

DISCIPLINARY PANEL HEARING

Case of:

**Mr Damien Clarke MRICS [0846524]
Colliers International [722886]**

On Tuesday 18 October 2022

By video conference

Panel

Ms Sally Ruthen (Lay Chair)
Mr Greg Hammond (Lay Member)
Mr Justin Mason (Surveyor Member)

Legal Assessor

Mr Peter Steel

RICS Presenting Officer

Mr Christopher Geering (Barrister)

**Mr Damien Clarke
Colliers International**

Present and represented by Mr Paul Parker (Barrister), instructed by Clyde & Co.

Regulatory Tribunal Executive

Mrs Maria Choudhury-Rahman

The formal charges against the Member and the Firm (as amended) are:

Mr Clarke

1. Whilst acting as an expert witness for Gardiner & Theobald:

- a. Mr Clarke failed to declare that he was also instructed by Gardiner & Theobald under a conditional fee agreement, and / or the Firm had a financial interest in the case,
- b. Wrongly signed a declaration that stated:
 - i. He was not instructed under any conditional fee or other success-based fee arrangement,
 - ii. He had complied with the requirements of RICS practice statement: Surveyors acting as expert witnesses.
- c. His actions at (a) and / or (b) were in breach of his professional obligations.

Contrary to Rule 3 of the Rules of Conduct for Members 2007

...

3. Whilst representing / assisting Gardiner & Theobald on behalf of the Firm, Mr Clarke failed to respond in a timely manner to the Valuation Officer's requests for documentation on one or more occasions.

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

The Member is therefore liable for disciplinary action under RICS Bye-law 5.2.2 (c)

The Firm

- 4. The Firm agreed to or acquiesced in Mr Clarke acting as an expert witness for Gardiner & Theobald and it knew or should have known:
 - a. The Firm was also instructed by Gardiner & Theobald under a conditional fee agreement, and / or the Firm had a financial interest in the case,
 - b. Mr Clarke had wrongly signed a declaration that stated:
 - i. He was not instructed under any conditional fee or other success-based fee arrangement,
 - ii. He had complied with the requirements of RICS practice statement: Surveyors acting as expert witnesses.
 - c. Its actions at (a) and / or (b) were in breach of its professional obligations.

Contrary to Rule 3 of the Rules of Conduct for Firms 2007

The Firm is therefore liable for disciplinary action under RICS Bye-law 5.3.2 (c)

Determination

Background to the case

1. Mr Clarke joined RICS on 01 January 2000. At the material time he was employed by Collier International (“the Firm”) as Head of London Rating. The Firm itself joined RICS on 26 April 2012.
2. The background to this matter was that a client, Gardiner & Theobald LLP (“Gardiner & Theobald”) had instructed the Firm to provide a “comprehensive rating service” in respect of certain properties including an office on Tottenham Court Road (“the Property”). The Property was entered on the 2010 local non-domestic rating list at a rateable value of £2,300,000. The Firm sent a proposal to the Valuation Officer seeking a reduced rate. This was rejected and the matter was referred to the Valuation Tribunal for England which in turn rejected this appeal on 19 December 2016.
3. The Firm, still acting on behalf of Gardiner & Theobald, lodged an appeal before the Tribunal. Mr Clarke signed a declaration accepting responsibility for the conduct of the appeal.
4. On 13 September 2018, RICS received a letter from Mr Justice Holgate, President of the Upper Tribunal (Lands Chamber) (“the Tribunal”). This attached a copy of his judgment in *Gardiner & Theobald LLP v Jackson* [2018] UKUT 253 (LC) and set out the Tribunal’s concerns regarding Mr Clarke’s conduct as an expert witness in that case, in particular that he had failed to declare that he was instructed by Gardiner & Theobald under a conditional fee arrangement, and that he had not responded in a timely fashion to requests by the Valuation Officer for documentation.

Preliminary issues

Application for the matter to be resolved by way of an agreed outcome

5. The Parties invited the Panel to deal with this case by way of an agreed outcome in the following terms:

“Proposed Agreed Outcome

Introduction

This document sets out a proposed agreed outcome to dispose of this case. It is the view of both parties that the terms of the proposed agreed outcome represent a proportionate outcome to the misconduct identified. However, ultimately it is for the Tribunal to decide whether it accepts the admissions made and the sanction proposed.

Background

*The RICS has made formal charges against both: 1) Colliers International (“**Colliers**”); and 2) a Director of Colliers, Mr Damien Clarke MRICS (“**Mr Clarke**”), as more particularly set out in a Case Summary, prepared by Christopher Geering of 2 Hare Court Chambers on behalf of the RICS, dated 1 December 2021 (“**the Allegations**”).*

The Allegations relate to the instruction of Colliers by Gardner & Theobald LLP (“G&T”), to provide advice and representation to G&T in respect of a portfolio of properties, including commercial premises at 227-233 Tottenham Court Road, London W1 (“the Property”). The retainer in question was in respect of the listed rateable value of the Property in the 2010 non-domestic rating list.

