Appeal Panel Hearing

Case of

Mr Roderick James Stephens
NSW, Australia

On

Wednesday 2 – Thursday 3 October 2019

At

Parliament Square, London

Panel

Sir Michael Burton (Lay Chairman)
Ron Barclay-Smith (Lay Member)
Nick Turner (Surveyor Member)

Legal Assessor

Chris Hamlet

RICS Representative

This was a paper hearing with no parties in attendance

Background

1. On 19 March 2018, the Appellant appeared before a Disciplinary Panel of the RICS via video-link in respect of the following charges:

> 1. Mr Stephens sent a letter to Mrs A dated 25 May 2016 which contained personal abuse directed at Mrs A and her family and allegations of criminal conduct on the part of RICS and sought to induce Mrs A to give evidence against her husband by reference to the consequences of not doing so for her and her children. The letter caused Mr and Mrs A alarm and distress.
>
> **contrary to Rule 3 of the Rules of Conduct for Members 2007**

2. Mr Stephens failed to co-operate with RICS staff in the course of its investigation into the above conduct, in particular by refusing to give any or any substantive response to the allegations and questions posed.

contrary to Rule 9 of the Rules of Conduct for Members 2007

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

2. The Appellant was represented at that hearing by Mr Marc Beaumont, Counsel, and the RICS by Mr Adam Solomon QC and Ms Kelly Sherlock, Solicitor.
3. On the first day of that hearing, following extensive discussion between the parties, an Agreed Outcome was jointly presented to the Panel for approval. The terms were as follows:

A: Facts

i. Mr Stephens sent a letter to Mrs A dated 25th May 2016, which contained personal abuse directed at Mrs A and her family and sought to induce Mrs A to give evidence against her husband by reference to the consequences of not doing so for her and her children. The letter caused Mr and Mrs A alarm and distress. Mr Stephens therefore breached Rule 3 of the RICS Rules of Conduct for Members 2007 and was liable to disciplinary action under Bye-law 5.2.2(c) and/or conducted himself in a way which was liable to bring RICS into disrepute and was liable to disciplinary action under Bye-Law 5.2.2(a).

ii. Mr Stephens failed to co-operate with RICS staff in the course of its investigation into the above conduct, in particular by refusing to give any or any substantive response to the allegations and questions posed. He therefore breached Rule 9 of the RICS Rules of Conduct for Members 2007 and was liable to disciplinary action under Bye-Law 5.2.2(a).

B: Outcomes

i. Mr Stephens agrees to apply forthwith to resign his RICS membership. RICS will revoke his membership on receipt of his resignation and Mr Stephens agrees not to reapply for membership thereafter.

ii. Mr Stephens will not seek to join RICS or the RICS Valuer Registration Scheme, whether through membership of the Australian Property Institute ("API") or otherwise.

iii. RICS agrees not to make a complaint to API about Mr Stephens' conduct which is the subject-matter of these proceedings.

iv. Mr Stephens undertakes not to communicate with Mrs A ever again.

v. Mr Stephens undertakes only to communicate with Mr A through solicitors that Mr Stephens has instructed.

vi. Mr Stephens agrees that the anonymity of Mr and Mrs A in these proceedings shall continue and that he will not bring any further challenge to the order as to anonymity.

vii. Mr Stephens will on or before 4pm on 16th April 2018 pay RICS £15,000 in cleared funds, such sum being in respect of its costs of these proceedings.

4. The Panel was invited by the parties to approve and adopt this agreement in accordance with the procedure outlined in the case of *In re Carecraft Construction Co Ltd [1994] 1 WLR 172*.

5. The Panel determined as follows:

"Having accepted the advice of the Legal Assessor and having carefully considered the proposed agreement and the public interest, the Panel were satisfied that it was a proportionate and fair disposal of the case. It adequately protects the interests of Mr and Mrs A, the public interest generally and the reputation of the profession. It therefore approved the Statement of Agreed Facts and Outcomes as set out above."

6. However, following the hearing, the Appellant did not resign his membership nor did he pay the costs as agreed. The Appellant submitted no appeal against this decision within the 28 days specified under the Rules, or at all. The RICS wrote to the Appellant on several occasions in respect of these breaches.

7. On 15 October 2018 a further hearing took place before the same Panel. The matter could not be concluded due to lack of time.

