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, Atria One, 144 Morrison Street, Edinburgh

Complainers

against

DAVID EWAN McNEISH, formerly of Optima Legal (now Alston Law) and now of DWF LLP, No. 2 Lochrin Square, 96 Fountainbridge, Edinburgh

Respondent

1. A Complaint dated 29 November 2021 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that David Ewan McNeish, formerly of Optima Legal (now Alston Law) and now of DWF LLP, No. 2 Lochrin Square, 96 Fountainbridge, Edinburgh (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer, Dr A, on her own behalf and on behalf of her child.

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

4. Both parties were granted a period of time to adjust their pleadings. The Complaint and Answers having been adjusted, and both parties having confirmed that it was appropriate to fix a full hearing, in terms of its Rules, the Tribunal appointed the Complaint to be heard on 26 April 2022 and notice thereof was duly served on the Respondent. The Respondent having

indicated to the Tribunal that a virtual hearing would not be suitable, the Tribunal determined that the hearing should be in-person.

5. At the hearing on 26 April 2022, the Complainers were represented by their Fiscal, Elaine Motion, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Ian Ferguson, Solicitor, Glasgow. The Fiscal invited the Tribunal to allow an amended Record and amended Joint Minute to be received. The Respondent confirmed his consent to the motions. The Tribunal proceeded to hear evidence and submissions from both parties.

6. Having given careful consideration to the amended Record, Joint Minute, parole evidence, productions and the submissions from the parties, the Tribunal found the following facts established:-

6.1 The Respondent is David Ewan McNeish, who was born on 15 June 1972. The Respondent was employed as an employee in various firms from 1997 onwards joining Optima Legal Services Limited on 3 April 2013 as an employee and subsequently on 1 May 2014 as an employee with Optima Legal (Scotland) Limited (now Alston Law) until his departure on 27 July 2015. He is presently employed, as an employee, with DWF LLP, Solicitors, that employment commencing on 30 July 2015. He holds a current Practicing Certificate.

6.2 Dr A was at the material time the wife of Mr A. On 30 October 2014, Firm 1 submitted a formal letter to Firm 2, offering to purchase property B, on behalf of Mr A and his wife, at the price of £235,000 and with entry as at 16 January 2015.

6.3 The Respondent's attendance note dated 8 January 2015 records as follows:-

"Tel. call from [Mr A] on 7/1 instructing us. Had to put in an offer *via* [Firm 1] but they're not on Coventry Building Society's panel, so now wishing to instruct us to act both for the purchasers and Coventry. His wife is [Dr A]. He had applied direct to Coventry, query over whether wife as non-EU national can be a borrower even if income disregarded (explained they will almost certainly want borrowers and owners to be the same). I would check with Coventry before progressing further. Price agreed is £235,000, DoE 30 Jan, borrowing £82k, balance is from joint savings."

6.4 On 8 January 2015, the Respondent wrote to Firm 1 in the following terms:-

"I refer to your recent offer on behalf of [Mr A and Dr A]. Please note that we have now been instructed by them to act for both of them and their lender in connection with their proposed purchase."

6.5 On 8 January 2015 the Respondent wrote to Firm 2, the Seller's agents confirming that he was acting on behalf of Mr A and Dr A.

6.6 On 8 January 2015, in the afternoon, the Respondent e-mailed Mr A (and Mr A alone), saying:-

"I am waiting for a response from the Coventry about the point we discussed yesterday. Do you have a contact name and/or application number, which might help us get a faster answer? In the meantime I have told [Firm 1] and [Firm 2] that we will be representing you in connection with your purchase. I have posted our initial engagement letter, fee quote, etc. to you and attach copies for your reference. If you have any further queries in the meantime please let me know."

6.7 The Letter of engagement referred to in the preceding paragraph was made out to both Mr A and Dr A. The Terms of Business was also provided by e-mail and indicated in terms :-

"Your case will be handled by David McNeish, who is a fee earner within our conveyancing department [who] may from time to time be assisted by other team members…. "

"….Optima Legal reserves the right to cease to act on your behalf if we consider this appropriate… If we intend to do this, we shall do so as far as practical, consult with you first and provide reasonable assistance in transferring the matter to another firm…"

6.8 The Letter of engagement, Terms of Business, Purchase Information Sheet and fee quote were both posted and sent by e-mail to Mr A's email address.

