

## **Disciplinary Panel Hearing**

Case of

Warwick Estates Property Management Limited

On

Wednesday, 21 February 2018

At

RICS, Parliament Square, London, SW1P3 AD

### **Chairman**

Helen Riley (Surveyor Chair)

### **Members**

Gillian Seager (Lay Member)

Ian Hastie (Surveyor Member)

### **Legal Assessor**

Alastair McFarlane

### **RICS Representative**

James Lynch

### **The Firm's Representative**

Peter Mant, Counsel, 39 Essex Chambers

### **Audio Technician**

Jamie Kim

### **Hearing Officer**

Jae Berry

## **The formal charge is:**

*Between February 2012 and August 2014, you failed to conduct your undertaking, namely the property management of Marsden House in such a way as to ensure, so far as was reasonably practicable, that persons not in your employment were not thereby exposed to risks to their health and safety when using lifts provided at the building. In doing so, the Firm failed to carry out its professional work with due skill, care and diligence and with proper regard for the technical standards expected of it.*

## **Contrary to Rule 4 of the Rules of Conduct for Firms 2007**

### **Particulars**

- a. *On 23 December 2016, the Firm pleaded guilty to and was subsequently convicted of a single charge of failing to discharge the duty imposed by section 3(1) of the Health and Safety at Work Act 1974, relating to events which occurred on 30 August 2014 at Marsden House, Bolton and which resulted in a resident falling to his death down a lift shaft.*
  
- b. *The underlying acts or omissions resulting in the failure to maintain the lifts at Marsden House were:*
  - i. *Although the Firm engaged suitably qualified lift engineers, Zurich Management Services, to examine the lifts at six monthly intervals and despite paying Zurich's invoices for doing that work and providing those reports, the Firm failed to ensure that they actually received those reports. Had the Firm seen those reports, it was evident that significant faults in the operation of the lifts had been identified and required urgent attention, that ultimately was not taken.*
  
  - ii. *Maintenance and emergency call out reports prepared by a third party, Ark Elevators, were provided to the Firm and those reports referred to instances of lifts becoming stuck between floors and passengers forcing the doors open to escape, and some reports of the auto-dialler system not working. Despite receiving these reports, the Firm failed to*

*investigate and seek to rectify the lifts operation in order to ensure that should persons become trapped in a lift, there was a prompt and reliable system in place ensuring their rescue.*

- iii. The Firm failed to provide appropriate Health & Safety training for the building caretaker, Mr. Lamb, to enable him to understand who specifically should be notified in the event of a lift failure or emergency*

## **DETERMINATION**

## **REPRESENTATION**

1. Mr. Lynch represented RICS and Mr. Mant represented Warwick Estates Property Management Limited ("The Firm").

## **PRELIMINARY APPLICATION**

2. Mr. Lynch and Mr. Mant made a joint application under Rule 41 h by consent to amend the charge as follows:

*"a. On 23 December 2016, the Firm pleaded guilty to and was subsequently convicted of a single charge of failing to discharge the duty imposed by section 3(1) of the Health and Safety at Work Act 1974 to ensure so far as reasonably practicable that persons were not exposed to risks to their health and safety. ~~relating to events which occurred on 30 August 2014 at Marsden House, Bolton. and which resulted in a resident falling to his death down a lift shaft .~~"*

*"b (iii) The Firm failed to provide focused training concerning its specific work duties ~~to appropriate Health and Safety training~~ for the building caretaker Mr Lamb, to enable him to understand who specifically should be notified in the event of a lift failure or emergency."*

3. The Panel was satisfied that the amendment could be made without injustice. Accordingly, it granted the amendment sought.

