Appeal Panel Hearing

Case of

Mr Richard Barnes BSc Hons, MSc, FRICS, FCIArb [1146467]
Cheshire, S18

On

Thursday 30 June and Friday 1 July 2022

At

Remotely via Microsoft Teams

Panel

Sir Michael Burton GBE QC (Lay Chair)
Dr Angela Brown (Lay Member)
Paul Watkinson FRICS (Surveyor Member)

Legal Advisor

Peter Steel

RICS Representative

Christopher Geering, 2 Hare Court

Member's Representative

Chris Pataky, Clerksroom Chambers

Hearings Officer

Jae Berry

Introduction

1. This is an appeal by Mr Barnes against liability following a Disciplinary Panel hearing on 24 January – 28 January 2022, 3, 17 and 18 February 2022.

2. At the same time, RICS seek a review of the sanction imposed by the Panel under Bye-law B5.5.2 and Rule 166 of the Regulatory Tribunal Rules – Version 1 [with effect 2 March 2020] (the Rules) on the grounds that it was unduly lenient.

Burden of proof

3. Under Rule 165 of the Rules, the burden is on Mr Barnes to satisfy the Appeal Panel that the finding made by the Disciplinary Panel was wrong. Correspondingly, under Rule 177, the burden is on RICS to satisfy the Appeal Panel that the Regulatory Sanction imposed by the Disciplinary Panel was unduly lenient.

Background

4. The charges found proved against Mr Barnes were as follows:

> "1*. Richard Barnes FRICS acted dishonestly in that he:*
>
> *(i) in about December 2019, submitted an adjudication decision ('the Decision') to RICS as part of an application to join the RICS Global President's Panel of Dispute Resolvers as a Construction Adjudicator ("the Panel") which did not and which he knew did not accurately represent his own work but was a modified adjudication decision prepared by another practitioner ('Practitioner A') and/or*
>
> *(ii) knowingly misled members of an interview panel on 27th April 2020 by falsely asserting that the Decision had been created by him using/following a template.*
>
> ***Contrary to Rule 3 of the Rules of Conduct for Members 2007 He is therefore liable to disciplinary action under RICS Bye- Law 5.2.2 (a) or (c)***
>
> *2. Richard Barnes FRICS failed to act with integrity and/or avoid any actions that were inconsistent with his professional obligations by:*
> *(i) presenting plagiarised work (the Decision) as his own work to RICS as part of an application to join the RICS Global President's Panel of Dispute Resolvers as a Construction Adjudicator ("the Panel") in about December 2019 and thereby misleading the interview panel, and/or*

(ii) presenting to RICS work done in a personal exercise (the Decision) as being compliant with the criteria contained within the RICS Dispute Resolution Service Criteria for Inclusion of Construction Adjudicators on the President's Panel in about December 2019, and/or

…

(iv) causing or allowing members of an interview panel on 27th April 2020 to be misled in that he failed to explain that the Decision was created using a genuine decision made by Practitioner A, and/or

(v) causing or allowing members of an interview panel on 27th April 2020 to be misled in that he asserted that the Decision had been created by him using/following a template.

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

5. The relevant facts in respect of the proved allegations, are as follows:

6. Mr Barnes joined RICS in 2006. In 2015 he became a Fellow. He has no prior disciplinary history.

7. In June 2019 Mr Barnes applied to join the RICS President's Panel of Construction Adjudicators. Candidates applying to be considered for the significant position of Construction Adjudicator were required to comply with the following criteria (among others) (the Criteria):

"*3.* ***Panel interview***

Prior to the panel interview, you will need to send to DRS:

…

- *An adjudication decision that you completed in the last two years (if this is not available, a mock examination decision from the RICS Diploma in Adjudication or the Chartered Institute of Arbitrators adjudication training or a mock adjudication from other forums)…*

…

Adjudication decision

Before your panel interview, you will need to submit one adjudication decision that you completed in the last two years. (Please note, we cannot accept ...a decision where you were only a co-author). If you have not prepared an adjudication decision in the last two years, you can submit the mock decision that you submitted as part of your final exam for the RICS Diploma in Adjudication or the Chartered Institute of Arbitrators

adjudication training) or a mock adjudication from other forums.

…

Decision, including identifying the issues and analytical reasoning

You must be able to demonstrate the ability to write a decision that:

- *identifies, expresses and analyses the issues and sub-issues that need to be considered during decision-making;*
- *shows that you can apply analytical skills throughout the process;*
- *is concise, clear and includes logical reasons for your decision;*
- *can communicate your conclusions and reasoning in a structured, fluent and logical manner.“*

8. Mr Barnes submitted a decision, which purported to be his own decision, both on the front sheet, and throughout, in using the first person (e.g. “*I wrote to the parties… I acknowledged receipt...*”), and as signed off in his name at the end. In fact, as part of his informal CPD learning in 2018, he had spent 6 hours researching from his partnership’s website a decision which one of his partners (Practitioner A) had delivered. After considering the papers underlying the decision, he then adopted Practitioner A’s decision as his own, after some omissions and amendments, and that was what he submitted.

