

DISCIPLINARY PANEL HEARING

Case of:

Mr Kevin McNally [0848999]

On Tuesday 15 and Wednesday 16 September 2020

By video conference

Panel

Dr Angela Brown (Lay Chair)
Mr Ron Barclay – Smith (Lay
Member)
Mr Justin Mason (Surveyor Member)

Legal Adviser

Mr Peter Steel

RICS Presenting Officer

Mr Christopher Geering (Barrister)

Mr McNally did not appear and was not represented

Regulatory Tribunal Executive

Mrs Jae Berry

The formal charge against the Member (as amended) is:

1. You failed to carry out your work with due skill, care and diligence in that you issued, on behalf of the Approved Inspector, BBS Building Control Ltd, a final 'partial' certificate dated 30 September 2013, which had the effect of indicating works carried out to the Property were compliant with Building Regulations, when in fact at the relevant time, the works risked noncompliance with such regulations.

Contrary to Rule 4 of the Rules of Conduct for Members 2007

2. You acted without proper regard for standards of service and customer care, and failed to carry out your work with due skill, care and diligence in that; you signed a final certificate which was intended to cover a limited part of the works only, but
 - a. failed to clearly state which completed works the certificate related to; and/or
 - b. failed to take steps to ensure that the contractor and/or home owner understood the precise scope of that certificate.

Contrary to Rule 4 and Rule 5 of the Rules of Conduct for Members 2007

The Member is therefore liable to disciplinary action in accordance with Bye Law 5.2.2 (c)

Determination

Preliminary issues

Service and proceeding in absence

1. Mr. McNally did not attend the hearing nor was he represented. A Notice of Hearing was sent by special post (email with a delivery receipt) to Mr. McNally's preferred address held by RICS on 30 June 2020. A copy of the electronic delivery receipt for the Notice of Hearing had been produced to the Panel showing that delivery had been effected on the same date. The evidence bundle had been sent separately to Mr McNally by email.
2. The Panel was satisfied that Notice had been properly served in accordance with Rule 23. The Panel next considered whether to proceed in the absence of Mr McNally. The legal adviser's advice was sought and accepted. The Panel was referred to the case of *R-v-Jones [2002] UKHL 5*, which the case of *Tait v The Royal College of Veterinary Surgeons (RCVS) [2003] UKPC 34* states is also applicable to professional conduct proceedings.
3. The Panel also had regard to the case of *General Medical Council v Adeogba; General Medical Council v Visvardis [2016] EWCA Civ 162*, in particular the comments of Sir Brian Leveson P that : "...it is important to bear in mind that there is a difference between continuing a criminal trial in the absence of the defendant and the decision under Rule 31 to continue a disciplinary hearing. This latter decision must also be guided by the context provided by the main statutory objective of the GMC, namely, the protection, promotion and maintenance of the health and safety of the public as set out in s. 1(1A) of the 1983 Act. In that regard, the fair, economical, expeditious and efficient disposal of allegations made against [medical] practitioners is of very real importance.

It goes without saying that fairness fully encompasses fairness to the affected [medical] practitioner (a feature of prime importance) but it also involves fairness to the GMC ... In that

regard, it is important that the analogy between criminal prosecution and regulatory proceedings is not taken too far. Steps can be taken to enforce attendance by a defendant; he can be arrested and brought to court. No such remedy is available to a regulator."

4. Sir Brian Levenson went on to add that the duty of the regulator in these circumstances: *"...is very simple. It is to communicate with the practitioner at the address he has provided; neither more nor less. It is the practitioner's obligation to ensure the address is up to date."*
5. The Panel noted that this case had previously been listed to be heard on 14 – 16 April 2020 and Mr McNally had been sent a Notice of Hearing to that effect. In response to an email from RICS dated 23 March 2020 serving the bundle, Mr McNally had returned a completed Listing Questionnaire dated 31 March 2020 in which he indicated that he was not going to attend the hearing nor was he planning to be represented at it.
6. Having considered all the circumstances, the Panel was content that it was fair and in the public interest for it to proceed to consider the case. Mr McNally had previously indicated that he was not planning to attend the hearing and that he anticipated the hearing going ahead without him. It was reasonable to suppose that he had therefore voluntarily waived his right to be present or represented.

