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DISCIPLINARY PANEL HEARING DECISION

IN THE CASE OF	MARK DOUGLAS	
MEMBERSHIP NUMBER	PW.0673	
CASE REFERENCE	PS-2022-078	
DATE & TYPE OF PANEL HEARING	22 March 2023	PAPER HEARING
PANEL MEMBERS	**CHAIR, Legally qualified independent member:** His Honour Edward Bailey **FPWS Members:** Andrew McAllister - Fellow Colin Chambers - Member	
CHARGES CONSIDERED	**Ground 1: Breach of Rule 3.1 of the Faculty's Code of Conduct (Ethical Behaviour)** Acting as an Agreed Surveyor despite a conflict of interest given apparently longstanding contractual relationship with the Adjoining Owner SBHA. **Ground 2: Breach of Rule 3.2 of the Faculty's Code of Conduct (Ethical Behaviour)** Failure to act impartially given Award states that wall is sufficient for AO and requires BO to pay full cost which suggests favouring the AO with whom the Member apparently has a contractual relationship. **Ground 3: Breach of Rule 4.1 of the Faculty's Code of Conduct (Competence)** Asserting that planning permission was required prior to making an award; Instructing a boundary expert (post Award) involving unnecessary work and expense. **Ground 4: Breach of Rule 5.1 of the Faculty's Code of Conduct (Service Standards)**	

	Failed to act fairly with courtesy and respect with regard to the service standards expected. More particularly (1) lack of courtesy, (2) No or inadequate communication, (3) Delay in replaying to emails and in providing information requested, eg time taken to approve arboriculturist reports, (4) Inadequate CHP and failure to respond to complaint. **Ground 5: Breach of Rule 7.1 and 7.2 of the Faculty's Code of Conduct** **(Cooperation)** Failed to provide information and documentation in response to Faculty requests in letters dated 22 June and 5 July 2022.
KEY DOCUMENTS CONSIDERED	Charge Sheet Investigator's Case Summary Complainant's letter to Member dated 14 March 2022 with attached log of events Complaints/ Disciplinary Questionnaire dated 10 May 2022 Member's response to complaints dated 10 January 2023 Party Wall Award dated 24 January 2022 (with Structural Report by Damola Awoyokun following visit on 10 November 2021)

Background

1. The Complainant, Mr Tobias Lindvall, and his wife Alice Lindvall, are the owners of the dwelling house 74 Richford Street, London W6 7HP. This property backs onto another residential building, 194 Hammersmith Grove, London W6 7HG. At some point in the past it would appear that a section of the back garden to 194 Hammersmith Grove has been incorporated into the back garden of 74 Richford Street. This appears most clearly from the F Line Designs drawing number FL-02 dated November 2021 which is attached to the Party Wall Award made by the Member on 24 January 2022. As a result of this incorporation, 74 Richford Street has a wall on or at the line of junction with part of the garden of 196 Hammersmith Grove, London W6 7HG, ('the wall'), as well as with the garden of 194 Hammersmith Grove. 196 Hammersmith Grove is owned by the Shepherd's Bush Housing Association ('SBHA').

2. In September 2021 the Complainant wished to carry out works of refurbishment and repair to the wall. The Complainant made contact both with Andrew Byrne who was acting for SBHA and also the Member in his capacity, through his company "b3-cc", as retained surveyor for SBHA and informed them as to his proposed works to the wall. The Complainant was told that he needed to serve a Party Wall Notice. This the Complainant did, serving a Notice of proposed works under s.2 1996 Act dated 17 September 2021 attached to an email of the same date. This was a notice prepared by the Complainant without professional assistance. In the email of 17 September 2021 the Complainant explained to Mr Byrne that the Member had expressed the view that he should be appointed as Agreed Surveyor both to prepare a Notice and to prepare

an Award. The Complainant expressed his concern as to the cost of the exercise, the Member having quoted £1,500 plus vat, and pointed out that an Award was only required if there was a dispute. In essence the Complainant was asking SBHA to agree to his works without the necessity of an Award.

3. There is no reply by Andrew Byrne to the email of 17 September 2021 before the Panel, but it appears that SBHA did require an award. This is expressed in the Member's email of 21 September 2021, in which he states that the Complainant should seek professional advice but also suggests that while he will definitely be acting as Adjoining Owner Surveyor he might instead act as Agreed Surveyor. The Complainant's Notice can be, and indeed was, criticised by the Member as not complying with s3 of the Act. The Member states in his email of 21 September 2021 that "we [ie SBHA] are still yet to be served with a robust party wall Notice(s) package which also include a clear indication of the proposed works under the Act". The Member continues: "Unfortunately we are not appointed to educate Alice or Tobias Lindvall in the roles of a Party Wall Surveyor nor is it in our remit to educate a Building Owner on the above matters". This observation is strictly correct, but it does set a poor tone. It is of course up to individual surveyors whether they give any, and if so what, assistance to a proposed building owner when acting for the adjoining owner. However, comments about education are unnecessary, especially when it would have taken so little effort to direct the Complainant to the express provisions of s3 of the 1996 Act which clearly set out what is required for a statutorily compliant party structure notice.

