SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 54
XA95-20

Lord Justice Clerk
Lord Turnbull
Lord Woolman

STATEMENT OF REASONS

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal under Section 22 (1)(e) of The Architects Act 1997

by

JAMES CRAIGIE TANNAHIL THOMSON

Appellant

against

THE ARCHITECT REGISTRATION BOARD

Respondent

Appellant: Melvin-Farr, Adv; Allan McDougall
Respondent: Lindsay QC; Anderson Strathearn LLP

28 September 2021

Introduction

[1] On 25 September 2020 the respondent's Professional Conduct Committee ("PCC"') determined that the appellant was guilty of Unacceptable Professional Conduct and imposed the sanction of erasure from the register, with the possibility of applying to be re-

admitted after a period of two years. The appellant challenges the PCC's decision to conduct the hearing in his absence. He also challenges the sanction as excessive.

Factual background,

[2] The appellant, as a registered architect, was instructed in connection with the construction of a block of flats in Troon in 2014. His role included checking the quality of building work, ensuring compliance with approved drawings, carrying out, and reporting on, site inspections, and issuing the final inspection and professional consultant's certificates. In November 2016 the respondent's Investigations Panel determined that the appellant had no case to answer to a professional complaint based on allegations of inadequate soundproofing.

[3] A further complaint relating to a lack of fireproofing, intimated in November 2018, prompted a reconsideration of the case in terms of Rule 13 of the Investigations and Professional Conduct Committee Rules. An Investigations Panel concluded that the appellant had a case to answer in respect of either unacceptable professional conduct or serious professional incompetence, the nub of the complaint being that he had issued the relevant final certificates when the building was not constructed in conformity with (a) the minimum requirements of Building Regulations regarding fire resistance; and (b) the drawings approved by Building Control.

[4] A hearing was scheduled start to start before the PCC, on 30 March 2020. On 25 February 2020 the appellant submitted an Acknowledgement of Notice of Hearing form in which he indicated that he admitted both (a) and (b) above, and that these facts constituted unacceptable professional conduct. He denied serious professional

incompetence. The form also stated that he would be legally represented and that he did not intend to call any witnesses.

[5] The appellant sought to have the ARB proceedings sisted or adjourned pending resolution of outstanding civil proceedings, arguing that to proceed when there were "live" civil proceedings would be unfair. Those proceedings, in which the appellant was the defender, had been sisted at his instance in February 2018. It was asserted that he was constrained from participating by the civil proceedings, in which his insurance required that he refrain from commenting on the matters at issue without permission of his insurers. No evidence of this was provided. His request was refused. The committee chair stated the following reasons:

> "The civil proceedings are effectively stayed and are not being actively progressed. Therefore, any adjournment would be of indeterminate length and be dependent upon the parties re-activating the civil matter. I do not consider that this would be in the public interest or be fair to the ARB.
>
> The regulatory proceedings are for a different purpose and have a different focus even though the factual matters may overlap. Any findings made by the Professional Conduct Committee would not bind the civil courts. I cannot see how Mr Thompson's (sic) participation in the regulatory process would prejudice those proceedings.
>
> I have seen no evidence that Mr Thompson (sic) would be constrained by his insurers to such an extent that he would be unable to give evidence or participate in a hearing. Mr Thompson (sic) is professionally obliged to co-operate with his regulator and provide evidence to them.
>
> I have seen no evidence from the insurer that would support the position that Mr Thompson's (sic) participation in a hearing would prejudice any civil proceedings beyond his general obligations under the policy.
>
> In the circumstances I do not consider that the matter should be adjourned until the outcome of the civil proceedings has been determined."

[6] As a result of the pandemic the hearing of 30 March was postponed to 17 August 2020. By letter of 24 July, the appellant's agents requested that this hearing be postponed.