## **BACKGROUND**

4. The firm has been regulated by RICS since August 2012.
5. There are eight principals of the Firm. Four of the principals, Karl Ardern, Nicholas Rich, Craig Stephens and Abigail Teece are associate members of RICS (AssocRICS). The other four principals are not members of RICS.
6. The Firm was appointed as Managing Agents for Marsden House, a mixed use residential and commercial building in Bolton, in February 2012.
7. On 30 August 2014, Mr. Craig Jones, a resident of Marsden House, was returning to his flat on the 9<sup>th</sup> floor. Mr. Jones and a friend, Mr. Stedford, were travelling up in the lift when the lift suddenly stopped between the 4<sup>th</sup> and 5<sup>th</sup> floors. Mr. Jones pressed the emergency button but an automated message informed the occupants that it had not been possible to connect their call. Mr. Jones told Mr. Stedford that this was a regular occurrence and that he had had to self-rescue on a number of occasions in the past.
8. Mr. Jones pushed open the internal lift doors, revealing the top 18 inches of the 4<sup>th</sup> floor landing. He attempted to lower himself through the gap and onto the 4<sup>th</sup> floor landing. Mr. Jones slipped and fell into the lift shaft where he was impaled on a ladder that was kept there for maintenance purposes. Realising what had happened, Mr. Stedford had to lower himself through the same gap to try and obtain help for Mr. Jones. Mr. Jones died in hospital later that day.
9. A coroner's inquest ruled that this was an 'accidental death'. However, the Firm was subsequently prosecuted for a failure to discharge its duties imposed under S3(1) of the Health and Safety at Work Act 1974 (extract at page 23), which reads:

*“It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.”*

10. Peter Smith, one of the non-Member principals, pleaded guilty to the charge on behalf of the Firm at an early stage in proceedings. The Firm was convicted on 27 June 2016.
11. On 23 December 2016, His Honour Judge Clayson passed a financial penalty of £120,000 plus costs of £45,000 and a victim surcharge of £120, payable by way of 12 equal monthly instalments

## **RICS' SUBMISSIONS**

12. RICS relied upon the sentencing remarks of the Judge, where he highlighted three failures by the Firm that amounted to a breach of section 3(1) of the Health and Safety at Work Act 1974:
  - a. Although the Firm engaged suitably qualified lift engineers, Zurich Management Services, to examine the lifts at six monthly intervals and despite paying Zurich's invoices for doing that work and providing those reports, the Firm failed to ensure that they actually received those reports. Had the Firm seen those reports, it was evident that significant faults in the operation of the lifts had been identified and required urgent attention, that ultimately was not taken.
  - b. Maintenance and emergency call out reports prepared by a third party, Ark Elevators, were provided to the Firm and those reports referred to instances of lifts becoming stuck between floors and passengers forcing the doors open to escape, and some reports of the auto-dialler system not working. Despite receiving these reports, the Firm failed to investigate and seek to rectify the

lifts operation in order to ensure that should persons become trapped in a lift, there was a prompt and reliable system in place ensuring their rescue.

- c. The Firm failed to provide appropriate Health & Safety training for the building caretaker, Mr Lamb, to enable him to understand who specifically should be notified in the event of a lift failure or emergency.

13. RICS invited the Panel to rely upon the Certificate of Conviction as prima facie evidence that the Firm failed to comply with their statutory duties under S3(1) of the Health and Safety at Work Act 1974, during their appointment as Managing Agents for Marsden House. (para 41.d of the Disciplinary, Registration and Appeal Panel Rules) and to rely upon the basis of plea and the Judge's sentencing remarks as evidence of the facts giving rise to that conviction.
14. RICS contended that by acting in breach of the Health and Safety at Work Act, to the extent that their actions resulted in a conviction, the Firm failed to act with due skill, care and diligence and with proper regard for the standards expected of it contrary to Rule 4 of the Rules of Conduct for Firms 2007.
15. Further, RICS submitted that such a failure to comply with a RICS rule may render the Firm liable to disciplinary action in accordance with Bye-Law 5.3.2(b). In this case the Firm failed, in the course of its business, to comply with statutory requirements and was convicted of a criminal offence as a result. The Firm exposed a great number of people to risk over a sustained period and that breach is sufficiently serious, in RICS's view, as to render the Firm liable to disciplinary action.
16. The incident, the subsequent inquest and the criminal proceedings attracted significant media interest. RICS submitted that the nature of the negative press serves to diminish the reputation of the profession and bring RICS into disrepute. It is important that the public can trust RICS members to undertake their duties with the utmost care and diligence. The Firm would therefore be liable to disciplinary action in accordance with Bye-Law 5.3.2(a).