9. Mr Barnes was interviewed about his submission on 24 April 2020. The chair of the interview panel asked, “*Just on the structure of your decision, it strikes me that you follow a template, would I be correct?*” He responded, “*Erm, in this instance, yes, I did follow a template.*” He described what the template would contain. He did not explain he had used a genuine adjudication decision drafted by a colleague as a “template”.

10. Mr Barnes gave evidence to the Disciplinary Panel hearing. He accepted that he had made use of a colleague’s adjudication decision. However, he said that he had amended and added to the decision. He asserted that he had applied his own mind to the document such that, when he had finished it, he considered the work as his own. He argued that he therefore used the original decision as a “template”.

11. The Disciplinary Panel rejected this explanation. With the exception of 2 (iii), it found all the particulars proved. It set out its reasoning at paragraph 34 of its determination onwards, which included the following:

    (i) “…*The issue concerned whether, by virtue of those modifications, it did not represent his own work – and he knew that to be the case…*

The Panel also had careful regard to the evidence from Mr Barnes himself. It was not persuaded by his assertion that "overwriting" [Practitioner A]'s decision in the context of this application was no different to drawing from a template or indeed from a colleague's decision, which he suggested was commonplace in his day-to-day work.
Populating a template that provided only a structure for the decision is quite different, the Panel concluded, to amending an existing decision in which a critical analysis had already been applied to a given set of facts."

and

(ii) *As to whether Mr Barnes knew it did not represent his own work, the Panel took account of Mr Barnes' evidence that he gave the application a great deal of thought and felt he knew the criteria for the application "inside out". The Panel considered it likely in that context, and in view of his wider experience, that he understood not only what material would fulfil the letter of the criteria, but the purpose for which that material was required. On balance, the Panel considered Mr Barnes would have known that the submission of an amended version of the Hoyle v BAK decision, upon proper analysis of the way in which it was created, did not fulfil the criteria for a "mock decision from another forum", nor was it representative of his own work.*

The Panel considered it relevant in that regard that Mr Barnes' correspondence after the Interview suggested that he drew a distinction between "mock adjudications" and "other decisions". This did not sit easily with his assertions that he truly believed the Decision was based on a template, given that he knew the source was a genuine decision or a draft genuine decision by [Practitioner A].

The Panel considered that Mr Barnes' responses in interview to questions about the Decision were also instructive as to his state of mind in respect of the document. Having taken account of the video and transcript of the interview on 27 April 2020 the Panel took the view that Mr Barnes, when asked by Mr Davis "…it strikes me that you follow a template…", knew that he was referring to the Decision itself, rather than how templates in general are utilised. As such, the Panel considered that if Mr Barnes' held a genuine belief that his methodology in producing the Decision was legitimate, he would have taken the opportunity at that stage to disclose his use of [Practitioner A].'s decision as a template. Instead, he talked about his use of templates in general by reference to a basic structure to which he would add the relevant detail.
The Panel took the view that that was deliberate obfuscation borne of the fact that he knew the interviewing panel would be concerned about his use of and reliance upon Mr Conway's decision in Hoyle v BAK.

Taking all of this into account, the Panel concluded that:

a) Mr Barnes knew at the time of his submission of the Decision that it was not representative of his own work; and
b) ordinary, decent people would consider that to be dishonest."

The decision of the Disciplinary Panel on sanction

12. Having made the factual findings set out above, the Disciplinary Panel found Mr Barnes liable to disciplinary action.

13. The Disciplinary Panel assessed the aggravating features of the case as follows:

    - *The dishonest conduct was denied.*
    - *Little if any genuine insight was demonstrated, even with hindsight, into the nature of the misconduct.*
    - *His conduct was motivated by career advancement and the potential for enhanced professional status.*
    - *The dishonesty was of a continuing nature, from the point of the application being submitted in December 2019, to the point it was discovered in April 2020.*
    - *The dishonesty was concealed by the answers given in interview in April 2020.*
    - *It was brought to light only by the intervention of others.*

    and the mitigating factors as follows:

    - *He had no previous disciplinary history.*
    - *The conduct was isolated in the context of his whole career.*
    - *There was no risk of repetition.*
    - *His dyslexia may have had some bearing on his conduct, albeit not such that it excused or explained it.*

14. It commented further at:

    "*The Panel was concerned by the nature of the misconduct in this case and the failure of Mr Barnes to 'come clean' about the way he produced his application over the weeks that followed its admission. However, it considered that Mr Barnes was unlikely to repeat the conduct and that there were other relevant mitigating factors to consider in this case*."

15. Having assessed the aggravating and mitigating features of the case, the Disciplinary Panel stated that although dishonesty of this nature would ordinarily result in expulsion, the evidence of Mr Barnes' good character, the mitigating features and the positive

testimonials, suggested that it was an aberration that did not reflect his usual character or wider professional practice.

