

Disciplinary Panel Hearing

Case of

**Mr Stewart Robertson FRICS [0042053] and,
Stewart Robertson FRICS (the Firm),
Middlesex, EN1**

On

Wednesday 13 November 2019

At

RICS, 55 Colmore Row, Birmingham, B3 2AA

Lay Chairman

Angela Brown

Members

Nick Turner (Surveyor Member)

Jane Bishop (Lay Member)

Legal Assessor

Margaret Obi

RICS Representative

Kelly Sherlock

Preliminary Matters

Service

1. A Notice of Hearing, dated 13 September 2019, was sent by post to the preferred address notified by Mr Robertson to the RICS. A copy of the Notice was provided to the Panel which confirmed that Mr Robertson had been informed of the date, time and venue of the hearing. In addition, the Panel was provided with a witness statement from a Regulatory Tribunal Executive confirming that in addition to sending Notice of Hearing by post it was sent to Mr Robertson's preferred email address. A copy of that email was also provided. Further information requested by the Panel indicated that Mr Robertson had not updated his preferred contact details since 27 February 2018.
2. The Panel noted that it is the responsibility of the Member to maintain an up to date preferred address for receipt of communications from the RICS. The Panel also noted that service is effected when the Notice of Hearing is sent; it is not dependent on the Notice of Hearing being received. The Panel concluded that service had been properly effected in accordance with the Rules.

Proceeding in Absence

3. Ms Sherlock, on behalf of the RICS, made an application for the hearing to proceed in the absence of Mr Robertson.
4. The Panel concluded that it was fair and reasonable to proceed in Mr Robertson's absence for the following reasons:
 - (i) Mr Robertson had been properly served with the Notice of Hearing. The Panel noted that the RICS had made significant efforts to bring the Notice of Hearing to Mr Robertson's attention. A further copy of the Notice of Hearing was sent to Mr Robertson's personal address on 6 November 2019. A copy of the delivery receipt, dated 8 November 2019, confirmed that the letter sent on 6 November 2019 had been signed for. In addition to Mr Robertson's preferred email address, the Notice of Hearing was sent to two other email addresses on 19 August 2019. In these circumstances, the Panel was satisfied that it was

reasonable to conclude that Mr Robertson had chosen not to participate in these proceedings and had therefore waived his right to attend.

- (ii) There has been no application to adjourn and no indication from Mr Robertson that he would be willing to attend a hearing on an alternative date and therefore re-listing this hearing would serve no useful purpose.
- (iii) Any potential injustice to Mr Robertson in not being able to make oral representations to the Panel is outweighed by the strong public interest in ensuring that the substantive hearing proceeds as efficiently and effectively as possible.

Charges

The formal charges in relation to Mr Stewart Robertson allege that:

1. He failed to carry out his professional work with proper regard for the standards of service and customer care expected of him in that, following completion of their building survey report:
 - a. He did not respond in an appropriate or timely manner, or at all, to communications from or on behalf of Ms Robinson and/or Mr Armstrong;
 - b. He did not provide a copy of the Complaints Handling Policy belonging to the Firm, which he operated, to Ms Robinson and/or Mr Armstrong, or those instructed by them.

Contrary to Rule 5 of the Rules of Conduct for Members 2007

2. Between the period of December 2018 and February 2019, he failed to cooperate adequately with RICS in relation to the complaint raised by Ms Robinson and Mr Armstrong.

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

The formal charges against the Firm allege that:

1. It failed to carry out its professional work with proper regard for the standards of service and customer care expected of it, in that, following completion of their building survey report:
 - a. It did not respond in an appropriate or timely manner, or at all, to communications from or on behalf of Ms Robinson and/or Mr Armstrong;
 - b. It did not provide a copy of the Complaints Handling Policy belonging to the Firm, which he operated, to Ms Robinson and/or Mr Armstrong, or those instructed by them.

Contrary to Rule 5 of the Rules of Conduct for Firms 2007

2. It failed to operate a Complaints Handling Procedure.

Contrary to Rule 7 of the Rules of Conduct for Firms 2007

3. Between the period of December 2018 and February 2019, it failed to cooperate adequately with RICS in relation to the complaint raised by Ms Robinson and Mr Armstrong.

