle a pre-existing dispute as determinative of its status as arbitration."

36. Arbitrators have long had judicial immunity at common law, though since the introduction of the Arbitration Act 1996, by Section 29, they no longer have immunity where they act mala fide.

37. Arbitrators have the duty under Section 33(1)(a) of the Arbitration Act 1996 to *"act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.*" No similar duty is applicable to Party Wall Surveyors.

38. The Appellant's submission was that Party Wall surveyors' awards under the Party Wall Act 1996 may not be questioned, pursuant to Section 10(16), and that Party Wall surveyors have also held, like Arbitrators before the Act, judicial immunity at common law, notwithstanding that they may have neither expertise nor qualifications (which the Party Wall Act does not

require). We could derive no assistance from Hansard, which Mr Mayall put before us, nor did he produce authority to support his proposition.

39. We considered the differences and similarities between the procedure under the Party Wall Act and judicial proceedings, assisted by schedules prepared by the Appellant and the Respondent at our request. We observed that the list of differences identified by the Respondent far exceeded the number of similarities. The differences included:

    - No procedure in the Party Wall Act for hearing evidence or submissions;
    - No procedure in the Act for disclosure;
    - It is not clear what evidence the Party Wall Surveyor will rely on - i.e. he is not limited to the information the parties put before him;
    - There is no requirement for a hearing in public or otherwise;
    - No witnesses called on oath or otherwise;
    - No ability to compel evidence;
    - No judicial training or assistance;
    - No formal qualification needed at all;
    - The Party Wall Surveyor investigates, rather than just adjudicates, which is a non-judicial function;
    - Unlike a judge or arbitrator, he can rely on an opinion which has not been ventilated before the parties to reach his decision.

40. No authority was presented to us in which judicial immunity has ever been applied, at common law or otherwise, to Party Wall surveyors, or to surveyors acting in an equivalent role, and, in particular, to one who does not need to have any expertise or qualification and who has no duty to act judicially, in the sense fully discussed in the authorities or by reference to the arbitrator's statutory duty.

41. We conclude that public policy protects judges and arbitrators, and there can be no justification for extending immunity to any dispute-resolver.

42. In the case of a Party Wall surveyor's decision, there can be no challenge to his Award in the interest of finality, but there must be a positive public policy in favour of his conduct being able to be monitored by his professional body: for example in relation to misconduct prior to or in the course of the award, as exemplified by some of the facts considered in this appeal.

43. We reject the Appellant's ground in respect of judicial immunity.

44. We thus proceed to consider the grounds of appeal in respect of the individual charges 1(d), 2, 4, 6 and 9.

Charge 1(d)

45. The Appellant admitted at the initial hearing that on 19 October 2014 during a visit to the home of Mr and Mrs B, he made the statement to Mr B and Mr B Junior "I'm your worst nightmare".

46. In his oral evidence to the Disciplinary Panel, he gave the explanation that he was warning the B's that he was entitled to act in self-defence to a perceived threat of violence by them. The Disciplinary Panel rejected that explanation at paragraph 70 of its determination.

47. The Disciplinary Panel heard evidence about the confrontation with the Bs from Ms D, the adjoining owner, who subsequently appointed the Appellant as her surveyor.

48. The Disciplinary Panel stated at paragraph 60 of its decision, in relation to its assessment of the credibility of the witnesses who had given evidence that it "*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 his boundary dispute and there was a possibility that this had a bearing on her perception of events*".

49. It was submitted on behalf of the Appellant at the appeal hearing that the Disciplinary Panel could not reject the evidence of Ms D on the basis referred to at paragraph 60 of their determination, pursuant to the rule in ***Browne v Dunn [1894] 6 R 67****,* which we noted was recently considered by the Court of Appeal in ***Markem Corp. v Zipher Ltd. [2005] EWCA Civ 267****.* The suggestion that Ms D's evidence might be biased had not been put to her in cross-examination in order that she was given the opportunity to answer the point. It was submitted that, had the Disciplinary Panel fully accepted Ms D's evidence, they may have reached a different conclusion.

50. Having rejected the self-defence case in paragraph 70, the Disciplinary Panel, at paragraph 71, reinterpreted the Appellant's contemporaneous statement made for the purpose of presenting to the County Court the following day to obtain an injunction against the Bs and paid no regard to the fact that (i) his account in that statement that the Bs were anticipating that he would obtain an injunction and (ii) that Ms D did obtain an injunction on the very next day, based upon what the Bs had done, and the Appellant's witness statement.

