THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
(PROCEDURE RULES 2008)

F I N D I N G S

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY of SCOTLAND, formerly at 26 Drumsheugh Gardens, Edinburgh and now at Atria One, 144 Morrison Street, Edinburgh

against

BRIAN TRAVERS, Solicitor, Marshall Wilson Law Group Limited, 2 High Street, Falkirk

1. A Complaint dated 20 November 2015 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Brian Travers, Solicitor, Marshall Wilson Law Group Limited, 2 High Street, Falkirk (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was no Secondary Complainer.

3. There previously had been before the Tribunal a Complaint against the present Respondent and two others. Following sundry procedure, that Complaint called for a procedural hearing on 23 November 2015. On that date the Complainers were allowed to withdraw that Complaint and lodge the current Complaint in place thereof. At the hearing on 23 November 2015 the agent for the Respondent accepted service of the present Complaint on behalf of the Respondent. The agent for the Respondent sought a period of six weeks to take instructions and to lodge Answers to the new Complaint. The Tribunal agreed that a further procedural hearing should be fixed in due course and the date intimated to parties.

4. Due to the Respondent's ill-health, Answers were not lodged within the six week period. An extension was granted to 15 February 2016. In February 2016 a further extension was granted.

5. The Complaint called at a procedural hearing on 16 August 2016. The Complainers were represented by their Fiscal, James Reid, Solicitor, Glasgow. The Respondent was not present but was represented by David Burnside, Solicitor, Aberdeen. On Joint Motion the case was continued to a full hearing on 28 and 29 November 2016.

6. On 28 November 2016 the Complainers were represented by their Fiscal, James Reid, Solicitor, Glasgow. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen. A Record and Joint Minute were before the Tribunal. The Complainers lodged a Third Inventory of Productions. The Fiscal made a motion to amend the Record. In the first line of Answer 9.3 the motion was to delete references to paragraphs 16.1 and 16.2 and instead substitute paragraphs 9.1 and 9.2. There was no objection on behalf of the Respondent. This motion was granted. The Complainers led evidence from one witness, Graham Matthews. The Respondent gave evidence. Witness Stephen Biggam gave evidence on the Respondent's behalf. Both parties made submissions.

7. The Tribunal found the following facts admitted:-

7.1 The Respondent's date of birth is 2 October 1957. He was a partner with Marshall Wilson, Solicitors, Falkirk until 2 November 2008 and has been a Director of the Marshall Wilson Law Group Limited, Solicitors, Falkirk from 3 November 2008.

7.2 The Complainers carried out an inspection of the Marshall Wilson Law Group Limited between 25 and 27 May 2009. The inspection noted the purchase of forty-eight flats at Street C on behalf of clients, Mr and Mrs A.

The Solicitor dealing with the transactions on behalf of Mr and Mrs A was Mr Morton. Marshall Wilson were also acting on behalf of various commercial lenders who were providing finance for the forty-eight flat purchase.

The transaction was referred to Mr Morton by another Solicitor, James Turnbull of James Turnbull and Co, Solicitors, Falkirk.

7.3 The Marshall Wilson file contains a copy of a fax dated 6 August 2008 from Reith Lambert, Commercial Property Advisers, to Countrywide Residential Lettings setting out Mr A's intention to purchase the various properties, subject to Heads of Term set out in the letter. It advised that Mr A's Agent for the transaction would be Burness and that Mr A intended to set up a Special Purpose Vehicle for the purchase.

7.4 An email from James Turnbull to Mr Morton dated 2 September 2008 provided the initial instructions to Marshall Wilson and noted that Marshall Wilson would take the place of Burness in relation to the purchases.

A handwritten filenote of 15 September 2008 reads "Flats 150k each. But valued at 200k (48)".

7.5 Subsequent correspondence in relation to the provision of Property Enquiry Certificates concludes with a letter from James Turnbull & Co to Marshall Wilson on 30 September 2008 confirming that the selling agents are only willing to meet the cost of providing five Property Enquiry Certificates on the basis that all the properties are identical.

Mr Morton replied on 1 October 2008 confirming "We are prepared to accept the position regarding the Property Enquiry Certificates."

7.6 In an undated fax bearing a note to the effect it was received on 10 October 2008, Mr Turnbull advised Mr Morton:-

"Raymond
We are on the verge of concluding this deal. Settlement may (I stress may) take place 17.10.2008.
Before I conclude, I must have your confirmation that you are satisfied as to the conditions attached to the mortgage offers already issued and that

there are no impediments to your submitting the appropriate Certificates of Title to obtain the mortgage funds imminently.
Please let me have the necessary confirmation by return.
Regards
Jim"

By fax dated 14 October 2008 Mr Morton replied to Mr Turnbull advising:-

"I confirm that I have now gone over the conditions and the offer of loan in respect of the various properties. I attach hereto a schedule showing the various lenders and their requirements.

