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, 26 Drumsheugh Gardens, Edinburgh

against

SCOTT ALLAN, Solicitor, Anderson Bain LLP, 6, 8 & 10 Thistle Street, Aberdeen

1. A Complaint dated 28 April 2014 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Scott Allan, Solicitor, Anderson Bain LLP, 6, 8 & 10 Thistle Street, Aberdeen (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.

2. The Complaint was made on behalf of the Secondary Complainer, Mr and Mrs Steven Aitken of Inchgarth Lodge, Inchgarth Road, Pitfodels, Aberdeen.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

4. In terms of its Rules the Tribunal appointed the Complaint to be heard on 11 July 2014 and notice thereof was duly served on the Respondent.

5. The hearing took place on 11 July 2014. The Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen. The Secondary Complainer, Mr Aitken, was also in attendance.

6. A Joint Minute was lodged admitting the facts in the Complaint. The Tribunal then heard evidence from the Respondent.

7. The Tribunal having noted the terms of the Joint Minute and having heard evidence from the Respondent, found the following facts established:-

7.1 The Respondent was born 22nd February 1982. He was admitted and then enrolled as a solicitor in the Register of Solicitors practising in Scotland in September 2005. From 11th October 2005 through to 31st October 2006, he was employed with the firm Hutcheon Rattray & Co, Solicitors. From 1st November 2006 to date he has been employed in various capacities with the firm Anderson Bain, Solicitors, Aberdeen initially as an employee then an associate and latterly as a partner.

7.2 The Secondary Complainer is Mr and Mrs Steve Aitken who reside at Inchgarth Lodge, Inchgarth Road, Pitfodels, Aberdeen.

<u>Sale of Property 1</u>

7.3 The Respondent acted on behalf of the clients, Mr and Mrs A in relation to the sale of Property 1. The firm was instructed to market the property on or about 14th January 2013. Three notes of interest were received, one on behalf of a Mr B intimated on 7th February 2013; one from a colleague of the Respondent in his firm on behalf of a Mr C and Ms D intimated

on 8th February 2013 and one on behalf of Mr and Mrs Steve Aitken intimated on 11th February 2013. Mr C and a Ms D made a formal offer to purchase the subjects Property 1 at a figure of £680,000 of which the sum of £20,000 was to be apportioned in respect of moveables. The offer specified that the carpets, curtains and floorcoverings, the light and bathroom fittings, the hot-tub, the gazebo and any other moveable items specified in the sales particulars were to be included in the sale. This offer was dated 11th February 2013 and was submitted by a colleague, working in the same firm and office as the Respondent, Mr E, acting on behalf of Mr C and Ms D. That offer was one acceptable in principle .On 11th February 2013, the Respondent wrote to Mr and Mrs A enclosing Terms of Business. In this letter he confirmed that his firm Anderson Bain acted on behalf of the purchasers as well as themselves and advised Mr and Mrs A "in terms of guidelines laid down by our regulating body, the Law Society, we are obliged to draw this aspect to your attention and in the event that you consider there to be a conflict of interest in view of such representation then you are entitled to take separate and independent legal advice. In the event of any matter arising during the course of the transaction which gives rise to any question of conflict or difficulty due to such representation then we will again raise this matter with you and should you consider it to be necessary, we will step down as your legal representatives and make the recommendation of another solicitor to you."

7.4 Mr C and Ms D instructed Mr E to withdraw their offer on 20th February 2013. Mr E emailed the Respondent to advise him of this on 20th February 2013. Having been provided with this information the Respondent then contacted the firm Messrs Burnett & Reid. They acted on behalf of a Mr and Mrs Aitken. These clients had expressed an interest in the property. They had intimated to the Respondent a note of interest. The

message conveyed by the Respondent to Messrs Burnett & Reid was to advise that the property was available and back on the market. On 21st February 2013 the solicitor acting on behalf of Mr and Mrs Aitken, intimated by facsimile transmission a missive to the Respondent in terms of which they offered to purchase the property on behalf of Mr and Mrs Aitken at a price of £670,000. In a conversation with Mr F on the phone the Respondent indicated that the offer on behalf of Mr and Mrs Aitken was acceptable in principle and that a qualified acceptance would be issued as soon as possible. This acceptance was conveyed to Mr and Mrs Aitken. A review of the file maintained by the Respondent revealed that the Respondent dictated a qualified acceptance to be sent to the solicitor acting on behalf of Mr and Mrs Aitken and a letter withdrawing from missives addressed to Mr E his partner who was acting on behalf of Mr C and Ms D. This apparently was to be typed first thing on 2nd February. This date was a mistake on the file. The oral acceptance by the Respondent on behalf of the seller at the figure of £670,000 was of an offer which specified similar moveable items which had been contained in the offer from Mr C and Ms D. Said letters were never, in fact, typed.