51. We viewed the contemporaneous video footage of the incident. We observed from the footage that the Appellant said to the Bs "*you shouldn't threaten people"*; and he reported them to the Police. The Disciplinary Panel made no reference in its determination to this very relevant contemporaneous evidence.

52. We concluded that there had been a demonstrable failure by the Disciplinary Panel to consider relevant evidence which, coupled with its approach to the evidence of Ms D, meant that its finding in respect of Charge 1(d) was plainly wrong.

53. Further, the Disciplinary Panel did not give an explanation of why the Appellant's words, as explained by him in his court statement (which they accepted), were not befitting of a

chartered surveyor, or brought the profession into disrepute. RICS' expert, Mr Birrell, was not critical of these words taken in isolation, i.e. in the event that, as was found, these were the only words complained of. We considered that the Disciplinary Panel's reasoning did not explain how these words reached the threshold of gravity to warrant liability to disciplinary action and it was apparent that the Disciplinary Panel itself recognised the difficulty by reference to the apparent contrast between paragraphs 71 and 114 of its determination. On this basis also, we concluded that the decision on Charge 1(d) was one which could not reasonably be explained or justified.

54. We therefore upheld the Appellant's appeal on Charge 1(d).

Charge 2

55. The Disciplinary Panel's finding was that the Appellant should not have accepted the appointment by Ms D as, in the light of the confrontation which had taken place with the Bs, he had a conflict of interest.

56. The Appellant submitted that the Disciplinary Panel had made an error of law. His argument was that the Panel had ignored the uncontested expert evidence of RICS' expert witness Mr Birrell. There was no evidence that the Bs perceived there was a conflict of interest. The circumstances did not amount to a conflict of interest as defined in RICS' Guidance.

57. We found it difficult to identify the conflict of interest. We noted that Mr Birrell did not consider that the making of the single statement which the Disciplinary Panel found proved, by Charge 1(d), would constitute such a conflict.

58. RICS submitted that the confrontation was sufficient, and that if the Appellant's appeal succeeded in respect of Charge 1(d), that emphasised that there was such a confrontation. However, the appeal in respect of Charge 1(d) is allowed, inter alia, on the basis that the Disciplinary Panel failed to consider that the Appellant was acting in self-defence and took immediate steps to restrain unlawful activity. It does not lead to the inference, nor was such suggested, that the Appellant would be biased if appointed. In any event, the Disciplinary Panel did not refer to or accept Mr Birrell's powerful evidence that a surveyor should not be bullied out of an appointment. We concluded that no reasonable panel could reject that evidence, and the Disciplinary Panel gave no reason for doing so.

59. The appeal on Charge 2 was therefore upheld.

Charge 4

60. The Appellant admitted at the disciplinary hearing that he wrote the letter dated 9 May 2017 to Mr and Mrs B and should not have included the reference to Section 10(7) of the Party Wall Act. The Disciplinary Panel found that all questions except one posed in the letter concerned matters in dispute between the Appellant and the Bs and were not appropriate for

a Section 10(7) Notice. This section is intended to allow the Party Wall Surveyor to act ex parte where an agreed surveyor has failed to act for a set period.

61. The Appellant's case was that the reference to Section 10(7) had been a mistake. He submitted that the Disciplinary Panel ignored the fact that the letter was copied to Mr Stevens, the Bs' surveyor, and that the Bs were advised to contact him (Mr Stevens) for advice. He submitted that the Disciplinary Panel also failed to acknowledge that Mr Birrell had recognised that it would be unusual to send such a letter to Mr Stevens if it was intended to intimidate. The Appellant submitted that the finding of the Disciplinary Panel that this was not an error, that he (the Appellant) had deliberately misrepresented his powers and that this was the product of a lack of integrity, was wholly lacking in sustainable reasons.

62. We were mindful of the evidence of Mr Birrell. He was not critical of the content of the letter. What made it worthy of criticism was the use of Section 10(7), and Mr Birrell said so in terms. The Disciplinary Panel found this to have been deliberate and not an error. There was no explanation as to why the letter was sent including the threat of action by reference to Section 10(7) in the event of non-compliance within 14 days.