I also note that I am suppose to confirm to you that certain lenders that the purchase of each flat is £200,000, whereas of course it would appear that the 48 flats are being purchased for £125,000 each."

In a letter dated 15 October 2008 Mr Turnbull advised Mr Morton inter alia:-

"I refer to our telephone conversation when we agreed the position regarding the valuations and purchase prices of the properties.

I enclose, for your information, copy (poor) Money Laundering documentation.

I enclose copies of the Tenancy Agreements for all the flats. (The sellers) have been lax in maintaining rentals at the current levels. It is the client's intention to rectify the situations on matter of priority."

7.7 By letter dated 20 October 2008 Mr Morton wrote to Mr Turnbull advising:-

"I have to say that I have some concerns regarding the loans which Mr and Mrs A are receiving, in respect of in particular the Bank of Ireland, Birmingham Midshires and Bristol and West. In these three cases I have to submit a Report on Title and

confirm that in particular the present rents are sufficient to cover the mortgage payments which are being made by Mr and Mrs A. Having checked the Short Assured Tenancy Agreements, this is obviously not the case in respect of any of the loans applying to these three societies. If I submit a Certificate/Report on Title to these lenders, it will be quite apparent to them that when they receive the Land and Charge Certificate and Tenancy Agreements, that I have falsely reported the position, which would then leave myself and my firm with the possibility of not only being reported to the Law Society but taken off their Solicitors panel."

7.8 Marshall Wilson received an offer dated 29 October 2008 to sell twenty-seven flats to Mrs A for £2,750,000. Missives were concluded on 14 November 2008.

On the basis of the Missives, the average price paid by Mrs A for the twenty-seven flats purchased by her was £101,851.

Of the twenty-seven flats purchased by Mrs A, twenty-one flats were subject to loans from commercial lenders, as detailed in the accompanying Schedule A.

The loans for the twenty-one flats totalled £3,060,000. At settlement 5 loans were not drawn down totalling £770,000 resulting in loans actually utilized totalling £2,290,000.

The total of the purchase prices of the twenty-one flats, as certified in the Certificates of Title, was £4,000,000.

7.9 Marshall Wilson received an offer dated 29 October 2008 to sell to Mr A twenty-one flats at Street C for £2,750,000. Missives were concluded on 14 November 2008.

On the basis of the Missives, the average price paid by Mr A for the twenty-one flats purchased by him was £130,952.

Of the twenty-one flats purchased by Mr A, eighteen of the flats were subject to loans from commercial lenders, as detailed in the accompanying Schedule B.

The loans for the eighteen flats totalled £2,861,596. The total of the purchase prices of the eighteen flats, as certified in the Certificates of Title, was £3,600,000.

7.10 The total actual purchase price for all forty-eight flats at Street C was £5,500,000. The average purchase price per flat was accordingly £114,583.33.

The total purchase price of the 39 flats as stated in the Certificates of Title was said to be £7,800,000 on the basis of £200,000 purchase price per flat.

The total of the loans for the 39 flats was £5,350,000. Only £150,000 was paid by Mr and Mrs A towards the actual purchase price.

Of the 48 flats, only 34 flats were subject to loans at settlement. As a result, 14 flats were purchased by Mr and Mrs A free from any loans.

7.11 The Council of Mortgage Lenders Handbook applied to transactions where loans in respect of various flats were received from Alliance & Leicester, Bank of Ireland, Birmingham Midshires, and the Chelsea Building Society, et separatim Loan Instructions applied in respect of the aforementioned Lenders and the Bristol & West Building Society all as detailed in the said Schedules A and B.

Alliance & Leicester

7.12 The offer of loan from the Alliance & Leicester provided that instructions to Marshall Wilson were based on the conditions set out in the CML Lenders Handbook for Scotland.

The offers of loan stated that the Solicitor was required to confirm "The purchase price stated in the mortgage offer is correct and the same amount will be stated in the corresponding contract of sale."

The Certificates of Title confirmed the relevant mortgage advance figure and that the "price stated in transfer" is £200,000.

Bank of Ireland

7.13 The offers of loan instructed Marshall Wilson to investigate the Title in line with the terms of Bank of Ireland's mortgage offer and the Mortgage Conditions (Scotland) and the CML Lenders Handbook, Parts I and II.

The offers of loan stated that "The Solicitor must state the actual purchase price being paid. Any discount, cash back or allowance should be reported to us as soon as possible." In addition, the offers stated that the payment of rent should be at least sufficient to cover the amount of the monthly instalments of interest due under the mortgage.

Birmingham Midshires

7.14 The offers of loan stated that Marshall Wilson were instructed in accordance with the CML Lenders Handbook for Scotland and Birmingham Midshires Part 2 instructions.