The reasons advanced previously were repeated. It was also submitted that since courts had started to re-allocate cases adjourned for the lockdown it was impractical for the appellant's agent to be able to attend the hearing, since he might be required to attend court for other cases; that a video hearing was inappropriate to the subject matter as it was more difficult to assess the evidence of witnesses given in this way; that a video hearing would also mean that the witnesses would require to have access to the productions in advance of the hearing; and that the appellant's solicitor was awaiting a date for treatment for a medical condition. No date for such treatment was provided. The request was refused on 3 August. It was determined that the reasons previously given remained valid and that there was no unfairness in a video hearing.

[7] On 14 August, the appellant's solicitor emailed the PCC stating that neither he nor the appellant would attend the hearing. Written submissions re-stated the request for an adjournment. They also addressed mitigation, in the event that the PCC allowed the hearing to proceed and reached an adverse conclusion.

[8] At the outset of the hearing the PCC considered whether it should proceed to hear the matter in the absence of the appellant and his agent. It had regard to para 14 of the Rules, which provides:

> "If the [architect] fails to appear in person or by his or her legal representative at a hearing or adjourned hearing of a Charge the Hearing Panel may, if satisfied that the [architect] has been given an adequate opportunity to appear before the Hearing Panel to argue his or her case and has provided no sufficient reason for non-attendance, hear the case in the [architect's] absence."

The PCC concluded that the reasons for previous refusal of the request remained valid. It could identify no barrier to effective participation by the appellant, in person or through his agent. In the documentation submitted he had made a full admission that his conduct

amounted to unacceptable professional conduct, presumably with the approval of his insurers. The PCC could identify no reason why matters should not proceed. There was no unfairness in a virtual hearing conducted via video link. There was a public interest in the expeditious disposal of matters of this kind. The PCC therefore proceeded with the hearing.

The substantive decision of the PCC

[9] The PCC found the factual allegations proven and concluded that the appellant's actions amounted to unacceptable professional conduct. Additional time was required to address the issue of sanction and so the PCC continued the hearing until 24 September. The appellant and his representatives were notified of the continued date and were sent copies of the PCC's decision.

[10] On 23 September the agent confirmed that there would again be no attendance for the appellant, for the reasons previously submitted. They asked that the PCC consider previously tendered submissions "in mitigation". Again, in light of the previous applications, the correspondence and having taken account of the relevant authorities the PCC considered that it was fair and proportionate to proceed to determine the issue of sanction in the absence of the appellant.

[11] The solicitor for the respondent directed the committee to the relevant aggravating and mitigating factors. Aggravating factors were: the very serious effect of the failings of the appellant on the residents of the flats; the absence of any insight on his part into his actions (he continued to blame others for his failings); and his failure to provide any evidence of corrective steps to reassure the PCC that his failings would not be repeated. Regarding mitigation, there were no adverse regulatory findings against the appellant in a lengthy career of 30 years and he had, to a limited extent, provided responses even though he had

not participated in the hearing process. The PCC also had regard to the written submissions advanced by the appellant, which emphasised his lengthy career with no previous complaints and submitted that this matter occurred in the context of one project in which the builder had deliberately attempted to mislead him.

[12] The PCC acknowledged that the purpose of imposing a sanction was not to be punitive although it may have that effect. Regard had to be given to the public interest. The PCC took into account the appellant's interests, the ARB Sanctions Guidance and the need to act proportionately in light of the aggravating and mitigating factors. It considered that the conduct was sufficiently serious to require the imposition of a sanction. It then considered potential sanctions in ascending order of severity, concluding that a reprimand, penalty order or suspension did not reflect the seriousness of the conduct. The only appropriate and proportionate sanction to uphold the reputation of the profession and protect the public was erasure. The PCC recommended, however, that the appellant should be allowed to apply for restoration to the register in no less than two years' time.

Grounds of Appeal

[13] The appellant stated three grounds of appeal. Only the second and third grounds were insisted on, namely that he had not received a fair hearing, the PCC having failed to recognise a risk that ongoing civil proceedings prevented him from participating in his defence; and that the sanction was excessive.