Contrary to Rule 15 of the Rules of Conduct for Firms 2007

Response

5. To date there has been no response from Mr Robertson or the Firm. In these circumstances, the Panel assumed that the allegations were denied.

Background

6. Mr Robertson was registered as a professional member of the RICS on 9 November 1970 and subsequently became a Fellow. The Firm registered with the RICS on 24 September 2007.
7. Mr Robertson was engaged by Mr Armstrong and Ms Robinson ('the Complainants') to survey a property they were considering buying. He carried out the inspection on 13 August 2018 and produced his report on 20 August 2018.

8. According to the Complainants, when they purchased the property, they discovered evidence of damp and other structural issues. They raised this with Mr Robertson and, after a delay of two weeks, he visited the property again. He advised that he would send an amended report, as well as details of his complaints handling procedure, and his insurance information. However, he never did so. Having had their calls, texts and emails ignored, the Complainants referred the matter to the RICS on 12 November 2018.
9. In addition, the Complainants instructed Ozon Solicitors ('Ozon') to consider potential legal action. Ozon wrote to Mr Robertson on 22 November 2018 setting out allegations of professional negligence. It asked for details of his professional indemnity insurance. On 11 December 2018 a further letter noted '*...your continuing failure to deal with correspondence is discourteous and professionally deficient.*'
10. On 21 December 2018 the Complainants provided the RICS with an update. According to their account the previous week they had called Mr Robertson from a different number asking him to call them back. When Mr Robertson did so, and he realised who he was speaking to, he indicated that he would not be sending his complaint handling procedure and would not be responding further.
11. The RICS attempted to speak to Mr Robertson on several occasions by telephone without success. The RICS wrote to Mr Robertson on 4 December 2018 informing him of the open investigation and invited him to provide a response. He was given a deadline of 18 December 2018. However, no response was received. On 20 December 2018 a chasing email was sent with a revised response deadline of 4 January 2019. Again, there was no response. On 1 February 2019 a letter was sent to Mr Robertson with a final deadline of 8 February 2019. No communication was received and the case was referred to a disciplinary panel.

Findings of Fact

Panel's Approach

12. The Panel was aware that the burden of proving the facts was on the RICS. Neither Mr Robertson nor the Firm had to prove anything, and the charges could only be found proved, if the Panel was

satisfied, on the balance of probabilities. The Panel was also aware that where the allegation refers to a *'failure'* the RICS must first prove that Mr Robertson and/or the Firm had a duty to do something, and secondly, that it was not done. If the Panel determines that there was a duty to do something, which was not done, it may consider if there is any evidence that this was for *'good reason'*.

13. In reaching its decision the Panel took into account the documentary evidence within the hearing bundle which included correspondence to Mr Robertson from Mr Armstrong and Ms Robinson, Ozon and the RICS.

Decision

Member

Charge 1(a) and 1(b) – Found Proved

'He failed to carry out his professional work with proper regard for the standards of service and customer care expected of him in that, following completion of their building survey report:

- a. He did not respond in an appropriate or timely manner, or at all, to communications from or on behalf of Ms Robinson and/or Mr Armstrong;*
- b. He did not provide a copy of the Complaints Handling Policy belonging to the Firm, which he operated, to Ms Robinson and/or Mr Armstrong, or those instructed by them.*

14. The Panel noted that Rule 5 of the Rules of Conduct for Members 2007 states that, *'Members shall carry out their professional work in a timely manner and with proper regard for standards of service and customer care expected of them'*. The Panel noted that Mr Robertson, as a Member of the RICS, has an obligation to comply with the rules governing his membership at all times. The Panel accepted the evidence of Ms Robinson. In her witness statement, dated 18 July 2019, she stated that Mr Robertson carried out a survey of a property in Enfield on 13 August 2019. Ms Robinson went on to state that after purchasing the property she visited the property on 28 September 2018 and noticed what appeared to be severe damp. She contacted Mr Robertson after her visit but he *'ignored [her] calls'*. Mr Robertson eventually responded and agreed to re-