4. In the event the Complainant, as Building Owner, appointed the Member, as he thought, as Agreed Surveyor. All party wall surveyor appointments must be in writing, as required by s10(2) of the 1996 Act, and it is common practice for party wall surveyors to provide appointing owners with a form of written appointment. This the Member did in the case under review, providing the Complainant with such a form on b3cc headed paper with the text completed.

5. The form in question is dated 1 October 2021 and it has been signed by both the Complainant and Mrs Lindvall. But the form is a mess. It purports to appoint the Member as the adjoining owner's surveyor. As the form refers to both 194 and 196 Hammersmith Grove and is an appointment of the Member as adjoining owner's surveyor, the Panel assume that the Member simply took the form of appointment he had prepared for SBHA to execute and changed the name of the signor to that of Mr and Mrs Lindvall. In the scheme of things it probably does not matter, but it raises doubts as to whether the Member was ever duly appointed as Agreed Surveyor. On the assumption that there is a similar document executed by SBHA it would be well arguable that both owners have "concurred in the appointment of one surveyor" for the purposes of s10(1)(a), even though both owners are described as adjoining owners. Nevertheless it is a poor show that a Faculty surveyor who takes the trouble to tell the building owner that it is not in his remit to educate him on party wall matters should not himself ensure that the fundamentals of his appointment are in order, and that there is proper compliance with s10(2) of the 1996 Act. The appointment picture is, incidentally, the more confused because in his letter of 4 October 2021 to SBHA the Member states that he has been appointed by Mr and Mrs Lindvall "to act on their behalf with regards to Party Wall matters" and there is no suggestion that he is acting as agreed surveyor.

6. Accompanying the Member's letter of 4 October 2021 were two party wall notices. The first was a notice under s1(2) of the Act informing SBHA that the Lindvalls proposed to construct a wall astride the LOJ. The proposed works were shown on drawings which accompanied the Notice. The second was a party structure notice informing SBHA that the Lindvalls proposed to exercise their rights under s2(2)(l) of the Act, the proposed works being "Demolish a section of the Party

Fence Wall running between both properties and rebuild, in matching construction, as a Party Wall". The lead time before works may be started under these two notices is, respectively, one month and two months so realistically the Lindvalls were not in a position to start their works before 5 December 2021.

7. There was however an amount of preparatory work to do before works of demolition and construction began. The Member visited 74 Richford Streeton 6 October 2021 and advised the Lindvalls that they needed to obtain reports from a structural engineer and an arboriculturist before works could commence. The Complainant obtained two quotes from arboriculturists which he sent to the Member on 11 October 2021. Between 14 October and 26 October 2021 the Complainant texted or called the Member to action an arboricultural report to no avail, and on 27 October 2021 the Member stated that he would obtain a further arboricultural report "to be prudent" and a quote from a structural engineer. The Complainant obtained a third arboricultural quote on 28 October 2021 which he forwarded to the Member immediately against a promise that the Member would respond to the Complainant the same day. The Member did not so respond, and on 2 November 2021 the Complainant sent the Member a log of events to date stating that he was displeased with the level of service.

8. The Member's response was to blame the Complainant for the fact that expert reports had not been obtained and making it clear that he would not be "pressured of bullied into making hasty decisions, despite your timeframe". There was then disagreement over the choice of structural engineer, the Complainant being concerned that the Member had selected one of the more expensive quotes without giving reasons. On 12 November 2021 the Complainant sent the Member the arboricultural report asking for approval, which was given on 16 November 2021. The structural engineer's report was forwarded by the Complainant to the Member on 3 December 2021, asking for approval, and on 10 and 14 December 2021 the Member made comments on the report which led to a final version of the structural engineer's report being submitted on 16 December 2021.

9. Meanwhile, on 10 December 2021, the Member raised what he asserted was the need for planning permission to be obtained before an Award could be made. Against a background of pressure from the Complainant to get things moving, on 14 December 2021 the Member emailed the Complainant to say:

> "Again, you're wasting time and energy on this matter, as you need planning consent and I will not be agreeing to matters without your obtaining planning consent.
>
> You cannot touch this wall without planning consent. If it was a simple wall that wasn't in a conservation area, this would be a different discussion, however as we stand you will need [to] obtain consent before the award is signed and served and this wall is demolished and built."

10. The assertion that planning consent was required caused the Complainant to take the matter up with the RICS, who referred the Complainant to Robert Burke of Cluttons. Mr Burke made the point (correctly) that the making of an Award was not dependent on any necessary planning consent being obtained. The Member was dismissive "Cluttons do not have any jurisdiction in these matters", and he reasserted his suggestion that necessary planning permissions had to be obtained before there could be construction. All this on 14 December 2021.

11. By 16 December 2021 the Complainant had spoken to the local planning department and learnt that planning permission was not required to take down and rebuild a wall provided the height of the wall was not increased (something the Complainant did not wish to do).

12. The same day, 16 December 2021, the Complainant requested the Member to approve the final version of the Structural Engineer's report, a request he repeated on 22 December 2021, 5 January 2022, and 10 January 2022. On 10 January 2022 the Member was still insisting that planning permission was required for the demolition and reconstruction of the wall before he could issue an Award, and the Complainant decided to speak to Andrew Byrne to try and break the log jam. Andrew Byrne was helpful, and on 13 January 2022 Mr Byrne informed the Complainant that he had instructed the Member to issue the Award without there being planning permission in place.