7.5 There then followed a series of e-mail communication which is of relevance to the matter at hand. At 20.18pm on the evening of 21st February 2013 Mr C e-mailed Mr E advising that loan finance was in place and that he and Ms D were now comfortable with the prospect of the prospective development relating to the proposed purchase. These were issues which caused them concern earlier. Mr C instructed Mr E to "contact the sellers and advise them that we wish to make the same offer that was earlier accepted and proceed to conclude the deal on Property 1." Mr E e-mailed Mr C and Ms D at 10.34am on 22nd February 2013 advising that "the sellers got another offer yesterday which they instructed my colleague to accept. The

written acceptance has not been sent yet. (Mr Allan) has now gone back to his clients to say that your offer has been reinstated. I am waiting to hear back from him and will let you know as soon as I hear something. Apparently this other party is also aware of the planning situation and is accepting of it. I know the sellers were taken with you. Would it be worth a telephone call to explain that the delay was necessitated by Mr C's absence overseas and to emphasise your commitment to proceed?"

7.6 At 10.33am Mr E e-mailed Ms D declining to contact the sellers on her behalf "because it is someone else's client Ms D. I can copy your e-mails to Scott though. I think a call from either of you might just swing it." Ms D replied "yes please ask Scott to pass on our comments". At 10.55am Mr E e-mailed the Respondent attaching an e-mail or e-mails from Ms D he said "I think Ms D may call your folk. She is quite upset – but doubt this other party is too. If you set a closing you wouldn't lose us". The Respondent replied at 10.56am saying "okay cheers Mr E – I will keep you posted". The Respondent telephoned his clients (the sellers) to advise them of the fact that the offer from Mr C and Ms D, which although withdrawn verbally had never been withdrawn in writing, was once more available to them. The Respondent's clients instructed him to indicate to Mr and Mrs Aitken that if they were prepared to increase their offer to £680,000 that would be acceptable to the sellers. The Respondent advised his clients that there could be said to be a conflict of interest and that he was not comfortable because there was potential for his integrity to be brought into doubt. The Respondent then telephoned Mr F of Messrs Burnett & Reid and advised him of the situation. The Respondent specifically asked Mr F if, in light of the circumstances, Mr F wished the Respondent to resign from acting and Mr F replied

that he did not consider that there was any reason for the Respondent to resign agency.

7.7 At 11.15am Ms D contacted Mr E again to ask if the Respondent could pass her comments on to the sellers and at 11.42am Mr E e-mailed the Respondent who replied at 11.46am saying "thanks – I will see what my folks say". Meantime at 11.43am Mr E e-mailed Ms D providing her with the seller's telephone number.

7.8 A review of the Respondent's file reveals a summary/resume prepared by him. This refers to him having received an e-mail from Mr E "stating that his clients were now happy to proceed, SB then issued a missive letter first thing which merely deleted the time limit from SA's qualified acceptance". This resume/summary continues "by this stage the QA to Mr F and letter withdrawing to SB has not been typed and SA stopped these." It goes on, having then spoken "with both Mr and Mrs A at length ultimately decided that if Mr F's clients were prepared to come up to £680,000 they would deal with them given the messing around by SB's clients."