16. The Panel therefore concluded that the need to maintain trust and confidence in RICS and to uphold good standards of conduct could be achieved without imposing the ultimate sanction. It imposed the following sanction:

    a. Reprimand
    b. Fine of £5,000
    c. Conditions, in the following terms:
        i. Mr Barnes may not make an application for inclusion on the RICS President's Panel until a period of 5 years has elapsed from the date of this decision;
        ii. Any application made by Mr Barnes to the RICS President's Panel must meet the criteria by other means than a "mock adjudication from other
        forums";
        iii. Mr Barnes must attend a course on professional ethics, the precise nature of which to be determined by RICS, within 24 months of the date of this decision.

Preliminary Issues – admission of new evidence

17. Mr Barnes had sought to admit a significant amount of further evidence in support of his appeal. By the time of this hearing, his application was limited to the following documents:
    - A report on Mr Barnes' dyslexia by Dr Jennifer Haigh, a chartered psychologist, dated 26 January 2022 (but received by Mr Barnes on 30 January 2022, i.e. after the Disciplinary Panel had retired to consider the facts but prior to its handing down the decision itself);
    - An exchange of emails between Dr Haigh and Mr Barnes on 15 and 16 February 2022 in which he reported the Disciplinary Panel's findings on facts and in which Dr Haigh provided further comment on the effect of his dyslexia;
    - An email from Dr Haigh to Mr Barnes on 30 January 2022 attaching the report dated 26 January 2022; and
    - A Candidate Assignment from the RICS/RCHP Diploma in Adjudication course.

18. Mr Geering objected on behalf of RICS to the admission of that further evidence on the usual **Ladd v Marshall [1954] 1 WLR 1489** principles. It was agreed between the parties that **Ladd v Marshall** set out the right approach for this Panel in considering whether to admit the documents into evidence

19. Mr Pataky, on behalf of Mr Barnes, submitted that although Dr Haigh's report had in fact been submitted to the Disciplinary Panel at the sanction stage, it (and the accompanying emails) should have been before the Disciplinary Panel at the liability stage. The report

in particular was relevant to the issue of whether Mr Barnes (as the Disciplinary Panel had found) was "obfuscating" in his response to the question put to him by the Interview panel on 27 April 2020 about whether he had used a template in his submission or not. Mr Pataky submitted that the report and the evidence it provided about Mr Barnes' dyslexia provided a partial shield against the implication that Mr Barnes' inadequate answer to a badly phrased question was deliberate obfuscation. Mr Pataky asserted that the Disciplinary Panel were unlikely to have formed such a robust view on the meaning of a passing exchange in the interview in the light of the report.

20. As regards the Candidate Assignment document, Mr Pataky said that document provided evidence that for the purposes of the RICS Diploma in Adjudication, the mock decision was able to be produced at home on an open book basis rather than by exam. In Mr Pataky's submission, this contradicted and undermined the evidence of Dr Fletcher, one of the RICS witnesses to the effect that 'mock adjudications' must be comparable to those '*produced for the RICS Diploma in adjudication…and prepared under training / exam conditions*'

21. Mr Geering on behalf of the RICS submitted that none of the documents had been obtained with reasonable diligence. Indeed Dr Haigh's report was not fresh evidence. Mr Barnes could have sought to place it before the Disciplinary Tribunal before its decision on the facts, but it appeared from his email of 15 February 2022 and his further response in support of the appeal that his legal team had decided not to use the report. Similarly, Dr Fletcher's position was clear from his witness statement and the Candidate Statement could have been obtained and put in evidence prior to the Disciplinary Panel hearing.

22. In addition, Mr Geering submitted that neither the report/emails nor the Candidate Assignment were relevant. The dyslexia report did not meet the criteria for an expert report. Even if it had done, its findings provided scant assistance to Mr Barnes' case, in that it was unclear how the difficulties observed by Dr Haigh were relevant to the question of dishonesty or served to explain his answers in interview. Furthermore, the Disciplinary Panel had had the benefit of seeing Mr Barnes' interview and his response to other questions. It also heard him give evidence at some length and under stressful conditions. There did not, in Mr Geering's submission, appear to be any widespread failure to process information.

23. Mr Geering said that the Candidate Assignment in no way displaced the thrust of Dr Fletcher's evidence, which was that a candidate's work should be their own and not plagiarised.

24. The Appeal Panel noted that the usual position was that evidence which was not before a lower court or tribunal will not usually be admitted unless; first, it can be shown that the evidence could not have been obtained with reasonable diligence for use at the original hearing; secondly, if admitted it would probably have an important influence on

the result of the case, though it need not be decisive; and lastly that the evidence must be apparently credible, though it need not be incontrovertible.

25. In this case, the Appeal Panel considered that the report of Dr Haigh was self-evidently not fresh evidence. It had been available prior to the decision on facts and Mr Barnes' team had considered that it did not assist him on liability, as Mr Barnes had candidly indicated in his submissions for this appeal ("*It was felt that it was inappropriate / not helpful to submit this to the panel at this point as I was not trying to use it as a defence / explanation for my actions which had been put before me.*").

