

Disciplinary Panel Hearing

Case of

Mr Wai Fung Dy MRICS [0102892]

Hong Kong

On

Tuesday 1 October 2019

At

By Telephone conference

Panel

John Anderson (Lay Chair)
Jane Bishop (Lay Member)
Ian Hastie (Surveyor Member)

Legal Assessor

Chris Hamlet

RICS Representative

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

The formal charges are:

The charge against Mr Dy is:

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

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

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

Notice/Proceeding in Absence:

1. Mr Dy was given notice by International Special Delivery and email of 15 August 2019 that this case was to proceed by way of written representations ie: a paper hearing, in accordance with Rules 4d and 43a of the Disciplinary, registration and Appeal Panel Rules version 7 (the “Rules”).
2. The Panel received advice from the Legal Assessor as to the Rules regarding service in respect of paper hearings. It concluded Notice had been properly served in accordance with R43a(a).
3. The Panel next considered whether to proceed in the absence of Mr Dy. The Legal Assessor’s advice was sought and accepted. The Panel was referred to the case of R-v-Jones [2002] UKHL 5, which Tait v The Royal College of Veterinary Surgeons (RCVS) [2003] UKPC 34 states is also applicable to professional conduct proceedings. The Panel were further referred to the case of GMC v Adeogba and GMC v Visvardis [2016] EWCA Civ 162, in which the Court of Appeal ruled that the regulator’s responsibility was to communicate the Notice of Hearing to the address provided by the Registrant and no more.
4. The Panel in this case took account of the fact, confirmed by the statement of Mrs Emma Jones dated 18 September 2019, that Mr Dy has been emailed and served by post the Notice and bundle of evidence in accordance with the Rules, to his preferred email and postal addresses as notified to RICS. The Panel noted that Mr Dy has not responded to this or any other correspondence from RICS, since at least 9 January 2019.
5. Whilst the Panel could not, in these circumstances, be certain whether Mr Dy had received the notice, or whether he had deliberately chosen not to engage with the proceedings, it bore in mind the positive duty upon members to ensure their preferred correspondence addresses were updated and effective. It was satisfied that since service had been effected in accordance with the Rules, the proceedings should not be delayed by Mr Dy’s failure – deliberate or otherwise – to engage with them.
6. The Panel duly concluded it was appropriate to proceed in his absence.

Evidence:

7. The Panel received a bundle containing material relevant to each stage of the proceedings. On advice from the Legal Assessor, the Panel initially took account of the material only insofar as it was relevant to its decision on the charge and liability to disciplinary action. This included a Case Summary produced on behalf of RICS and statements from Mr Joe Poole, RICS CPD administrator, dated 13 May 2019 (of which account was taken only in respect of the failure to record CPD for the year 2018).

Burden and standard of proof:

8. RICS is required to prove the allegations to the civil standard; that it is more likely than not that any event material to those allegations occurred. That is a single unwavering standard of proof, though the more unlikely an allegation the more careful an examination of the evidence might be required before a Panel find it proved. There is no requirement for Mr Dy to prove anything. The Panel had in mind throughout its deliberations that the right to

practise a profession is involved in these proceedings and proceeds upon the basis that the Human Rights Act 1998 will apply. It bears in mind in particular Mr Dy's right to a fair trial and respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as incorporated within UK law by that Act. The question of whether or not any facts admitted or found proved gave rise to liability to disciplinary action is a matter for the Panel's judgment.

Facts:

9. The Panel had regard to the evidence produced that Mr Dy, as a matter of fact, had recorded only 10 hours of CPD between 1 January 2018 and 1 February 2019. That evidence comprised a print out of Mr Dy's CPD record and the statements on behalf of RICS referred to above.
10. It was noted that there is no evidence that Mr Dy has applied for any RICS Exemption or Concession which would have allowed him to avoid that requirement.
11. The Panel concluded that as a matter of fact the charge was proved.

Liability to Disciplinary Action:

12. The Panel went on to consider whether Mr Dy was liable to disciplinary action. In coming to its conclusion the Panel accepted the advice of the Legal Assessor. This question is one for the Panel's judgment. The Panel considered that failure to carry out a condition of membership which is there to ensure members retain current knowledge and skills, is serious.
13. The Panel noted that Mr Dy had recorded only 10 hours of CPD activities for 2018, and none for 2013 or 2015. This represented a pattern of failures which prevents RICS from monitoring his compliance with his professional obligations and tends to undermine public confidence in the profession.
14. The Panel observed that Mr Dy had not responded to the numerous chasers by RICS by email and telephone since January 2019.
15. The Panel took into account the fact that the CPD policy was approved by the Regulatory Board and is an expressly stated RICS Rule. The Panel noted that all members agree to adhere to the RICS Rules, Regulations and Bye Laws and accept that they may be subject to disciplinary action if they fail to do so.
16. It concluded that Mr Dy was liable to disciplinary action.