7.9 The resume/summary indicates that the Respondent then reverted to Mr F who having taken instructions "advised that they would go to that level but wished further extras to be included in the price." However "Mr A was furious at the new purchasers stance given he had expressly stated these extras would never be included" and instructed Mr Allan to conclude a contract with Mr C and Ms D. This resume/summary contained no detail as to when the Respondent spoke with Mr F nor as to how. The resume/summary prepared by the Respondent indicates that he then advised Mr A that he would require to withdraw from acting "and thereafter discuss matters with Mr G of Wilsone & Duffus who then proceeded to conclude the

contract." A review of the file reveals no evidence documenting any telephone conversation between the Respondent and Mr G. A formal letter issued by Wilsone & Duffus in conclusion of the contract is dated several days later. The "further extras" referred to above had a value in the region of £10,000 and were never items which the sellers intended to be sold, let alone included in the price. The attempted inclusion of valuable extras in the price meant that Mr and Mrs Aitken had fundamentally altered the basis on which they had been given an opportunity to improve their offer, if they so wished.

7.10 At some time in the course of 22nd February a missive dated 21st February 2013 appears to have been passed to the Respondent by Mr E which deleted the time limit contained in the qualified acceptance. At 13.26pm on 22nd February 2013, the Respondent received an e-mail from Mr F in the following terms "Scott can you give me a shout when you have a second and I will tell you what they said." At 16.39pm Mr F e-mailed the Respondent again stating "Scott, client still unhappy about the unfairness of it all and have just e-mailed me to say that he phoned you and left a message. He may actually insist we formally moan but I have already told him it's a bit pointless and you did exactly what I would have done had the situation been reversed. If your clients don't know what they want you can't do much about it. So ignore his message. I will tell him that if he really wants us to complain then we will do that and you can refer the conveyancing on." The Respondent replied at 17.09pm. "Thanks Mr F – I was called away urgently but I will ignore his calls. Appreciate your assistance today".

7.11 On 25th February 2013 a letter bearing the reference of the Respondent was sent to the lenders of Mr and Mrs A asking the Bank to forward the title deeds as soon as possible. On 26th February 2013 Anderson Bain received a formal letter from

Wilsone & Duffus on behalf of Mr and Mrs A which adopted the previous missives, accepted the qualification contained in Mr E's formal letter dated 21st February 2013 and concluded the bargain.

7.12 The conveyancing proceeded normally. The Respondent having begun again to act on Mr and Mrs A's behalf wrote to the Natwest Bank on 24th April 2013 asking that the title deeds be forwarded to him. Thereafter all of the correspondence on the file maintained by the firm bears the reference of the Respondent.

7.13 In the circumstances of this matter the Respondent should have withdrawn from acting as soon as his client's instructions altered. The Respondent had intimated verbally to the solicitors for Mr and Mrs Aitken that their offer was acceptable in principle. In these circumstances the Respondent should not have entered into negotiations with Mr and Mrs Aitken to seek an increase in the price.

8. Having very carefully considered the foregoing circumstances and the submissions from both parties, the Tribunal found the Respondent not guilty of professional misconduct but considered that his conduct may amount to unsatisfactory professional conduct and accordingly remitted the Complaint to the Council of the Law Society of Scotland under Section 53ZA of the Solicitors (Scotland) Act 1980.

9. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 11 July 2014. The Tribunal having considered the Complaint dated 28 April 2014 at the instance of the Council of the Law Society of Scotland against Scott Allan, Solicitor, Anderson Bain LLP, 6, 8 & 10 Thistle Street, Aberdeen; Find the Respondent not guilty of professional misconduct; Remit the Complaint under Section

53ZA of the Solicitors (Scotland) Act 1980 to the Council of the Law Society of Scotland; Find the Respondent liable in the expenses of the Complainers 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 and may but has no need to include the names of anyone other than the Respondent.

(signed)

Alistair Cockburn

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

IN THE NAME OF THE TRIBUNAL

Alistair Cockburn
Chairman

NOTE

A Joint Minute was lodged with the Tribunal in which the facts in the Complaint were admitted subject to the Answers. Mr Burnside confirmed, after enquiry from the Chairman, that the Respondent did admit all the facts in the Complaint but wished to lead evidence with regard to some of the facts in the Answers. These were relevant to some of the deductions to be made. Mr Burnside clarified that the admissions in the Joint Minute were not in any way qualified and agreed that "subject to the Answers" could be deleted from the Joint Minute on the basis that the Respondent would lead evidence on matters that were not directly in contradiction to what was in the admissions.

