

Appeal Panel Hearing

Case of

**Mr Stewart Robertson and Stewart Robertson FRICS (the firm)
Suffolk, CO10**

On

Friday 27 March 2020

By Skype video conference

Panel

Sir Michael Burton GBE QC (Lay Chair)
Patrick Bligh-Cheesman (Lay Member)
Justin Mason (Surveyor Member)

Legal Assessor

Peter Steel

The matter was dealt with on the papers and there were no appearances

Hearings Officer

Emma Jones

Introduction

1. This is Mr Robertson and his firm's (the Firm's) appeal against the findings made and the sanction imposed by a Disciplinary Panel on 13 November 2019. The charge against Mr Robertson was as follows:

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

2. The charge against the Firm was as follows:

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

Burden of proof

3. Under Rule 151 of the RICS' Disciplinary, Registration and Appeal Panel Rules (Version 8 with effect from 1 October 2019) ("the Rules"), the burden is on the Appellant to satisfy the Appeal Panel that the order being appealed was wrong.

Background

4. 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.
5. 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.
6. 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.
7. 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.*'
8. 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.
9. 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.
10. As indicated above, the Disciplinary Panel heard the case on 13 November 2019. Mr Robertson did not attend nor were he or the Firm represented. The Disciplinary Panel was provided with evidence showing that a Notice of Hearing, dated 13 September 2019, had been sent by post to the preferred address notified by Mr Robertson to the RICS, as well as by email to his preferred email address. Further information requested by the Panel indicated that Mr Robertson had not updated his preferred contact details since 27 February 2018.
11. The Disciplinary Panel noted that it was 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 and is not dependent on the Notice of Hearing being received. The Panel therefore concluded that service had been properly effected in accordance with the Rules. Having received the advice of its legal assessor, the Disciplinary Panel concluded that Mr Robertson had chosen not to participate in the hearing and had therefore waived his right to attend. It therefore determined that it would be fair and reasonable to proceed to hear the case in Mr Robertson's absence.

12. Having done so, the Disciplinary Panel found all charges proved against both Mr Robertson and the Firm and that both were consequently liable to disciplinary action under RICS' Bye-Laws. The Disciplinary Panel determined that in light of its findings, it had no option but to expel Mr Robertson and remove the Firm from membership of the RICS.
13. By letter dated 19 November 2019, Mr Robertson submitted an "Application for appeal" to the RICS. In a subsequent statement dated 13 February 2020, he indicated that he was willing for the matter to be considered on the basis of the papers.

Mr Robertson and the Firm's Appeal against the decision of the Disciplinary Panel

14. In the Grounds of Appeal section of his Application, Mr Robertson indicated that he wished to appeal on the following basis:

"1. The matter was referred to the CEDR who found that I had no liability in respect of the claim.

2. I did not receive the emails as I had changed my broadband provider and therefore my email address.

3. I did not receive the letter sent to my home address informing me of the Disciplinary Hearing as it was not delivered by Royal Mail to this address. It was signed for by someone called Coward who does not live at this address as only my wife and I live here.

In all the circumstances, I would suggest that in view of the decision of the Panel the appropriate action on the basis of natural justice would be to refer the matter back to the Disciplinary Panel in order that I can present all the facts as outlined in general terms above."

15. In his statement dated 13 February 2020, Mr Robertson repeated the above points. He added that he accepted that he had not provided the Complainants with a copy of the Complaints Handling Policy as *"I was exceptionally busy at the time and I sincerely regret that the matter was overlooked...[the Complainants] subsequently submitted a claim to the CEDR who rejected the claim in its totality...I assumed therefore that the matter was therefore concluded and no further action was needed as the RICS would have been made aware of the decision of the CEDR."*
16. Mr Robertson's statement attached a copy of the CEDR Adjudicator's Decision dated 5 April 2019 in response to the claim made by the Complainants, as well as some feedback about his work provided by clients to a website, "Reallymoving.com".

RICS' submissions regarding the Appeal

17. In its written Response to the Appeal, the RICS observed that the CEDR Adjudicator's Decision about the standard of Mr Robertson's surveying services had no bearing on the allegations found proved by the Disciplinary Panel against him and the Firm. In fact, the Adjudicator's Decision was unhelpful to Mr Robertson, in that the adjudicator had found that the Firm's customer services fell short, as it had failed to provide a copy of its complaint handling process on request by the Complainants. The adjudicator had directed the Firm to provide its complaint handling process and a copy of its certificate of insurance to the

Complainants and had added: *"I do consider an apology is due as the service level in relation to communication between the company and the customer by the company fell short of the standard that would reasonably be expected..."*