26. The Candidate Assignment was equally something that could have been obtained prior to the Disciplinary Panel hearing in the light of the evidence of Dr Fletcher set out in his witness statement. The Panel noted that Mr Barnes had had the benefit of legal representation during the hearing

27. Further, even if the Appeal Panel had been prepared to accept the documents into evidence, it did not consider that any of the documents were relevant to the issues before it or to the grounds of appeal. Dr Haigh's report was fatally undermined by the fact it appeared Mr Barnes' legal team had not considered it relevant on liability. Neither of the emails advanced matters any further. Lastly the Candidate Assessment did not in the Panel's view undermine Dr Fletcher's evidence as Mr Pataky had suggested. None of the documents were therefore likely to have had an important influence on the outcome of the case.

Approach of the Appeal Panel

28. The Appeal Panel carefully considered all the written material with which it had been provided, including the helpful written submissions of both parties and the significant volume of case law on which the parties had relied. It listened carefully to the submissions of Mr Pataky and Mr Geering.

29. The Panel noted that there was no dispute between the parties as to the approach it should adopt. The appeal was a review rather than a rehearing of the case before the Disciplinary Panel. The Panel reminded itself to exercise particular restraint in interfering with findings of fact where the original tribunal had the benefit of seeing, hearing and evaluating the witnesses' credibility and that it should only interfere with those findings if the original tribunal could not properly and reasonably have decided those facts in that way. Mr Pataky reminded the Panel that as indicated in the case of General Medical Council v Jagivan [2017] 1 W.L.R 4438, should the question before it be "what inferences are to be drawn from specific facts?" it was less constrained in drawing such inferences as might seem fit.

Grounds of Appeal

Ground 1 (a) The Panel failed to take adequate account of RB's evidence in making its decision on facts and/or failed to provide adequate reasons for its decision

30. Mr Pataky submitted that the evidence in this case was complex and therefore required careful assessment of the evidence in order to establish the facts and in particular to determine the actual state of Mr Barnes' knowledge and belief both at the time he submitted his application and also during the interview.

31. Mr Pataky said that the complex background meant in relation to the reasons for the decision, it was necessary for the Disciplinary Panel to establish what exactly Mr Barnes knew and when, and what significance or salience they had attributed at the time to what he knew. He asserted that the Disciplinary Panel had failed to take adequate account of Mr Barnes' evidence in this regard and/or failed to provide adequate reasons for its factual decision making and the inferences it had drawn. Specifically, he suggested that the Disciplinary Panel (i) had failed to take into account Mr Barnes' understanding of the term "template" or had substituted its own understanding of the term; (ii) had failed to take adequate account of the background facts, including the amount of time (6 hours) that Mr Barnes had spent preparing the mock decision and the fact that he had supplied a copy of his submission to Practitioner A before the interview (though the latter had not opened or read it, nor had he been asked or informed about the use of his decision); (iii) had failed to take adequate account of the fact Mr Barnes' belief that the submission only contained about 20 – 25% of Practitioner A's words; and (iv) had failed to take adequate account of the fact that Mr Barnes had been provided with a template by RICS (albeit of an initial contact letter between adjudicator and parties, together with accompanying documents) at a familiarisation day in November 2019, which had influenced his understanding of what a template was.

32. Mr Pataky further submitted that while the Panel was entitled to reject Mr Barnes' evidence, it was critical that it took adequate account of it and provided adequate reasoning in the event that it was to be rejected.

33. Mr Geering, on behalf of the RICS, submitted that on the contrary this was a straightforward case. Mr Barnes had submitted a mock decision which was not his own and largely copied from Practitioner A's decision That was inappropriate, indeed Mr Barnes had accepted this as was indicated in the opening note submitted on his behalf to the Disciplinary Panel, which stated:

"*…it is accepted…*
that the Decision bore excessive similarity to the adjudication decision previously made by [Practitioner A]*; and*

…Mr Barnes accepts that he should not have sought to provide documentary support for his application to join the Panel by using the Decision, or by using it in the manner in which he did."

34. Mr Geering said that Mr Barnes had explained his state of mind at the time to the Disciplinary Panel in evidence. That explanation was rejected. This was the kind of case where little else was needed by way of reasons, and fairness did not require the Disciplinary Panel to set out in detail their rejection of each and every point advanced in Mr Barnes' defence.

35. The Panel rejected this ground of appeal. It agreed with the analysis of Mr Geering that this was indeed a simple case. Mr Barnes was required to submit a mock decision in support of his application that had to be his own work. The document he had submitted was plainly not. The fact that Mr Barnes says he would have come to the same conclusion as Practitioner A, and for the same reason, did not make it a decision of his own. Mr Barnes had seen Practitioner A's version and he had adopted much of its wording. Whether he held the (unjustified) belief that only 20 – 25% of the wording was Practitioner A's in the version he submitted seemed to this Panel irrelevant. He knew that it was not all his own work, he had conceded in the Disciplinary Panel hearing that there was excessive similarity, and the parts he had plagiarised were not just standard paragraphs.