It was a condition of the offers of loan that the monthly rental income under the Tenancy Agreement must be greater or equal to a minimum of 100% of the monthly mortgage payment.

Bristol & West

7.15 The offers of loan stated that Marshall Wilson were instructed in line with the terms of the lenders Offer of Loan and Solicitors Instructions (Scotland).

The offers provided that "The Solicitor must state the actual purchase price being paid. Any discount, cash bank or allowance should be reported to the lender as soon as possible".

In addition, the conditions provided that the payment of rent should be at least sufficient to cover the amount of the monthly instalments of interest due under the mortgage.

The Solicitors Instructions (Scotland) provided that in all purchase cases the Solicitor was required to obtain a Property Enquiry Certificate.

Chelsea Building Society

7.16 The offers of loan stated that Marshall Wilson were instructed in accordance with the second edition of the CML Lenders Handbook for Scotland dated 1 January 2003 and Chelsea Building Society's Part 2 Instructions.

7.17 The total purchase price of the flats was £5,500,000. The Certificates of Title showed purchase prices totalling £7,600,000.

The purchase price covered forty-eight flats. Of the forty-eight flats, only thirty-four flats were ultimately subject to loans/mortgages. Fourteen flats were purchased subject to no borrowings.

The loans/mortgages provided totalled £5,350,000.

7.18 Flat purchases were progressed and Certificates of Title signed and/or completed, all as per the accompanying detailed Schedules in circumstances where:-

(a) The purchase price in the mortgage offer exceeded the amount stated in the contract of sale.

(b) Payment of rent was not sufficient to cover the amount of monthly instalments of interest due under the mortgage.

(c) The actual purchase price being paid for the flat was not stated.

7.19 Copy identification documents in respect of the purchasers Mr and Mrs A were sent by James Turnbull to Mr Morton. The documents were not "certified a true copy". There was no indication that Mr Morton had ever met the purchasers.

There was no indication that James Turnbull consented to being relied on by Mr Morton in terms of the Money Laundering Regulations 2007, Regulation 17(1)(a).

There is no indication that James Turnbull had carried out due diligence in terms of the 2007 Regulations.

A copy Bank Statement provided showed that one of the purchasers, Mr A, had £2,000,000 in the account. Mr Morton raised no queries re the source of these funds.

7.20 Marshall Wilson Money Laundering Compliance Risk Assessment form was completed and signed by Malcolm Thomson, a partner of Marshall Wilson on 4 November 2008. He noted the transaction was "high risk".

Mr Morton was responsible for identification but had not signed the verification section of the form.

Mr Morton certified as a true copy photocopies of the copy identification documentation provided by James Turnbull although he had not met the purchasers and the original copy documentation was uncertified.

7.21 Mr Morton went on holiday on or about 7 November 2008. As a result, the Respondent became involved in the transactions and ultimately settled them on or about 14 November 2008.

7.22 In advance of the settlement there was an attempt to change the identity of the purchasers by having the title to the properties taken in the name of a limited company. The proposed change did not in fact proceed. The Respondent requested, obtained and acted on advice received from the Complainers' Professional Practice Department.

7.23 On 12 November 2008 the Respondent wrote to Mr and Mrs A confirming that Marshall Wilson held loan funds in respect of the purchase of the forty-eight flats at Street C, these funds totalling £5,356,185. The letter advised that the amount required to Stamp Duty, Land Tax and Registration Fees was £371,285.

7.24 On 13 November 2008 the Respondent wrote to James Turnbull following a telephone conversation between the two men earlier in the day.

The said letter referred to Mr Morton's letter of 20 October 2008 to James Turnbull which referred inter alia to rents being insufficient to cover mortgage payments.

The letter of 13 November 2008 referred to various steps to be taken inter alia by Mr and Mrs A. Notwithstanding these proposed steps, the position remained that, as stated in the letter of 20 October 2008, rents were insufficient to cover mortgage payments.

The Respondent was aware of the position in respect of the rents in that he stated in the letter:-

"I should point out, however, that in my view there may be a slight difficulty in obtaining fresh Leases without the consent of the various tenants. As you can appreciate the fact that whatever the basis of the original Leases were they are certainly no longer Short Assured Tenancies. In my view they are Scottish secure tenancies. In my view the only way in which it is likely that the appropriate new tenancy agreements can be entered into is either by the tenants voluntarily relinquishing the basis of the current tenancies (ie Scottish secure tenancies) and/or alternatively entering into fresh Short Assured Tenancies."

Notwithstanding the issue of rents being less than mortgage payments, the Respondent settled the transactions on 14 November 2008.

8. Having given careful consideration to the established facts and the submissions made by both parties, the Tribunal found the Respondent not guilty of professional misconduct.