18. Neither Mr Robertson nor the Firm had complied with that direction. The RICS suggested that this was an aggravating factor. Further, Mr Robertson had accepted in his statement of 13 February 2020 that he had not sent the complaints handling policy to the Complainants and therefore had effectively admitted allegation 1(b) of the charges as against both himself and the Firm. He had not provided any defence to charges 1(a) or 2 against himself or 1(a), 2 and 3 against the Firm. The RICS submitted that Mr Robertson therefore had no arguable defence that would warrant the matter being remitted to the Disciplinary Panel.
19. As regards Mr Robertson's claim that he had not received any notice of the Disciplinary Panel hearing, the RICS' Response referred to the Disciplinary Panel's decision on proceeding in Mr Robertson's absence. The Disciplinary Panel had concluded that service had been effected in accordance with the Rules to Mr Robertson's preferred postal and email addresses. It was the latter's responsibility to maintain an up to date preferred address for receipt of communications from RICS. The RICS had made numerous additional efforts to communicate with Mr Robertson about his hearing by attempting to telephone him, using alternative email addresses and sending correspondence to his home address by special delivery.
20. The RICS therefore submitted that it was inconceivable that Mr Robertson had remained entirely unaware of the Disciplinary Panel hearing. Consistent with his conduct during the RICS investigation and in response to the Complainant's complaint, he had ignored all the attempted contact.

Appeal Panel's Decision

21. The Panel determined that it was in the interests of justice to receive Mr Robertson's new evidence, including the CEDR Adjudicator's Report, under Rule 163 of the Rules.
22. The Panel carefully considered all of the evidence before it, as well as the written submissions of Mr Robertson and of the RICS. It accepted the advice of the Legal Assessor. It noted that Mr Robertson had not provided any further submissions in answer to the RICS' Response, despite that having been sent to the new email address contained in his application for appeal.
23. Having done so, the Panel concluded that this appeal was entirely without merit. On the face of the evidence before it, Mr Robertson had remained completely uncooperative with his client and the RICS throughout his dealings with them. Although he had subsequently engaged with the RICS to the extent of submitting an appeal against the Disciplinary Panel's decision, it had proved similarly difficult to communicate with Mr Robertson during the appeals process.
24. Bearing in mind the burden of proof under Rule 165, the Panel was not persuaded that the findings made by the Disciplinary Panel against either Mr Robertson or the Firm were wrong. First, the Panel did not accept that the notice provided to Mr Robertson was in any way deficient. It agreed with the Disciplinary Panel's conclusion that service had been effected in accordance with the Rules. The Disciplinary Panel was required to bear in mind both fairness to Mr Robertson and the public interest in the effective and expeditious

disposal of regulatory proceedings in exercising its discretion to proceed in his and the Firm's absence.

25. In circumstances where the RICS had clearly gone further than the requirements of the Rules in attempting to bring notice of the proceedings to Mr Robertson's attention, the Panel did not find the Disciplinary Panel's decision to proceed unreasonable. The responsibility for ensuring that RICS was able to communicate effectively with Mr Robertson lay at all times with him.
26. Secondly, the Panel was equally unpersuaded that Mr Robertson's or the Firm's proposed defences had any merit. The CEDR Adjudicator's Report that he had provided as part of his appeal in fact established the RICS' case in respect of allegations 1(b) against both himself and the Firm, which was buttressed by his admission in the statement of 13 February 2020 that he had not provided the complaints handling policy to the complainants.
27. Mr Robertson had not provided any explanation of his or the Firm's defence to the remaining allegations, namely: his and the firm's failure to respond to the Complainants or their representatives (allegation 1(a)); his and the Firm's failure to cooperate with RICS by failing to respond to requests for information (allegations 2 and 3 respectively; and the Firm's failure to operate a complaints handling policy (allegation 2 against the Firm). In reality, it was difficult for this Panel to see what defence there could be to those allegations, which were clearly evidenced by the material presented to it and to the Disciplinary Panel. The fact that the CEDR Adjudicator's Report had found in Mr Robertson's favour as regards the claim was irrelevant. Mr Robertson's standard of service in preparing the survey for the Complainants was not in issue in the case presented to the Disciplinary Panel.
28. The Panel therefore concluded that Mr Robertson and the Firm's appeal failed on both these grounds. The Panel noted that had there been any merit to the defence, it would be preferable if the Rules contained a provision whereby a reasonably arguable case could be referred back to the Disciplinary Panel for re-hearing on the papers, provided the appellant is able to establish a valid reason for their non-attendance at the original hearing.

Publication and Costs

Publication

29. The Panel considered the guidance as to publication of its decisions and 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. 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.
30. The Panel therefore orders that this decision recording be published on RICS' website and in RICS Modus, in accordance with Supplement 3 to the Sanctions Policy 2008 version 6.

Costs

31. RICS made an application for costs in the total sum of £1,000 and submitted a schedule of their costs to the Panel .

32. The Panel considered all the circumstances. The Panel concluded that it was appropriate for Mr Robertson to make a contribution towards the costs of this appeal, otherwise the full cost of these proceedings would fall on the profession as a whole. The Panel was therefore satisfied that it was just and reasonable to order that Mr Robertson and/or the Firm jointly and severally pay RICS' costs of this hearing in the sum of **£700.00**, in addition to the costs previously ordered by the Disciplinary Panel in the sum of **£4,475.00** . The total sum of **£5,175.00** must be paid to RICS within 14 days.