



Minutes Professional Conduct Committee Review Day 20 October 2011

| Location | Present | In Attendance |
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| ARB 8 Weymouth Street London W1W 5BU | Alexandra Marks (PCC Chair) Paul Housego (PCC) Julian Weinberg (PCC) Donal Hutchinson (PCC) Judy Carr (PCC) Jim Cuthbertson (PCC) Stephen Neale (PCC) Linda Read (PCC) Barbara Saunders (PCC) | Nicola Hill (Clerk) Stephen Battersby (Clerk) Alison Carr (ARB) Simon Howard (ARB) Tanya Grundy (ARB) Kristen Hewett (ARB) Sarah Loukes (ARB) |

1. Apologies

There were none.

2. Minutes of previous meeting

The minutes of last year's meeting, held on the 14th September 2010, had been circulated and were agreed as a correct record. AC commented that there were no proposed amendments to the relevant legislation for now, but she was aware that other Regulatory Bodies may have changes in the offing. DH wondered whether it was necessary to introduce a language test for potential entrants to the profession but PH pointed out that this was covered under Standard 2.3 of the Code which expected architects to ensure that they had the necessary communication skills to discharge their responsibilities.

3. Election of PCC Chair

AM was proposed, seconded and elected without opposition to continue in the role of PCC Chair.

4. PCC Members' Contracts and Terms of Reference

Drafts of the PCC Contracts and Terms of Reference had been circulated. AM suggested that the bullet points in the terms of reference would be better presented as numbered paragraphs. It was generally agreed that the contract itself was admirably concise but it was suggested that the following additions could be made :-

- i. It could include a declaration of the type made by jurors in criminal cases '*faithfully to try a case according to the evidence*'.
- ii. A further requirement would be included in the Contract that Members should have regard to the Indicative Sanctions Guidance in reaching decisions. It was accepted that sanctions could be imposed which fell outside the Guidance, but in this event careful reasons should be given for departing from it.
- iii. NH pointed out that in paragraph 4 of the Terms of Reference there was no reference to cases involving criminal convictions, which clearly should be included.
- iv. AM suggested, and it was agreed, that the Terms of Reference and the PCC Code of Conduct should be Appendices 1 and 2 to the Contract.
- v. It was agreed that Clause 3 in the Contract, relating to confidentiality, only related to genuinely confidential matters which were not in the public domain.
- vi. AM suggested that the wording of Clause 4 of the Contract should be amended to read 'shall be entitled to claim £x per day'.

5. PCC Code of Conduct

AM commented that the draft produced was admirably concise but may need minor amendment. It was suggested that the second paragraph, about Conflicts of Interest should refer to 'potential or actual' conflicts. It was accepted also that there should be a Register of Interests for PCC members to safeguard impartiality. The implications of the new criminal legislation on bribery and corruption would also need to be borne in mind. JW commented how important it was to avoid informal discussions about cases prior to hearings, particularly when all three Members were not present.

6. Appraisal Scheme

The proposed appraisal scheme was accepted by all present as being an excellent initiative. The feeling of the meeting was that the Appraisal Form, a draft of which had been circulated, should be completed by each Member on an annual basis and then comprise the background for the actual appraisal, which could be done either face to face or over the phone. SH envisaged that the appraisal scheme would work in conjunction with Review Forms produced by Members sitting on individual cases. SB suggested that the Terms of Reference could be extended to include a requirement to complete and return a Review Form after each sitting, but SH took the view that this was not necessary. It was agreed that any consistent problems identified through the appraisal scheme would need to be addressed.

7. Indicative Sanctions Guidance

Recent decisions of the High Court had been critical of other professional tribunals for not having Indicative Sanctions Guidance to assist the tribunal and those appearing before it. A draft had therefore been produced of Indicative Sanctions Guidance for the PCC and circulated in advance of the meeting. This covered the purpose of sanctions, a list of available sanctions, and how the Committee should go about deciding upon sanction by

considering the least serious first. It went on to deal with factors which may point towards imposition of each of the sanctions as well as mitigating and aggravating factors.

PH suggested that the Guidance should be sent to Respondents with the papers in each case and it was accepted by all that this would be desirable.

