

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

**FINDINGS**

**in Complaint**

**by**

**THE COUNCIL OF THE LAW  
SOCIETY of SCOTLAND, 26  
Drumsheugh Gardens, Edinburgh**

**against**

**MANUS GERARD TOLLAND,  
Formerly of Flat 2/1, 79 Newlands  
Road, Cathcart, Glasgow now 2FL,  
7 Causeyside Street, Paisley  
(First Respondent)**

**and**

**IAIN ROBERTSON, Robertson &  
Ross Solicitors, 7 Causeyside  
Street, Paisley  
(Second Respondent)**

1. A Complaint dated 16 December 2013 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Manus Gerard Tolland, formerly of Flat 2/1, 79 Newlands Road, Cathcart, Glasgow now 2FL, 7 Causeyside Street, Paisley (hereinafter referred to as "the First Respondent") and Iain Robertson, Robertson & Ross Solicitors, 7 Causeyside Street, Paisley (hereinafter referred to as "the Second 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 Tribunal caused a copy of the Complaint as lodged to be served upon both Respondents. Answers were lodged for both Respondents.

3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 17 March 2014 and notice thereof was duly served on both Respondents.
4. The hearing took place on 17 March 2014. The Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The First Respondent was present and represented himself. The Second Respondent was present and represented himself.
5. A Joint Minute of Admissions was lodged admitting some of the facts in the Complaint and some of the facts in the Answers.
6. The Tribunal then heard evidence from Iain Ritchie on behalf of the Complainers. The First and Second Respondents did not give evidence and did not lead any witnesses.
7. The Tribunal found the following facts established
  - 7.1 The First Respondent was born 2<sup>nd</sup> September 1956. He was admitted as a Solicitor on 16<sup>th</sup> January 1981. He was enrolled as a Solicitor in the Register of Solicitors Practising in Scotland on 3<sup>rd</sup> February 1981. From 1<sup>st</sup> July 1987 until 31<sup>st</sup> March 2004 he was a partner in the firm of Robertson & Ross, Solicitors, Paisley. Thereafter from 1<sup>st</sup> April 2004 until 31<sup>st</sup> March 2005 he was employed as a partner with the firm Ferguson Dewar, Solicitors, Glasgow. He was employed by PSM Law Group/Moore Marshall, Solicitors, Falkirk from on or around 4th April 2005 until 23rd April 2006, and by Lyons Laing, Solicitors, Greenock and Glasgow, from on or around 2nd May 2006 until on or around 28th May 2009. He was then employed by Robertson Ross Solicitors Limited, as a qualified assistant from 13th June 2011, until being appointed as a director of Robertson Ross Solicitors Limited on or around 12th March 2012. He ceased to be a director of said Company on 31st October 2013,

but continued to be associated with the Company as a qualified assistant. From March 2013 to date, the First Respondent has been sole practitioner of the Firm of Crimlaw, Criminal Defence Lawyers, 2nd Floor, 7 Causeyside Street, Paisley.

- 7.2 The Second Respondent was born on 6<sup>th</sup> April 1953. He was enrolled as a Solicitor in the Register of Solicitors Practicing in Scotland on 1<sup>st</sup> November 1976. For various periods during his professional career he has been a partner or associated with a number of firms including Robertson & Ross, Solicitors, Downie Aiton & Company, Solicitors, Ghazala Ahmed Robertson & Ross and Blackwood & Company. He did his apprenticeship at Messrs. Drummond Miller, Solicitors, Murray Place, Edinburgh. Thereafter he was an Assistant with Ross Harper at Ross Harper & Murphy, Solicitors Glasgow and Kilmarnock. He was the founding partner of the firm of Messrs. Robertson & Ross Solicitors which commenced in 1978. Since 1978 he has been a Partner or Director of that firm.

#### Purchase of Property 1

- 7.3 The First Respondent was instructed to act in connection with the purchase of the heritable subjects at Property 1 at a price of £125,000. The file maintained by the First Respondent commences with a faxed letter of instruction from a Ms A of Company 1 an estate agency business. The offer was to be submitted in the name of a Miss B. The selling agents were the firm Austin Lafferty, Solicitors. On 25<sup>th</sup> January 2012 the First Respondent wrote to Miss B to advise that he had submitted an offer on her behalf and enclosed a copy of the firm's terms of business. This letter indicated that the First Respondent was dealing with the transaction on a day to day basis but that the Second Respondent retained overall responsibility for the transaction. There was a signed copy of the firms terms of

business letter on the file maintained by the First Respondent dated 5<sup>th</sup> February 2012. The First Respondent was instructed to act in connection with the purchase of the heritable subjects of Property 1 at a price of £125,000 by Miss B, in his capacity as a qualified assistant of the Firm of Robertson and Ross Solicitors Limited. The offer was submitted to Austin Lafferty.