The Chairman enquired as to what parties' positions were on the interpretation of the words in the Complaint "offer was verbally accepted". The Chairman enquired as to whether this should be taken to mean that the offer was to be accepted on all conditions i.e. without any further qualifications or whether it was an acceptance in principle. Mr Reid clarified that the Respondent had indicated that the offer was acceptable and that a qualified acceptance would be prepared.

After a short adjournment, both Mr Reid and Mr Burnside indicated that they would leave this as a matter to be determined by the Tribunal.

Mr Reid lodged a Second Inventory of Productions and List of Authorities. Mr Burnside indicated that he had no objection to these documents and they were allowed to be lodged.

Mr Burnside indicated that he had prepared four Affidavits but these had not yet been lodged with the Tribunal because Mr Reid had objected to them. Mr Reid clarified that his position now was that he was neutral in respect of the Affidavits from Mr F, Mr H and Mr A but objected to the last paragraph of the Affidavit from Mr I which was by way of an expert opinion. Mr Burnside explained that Mr A was unavailable to attend the Tribunal today and asked the Tribunal to use its discretion to allow the Affidavit evidence to be lodged.

The Tribunal adjourned to discuss. The Tribunal is governed by the terms of the Civil Evidence Act and accordingly the leading of Affidavit evidence is not incompetent but is not envisaged in these circumstances by the Tribunal Rules. The Tribunal, in the absence of any objection and in the particular circumstances of the case, decided to allow the Affidavits of Mr F, Mr H and Mr A to be lodged. However the Affidavits would be received *quantum valeat*. In the case of the Affidavit from Mr I, the Tribunal did not allow this to be lodged at this stage in the proceedings but indicated that should the Respondent be found guilty of professional misconduct, it could be lodged to go to mitigation.

The Chairman explained for the benefit of the Secondary Complainer, who was present in the Tribunal, that the Tribunal were allowing the evidence of sworn statements in writing but the Tribunal would assess what weight to give them at the appropriate stage in the proceedings.

Mr Burnside advised that Mr J, the Respondent's senior partner, was present at the Tribunal to provide mitigation and also to address some issues raised by the Secondary Complainer but would not be giving evidence in connection with the merits of the case. It was accordingly agreed that he could remain in the Tribunal room.

EVIDENCE FROM THE RESPONDENT

The Respondent confirmed that he accepted the factual narrative as set out in the Complaint. An offer had been received from Mr C and Ms D in the sum of £680,000. The Respondent's partner Mr E was acting for them. The Respondent issued a qualified acceptance. He then found out that there were two minor issues, one being funding issues for Mr C and Ms D and the other being the disclosure in the qualified acceptance that Company 1 wanted to build in a field nearby and Mr C and Ms D wished to investigate this.

The Respondent then received notification from his partner, Mr E, that there might be a problem in proceeding with the offer and that accordingly the Respondent may wish

to put the property back on the market as Mr E knew there were other expressions of interest. The Respondent confirmed that there were two notes of interest, one from Mr and Mrs Aitken which came in on the date that the offer from Mr C and Ms D was accepted. The Respondent indicated that there was no formal withdrawal of the offer from Mr C and Ms D but Mr E had stated that they could not proceed with the offer at that point. The Respondent accordingly contacted his clients, Mr and Mrs A, and advised them that there were two other noters of interest and that they could approach them or else put the house back on the market. He was instructed to approach the two noters of interest on his client's behalf.

The Respondent intimated to Mr F that the offer from Mr C and Ms D was no longer proceeding and if his clients wish to offer, the Respondent's clients would be receptive to the offer. The offer from Mr F came in for £670,000 and was in similar terms with regard to the moveables etc. This was a written faxed offer. The Respondent spoke to his clients and they said that in principle they would be happy to accept the sum of £670,000 and the Respondent discussed the terms of the written offer that had been received with his client. He dictated a qualified acceptance which included the same points with regard to the planning development. The Respondent indicated to Mr F that the offer was in principle acceptable and that he would get a qualified acceptance to him as soon as possible. He dictated the qualified acceptance which was in similar terms to the qualified acceptance sent to Mr C and Ms D. This was never typed as it was going to be typed first thing the next day. The Respondent also dictated a formal withdrawal of the missives in respect of the offer from Mr C and Ms D. The Respondent's position was that at this stage because he had issued a qualified acceptance to Mr C and Ms D they could still have accepted this.