visit the property on 1 November 2018. Following, the second visit Ms Robinson sent an email to Mr Robertson on 2 November 2018 in which she stated, *'During the visit you advised that you would email us the outcome of the survey by 2nd.11.2018. You advised that you would send your insurance company's details. You advised you would do this given that there is a clear indication of damp in the property. Which has given us as buyers a great cause for concern (sic)'*. Ms Robinson indicated that she would appreciate a quick response. However, she received no response from Mr Robertson despite further attempts to contact him via telephone and by email on 7 November 2018 and 9 November 2018. The email sent on 9 November 2018 was a formal complaint letter in which Ms Robinson requested a copy of the Firms complaints procedure. Mr Armstrong and Ms Robinson subsequently instructed Ozon to pursue a professional negligence claim against Mr Robertson. Ozon wrote to Mr Robertson on 22 November 2018, 11 December 2018 and 22 December 2018. There was no response from Mr Robertson to any of the letters from Ozon. The Panel noted that Ms Robinson informed the RICS in a telephone call on 21 December 2018 that the last communication had with Mr Robertson was *'...last week when they called him from a different number asking for a call back, when he called them and realised who it was he advised that he would not be sending them his [complaint handling policy] or responding further.'*

15. The Panel concluded that from 2 November 2018 Mr Robertson chose to ignore the telephone calls and emails he received from the complainants and the letters he received from Ozon. The Panel was satisfied that Mr Robertson's conduct and behaviour fell far below the standards of service and customer care that is expected of a RICS members.
16. Having accepted the evidence of Ms Robinson the Panel was satisfied that the Firm's complaint handling policy was never provided to her or her husband and was never provided to Ozon.
17. Accordingly Charge 1(a) and 1 (b) were found proved.

Charge 2 – Found Proved

'Between the period of December 2018 and February 2019, he failed to cooperate adequately with RICS in relation to the complaint raised by Ms Robinson and Mr Armstrong.'

18. The RICS wrote to Mr Robertson on 4 December 2018 to inform him that a complaint had been received from Mr Armstrong and Ms Robinson. Prior to sending the letter four telephone calls had been made to Mr Robertson's business and mobile number in an attempt to discuss the complaint but no response was received to the voice messages that were left for him. There was no response to the letter dated 4 December 2018 and no response to the follow-up email sent to Mr Robertson and on 20 December 2018. On 1 February 2019, the RICS wrote to Mr Robertson again to inform him that the matter had been referred to the investigation team. On 28 February 2019 a further letter was sent to Mr Robertson to inform him that the matter had been referred to a disciplinary panel.

19. The Panel noted that Rule 9 of the Rules of Conduct for Members 2007 states that, '*Members shall co-operate fully with RICS staff and any person appointed by the Regulatory Board.*' The Panel was satisfied that Mr Robertson did not respond to any of the communication he received from the RICS and was therefore in breach of Rule 9. The Panel concluded that Mr Robertson's conduct and behaviour fell far below the standard expected of a RICS member.

20. Accordingly, Charge 2 was found proved.

The Firm

Charge 1(a) and 1(b) – Found Proved

'It failed to carry out its professional work with proper regard for the standards of service and customer care expected of it, in that, following completion of their building survey report:

- a. It did not respond in an appropriate or timely manner, or at all, to communications from or on behalf of Ms Robinson and/or Mr Armstrong;*
- b. It did not provide a copy of the Complaints Handling Policy belonging to the Firm, which he operated, to Ms Robinson and/or Mr Armstrong, or those instructed by them.'*

21. The Panel found Charge 1(a) and 1(b) proved, in relation to the Firm, for the same reasons that the Charges 1(a) and 1(b) in relation to Mr Robertson were found proved.

22. Accordingly, Charge 1(a) and 1(b) were found proved.

Charge 2 – Found Proved

'It failed to operate a Complaints Handling Procedure.'

25. All firms registered with the RICS are required to adopt a complaints handling procedure. The Panel noted that there was no evidence that the Firm had such a procedure. Mr Robertson received a formal written complaint from Ms Robinson on 9 November 2018 and therefore she was entitled to expect that her complaint would be acknowledged and given appropriate consideration. However, having accepted the evidence of Ms Robinson, the Panel was satisfied that at no stage did the Firm instigate a complaints handling procedure in response to her complaint. The Panel concluded that Mr Robertson's conduct and behaviour fell far below the standard expected of a RICS member.