6.9 At no time did the Respondent meet with Mr A or Dr A.

6.10 Although the purchase information sheet indicated that the Respondent could take instructions from either party, at no time did the Respondent have any meetings or discussions with Dr A to confirm this. He did not address any emails solely to Dr A to confirm this or to take any other instructions. The Respondent proceeded to take instructions only from Mr A.

6.11 There is no signed Letter of engagement on the Respondent's file to evidence that Dr A had been provided with that document or indeed the terms of business, fee estimate or purchase information sheet.

6.12 In the evening of 8 January, Mr A e-mailed the Respondent in the following terms:-

"I normally contact the Coventry Bank through their main telephone line 08457 6655522 and the letters I receive from the Coventry Bank is coming from Amy Walsh Solicitor Panel Management Officer and from Alan Finney, Head of Direct Mortgages, but I do not have a direct contact for them. I do not know if it could help you but my mortgage application reference is CB50129123."

6.13 By e-mail of 9 January 2015 Coventry Bank indicated :-

"We would consider an application in joint names but the applicants would have to submit a new application to us in joint names, we cannot proceed on the basis the mortgage being in Mr A sole name but the title showing joint names. Provided Dr A could prove two years' proof of residency and employment within the UK and meets our standard underwriting criteria we would consider a new application. Please confirm how the applicants wish to proceed and if a new application is to be submitted."

6.14 On 9 January 2015 the Respondent copied the e-mail to Mr A, saying :-

"Please see below the reply I received from the Coventry, which seems promising, if [Dr A] meets the criteria? If so, I suggest you contact the Coventry to make a joint application. Please let me know how you are proceeding."

6.15 On the same date Mr A replied in the late evening, in the following terms :-

"We did already a joint application under the reference CBS01250930. However, the mortgage application has been rejected as my wife is not an EEA member (she holds the Taiwanese nationality) and she has the residence card of a family member of an EEA national which is valid until 26 Sept 2017. But I confirm that my wife is living in the UK over two years (since 2007) and has [been] employed within the UK over two years (since 2007). I believe the issue is due to the visa type which is not a permanent visa and depends of the marriage with myself as a member of the EU. I think that we need confirmation that the joint mortgage application under the reference CBS 01250930 can be accepted even if my wife has a residence card of a family member of an EEA national which is valid until 26 Sept 2017. If not, we would need to proceed for the sole mortgage application under the reference CBS0129123. Would you please contact the Coventry Bank for clarification on the case. The entry date is on the 30th day of January and we would need after to be quick to proceed. Do we still have time?"

6.16 By letter of 9 January 2015 Firm 2 forwarded the title deeds together with drafts for revisal/approval.

6.17 On 9 January 2015 Mr A completed and signed a client details questionnaire indicating that the title was to be taken out in his sole name. It also confirmed that the deposit – contribution towards purchase price of £153,000- would be made from a savings account – Bank of Scotland. It did not clarify whether this was a joint or sole bank account. The questionnaire was also provided to the Respondent at the same time as the original passport and driving licence of Mr A. No such documents were provided by Dr A at this stage – or indeed at any stage- directly by her. Therefore, as at 9 January 2015 Mr A's position was that title would be taken in his sole name. No action was taken by the Respondent at this time to contact Dr A directly, by any means, to confirm the position, given that as at 9 January 2015 the position was the property purchase was not to be in joint names.

6.18 On 12 January 2015, the Respondent forwarded Mr A's e-mail to the Coventry, asking:-

"Can you please clarify whether [Dr A] can be accepted as a borrower?" Thereafter, he e-mailed Mr A, advising, "I have asked the Coventry to clarify" and that it might prove necessary to delay the date of entry.

6.19 On 13 January 2015, a letter (with the Respondent's reference) was on file addressed to Mr A and Dr A jointly. It reported on the title.

6.20 On 14 January 2015 the Respondent received loan papers from the Coventry, whereupon the Respondent e-mailed Mr A (and Mr A alone), saying :-

"I've received the mortgage offer in your sole name (attached for your information). If you wish to proceed then you will need to register title in your sole name. Even if you wanted to do that, it's possible that the Coventry may have a difficulty with the rest of the funds coming from a joint account as they may feel that gives your wife a competing interest in the property. Did you explain in your application that is what you are proposing? You could transfer the property into joint names at a later date but that would require a new mortgage. I have not heard back about the joint application – I will chase them up."

6.21 On 14 January 2015 the Respondent acknowledged the client details questionnaire and AML documentation with original documents being returned.