63. We concluded there was no ground for us to interfere either with the finding of the Disciplinary Panel as to facts, or its finding that the lack of integrity proved warranted a finding of liability to disciplinary action.

64. We therefore rejected the appeal on Charge 4. The Disciplinary Panel was entitled to form the view it did at paragraphs 90 and 91 of its determination.

Charge 6.

65. We heard argument from the parties in respect of this charge. The factual sub-particulars a-d and f-h had been found proved.

66. In his evidence at the disciplinary hearing, RICS' expert, Mr Birrell, eventually accepted that the Award was one which the Appellant was able to make. His evidence was that, whilst the items could properly be claimed under the Party Wall Act, he himself would not have made an award in respect of them.

67. The Appellant submitted that it was not open to the Disciplinary Panel in law to find that the Appellant made a Party Wall Award in respect of matters that did not arise out of, or incidental to, the dispute, because it was not open to it to go behind, or question, a Party Wall Award as a result of Section 10(16) of the Party Wall Act. This was conceded by RICS at the disciplinary hearing. When the issue was drawn to the attention of the Disciplinary Panel by Mr Mayall, the Panel included the following statement in its reasoning (paragraph 106):

”W*hilst 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 of or incidental to the dispute*”.

68. The Appellant’s primary ground of appeal concerned the formulation of the charge, namely:

“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:

69. As drafted, proof of the second element of the charge, which was the mischief of the allegation, was dependent on proof of the first element which, for the reasons set out above, would offend against Section 10(16). We considered that this submission was correct, and we also concluded, as a matter of fact, that the evidence of Mr Birrell did not support this proposition.

70. In the course of submissions on this point at the Appeal hearing, RICS accepted that this finding could not be sustained, because the Party Wall Award was valid and could not be questioned by it or by the Disciplinary Panel. Since the first element of the charge could not stand, the second must, as a consequence, fall away.

71. The only basis of the Disciplinary Panel’s conclusion that the Award was a penalty was the inappropriateness of its content, which they could not find in law or on Mr Birrell’s evidence. RICS accepted that it could not properly oppose the appeal on this ground. We concur and accordingly, the appeal on charge 6 is upheld.

Charge 9

72. It was common ground that that the Party Wall Act required service of the ex parte Award (which was in respect of the Appellant’s fees) at the site, where there was a manned site office. The Disciplinary Panel reached the conclusion that the Appellant so served it knowing that it was unlikely to come to the client’s notice “*in a timely manner*” i.e. within the 14-day period for a challenge (paragraph 121 of the Disciplinary Panel’s determination).

73. The Appellant’s evidence was that he always served an Award in accordance with the Act and never accompanied it with an email, having formed the view, which Mr Lynch for the RICS did not challenge, that it could cause problems if it was unclear which of the two led to good service, from which time for the appeal period would run.

74. It had been agreed that the clients’ surveyor, Mr R, would be called as a witness at the disciplinary hearing. The Appellant served a bundle of documents with a view to using them to discredit Mr R. There was a dispute, as a result of which first the bundle was excluded and then, by agreement with Mr Lynch, Mr R was not to be called, and his witness statement was redacted to exclude his statement that he and the client did not receive the award. What

remained was a statement that the first time the Appellant raised it with him was at a meeting on 13 October 2015 (after the 14-day period).

75. There was, however, correspondence before the Disciplinary Panel between the Appellant and Mr R, when the 14-day period had not yet run, which referred to the Appellant's fees. There was no mention by the Appellant in that correspondence that an ex parte award had already been made and served in respect of the fees, in circumstances when such mention would have been natural. This correspondence was referred to in the statement of Mr R and the reference remained in the redacted version of his statement.

76. The Disciplinary Panel concluded, after considerable cross-examination of the Appellant on the point, that it was clear from the correspondence that Mr R did not know about the Award, and that, in circumstances in which any reasonable person would have mentioned the award, the Appellant deliberately did not do so (paragraphs 124-126 of the determination).