13. On 17 January 2022 the Member informed the Complainant that he would issue the award by 21 January 2022. In the event the Award was issued on 24 January 2022. The Award describes the Member as Agreed Surveyor.

14. The Complainant was concerned that the Award stated at clause 1(b) that "the walls and premises as described in the attached Schedule of Condition are sufficient for the present purposes of the Adjoining Owner", when he was in fact undertaking the works because the wall was in a poor state of repair and an independent surveyor had previously stated that the wall would need to be taken down and re-constructed on a new foundation". The possibility that this statement was made in order to protect SBHA from having to contribute to the cost of the wall was of concern to the Complainant. Indeed clause 4(a) of the Award provided that the Building Owner, if he commenced the works, "shall … execute the whole of the works at the sole cost and risk of the Building Owners…". This notwithstanding the provisions of s1(3) of the Act which envisages that the cost would be shared by the two owners "in such proportion as has regard to the use made or to be made of the wall by each of them …". However, although not in good condition the wall was standing at the boundary between the properties. It was not actually falling down (so far as the Panel can judge from the photographs) and in the circumstances it was not wrong for the Member to include this comment in the Award.

15. The Complainant was concerned that SBHA should contribute to the cost of the wall, and clause 4(a) of the Award left the Complainant facing the cost and delay involved in an appeal to the county court if he was to change this provision of the Award. However, the Complainant was able to speak to Andrew Byrne on 2 February 2022 and agree with him that the Member should be asked to amend the Award in relation to the cost of the works. On 4 February 2022 the Member emailed to state (as the Complainant puts it in his log of events "… that the costs for repairing the wall are to be shared, or that SBHA should contribute to the cost, but formal quotations from builders are required to move forward in this respect. Mark also states that he needs a qualified RICS boundary expert to establish ownership of the wall. When these two items have been actioned, he can establish the cost split in further awards for which he will charge £170+VAT".

16. In March 2022 the Complainant held discussions with Andrew Byrne as to sharing the costs involved in the construction of the replacement wall, and on 29 April 2022 there was an exchange of emails recording an agreement between the owners, the essence of which is that SBHA is to contribute 50% of the costs of the reconstruction of the wall and the associated expert reports.

17. Meanwhile, On 7 February 2022, the Complainant requested the Member to provide his CHP because he intended to make a complaint. This was provided on 17 February 2022, and a formal complaint was made to the Member on 16 March 2022. The complaint with which the Panel is concerned was made to the Faculty on 10 May 2022. The Member provided a response to the Faculty company on 10 January 2023.

Discussion

Preliminary

18. The Member was instructed in this matter to prepare a party wall award to cover the repair and refurbishment or the reconstruction of a small stretch of garden wall a metre or so high. This stretch of wall formed part of a much longer wall surrounding the back garden of 74 Richford Street, a wall which was built on or at the line of junction of three other properties beside 196 Hammersmith Grove, the adjoining property for the purpose of the Member's award. The Member did not prepare a written Schedule of Condition, but contended himself with a photographic Schedule of Condition which he appended to his Award. The photographs show parts of wall in a generally poor state of repair, with one or two areas requiring some reconstruction, but with other parts perfectly serviceable as a garden wall. Unfortunately the photographic Schedule of Condition gives no indication which part of the wall is being photographed, or, where buildings or sheds are shown in the background the position of such buildings or sheds in relation to the short stretch of wall covered by the wall.

19. For the purposes of a Party Wall Award this is not ideal, and for the Panel reviewing this matter it makes the task more difficult, but in the overall circumstances this should not have been a serious failing. For this should have been a straightforward award for a party wall surveyor to make. The works required were minor works, and provided the party wall surveyor had no reason to suppose that the building owner would not have employed a competent contractor, there would have been no need for the surveyor to require plans and drawings of the works for the purposes of his award, (but see paragraph 21).

20. But the Member appears to have given little clear thought to the drafting of this award. The works authorised by the Award are set out in Clause 2 as follows;

> **That** after service of the signed Award the Building Owners shall be at liberty, but without obligation, to carry out the following works:
>
> - Excavations to a depth of 2500mm, or as directed by the Building Control Officer, to create a new garden party wall.
> - Construction of a wall astride the LOJ.

- Demolish a section of the Party Fence Wall running between both properties and rebuild, in matching construction, as a Party Wall.

The plans attached to the Award have not been prepared, or commented on, by the member. These plans were prepared by F Line Designs for (or as part of) Green Code Engineering on behalf of whom Damola Awoyokun prepared a one page report which is at p30 of the Award. The pages which follow this report contain plans and photographs (none of which photographs are referenced to any plan) and suggest that Damola Awoyokun was proceeding on the basis that he was reporting on the wall to the entirety of the back garden to 74 Richford Street (see in particular the plan at p28 of the Award, repeated at p40 of the Award) not just that part of the wall along the boundary with 196 Hammersmith Grove, which on a rough calculation amounts to some 17.5% of the total length of the wall. Of course it is possible (and desirable) had one party wall surveyor been appointed to prepare all the necessary awards between 74 Richford Street and all the other boundary properties. Indeed, the Member may have been that surveyor, but there is nothing to that effect in the Award or in the papers before the Panel.