Before the withdrawal of missives and the qualified acceptance were typed, first thing on 22 February the Respondent received an email indicating that Mr C and Ms D wished to proceed with their offer and conclude a contract. The Respondent spoke to his clients and intimated the position to them. He advised them that the offer from Mr C and Ms D was back on the table and available to them. The Respondent indicated that there was a possibility that this could be deemed a conflict and that he felt uncomfortable and that he would keep them advised but he would discuss it with Mr F. This could have led to him having to resign. The Respondent said that he felt it was

arguable that there were two offers and missives and therefore there was a conflict which might affect his integrity. His client came back to him and instructed him to go to Mr and Mrs Aitken's solicitor and ask them to offer £680,000 which would then be accepted. The Respondent spoke to Mr F and intimated this to him. The Respondent indicated that he felt there might be a conflict and asked if Mr F wanted him to resign agency. Mr F stated that he did not believe there was any requirement for the Respondent to resign agency and would discuss matters with his clients.

After this Mr F phoned the Respondent and indicated that his clients would increase their offer to £680,000 but wished to include in the sale the large sofa and the television in the cinema room. These items had never been included in the sale and were worth around £10,000. The Respondent conveyed this to his client who was very annoyed because these items had never been included in the sale and the client instructed the Respondent to accept the offer from Mr C and Ms D. The Respondent phoned Mr F to advise him of his client's position with regard to accepting the other offer. At this stage the Respondent resigned because he felt there was a conflict and it was the most prudent thing to do. He indicated that it was further down the road and he thought he should resign. With hindsight, the Respondent accepted that he should have resigned when the original offer came back on the table. The Respondent however did canvas his earlier resignation with his client and also with Mr F. Neither expressed the view that he should resign. Mr F was not unhappy to continue dealing with the Respondent. If he had resigned his client would have continued to follow the same course with a different solicitor.

The Respondent indicated that his client's motive was to receive as much money for the property as he could. The Respondent stated that he was entirely honest and transparent with Mr F from the outset. Mr F knew the exact position and was able to relay it to his client who could decide how to proceed. The offer from Mr and Mrs Aitken did not match the offer from Mr C and Ms D. Mr G took over acting and concluded the missives. Thereafter the Respondent's firm completed the transfer of title.

The Respondent submitted that he did not breach Rule 1.2 or 1.9.1 or 1.14.1. He did act with integrity, communicated effectively and did not mislead anyone. In

connection with going back on his word, the Respondent stated that he merely indicated to the other agent what his client's instructions were.

In connection with the article in the Journal, in the Complainers' Second Inventory of Productions, on gazumping, the Respondent indicated that this was not the situation here.

In cross-examination, the Respondent accepted that solicitors are an honourable profession who must act with total independence and total integrity. He further accepted that solicitors dealing with conveyancing are in a privileged position and that the purpose of the Law Society's Rules was to regulate the profession and ensure public trust in solicitors.

Mr Reid referred the Respondent to the offer and qualified acceptance in the Complainers' Inventory of Productions.

In response to a question from the Chairman, the Respondent indicated that in practical terms the previous offer from Mr C and Ms D had gone.

The Respondent confirmed that he dictated a qualified acceptance to the offer from Mr and Mrs Aitken in similar terms to the one at Production 5.

In response to a question from Mr Reid as to why the Respondent did not withdraw when the other offer came back on the table, the Respondent stated that he wished to help his clients and with hindsight he should have withdrawn. The Respondent however did not accept that he breached the rules and indicated that he had been open and honest. He accepted however that it would have been prudent to resign at that time. The Respondent explained that having looked more into things since, he could see that the correct thing to do would have been to withdraw at the time. The Respondent stated that he felt that he had to resign when his client said to go with the first offer. Once missives were concluded the contentious part was finalised and the Respondent did the conveyancing. He confirmed that his firm received a fee of £695.00. The Respondent indicated that the fee note at Production 20 had a standard

narrative including the words "concluding missives" and this should have been removed.