17. RICS submitted that this case is of course made more serious by Mr. Jones' death. However, any failing that exposes occupants of a building to unacceptable risks to their health, should be treated seriously and it is not only those breaches resulting in serious injury or death that render a firm liable to disciplinary action.

### **THE FIRM'S SUBMISSIONS**

18. The Firm admitted the facts and that the facts rendered it liable to disciplinary action

### **BURDEN AND STANDARD OF PROOF**

19. RICS is required to prove the allegations to the civil standard; that it is more likely than not that any event material to those allegations occurred.

### **DECISION ON FACTS**

20. On the basis of the Firm's admission, the Panel finds the factual allegation proved.

### **LIABILITY TO DISCIPLINARY ACTION**

21. The Panel reminded itself that liability to disciplinary action was a matter for the judgment of the Panel. On the basis of the facts found the Panel had to decide whether or not the Firm is liable to disciplinary action. In coming to its conclusion, the Panel accepted the advice of the Legal Assessor. The Panel reminded itself that as the professional regulator, it had a different role and function to the criminal courts.
22. The Panel noted that the Firm accepted that its failings rendered it liable to disciplinary action and took this acceptance into account in making its judgment.
23. The Panel decided that the Firm is liable to disciplinary action in accordance with Bye Law B5.3.2.a, in that it has conducted itself in a way liable to bring RICS into disrepute by committing the serious criminal offence under the Health and Safety at Work Act 1974. The Panel also decided that the Firm is liable to disciplinary action in accordance with Bye Law B5.3.2.c as a result of its failure to comply with Rule 4 of the Rules of Conduct for Firms 2007. The Panel was satisfied that the Firm's failures

were serious and undermined the reputation of the profession and public confidence in it. The Firm failed to actively maintain an overview of the safety of the lift operations. The failures led to it not appreciating that residents and visitors were intermittently becoming trapped in lifts and on occasions seeking to self-rescue. These problems happened “quite often” in 2012 to 2014 and were described by the sentencing Judge as “a serious accident waiting to happen”. The Judge further commented “Had those improvements been made, it is in my view likely that the incident with which this case is concerned would not have happened.” The Panel considered that the case is made more serious by the death of Mr Jones. It accepted RICS’s submission that the Firm’s failings exposed a great number of people to risk over a sustained period. It also noted that the sentencing Judge considered the Firm’s proposition that had it been aware of the problems with the lifts, their rectification would not have prevented Mr Jones’ death to be “wholly unsustainable”. The Panel also bore in mind that in relation to the criminal sentencing guidelines, the Judge ascribed the “medium” culpability categorisation and stated that this was not a case where there were “no or very inadequate systems in place”.

24. Considering all these matters, the Panel had no hesitation in determining that the Firm’s failures were sufficiently serious to render it liable to disciplinary action.

## **SANCTION**

25. The Panel next considered sanction. It noted the submissions of Mr. Lynch on behalf RICS and Mr. Mant on behalf of the Firm. It had regard to the RICS Sanctions Policy and bore in mind the overriding principle of proportionality.
26. The Panel also received oral evidence from Mr. Ardern, a Director of the Firm, who indicated that he had been the person primarily responsible for dealing with the case through the Health & Safety Executive investigation and the criminal case. He also detailed the various steps and systems and procedures the Firm has put in place since this tragedy. These included what Mr. Ardern contended were multiple checks and balances through a designated Risk Management Department; updates to their IT

system; regular contact with local fire brigades and a bespoke in house training academy for their staff on health and safety issues.