The Tribunal did not consider that the conduct established could meet the test for unsatisfactory professional conduct and therefore declined to remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980.

9. Having heard further submissions from the parties in relation to expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 28 November 2016. The Tribunal having considered the Complaint dated 20 November 2015 at the instance of the Council of the Law Society of Scotland against Brian Travers, Solicitors, Marshall Wilson Law Group Limited, 2 High Street, Falkirk; Find the Respondent not guilty of professional misconduct; On the unopposed motion of the Respondent, Find the Complainers liable in the expenses of the Respondent and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but shall not include the names of the firm's clients who were the purchasers. Publicity shall be deferred until publication of the Tribunal's decision in parallel proceedings.

(signed)
Nicholas Whyte
Chairman

10. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 6 JANUARY 2017.

IN THE NAME OF THE TRIBUNAL

[redacted]

Nicholas Whyte

Chairman

NOTE

Prior to the Hearing on 28 November 2016, the Complainers had lodged two Lists of Productions and a List of Witnesses. The Respondent had lodged a List of Witnesses. At the Hearing a Joint Minute was lodged in which the facts and averments in the Complaint were admitted. The Joint Minute also agreed that Schedules A and B (Productions 1 and 2 for the Complainers) were true and accurate records of the properties at Street C purchased by Mr and Mrs A. Productions 3-26, 30 and 31 for the Complainers were agreed as being true and accurate and what they bore to be. The Tribunal allowed the Record prepared by the parties to be received. The Tribunal allowed the Record to be amended. On the Complainers' motion, the reference to "paragraphs 16.1 and 16.2" was deleted and "paragraphs 9.1 and 9.2" substituted. The Tribunal allowed the Fiscal to lodge a third inventory of productions. The Fiscal indicated that he intended to lead evidence from only one witness, Mr Graham Matthews.

EVIDENCE FOR THE COMPLAINERS

WITNESS: GRAHAM MATTHEWS

The witness confirmed that he qualified as a solicitor in 1979 and was a partner in Peterkins Solicitors, Inverurie. He joined the Council of the Law Society of Scotland in 2005. He was the convenor of various committees and working parties for the Law Society of Scotland. He used to chair Guarantee Fund interview panels.

The witness was referred to Production 29 for the Complainers. He confirmed that this was a Guarantee Fund Committee Note of Interview from 15 October 2009. He confirmed that he had been the Convenor for that interview. He indicated that the interview had taken place in two parts because relations were so bad between the partners of the firm some of them could not be in the same room at the same time. The witness indicated that the main purpose of the meeting was to deal with the Law Society's concerns about the Street C purchases.

The Fiscal took the witness through the terms of production 29. The witness explained the background to the transaction as is recorded at p29/3 and the explanations given by Mr Thomson and Mr Travers as minuted on p29/4 and p29/5. The witness explained that the concern of the Guarantee Fund Committee was that there had been breaches of the rules during the course of these transactions, and in particular, it appeared that some of the purchases had been 100% funded by loans at a time when the banks were not providing that level of lending. The Fiscal indicated to the witness that it was a matter

of agreement that of the 48 flats purchased, 34 of these had loans and 14 were purchased outright. The witness agreed with this and that the purchase cost was said to be £200,000 per flat but was in fact £150,000. Generally, in such a scenario, there would be a duty on the solicitor to write to the lender to ask whether the lender was aware of the fact that some flats were being purchased without loans and others almost fully funded by loans. The Committee's main concern was whether there was likely to be a claim against the Guarantee Fund.

The Fiscal referred the witness to p29/5, in particular the section said to be quoted from a letter of 20/10/08 by Mr Morton to Mr Turnbull (also found as Complainers' production number 15/1). Said letter was said to have said,

"I have to say that I have some concerns regarding the loans which Mr and Mrs A are receiving in respect of, in particular, the Bank of Ireland, Birmingham Midshires and Bristol and West. In these three cases I have to submit a report on Title and confirm that in particular the present rents are sufficient to cover the mortgage payments which are being made by Mr and Mrs A. Having checked the Short Assured Tenancy Agreements, this is obviously not the case in respect of any of the loans applied to these three Societies. If I submit a certificate/report on Title to these lenders, it will be quite apparent to them that when they receive the Land and Charge Certificates and Tenancy Agreements that I have falsely reported the position which would then leave myself and my firm with the possibility of not only being reported to the Law Society, but taken off their Solicitors Panel. I would appreciate your thoughts on the matter."

The witness indicated that one of his colleagues had found this letter in one of the files. The witness considered it to be of importance because it appeared that Mr Morton was well aware of the circumstances of the transaction.