7.4 An offer of loan for Miss B was received by the First Respondent from the Birmingham Midshires Building Society dated 22<sup>nd</sup> or 29<sup>th</sup> January 2012. The offer of loan stated that the property was valued at £125,000 on 22<sup>nd</sup> December 2011. The loan to be advanced was £93,750. The offer of loan explicitly provided that the firm is “instructed in accordance with the CML Lenders Handbook for Scotland and (Birmingham Midshires) part 2 instruction”. On 30<sup>th</sup> January 2012 the First Respondent wrote to Miss B to advise that the sum of £32, 125 was required to complete the purchase on her behalf and provided her with instructions regarding the manner in which this deposit should be transferred to the firm’s client account.

7.5 In the course of this enquiry the conveyancing file maintained by the First Respondent was recovered and investigated. Preceding the letter of 30<sup>th</sup> January 2012 there is an undated typed memorandum which appears to have been produced by the First Respondent although the memorandum does not identify its author. The memorandum is addressed to the Second Respondent and concerns the file and states as follows;

“I think we should swerve this. Austin Lafferty has confirmed that his client has signed a mandate to Company 2 to pay them £40,000 from the sale proceeds. We have to report this to the lender, and they will surely instruct that we pull the plug. Having got this info I googled the price of houses on the street, the average price was £90,000. In October 2010 the house five doors

away sold for £85,000. Our offer price was £125,000 which is spookily £40,000 more so this is possibly a mortgage fraud. Might be interesting to see the survey report. What do you think?"

The memo referred to was in the file when the file was examined by the Petitioners Financial Compliance Team carrying out the routine inspection of the Firms books. The Second Respondent is not a surveyor. There was a valuation report carried out by a reputable firm of Surveyors valuing the property at £125,000. This constituted an unusual circumstance in terms of the CML Rules.

Company 2 is a limited company which deals with distressed sellers based in west central Scotland.

7.6 On the file maintained by the First Respondent, immediately after the aforementioned memorandum is a copy of a faxed letter from Austin Lafferty, Solicitors, dated 31<sup>st</sup> January 2012 who were then the agents acting on behalf of the seller. This letter requested that the firm confirm that should Miss B be funding her purchase by way of a mortgage her lender had been informed that the seller intended to pay £40,000 to Company 2 in terms of a signed mandate to that effect. No mandate was produced. In reply the Second Respondent wrote to Austin Lafferty, Solicitors on 9<sup>th</sup> February 2012 and queried why the firm required to inform Birmingham Midshires of the seller's intention to pay £40,000 from the sale proceeds to a third party.

7.7 Thereafter, out of chronological sequence, there is a letter from the First Respondent to Austin Lafferty, Solicitors dated 31<sup>st</sup> January 2012 which confirmed that he would bring the seller's intention to dispose of £40,000 from the sale proceeds to a third party to the attention of the firm's lending client. The solicitor

observed in this correspondence that this would likely place the future of the transaction in doubt and therefore noted there was little point in progressing with the underlying missives at this time.

- 7.8 A further facsimile transmission from Austin Lafferty, Solicitors on 9<sup>th</sup> February 2012, apparently in response to the Second Respondent's letter of the same date requested confirmation that the firm's lending client had been informed that "£40,000 of the purchase price is being repaid to the purchaser".
- 7.9 The transaction between Robertson & Ross Solicitors and Austin Lafferty Solicitors did not proceed. Missives were not concluded with Austin Lafferty. Austin Lafferty withdrew. The next entry on the file is an undated facsimile transaction from the First Respondent to Ms C of Clarity Law Scotland Limited advising that he held instructions to submit an offer for the property to her and thereafter requesting her firm's full contact details. The receipt attached to the transmission suggests this was sent on 14<sup>th</sup> February 2012. Simultaneously on that date, the First Respondent wrote to Miss B to advise that the seller had changed agents and enclosed a copy of the fresh offer which had been submitted to the newly instructed selling agents. The missives for the purchase of the property confirm that a contract was concluded by the firm on behalf of Miss B with the new firm Clarity Law Scotland Limited acting on behalf of a Ms D. The purchase price is stated as being £125,000 with a date of entry of 20<sup>th</sup> March 2012.
- 7.10 The file reveals that the First Respondent also requested a copy of Miss B's bank statement to confirm the source of the deposit. The First Respondent sought written confirmation from Miss B as to whether she was receiving any financial incentive from the seller of the property as an inducement to purchase the property.

In an email dated 24 February 2012 the First Respondent set out his desired wording for such a confirmation to Miss B as follows:

“I Miss B of Property 2 can confirm that I am purchasing Property 1 as a normal arms length transaction. Specifically I have not received any financial incentives from the seller, nor am I entitled to any cash back payments from her.”

The client Miss B did so confirm she forwarded the confirmation by email. The email was sent to the First Respondent to the First Respondent’s email address. Unfortunately he did not print the email off and it was not on the file at the time of the inspection. A review of the file maintained by the First Respondent did not reveal this email.