In re-examination, the Respondent confirmed that he was a fixed share and not an equity partner and accordingly the fee of £695.00 did not affect him personally. With regard to gazumping, the Respondent stated that there had been no concluded deal.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid emphasised that decisions of the Tribunal were very important and set the standards of professional practice which were followed by the profession. The profession of solicitors was an honourable profession and it was imperative that solicitors who were members of that profession acted with upmost propriety and integrity and with complete independence.

In this case, the Respondent's integrity was called into question. Mr Reid referred the Tribunal to the guidance in the Law Society Journal on gazumping in January 2005. This stated that *"where a solicitor for a seller has intimated verbally or in writing to the solicitors for a prospective purchaser that their client's offer is acceptable…the seller's solicitor should not accept subsequent instructions from the seller to accept an offer from another party unless and until negotiations with the original offeror have fallen through."*

Mr Reid stated that although it was accepted that this guidance was not a practice rule and breach of it did not automatically amount to professional misconduct, in this case the Respondent had given his word and it was fundamental that solicitors do not go back on their word. The Respondent gave his word to Mr and Mrs Aitken and then reneged on this.

In response to a question from the Chairman, Mr Reid stated that what he was saying was that if you indicate to a solicitor on behalf of another that you accept in principle, it would be expected that the transaction would proceed along the standard format for conveyancing missives.

In response to a further question from the Chairman, Mr Reid confirmed that his position was that if there had never been a phone call and the Respondent had just issued a qualified acceptance and then the seller wished to withdraw this acceptance there would not be an issue of integrity arising.

Mr Reid stated that Mr and Mrs A had reneged on their instructions. Mr and Mrs Aitken could not do anything about this as there was no binding contract so to preserve the integrity of the system, it was necessary to rely on Mr Allan's word. He submitted that this issue went to the integrity of the conveyancing system.

The Chairman referred Mr Reid to paragraph 9 of the practice guidelines on gazumping, gazundering and closing dates where it is said that *"Solicitors acting for purchasers who have received a verbal or qualified acceptance – whether following a closing date or not – should advise clients that although an initial acceptance may have been given by the seller, the contract will not be binding until missives are concluded."*

The Chairman enquired as to whether the Law Society's position was that if a solicitor issued a qualified acceptance this could not be withdrawn without giving the other side a chance to accept it first. Mr Reid said that just because some solicitors engaged in a practice did not mean it was right and did not mean it was not misconduct.

In response to a question from a member of the Tribunal, Mr Reid stated that if a solicitor said verbally that an offer was acceptable in principle and the client's instructions changed, the solicitor should withdraw but if a qualified acceptance is issued and the client's instructions change and the solicitor has to withdraw the qualified acceptance. This is different because he has not given his word.

SUBMISSIONS FOR THE RESPONDENT

Mr Burnside asked the Tribunal to look at the Affidavit from Mr A. This made it clear that the situation arose due to the client's instructions. The Chairman pointed out that

it is often the client's instructions that led the solicitor to offend against his professional obligations. Mr Burnside referred the Tribunal to page 279 of Paterson & Ritchie, Practice and Conduct for Solicitors which states *"when solicitors offer for a property, they are not giving their own word but are communicating their client's instructions and similarly if the selling solicitors intimate acceptance of such an offer they are not giving their word but communicating their client's instructions."* Mr Burnside accepted that this paragraph went on to indicate that the Law Society had introduced guidelines on gazumping and gazundering in 2005 which indicated *"where the client wishes to go back on prior instructions to accept an offer when that solicitor has communicated it to the other side, thus putting the solicitor in a position of having to go back on his or her word if he or she accepts the change of instructions, solicitors should withdraw from acting in order to protect their integrity."*

In this case the Respondent was conveying his client's instructions. The Respondent told Mr and Mrs Aitken's solicitor of the situation and he was ok with it. Mr F did not consider it to be a problem. The Respondent had only ever indicated that the offer was accepted in principle. The Chairman pointed out that the profession depended on its reputation and raised the question of whether an objective bystander would think there was something not right. Mr Burnside pointed out that due to the planning issue there may never have been a concluded bargain.

Mr Reid pointed out at this stage that if the Respondent had issued a qualified acceptance and then withdrawn it there would not have been a problem. The problem in this case was the coming back and trading that was the mischief. The Chairman sought clarification that Mr Reid was stating that the mischief in the case was the seeking of an increase in price after indicating that an offer was acceptable and reneging on this to solicit a higher offer. Mr Reid clarified that his position was that as soon as he went back on his word he should have withdrawn.