Application to amend the charge

7. Mr. Geering, on behalf of RICS, applied to amend the charge so that Mr. McNally was alleged to be liable to disciplinary action under Bye-law 5.2.2 (c) rather than simply Bye-law 5.2.2 as originally drafted. He submitted that this did not affect the substance of the charge against Mr. McNally and served only to clarify which part of the Bye-laws was engaged. Having consulted the legal advisor, the Panel agreed that this amendment could be made without injustice.

Application to introduce further evidence

8. Mr. Geering then applied to introduce some further documents in evidence which had been omitted in error from the bundle of relevant documents supplied to Mr. McNally and the Panel in advance of the hearing. These were:
 - a. The Rule 5 letter addressed to Mr. McNally dated 24 April 2019; and
 - b. Mr. McNally's email in response dated 9 May 2019.
9. It was obvious that Mr. McNally had already seen these documents, and Mr. Geering submitted that since the email contained Mr. McNally's response to the allegations contained in the Rule 5 letter, it was clearly right that the Panel should see them. Having taken the legal advisor's advice, the Panel concluded that it was in the interests of a fair hearing to admit these documents into evidence.

Background

10. Mr McNally has been registered with RICS since 7 February 2001. At the time of the allegations, he was employed as Building Control Surveyor at BBS Building Control Ltd (BBS). BBS is an Approved Inspector, advising clients on the Building Regulations.
11. The allegations stem from a complaint received by RICS on 31 January 2017 from Mr P J. Mr J owns a property called 'The Bolt' (the Property). He commissioned South West Loft

Conversions Ltd (SWLC) to replace the roof of the Property incorporating roof space accommodation. A & K Architectural Services (A&K) undertook the design work.

12. BBS was appointed by A&K / SWLC to act as the Approved Inspector for the Property and certify that Building Control Regulations had been complied with. BBS were appointed to act as Approved Inspector after it submitted an initial notice to the relevant Local Authority, which was approved on 1 May 2013. Mr. McNally was responsible for overseeing the works and to ensure it complied with the Building Regulations.
13. SWLC started the work, which was due to be completed by September 2013. Between 17 May 2013 and 25 September 2013, Mr. McNally undertook several site inspections. Following an inspection on 25 September 2013, Mr. McNally issued what was described as a "partial final certificate" dated 30 September 2013, which stated:

"External envelope complete & weather tight – Internal works still to complete".

14. The site report for the inspection dated 25 September 2013 indicated that there were internal works to be completed. A&K / SWLC subsequently left the site. In the following months, various structural faults became apparent at the Property. Mr. J contacted the local authority Building Control Officer who suggested that he call Mr. McNally. Mr. McNally returned to the Property in March 2014. In a site report dated 20 March 2014 he stated that during the last inspection there had been a few items which were required to be completed without a further visit, but it appeared some of those issues had not been addressed and a further issue had since emerged which was originally overlooked. On 24 March 2014 Mr. McNally wrote to SWLC informing them of the outstanding issues and works required and invited them to contact Mr. J to discuss carrying out the remedial works required.
15. SWLC maintained that as the contracted works had been certified by Mr. McNally, the works met the standards required. SWLC did not carry out the remedial works. Mr. J subsequently appointed another building company to carry out the remedial works.
16. The outstanding issues were eventually resolved. Following an inspection on 30 September 2015, Mr. McNally issued a final certificate on 7 October 2015, on behalf of BBS.
17. On or around 30 June 2016, Mr. J reported the matter to the Construction Industry Council Approved Inspectors Register (CICAIR). CICAIR conducted an investigation against BBS. In its response to the CICAIR investigation, BBS accepted that Mr. McNally should not have issued a partial final certificate following his inspection on 25 September 2013, as there were works yet to be carried out.
18. The complaint was referred to the CICAIR disciplinary committee which heard the allegations against BBS on 14 December 2016. The CICAIR disciplinary committee found that BBS had breached the Code of Conduct for Approved Inspectors in various respects and issued a written reprimand to BBS.