36. That last point was amply demonstrated by a number of examples that were demonstrated to the Disciplinary Panel. It was clear that in certain respects Mr Barnes had copied Practitioner A's wording rather than making his own summary of the source material. For instance, the referral for adjudication stated:

    "*At that site meeting, in preparation for any reasons (valid or otherwise) that BAK may later give for non-payment, CDH obtained a signed conformation (at Appendix B) from BAK's site manager that CDH had worked on the Langdale Gardens / Clifton Court sites for 24 weeks from 29 May 2017 to 12 November 2017.*"

37. Practitioner A had stated, "*CDH asserts that BAK's Manager signed a confirmation that CDH had worked on the Site for 24 weeks from 29 May 2017 to 12 November 2017*." In almost identical terms, Mr Barnes had written: "*He asserts that B XXX s Manager signed a confirmation that he had worked on the Site for 24 weeks from 29 May 2017 to 12 November 2017*." Mr Barnes had used Practitioner A's wording, not the referral's.

38. The findings of the Disciplinary Panel did not depend upon their definition of template, as Mr Pataky had asserted. What the Disciplinary Panel was addressing was whether the decision, which Mr Barnes was advancing as his own, was in fact his own work, capable of illustrating any of the Criteria for which the interview panel was looking.. Equally this Panel considered that it was plainly not a "*mock decision… submitted as part of your final exam for the RICS Diploma in adjudication or the Chartered Institute of Arbitrators adjudication training* "(both of which would have constituted his own original

work) nor was it a mock adjudication from "*other forums*". He was not even a "co-author" though that itself was expressly ruled out by the Criteria. He knew that the candidate applying to be an Adjudicator had to demonstrate his own ability to craft a decision.

39. It was clear from the Disciplinary Panel's determination, particularly from the passages set out in paragraph 11(i) above, that it had given proper consideration to Mr Barnes' evidence, which it had rejected.

40. The Appeal detected no deficiency in the reasons provided by the Disciplinary Panel. It noted in this respect that the case law indicated that a panel is required only to provide sufficient reasons for a party to know why he won or lost. It is not required to identify every factor which it weighed in its appraisal of the evidence, but rather those matters which were vital to its conclusion (see **English v Emery Reimbold [2002] 1 WLR 2409** at 2418). In this essentially simple case, that is clearly what the Disciplinary Panel had done.

Ground 1(b) The Panel failed to take adequate account of RB's evidence in relation to its subjective assessment of RB's beliefs in applying the test set out in Ivey v Genting Casino and/or took into account aspects which were not relevant to that subjective assessment

41. Mr Pataky submitted that the Disciplinary Panel had made no adequate assessment of Mr Barnes' subjective knowledge or belief of the facts in respect of either allegation 1(i) or allegation (ii). He said that there was nothing to suggest that the Disciplinary Panel had first ascertained the Appellant's understanding or beliefs at the time he submitted the decision (in respect of allegation 1(i)) or at the time of his interview (in respect of allegation 1(ii)).

42. Mr Pataky asserted that a number of factors indicated Mr Barnes' "*clean mind*" with respect both to his submission of the decision and to his response to the question during the interview panel about whether he had used a template. These factors were (similar to the previous ground of appeal): (i) his understanding at the time of submission and interview of the meaning of the word "template"; (ii) the fact that he had first prepared the document in 2018, had spent 6 hours doing so and believed it to be his own work at the time; (iii) the fact that he had supplied a copy of his submission to Practitioner A before the interview; and (iv) his receipt of the "First Decisions" template in November 2019 which had influenced his understanding of the term "template".

43. Mr Pataky submitted that while the Disciplinary Panel was entitled to reject Mr Barnes' evidence, it was critical that it first took adequate account of his subjective understanding at the material time and made a proper assessment of the same, and it had not done so.

44. Mr Geering, on behalf of RICS, submitted that it was clear from the determination that the Disciplinary Panel had considered Mr Barnes' state of knowledge, consistent with

the test in **Ivey v Genting Casinos [2017] UKSC 67**. To the extent that Mr Barnes was criticising the Disciplinary Panel for not analysing his belief about the meaning of "template" at the time of submission, Mr Geering said that was extending the requirement of reasons too far. The fundamental issue was whether Mr Barnes realised that his application did not represent his own work, which encompassed his understanding of the meaning of "template".

45. For similar reasons to the previous ground, the Appeal Panel rejected this ground. As indicated above, the Disciplinary Panel's decision did not depend upon the definition of "template". The crucial issue, as Mr Geering had submitted, what whether Mr Barnes knew that his application was not his own work at the time of submission. That the Disciplinary Panel had indeed considered Mr Barnes' subjective state of knowledge was clear from the passage of its determination quoted at paragraph 11(ii) above.