21. The Panel notes that the Line of Junction Notice prepared and served by the Member on 4 October 2021 refers to a construction of a wall astride the line of junction and it is stated in the notice that "the proposed works as shown on the accompanying drawings". The drawings which accompanied the notice are not in the papers before the Panel. That is of no consequence, but assuming that these drawings do properly show the proposed works it was remiss of the Member not to ensure that they were referred to in the Award.

22. For the short stretch of wall covered by the Award, and indeed even for the whole length of the garden wall, the Member's approach is difficult to understand. This was a garden wall, minor works in anyone's view. It is by no means obvious that the entire stretch of wall had to be demolished and reconstructed. It is quite extraordinary that the wall, if it were to be reconstructed, should be on foundations excavated to a depth of 2500mm. This would provide foundations for the garden wall far in excess of the foundations on which the surrounding residential properties were constructed. There is no explanation whatever in the Award as to why such a foundation would be required. It is simply stated. The basis of this provision in the Award appears to be the diagram at pages 29, 31 and 41 suggesting that a 2.42m foundation (for building a house ie not relevant to a 1m garden wall) should be provided where construction is adjacent to a 20 metre high tree. This diagram is reproduced from Appendix B of guidance provided by NHBC at Part 4 : Foundations - Chapter 4.2. If any of the trees adjacent to the wall are 20 metres high (and there may be one or more) these are not marked on any plan. Neither is there any suggestion in the Award that the foundation depth may be only 1 metre, which is the minimum depth suggested by Damola Awoyokun in his report at p30 of the Award.

23. The Award also authorises the demolition of "a section of the Party Fence Wall" which is to be rebuilt as a party wall, but the section concerned is not identified in any way. The Panel notes that the Party Structure Notice prepared and served by the Member on 4 October 2021 covers this work in the same terms as in the Award, but there is no plan or other indication in the Party Structure Notice of where the relevant section of party fence wall is that is to be demolished. The Panel cannot discern where the wall between 74 Richford Street and 196 Hammersmith Grove is a Party Fence Wall rather than a Party Wall. Assuming that there is a Party Fence Wall

along part of the boundary in question it is not made obvious why only a section of this wall is to be demolished. And if the entirety of the Party Fence Wall was to be replaced with a Party Wall this should have been stated in terms.

24. The Panel is also concerned that the Member felt it necessary to obtain engineering and arboricultural advice for a matter of this nature. It was a garden wall. It was in need of repair. The work on any footing was minor. The advice obtained was general advice. No particular area of engineering concern was identified. No individual tree was highlighted as being a potential problem to the repair or reconstruction of this wall. A competent Party Wall Surveyor should be able to take this area of work in his stride, and only seek specialist advice where a particular problem arises. If there were any such problems they have not been highlighted by the Member.

25. The Panel is conscious that the Member faces five specific charges, and that the charge covering competence in relation to the Award refers only to the statement that it is not appealable. It is open to the Panel to raise further charges against the Member relating to the Panel's concerns that this Award does appear to fall short of what the Panel would expect to see in the preparation of an award of this nature. After some consideration however the Panel have decided to leave the charges as they have been laid.

26. In addition to the above, the Panel would point out that the wall the subject of the Award was, an existing party fence wall which was to be repaired or rebuilt. It would follow that there was no need for the service of the Line of Junction Notice prepared and served by the Member on 4 October 2021. S1(1) of the 1996 Act applies "where lands of different owners adjoin and (a) are not built on at the line of junction; or (b) are built on at the line of junction only to the extent of a boundary wall … and either owner is about to build on any part of the line of junction". However, the Panel recognises that s1(1) of the 1996 Act does give rise to difficulties of interpretation and is described by one of the two leading textbooks in this area as containing "inherent contradictions". Serving an unnecessary notice is probably a better approach for a party wall surveyor uncertain of the position than risking having a court determine after the works commence that a notice was needed all along.

Ground 1: Breach of Rule 3.1 of the Faculty's Code of Conduct (Ethical Behaviour)
Acting as an Agreed Surveyor despite a conflict of interest given apparently longstanding contractual relationship with the Adjoining Owner SBHA.

27. In the ordinary course there would be a significant breach of Rule 3.1 where a member of the Faculty acted as Agreed Surveyor in circumstances where he had a longstanding contractual relationship with one of the owners. In the present case however the Lindvalls were made aware of this relationship. They chose to appoint the Member as party wall surveyor notwithstanding the fact that they knew of his relationship with SBHA, and against his informing them that "..we are the independent surveyors that act on behalf of SBHA in respect of neighbourly matters [to] look [~~and~~] after their interests". Where disclosure of the relationship with one of the parties is made to the other, there can be no valid complaint that the Member accepted appointment from the other party. This charge is not made out.

Ground 2: Breach of Rule 3.2 of the Faculty's Code of Conduct (Ethical Behaviour)
Failure to act impartially given Award states that wall is sufficient for AO and requires BO to pay full cost which suggests favouring the AO with whom the Member apparently has a contractual relationship.

