

Case Numbers:

REG0000146958 & REG0000151472

Disciplinary Panel Hearing

Case of:

Firm: Gerald Eve LLP, London

Member: Mr Charles Wilford BSc, FRICS, [0083377] Banbury, Oxfordshire

Thursday 16 September 2021, Friday 17 September 2021 and Monday 20 September 2021

Remotely by Microsoft Teams

Panel

Mr Nick Hawkins (Lay Chairman)

Mr Ron Barclay-Smith (Lay Member)

Mr Chris Pittman (Surveyor Member)

Legal Adviser

Alastair McFarlane

RICS Presenting Officer

Mr Adrian Keeling QC

Member/Firm's Representative

Mr Patrick Lawrence QC

Regulatory Tribunal Executive

Ms Maria Choudhury

The formal charges are:

Member

The formal charge against Mr Wilford is that:

1. During his involvement with the appeal to the Upper Tribunal of *Merlin Entertainments v Cox*:
 - a. Following the decision of *Gardiner & Theobald LLP v Jackson*, he agreed that his evidence be treated as factual evidence, in an inappropriate attempt to avoid the requirement to disclose to the court that fee(s) owing to the Firm and/or himself were contingent on the success of the litigation.
 - b. His actions at (a) above demonstrated a lack of integrity.

Contrary to Rule 3 of the Rules of Conduct for Members 2007 Mr Wilford is therefore liable to disciplinary action under RICS Bye-law 5.2.2 (a) or (c)

The Firm

The formal charge against the Firm is that:

1. During the Firm's involvement with the appeal to the Upper Tribunal of *Merlin Entertainments v Cox*:
 - a. Following the decision of *Gardiner & Theobald LLP v Jackson*, the Firm agreed that Mr Wilford's evidence be treated as factual evidence, in an inappropriate attempt to avoid the requirement to disclose to the court that fee(s) owing to the Firm and / or Mr Wilford were contingent on the success of the litigation.
 - b. Its actions at (a) above demonstrated a lack of integrity.

Contrary to Rule 3 of the Rules of Conduct for Firms 2007 Gerald Eve LLP is therefore liable to disciplinary action under RICS Bye-law 5.3.2 (a) or (c)

DETERMINATION

APPLICATION TO AMEND CHARGE

1. At the outset of the Hearing Mr Keeling on behalf of RICS made an application to amend the Charge by adding a Rule 4 Charge against both Mr Wilford and the Firm alleging that the conduct amounted to failures to carry out professional work with due skill, care and diligence as alternatives to the Rule 3 want of integrity Charges. Mr Keeling submitted that, following discussions with Mr Lawrence for the Respondents, RICS was satisfied that in the specific circumstances of this case, admissions to the proposed Rule 4 Charges would sufficiently address the culpability of the respective parties and meet the requirements of justice and fairness in this case. Mr Lawrence on behalf of the Respondents supported the application.
2. The Panel noted the submissions of the parties and accepted the advice of the Legal Adviser. It was satisfied by the reasons advanced by both Counsel that the amendment could be made without injustice and therefore granted the application under Rule 122.
3. The amended additional charges were as follows:

Member

You failed to carry out your professional work with due care and skill, care and diligence and with proper regard for the technical standards expected of you in that following the case of *Gardiner & Theobald LLP v Jackson* you gave evidence in the case of *Merlin v Cox* [2018] UKUT 0406 that was found by Sir David Holgate the President of the Upper Lands Tribunal to be in part of an expert nature, and did so whilst your were party to a conditional fee arrangement which had not been previously disclosed, and that in doing so breached the mandatory prohibition in the RICS Practice Statement on Surveyors acting as expert witnesses paragraph 10.1 that he should not undertake expert witness appointments on any form of conditional or other success-based arrangement.

Contrary to Rule 4 of the Rules of Conduct for Members 2007, wef 1 January 2013.

Firm

You failed to carry out their professional work with due care and skill, care and diligence and with proper regard for the technical standards expected of you in that following the case of *Gardiner & Theobald LLP v Jackson* the Firm agreed that Charles Wilford give evidence in the case of *Merlin v Cox* [2018] UKUT 0406 that was found by Sir David Holgate the President of the Upper Lands Tribunal to be in part of an expert nature, and did so whilst the Firm was party to a conditional fee arrangement which had not been previously disclosed, and that in doing so breached the mandatory prohibition in the RICS Practice Statement on Surveyors acting

as expert witnesses paragraph 10.1 that Charles Wilford should not undertake expert witness appointments on any form of conditional or other success-based arrangement”

Contrary to Rule 4 of the Rules of Conduct for Firms 2007, wef 25 April 2017.