During cross examination, the witness conceded that it was apparent that the Street C transaction had belonged to Mr Morton and that he had gone on holiday without leaving any detailed instructions when it had been due to settle. He said it was apparent to him that decisions relating to funding had been taken before Mr Travers' involvement. The witness agreed that multiple lenders were involved.

The witness indicated that he is a partner in a ten partner High Street practice of solicitors. The witness indicated in answer to a question that the partners at his firm are entitled to holidays and that at his firm there is a practice of leaving detailed notes on files for others to look after. The witness said that it was not reasonable to leave a transaction like the Street C purchases with someone else.

However, if he had been left with the file without a detailed file note, it would have been appropriate to read the file, or least the report on Title. To make sure the money was going to come through, the solicitor should check to see that they are signed. Mr Burnside asked if the witness was of the view that a new, junior partner who has been given inadequate information but has been reassured by the solicitor who has referred the business, has a duty to check the ratio of borrowing. The witness conceded that the Respondent was in a difficult position, however maintained that even if he had checked four or five of the files, he would have identified the problem.

Mr Burnside asked the witness whether, if the loan funds were in, the Respondent had an obligation to look at the certificates of title. The witness indicated that the solicitor should double-check. However, the witness didn't remember being told that the money was already in.

The witness said that he was told that the Respondent had queried the position regarding the limited company with the Law Society. Mr Burnside suggested that this was more than would be expected from someone who was standing in during a partner's holiday. The witness said that he wondered why, if he spotted that, he did not spot the issues for the lender.

The witness confirmed that he had read out the letter of 20 October 2008 at the interview. He was asked what the reaction he received. He said that there was "stunned silence". Mr Burnside asked him whether the Respondent was also stunned and the witness said that he was surprised.

Mr Burnside asked the witness whether he remembered making a comment that the parties should reconsider remaining partners and he said that he could not remember saying such a thing.

During re-examination the witness said that he asked the partners whether they had read the files because it was inconceivable to him that they could have read that letter and proceeded with the transaction.

In response to a question from the Chairman, the witness indicated that the purpose of the committee was to assess the danger to the Guarantee Fund and was not the allocation of particular responsibility to any party. At that time there had been a lot of CML breaches and there was a concern that a big transaction might "bust" the Guarantee Fund. This case stood out as being particularly worrying. Mr and Mrs A had funded a £5.5 million purchase with £135,000. The Committee was trying to get to the bottom of what had happened and who if anyone should have stopped the transaction. There were

three junior partners who knew nothing about the case. The main culprit was Mr Morton. However, the interviewers formed a view that the Respondent should have stopped the transaction.

EVIDENCE FOR THE RESPONDENT

WITNESS: BRIAN TRAVERS

The witness confirmed that he was 59 years old and a Director of the Marshall Wilson Law Group Limited. He became a partner in Marshall Wilson in April 2007. The partnership became a company in November 2008. The witness said his areas of experience were mostly civil litigation and conveyancing although he had some previous criminal law experience. He was a "generally experienced" conveyancer. He described Mr Morton as being very egotistical. He wanted to drive the partnership and be the "rainmaker". Most other partners had trained with MW and all, including the Respondent, were viewed by Mr Morton as his juniors. The Respondent had no concerns at the time about Mr Morton's abilities as a conveyancer or about his business ethics or practices.

The Respondent indicated that he first became aware of the Street C purchases at a partners' meeting around November 2007. Mr Morton had in passing mentioned the possibility of a fairly substantial referral from Mr Turnbull. The Respondent knew Mr Turnbull as a sole practitioner who worked locally. The Respondent knew him from other cases. The next thing the respondent was aware of was on the morning of Monday 10th November 2008, Malcolm Thomson phoned and asked the Respondent to go up to his room. When he arrived, Karen Thomson, Mr Morton's assistant and paralegal was also present. Karen Thomson informed him that Mr Morton was on holiday for a week. Mr Thomson asked if the Respondent would deal with the transaction in Mr Morton's absence. Karen Thomson was holding a scrap of paper with instructions. She said that the transactions were "good to go". There was nothing to indicate that there was any problem. The Respondent did not read the scrap of paper which was retained by Karen Thomson. She told him that the loan funds were in and the clients were looking to settle that week. Karen Thomson was a paralegal with 25-30 years' experience in conveyancing. She was the long term assistant to Mr Morton. She was very competent. Mr Morton relied upon her. She told the Respondent that all the flats were to be purchased by a Mr and Mrs A, some individually and some on a joint basis. The Respondent was not given any files.