27. The Panel considered that the Firm had demonstrated that it had taken significant remedial steps to put in place systems and procedures to reduce the risk of such failures re-occurring.
28. However, the Panel was far less impressed with Mr. Ardern's evidence as to the Firm's understanding of the impact on the Firm's failings on the reputation of the profession and the role of its regulator. It was concerned particularly to note that, despite detailed questioning, Mr. Ardern did not demonstrate any real insight into the impact of such failings on the standing of the profession.
29. The Panel bore in mind 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.
30. The Panel also took into account that the Firm had received a criminal sanction of a fine of £120,000 for the offence it had committed, but reminded itself that, as the Regulator, this Panel has a different function to the criminal courts and that its overarching duty is to ensure public protection and to declare and uphold proper standards of conduct and to maintain the reputation of the profession.
31. The Panel considered carefully the mitigating and aggravating factors of this case as well as the issue of proportionality in weighing up the most appropriate response.
32. The Panel considered that the following aggravating factors were present:
  - There had been a serious risk of harm to the public
  - The Firm's failings contributed to the death of Mr. Jones
  - The failings resulted in a criminal conviction

- The failures were over a prolonged period of time
- The absence of five Thorough Examination Reports from the lift experts were unnoticed by the Firm through their system failure
- The Firm had demonstrated only very limited insight into the impact of such failings on the reputation of the profession and the role of the RICS as its regulator

33. The Panel considered that the following mitigating factors were present:

- The Firm has admitted the charge
- The breaches were not intentional
- It has no previous regulatory history
- It has engaged with RICS' disciplinary process
- It has put systems and processes in place to reduce the risk of repetition since the failings
- There is no evidence of any repetition of these failures

34. The Panel first considered whether to take no action. The Panel concluded that the failures were far too serious for this to be a realistic option.

35. The Panel went on to consider a Caution but concluded that the failures could not be described as minor. It concluded that a Caution would not be proportionate or appropriate, given the gravity of the failures.

36. The Panel considered that the combination of a Reprimand and a Fine would be the sufficient and proportionate sanction to mark the gravity of the failures where there had been a risk of harm and to reflect the damage such failings cause to the standing and reputation of the profession with the public.

37. In all the circumstances and mindful of the size of the Firm and the gravity of the failings, the Panel determined that a fine of £20,000 would be appropriate and proportionate.

38. Given the Panel's acceptance that systems had been put in place, it was satisfied that there was a low risk of repetition. Therefore, it did not consider that a condition of an audit to ensure compliance, as suggested in the alternative by Mr. Mant, was necessary or proportionate.

## **PUBLICATION**

39. The Panel has 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. It did not consider that there were any exceptional reasons not to follow the usual presumption of publication.

## **COSTS**

40. RICS made an application for costs in the sum of £10,378. This did not include its costs for a Direction Hearing on 14 February 2018, where RICS had attempted to admit evidence relating to a statement detailing exchanges between the Firm and the Case Presenter for RICS at the first hearing of this case (which was adjourned) on 22 November 2017. RICS was unsuccessful in this application. The Panel saw an e-mail chain in relation to this evidence. Mr. Mant for the Firm, contended that as the Chair ruled on 14 February 2018 that it would be "grossly unfair" to allow RICS to rely on such evidence and that it was "highly undesirable" to encourage parties to rely on such statements, these were reasons for departing from the ordinary rule that costs should not be awarded against a regulator. Mr. Mant sought to set off the Firm's costs incurred for the Direction Hearing against RICS' costs summary and also queried the quantum of costs in respect of RICS preparation time.
41. The Panel accepted the advice of the Legal Assessor. It had regard to the principles set out in *Baxendale-Walker v. The Law Society*. While it noted that the application from RICS on 14 February 2018 was unusual and unsuccessful, it was not persuaded by Mr. Mant's arguments that RICS should be required to pay the Firm's costs for that

hearing. In the circumstances, the Panel considered that there was no basis to depart from the “normal” rule in regulatory proceedings in this case.

42. As regards RICS’ costs, the Panel was satisfied it was just and proportionate to make an award of costs in the sum of £10,378 as claimed by RICS.

## **APPEAL PERIOD**

43. The Firm has 28 days, from the service of the notification of the decision, to appeal this decision in accordance with Rule 59 of the Rules.
44. 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.