Mr Burnside stated that the Respondent could not have issued the qualified acceptance because his client had given him instructions not to. The Chairman raised the question of this however putting his integrity into question and that propriety would require him to withdraw. Mr Burnside stated that on reflection the Respondent

would have acted differently but he had been charged with acting dishonestly and there was no evidence of this.

The Chairman pointed that there is a general requirement that solicitors do not act in any way that causes their integrity to be placed in doubt. Mr Burnside submitted that the Respondent was honest and dealt appropriately with his fellow professionals and made them fully aware of the situation. Mr Burnside submitted that there was no evidence that the Respondent had breached Rules 1.2 or 1.9 or 1.14 of the 2011 Practice Rules.

DECISION

The Tribunal found that the Respondent gave his evidence in a straightforward and open manner. The Tribunal found him to be a credible and reliable witness and accepted his evidence. The Respondent had accepted all the facts as set out in the Complaint. The Respondent gave evidence with regard to the facts as set out in his Answers.

The Tribunal also noted the terms of the Affidavits lodged but gave them little weight as they were not spoken to.

In respect of Article 2.2 of the Complaint, the Tribunal amended the findings in fact to reflect the evidence given by the Respondent in respect of the conversation between the Respondent and Mr F in connection with the offer of £670,000. Also on the basis of the Respondent's evidence, the Tribunal added in as a finding in fact some of Answer 2.2 and 2.7 and also parts of Answers 2.4 and 2.5 as amended to reflect the evidence given.

On the basis of these facts, the Tribunal considered that what had happened in this case was that the Respondent had received an offer from an internal client for the purchase of heritable property at the price of £680,000 subject to conditions, one of them being a standard condition relating to planning. Before acceptance, the offer was verbally withdrawn due to difficulties relating to funding. In consequence of this, the Respondent intimated to the agents acting for Mr and Mrs Aitken who had previously

registered a note of interest, that effectively the property was back on the market. In consequence of that exchange an offer was received by the Respondent from the solicitors acting for Mr and Mrs Aitken where the price was £670,000 and, as is not unusual, the offer was subject to a number of conditions.

The Respondent telephoned the solicitor acting for Mr and Mrs Aitken to indicate that his client's offer was acceptable in principle, which can only be taken as an intimation that as regards to the price the offer was acceptable. The Respondent indicated that he would issue a qualified acceptance as soon as possible. Before that occurred, the internal client intimated that his offer was to be regarded as reinstated. After discussing matters with his client, the Respondent then reverted to Mr F advising him of that situation. The Respondent was then instructed by his client to indicate that if Mr and Mrs Aitken were prepared to increase their offer to £680,000 then missives could be concluded with them and not with the internal clients.

At the point in time of inviting Mr F to have his clients increase their offer to £680,000 the Respondent did invite the opinion of Mr F as to whether the Respondent should withdraw from acting but Mr F indicated that he did not believe that there was any reason for the Respondent to resign. Mr F states in his Affidavit that his advice to his client was to submit an increased offer.

An oral offer of £680,000 was made which included the sofa and the television system. The Respondent was instructed to break off contact with Mr F and to conclude missives with the original internal offeror. The Respondent thought it prudent to cause the seller at this stage to be represented by different agents for the formal conclusion of missives with those clients. However missives having been entered into he took back the responsibility for dealing with the conveyancing and the formal transfer of title.

In this case the Complainers have alleged that the Respondent has breached Rules 1.2, 1.9.1 and 1.14.1 of the Practice Rules 2011. The Tribunal do not consider that there is anything in the facts found which would suggest that the Respondent failed to communicate effectively with his clients and others. The Respondent disclosed the full situation to Mr F and did not keep any information from his clients. There is also

no evidence that the Respondent breached Rule 1.14.1. The Respondent did not knowingly mislead a regulated person. He fully disclosed the situation to Mr F and accurately recorded it in the note he made. The Tribunal considered that the Respondent's actings in this regard were transparent. The Tribunal also do not find that the Respondent was in any way dishonest or untrustworthy. However the Respondent's actings in becoming involved in negotiating for a higher price for his clients is conduct which brought his integrity into question.