- 7.11 On 2 March 2012 the First Respondent wrote to Birmingham Midshires in response to its letter of 28 February 2012. The lender asked the First Respondent to confirm various aspects of the transaction including that all funds would pass through the firm’s client account; that the transaction was at arm’s length; and that it was not a back-to-back sale, a distressed seller or a sale/leaseback. In reply the First Respondent confirmed the position to the lender setting out that the deposit had been provided by Mr E as a gift to the borrower Miss B and that funds passed through the client account; that he had Miss B’s written confirmation that the transaction was at arm’s length; and confirming that it was not a back-to-back sale, a distressed seller or a sale and leaseback. The client wrote to the First Respondent to advise the transaction was a genuine arm’s length transaction and sent an email on 2 March 2012 indicating it was “not distressed or any other described” At the time the First Respondent sent this letter he had clear evidence on his file that the transaction was a potential distressed sale having regard to the information in his knowledge regarding the mandate provided

by the first firm of solicitors acting for the seller and by information provided by the second firm of solicitors acting on behalf of the seller who had advised the First Respondent that the seller had instructed a broker. Thereafter on 5<sup>th</sup> March 2012, the agents acting for the seller, contacted the First Respondent to advise that she had been made aware that the seller “has engaged with a sales broker in respect of the sale of their property” and sought confirmation regarding the source of Miss B’s funding and confirmation that her lender had been satisfied as to the source of the deposit required for the purchase of the property. The First Respondent replied that day to advise that he was awaiting confirmation from the lender that it was satisfied as to the source of Miss B’s deposit. The correspondence received from Birmingham Midshires was copied to the seller’s agent together with correspondence received from Miss B and the solicitor confirmed that her firm was satisfied with the lender’s response.

The client Miss. B wrote to the firm of Robertson & Ross Solicitors Limited confirming that she was purchasing Property 1 as a normal arm’s length transaction. She further stated “specifically I have not received any financial incentive from the seller, nor am I entitled to any cash back payments from her”.

- 7.12 A Form 12A report was obtained and confirmed the position regarding the status of the property and the interested parties immediately prior to settlement of the transaction. This report disclosed that Ms D, formerly Ms F, was the owner of the property having her title recorded on 20 July 2004. The report also revealed that Ms D was subject to an inhibition at the instance of the Bank of Scotland registered 17 July 2007. The First Respondent noted the existence of the inhibition and sought sight of a draft discharge of the inhibition. A review of the file maintained revealed a copy of a certificate of title on the file



which bore the reference of the First named Respondent although signed by the Second named Respondent on 19 March 2012 confirming to the lender that the firm had “investigated the title to the property offered to you as security for the advancement of your instruction. The title is good and marketable and may safely be accepted by you”. The purchase price was transferred through the seller’s agent client account on 20 March 2012 and the transaction settled and proceeded to a normal conclusion. The land and charge certificates were delivered to the lender on 17 May 2012. The Inhibition was discharged.

- 7.13 On the inside cover of the file maintained by the First Respondent there is a copy of a risk assessment form completed by the solicitor. Also on the inside cover of the file is a fax dated 1 March 2012 from the Clydesdale Bank who maintained the client account for the firm. This confirmed that the payment into the firms Client Account in the sum of £32,125 came from the joint account of Miss B and Mr E, it confirmed that Mr E had transferred funds from his own account into the joint account. There was also a copy of a letter from the client to the solicitor dated 13 March which stated “in response to your enquiries the gift is not encumbered there is no obligation for the gift to be repaid; there is no second charge or anything else untoward in this transaction. My spouse is providing this deposit as a gift only. He is not the vendor.”
- 7.14 The First Respondent was the principal solicitor dealing with this transaction. He was instructed by the lender, the Birmingham Midshire Building Society in terms of the offer of loan. The offer of loan was explicit in its instruction to the First Respondent that he was being instructed in accordance with the CML Lenders Handbook for Scotland. As a consequence the First named Respondent required to act in accordance with the obligations imposed upon him by the said CML Lenders

Handbook. In the course of the transaction the Respondent failed to so act. The Respondent submitted to the Building Society a certificate of title which was unqualified. The document was signed by the Second named Respondent. As a result of receipt of the certificate of title, the lender released the mortgage advance to the firm in reliance upon the certificate of title. The First named respondent did not bring to the attention of the lender any of the matters which were set out in the memorandum referred to which was upon the file maintained by the First named Respondent. The First named Respondent failed to inform the lender that the seller in the transaction had appointed a broker. The First named Respondent provided incomplete information to the lender in his letter dated 2<sup>nd</sup> March 2012. The First named Respondent at the time of sending the letter had clear evidence that the transaction was a potential distressed sale having regard to the information concerning the mandate provided by the sellers first appointed firm of solicitors and by the information provided by the sellers second appointed firm of solicitors who had advised the First named Respondent that the seller had instructed a broker. The First named Respondent had failed to investigate the balancing payment of the purchase price which had come directly from the husband of the client. This was a matter of significance in light of the existence of the mandate payment, which is an indicator of a revolving deposit that suggests potential involvement in mortgage fraud.