46. The Appeal Panel saw no basis on which the Disciplinary Panel's reasoning could be impugned on this point.

Ground 1(c) The Panel fell into error in determining that the conduct amounted to a lack of integrity and/or imported errors that it had made in respect of Allegation 1 into Allegation 2

47. Mr Pataky submitted that allegations 1 and 2 were almost indistinguishable, with the conduct underlying allegation 2 largely synonymous with allegation 1. He said that his submissions regarding allegation 1 above had application to this ground of appeal.

48. Mr Pataky said that the Disciplinary Panel went on to make a number of errors in reaching its conclusions in respect of allegation 2, firstly by importing its conclusions in respect of allegation 1(i), which had erroneously relied on its narrow assessment of Mr Barnes' mindset at interview rather than at the time of the application; and secondly by determining that the conduct breached standards from the Global Professional and Ethical Standards, which were solely relevant to dishonest conduct. The RICS case presenter had equated lack of integrity with being straightforward in all that you do, failing to recognise that 'being straightforward' was also a term synonymous with 'honesty' as referred to by Stadlen J within the case of **R (on the application of May) v Chartered Institute of Management Accountants [2013] EWHC 1574 (Admin)**.

49. Mr Pataky submitted that having reached a conclusion in respect of allegation 1 (albeit erroneously), the Disciplinary Panel ought to have determined it was not necessary to consider allegation 2 further.

50. Mr Geering submitted that the Disciplinary Panel had received appropriate advice from the legal advisor, including about the leading case on integrity, **Wingate and Evans v SRA; SRA v Malins [2018] EWCA Civ 366**. That case, decided since the case of **May** referred to by Mr Pataky, had clarified the distinction between lack of integrity and lack of honesty. Lack of integrity was a useful shorthand to express the higher standards that

society expected from professional persons and which professions expected from their own members.

51. Again, the Appeal Panel rejected this ground of appeal. The facts the Disciplinary Panel had found proved manifestly supported the allegation of lack of integrity, which as **Wingate and Evans** had established, was a different standard from dishonesty. The Disciplinary Panel had rightly observed that plagiarism was not a practice that would ever be acceptable in the context of an application for a quasi-judicial position such as a member of the President's Panel of Adjudicators. What was required by the Criteria was for the candidate to exemplify his own skill in decision-making.This was rightly a question of integrity, involving as it did, an application for a respected professional position. This Panel found nothing in the points raised on Mr Barnes' behalf that displaced the Disciplinary Panel's conclusion about this allegation.

Ground 2: The decision is wrong in light of the new evidence which is available

52. Mr Pataky had submitted that the determination of the Disciplinary Panel was wrong in the light of the new evidence which he had sought to adduce as part of his appeal. For the reasons set out at paragraphs 17 to 27 above, the Appeal Panel had rejected the application to admit the evidence in question which in its view was neither fresh nor persuasive. The RICS had however agreed that Mr Barnes could rely on a number of standard definitions of the term "template", including those from the 2012 edition of the Oxford English Dictionary ("*Something serving as a model for other people to copy*").

53. Mr Pataky submitted that had the Disciplinary Panel had the opportunity to consider these definitions, it would likely have assessed the term differently and reached a different conclusion, particularly in relation to its assessment of Mr Barnes' response to the question of the interview panel: *"…it strikes me that you follow a template?"*.

54. Mr Geering submitted in response that there was no dictionary definition which supported using an actual adjudication decision on the same facts as the basis for Mr Barnes' own adjudication of the same facts. Using one decision as the basis for drafting another decision on different facts might be an acceptable practice, but that is not what Mr Barnes did, and he knew as much.

55. The Appeal Panel rejected this ground of appeal. For the reasons stated above, the findings of the Disciplinary Panel did not depend upon their definition of the word "template". Further, a belief that the use of a template justified wholesale plagiarism was clearly unreasonable, within the subjective limb of the test in **Ivey v Genting Casinos**.

56. Having rejected Mr Barnes' appeal in its entirety, the Appeal Panel proceeded to consider the RICS' appeal on sanction.

RICS' submissions regarding the Appeal on Sanction

57. Mr Geering submitted that the sanction imposed by the Disciplinary Panel's was unduly lenient on the following grounds:
    i. The panel failed adequately to evaluate the gravity of the offending and the aggravating and mitigating factors, or failed to provide adequate reasons; and
    ii. If the panel did find extenuating circumstances such as to justify a lesser sanction than expulsion, they did not express them, were wrong to do so, and in any event failed to provide adequate reasons.

58. In respect of the first ground, Mr Geering submitted that a proper assessment of the case required analysis of the nature of the dishonesty. In this case, the dishonesty was of a continuing nature and was concealed by Mr Barnes' answers in interview.

59. Further, a proper assessment of seriousness would have recognised that the dishonesty was in the context of an application to a quasi-judicial role. Mr Barnes was applying for an appointment to a position of trust. Mr Geering said there was a strong public interest in such a person being of the highest integrity, yet Mr Barnes had attempted to cheat his way to that position.