[14] The revised note of argument for the appellant sought to advance an argument not foreshadowed in the grounds of appeal, based on an assertion that there had been a delay in progressing the complaint which deprived him of a fair trial. This is the second attempt by him to introduce a new matter not addressed in the grounds of appeal. The first attempt

related to an argument that the decision of the Investigating Panel that there was no case to answer had been a final determination of the issue. That matter was disposed of at a procedural hearing, at which Lord Malcolm refused to allow the issue to be raised. He ordained the appellant to lodge a revised Note of Argument addressing only issues pertinent to the appeal.

[15] We determined that the appellant should not be allowed to raise the issue of delay, which in our view is clearly a new matter. It is not referred to at all in the grounds of appeal. A general reference to fairness under reference to Article 6 is not sufficient to allow the appellant to advance the point, particularly where the main thrust of the argument is that there should have been further delay in the ARB hearing to allow the civil proceedings to be disposed of. The sole basis upon which Article 6 is relied upon in the grounds of appeal relates to the (alleged) adverse effect on the appellant's position in the civil proceedings. There is no explanation for seeking to raise the question of delay at this late stage of the appeal, and we declined to allow the point to be advanced.

Submissions for the appellant

[16] Counsel for the appellant explained that he had not been made aware of the contents of the Acknowledgement of Notice of Hearing until only a few days prior to the hearing of the appeal. However, he did not consider that this affected the substantive submissions he intended to make, or those advanced in the written note of appeal. He submitted that where a party is not present at proceedings, the matter should be adjourned (*Brabazon-Drenning* v *United Kingdom Central Council for Nursing Midwifery & Health Visiting* [2001] HRLR 6, paras. [18] and [22]) to ensure a fair trial. The discretion to proceed with a hearing in such circumstances "must be exercised with great care and only in rare and exceptional cases that

it should be exercised in favour of a trial taking place or continuing particularly if the defendant is unrepresented" - *GMC* v *Adeogba* [2016] 1 WLR 3867, at page 3873 (citing *R* v *Hayward* [2001] QB 862). The seriousness of the case against the practitioner is or should be a relevant factor in whether an adjournment should be granted. Reference was made to *Tait* v *Royal College of Veterinary Surgeons* 2003 UKPC 34.

[17] The appellant's agents had told the PCC that he could not effectively participate because of the existence of the civil proceedings; and that because of a medical issue with the solicitor for the appellant, the practitioner would not be legally represented at the hearing. In order to provide a fair trial the PCC should have further adjourned the hearing to permit the appellant to be represented. There was a risk that the PCC would reach the wrong conclusions without hearing additional or contrasting evidence.

[18] In any event, the hearing should have been adjourned in relation to sanction, to allow the appellant the opportunity to influence the PCC's decision in that regard. The refusal to grant an adjournment ensured that he did not receive a fair hearing.

[19] As to sanction, its principal purpose was the preservation and maintenance of public confidence in the profession, rather than the punishment of the practitioner (*Raschid* v *General Medical Council* **[**2007] 1 WLR 1460). A clearly inappropriate sanction could be revised by an appellate court - *Salsbury* v *Law Society* **[**2009] 1 WLR 1286, para 30. The sanction ordered was not appropriate. The PCC could not, as it asserted, have considered all the mitigating circumstances when the appellant was not in attendance. It did not set out what weight it attached to the submissions in mitigation. It failed to explain to the appellant why his long career as an architect warranted erasure or why one error of judgement warranted erasure. This evidence of good character is relevant to the assessment of knowledge with regard to the issue of disciplinary matters – see *Bryant* v *Law Society* [2009] 1

WLR 163. The appellant's age and the practice and employment of other architects were not taken into account. Sanction should have been confined to a period of reprimand or a short period of suspension from practice (*Bijl* v *General Medical Council* 2001 UKPC 42).