6.22 On 15 January 2015 the Coventry e-mailed the Respondent, advising :-

"we are unable to accept [Dr A] as she does not hold indefinite right to remain in the UK, which is a requirement of our lending policy." They added: "we are only able to proceed with a sole application in [Mr A's] name only, and the title must also be in [Mr A's] name."

6.23 On 15 January 2015 the Respondent forwarded the e-mail to Mr A while advising that, if Mr A did not "wish to proceed with the sole mortgage", then he should contact a mortgage broker, "as they will have knowledge of which lenders [.....] in the circumstances": he asked Mr A to let him know how he wished to proceed. This was despite receiving the client details questionnaire as detailed above.

6.24 On 16 January 2015 Mr A replied saying :-

"We would like to proceed with the sole mortgage application and to register the deeds tile (sic) both on my name." He advised the Respondent that he had told the Coventry "we are using savings from our joint account" and that the Coventry had no concerns regarding the matter. At no point did the Respondent check either with the Coventry or Dr A directly in relation to this.

6.25 On 16 January 2015 a letter was sent from the sellers Solicitors, Firm 2, with the heading as the purchasers being jointly Mr A and Dr A. By usual post the Respondent would have received this letter on 17 January 2015. The Respondent considered Mr A's email of 16 January 2015 as joint instruction to proceed by putting title in his sole name.

6.26 On 19 January 2015 the Respondent e-mailed Mr A seeking instructions, with a view to issuing a fresh offer.

6.27 On 19 January 2015 Mr A replied forthwith, instructing :-

"send the formal offer to the selling solicitors to replace the one which [Firm 1] sent" and stating that "we would like to keep the date", although he expressed concern as to whether the bank could transfer the funds timeously.

6.28 By letter of 20 January 2015 the Respondent issued an offer to Firm 2 in the sole name of Mr A sent by e-mail "on behalf of my client".

6.29 At no stage prior to sending the letter of 20 January 2015 to Firm 2 did the Respondent terminate instructions from Dr A/advise her that they were no longer acting for her in relation to the purchase of the property.

6.30 On 20 January 2015 the Respondent issued a letter addressed to Mr A and Dr A jointly, enclosing a Standard Security for signature and a draft Stamp Duty Land Tax form. Having briefly explained the nature of the deed, he intimated:-

"Dr [A], you are signing not because you are an owner or borrower, but in order to waive your occupancy rights over the matrimonial home in the event that the Coventry Building Society wanted to repossess the property. This does not affect any other rights you have to occupy the house."

6.31 In the letter referred to in the preceding paragraph the Respondent added:-

"If either of you has any doubt about the meaning of the Standard Security, please do not sign it until you have discussed it further with me."

6.32 Having advised as to how the Standard Security should be signed, the Respondent explained that the Stamp Duty Land Tax return would be submitted on-line and asked, "Could you please sign the mandate to enable us to do that."

6.33 The Standard Security referred to Mr A as the sole obligant and Dr A as the non-entitled spouse.

6.34 On 20 January 2015 the Respondent e-mailed Mr A with a financial statement showing the balance that was required and indicated that as it was a joint account then :-

"I will also need to see identification documents for your wife. If there are any difficulties with this please let me know".

No request was made directly to Dr A asking her to produce those documents directly herself.

6.35 On 21 January 2015, Mr A sent the firm copy bank statements and promised to send Dr A's ID.

6.36 On 23 January 2015 the Respondent e-mailed Mr A alone in relation to other matters ending with "do you want your Council Tax bill to be in joint names or just your own?". On the same date Mr A instructed "for the Council Tax we would prefer in joint names".

6.37 Around this time, the signed Standard Security was sent to the Respondent. It bears to have been subscribed both by Dr A and Mr A in the presence of HS. At no time did the Respondent advise Dr A to seek separate legal advice in relation to the signing of that Standard Security. He did not send a letter solely to Dr A with advice. The Standard Security was subscribed by Dr A, along with Mr A in the presence of a witness. Dr A did not see the letter enclosing the Standard Security.

6.38 On 26 January 2015 Mr A e-mailed the Respondent advising that the deposit was to be transferred that day.

6.39 On 28 January 2015 Missives were concluded. On 29 January 2015 Mr A e-mailed the Respondent advising, "My wife will go to get the keys" and instructing him to inform Firm 2 accordingly.