26. Accordingly, Charge 2 was found proved.

Charge 3 – Found Proved

'Between the period of December 2018 and February 2019, it failed to cooperate adequately with RICS in relation to the complaint raised by Ms Robinson and Mr Armstrong.'

27. The Panel found Charge 3 proved, in relation to the Firm, for the same reasons that Charges 2 in relation to Mr Robertson was found proved.

28. Accordingly, Charge 3 was found proved.

Liability to Disciplinary Action

29. The Panel noted that a member or firm "may be liable to disciplinary action under these Bye-Laws... by reason of: ... (c) a failure to adhere to these Bye-Laws or to Regulations or Rules governing Member's conduct". The Panel was aware that not every breach or departure from the regulations or rules will render a member or firm liable to disciplinary action.

30. Mr Robertson's status, as a member of the RICS, carries a legitimate expectation and an obligation to comply with the RICS rules. Mr Robertson failed to communicate with the complainants, their legal representative and the RICS and failed to operate a complainants handling procedure. Furthermore, Mr Robertson's failure to respond adequately to reasonable requests for information by the RICS limited its ability to assess the extent of an ongoing risk to members of the public. The absence of full cooperation undermines the purpose of professional regulation and the RICS' ability to protect the public and uphold high standards of conduct and behaviour. The Panel took the view that Mr Robertson's failure to cooperate was serious and fell far below the standard of behaviour expected of RICS members.
31. The Panel took the view that these failings amounted to a serious falling short of his professional obligations. Mr Robertson enjoyed the benefit of holding himself out as a Fellow of the RICS and it was his responsibility to ensure that he was aware of the rules and that he fully complied with them.
32. The Panel concluded that Mr Robertson's acts and omissions had the potential to cause harm and seriously undermine public trust and confidence in the profession and the regulatory process. In these circumstances, the Panel was satisfied that Mr Robertson and the Firm are liable to disciplinary action.

Sanction

Panel's Approach

33. The Panel accepted the advice of the legal assessor and had regard to the RICS' Sanctions Policy and the submissions made on behalf of the RICS. The Panel bore in mind that the purpose of sanctions is not to be punitive, though they may have that effect. The purpose of sanctions is to declare and uphold the standards of the profession, to safeguard the reputation of the profession and of the RICS as its regulator and to protect the public.
34. The Panel was mindful that sanctions must be proportionate and therefore it started by considering the lowest sanction, moving up the scale of gravity only when the sanction under consideration was insufficient to meet the public interest. The Panel considered carefully the mitigating and aggravating factors of this case.

Sanction Decision

35. The Panel took the view that the conduct and behaviour of Mr Robertson and the Firm are aggravated by the following factors:

- As Mr Robertson has not engaged with these proceedings he has demonstrated no insight into the nature and extent of his own wrongdoing and that of the Firm.
- Distress was caused to Mr Armstrong and Ms Robinson as a consequence of Mr Robertson's failure to communicate with them and his refusal to provide his insurance details.
- The refusal to communicate with Mr Armstrong and Ms Robinson and the RICS was a deliberate and conscious decision by Mr Robertson to blatantly disregard his professional obligations.

36. The Panel was unable to identify any mitigating factors other than the absence of any adverse disciplinary history.

No Action

37. The Panel first considered taking no action. The Panel concluded that, in view of the nature and seriousness of the Rule breaches, to take no action regarding the RICS membership of Mr Robertson and the Firm would be inappropriate as it was unable to identify any exceptional circumstances. Furthermore, the Panel concluded that taking no action would be insufficient to maintain public trust and confidence in the profession and the regulatory process and would undermine the need to declare and uphold the high standards of the profession.