19. Mr J also complained to RICS, which sent Mr McNally a Rule 5 letter outlining the allegations against him on 24 April 2019. Mr McNally responded on 9 May 2019. He said that the partial final certificate had been issued in good faith following verbal communication with Mr J's agent, Mr G (of A&K), who had informed Mr McNally that the outstanding items had been completed. Mr McNally stated that the certificate "*appears to have been issued somewhat naively*".
20. Mr McNally also said that "*...lessons have been learnt since this certificate was issued*" and that although he no longer worked for BBS, he had "*...taken this experience forward to my present employment and now ensure all parties are aware of the status of all projects I have responsibility for...*". He maintained that "*...at the time I carried out my duties as a Building Inspector with due skill & care (as can be seen from the remediation schedule originally drawn up) however I do accept the fact that reporting back my inspection findings could have been more robust. That said, my ultimate responsibility is to the Building Act and to ensure compliance of developments with the Building Regulations which I believe I did.*"

Findings on facts

21. The Panel was referred to a bundle of documents prepared by RICS, containing the relevant documents, including the various site inspection reports, correspondence passing between Mr. J, Mr. McNally, BBS and the contractors, an expert report by Mr. Stephen Welch FRICS dated December 2019 and Mr. Welch's further opinion in response to a number of clarification questions from RICS; and the witness statement of Mr. J dated 30 January 2020. The bundle also contained a statement of the findings by CICAIR concerning BBS. However, Mr. Geering indicated that RICS did not place any reliance on these (i.e. RICS was not advancing those findings as proof of the allegations against Mr. McNally). Accordingly, the Panel did not take that evidence into account in making its findings.
22. The Panel was also assisted by evidence from Mr. Welch in person. It found him to be a careful and credible expert witness. Although not an Approved Inspector (AI) himself, his CV demonstrated wide experience of the Building Regulations and the AI regime from the perspective of a service user, as well as their application in a range of construction situations.
23. The Panel carefully considered all the written evidence provided to it (save the CICAIR material as indicated above). It took full account of the response Mr. McNally had provided to the Rule 5 letter dated 9 May 2019, as well as the comments contained in the Listing Questionnaire he had returned to RICS dated 31 March 2020. Mr. McNally had denied all the allegations. Having considered all the written and oral evidence in the case and the submissions of Mr. Geering on behalf of RICS, the Panel made the following findings of fact.
1. *You failed to carry out your work with due skill, care and diligence in that you issued, on behalf of the Approved Inspector, BBS Building Control Ltd, a final 'partial' certificate dated 30 September 2013, which had the effect of indicating works carried out to the Property were compliant with Building Regulations, when in fact at the relevant time, the works risked noncompliance with such regulations.*

24. **Proved.** Mr. McNally denied this allegation in the Listing Questionnaire, commenting:

“1. I initially drew up a schedule of items requiring action prior to the issue of a partial final certificate for the works and I was subsequently informed by the clients agent that the items had been satisfactorily completed. At the time it was common across the company for such confirmation to be acceptable as evidence in order to issue a partial final certificate, knowing that prior to the issue of a full final certificate further visual site inspections would have been necessary.”

25. Mr Welch was asked during his evidence in what circumstances a “final ‘partial’ certificate” would be issued. His answer was that there was no such thing. Either there should be a final certificate or nothing. He was clear that this was not acceptable practice, even if Mr McNally considered it common practice within BBS or elsewhere. Mr Welch said that what sometimes happened was that a final certificate was issued for a discreet part of a project, e.g. where the planning permission envisaged two dwellings on one site, but where only one is constructed. The final certificate could be issued in respect of that single building. However, that was not this situation, where without inspecting the property to ensure that all outstanding works had been completed, Mr McNally had issued a final certificate when aspects of the structure were not in compliance with the Building Regulations. In response to a specific question by the Panel, Mr Welch remained clear that it was wrong to have issued the certificate in these circumstances.

26. The Panel noted the partial admission contained in Mr McNally’s email of 9 May 2019 that “...issuing the Partial Final Certificate is now considered to have been in error.” The Panel agreed that it was an error. It was hard to understand how Mr McNally could have satisfied himself of the matters certified without having conducted an inspection of the property and instead relying solely on the word of the contractors. It was evident from Mr McNally’s account of his subsequent actions that the property was not at that point in compliance with the Building Regulations, despite his attempt to assert the contrary. There remained significant structural issues including problems with the roof and the water tightness of the building. The Panel was clear that in issuing a certificate which did not correspond to the situation on the ground, Mr McNally had failed to act with the appropriate skill, care and diligence required of a chartered surveyor.