ADMISSIONS

4. Mr Lawrence indicated on behalf of Mr Wilford and the Firm that the Rule 4 Charges were admitted, and the Rule 3 Charges were denied.
5. Mr Keeling indicated that RICS was content with these admissions and in the circumstances did not seek to pursue the Rule 3 Charges against Mr Wilford or the Firm.
6. The Panel noted its power to vary its procedure under Rule 123(c) and determined, with the consent of the parties, that it was appropriate to find the facts proved on the Rule 4 Charges against Mr Wilford and the Firm on the basis of the admissions and then to consider the sequential submissions of both Counsel on all issues and then determine sequentially the issues of liability to disciplinary action, and if appropriate, sanction, costs and publicity in one retiring.

BACKGROUND

7. Mr Wilford is a Chartered Surveyor and partner in Gerald Eve LLP (“the Firm”).
8. Merlin Entertainments Group Ltd (“Merlin”) owned Alton Towers theme park. On 2 June 2015 the “Smiler” ride crashed, causing serious injury to a number of passengers. Subsequently Merlin applied to alter Alton Towers’ assessment in the 2010 Rating List, which at that time stood at £6,625,000, on the basis of a reduction in visitors following the crash. The Valuation Officer refused and Merlin appealed to the Valuation Tribunal for England (“VTE”) which dismissed the appeal. Merlin pursued the matter to the Upper Tribunal (Land Chamber) which considered the case on 23-24 October 2018 and also dismissed the appeal.
9. Mr Wilford had advised Merlin and its predecessor companies since the 1995 rating list. He supported Merlin’s application for a reduction in the rating list, and its subsequent appeals. Both his conduct, and the Firm’s, was subject to considerable judicial criticism by the Upper Tribunal. Following the conclusion of that case the President of the Tribunal, Sir David Holgate, wrote to inform RICS of his concerns.

10. The relevant history is as follows. On 6 March 2017 Mr Wilford, on behalf of the Firm, had written to Merlin to set out the scope of the services it offered, and its fee arrangements, in order to seek a reduction in the assessment for Alton Towers in the 2010 rating list. It was agreed that the fee was to be a percentage of any saving. Save out of pocket expenses no other fee was agreed.
11. Of relevance to this case is the RICS Practice Statement and Guidance Note “Surveyors acting as expert witnesses” published on the 2nd April 2014. Compliance with the RICS practice statement is mandatory under Rule 4 of the Rules of Conduct for Members

PS13 states when it applies:

1.1 This practice statement applies to any RICS member (usually described hereafter as the “expert witness” or “you”) who provides expert evidence, whether oral or written, to the proceedings or any tribunal subject to the rules of that specific tribunal and its jurisdiction.

1.2 This practice statement does not apply to you when acting in any capacity other than as an expert witness (for example, in the capacity of a witness of fact).

PS10 Conditional Fees states:

10.1 You should not undertake expert witness appointment on any form of conditional or other success-based arrangement including where those instructing you are engaged on such a basis.

10.2 It is inappropriate to be remunerated by way of a conditional fee arrangement when acting as an expert witness, but it may be an appropriate fee basis when acting as an advocate. When acting in a dual role as expert witness and advocate, where permitted in lower tribunals, a conditional fee arrangement may be acceptable because it will be seen as attached to the role of advocate.

10.3 When acting in a dual role and where a conditional fee has been agreed, this must be declared to the tribunal.

10.4 It is unlikely that a dual role will be permitted in higher tribunal formats and consequently previously agreed conditional fees when the surveyor has appeared in a lower tribunal will, at the point of transferring to the superior or higher tribunal need to be commuted and replaced by an hourly or fixed fee arrangement.

RICS SUBMISSIONS

12. RICS's central concern is that Mr Wilford gave evidence to the Upper Tribunal, which was expert evidence when his Firm was operating under a conditional fee agreement. This was prohibited by RICS's Practice Statement and therefore by Rule 4.
13. Further, the case of *Gardiner & Theobald LLP v Jackson [2018] UKUT 253 (LC)* was published on the 3 August 2018. It was widely publicised and both Mr Wilford and the Firm admit an immediate awareness of it. The prohibition on the giving of expert evidence under a conditional fee under the Practice Statement was already established. *Gardiner* did not alter that.
14. RICS submitted that *Gardiner* publicised the determination of the Upper Tribunal to demand disclosure of and police surveyors who gave in part expert evidence, with a hidden conditional or success fee arrangement. In doing so it emphasised the obligations that any individual professional owed.
15. RICS accepted that Mr Wilford has been advised by the lawyers to the effect that if his status was changed to a witness of fact as opposed to an expert the obligation to disclose the conditional fee agreement would not arise. It appeared that attempts were made to badge Mr Wilford's evidence as evidence of fact, but RICS contended that Mr Wilford's belief that he had given evidence of fact was "wrong and badly wrong".
16. Mr Wilford gave evidence before both the Valuation Tribunal, and then again on appeal to the Upper Tribunal (Lands Chamber) - the latter alone being the subject of the charges. RICS submitted that it was the clear judgment of Sir David Holgate that part of the evidence that he gave was of an expert nature and any examination of it shows that parts fall far outside limited ambit of "witness of fact".
17. Further, RICS noted that the Respondents accepted that the Upper Tribunal was entitled to form the view that there were certain limited aspects of the statement that might be regarded as expert evidence.
18. RICS submitted that while the conduct of the lawyers may have fallen short of what they ought to have done, they were not before this Tribunal and in any event ultimate responsibility for his own conduct rested with Mr Wilford as a professional given the obligations imposed upon him by the Practice Note and the Guidance and that his duties cannot be derogated to lawyers. It was his duty both as a chartered surveyor and as an expert witness.