77. The Appellant submitted that the Disciplinary Panel's conclusion in paragraph 121 (which mirrored particular (c) of the charge) in the light of the common ground was unsustainable, and one to which no reasonable panel could come. We were prepared to assume that was the case but:

    (a) The particulars of Charge 9 were pleaded severally and the case as to deliberate concealment in the correspondence was in particulars (f) and (g), and the conclusory particular (h) was based on all the earlier particulars;

    (b) The conclusion of the Disciplinary Panel was perfectly clear in paragraph 122: "whether or not" the Appellant had the belief in paragraph 121, they were satisfied by the correspondence as to his subsequent knowledge that it had not been served and should have been mentioned;

    (c) The 'alternative case' was fully put in cross-examination;

    (d) There was no agreement, when Mr R's statement was redacted, that RICS could not rely on the correspondence for the clear inference that the award had not been received, and there was (rightly) no objection by Counsel when the obvious inference from the correspondence was put to the Appellant in cross-examination;

    (e) The explanations which the Appellant put forward for not mentioning the Award in the correspondence were fully considered by the Disciplinary Panel (and repeated before us) but did not persuade the Disciplinary Panel, or us, the Appeal Panel. The fact that if the 14-day period had expired an application could be made to the Court did not affect the Panel's view as to A's motivation. The fact that the award was ex parte and therefore not expected by the client made it more important to mention;

(f) The Appellant complained about the admission of a judgment of HH Judge Bailey in ***Mills v Savage*** relating to a subsequent occasion in which the Judge was critical of the Appellant for not mentioning an award in correspondence. Although there was lengthy discussion before the Disciplinary Panel about the admission of this judgment in evidence, it did not lead to any specific finding, nor even any mention in the Disciplinary Panel's determination. Mr Mayall accepted in argument (it may be in the light of ***O'Brien v Chief Constable of South Wales [2005] UKHL 26***, relied upon by RICS) that he could not have objected to the relevant content of HH Judge Bailey's judgment being put to the Appellant in cross-examination.

78. We are satisfied that that there can be no sustainable appeal against the finding of the Disciplinary Panel in paragraph 127 of its decision that "*the Respondent's conduct was calculated to frustrate the building owners' ability to challenge the award. It followed that that represented a lack of integrity".*

79. We therefore reject the appeal on Charge 9.

Liability to Disciplinary Action

80. We conclude that there was liability to disciplinary action as a result of the findings of lack of integrity on charges 4 and 9, in respect of which the Appellant's appeal had been unsuccessful. We found no reason to interfere with the decision of the Disciplinary Panel in this respect.

Appeal against penalty

81. In the light of our decision to uphold the Appellant's appeal in respect of Charges 1(d), 2 and 6, we invited submissions from the parties in relation to penalty in respect of charges 4 and 9.

82. We considered the submissions of the parties. Mr Mayall submitted that, given that only two of the five findings of the Disciplinary Panel had been upheld, and the findings now concerned two, rather than three, clients, the sanction of exclusion was no longer justified. He submitted that a fine and/or reprimand would be proportionate.

83. Mr Geering, for RICS, reminded us of the previous disciplinary findings against the Appellant which were considered by the Disciplinary Panel at the sanction stage. He submitted that, given that there remained two serious findings of lack of integrity in respect of two clients, and in the light of the previous history, exclusion from membership of RICS was still warranted.

84. In considering the Appellant's appeal against penalty, we referred to RICS's Sanctions Policy and its supplements. We adopted a proportionate approach, considering all the available sanctions in ascending order of gravity. We bore in mind that we should impose the least restrictive sanction which meets the public interest.

85. We referred to the determination of the Disciplinary Panel in relation to sanction. It had identified that the findings of lack of integrity, in respect of charges 4 and 9, involved intentional wrongdoing. The Disciplinary Panel further considered that the Appellant had not accepted responsibility or demonstrated insight into the effects of his actions on the reputation of the profession.

86. The Disciplinary Panel took account of previous disciplinary findings in respect of Mr Antino in 2012, arising from conduct in 2008 and 2009, which were upheld on appeal in 2013. It considered these findings reflected a similar pattern of behaviour, including a failure to avoid a conflict of interest, a misrepresentation of his position and exploitation of the Party Wall Act with a view to extracting payment of his fees. The Disciplinary Panel concluded that repetition of such behaviour suggested that Mr Antino was unwilling or unable to change his practice. It noted that the matter involving Mr and Mrs B arose less than 16 months after the previous appeal decision in 2013.