The Respondent decided to call Mr Turnbull to ascertain the position and get an overview. Mr Turnbull told him that the sellers were keen to get the transaction settled. Mr and Mrs A were also keen to conclude. The Respondent said that Mr Turnbull mentioned that title was to be taken in the

name of a limited company in the first instance. He explained it was a tax avoidance scheme for stamp duty and that the intention was to transfer immediately the titles to Mr and Mrs A. The Respondent called Mr and Mrs A's tax advisor to get more information. He learned that it was a legitimate scheme and that by setting up a company they could claim entrepreneurial relief which could be claimed back against stamp duty. Mr Turnbull said that Mr Morton was aware of the scheme. The Respondent took advice from the Law Society and was told that he would have to notify and advise the lenders of the scheme. The Respondent advised Mr Turnbull accordingly. The Respondent took no steps to look at the files. He indicated that there was no reason to do so. The complication regarding the limited company meant that until it was resolved, there was nothing for him to do. He thought settlement was going to be delayed and he would not have any work to do on the transaction before Mr Morton's return.

However, Mr and Mrs A indicated they would proceed without the limited company. The cash room manager confirmed that they were in funds. It was apparent that the bulk of funds was coming from a number of lenders. However, the Respondent did not look at the ledger. He took a global approach. He asked the cash room manager if they had sufficient funds to settle and was told that they did.

The Respondent made contact with Mr Turnbull to say that they were in funds but he had concerns about the leases on the flats to be purchased. Mr Turnbull indicated that this was something he had already discussed with Mr Morton. Mr Turnbull reassured the Respondent that all was in order, and that Mr Morton had been aware of the situation. Following that telephone conversation, the Respondent dictated a letter to be faxed to Mr Turnbull. The Respondent confirmed that this was the letter which is Production number 24/1 for the Complainers. The Respondent confirmed that this letter specifically refers to the letter of 20 October 2008. The Respondent maintained that he never saw the letter of 20 October 2008 until the Guarantee Fund interview and that the reference to it in the letter was based on information Mr Turnbull had given him. The Respondent was reassured by Mr Turnbull that although not all rents were sufficient to cover the mortgage payments, Mr and Mrs A would remedy that situation. The transactions were settled on the basis of the assurances given to him by Mr Turnbull and in particular by the assurances by Mr Turnbull that Mr Morton was aware of the situation and approved the arrangements. The Respondent said that he was under the impression that the lenders were aware of the refurbishment works to ensure that rents would be increased.

Mr Burnside asked what the Respondent would have done if he had seen the letter of 20 October 2008. The Respondent said that he would have looked at each and every note on title and the loan offers and make sure what had been reported to the lenders was correct. Assuming that the true position had not

been reported to the lenders originally, he would have retained the loan funds, withdrawn from acting, and called a partners' meeting to discuss the case. He agreed with Mr Burnside that the matters in the letter of 20 October 2008 were extremely serious and it was inconceivable that he would have proceeded with the transaction if he had seen it. However, he did not see the letter and he proceeded to conclude missives and settle the transaction. He accepted the offer to sell on the instructions of the clients because all conditions were acceptable and he had the necessary funds. Looking back with hindsight the Respondent identified things that should have been done but there was nothing to indicate to him at the time that there was anything untoward. The only obvious problem was the back to back transactions and he dealt with that.

The Respondent said that he was asked to take on this large transaction during a busy week when he had court commitments etc. In his view it was not feasible or reasonable for him to be completely au fait with the transaction as the original solicitor. There was nothing to suggest there was any issue and he had the assurance from Mr Morton that he had not identified any problem.

The Respondent explained that when Mr Morton returned to work he did not discuss the matter with him as they were not on good terms by then. A number of months after settlement they were embroiled in a partnership dispute and the case came to light after a Law Society inspection regarding disputed fees. At that stage he had a rough idea that there was something wrong with the transactions. He looked at the ledgers and saw how much Mr and Mrs A had put to the price of the purchase. The partners had a discussion about how serious this was for them as a group. They had no knowledge of Mr Morton's complicity until some time after this. It only became clear to him after the Guarantee Fund Committee meeting when the letter of 20 October 2008 was read out to them. The Respondent took issue with the minute of the interview at 29/3. He said it looked as though he and Mr Thomson reviewed the files at the time of the transaction. However, the review took place some months later and even then it was not based on full information. The files were at the Law Society and so the position was built up from what they could run off from the computer and ledger cards.

The Respondent explained that he was shocked when the letter of 20 October 2008 was read out to him. This gave way to anger. Even at that time he could not believe that Mr Morton was involved in something like that and had embroiled the rest of the partners in it. The Respondent maintained that there was no causal connection between the letter and his fax to Mr Turnbull which referred to the letter. The Respondent said that after reading the letter out, Mr Matthews said that he could tell by the looks on their faces that this was a surprise to them and that they might want to consider whether they wished to remain in partnership with Mr Morton.