19. RICS submitted that Mr Wilford gave expert evidence (in part at least) to the Upper Tribunal. By giving such evidence to the Upper Tribunal he was in breach of paragraph 10.1 of the Practice Statement. He would also have been in breach of the Rules of Court that any expert should submit a truthful and full declaration of independence. He did so notwithstanding the strong judgment that had just been given by the Courts in the case of *Gardiner*.
20. Following the amendment of the Charge and RICS's acceptance that, in the circumstances an admission to the added charges met the justice of the case, it contended that the admitted breaches of personal and professional standards for both members and firms as set out in their respective Rule of Conduct, Rule 4 of 2017 were serious and clearly rendered both the Member and the Firm liable to disciplinary action.
21. Mr Keeling made then made conditional submissions on sanction, including that, in RICS' view, the gravity of the case in the circumstances demanded more than a caution but did not merit expulsion as want of integrity was no longer alleged. He also submitted on costs and publication.

SUBMISSIONS ON BEHALF OF MR WILFORD AND THE FIRM

22. Mr Lawrence on behalf of Mr Wilford and the Firm did not contest that the facts proved rendered both liable to disciplinary action.
23. Mr Lawrence made detailed submissions in mitigation on behalf of both Mr Wilford and the Firm. These included emphasising that RICS had not pursued the want of integrity charge; that the Panel should not assume that the conduct amounted to very serious wrongs as all professionals can make mistakes and also the conduct was at the other end of the spectrum from that of an expert covertly taking a conditional fee and deliberately concealing that from the court, which he accepted would be disgraceful conduct.
24. Mr Lawrence emphasised that the plan devised by Mr Wilford's lawyers was misconceived as the issue before the Upper Tribunal was one of pure law and, in the circumstances, there was no good reason to call expert evidence (although this had previously been advised by Counsel). He referred to this as "a misconceived plan to put in expert evidence when it was not required" and emphasised that this was the context and background to Mr Wilford's evidence. After the *Gardiner* decision both Mr Wilford and the Firm – to their credit – recognised that a difficulty had arisen about giving evidence as an expert and that while the lawyers were not before this Tribunal and it

was not appropriate to make any findings against the lawyers, it was his submission that it was “entirely reasonable for Mr Wilford to believe that the lawyers were properly and professionally acting in accordance with their obligations and rules” and in the light of their advice Mr Wilford genuinely believed his evidence was now evidence of fact. Mr Lawrence emphasised that Mr Wilford acted in good faith in the reasonable belief that his evidence was to be treated as evidence of fact and that he had formed that belief in reliance upon the advice of his lawyers. He accepted that Mr Wilford and the Firm ought to have done more and that with hindsight it would have been much better if the fee arrangement had been disclosed at the time.

25. Mr Lawrence further relied upon the apologies expressed by Mr Wilford and the Firm and the previous exemplary record of both. He further emphasised that the risk of repetition of such behaviour was nil and that the Panel could be “absolutely sure” that both Mr Wilford and the Firm would respond in entirely the right way going forward and that this entire experience had been a harrowing and salutary one for Mr Wilford. He also referred to the extensive delay between November 2019 and this hearing taking place, which despite the pandemic he described as “completely unacceptable”.

26. In respect of Sanction Mr Lawrence urged the Panel to consider a caution in all the circumstances.

Findings of fact

27. As indicated above, the Panel found the Rule 4 Charges against both Mr Wilford and the Firm proved by virtue of the admissions made. In the circumstances, and given the submissions of the parties, with which it agreed, the Panel found the Rule 3 Charges not proved.

Liability for Disciplinary Action

28. The Panel noted the submissions of RICS and that Mr Lawrence did not seek to argue that the proved Charges did not render Mr Wilford and the Firm liable to disciplinary action under bylaw 5.2.2 (c).