- 7.15 The Second named Respondent was the principal solicitor responsible for supervising the conduct of the First named Respondent. The First named Respondent was a solicitor restricted from holding a full practising certificate until March 2012. The Second named Respondent was the principal solicitor responsible for his supervision. At the material time the Second named Respondent was the designated cashroom partner for the firm. The communication on the file maintained by the First

named Respondent reveals the Second named Respondent was aware as to the circumstances of the transaction. The memorandum was addressed to him and he signed the certificate of title. The Second named Respondent failed to properly supervise the conduct of the First named Respondent.

8. Having considered the foregoing facts and the submissions made by the Complainers and by the First and Second Respondents, the Tribunal found the First Respondent guilty of Professional Misconduct in respect of:

- 8.1 his conduct amounting to a failure on his part to comply with the terms of the common law standard applicable to a solicitor acting on behalf of a lender in a conveyancing transaction. In particular as a consequence of his failure, to report to his client an unusual circumstance and his failure to comply with the explicit instructions provided to him by his client being the obligations imposed upon him as provided for within the CML Lenders Handbook for Scotland. As a consequence of his failure to act in this fashion the First Named Respondent failed to act with absolute propriety and to protect the interests of his client being the lender in respect of this transaction.

9. The Tribunal found the Second Respondent guilty of professional misconduct in respect of:

- 9.1 his conduct amounting to a failure on his part to adequately supervise his employee namely the First Named Respondent, who was then acting in the course of their employment in that the First Named respondent failed to abide by established conveyancing practice and adhere to the duties which he owed to his clients namely the heritable security lenders.

10. Having noted the terms of a previous Finding of professional misconduct against the First Respondent and having heard submissions from the First Respondent and Second Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 17 March 2014. The Tribunal having considered the Complaint dated 16 December 2013 at the instance of the Council of the Law Society of Scotland against Manus Gerard Tolland, formerly of Flat 2/1, 79 Newlands Road, Cathcart, Glasgow now 2FL, 7 Causeyside Street, Paisley (“the First Respondent”) and Iain Robertson, Robertson & Ross Solicitors, 7 Causeyside Street, Paisley (“the Second Respondent”); Find the First Respondent guilty of Professional Misconduct in respect of his conduct amounting to a failure on his part to comply with the terms of the common law standard applicable to a solicitor acting on behalf of a lender in a conveyancing transaction, his failure to comply with the CML Handbook for Scotland and his failure to act with absolute propriety and to protect the interests of his client being the lender in respect of a transaction; Find the Second Respondent guilty of professional misconduct in respect of his failure to adequately supervise his employee, the First Respondent, who was acting in the course of his employment whereby the First Respondent failed to abide by established conveyancing practice and adhere to the duties which he owed to his clients, the lenders; Censure the First Respondent and Fine him in the sum of £500 to be forfeit to Her Majesty; Censure the Second Respondent and Fine him in the sum of £1,500 to be forfeit to Her Majesty; Find the First Respondent and Second Respondent jointly and severally 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 First Respondent and the Second Respondent and may but has no need to include the names of anyone other than the First Respondent and Second Respondent.

**(signed)**

**Alan McDonald**

**Vice Chairman**

11. 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 First Respondent and Second Respondent by recorded delivery service on

**IN THE NAME OF THE TRIBUNAL**

**Alan McDonald**  
**Vice Chairman**

**NOTE**

A Joint Minute of Admissions was lodged admitting many of the facts in the Complaint and some of the facts in the Answers. The First and Second Respondents lodged two emails as additional Productions and there was no opposition by Mr Reid. Mr Reid lodged a survey report and two articles as additional Productions and there was no objection by the First and Second Respondents. These additional productions were admitted into process.

The First and Second Respondents confirmed that they did not seek to lodge the Affidavit evidence from Mr E and Miss B and that they would not be calling Mr E and Miss B as witnesses. Mr Reid confirmed that he would not be pursuing the issue of the signatures. This was accordingly deleted from the facts at article 2.1.

**EVIDENCE FOR THE COMPLAINERS**

The Complainers led the evidence of Iain Ritchie, Clerk to the Law Society's Professional Conduct Sub Committee.

Mr Ritchie advised that the Second Respondent's firm had been inspected in April 2012 which had led to the Complaint being raised. There were a number of issues of concern. Mr Ritchie explained the background of what happened after a Law Society inspection. He confirmed that the First and Second Respondents were given numerous opportunities to provide satisfactory explanations for what had happened in this transaction. They were given an executive summary and also invited to a general interview with the Guarantee Fund Committee.