2. You acted without proper regard for standards of service and customer care, and failed to carry out your work with due skill, care and diligence in that; you signed a final certificate which was intended to cover a limited part of the works only, but
 - a. failed to clearly state which completed works the certificate related to; and/or
 - b. failed to take steps to ensure that the contractor and/or home owner understood the precise scope of that certificate.
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27. **Proved.** Mr. McNally also denied this allegation in the Listing Questionnaire, commenting:

“2. (a & b) The partial final certificate clearly stated External envelope complete and watertight, internal works still to be completed – this was again something confirmed by the cliets (sic) agent as a distinct first phase of the works, leaving the client to complete the internals himself. Again the phrasing on the certificate was common across the company at the time and used on a number of projects where different builders would have been employed for different phases.

Following this issue being raised with the CICAIR, company policy was indeed changed whereby partial final certificates where (sic) only ever issued for more distinct phasing of works on a project, an individual plot on a multi-plot site or a separate apartment in a block of flats for instance.”

28. In his reports to RICS and in his oral evidence to the Panel, Mr Welch was clear that in issuing a final certificate under the Building Regulations, there is an obligation on the certifying officer (in this case Mr McNally) to ensure that his ultimate client (the building owner) understands what it is that is being certified. If the Approved Inspector fails to make clear that the certificate only relates to the building control aspects of construction rather than any further repairs required, the client may be misled. Mr Welch’s opinion was that the level of communication by Mr McNally fell beneath the standard of a reasonably competent certifier of building work. It was inappropriate simply to have told the client’s agent and to have relied upon the agent to have explained the scope of the certificate.

29. The Panel agreed and considered that in this situation, given the invalid “partial final certificate” was principally based on the agent’s say so, this course of action was fraught with risk. The certificate was in any event sparse on detail and failed to address what was intended to be covered by “*internal works*”. The Panel accepted Mr Welch’s evidence that this was inadequate in the circumstances. It therefore had no hesitation in finding that this allegation was proved and that Mr McNally had not had proper regard for standards of service and customer care and had failed to carry out his work with due skill, care and diligence in this instance.

Liability to Disciplinary Action

30. The Panel listened carefully to the submissions by Mr. Geering on behalf of RICS. Mr. Geering submitted that the Panel’s findings made Mr. McNally liable to disciplinary action under Bye-Law 5.2.2(c) as they clearly made out breaches of Rule 4 of the Rules of Conduct for Members (4 June 2007 version 6) (“*Members shall carry out their professional work with due skill, care and diligence and with proper regard for the technical standards required of them*”) and Rule 5 (“*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 breaches were serious and plainly justified a finding of liability to disciplinary action.

31. In the Listing Questionnaire, Mr. McNally had disputed that he was liable to disciplinary action stating:

“As mentioned above I was at the time following company policy in the issuing of the partial final certificate. Since then procedures have become more stringent and a greater emphasis has been placed upon more significant proof of the completion of outstanding issues and contraventions of the Building Regulations. I admit there was a certain naivety (sic) in issuing the partial final certificate, but that is all it was, the issue of the certificate was never meant to confuse anyone nor was it done with any alteria (sic) motive than to help the relationship between the client and builder by providing a clear cut off of responsibility for the works.”

32. The Panel accepted the advice of the legal advisor. All the evidence the Panel had seen and heard in this case suggested a failure on Mr. McNally’s part to comply with acceptable professional standards, particularly as regards Rule 4 (Competence) and Rule 5 (Service) of the Rules of Conduct for Members. The Panel was clear that these failings were potentially serious. The essence of the job of an Approved Inspector is to ensure compliance with the Building Regulations, which existed amongst other matters to ensure the safety of structures. At the very least, Mr. McNally’s failure to ensure that Mr. J understood what the certificate meant in practical terms suggested an overly casual approach to risk.
33. Accordingly, the Panel was satisfied that Mr. McNally was liable to disciplinary action under Bye-Law 5.2.2(c).

Sanction

Panel’s Approach

34. The Panel took into account the submissions of RICS as set out in the Case Summary in the bundle and Mr. McNally’s explanations contained within his email of 9 May 2019 and the Listing Questionnaire dated 31 March 2020. It had regard to the RICS Sanctions Policy.
35. The Panel bore in mind that the purpose of sanctions is not to be punitive, although it 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 RICS as its regulator and to protect the public. Sanctions must be proportionate to the breach and all the circumstances and a decision should be reached having taken into account any mitigating and/or aggravating factors.