29. The Panel accepted the advice of the Legal Adviser. It reminded itself that liability to disciplinary action was a matter for the judgment of the Panel. It was satisfied separately that both Mr Wilford’s conduct and the conduct of the Firm amounted to a breach of their professional obligations. The Panel had no doubt that it was sufficiently serious to render both Mr Wilford and the Firm liable to

disciplinary action, as their conduct fell well-below that to be expected of a Member and Regulated Firm.

SANCTION

30. The Panel next considered sanction separately in relation to Mr Wilford and the Firm. It noted the submissions of RICS and of Mr Lawrence as well as the supportive testimonials and the previously unblemished record of Mr Wilford and of the Firm. It accepted the advice of the Legal Adviser. It had regard to RICS' Sanctions Policy, and in particular the overriding principles of acting in the public interest, to protect the public, the reputation of the profession and to declare and uphold proper standards and bore in mind the overriding principles of proportionality.

31. The Panel reminded itself 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.

32. The Panel considered carefully any mitigating and aggravating factors of this case as well as the issue of proportionality in weighing up the most appropriate response.

33. The Panel identified the following mitigating factors in relation to Mr Wilford and the Firm:

- Both Mr Wilford and the Firm admitted the Rule 4 Charge as soon as it was put to them
- Both apologised for the conduct, which was not deliberate or intentional and was not committed in bad faith
- Mr Wilford had positive character testimonials
- There was no previous disciplinary history for Mr Wilford or the Firm
- Both had demonstrated to the Panel an appreciation of and insight into the impact of such serious offending on the reputation of the profession

34. The Panel considered that the following aggravating factors were present:

- The conduct, whilst not deliberate, was serious and represented a significant failing by both Mr Wilford and the Firm

- Despite reliance on the advice of lawyers, the Panel had no doubt that this did not negate the individual responsibility of Mr Wilford and of the Firm as professionals in their own right to ensure that they discharged their own professional obligations

Decision

35. The Panel reminded itself that giving expert evidence is a heavy obligation upon a professional and that non-compliance with the Rules on Declaration can mislead a court or tribunal and significantly undermine the reputation of the profession and public confidence in it.
36. For both the Firm and Mr Wilford, the Panel considered the matters too serious for no sanction at all to be imposed. They considered the sanctions in ascending order of severity.
37. The Panel considered that a Caution was insufficient to mark the seriousness of the behaviour and to adequately maintain the reputation of the profession and the failings could not be described as "minor".
38. The Panel was satisfied that it was not unreasonable for Mr Wilford to take advice from his lawyers, but even if this turned out to be erroneous, it was satisfied that this did not exculpate him or the Firm from responsibility. As professionals, they had the primary obligation to ensure that Mr Wilford's conduct was compliant with their own professional rules. There was no evidence that the Firm looked at the practice standards or questioned the advice received from the lawyers. The Panel had no doubt that there was not a discharge of either Mr Wilford's or the Firm's professional obligations by simply accepting the lawyers' advice.
39. Whilst the Panel had specific regard to the seriousness of the conduct and the highly detrimental impact such serious behaviour has upon the standing and reputation of the profession, it was satisfied that, given the extensive mitigation and insight in this case, there was the very low chance of any repetition and the salutary effect these proceedings have had on both Mr Wilford and the Firm, that it was appropriate and proportionate to issue a Reprimand coupled with a Fine to both Mr Wilford and the Firm. The Panel considered that the culpability of Mr Wilford and the Firm was to all intents and purposes equal. It determined to fine Mr Wilford the sum of £2,000 and the Firm £10,000. It had reduced the Fine payable by Mr Wilford because of his personal mitigation and the fact that the matter had been hanging over him for 22 months and considered this more significant to him as an individual than to the Firm.

Publication

40. The Panel was satisfied that no justifiable basis was advanced for departing from the presumption of publication. The Panel considered the policy on publication of decisions, The Sanctions Policy Supplement 3 - Publication of Regulatory Disciplinary Matters. This decision will be published on the RICS website and in the RICS magazine Modus

Costs

41. RICS made application for costs in the sum of £20,601 and had submitted a statement of costs. Mr Lawrence submitted that no costs should be awarded given the significant delays that had occurred. Subsequently a revised cost schedule was submitted by RICS following application by the Respondents as it was only the Panel sitting on the third day as the evidence and submissions were completed on Friday 17 September. This was for £20,201.

42. The Panel was satisfied that it was appropriate to make an award of costs in this case in favour of RICS. It was further satisfied that the sum claimed by RICS was fair and reasonable for the work done and time spent on this case. The Panel noted from the schedule of costs that there was no evidence that the delay significantly impacted the level of costs claimed and determined that it was fair, appropriate and proportionate to award costs in the sum claimed of £20,201.

Appeal Period

43. The Relevant Person has 28 days, from the service of the notification of the decision, to appeal this decision in accordance with Rule 152 of the Rules.