Mr Reid referred Mr Ritchie to Production 28 being the letter by Miss B to the First Respondent. Mr Ritchie confirmed that this letter was on file and sent to the Law Society by the First Respondent in response to the executive summary. Mr Ritchie explained to the Tribunal what a revolving deposit scheme was where a third party pays the deposit for the end purchaser and gets money back. An example of this was where there was a facilitator who was someone who dealt with distressed sales and got a mandate from the seller who provided the deposit for the purchaser and a

substantial part of free proceeds of sale went to the facilitator. This affected the loan to value ratio which would not be what the lender believed it to be and also could lead to the Registers of Scotland being misled in respect of the price of a property.

Mr Reid referred Mr Ritchie to Complainers Production 1 being the new case instruction which showed that the client was introduced by Company 1. Mr Ritchie confirmed that the Company 1 had the same directors and same address as Company 2 and also the same address as Clarity Law. Company 2 acted for distressed sellers who were desperate to sell because they were “under siege” from creditors.

Productions 2 and 3 were the letters of engagement with the client and stated that the partner responsible was the Second Respondent. Production 5 was the loan instructions confirming that the firm were instructed in terms of the CML Handbook. Production 6 was a letter to Mrs B confirming that the client was due to pay £32,125. Production 7 was the memo which was found on the file and had a lot similarities to what had happened in the Lints case. i.e. a large amount of the proceeds of sale was to go to Company 2. There was a risk that the money would be used to provide a deposit so that the loan to value ratio was not what the building society thought it was. Production 8 was a letter from Austin Lafferty asking if the lenders had been advised that £40,000 of the purchase price was to be paid to Company 2 by way their client’s mandate. The memorandum at Production 7 clearly considered this of concern and it was getting into the realms of having to be reported to the organised crime unit. There was a high risk of mortgage fraud. Production 9 was a letter to Austin Lafferty from the Second Respondent and Mr Ritchie commented on one of the sentences in this letter being to the effect that “we had understood that cash back etc would be declared.” Mr Ritchie submitted that this suggests that they knew more about the fact that the money was going from the seller to the purchaser than they were letting on. Production 10 did not show that this evidence had been brought to the attention of the lenders. Production 11 was a letter from Austin Lafferty asking for confirmation that their client’s lender was aware of the £40,000 of the purchase price being repaid to the purchaser. Mr Ritchie submitted that this showed blatant mortgage fraud and that Austin Lafferty withdrew after this. Production 12 was from the new firm who started acting. Mr Ritchie stated that Respondent’s Production 2 being the email to Mrs B dated 1 March 2012 and her response dated 2 March 2012 had only been produced



today. Production 15 suggests that the First Respondent wrote to the building society without authority but the email may suggest that this was on the client's authority. However Mr Ritchie pointed out that the email makes no reference to the mandate and nor does the letter to the building society. Mr Ritchie submitted that the First Respondent was aware that something was not right and that this might have an impact on the interests of the lender. The building society were not alerted to the potential difficulties. Production 16 was a letter from Clarity Law, the new solicitors acting for the seller which refers to a sales broker. Mr Ritchie submitted that this should have put Robertson & Ross on notice that there were concerns with regard to the transaction. The letter also asked them to confirm that the lender was satisfied with regard to the deposit. Mr Ritchie submitted that it was unusual for a seller's solicitor to withdraw.

In connection with Production 17 from the First Respondent which indicates that they are awaiting a response from the building society. Mr Ritchie submitted that this follows on from the building society's letter dated 28 February at Complainers Production 36. The building society asked for a number of points to be clarified. Production 15 was the First Respondent's reply to the points raised in this letter.

Mr Reid then referred Mr Ritchie to Complainers Production 20 being the Certificate of Title. Mr Ritchie stated that he was not aware of any problems with the title but that a clean Certificate of Title should not have been sent to the building society because the lender should have been told of the information that Robertson & Ross had.

## **CROSS-EXAMINATION**

It was confirmed that the Second Respondent wished to cross-examine Mr Ritchie first. There was no objection to this. Mr Ritchie confirmed that the Law Society inspections were now risk based but routine inspections occurred every 3 years. Mr Ritchie confirmed that this file was requested by the compliance team. He confirmed that the DM Hall survey report was the one that was produced. Mr Ritchie confirmed that the Scottish Legal Complaints Commission has a sifting role in relation to conduct. It was put to Mr Ritchie that the Second Respondent's Answers had been