8. Clerks' presentation - latest case law

i. Standard of Proof

NH explained that the civil standard of proof is the balance of probabilities. This is only relevant to the fact finding stage of proceedings and not to UPC (unacceptable professional conduct) or SPI (serious professional incompetence). Pre 2008 there was a sliding scale but following the cases of re ***B [2008] UK HL35*** and re ***D [2008] UK HL33*** the position is that there is one standard and that is the balance of probabilities. This means proof that the facts more probably occurred than not. There is no room for any intermediate standard, flexible standard, heightened standard or sliding scales. However, cases in which the allegation or the consequences of it being proved are serious require "critical attention" or "heightened examination" and "appropriately careful consideration". They do not necessarily require more cogent evidence.

PH explained that he had considered the judgements and that the balance of probabilities could be considered as being at 51%. Either something had happened or it had not. In deciding this, the Panel would need to look at inherent probabilities, for example if someone said he had seen a dog walking in the park, the Panel would not need much persuading. However if someone said that he had seen a black panther walking in the park, the Panel would need much more persuasion.

SB and NH then went through the case law update and all present were provided with the cases discussed.

ii. Hearsay Evidence

NH referred to a couple of recent cases regarding reliance on statements made by absent witnesses. The first case was that of **Ogbonna** in which the Nursing and Midwifery Council (NMC) was criticised for not having made arrangements for a key witness to be present at a hearing. The court held that it was not fair to the Respondent simply for the statement to be read out when the NMC had not made any attempt either to secure the attendance of the witness or at least to set up a video link. This resulted in the relevant allegation against the Respondent in that case being quashed by the Court of Appeal.

In the GMC case of **Bonhoeffer** the High Court followed a similar line in the case of a witness who lived in Kenya and had not been called to give live evidence. This was found to be inherently unfair to the Respondent and breached his Article (6) (1) right to a fair hearing.

iii. Absent witnesses

SB referred the Committee to the case of **Vali** in which Mr Justice Ouseley had been guided by the provisions of s116 (2) of the Criminal Justice Act 2003 in deciding whether and when it would be proper for a tribunal to accept written evidence from an absent witness. A copy of the relevant section was circulated to those present.

iv. Dealing with cases in the absence of Respondents.

SB referred the meeting to the leading case on the subject, which was the criminal matter of **Jones** dealt with by the Court of Appeal in 2003. He provided Members with a list of the relevant principles to be taken into account and added that these had already been used by the Committee in recent relevant cases.

v. Action Estoppel

SB drew the attention of the meeting to a recent High Court case (***R(Coke-Wallis) v Institute of Chartered Accountants in England & Wales*** (ICAEW)) arising from disciplinary proceedings brought by ICAEW. ICAEW had sought to proceed against one of its Members on the basis that he had been convicted of an offence in Jersey. However, the proceedings against him had been dismissed because the offence in question did not amount to a crime in this jurisdiction. ICAEW had then attempted a second bite at the cherry by bringing proceedings not reliant upon the conviction but based on the same facts. The matter eventually found its way to the Supreme Court which had ruled that ICAEW should not be allowed to proceed with a second case based on the same facts as the first.

vi. Expert witness immunity

SB drew the attention of the meeting to the case (***Jones v Kaney***) in which the Supreme Court had decided that expert witnesses no longer had automatic immunity from being sued for negligence.

vii. Panel Doing Own Detective Work

SB referred to a recent case arising of disciplinary proceedings against a nurse who had made dishonest claims for work done (***Sharp v NMC***). The tribunal members in that case had, however, taken account of evidence which had not been put before them by the parties and had effectively, therefore, carried out their own detective work with adverse consequences for the Respondent. They were heavily criticised by the High Court for doing this, their decision was overturned and the matter remitted back for re-hearing. This clearly has important ramifications for all disciplinary tribunals and illustrates the importance of matters being dealt with on the basis of the evidence placed before the tribunal by the parties and upon that evidence only.

9. Expenses (New Guidance)

The ARB's expenses guidance has changed slightly: the standard travel requirements have now been bolstered.

Last minute cancellation of hearings was considered. AC explained that the ARB has researched other bodies' policies: some pay nothing to members stood down and some do pay. The ARB's policy is that if a Panel member wishes to claim, s/he will be able to claim 50% of the day rate if s/he would otherwise miss out financially (e.g. not able to return to his/her office). This will not be in the ARB's global guidance on expenses because that guidance is applicable to everyone involved in the ARB but will be inserted into PCC papers because PCC members are treated slightly differently.

With regard to train fares, if a first class fare is cheaper this must be evidenced against the cheapest available standard class ticket on the same train. Therefore if you are on the XX train, the first class ticket price must be compared with the cheapest standard ticket on that train. This needs to be evidenced by an online print out. What should be done about a first class *return* ticket? This should be compared with a standard flexible return ticket.