Submissions for the respondents

[20] The decision of the PCC was lawful and reasonable. The hearing was procedurally fair at common law and in terms of Article 6 ECHR. The PCC acted in accordance with the ARB rules (and in particular Rule 14) at all times, along with the respondent's Guidance. It struck a careful balance between fairness to the appellant and the wider public interest.

[21] There was no doubt that notice of the hearing had been correctly served on the appellant. The PCC took into account all of the reasons advanced by the appellant. It exercised great care and caution in reaching its decision and carefully considered the overall fairness of the proceedings. It was satisfied that the appellant had been given adequate opportunity to participate and that he had chosen not to do so. It provided clear reasoning for reaching the view that it was not appropriate to adjourn the hearing.

[22] The sanction was not excessive or disproportionate. The PCC took into account all of the mitigating factors and all relevant considerations. This court could only interfere with the sanction imposed if it was excessive or disproportionate or plainly wrong. The sanction imposed was none of those.

Decision and analysis

Ground 2

[23] The only basis upon which it was stated in ground 2 that the failure to adjourn was unfair to the appellant was that his ability to participate was impeded because of the requirements of his insurers in the civil proceedings. Strikingly, this point did not feature

anywhere in the appellant's Note of Argument or in oral submissions. Having regard to our observations at paras [14] and [15] above, we had some hesitation about whether we should even consider these. However, there had been no objection from counsel for the respondent, who was able to answer the points, and they had been considered in detail by the PCC, so we proceeded to consider them. They are in any event entirely without merit.

[24] The appellant's reliance on *Brabazon* and *Adeogba* as providing a presumption in favour of adjournment if the practitioner is not present or represented is misplaced. The former was a case where the appellant had been unable to attend due to medically established ill health rendering her unfit to do so. Standing that clear evidence, there had been no compelling public interest in allowing the hearing to proceed. The latter was a case where the appellant was unrepresented, which was not the case here. Throughout the submissions the appellant conflated the issue of attendance and representation. The appellant was represented throughout the proceedings by law agents. Those agents chose, presumably on instructions, not to attend the hearing. There is no explanation for their declining to do so. Even if they had legitimate concerns about the effect of the civil proceedings, the agent could have attended to represent the appellant's interests.

[25] There was no evidence to support the assertion that the appellant would be constrained by his insurers to such an extent that he would be unable to give evidence or participate in a hearing. It seems highly unlikely that this would be the case, standing his professional obligation to co-operate with the statutory regulator, and as we have noted this was not the subject of submission during this appeal. In any event, in response to the notice of hearing the appellant had admitted the key facts and unacceptable professional conduct. The civil proceedings had been sisted for a period of over two years, at the instance of the appellant, and there was no indication that they might become live any time soon. That this

meant that any adjournment would be of indeterminate length was a matter which the PCC was entitled to take into account. It was also entitled to recognise that the regulatory proceedings were for a different purpose and had a different focus from those of the civil action.

[26] As *Brabazon* indicates, a medical incapacity on the part of the subject of disciplinary proceedings can amount to good reason for a tribunal being adjourned, particularly where credible medical evidence in support is received. There is no basis to extend this to the person's representative, save perhaps in exceptional circumstances which do not exist here. No information was placed before the committee to suggest that an appointment had been arranged for the period of time over which the hearing was scheduled: the highest the matter ever came was that the agent was awaiting treatment. There is in any event no reason why another agent or counsel could not have appeared.