Decision

36. As noted above, Mr. McNally had maintained that not only was his certificate accurate and sufficient, but also in accordance with his company’s usual practice. The Panel had rejected that explanation.
37. The Panel considered it some mitigation that Mr. McNally had subsequently returned to the site and attempted to address the situation beyond the point of issue of the certificate. Further, he had cooperated with RICS throughout the investigation to some extent (though not to the extent of appearing at this hearing). Mr. McNally did not have any previous disciplinary history. Lastly the Panel took account of the fact that the events in question took place some time ago, without any further conduct issues coming to light in the intervening period.

38. The Panel considered that the following aggravating factors were present in this case:

- Mr. McNally had not made any admissions or expressions of regret;
- He was an experienced practitioner who should have recognised the potential risks of his conduct;
- His client, Mr. J, had relied on the certificate to the extent of paying the contractors who, according to the client, then disappeared; and
- Issuing an invalid certificate created a potential risk to the safety of the public and indicated to the Panel a cavalier attitude on Mr. McNally's part.

39. RICS is a professional membership organisation and sets standards for its members as a condition of membership. Any serious failing in competence and service to clients by a member impacts on the reputation of surveyors generally.

40. The Panel first considered whether it was appropriate to impose any sanction at all. The Panel concluded that the professional failings in this case, although limited to a single engagement some time ago, were plainly serious. In the absence of exceptional circumstances, imposing no sanction would be neither proportionate nor appropriate.

41. The Panel went on to consider whether to impose a caution. The Panel concluded that a caution would not adequately reflect the seriousness of the case, recognising the safety aspects to the case and the potential effect of Mr. McNally's conduct on the standing of the profession. The Panel also considered the imposition of a reprimand, but concluded that a reprimand on its own would not reflect the seriousness of Mr. McNally's conduct.

42. The Panel considered that Mr. McNally had demonstrated a limited degree of insight in his email of 9 May 2019, in that he acknowledged that he had amended his practice since the events in question. It felt that the serious deficiencies in Mr. McNally's professional outlook demonstrated by this case were nonetheless remediable. In consequence, the Panel concluded that it would be proportionate and would sufficiently address the misconduct in this case to impose a reprimand, fine and a condition. It therefore ordered:

1. Mr. McNally receive a reprimand;
2. Mr. McNally pay a fine of £1,000;
3. As a further condition of his continuing membership, Mr McNally is directed to complete the following course on professional ethics: <https://www.rics.org/uk/events/training-courses/conduct-rules-ethics-and-professional-practice-1-day/london/20201104/>; or failing which another course in professional ethics agreed by RICS' Head of Regulation and to provide proof of attendance and satisfactory completion of the course to RICS' Head of Regulation by 31 December 2021; and
4. Failure to comply with condition 3 above will result in referral to a fresh Disciplinary Panel.

43. While the Panel was troubled by the degree of his insight and what this case and his subsequent dealings with RICS indicated about Mr. McNally's attitude towards professional regulation, it recognised that this case involved one incident some years ago and that there was no suggestion of dishonesty, fraud or similar in the allegations. It therefore considered that it would be disproportionate to go beyond the level of sanction set out above, which was intended to underline the importance of professional ethics for all chartered surveyors in their dealings with clients, regardless of the professional role they occupy.

Publication

44. The Panel has considered the policy on publication of decisions, The Sanctions Policy Supplement 3 - Publication of Regulatory Disciplinary Matters. The Panel was unable to identify any reason to depart from the presumption that this decision should be published on the RICS website and in the RICS magazine Modus.

Costs

45. RICS applied for costs in the sum of £13,762.50, though Mr. Geering indicated that as the hearing would not last for the three days originally envisaged, RICS invited the Panel to reduce proportionately the amount of the amount of any costs awarded.

46. The Panel considered carefully the issue of costs. The costs figure represents a contribution towards the costs incurred by RICS in preparation for the hearing and the hearing itself. The Panel had no reason to doubt that the costs application was fair and reasonable. Given the fact that the hearing had lasted only 2 days rather than 3, the Panel assessed the claim for costs and concluded that £10,000 was a reasonable figure in the circumstances.

47. The Panel concluded that it was appropriate for Mr. McNally to make a contribution towards the costs of bringing this case, otherwise the full cost of these proceedings would fall on the profession as a whole.

48. The Panel therefore orders that Mr. McNally pays to RICS the costs of these proceedings in the sum of £10,000.

Appeal Period

49. Mr. McNally has 28 days, from the service of the notification of the decision, to appeal this decision in accordance with Rule 59 of the Rules.

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