The Allegations arise from a hearing in the Upper Tribunal (Lands Chamber) (“the UT”), held on 26 June 2018, and a subsequent written judgment from the Honourable Mr Justice Holgate, Chamber President, dated 3 August 2018 (“the Judgment”).

The Judgment was sent to the RICS by the UT on 13 September 2018 so that the RICS may “...consider whether the decision has any implications for its Practice Statement, or more generally, and whether any further steps should be taken in relation to the circumstances of this case.”

Mr Clarke

Relevant Person: DAMIEN CLARKE [RICS membership number 0846524] of COLLIERS [RICS membership number 722886], 50 George St, Marylebone, London W1U 7GA.

I, DAMIEN CLARKE, admit

(a) **a breach of Rule 3 of the Rules of Conduct for Members (with effect from 1 January 2013)**, namely that while representing and/or assisting G&T on behalf of Colliers

(i) I mistakenly interpreted and understood PS10.4 of the Practice Statement;

(ii) Consequently,

(A) I failed to declare that I was also instructed by G&T under a conditional fee agreement, and

(B) Colliers therefore had an undeclared potential financial interest in the case;

(iii) in so doing I acted in a manner which was inconsistent with my professional obligation under PS10 of the Practice Statement;

(b) **a breach of Rule 5 of the Rules of Conduct for Members (with effect from 1 January 2013)**, namely that while representing and/or assisting G&T on behalf of Colliers, I omitted to respond in a timely manner to the Valuation Officer’s requests for documentation on one or more occasions, and did not create or keep sufficient documentation / records to evidence any good reason for this omission.

In light of the above admissions, I agree to accept disciplinary action from the RICS as follows:

- In relation to my admitted breach of Rule 3 and 5, a reprimand and a fine in the sum of £1,500;
- To contribute to the RICS’ costs of the Disciplinary Action in the sum of £1,250. Payment to be made within 28 days of the date of this Agreed Outcome.

Colliers

Relevant Person: COLLIERS INTERNATIONAL [RICS membership number 722886], 50 George St, Marylebone, London W1U 7GA.

COLLIERS INTERNATIONAL admit a breach of Rule 3 of the Rules of Conduct for Firms (with effect from 1 January 2013), namely that:

- (a) *In agreeing to Mr Clarke acting as an expert witness for G&T, Colliers permitted a situation to arise whereby*
 - (i) *Mr Clarke held and acted upon a mistaken understanding of PS10.4 of the Practice Statement, and thus*
 - (ii) *since Colliers knew it had also been instructed by G&T under a conditional fee agreement, it had a potential financial interest in the case;*
- (b) *in so doing Colliers failed to avoid a situation that was inconsistent with its professional obligation under PS10 of the Practice Statement.*

In light of the above admission, Colliers agrees to accept disciplinary action from the RICS as per the following:

- *a reprimand and a fine in the sum of £7,500;*
- *To contribute to RICS' costs of the Disciplinary Action in the sum of £6,750. Payment to be made within 28 days of the date of this Agreed Outcome.*

Further, and for the avoidance of doubt, I confirm on behalf of Colliers that we have taken the following actions:

- *Reviewed and will continue to review Colliers' procedures to reasonably ensure that any related retainers containing conditional fee agreements are appropriately concluded before a member undertakes Expert Witness work, in accordance with the Practice Statement, and that the workforce is aware of the same.*

RICS agrees that:

- 6. *It considers the proposed outcome to be proportionate and in the public interest. Following the disposal of this case, RICS will take no further disciplinary action as against Mr Clarke or Colliers in respect of the Allegations provided Mr Clarke and Colliers comply with the terms of this Agreed Outcome."*

[The Proposed Agreed Outcome also included the signatures of the Firm and Mr Clarke and a declaration by each acknowledging that a record of the Agreed Outcome would be kept on file from the date of signature, that it was their responsibility to ensure that the terms of the Agreed Outcome could be complied with within the time frame specified and that failure to follow the terms of the Agreed Outcome might give rise to liability to disciplinary action.]

- 6. Mr Geering, on behalf of RICS submitted that the Proposed Agreed Outcome was a pragmatic and proportionate way to conclude the case and satisfied the public interest. The proposed sanction appropriately marked a significant and serious breach by the Member and the Firm. Mr Geering said that despite this, RICS accepted that the passage of time had assured it that there had been no repetition of the same sort of admitted misconduct, that the events had been confined to a relatively short time period and that they therefore represented an aberration on the part of both Member and Firm.
- 7. Mr Parker, on behalf of Mr Clarke and the Firm agreed and endorsed Mr Geering's submissions and added that there were sound policy grounds for the Panel to determine that the matter be disposed of in accordance with the Proposed Agreed Outcome. This would spare the parties the stress and expense of a fully contested hearing. Mr Clarke and

the Firm fully accepted the basis of the charges as amended.