If a first class ticket is purchased there must be evidence to justify why this was so. Otherwise this is a story waiting to happen as people do make FOI requests. A justifiable difference in price between a first class and standard class ticket would, in AC's mind, be no more than £30.

PH reported that he had received money back once when a hearing was cancelled even though he had bought a fixed ticket. There was a small admin fee.

10. Projected PCC Workload for 2012

There will be a marked increase in cases before the PCC in 2012 which is expected to be the busiest year so far. Five cases are booked, 12 are with Solicitors and there are others at Investigations Committee stage. There are usually 15 PCC hearings a year, but it is anticipated there will be 25 this coming year.

11. 2011 Case Review

It was agreed that paragraph numbers from decisions will be retained within the decisions circulated.

All agreed the case review bundle was helpful and interesting. Responses from the public were also discussed. Reactions to press releases show that a wide section of the profession does not understand what the ARB does. Can the ARB tackle this issue, so that people do understand? AC explained that the ARB does try to provide guidance but clearly more is needed. There is a small number of architects who do not wish to know what the ARB does and would not be converted but there are others who may be interested. The ARB is happy to travel and speak at any event: it just needs the invites! SH advised that in all press releases it is confirmed that financial penalties recovered do not go to the ARB and what the maximum fines are, but these are never reported.

PH said that web links made communication much easier and more interactive.

AM said that, on considering the case review, she had spotted some emergent themes: for example, there were three cases arising from debt collection. This is a serious issue in the current climate but the profession should be made aware that certain methods are not legitimate for claiming unpaid debts. Another recurrent theme was that architects are extraordinarily discourteous in their correspondence with their regulatory body.

There was discussion on whether RIBA would be willing to assist individual architects facing disciplinary proceedings. RIBA has been approached but many architects who do not actively engage with the ARB are not members of RIBA either.

It was explained that when an architect is not intending to be represented at a hearing, s/he is sent a booklet advising him/her to seek representation from RIBA, the Citizens' Advice Bureau or the Bar Council. If s/he remains unrepresented, s/he is sent a booklet setting out the procedures and explaining how to represent themselves.

It was confirmed that if a Registrant does not attend the PCC hearing (and sometimes if s/he does attend but is unrepresented), s/he is treated as denying the allegations thereby putting the ARB to proof, and minimising the risk of any perception that the Registrant is being unfairly treated.

Consideration was given to the role of the Inquirers under the Investigations Rules & PCC Rules. Inquirers have a duty objectively to assess matters and make clear anything that is either to the benefit or detriment of the architect. It is their role to investigate, and they can be called to give evidence at the PCC but they are not experts. The Board's Solicitors have access to technical advice through information that has come from the Investigations Committee or they can instruct experts themselves.

It was agreed that if an Inquirer interviews an architect, because under the Rules the architect must speak to the Inquirer, s/he needs to be warned about self incrimination and advised that s/he might wish to seek legal advice before speaking to the Inquirer. Such a statement will be added into the letter sent to the Registrant at the relevant stage.

DH said that a number of reports show that the Board's Solicitor has not necessarily understood the role and responsibilities of the architect and the processes involved,

for example the differences between building regulation approvals and planning permission. This will be fed back to the Board's Solicitors.

There had been only one case on poor design during 2011: the vast majority were on procedure or client care and standard terms of business. When a complaint is received against an architect, s/he is always asked to provide a copy of their PII Certificate and a copy of their Terms of Business even if this is not part of the complaint.

BS said there seems to be a mismatch between what the architect sees as his role and that which the public expect it to be e.g. Project Manager. The profession seems to be failing to face up to this mismatch: architects should realise that they must explain their role to the client in straightforward language at the beginning of an assignment or they could be in trouble.

There was discussion on the levels of fine imposed in comparison with other regulatory bodies.

12. PCC Handbook (To follow meeting)

SH advised that all PCC members would receive a handbook containing the Architects Act, the PCC Rules, the PCC Code of Conduct, PCC General Terms of Reference, Indicative Sanctions Guidance, Guidance given to Architects, expenses claim forms and anything else that a PCC member would need.

13. AOB

(1) Defamation

AM had recently attended training at RICS. RICS had been sued by a witness in a professional conduct case because the Panel had stated in their reasons that they had found him to be "lacking in credibility". When giving reasons for

findings of fact, it would generally not be enough simply to state “we prefer the evidence of A over B”, but Panel members should be very careful how they express themselves.