28. There is no evidence before the Panel as to SBHA's view as to the sufficiency of the wall for its purposes, see clause 1(b) of the Award (para 14 above), but that is not of any particular relevance in the circumstances set out below. In the event the provisions of Clause 4(a) of the Award are of concern, whether or not clause 1(b) was designed to pave the way for the Award as to the costs of the works. It may be noted that the Member had himself drafted and served the Notice under s1(2) of the Act. The Member must be taken to be aware of the provisions of s1(3) of the Act. These are:

    "(3) If, having been served with notice described in subsection (2), an adjoining owner serves on the building owner a notice indicating his consent to the building of a party wall or party fence wall –
    (a) The wall shall be built half on the land …
    (b) The expense of building the wall shall be from time to time defrayed by the two owners in such proportion as has regard to the use made or to be made of the wall by each of them and to the cost of labour and materials prevailing at the time when that use is made by each owner respectively."

29. Although there is no copy of such a notice in the papers before the Panel it is apparent that SBHA did indeed consent to the Lindvalls' works. This is evident from clause 1(5) of the Award which states in terms that "the Adjoining Owner has consented to the building of a party wall/party fence wall in accordance with s1(3) of the Act". S.1(3)(b) is in mandatory terms: "The expense of building wall *shall* be from time to time defrayed by the two owners…" and while it might just be arguable, in exceptional circumstances, that the proper proportion to fall on the adjoining owner should be nil, such circumstances would indeed need to be exceptional and should be explained in the Award. Clause 1(b) ("that the walls … are sufficient for the present purposes of the Adjoining Owner") and Clause 1(e) ("that the Adjoining Owner has consented to the building of a party wall/party fence wall in accordance with Section 1(3) of the Act") sit very uncomfortably together. And if Clause 1(e) is correct, which subsequent events proved to be the case, clause 1(a) is of no relevance to the question of the cost of the work even if correct.

30. In his response to the Faculty dated 10 January 2023 the Member explains Clause 4(a) on the basis that "the wall in question was being demolished and rebuilt solely for the purposes of the BO's notifiable works and gain". The Member also refers to s11(11) of the Act which requires an adjoining owner to pay a due proportion of the expenses of the building owner in the event that the adjoining owner makes subsequent use of the work carried out by the building owner. The prospects of a claim arising under s11(11) where the works comprise a garden wall are slim, but s11(11) is nothing to the point, which is the express provisions of s1(3) of the Act. It is theoretically possible that the Member was not aware of the provisions of s1(3), and that his error is one of competence not partiality. But the Member expressly refers in clause 1(e) of the

Award to SBHA's consent to the party wall "in accordance with Section 1(3) of the Act", so that theoretical possibility really does not arise.

31. Without a clear and persuasive explanation justifying the provisions of Clause 4(a) which impose the entire cost of the wall construction on the building owner, and there has been none, the Panel are driven to the conclusion that the Member has acted impartially in favour of his long-standing client SBHA. It may be that the Member was more than a little upset with the pressing behaviour he had faced from the Complainant, and that he was disturbed by the Complainant's refusal to accept his statement that an Award could not be made before planning consent was given, and that the Complainant was correct in his refusal, but it is the duty of the party wall surveyor to follow the Act and to do so in an impartial manner. The Member failed in that duty. This charge is made out.

Ground 3: Breach of Rule 4.1 of the Faculty's Code of Conduct (Competence)

Asserting that planning permission was required prior to making an award; Instructing a boundary expert (post Award) involving unnecessary work and expense; incompetent award (stating that it was not appealable.

32. As has been stated already, the assertion that an award could not be made until all necessary planning permissions were in place is just plain wrong. Planning permission is concerned with development, ie works, not party wall awards. Quite how the Member came to his view is not understood by the Panel. At the time, it is noted, the Member was being pressed by the Complainant to get on with the work leading to an award and the assertion was (intentionally or unintentionally) convenient to counteract that pressure. There is no need for the Panel to make a finding on that suggestion. The simple fact is that the assertion demonstrates a lack of competence. In his Response of 10 January 2023 the Member continues to argue the issue of the need for planning permission. He ignores the gravamen of the charge, namely his assertion of the need for permissions to be in place before an award may be made, not before works can commence. This first item of incompetence is made out.

33. The second of the three items of suggested incompetence is that on 4 February 2022 the Member emailed the Complainant to say that "he needs a qualified RICS boundary expert to establish ownership of the wall". (This item is based on the Complainant's log of events; the Panel has not seen the email in question). The Member does not deal with this item in his Response of 10 January 2023, and so it goes unchallenged. It would have been an extraordinary thing to say. The Member had been acting as Agreed Surveyor since 1 October 2021. He had asked the Complainant to obtain expert arboricultural and structural engineering advice, he was also acting for SBHA, clients of his for some time, he has made an Award on 24 January 2022, and then on the 4 February 2022 he decides that he wants the Complainant, in effect, to incur the cost of proving that it has been his wall all along. This is not the approach of a competent surveyor. This second item of incompetence is made out.