Caution

38. The Panel next considered whether to impose a caution but considered this to be insufficient to mark the seriousness of Mr Robertson's actions and the persistent nature of his failures and the failures of the Firm. The Panel noted that at no stage has Mr Robertson or the Firm taken the opportunity to acknowledge their own wrongdoing, the potential impact of their behaviour on the complainants, or the impact of their behaviour on the wider profession and their professional standing as members of the RICS. In the absence of any insight the Panel concluded that there was a risk of repetition. Furthermore, the Panel took the view that the conduct of Mr Robertson

and the Firm could not be described as '*minor*' or an isolated incident which may justify a sanction towards the lower end of the spectrum. Therefore, the Panel concluded that a caution was not an appropriate and proportionate sanction.

Financial Penalty

39. The Panel went on to consider whether a fine should be imposed. The Panel concluded that a financial penalty alone would be purely punitive and would not adequately address the Panel's concern regarding public protection and public trust and confidence in the profession. The Panel also concluded that a fine in combination with a caution, reprimand, conditions or undertakings would not adequately address the Panel's concern regarding public trust and confidence in the profession.

Reprimand

40. The Panel next considered whether to impose a Reprimand. The Panel concluded that the risk of potential harm to consumers was so serious that it required more than a formal admonishment to declare and re-affirm the standards expected of registered members and Firms. The Panel was also satisfied that a Reprimand would not send a clear message to the wider profession about the standards of conduct expected and would therefore be insufficient to uphold public trust and confidence in the profession and the regulatory process.

Conditions and Undertakings

41. The Panel next considered whether conditions or undertakings should be imposed on the membership of Mr Robertson and the Firm. The Panel carefully considered the nature and seriousness of the conduct and concluded that, even if suitable conditions or undertakings could be formulated, they would be insufficient to send a signal to Mr Robertson, the Firm, the wider profession and the public, reaffirming the high standards expected of Members at all times. In these circumstances, the Panel took the view that conditions or undertakings would not be appropriate or sufficient to protect the wider public interest.

Expulsion and Removal

42. The Panel determined that it had no option in this case but to expel Mr Robertson and remove the Firm from membership of the RICS. In reaching this conclusion it had regard in particular to the persistent failure to comply with the RICS Rules for a significant period of time. The Panel took the view that expulsion and removal is justified and proportionate in this case in order to maintain public trust and confidence in the surveyors' profession and ensure proper standards of conduct are upheld. The Panel concluded that only expulsion and removal would demonstrate that the RICS takes appropriate action to protect the public interest and promote regulatory compliance as well as deter others from future non-compliance.
43. Accordingly, the Panel orders Mr Robertson's expulsion and removal of the Firm from the RICS' membership.

Publication and Costs

Publication

44. Ms Sherlock invited the Panel to order publication in accordance with the open justice principle.
45. The Panel accepted the legal assessor's advice that in view of the publication policy it is usual for decisions to be posted on the RICS website and published in Modus. The Panel was unable to identify any valid reason for departing from the presumption that Disciplinary Panel decisions will be published. The Panel's overarching objective is to declare and uphold standards and to uphold the reputation of the profession, and publication of its decisions is an essential part of that role.
46. Accordingly, the Panel determined that this decision, in relation to Mr Robertson and the Firm, should be published on the RICS website and in Modus.

Costs

47. Ms Sherlock made an application for costs in the sum of £4,475 which represents the costs of the investigation and the substantive hearing.
48. The Panel was satisfied that the case had been properly brought against Mr Robertson and the Firm, and if no costs order was made the financial burden of bringing this case would fall on the profession as a whole. In the absence of any financial evidence of Mr Robertson's means or the

Firm's income the Panel was unable to identify any reason for reducing the costs. The Panel concluded that the costs were fair, reasonable and proportionate.

49. Accordingly, the Panel ordered Mr Robertson and/or the Firm to pay the RICS costs in the sum of £4,475. Mr Robertson and the Firm are jointly and severally liable to pay these costs. In determining that Mr Robertson and the Firm should pay the RICS' costs, the Panel took into account the fact that they would be able to enter into negotiations with the RICS to devise an acceptable payment plan.

Right of Appeal

50. Mr Robertson has 28 days, from service of this decision, to appeal in accordance with Rules 59 of the RICS Disciplinary, Registration and Appeal Panel Rules 2009.

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