[27] There was no unfairness in conducting the hearing by video. The submission that there was, and the submission that the PCC, in the absence of the appellant or his representative, "might reach the wrong conclusion" without hearing additional or contrasting evidence, are devoid of content. There has never been any suggestion that such evidence might be led, and the terms of the Acknowledgement of Notice of Hearing form are to directly contrary effect. The argument that the appellant was deprived of a fair trial is also devoid of content, being nothing but assertion without any supporting foundation. The submissions do not explain what the anticipated result of his participation might have been, or what different result might have followed had he attended. In acknowledging notice of the hearing, the appellant indicated that he intended to admit the allegations specified against him, that he would not be calling any witnesses and that he admitted that the allegations amounted to unacceptable professional conduct. There was no indication that he

intended to mount a challenge to anything other than the assertion that the conduct amounted to serious professional incompetence. The findings made against him appeared to reflect that which he accepted. In these circumstances it is impossible to see that he has been denied any form of fair hearing.

[28] The appellant plainly waived his right to attend a hearing of which he had proper notice. There was a public interest in the hearing proceeding. It related to conduct taking place in 2014 and the hearing had already been adjourned once. In short, there was no good reason to adjourn the hearing or not to proceed in the appellant's absence. The PCC had regard to the requirements of Rule 14 and complied with it.

[29] As to the issue of adjourning for sanction, this is in fact the course the PCC took. The appellant again refused to attend, and his agent did likewise. He was not deprived of representation by any action of the panel, nor was he deprived of the opportunity to make representations regarding sanction. He could have done so in person, in writing or through his agents. He chose not to do so. In any event, he had made written representations on the issue of mitigation. Moreover he does not specify what other material he maintains the PCC should have taken into account.

Ground 3

[30] As to the sanction itself, we have had regard to the comments made by this court in *Professional Standards Authority for Health and Social Care* v *Nursing and Midwifery Council* 2017 SC 542 (para [25]) (and approved in *GMC* v *Medical Practitioners Tribunal* 2019 SLT 24 para [25]):

> "The court was favoured with the citation of a large number of previous decisions in cases of this kind. There is a well-established body of jurisprudence relating to the proper approach to appeals from regulatory and disciplinary bodies. The general principles can be summarised as follows. In respect of a decision of the present kind,

> the determination of a specialist tribunal is entitled to respect. The court can interfere if it is clear that there is a serious flaw in the process or the reasoning, for example where a material factor has not been considered. Failing such a flaw, a decision should stand unless the court can say that it is plainly wrong, or, as it is sometimes put, 'manifestly inappropriate'. This is because the tribunal is experienced in the particular area, and has had the benefit of seeing and hearing the witnesses … The same would apply in the context of a review of a penalty."

[31] The sanction applied by the PCC was one which was open to it, in terms of section 15(1)(a) of the Architects Act 1997, a finding of unacceptable professional conduct having been made. In reaching the decision, it followed the correct procedure as set down by the ARB rules, by considering the sanctions in order of ascending severity. It provided reasons for its decision. The PCC took into account the various points in aggravation and in mitigation.

[32] The PCC is a specialist tribunal whose findings must be approached with respect. To entitle it to interfere with the decisions of such a tribunal a court would require to find a serious flaw in the reasoning, a serious departure from proper procedure which vitiated the proceedings, or a determination which could be clearly said to be "plain wrong". There is no basis for any such findings. In its decisions on adjournment and sanction alike the PCC had regard to all relevant and material circumstances. It carefully and appropriately balanced the interests of the appellant with those of the public.

[33] Its approach to sanction was entirely consistent with its own Indicative Sanctions Guidance and with authority (*Raschid* v *General Medical Council* [2007] 1WLR 1460). It concluded that the conduct was so serious that it diminished the appellant's reputation and that of the profession generally, in addition exposing those who relied on his professional certificates to substantial detriment and financial loss. It undermined the integrity of professional certificates, which of course exist in the public interest. The appellant was instructed by the developer for the express purpose of carrying out site inspections to check

the quality of construction of a block of 9 flats in Troon. Purchasers relied on the assurances provided in the various certificates signed by the appellant. The PCC was entitled to consider this to be a serious matter justifying erasure.

Conclusion

[34] For these reasons we refused the appeal. Counsel for the respondents moved for expenses. That was not opposed by the appellant. Being satisfied that expenses should follow success we granted the motion.