consistent throughout the process. Mr Ritchie however stated that the Second Respondent had denied knowledge of Company 1 and Company 2. The Second Respondent stated that he had no personal knowledge of these entities. Mr Ritchie stated that the Second Respondent was the cash room partner. Mr Ritchie confirmed that he could accept that the First and Second Respondents had omitted the email at Respondent's Production 2 because it had not been printed. Mr Ritchie stated that he accepted that the DM Hall valuation report said the property was worth £125,000. Mr Ritchie said however that it was possible for surveyors to be involved in mortgage fraud but he could not say whether this was the case here. Mr Ritchie accepted that with buy to let loans the lender wished 75% of the value and were mainly concerned that the rent the property would receive would be sufficient to pay the mortgage. Mr Ritchie submitted that it was odd that the offer to purchase was submitted before the instructions. He indicated that there was nothing on file to suggest that this was not so. Mr Ritchie accepted that some solicitors do get referrals from estate agents and he also accepted that the address at Property 3 may be a large terrace. Mr Ritchie stated that he accepted that the memorandum prepared by the First Respondent was open and available on the file. Mr Ritchie further accepted that it was good practise for all free proceeds of a transaction to be remitted to the client and accepted that there were dangers with mandates. Mr Ritchie further accepted that if Austin Lafferty's client had got the money and paid it to Company 2 no one would have known about it. Mr Ritchie further accepted that it is only the 2<sup>nd</sup> letter being at Production 11 that mentions money going to the purchaser.

The Second Respondent indicated that his position was he had not seen this. Mr Ritchie stated that he accepted that the title may have been in order but there were reportable issues and the lender has to be able to give informed consent and should have been given the information earlier. Mr Ritchie accepted that Production 36 was possibly not the standard letter that a lender would issue and it was possible that it was sent because the lender had received some information. Mr Ritchie however stated that there was no note on the file of any phone call between the First Respondent and the building society in respect of this. Mr Ritchie stated that the Respondents had not answered all the issues raised in the building society's letter at Production 36 as this letter had asked for proof of deposit showing the accrual of funds over a period of time and this had never been provided. Mr Ritchie however

accepted that the lenders did issue the funds after they received the response at Production 15. Mr Ritchie said that he did not accept that the transaction with Clarity Law was a separate transaction and considered that it was all the same transaction and that it was significant that the previous selling agent had withdrawn. Mr Ritchie accepted that there was nothing in the letter from Clarity Law stating that money was going to the purchaser. Mr Ritchie also accepted that an agent is entitled to rely on what another agent states. Mr Ritchie stated that he was not aware that Colleys were in-house surveyors for the Halifax. He indicated that he agreed that the mandate was important. He stated that if the mandate had instructed Austin Lafferty then it would not necessarily be binding on Clarity Law but that it could be a more general mandate. Mr Ritchie accepted that Clarity Law had not mentioned the mandate.

In re-examination Mr Ritchie stated that the same seller, buyer, price and property were involved and only one offer of loan and it was all the same transaction. They were only a couple of weeks apart.

The First Respondent indicated that he had no questions. The Complainers then closed their case.

The First and Second Respondent indicated that they did not intend to lead evidence.

## **SUBMISSIONS FOR THE COMPLAINERS**

Mr Reid asked the Tribunal to make a finding of professional misconduct and commended the evidence of Mr Ritchie to the Tribunal. Mr Reid pointed out that Mr Ritchie had experience in these matters and in particular had dealt with a number of cases involving mortgage frauds and was able to explain the mechanics of the revolving deposit scheme. The terms of the Joint Minute of Admissions confirmed some of the facts and both the Respondents accepted the duties as set out in the Complaint. When the First Respondent was acting for Mrs B and the building society he owed the same duties to both. The two letters from Austin Lafferty should have set alarm bells ringing in connection with the £40,000 paid to Company 2. Production 11 mentioned it being repaid to the purchaser. Mr Reid submitted that it is no surprise that Company 2 would be referred to as the purchaser because Company 1 seemed to

have the same directors and referred the client to the First Respondent. The Respondents submitted the valuation report from D M Hall and this was instructed by Company 2. Mr Reid referred the Tribunal to two articles in the Law Journal in January 2009 and August 2009 both identifying the mechanics of mortgage fraud and showing that this was a prevalent problem. Given the onus on the First Respondent to act with propriety, he had failed to alert the building society with regard to what he had learnt from Austin Lafferty ie the existence of the mandate. The memorandum at Production 7 showed that the First Respondent was well aware the something was not right but he did nothing to alert the building society to this. He was alert to the possibility of mortgage fraud. The CML Handbook enhances the duty owed. Mr Reid submitted that the First Respondent acted contrary to the conditions of the CML Handbook. He should have reported matters to the lender and provided a summary of the legal risks and how this would affect the building society's interest. Mr Reid submitted that there was no suggestion that any important parts of the file had not been lodged. The email that was lodged today, being Respondent's Production 2, had not been on the file. The Respondents had also breached the Accounts Rules and the Money Laundering Regulations. Regulations were there to provide an environment of transparency so that the lender can make an informed decision on all the information available as to whether to lend. The First Respondent chose not to act with propriety. Mr Reid submitted that the transaction was all the same transaction with the same parties, same properties, same price, same lender and one set of loan instructions. When Clarity Law became instructed they referred to a sales broker. There was a duty to bring to the building society's attention the existence of the mandate.

In connection with the Second Respondent, Mr Reid submitted that he accepted that he had a duty to supervise and the memorandum was directed to him. He was the only fully qualified solicitor in the firm and accordingly he was guilty of professional misconduct in respect of his failure to adequately supervise the First Respondent.