(2) Bribery

The ARB will have a Fraud and Bribery Prevention Policy soon, following enactment of the Bribery Act. It is overarching to the whole of the ARB and there will be zero tolerance to bribery. The ARB will introduce a register of interests which will be updated at the PCC review date each year and, as necessary, at other times. There will be no de minimis rule so all (if any) gifts and hospitality received should be declared.

(3) Role of Architect Panel Member

JC wanted to discuss the role of the architect panel members. He sensed a shift since the new Chairs had come on board. Two of the new Chairmen had limited his questioning of witnesses. His questions would not have changed the findings of guilt overall, but would have resulted in “not guilty” findings for least one of the particulars. JC had circulated a note prior to the meeting. He set out at the meeting his concerns in relation to a Scottish case. JW told the meeting that, in that case, he had explained to JC that the Panel was only able to make a decision on evidence that had been presented at the hearing. In that case, the architect, who had been represented, had said in evidence that he could not justify the delay complained of. It was therefore not legitimate for the Panel to find – on the basis of information provided by the architect member of the Panel – that such a delay *was* reasonable in the circumstances and thus provided a defence.

It was confirmed that Panel members are only allowed to ask questions on points of clarification. A Panel member cannot seek to cross examine a witness as that is the preserve of the parties and their representatives. PH

said that Panel members could not be both investigators and decision makers. Thus Panel members cannot raise matters that have not been brought up by the parties or their representatives. If it is a really important matter, it can be raised with the Board's Solicitor by asking a question such as, "Have you thought about x, y or z?". In that way, the Board's Solicitor can reconsider, or justify, his or her line of questioning.

BS said she understood that architect PCC members are not appointed as experts but in order to judge what reasonable members of the profession would do in such circumstances. Their role was therefore as a touchstone of best practice.

DH said that in some cases, for example where various standard forms of building contract were used, he often wondered why the charges were framed as allegation x and not allegation y. Again, however, it is not the function of the Panel to reframe the allegations.

AM said that while it is sometimes tempting to ask for additional documents which seem to be missing from the case bundle, it is not usually legitimate for a Panel member to do so. If there are real concerns, the matter should be sent back for further investigation. Otherwise, there is too great a risk that the Panel is seen to be investigating the case when its role is to adjudicate it.

JC said that he understood the discussion and that, in future, he would seek the advice of the Chair before raising questions.

It was agreed that, in future, the Panel should adjourn before asking questions in order to identify issues for questioning by the Panel and ensure that only appropriate questions were asked. All agreed that this was a good idea.

PH reported that he had signed up for a daily briefing from the Architect's Journal and suggested that others may be interested in doing the same.

(5) Board Solicitors' approach to the Code of Conduct

PH spoke about the Board's Solicitors' reliance on the Code when drafting allegations. SH explained that they will not be drafting charges in that way in the future. They may rely on the Code to explain why the architect should have known that s/he should not have behaved in a particular way, but in future allegations will not be drafted in reliance on the Code as they have been in the past.

(6) Judicial Review

AC told the meeting that an application for judicial review (JR) had been lodged in relation to an Investigations Committee (IC) decision not to refer a matter to the PCC. It had been lodged by the Complainant. The application is on the basis of two limbs: (1) that the IC had not applied the right test; and (2) even if it did, no reasonable Committee would have reached the decision that it did. The ARB had obtained a number of different legal opinions and AC has referred the matter back to the IC. The JR may not proceed as far as a hearing. However, for the future, ARB will provide guidance on the IC's approach, which will be available on the website.

There are also issues about the level of detail and reasons given by the IC and the extent to which the IC should instruct the Board's Solicitor. For example, should the IC indicate that a case is one of unacceptable professional conduct and instruct the Board's Solicitor to investigate the facts, or should the IC specify the facts on which the Board's Solicitor should proceed?

There was discussion about disgruntled Complainants to other regulatory bodies bringing proceedings when matters that they have referred are not pursued following investigation.

(7) New Members to PCC

It was reported that two new members have been appointed to the IC but there were to be no new members of the PCC for the time being. JC suggested that there may need to be another Scottish Architect for those Scottish cases where he has a potential or actual conflict. The meeting was advised that when this had happened in the past, another Panel member had been co-opted for a single hearing.

AM thanked everybody for attending and closed the meeting.