During cross examination the Respondent confirmed that he had only focussed on the missives and had not investigated how much Mr and Mrs A were contributing to the purchase price. With hindsight he could appreciate that the difference between the contribution and the purchase price was alarming but at the time he did not consider the loan letters and he was taking a global approach to the total. Mr Reid pointed out that a global approach meant £5.3million loans for a £5.5million purchase so Mr and Mrs A were still contributing a very small balance. The Respondent said this did not set alarm bells ringing at the time. He did not know at the time that there was a condition that the rents had to be a particular figure. He understood Mr Turnbull to be saying that Mr Morton and the lenders were aware that some of the flats were unoccupied and no rents were available. He thought this had been discussed and agreed. The rents were not significant to him. He thought this issue was tenancies.

In re-examination the Respondent reiterated that the only unusual aspect of the transaction was the high value.

WITNESS: STEVEN BIGGAM

The witness confirmed that he is 48 years old and a Director at Marshall Wilson Limited in Falkirk. He joined the firm in July 2002. He has been a partner since about 2004/2005. He remembered the Street C transactions. He learned about them shortly before the hearing at the Law Society. He explained that when the letter of 20 October 2008 was read out at the interview he felt as if his "jaw hit the table." He said that none of the partners could believe the implications of it. It was clear that Mr Morton knew something and had not told them. In the witness's view all the partners at his part of the interview looked the same. They were all looking round at each other and were completely shocked. According to the witness, Mr Matthews remarked that it was clear that they didn't have any knowledge of the letter. The witness believed that the Respondent was as shocked as the rest of them.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid described the Complainers' position with regard to professional misconduct with reference to the averments of duty contained in the Complaint. The Fiscal conceded that Mr Morton was primarily responsible for the transaction and he had taken a week off just as the missives were due to be concluded and the transaction settled. He accepted that this was not an easy position for the Respondent to be in. However, it was his contention that on any cursory view, a £5.5 million transaction involving £5.3 million in loans with the purchasers only providing less than £150,000 of

the price should itself have "set alarm bells ringing." It was the Complainer's position that the letter of 12 November 2008 which the Respondent sent to the purchasers was sufficient for the Tribunal to infer that the Respondent knew the difference between the loan funds and the purchase price.

Given the size of the transaction, the fact the senior partner was on holiday and the paucity of information which was apparently contained in the handwritten note on a scrap piece of paper, there was justification for a much closer examination of the transaction. Mr Reid also asked the Tribunal to take account of the fax which the Respondent sent to Mr Turnbull on 13 November 2008 which specifically refers to Mr Morton's letter of 20 October 2008. In his submission, that letter effectively admitted that there were very significant problems with the transaction and if Mr Morton went ahead with it, he would be in breach of a whole variety of matters. If the Tribunal were to take the view that the Respondent saw the letter of 20 October 2008 then this is a damning situation. The breaches are clear. There is no way this transaction should have settled.

The Fiscal noted that the question of misconduct is for the Tribunal. He urged the Tribunal to consider whether it was the Respondent's responsibility to halt the transaction and make further inquiries. In the Fiscal's submission, even on the Respondent's evidence, there was a complete lack of information about a £5.5million transaction. The missives appear to have been concluded without reference to the files. In Mr Reid's submission, the circumstances were such that this amounts to professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

Mr Burnside submitted that one can start from the premise that a solicitor is responsible for his own workload. However, he asked the Tribunal to consider to what extent he is responsible for the workload of a partner. The Respondent had been with this firm for a relatively short time. Mr Morton did not tell him that he was going on holiday. In his submission, Mr Reid was setting the bar too high with regards to the Respondent's conduct. Mr Burnside submitted that the Respondent was not obliged to go through forty eight transactions to check that they were CML compliant.

Mr Burnside asked the Tribunal to consider what the Respondent did do. He got information from an experienced paralegal that a transaction was due to settle, that all was in order and there was nothing to set off any alarm bells. This was a big transaction for the firm being undertaken by its senior partner. The Tribunal must have regard to the Respondent's relatively junior position within the partnership. A trusted assistant of a senior partner tells the junior partner that all is in order. It cannot reasonably be

said that his obligation is to go beyond that on top of his existing workload. He cannot be cognisant of all the files in the firm. However, the Respondent didn't just proceed without making any enquiries. He got information from Mr Turnbull and the Law Society. He acted for his clients, the lenders, by telling the purchasers' agent that the proposal for the purchase to be done for a company would have to be authorised by the lenders. Mr Turnbull told him everything was fine. Both parties wanted to conclude. Mr Morton appears to have considered that everything was in order. In Mr Burnside's submission the Respondent dealt proactively with the situation and dealt with it properly.