## **SUBMISSIONS FOR THE FIRST AND SECOND RESPONDENTS**

The Second Respondent indicated that he was to make submissions for both of them. The First Respondent concurred that this is what he wished. The Second Respondent stated that it was for the Law Society to make out their case beyond reasonable doubt. The existence of the mandate had not been established. Mr Ritchie had been reluctant to concede that the mandate could only bind Austin Lafferty and not Clarity Law. The Second Respondent submitted that solicitors are entitled to rely on correspondence from a fellow agent and Clarity Law only mentioned the sales broker. The Second Respondent referred to the Sharp case and asked the Tribunal to look at the whole circumstances of the case. The Second Respondent pointed out that the transaction concluded normally and submitted that professional misconduct was not made out. The duties were accepted but the Law Society must prove that the building society were not aware of any earlier suspicious circumstances thrown up by Austin Lafferty. The Second Respondent submitted that Production 36 could well have been in response to information given. Although nothing was given in writing the date was significant because 28 February was after Austin Lafferty were no longer instructed. The Second Respondent referred to the email, being Respondent's Production 2 and pointed out that the position on record had always been that Mrs B had confirmed that the transaction was at arm's length and this letter was lodged in the productions. The email was not lodged earlier as it had not been printed off. The Second Respondent submitted that the memorandum showed that nothing was being hidden. Thereafter, the selling solicitor changed and there was no further information given with regard to a mandate. The building society asked for more information and a response was provided. After this response the building society decided to go ahead. The Second Respondent urged the Tribunal to consider that the conduct did not amount to professional misconduct but may amount to unsatisfactory professional conduct.

In response to a question from a Tribunal member Mr Reid stated that he had contacted Austin Lafferty but the solicitor there had moved on but pointed out that the fact that the mandate existed had been brought to the attention of the First Respondent who should have told the building society. There is nothing to suggest that the mandate did not exist.

In response to another question from the Tribunal, the Second Respondent accepted that mandates could be binding on more than the original addressee. The Second

Respondent also accepted that the whole circumstances did include the previous dealings but also included what happened afterwards with Clarity Law. The Second Respondent confirmed that the duties were accepted and conceded that there was a duty to report the information with regard to the mandate to the building society. The Second Respondent stated that with hindsight it was conceded that it would have been advisable to write to the lender.

## **DECISION**

The Tribunal found the evidence of Mr Ritchie credible and reliable. In respect of the disputed facts in Article 2.9, the Tribunal did not find it proved beyond reasonable doubt that the First Respondent replied to the building society without having any information from his client because there was evidence in the papers that the client had provided him with information. The Tribunal however was satisfied beyond reasonable doubt that the remainder of disputed facts in Articles 2.9 were proved beyond reasonable doubt on the basis of the evidence from Mr Ritchie and the evidence contained in Productions 7, 8, 9 and 11. The Tribunal was satisfied beyond reasonable doubt on the basis of the oral evidence of Mr Ritchie and the productions lodged that there was a mandate as set out in the letter from Austin Lafferty at Production 8. The Tribunal consider that solicitors are entitled to rely on what another solicitor states and Austin Lafferty solicitors clearly state this in the letter at Production 8 and also in the letter at Production 11. The facts in Article 2.12 of the Complaint were proved beyond reasonable doubt on the basis of Mr Ritchie's evidence and the productions with the exception of the allegation that the First Respondent provided false information to the lender in the letter of 2 March 2012 given that there was evidence that Mrs B had provided the First Respondent with this information. The First Respondent however did not provide the lender with complete information in response to their letter at Production 36.

The Tribunal went on to consider whether on the basis of the facts found as admitted or proved, the conduct of the First and Second Respondents was sufficiently serious and reprehensible in terms of the Sharp case to amount to professional misconduct. Although only one transaction was involved, the Tribunal consider that the terms of the memorandum at Production 7, when taken together with the information provided

in the two letters from Austin Lafferty at Productions 8 and 11, were such that any competent and reputable solicitor would have been alerted to the potential problem of mortgage fraud. Production 7 shows that the First Respondent was alert to the possibility of mortgage fraud and had real concerns. These serious matters should not have been ignored and the First Respondent had an obligation to advise the building society of this to comply with his duty to his client. The Tribunal does not accept that there were two different transactions involved, there was only one transaction. It was the same purchaser, the same seller, the same price, one set of loan instructions all within two weeks of each other, the only change being the seller's agent. It is not accepted that this could be considered to be a separate transaction. The First Respondent was fully aware of the information that he had received from the seller's previous agent and had an obligation to pass these concerns on to the building society. This is not a case where it was just an oversight. There is a suggestion that there may have been some verbal representations made to the building society which resulted in their letter at Production 36 being issued. The Tribunal however was not provided with any evidence of this and do not accept that either the First or Second Respondent provided any such verbal information.