34. The third of the three items of suggested incompetence relates to the assertion that the Member stated that his Award was not appealable. The Member's letter of 24 January 2022 accompanying the Award states:

> "I have to advise you that you have 14 days in which to appeal the Award in the County Court if you consider there may be something wrong but I would also advise that I believe that it is properly constituted in accordance with the Act and there are no grounds to make such an appeal."

35. This statement falls short of saying that the Award was not appealable, but it was a most unwise comment to make. The Panel would observe that, except where there is a difficult point involved which the surveyor has highlighted, any party wall surveyor making an award should believe that there are no grounds to appeal it for otherwise he should not be making the award. To state that the maker of the award believes the award to be correct, and therefore unappealable, should be assumed, but a statement to this effect should not be made. It gives quite the wrong impression. This third item of incompetence is not made out, but the Panel hopes that the Member will refrain from making such comments in future.

Ground 4: Breach of Rule 5.1 of the Faculty's Code of Conduct (Service Standards)

Failed to act fairly with courtesy and respect with regard to the service standards expected. More particularly (1) Lack of courtesy, (2) No or inadequate communication, (3) Delay in replaying to emails and in providing information requested, eg time take to approve arboriculturist reports, (4) Inadequate CHP and failure to respond to complaint.

36. (1) Lack of courtesy. The Panel has commented on the Member's somewhat offensive comment that he was not appointed to educate the Lindvalls in the roles of the party wall surveyor in his email of 21 September 2021, see para 3 above. This comment was made before the Lindvalls appointed the Member as Agreed Surveyor and it is, incidentally, open to question how far an appointed party wall surveyor should go in explaining the Act, and in this case s.3, to his own appointing party. The comment in the email of 14 December 2021 about wasting time and energy, quoted at paragraph 9 above, is also not exactly courteous. Apart from these instances however there is no obvious lack of courtesy shown by the Member, although it should be pointed out that there are few emails in the papers before the Panel. For the content of what was said in the various emails passing between the parties the Panel has had to rely on the Complainant's log.

37. (2) No or inadequate communication and (3) Delay in replying to emails and in providing information requested, eg time taken to approve arboriculturist reports can be taken together. These examples of sub-standard conduct are not straightforward for the Panel to determine. There is no doubt that the Complainant's log of events records a fair number of complaints of the Member's failure to respond to emails sent by him. But the Complainant was putting the Member under a fair deal of pressure to get on with the work and respond to emails within a short time, shorter time than many an owner would give to their appointed surveyor. As for the arborologist's report this was sent by the Complainant to the Member for approval on 12

November 2021 and it was approved on 16 November 2021. There is no cause to find delay there. There had been some difficulty between the parties as to the obtaining of an arborologist report in the first instance. The Complainant was understandably concerned that having obtained two quotes for such a report the Member wanted a third quote "to be prudent". The advisability of this requirement does rather depend on the identity of the two arborologists who first quoted. Nothing here however to justify this complaint. The Panel's general feeling is that while the Member did not react to the Complainant's pressure as well as he might, the conduct displayed falls short of inadequate communication and certainly it cannot be said that there was no communication.

38. (4) Inadequate CHP and failure to respond to complaint. The Member's CHP, ie the CHP of b3-cc Ltd, dated 4 January 2022, is in simple terms. It informs the reader that a complaint may be made by email, phone or post, giving addresses for emails and letters. The CHP requests the complainant to provide full details of the complaint, and that b3-cc will notify the complainant if further information is required. "The external complaints process and our preference are always to deal with your complaint on a person to person basis by phone, however if you prefer, we will deal with your complaint at any stage through email or letter." This is not an "external" complaints process as usually understood, but at the initial stage of a complaint it is to be expected that the process will be an internal one. The CHP then states that b3-cc "will endeavour to Fully consider your complaint by our director [ie the Member]" and concludes:

> "We will try to resolve the complaint to your satisfaction. If you are happy with the outcome of our director's investigation into your compliant, the matter will conclude. We will consider your complaint as quickly as possible. We will provide you with a full response or, if that is not possible, an update on what is happening with your complaint, within 28 days."

39. Many CHPs will contain more detail on the manner in which a complaint should be made and the provision of information. But this CHP does enough to enable a client or other complainant to make a complaint. There is however an inadequacy, as suggested by the Investigator, and this is the final section set out above. On any footing this is one-sided. The CHP does not envisage the Complainant *not* being 'happy' with the outcome. A proper CHP will envisage such an eventuality, and will provide for a further process, preferably by way of external appeal.

40. The Complainant in the present case requested the Member's CHP by email dated 7 February 2022, in which email he also requested the Member not to incur any further costs in the matter and to agree not to press for his remaining payment. The Member forwarded the CHP by email of 17 February 2022, but with no further comment. On 1 March 2022 [10:34] Ariane Whyte, the Member's administrative assistant, pressed for payment of outstanding fees to which the Complainant [11:38] responded that there had been no payment because of a lack of response to three emails (7,11 and 17 February 2021) raising questions about payments. The Complainant also stated that he had been recommended by Alex Frame, FPWS Director, not to make a further payment until the Complaints process had been completed, and that Mr Frame had offered to mediate. Ariane Whyte responded on 4 March 2022 [11:51] to state that the Member had advised that all "matters have been dealt with in accordance with the party wall act 1996", and

that if full payment of the outstanding invoice was not made "we will escalate matters in accordance with the act and the relevant section". This was a threat to take the Complainant to the Magistrates' Court under s17 of the Act, and was a threat which worked. The Complainant paid up, albeit under protest, as he states in his email of 16 March 2022 [13:59].