8. On 14 May 2019 a further disciplinary hearing was convened. The primary purpose of that hearing was to consider the status of the original charges in the light of the Agreed Outcome and, if appropriate, to determine an additional charge relating to the failure to comply with the terms of the Agreed Outcome.

9. The Appellant asserted during that hearing, inter alia, that he had not voluntarily consented to the Agreed Outcome and that it did not, in any event, represent a formal finding on the facts. The Panel disagreed, and concluded that the March 2018 panel, by adopting the Agreed Outcome, *had* formally determined Charges 1 and 2.

10. Charge 3 read as follows:

> 3. Mr Stephens acted with a lack of integrity in failing to comply with the terms of an Agreed Outcome dated 19 March 2018.
>
> **contrary to Rule 3 of the Rules of Conduct for Members 2007**
>
> In light of either or all of the allegations set out above Mr Stephens is liable to disciplinary action under RICS Bye-Law 5.2.2(a) or 5.2.2(c).

11. The Appellant did not deny Charge 3. He conceded, as recorded in paragraph 20 of the Panel's Decision, that, unless he could successfully appeal Charges 1 and 2, he had no positive defence to Charge 3.

12. The Panel concluded that the Appellant's failure to comply with the Agreed Outcome demonstrated a lack of integrity. Accordingly, Charge 3 was found proved.

13. The Panel proceeded to find that the Appellant was liable to disciplinary action. In considering sanction, the panel identified the following aggravating factors:

- The failure to comply with the Agreed Outcome was a deliberate and conscious decision;
- The Appellant had demonstrated a persistent lack of insight into the nature and extent of his own wrongdoing, choosing instead to focus on the behaviour of others;
- The letter to Mrs A was threatening in tone, offensive and abusive;
- The Appellant repeatedly chose to criticise the RICS' process in broad terms and make assertions that he did not have to respond to its request for information during the investigation stage, rather than cooperate constructively.

14. The Panel was unable to identify any mitigating factors other than the absence of any previous adverse disciplinary findings.

15. Accordingly, on 24 May 2019, the Panel concluded that it had no option but to expel the Appellant from the RICS. The Decision was delivered on 12 June 2019.

The Appeal

16. On 9 July 2019, the Appellant lodged an application for appeal of that Decision. His grounds, in summary, were as follows:

    1. The Panel was wrong to refuse to allow him to challenge the Agreed Outcome because:
        a. It was not binding under the Rules;
        b. It was agreed in circumstances that were unfair.
    2. The Panel lacked jurisdiction to determine the issues since they concerned a private dispute;
    3. The charges upheld against him differed from the content of the Agreed Outcome;
    4. The Panel should have set aside the "outcomes" in the Agreed Outcome;
    5. He was beyond the jurisdiction of RICS in any event, since he did not renew his membership at the end of 2018.

17. The Appellant applied on 14 August 2019 for the hearing to proceed by way of a paper hearing. The Respondent resisted. On 9 September 2019 the parties were notified that a decision had been reached by the Chairman in favour of a paper hearing.

18. In advance of the hearing, we were provided with 5 bundles of papers on behalf of the parties. This included detailed grounds of appeal and the Response by the RICS.

Application to admit additional evidence

19. Prior to this hearing, the Appellant submitted a lengthy bundle of some 1600 pages of additional material that he invited us to consider. We noted that this was the same

bundle which was put before the May 2019 Panel, and which was ruled by it to be inadmissible on the grounds of irrelevance.

20. We received advice from the Legal Assessor that the Appellant's application fell under Rule 65 of the Rules. We were advised that this represents 'new evidence' in the sense that it was not admitted in evidence by the May 2019 Panel, and therefore could not be considered by us without our leave. We were reminded that the purpose of an appeal in this context was to review the original decision and consider whether it was 'wrong', not whether a different decision could have been reached on the facts. As such, we were advised that we should not ordinarily take account of fresh material unless there were compelling reasons to do so.

21. We carefully considered this material. We concluded that the content was not relevant to our deliberations on the issues before us which focussed, centrally, on the status and breach of the Agreed Outcome, and not whether the content of the letter sent by the Appellant to Mrs A was justified.