60. In addition, the dishonesty in submitting plagiarised work was deliberate and planned. Mr Geering asserted that this was not a "moment of madness" case of the type recognised as demonstrating exceptional circumstances such as **SRA v James & Others 2018 EWHC 3058 (Admin)** The panel failed to list this as a feature, and to reflect it in its findings. The dishonesty in this case was at the top end of seriousness.

61. Against this, the mitigation that had been offered for Mr Barnes was limited. Indeed Mr Geering said that no mitigation had been offered regarding the actual offence, nor had the Panel adequately justified its conclusions. So for instance, the Disciplinary Panel's determination did not explain how Mr Barnes' dyslexia impacted on his conduct, or might have served to mitigate his actions. Mr Geering submitted that the issue of dyslexia was simply irrelevant.

62. Similarly, the Disciplinary Panel had considered Mr Barnes was unlikely to repeat his conduct. It was not clear that the Disciplinary Panel had conducted an adequate risk assessment. Even if it had, it would be insufficient to balance out the aggravating features in this case. The absence of a risk of repetition does not reduce the damage done to public confidence by such conduct.

63. As regards the second ground, the case law derived from solicitors' cases suggested that there was only a narrow category of case where proven dishonesty did not justify expulsion from the profession and that only exceptional (or extenuating) circumstances would justify such a course. The case of **Chandra v GMC [2018] EWCA Civ 1898** indicated that there were no significant differences between professions when it came to the issue of dishonesty.

64. In Mr Geering's submission, none of the factors relied upon to justify not expelling Mr Barnes from the profession related to the misconduct in question and therefore that mitigation did not constitute exceptional circumstances (or "*extenuating circumstances* "as per the RICS Sanctions Guidance). No mention was made by the Panel of the need for extenuating circumstances or their satisfaction. Such mitigating features as the Disciplinary Panel had identified amounted in Mr Geering's submission to just Mr Barnes 'good character, the irrelevant diagnosis of dyslexia and a lack of risk of repetition. Mr Geering said that there was no reasonable basis for arguing that a member who acted dishonestly in order to gain a position of trust to improve his professional standing, who obfuscated when questioned about it, and who lacked insight, should not be excluded simply because he is of good character and will not repeat his dishonesty. In his submission, that diluted the concept of "*extenuating circumstances*" to the point of becoming meaningless.

Mr Barnes' submissions regarding the Appeal on Sanction

65. Mr Pataky on behalf of Mr Barnes submitted that the Appeal Panel was required to consider the reasoning of the Disciplinary Panel with a "spirit of generosity". In doing so, it should bear in mind the principles relating to adequacy of reasons explored in the context of the appeal on liability, in particular **Phipps v General Medical Council [2006] EWCA Civ 397** and **English v Emery Reimbold [2002] 1 WLR 2409**.

66. In essence there were two factors for consideration by this Panel, the degree of misconduct and whether the Disciplinary Panel had identified (and/or the Appeal Panel could identify) "extenuating circumstances" entitling the Disciplinary Panel to depart from the normal course, namely a sanction of expulsion. Mr Pataky said that it was not fatal to the Disciplinary Panel's decision that they might not have explicitly identified all the extenuating circumstances, if it was apparent from the determination and surrounding evidence that there were indeed such circumstances

67. Mr Pataky referred to the case of *Sawati v General Medical Council* [2022] EWHC 283 (Admin) which indicated that this Panel should interfere only if it identifies an error of principle by the Disciplinary Panel in carrying out the evaluation, or the evaluation was wrong because it falls outside the bounds of what the Disciplinary Panel could properly and reasonably decide.

68. Mr Pataky said that it was therefore not for this Panel to impose its own decision, but rather whether the Disciplinary Panel's decision fell outside the range of reasonable decisions. In his submission, this was not an unduly lenient sanction but was in fact near the upper end of the sanction range. In respect of ground one advanced by the RICS, the Disciplinary Panel clearly had in their mind the principles they needed to apply in deciding on sanction as could be seen from paragraph 52 of the determination. When one looked at the determination in the round, it was not "pulling its punches" and clearly had regard to all the material factors.

69. As regards the RICS' second ground, considered as whole the determination did indicate the requisite extenuating circumstances. The Disciplinary Panel's reference to "*Little insight if any*" was not suggesting that Mr Barnes had no insight. The Disciplinary Panel had assessed there was no risk of repetition in the light of the sanction (including the restrictions on Mr Barnes making further applications to the President's Panel and attending an ethics course) that they had intended to impose. While Mr Pataky accepted that dyslexia did not explain or excuse Mr Barnes' conduct, he asserted that it provided at least some context to his behaviour.