8. The Panel listened carefully to the submissions of the parties and reviewed all the material before it. It accepted the advice of the legal assessor that although the Disciplinary, Registration and Appeal Panel Rules 2009 v.7 (“the Rules”) were silent on the issue, it would be permissible for it to consider an agreed outcome in line with the procedure identified in the case of *In Re Carecraft Construction Co. Ltd* [1994] 1 WLR 172 (and the Panel was told that RICS had adopted the same procedure in other cases, for instance *RICS v Elliot Taylor*)
9. The Panel noted that this was not a “rubber stamping” exercise, and it was required to satisfy itself both that the admissions had been properly made and that the sanction was appropriate in the circumstances of the case. It further noted that Rule 41(h) of the Rules permitted amendment to the charge at any stage of proceedings where the Panel concluded that no injustice would be caused to the parties, having heard their submissions and received the advice of the legal assessor. Given that the parties had agreed the amendments to the charges in this case, the Panel accepted that the proposed amendments should be made.
10. Having considered the case in full, the Panel was satisfied on the balance of probabilities that the admissions by Mr Clarke and the Firm were properly made. It therefore found the charges as amended proved in their entirety.
11. Both Mr Clarke and the Firm accepted that their respective breaches of the Rules of Conduct were sufficiently serious to render each liable to disciplinary action under Bye-Law 5.2.2(c) and the Panel agreed.

Sanction

Panel's Approach

12. When considering the appropriate sanction in this case, the Panel paid careful regard to all the circumstances of this case, including the evidence and submissions that the Panel received, and the admissions made by Mr Clarke and the Firm.
13. The Panel considered the overarching principles guiding the imposition of a sanction on Regulated Members under RICS’ disciplinary scheme. The Panel had regard to the principle of proportionality, the need to protect the public and to promote regulatory compliance. The Panel has further considered the need to protect the reputation of the profession and uphold proper standards.
14. The Panel carefully considered the Proposed Agreed Outcome. The Panel nonetheless considered the question of sanction independently having particular regard to the public interest and the proportionality of the sanction.
15. Any case in which a member of the judiciary felt obliged to draw the conduct of a Regulated Member or Firm to the attention of RICS – and to pronounce on that conduct in a public judgment - is necessarily serious, because of the effect that this might have on the reputation of the profession.
16. However, the Panel took account of the mitigation offered on behalf of Mr Clarke and the Firm. Mr Clarke and the Firm had no previous disciplinary history with RICS and had cooperated fully with the investigation. The Panel also accepted that the charges

represented an isolated breach of the required professional standards and that the case had taken a significant amount of time coming to a hearing, through no fault of the Member or the Firm.

17. The Panel noted that the Firm had taken steps to revise its policies and procedures promptly and had ensured that its staff were informed of the correct position. The Panel relied on these assurances, and the lack of any similar problem since this matter was brought to RICS' attention, to mitigate the risk of similar complaints occurring in the future, and to ensure protection of the public, especially those who would employ the Firm or its employees in an expert capacity.
18. Viewed in the light of this mitigation, the Panel was satisfied that the Proposed Agreed Outcome was a proportionate and fair disposal of the case. It adequately protected the particular public interest, the public interest generally, and the reputation of the profession.

Decision

19. Having careful regard to all the circumstances of this case, including the evidence and submissions that the panel has heard, the Proposed Agreed Outcome and the RICS guidance on Regulatory Sanctions, the Panel determined that the appropriate sanctions in this case are as follows:

Mr Clarke

1. Reprimand
2. Fine £1,500

Colliers International

1. Reprimand
2. Fine £7,500

Publication

20. 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 in the usual way.

Costs

21. As set out in the Proposed Agreed Outcome, Mr Clarke had agreed to contribute £1,250 towards RICS's costs, and the Firm had agreed to pay £6,750 to be paid within 28 days.
22. The Panel concluded that it was appropriate for Mr Clarke and the Firm 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.

23. The Panel therefore orders that Mr Clarke pays to RICS the costs of these proceedings in the sum of £1,250; and the Firm pays to RICS the sum of £6,750, to be paid within 28 days of the service of the notification of this decision on them.

Appeal Period

24. Mr Clarke and the Firm have 28 days, from the service of the notification of the decision, to appeal this decision in accordance with Rule 59 of the Rules.

25. 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.