22. We concluded that leave should not be given to receive this material in considering the merits of the appeal.

23. Having reached that decision in relation to our consideration of the grounds of appeal, we nevertheless recognised that the material *might* in theory be relevant in mitigation of the Appellant's conduct, insofar as he sought to argue that there was some underlying foundation to his assertions about Mr A. We reserved further consideration of that issue until after the substantive grounds of appeal had been determined.

Procedure on Appeal

24. We received advice from the Legal Assessor regarding the procedure to be followed. We were referred to Rule 64 of the Rules which provides that the appeal is by way of a review of the decision of the Disciplinary Panel, having regard to the evidence presented to that Panel, as well as representations by the parties. New evidence is not to be taken into account unless leave is granted by us, following an application no later than 14 days prior to the hearing.

25. We were reminded that the burden is on the Appellant to satisfy us that the order being appealed was wrong.

26. We were referred to our powers on appeal as set out at Rule 69.

Determination of the Appeal

27. We determined as follows in respect of each ground of appeal:

    1. The Panel was wrong to refuse to allow him to challenge the Agreed Outcome:

28. We observed first, in respect of Ground 1) generally, that the Appellant had not sought to appeal the decision of the original March 2018 Panel, which expressly adopted the Agreed Outcome as an appropriate disposal of the charges, within the 28 day period provided for at Rule 60 of the Rules or at all, and did not, until October 2018, raise any challenge at all to the decision. The merits of the Agreed Outcome were therefore not in issue when the matter came before the May 2019 Panel and the opportunity to challenge it has long since expired.

29. As such, the issue in this appeal, subject to the matters discussed below by reference to the Appellant's sub-grounds, concerns whether there was a breach of the Agreed Outcome, rather than whether it had binding status.

30. We noted that at paragraph 2 of the Appellant's grounds of appeal it was accepted that at the March 2018 hearing he made concessions on the facts and that, in his words, *"RICS could seek to rely on those concessions as admissions by me which go to proving them as being true."*

31. We considered this to be an express acknowledgement that the subject matter of the charges was not in issue at the time of the hearing.

32. Two sub-grounds were put forward by the Appellant on this issue:

    a. The Agreed Outcome was not binding under the Rules;

33. We took account of the ratio in *Carecraft,* which had been cited and followed by the March 2018 Panel. We were satisfied that *Carecraft* is good authority for the proposition that a tribunal can adopt a summary procedure by way of disposal, insofar as it is based upon an agreement between the parties on the facts which supports the conclusion reached by the tribunal in question.

34. Irrespective of that general proposition however, we were directed by the Respondent in their written response to the specific Rules applicable to these proceedings, which, at Rule 42, allow for a variation of the ordinary procedure should the Panel see fit, as well as to the guidance of the Divisional Court in *R (Hill) v Institute of Chartered Accountants in England and Wales [2013] EWCA Civ 555*. It was clear from paragraph 17 of its decision that the March 2018 Panel were directed to, and guided by, the ratio in *Carecraft* before accepting the Agreed Outcome as an appropriate means of disposal.

b. It was agreed in circumstances that were unfair.

35. This overlaps with Ground 4.

36. We observed that, in pursuing this ground, the Appellant had made serious allegations of misconduct/duress against counsel instructed on his behalf in March 2018. He did not, however, waive legal professional privilege in order that his counsel could respond to those allegations. We were conscious in those circumstances that the material provided by the Appellant in support of this assertion was incomplete and selective.

37. However, even in that context, we were satisfied that the material did not support any assertion of duress or other professional misconduct by his counsel, such as to render the Agreed Outcome unfair. On the contrary, it was striking that the Appellant had been given clear and repeated opportunities to accept or reject the agreement. Particular reference was made in that regard to the contemporaneous email communications between him and his counsel, included in the bundle, and to his counsel's later email of 7 March 2019.

38. This was an issue considered in full and ruled upon by the May 2019 Panel at paragraphs 63-65 of its Decision, and we concluded that the Panel's findings in that regard are unassailable on appeal. In any event, we particularly took into account the following:

i. As to whether the Appellant had a clear understanding, we noted p37 of the transcript of the March 2018 hearing, in which the Appellant was expressly asked, following the adoption of the Agreed Outcome, whether he had understood what had happened. He replied "yes";

ii. The issue of alleged duress was not raised by the Appellant until October 2018.

39. We concluded that there is no basis for an appeal on the ground that the agreement was reached in circumstances that were unfair.