41. Meanwhile, on 14 March 2022, the Lindvalls had sent the Member a letter detailing their complaints and enclosing the detailed log of events which is in the documentation before the Panel, although the log has been brought up to date to 10 May 2022. The Member acknowledged the complaint letter by email of 17 March 2022 {12:16] stating that the complaint would be reviewed and responded to in due course. The Member's 28 day deadline for a response or update, passed on 11 April 2022. No response had been received by 10 May 2022, when the Complainant complained to the RICS and to the Faculty. It is not at all clear to the Panel that the Member ever did provide a formal response to the complaint made on 14 March 2022.

42. It is plain from the above that the Member has failed to respond timeously to the complaint, and in the event the Member failed to respond at all. His reason for not responding, as explained in this Response to the Faculty dated 1 August 2022, was that "we haven't been furnished with a formal complaint from the Building Owner(s)". This really will not do. The Member's CHP does not set out any particular manner in which a "formal complaint" can be made. The letter of 14 March 2022 from the Lindvalls is clearly a complaint. It begins "We are writing to you in accordance with your Complaints Procedure, to complain…". It contains the statements "Please find attached a detailed log of events, which forms the basis of our complaint"; ".. we have explained to [the Member] that we were to issue this formal complaint…"; "Following this complaint,…"; and "Please provide a response to this complaint within 28 days in accordance with your Complaints Procedure,".

43. In the circumstances it is little short of absurd that the Member should assert that he has not been furnished with a formal complaint under his CHP. The Panel would point out that it is entirely a matter for the Member to decide how much detail he puts in his CHP. In the Member's CHP there is no detail as to how a "formal complaint" should be furnished. This lack of detail was of the Member's own choosing. The Panel's view is that the letter of 14 March 2022 is plainly sufficient for the purpose of making a formal complaint. It may be that the Member felt/feels that more information could and should have been provided. But his own CHP states "If we require further information we will notify you.." At no point did the Member ask for further information.

44. The charge of breach of service standards is therefore made out by reference to point (4) and, to a lesser extent, to point (1), as explained above, but on balance the Panel will restrict its finding to point (4).

Ground 5: Breach of Rule 7.1 and 7.2 of the Faculty's Code of Conduct (Cooperation)

Failed to provide information and documentation in response to Faculty requests in letters dated 22 June and 5 July 2022.

45. On 22 June 2022 the Professional Standards section of the Faculty sent a letter to the Member advising that the Complainant's complaint had been received, giving a seven point summary of the complaint, and attaching the documentation provided by the Complainant to support his complaint, together with a spreadsheet giving further details of the complaints. The Member was asked both (i) to provide a written response addressing each complaint set out in the spreadsheet but focussing specifically on the summary of the complaints, and (ii) provide information requested under nine separate headings.

46. On 27 June 2022 the Faculty received further information and documents from the Lindvalls, and this was forwarded to the Member under cover of a letter sent by email on 5 July 2022 [12:41]. This letter reminded the Member that he had yet to respond to the Complainant's complaint and asked him to advise 'promptly' as to when the Complainant might expect a substantive response. The attachment to the 5 July 2022 was apparently too large to go through to the Member on his email, but this was remedied on 7 July 2022 [14:55] by the material being posted on pCloud and a link provided to the Member. The Faculty's letter of 5 July 2022 also reminded the Member that the deadline for the provision of the information requested in the letter dated 22 June 2022 was 1 August 2022.

47. The information requested covered nine separate items, namely:

    (1) The number of occasions, if any, prior to appointment as Agreed Surveyor in relation to the party fence wall, that you had been engaged by the Adjoining Owner;
    (2) The letter of appointment by the Adjoining Owner;
    (3) Your terms of engagement as Agreed Party Wall Surveyor;
    (4) Your Complaints Handling Procedure and any correspondence in respect of it between you and/or your company and Mr Lindvall;
    (5) A copy of the response to the CHP complaint sent to the complainant; alternatively an explanation as to why no response has been sent and information as to when a response will be sent;
    (6) Copies of all notices served and an explanation as to why the notices were served, including the section 1, 6(1) and 6(2) Notices served one prior to your Award;
    (7) An explanation as to why you considered that the section 2(2)(l) notice served by Mr Lindvall was served incorrectly, and what action did you take in respect of it;
    (8) All replies received from the Adjoining Owner in respect of all Notices served;
    (9) A detailed breakdown of fees charged to Mr Lindvall.

48. The Member purported to provide the requested information by email dated 1 August 2022 [20:46]. The requested information was not dealt with item by item. The 1 August 2022 email makes a number of statements, for example that no formal complaint had been made by the Complainant, that if a formal complaint was made it would be dealt with, that in dealing with a

complaint “we go beyond our initial role to accommodate the expectations of all our clients”, that the Complainant had been made aware of the need to seek planning permission and that additional notices would be required, and that if the Complainant decided to move forward with the notifiable works without “the correct paperwork in place, they would be liable for planning, conservation or article 4 enforcement proceedings”. The Member also expressed the view that the Lindvalls were disgruntled and upset with how the matter concluded.