Sanction:

17. Having found the charge proved and determined that Mr Dy was liable to disciplinary action, the Panel referred to the written submissions on behalf of RICS regarding prior breaches of CPD obligations in 2013 and 2015, for which he received a Caution and a Caution and a Fine, respectively. It noted that he paid the fine issued in 2016 for the 2015 breach.

18. In addition, the Panel took account of the statement from Ms Hayley Moore, Business Improvement and Performance Team Manager at RICS, confirming the mailings sent to Mr Dy about his CPD obligations, including a postal reminder of the consequences of a further breach.
19. The Panel bore in mind that the purpose of sanctions is not to be punitive, though that may be their effect. The purpose of sanctions is to declare and uphold the standards of the profession, to safeguard the reputation of the profession and of RICS as its regulator and to protect the public. Sanctions must be proportionate to the matters found proved.
20. The Panel paid careful heed to the advice of the Legal Assessor and to the Sanctions Policy of RICS. It considered carefully the mitigating and aggravating factors of this case.
21. The Panel was advised that in determining what, if any sanction to impose on Mr Dy, Rule 21.1 of the Sanctions Policy provides for a presumption of expulsion in the event of a third breach of CPD obligations within 10 years. However, this presumption is capable of being displaced if the circumstances permitted. The advice, in keeping with the approach of other regulators, was that any sanction imposed must be proportionate, and therefore ought to involve consideration of the lowest sanctions available first and only moving to the next level of sanction if it decides the lesser sanction is inappropriate or otherwise fails to meet the public interest. The Panel bore in mind that more than one sanction may be imposed. If conditions are to be imposed they must be proportionate, workable and address the issues raised in these proceedings.

Mitigating/Aggravating features:

22. The Panel were struck by Mr Dy's almost complete lack of engagement with RICS and/or the proceedings. It noted a singular email from Mr Dy on 6 February 2019 in which he suggested he had "...got failure on getting access to the system" and requesting a new ID and password. He was provided with a new username and password on 12 February 2019 but did not engage with RICS thereafter.
23. However, the Panel observed that Mr Dy had managed to log more than the minimum number of required CPD hours in 2014, 2016 and 2017 and had logged 10 formal hours in 2018.
24. The following features of the case were considered to aggravate the breach:
 - Prior cautions for similar breaches in 2013 and 2015
 - Receipt of a fine for the 2015 breach
25. The following features of the case were considered to mitigate the breach:
 - He had recorded half the minimum hours of CPD in 2018 and in excess of the minimum in 2014, 2016 and 2017.

Decision on Sanction:

26. The Panel considered the matter too serious for no sanction to be imposed. It took account of the guidance at paragraph 21 of the Sanctions Policy which provides that a third breach of

Rules regarding CPD within 10 years of receipt of a caution raises a presumption of expulsion.

27. The Panel wished to emphasise to Mr Dy and all members the vital importance of recording CPD so that RICS can monitor and verify the maintenance of professional standards and in order to protect the reputation of, and confidence in, the profession.
28. Having said that, in light of the mitigating features of this case, which was suggestive of a broad pattern of compliance with the required recording of CPD, the Panel considered the presumption of expulsion would be disproportionate in this case. It wished to give Mr Dy one last chance. It gave careful consideration to all lesser sanctions available to them within the Sanctions Policy. It concluded that the public interest could be met with a Reprimand, in the first instance, in respect of his failure to conduct and record the minimum number of CPD hours, as well as the following Condition:

“You will comply with RICS’ requirements in respect of Continuing Professional Development (CPD) for the period 1 January 2019 to 31 December 2019 by completing and recording, or causing to be recorded, at least 20 hours of CPD, of which at least 10 hours must be formal, on the RICS CPD Portal by 31 January 2020.”

29. Failure to comply with this condition will result in Mr Dy’s automatic expulsion.
30. In addition, the Panel concluded a fine of £1000 was appropriate to mark the breach and to encourage future compliance.

Publication

31. The Panel considered the guidance as to publication of its decisions. It accepted the Legal Assessor’s advice. The advice was, and the guidance provides, that it is usual for the decisions of the Panel to be published on RICS’ website and in RICS Modus. The Panel sees no reason for departing from the normal practice in this case.
32. The Panel orders that this decision be published on RICS’ website and in RICS Modus, in accordance with Supplement 3 to the Sanctions Policy 2008 version 6.

Costs

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

Appeal Period

34. Mr Dy may appeal to an Appeal Panel against this decision within 28 days of notification of this decision, in accordance with Rules 58 – 70 of the Disciplinary, Registration and Appeal Panel Rules 2009 version 7.
35. The Honorary Secretary of RICS may require a review of a finding or penalty imposed by a Disciplinary Panel within 28 days from service of the notification of the decision, in accordance with Rule 59 of the Disciplinary, Registration and Appeal Panel Rules 2009 version 7.