2. The Panel lacked jurisdiction to determine the issues since they concerned a private dispute;

40. As was highlighted in respect of Ground 1), the March 2018 Panel determined the issues concerning his conduct in sending the letter to Mr A (being the subject of Charges 1 and 2). Those findings were thus of historical note to the May 2019 Panel – relevant only insofar as consideration of the breach of the Agreed Outcome and the determination in respect of Charge 3 was concerned.

41. We thus concluded that the opportunity to challenge the jurisdiction of the March 2018 Panel had long since expired.

42. Notwithstanding that, we were of the clear view that the jurisdictional point was baseless. We took account of the content of the letter, and in particular the following passages:

"You may not appreciate this, but I am letting you know what is going on at the moment, not for your sake, but for the sake of your children, who I am concerned are going to be very shortly tarnished with the past behaviours of both [Mr A] and yourself in relation to a number of criminal and civil investigations. You need to commence action now and make suitable arrangements, so that your children are not exposed to these matters anymore than they need to be."….

"So you now need to explain this to your children, about your past behaviour and you will also have to involve your family as they could well have to pick the pieces up if criminal charges are laid."….

"Although you personally, now need to decide whether you wish to defend [Mr A] and take his side, in circumstances where, if he is found guilty then you will also be found to be aiding and abetting or facing separate charges yourself. In that case, your child could well be parentless for a long while, and this is the only reason why I am giving you the benefit of warning you about what is going to happen, as I know your children are

completely innocent in this matter, and yet they too are victims of [Mr A's] and your behaviour and you should be completely ashamed of yourself as a parent. In fact I don't think that either of you are fit to be parents at all."….

"I believe that [Mr A] is a Sociopath and I set out the definition for this below.

Sociopath

A sociopath lies are often and deliberate and manipulative and intended to hurt someone. Compared to a pathological liar, the sociopath is much more manipulative and intends to use the lies to cause damage. All sociopaths are also pathological liars. Sociopaths feel no guilt for their actions and they show no emotions to anyone they cause damage to, especially their children and partners."…..

"However, I am concerned for your children. They don't deserve all of this. I am very disappointed that [Mr A] has so little regard to their futures or reputations from his actions, but that's what Sociopaths do."…..

"Time is not on your side. I can only give you to the end of May to make a decision. If you don't get back to me shortly, then I'll be clear where you stand on this. This is not just about the selfishness of yourself and [Mr A] but about the future of your children as well. The current policy in Australia is to extradite any criminals to their country of origin and leave the children born in Australia behind. This is why I am giving you an opportunity to do the right thing."…..

"…Jail is the only place for him. If you want to join him then good luck to you, but think of your children before you act, as they don't deserve parents like you two. I wouldn't want them to end up in a foster home, but that's your choice.".

43. We considered the letter to be offensive and disgraceful and likely to undermine the reputation of the profession, regardless of the circumstances in which the Appellant suggested it arose. As such, the underlying conduct was considered to fall squarely within Rule 3 and Bye-law 5.2.2 and, consequently, within the jurisdiction of the Panel.

44. In reaching this view, we were guided by the authority referred to by the Respondent in their Response, *R (Pitt) v General Pharmaceutical Council [2017] EWHC 809 (Admin),* and in particular the dicta of Elias LJ in *R (Remedy UK Ltd) v General Medical Council [2010] Med LR 330*, at paragraph 37(1), cited and relied on in *Pitt* at paragraph 33:

"Misconduct is of two principal kinds. First, it may involve sufficiently serious misconduct in the exercise of professional practice, such that it can be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur outwith the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession."

45. However, it was in any event clear that the letter was sent in the course of the Appellant's dispute with Mr A, which was said to involve the RICS, and thus went beyond the confines of a private dispute. Whilst the letter was headed 'private and confidential', it was plainly thus not a purely private matter, and, given its content, such a heading could not insulate him from the reach of his regulator, in the light of the obvious connection of such a letter with his professional standing.

3. The charges upheld against him differed from the content of the Agreed Outcome;

46. We noted that the Agreed Outcome did not make reference to the allegations of criminal conduct in the letter to Mrs A and in that respect differed from the content of Charge 1. However, the determination by the March 2018 Panel, in adopting the Agreed Outcome, concerned a breach of Rule 3 arising from personal abuse directed at Mrs A and her family, which the Appellant accepted as part of that Agreed Outcome.