The Tribunal has stated on numerous occasions that solicitors have a duty to the lender to report to them any suspicious or unusual circumstances occurring in respect of a transaction. A solicitor, when acting for both lender and borrower in a conveyancing transaction, requires to act with absolute propriety and to protect the interest of the lender with the same degree of care and responsibility as is given to a purchaser. The risks of mortgage fraud have been highlighted in the Law Society's Journal and the profession is well aware of them. In the circumstances the Tribunal find that the First Respondent's conduct does amount to professional misconduct.

In connection with the Second Respondent, he accepted that he was the only partner in the firm and had responsibility for the supervision of the First Respondent. The First Respondent drafted a memorandum to the Second respondent raising concerns with the transaction. Despite this, the Second Respondent did not do anything to ensure that the building society was informed of this. The Second Respondent adhibited the firms signature to the Report of Title when he knew of the unusual background circumstance in the case. In these circumstances the Tribunal find that

the Second Respondent's conduct is sufficiently serious and reprehensible so as to amount to professional misconduct.

Mr Reid advised that the First Respondent had three previous sets of findings of misconduct against him and that the Second Respondent had one previous finding where he had been Censured. Mr Reid unfortunately did not have copies of the findings. The Clerk to the Tribunal had a copy of the most recent finding against the First Respondent and the First Respondent confirmed that he had no objection to the Tribunal seeing these findings despite the fact that they were recent and had not yet become final.

### **SUBMISSIONS FROM THE SECOND RESPONDENT IN RESPECT OF MITIGATION**

The Second Respondent advised the Tribunal of his personal circumstances. He indicated that with hindsight he could see what should have been done. He explained that at the time he was involved in a proceeds of crime case which was taking up a lot of his time at the Court of Session. He was accordingly out of the office a lot. He had thought that the transaction was not happening when Austin Lafferty withdrew and he took his eye off the ball when it started up again with Clarity Law. He indicated that this matter had been hanging over him for some time. He pointed out that there were 200 conveyancing transactions covered by the inspection but this was the only one that attracted attention. He accepted that the First Respondent did bring the matter to his attention by way of the memo at Production 7. The Second Respondent pointed out that the First Respondent was only doing criminal work now and asked that the Tribunal allow the First Respondent to maintain his restricted certificate. He indicated that his firm was solvent but things were not as good as they had been and advised the Tribunal that he was earning around £35,000 this year.

### **SUBMISSIONS FROM THE FIRST RESPONDENT IN RESPECT OF MITIGATION**



The First Respondent outlined his personal circumstances. He explained that he started his criminal practice, which was in its infancy, and he was having some cash-flow problems. He stated that he accepted that he should have been more proactive in terms of the memorandum and perhaps should have swerved it. He indicated that his main experience was in conveyancing but he was better at criminal work. He stated that he thought he had spoken to the building society which resulted in the letter at Production 36 being issued as something had to have prompted it. He accepted however that he should have written and should have taken a more leading part in it rather than just to tell his boss. He indicated that he no longer did conveyancing and asked the Tribunal to let him continue with his criminal practice. He pointed out that the building society had not sustained a loss and that the tenant was in the property and the mortgage was up to date.

## **PENALTY**

The Tribunal noted that the First Respondent's previous findings which had recently been made in by the Tribunal, related to 13 transactions of an analogous nature undertaken by the First Respondent in 2009. As a result of this the First Respondent had had his practising certificate restricted so that he could only undertake criminal work. The Tribunal considered that the fact that the First Respondent wrote the memorandum at Production 7 drawing the matters to the attention of his employer, the Second Respondent, mitigated his involvement. An analogous previous finding was an aggravating matter but if all matters against the First Respondent had been dealt with together it is unlikely that the sentence imposed by the Tribunal in February 2014 would have been significantly different. Accordingly, as the First Respondent was already restricted to only undertaking criminal work, the Tribunal saw no reason to impose any additional restriction. The Tribunal noted that the First Respondent had obtained a number of confirmations from his client with regard to the transaction being arms length and had provided a lot of the information requested by the building society. However, to emphasis the fact that the Tribunal takes this kind of behaviour seriously, the Tribunal imposed a Censure plus a fine of £500 despite the First Respondent's limited financial circumstances.

In connection with Second Respondent the Tribunal considered that although it was not his transaction, the matter had been drawn to his attention and he had overall responsibility for ensuring that the building society was informed. The Second Respondent does not have any analogous findings and the Tribunal took into account the fact that there was only one case picked up by the Law Society out of numerous files and that there had been no loss to the building society and no personal benefit for either Respondent. The Tribunal did not consider that there would be a risk to the public if the Second Respondent was allowed to continue unrestricted in practice. The Tribunal, given that this only involved one transaction, did not consider this to be one of the most serious breaches of the CML Handbook cases and considered a Censure plus a fine of £1500 would be sufficient penalty.

The Tribunal found the First and Second Respondents jointly and severally liable in the expenses and made the usual order with regard to publicity.

**Vice Chairman**