Mr Burnside conceded that the letter of 20 October 2008 was something of a "smoking gun". If the Respondent had seen it, it was "inconceivable" that the Respondent would have proceeded. Unfortunately, he makes a passing reference to the letter. However, there is no proof that he had indeed seen the letter. Mr Burnside submitted that the Respondent was clear in his evidence that if he had seen the letter he would have halted the transaction. This shows the seriousness he would attach to these circumstances. It is clear that he did not know of the letter. This was a bombshell to him and the other parties.

Mr Burnside submitted that the differential between loans and purchase price of £150,000 was not sufficient for the Respondent to report the case to the lender. In this case there were six or seven different lenders all with different conditions. There was nothing to alert him to the breach of the CML handbook. The Law Society aver that he failed to provide material information but this is only relevant if he was aware of the information he had to give. He cannot tell them what he did not know. It is a counsel of perfection if the bar is so high that you have to read all the files of a holidaying partner. The Respondent had the material facts. He did not conceal anything from the lender.

It appears now that part of the funds were being used for the fourteen other properties. However, the Respondent would not have been able to obtain that detail just from the contribution of £150,000.

The senior partner handed over in the most irresponsible manner, a very large transaction. The Respondent behaved properly regarding the query he did have. He therefore invited the Tribunal to find that there was no professional misconduct by the Respondent.

DECISION

The Tribunal considered the case of Sharp v The Law Society of Scotland 1984 SC 129 and the definition of misconduct contained within, namely that:

"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is to be made."

It was necessary for the Tribunal in this case to consider not only the circumstances of the transaction which were serious, but also the degree of culpability which ought to be attached to the Respondent's individual actions or omissions.

One of the main issues of fact to be determined was the question of whether the Respondent had been aware of the letter of 20 October 2008. The Respondent gave evidence that he was not aware of the contents of the letter in November 2008. Graham Matthews and Stephen Biggam also spoke to the Respondent's reaction when the letter was read out at the Guarantee Fund Committee interview. The Tribunal considered that on the evidence it had not been proved that the Respondent had knowledge of the letter of 20 October 2008 when he was dealing with the transaction in questions.

The Tribunal went on to consider whether there were sufficient surrounding circumstances creating an obligation on the Respondent to consider that there might be a CML breach or that he should investigate matters further. The Tribunal considered that in a CML breach allegation that it is necessary to consider the conduct and knowledge of the individual solicitor and not those of the firm. The Respondent had not prepared, signed or submitted the Certificates of Title for the various lenders. What he had done was to conclude missives and settle the transaction. The Tribunal was of the view that there were insufficient surrounding circumstances for the Respondent to have been put on his guard so as to place on him an obligation to review the whole files. It is clearer with hindsight but considering the position that the Respondent was in at the time, the Tribunal was of the view that his actions did not constitute professional misconduct. He had been placed in a very difficult position by his senior partner. Best practice would have been to examine all the files before settlement. A prudent solicitor would have considered doing so. However, that is not the test for professional misconduct. The Tribunal was not of the view that the Respondent's actions were serious and reprehensible so as to meet the Sharp test. The Respondent was entitled to rely on his senior partner and on the word of his fellow solicitor, Mr Turnbull. The Tribunal accepted the Respondent as a credible witness. The Tribunal accepted that he did not see the letter of 20 October 2008 until the meeting of the Guarantee

Fund Committee. The surrounding circumstances of the high price and the lack of handover were not of themselves sufficient circumstances to give him warning and so for him to fall foul of the Sharp test. It was of note that the Respondent had recognised another potential breach in the form of the proposed back to back transaction and had been willing to risk the transaction by reporting the matter to the lender and taking the advice of the Complainers.

The Tribunal then considered whether or not to remit the complaint to the Law Society. In the whole circumstances, the Tribunal did not consider that the conduct of the Respondent could amount to unsatisfactory professional conduct and so determined not to remit the complaint to the Law Society under Section 53ZA of the Solicitors (Scotland) Act 1980.

On the unopposed motion of the Respondent, the Tribunal found the Complainers liable in the expenses of the Respondent and of the Tribunal. The Tribunal ordered that publicity be given to the decision but that publicity should be deferred pending the outcome of other related proceedings. Having regard to the potential damage to the interests of the purchasing clients, the Tribunal concluded that it would be inappropriate to publish their names in accordance with Article 14A of Schedule 4 to the Solicitors (Scotland) Act 1980 on the basis that it would be against their interest to have their financial affairs made public when they have had no opportunity to make representations in this regard.

When formulating the findings the Tribunal noted that there were arithmetical errors in the Record which have been reproduced above in paragraphs 7.8, 7.9, 7.10 and 7.17 of these findings, and which were referred to in submissions for the Complainers. The Tribunal was not addressed on these inaccuracies by either party at the Tribunal hearing. The Tribunal is of the view that these are purely arithmetical miscalculations which have no material bearing whatsoever on the outcome of the case.

Nicholas Whyte

Chairman