47. Accordingly, we concluded that the narrow distinction between the content of Charge 1 and the Agreed Outcome was immaterial.

4. The Panel should have set aside the "outcomes" in the Agreed Outcome;

48. In the light of our determination in respect of Ground 1)b), we were satisfied that the May 2019 Panel was right not to set aside the Agreed Outcome, and that the Appellant's conduct thereafter placed him in breach of that order.

5. He was beyond the jurisdiction of RICS in any event, since he did not renew his membership at the end of 2018.

49. We noted that the Appellant had not resigned. His assertion that by not paying fees in 2018 he had implicitly resigned so as to be beyond the jurisdiction of the RICS disciplinary procedures was, we concluded, wholly misguided.

50. Non-payment of fees and resignation are necessarily distinct. We considered that members of the RICS would view with some surprise and concern the suggestion that non-payment of fees on the due date would result in an automatic inference of resignation. We took account of the Respondent's reference to Regulation 2.3.4(b)(v), at paragraph 72 of its Response, in respect of the written notification to the Chief Executive of RICS that is necessary to effect resignation.

51. Further, we were directed by the Legal Assessor to Bye law 5.2.3 which provides:

"A Member shall not be entitled to resign from membership of RICS until all proceedings against him under this Bye-Law have been concluded other than in exceptional cases at the discretion of the Head of Regulation".

52. Finally, insofar as the Appellant relied on this ground by way of challenge to the determination of the May 2019 Panel in relation to Charge 3, we observed that no such challenge was raised at the time. On the contrary, it was noted at paragraph 20 of the decision of the May 2019 Panel that the Appellant had conceded that unless he could overturn Charge 1 and 2 he had "no positive defence to Charge 3".

53. In all the circumstances, we concluded that this ground was without merit.

Further consideration of additional material by way of mitigation

54. Having rejected the Appellant's application to admit additional material at the preliminary stage of the hearing on the ground of irrelevance, we considered at this juncture whether the same material ought to be taken into account by way of mitigation of his conduct.

55. We considered the Appellant's email of 19 September 2019, in which he asserted that the additional material, if considered accurate, could render his decision to send the letter that led to these proceedings "*understandable*".

56. We considered the material in that context, and concluded that whatever the merits of the dispute between the Appellant and Mr A, it could not possibly justify the content of the letter sent by the Appellant, as reflected in the extracts set out above.

57. We therefore concluded once again that the material was irrelevant, and that it did not serve to mitigate the Appellant's conduct in any way.

Conclusion

58. We concluded that the decision of the May 2019 Panel had simply put into effect the Appellant's own agreement to resign and to meet the costs of the proceedings, both of which he had failed to do. Accordingly, that Panel determined that Charge 3, which framed those failures as a lack of integrity, was proved.

59. We were in no doubt that the decision of the May 2019 Panel was correct and cannot be challenged on appeal.

Decision on costs

60. We took account of Rule 34 of the Rules, which provides that it may make such order for costs against the Relevant Person as it considers "fair and reasonable". We noted further that the ordinary position, as set out at paragraph 26.1 of the Sanctions Policy, is that where the Member is found to be in breach of any rule, the RICS will seek full recovery of the costs incurred in relation to the investigation and hearing of the case, and will ask the Panel to make an award in its favour.

61. The RICS submitted a Schedule of Costs in the sum of £5,100, representing the full costs of this hearing.

62. We concluded that the Appellant, having been unsuccessful on all grounds of his appeal, should bear those costs, subject to a reduction of £600 in view of the fact that the hearing was concluded a day earlier than anticipated.

63. In addition to the £4,500 awarded for this hearing, we noted that costs remained outstanding in the sums of £48,250 after the May 2019 hearing.

64. The total sum of £52750 is payable.

Publication

63. We considered the guidance as to publication of our decisions. We noted that it is usual for the decisions of a Panel to be published on the RICS' website and in the RICS

Modus. We saw no reason for departing from the normal practice in this case. Part of the role of the Panel is to uphold the reputation of the profession, and publication of its decisions is an essential part of that role.

64. We order that this decision be published on the RICS' website and in the RICS Modus, in accordance with Supplement 3 to the Sanctions Policy 2008 version 6.