87. We considered the impact of our findings in this appeal in relation to penalty. No finding of conflict of interest remained. The charges upheld related to two, rather than three, different clients. However, the two serious findings of lack of integrity found proved by the Disciplinary Panel had been upheld. We concurred with its reasoning. The two findings of lack of integrity represented very serious concerns which on their own would be likely to lead to exclusion from membership. The position regarding the Appellant's disciplinary history remained unchanged from the disciplinary hearing. The Disciplinary Panel's concerns relating to the Appellant's lack of insight or remedy of his past misconduct remained.

88. We concluded that the exclusion from membership of RICS remained the appropriate and proportionate sanction which would protect the public and the public interest.

Publication and Costs

89. At the conclusion of the hearing, we invited written submissions from the parties in respect of costs.

90. As to publication of the appeal decision, our preliminary view was that we saw no reason to depart from the usual position that there should be publication in accordance with RICS' Regulatory Board policy. However, should the Appellant wish to make submissions in respect of publication, these should be submitted in writing, together with his submissions on costs.

91. The submissions from the parties in respect of costs and publication should be submitted, in writing, within 14 days of receipt of this decision.

Consideration of costs and publication

92. In accordance with the above directions, we received and considered written submissions from the parties on the issues of costs and publication and reached our decisions on 7 June 2019.

The parties' submissions on costs

93. In its written submissions dated 29 May 2019, RICS' position was that it should be awarded a proportion of its costs of £25,998 in respect of the appeal. This was on the basis that Mr Antino was not successful on all the grounds of appeal he pursued at the appeal hearing, and that around half of the actual time at the appeal hearing was spent on his argument on Judicial Immunity, on which he did not succeed.

94. In relation to the costs order at the disciplinary hearing, RICS submitted that although on appeal Mr Antino succeeded in overturning some of the findings of the Disciplinary Panel, this did not necessarily mean that RICS should not be entitled to its costs of the disciplinary hearing, in accordance with the principle in the decision in *Baxendale-Walker v The Law Society [2008] 1 W.L.R 426.* RICS submitted these findings could be reflected in our decision in respect of the appeal hearing costs.

95. In written submissions dated 28 May 2019, Mr Mayall, on behalf of Mr Antino, submitted that as Mr Antino had had to bring the appeal in order to overturn three of the five charges which had been incorrectly decided by the Disciplinary Panel, he should be entitled to his costs of the appeal. It would be manifestly unfair if he had to pay the appeal costs of RICS.

96. In respect of the costs order at the disciplinary hearing, it was submitted that this must now be revisited, given that on appeal, Mr Antino was successful in respect of 80% of the original charges brought against him by RICS. Although it was accepted that costs orders are rarely made against regulatory bodies, it was submitted that there should now be no order for costs in respect of the disciplinary hearing.

Decision of the Appeal Panel

97. We considered the submissions of both parties. Rule 34 in Part IV of the Rules provides that a panel may make such order for costs against the Relevant Person or RICS as it considers "fair and reasonable".

98. We have determined as follows:

a. At the initial hearing, the Disciplinary Panel ordered that Mr Antino should pay RICS' costs in the sum of £75,000. In the light of the fact that Mr Antino succeeded on his appeal in respect of some of the grounds on which he lost before the Disciplinary Panel, the costs he must pay in respect of the Disciplinary shall be reduced to £62,000;

b. In respect of the costs arising from the appeal hearing, Mr Antino did not succeed on his ground relating to Judicial Immunity, which took substantial time, both as to preparation and argument before us. Although Mr Antino was successful in respect of three of his ten grounds of appeal (some of which were not pursued or fell away during the appeal hearing), in substance he was unsuccessful on his appeal overall and the sanction of exclusion from membership of RICS remains unaltered. RICS shall therefore be entitled to its costs of the appeal but, taking into account Mr Antino's submissions, in the reduced sum of £20,000.

99. In summary, therefore, we order that Mr Antino must pay the total sum of £82,000 in respect of the costs of RICS in relation to the disciplinary and appeal hearings.

Publication

100. RICS submitted that the decision on the appeal should be published in accordance with the usual policy and the Rules. Mr Antino made no submissions on the matter of publication.

101. We are mindful that our primary function is to protect the public and the public interest, and that the presumption is in favour of publication unless there are good reasons not publish. The publication of decisions of the RICS' disciplinary and appeal panels is an important part of their role in upholding the reputation of the profession

102. As indicated above when we invited submissions on publication from the parties, we find no reason to depart from the usual position and we therefore order that there shall be publication of this decision of the Appeal Panel in Modus and on RICS' website.