49. None of the above deals with the information requested by the Faculty in the letter of 22 June 2022. Attached to the email of 1 August 2022 were however the documents which answered items (2), (4) ie the CHP but not correspondence, and (6) the notices and cover letter dated 4 October 2021. The letter totally fails to address items (1), (3) (5), (6), (7),(8) and (9).

50. The email of 1 August 2022 from the Member ends:

> “I hope this now concludes matters and closes this case, as we take complaints very seriously, especially when we sit under the governing body of FPWS. With this said, I must admit that [we] do take matters like this to heart, as I know that the personal and professional level of service, which is provided by me and my colleagues are of a high standard.”

This was optimistic in the extreme, and the assertion of high standards is to be doubted.

51. Quite plainly the Member failed to provide the information which had been requested, and requested perfectly reasonably. This charge is made out.

Findings

52. The burden of proving that the Faculty’s Code has been breached falls on the Faculty, and the standard of proof is on the balance of probabilities.

53. Having considered the material identified above and the various documents provided by both the Complainant and the Member, the Panel is satisfied that in respect of the various charges brought against the Member:

Ground 1 is not made out.
Ground 2 is made out.
Ground 3 is made out in respect of particulars (1) and (2) but not (3).
Ground 4 is made out in respect of particular (4), but not (1)(2) or (3).
Ground 5 is made out.

54. The panel considered the appropriate sanctions for the breaches found to proven and reached the following conclusions.

Sanction

55. The available sanctions are those set out in Bye-laws 4.9.3 of the Faculty Bye-Laws which states:

"*4.9.3 The Faculty's Disciplinary Panel shall have power to acquit honourably, or alternatively to discipline the membership by way of:*
(i) a reprimand for any defined period up to three years;
(ii) the publication of their name and complaint details on the Faculty's website and newsletter;
(iii) a fine to contribute towards, but not exceed the costs of the investigation;
(iv) suspension of Faculty membership;
(v) expulsion from the Faculty."

56. In deciding which sanction(s) were appropriate to the charges that were found proved, the Panel has also had regard to the Faculty's Sanctions Guidance Document.

57. Having considered the matter carefully, and taken into account all of the matters above, the Panel considers that the appropriate sanction is:
    (i) In respect of Charge 2: Reprimand for three years
    (ii) In respect of Charge 3: Reprimand for three years
    (iii) In respect of Charge 4: Reprimand for three years
    (iv) In respect of Charge 5: Reprimand for three years
    (v) Fine in the sum of £3,993.50 representing the cost to the Faculty of this disciplinary process.

58. In considering the level of the fine the Panel had particular regard to the following matters:

    (a) the Faculty's costs of the disciplinary process and disciplinary panel hearing were £3,993.50;
    (b) The fine should reflect the severity of the offences and should be more than nominal but should not be unduly commercially injurious to the Member.

59. The Panel noted that it had no power to impose a requirement for re-education and training but would have considered the imposition of such a requirement in this case had it had the power to do so.

Publication

60. The Panel considered carefully the potential implications of publication both to the Faculty and to the Member either: (a) in the Faculty newsletter/blog/e-bulletin; and/or (b) on the Faculty website (in both the public and/or members only area).

61. The Panel started from the position that the Faculty wishes to be transparent regarding the disciplinary process and decisions and that members who are subject to disciplinary sanctions should be named and details of the charges and outcome published so as to protect the public, inform other members of the consequences of breach of the Code and thereby deter them from breaches, and to enforce compliance with sanctions imposed. 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.

62. Accordingly, the Panel orders that, in accordance with 4.9.3 (ii) of the Bye-laws of the Faculty, this decision is to be published in the Faculty's newsletter/blog/e-bulletin, which is available in digital format within the member's area of the website, AND in the public area of the Faculty Website.

File Retention Period

63. In accordance with the Faculty Guidance and the findings made above, the Disciplinary Panel recommends that the records in relation to this complaint be kept for a period of 3 years.

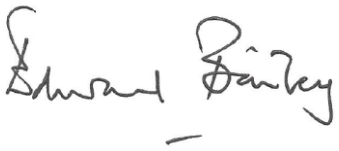
Appeal

64. Mark Douglas may request permission to appeal against this decision, or any part of it, within 21 days of the date of this letter, following which, in the absence of receiving any such appeal, this decision shall be final and shall not be subject to challenge.

65. Any request for permission to appeal should be made in writing addressed to the Disciplinary Panel c/o professionalstandards@fpws.org.uk or the address above and should include a detailed statement as to why permission to appeal is sought.

66. Permission to appeal will usually only be granted where new evidence is available and/or it is asserted that the sanction imposed is too harsh.

67. On appeal, the sanctions imposed by the Disciplinary Panel may be reconsidered and may be increased or decreased. In particular, as dealing with any appeal will incur further costs, any fine may be increased to take account of these additional costs if the appeal is unsuccessful in whole or in part.



HH Edward Bailey

Panel Chair

On behalf of the Disciplinary Panel

25 April 2023