The Tribunal noted the terms of the Law Society guidance on gazumping and gazundering.

Apart from the Practice Rules, there is an overarching principle that a solicitor should do nothing that it is likely to cause his integrity to be suspect or called into question. The Tribunal had to consider whether, having indicated that the offer was acceptable in principle, (which must include a reference to the price being acceptable) and that a qualified acceptance was to be issued as soon as possible, it was proper or improper for the Respondent to seek to have the offeror increase his price because of the reappearance of an earlier offeror who had offered that higher price. The Fiscal in response to enquiries from the Tribunal suggested that had there been no phone call, merely the issue of a qualified acceptance which would have included acceptance of the price, it would have been in order to withdraw what in effect is a counteroffer before it was accepted and then negotiate for a higher price. The Tribunal was not impressed by this submission. What is involved here is a matter of principle not legal nicety. If ethically he could not seek a higher price once he had indicated to the purchasers' agent that the offer was to be accepted without any acceptance being issued it is *a fortiori* of that position if a formal qualified acceptance is issued without any preceding verbal intimation of any intention so to do.

The Tribunal considered that the question to be posed and answered was – whether a fully appraised bystander, having looked at the situation, would form the view that the Respondent placed his integrity in question when he engaged in negotiations to increase the price to be paid for the subjects having earlier indicated that a particular price was acceptable (even if other aspects of the offer were subject to further negotiations).

In the Tribunal's view there is no doubt that the Respondent's actings in this matter were suspect and this view is reinforced by the Respondent's own thought processes as he clearly was aware that something was not right and this was why he raised the issue with his client and Mr F. The Respondent cannot be relieved of his responsibility by delegating the decision as to whether or not he withdrew from acting to the solicitor with whom he was seeking to negotiate on his client's behalf.

In the view of the Tribunal, the Respondent's actings in seeking to increase the price were not the actings of a solicitor that merit no criticism. The question however is whether the conduct in the whole circumstances was sufficiently serious and reprehensible to meet the Sharp Test. To meet the Sharp Test, the Respondent's conduct would have to be such that competent and reputable solicitors would consider his actings to be serious and reprehensible. The Respondent was not dishonest, he recognised that he was in a vulnerable situation and tried to seek clarity. He made the wrong decision which brought his integrity into question. The Tribunal cannot classify this as reprehensible given that the way in which he acted was open and honest. The Tribunal consider that the Respondent made a significant error of judgement which is worthy of criticism. The Respondent raised the issue with the solicitor acting on behalf of Mr and Mrs Aitken who did not consider it necessary for the Respondent to withdraw from acting.

There were accordingly exceptional circumstances in this case in that the agent, Mr F, indicated that he had no difficulty in the Respondent continuing to act. There were only two persons concerned directly with the Respondent's integrity being suspect or called in to doubt they being Mr F and his clients Mr and Mrs Aitken. Mr F was acting in an individual capacity when he indicated that he saw no reason for the Respondent to resign. He confirmed he had advised his clients fully of the position. In these particular circumstances the Tribunal found the Respondent not guilty of professional misconduct.

The Tribunal consider that the Respondent's conduct may amount to unsatisfactory professional conduct and accordingly remitted the Complaint to the Law Society in terms of Section 53ZA to determine whether or not his conduct merits a finding of

unsatisfactory professional conduct. The Law Society has powers similar to the Tribunal's to consider the Secondary Complainer's compensation claim.

Mr Reid asked the Tribunal to make the usual order for publicity and make no finding of expenses due to or by either party.

Mr Burnside indicated that the issue of unsatisfactory professional conduct was previously canvassed and asked the Tribunal to award expenses in the Respondent's favour.

The Tribunal consider that the only reason that the Respondent was before the Tribunal was as a result of his own conduct. The Tribunal did not consider that the prosecution was unreasonable and the Respondent only narrowly escaped a finding of professional misconduct. The Tribunal accordingly consider it appropriate for the Respondent to bear all the expenses of the bringing of the case to the Tribunal. The Tribunal found the Respondent liable in the expenses in the usual manner.

As this is a decision of the Tribunal, publicity must be given.

Alistair Cockburn
Chairman