70. In addition, Mr Pataky maintained that viewed in context, Mr Barnes' misconduct would not be viewed by ordinary members of the public as very high on the spectrum of dishonesty. Contrary to the assertion of behalf of the RICS, this was effectively an isolated instance of dishonesty. While the misconduct had occurred in a professional context, it had not affected Mr Barnes' day to day practice, in which his conduct was exemplary (as demonstrated by the testimonial and character evidence). If Mr Barnes had not made this application to better himself professionally, this entire case would not have occurred.

Appeal Panel's Decision on the Appeal on Sanction

71. The Appeal Panel carefully considered all the written material with which it had been provided, including the helpful written submissions of both parties and the significant volume of case law on which the parties had relied. It listened carefully to the submissions of Mr Geering and Mr Pataky.

72. Having done so, the Appeal Panel first determined that the approach it should adopt to the appeal was as follows. It noted that under Rule 177 of the Rules, the burden was on the RICS to satisfy the Appeal Panel that the sanction was unduly lenient.

73. Guidance on what constituted impermissible undue leniency was to be found in the case of **Council for the Regulation of Health Care Professionals v (1) General Medical Council and (2) Ruscillo; Council for the Regulation of Health Care Professionals v (1) Nursing and Midwifery Council and (2) Truscott [2004] EWCA Civ 1356**. The Appeal Panel accepted that decisions on dishonesty may be awarded a lesser degree of deference, as per **General Medical Council v Theodoropoulos [2017] EWHC 1984 (Admin)** and that, as per **Sawati** (ibid.), it benefited from the same expert composition as the Disciplinary Panel. Lastly it accepted that there was a responsibility on the part of Disciplinary Panels considering a case of dishonesty to evaluate the required extenuating circumstances, as per **Wisniewska v NMC [2016] EWHC 2672 (Admin)**, and that in the absence of extenuating (or exceptional) circumstances, the usual course would be expulsion **(SRA v Sharma [2010] EWHC 2022 (Admin)** and **James** (ibid.)).

74. The Appeal Panel considered that although the Disciplinary Panel's reasoning on its evaluation of the aggravating and mitigating factors and what constituted the

extenuating circumstances was not a model of clarity, what the Panel intended and why is sufficiently clear. The Disciplinary Panel had been referred to the requirement for extenuating circumstances and the suggested matters which could constitute extenuating circumstances, particularly in the oral and written submission on sanctions made by Mr Barnes' counsel.

75. Taking the submissions made to the Disciplinary Panel on sanction and the determination on sanction as a whole, its reasoning became apparent. In paragraph 53 the Panel considered that "*though dishonesty of this nature would ordinarily result in expulsion*", the evidence suggested that "*it was an aberration that did not reflect his usual character or wider professional practice*" and it seems clear that this is in the context that they had in mind the sanction which they proposed to impose, namely a condition preventing him from applying to be an RICS adjudicator for at least 5 years and in practice thus foreclosing that possibility, and requiring him to attend a course on professional ethics, so that he could thus carry on and stick to his normal professional practice: thus identifying extenuating circumstances which allowed the Panel to avoid the ultimate sanction of expulsion in this case

76. The Appeal Panel does not consider that a Disciplinary Panel is prevented from taking into account the sanction it proposes to impose in considering extenuating circumstances..

77. The extenuating circumstances (i.e. "*although dishonesty of this nature would ordinarily result in expulsion*"(paragraph 53)) identified by the Disciplinary Panel were that: (i) the incident of dishonesty in this case was effectively isolated in that it had occurred outside Mr Barnes' normal professional practice; (ii) Mr Barnes had demonstrated some, albeit limited, insight; (iii) he was to be excluded from adjudication work for 5 years at least; and (iv) the Panel had in mind that the misbehaviour in this case could be remedied by that exclusion and the requirement to undertake ethics training. Given that a member excluded from membership of the RICS could in theory be restored to membership after a period of 12 months, the Appeal Panel could identify an argument that in the circumstances of this case, the public interest was better protected than if expulsion had in fact been ordered.

78. Taken as a whole, the Appeal Panel concluded that the decision on sanction in this case may have been lenient, but it was not unduly lenient. It was not therefore outside the range of reasonable responses to a finding of dishonesty. The Appeal Panel therefore rejected the appeal on sanction.

Publication and Costs

Publication

79. The Panel considered the guidance as to publication of its decisions The guidance provides, that it is usual for the decisions of the Panel to be published on the 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.

80. 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

81. The RICS made an application for its costs in respect of Mr Barnes' appeal. Mr Barnes' applied for his costs of successfully resisting the appeal on sanction. Both parties submitted a schedule of their costs to the Panel.

82. After some discussion, Mr Pataky accepted on behalf of Mr Barnes that it would be reasonable for him to make a contribution towards the RICS' costs of £3,500. The Panel agreed that it was appropriate for Mr Barnes to make a contribution towards the costs of the substantive 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 Barnes pay the RICS' costs of this hearing in the sum of £3,500.

83. Absent any agreement to the contrary, those costs, together with the costs ordered by the Disciplinary Panel of £25,000 (i.e. a total of £28,500) must be paid to the RICS within 35 days.