6.40 On 30 January 2015 the transaction settled.

6.41 On 2 February 2015 settlement was confirmed only to Mr A by the Respondent.

6.42 Various credit and debit entries dated 26 January; 28 January; 29 January; 2 February and 4 February all 2015 appeared with the Respondent's reference. All of those were recorded for clients Mr A and Dr A.

6.43 The Respondent sent four letters by post addressed to both Mr A and Dr A: (i) 8/1/2015 letter of engagement with enclosures; (ii) 13/1/2015 letter reporting on title; (iii) 21/1/2015 enclosing the standard security for signature; and (iv) 26/1/2015 returning Dr A's identification documents. All other written correspondence issued by the Respondent to his clients was either addressed solely to Mr A, or sent by email using only Mr A's email address.

6.44 At no point during the transaction, from early January until February 2015, did the Respondent have any telephone calls/zoom meetings or direct e-mail contact to or from Dr A. Nor was there any face to face contact by the Respondent with Dr A. He sought no instructions from her alone nor did he seek to clarify any matter, particularly when there was a change of circumstances. By way of example, he did not:-

A - Communicate or explain by letter sent solely to Dr A that her name was not being included on either the mortgage as a joint borrower or the title deeds to the property as joint owner:

B - Check by letter sent solely to Dr A in relation to :-

(i) the change of circumstances with the title going into the sole name of Mr A and that she was comfortable with that and

(ii) the use of joint funds of over £150,000 being used for the deposit and that she was comfortable with that and

(iii) the mortgage payments would be paid from a joint account and that she was comfortable with that.

C - Explain clearly by letter sent solely to Dr A, as his client, the meaning and consequences of her signing the Standard Security document issued on 20 January 2015.

6.45 After the purchase of the property Dr A and Mr A separated and then divorced on 07 May 2019.

7. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct as follows:-

singly, in that:-

(a) In the period between 07 January 2015 and 03 February 2015 or any part of that period he failed to act in the best interests of Dr A by liaising directly with her in particular relation to the following:

i. he failed to take her initial instructions for the purchase of the property or liaise with her directly in any way in relation to the purchase;

ii. he failed to take her further instructions or liaise with her directly in any way in relation to the change of position from the property being purchased in joint names to the sole name of Mr A;

iii. he failed to give her full and proper advice and explanations directly of the consequences of the signing of the Standard Security given the title to the property was being taken in the sole name of Mr A;

iv. he failed to advise her directly of the consequences of the transfer of funds

from a joint account in light of the title being taken solely by Mr A;

v. he failed to fully advise her directly of the consequences of mortgage payments being made when the title was taken in the sole name of CR.

and

(b) In the period between 07 January 2015 and 03 February 2015 or any part of that period he failed to ensure that he had the authority of Dr A for his actings in the conveyancing transaction in particular in relation to the following:

i. to confirm directly with her, her instructions to act in the purchase of the property with title being taken in joint names;

ii. to ensure that he obtained Dr A's direct instructions and authority that the significant deposit could be taken from the joint account held in her name and that of Mr A when title was to be taken in both names;

iii. to ensure that he obtained Dr A's direct instructions and authority at the time of instruction to change title into the sole name of Mr A;

iv. to ensure that he obtained Dr A's direct instructions and authority to proceed with a mortgage in the sole name of Mr A;

v. to ensure he obtained Dr A's instructions and authority to use funds from the joint account for the purchase of the property in the sole name of Mr A;

and *in cumulo* that:-

(c) In the period between 07 January 2015 and 03 February 2015 or any period thereof he failed to communicate effectively with Dr A whilst she was a client of the firm. In particular he:

i. did not meet with her; send or receive e-mails directly to or from her; receive AML documents directly from her; speak to her or meet her either face to face or in zoom meetings to take her instructions or to communicate generally directly with her to allow her to make informed decisions;

ii. did not take instructions directly from Dr A that he could communicate solely with Mr A by email throughout the transaction;

iii. failed to directly advise Dr A of the significant development, namely that the

title in the property was to be taken in the sole name of Mr A rather than in the joint names of Mr A and Dr A, to allow her to make informed decisions;

iv. failed to ensure that Dr A had received any of the communications that he sent solely to Mr A;

v. he failed to directly advise her and explain the implications and consequences of signing the Standard Security for the limited purpose it was actually signed and so he failed to permit an informed decision to be made by Dr A regarding the signing of that document.

8. Having heard further submissions from both parties, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh, 26 April 2022. The Tribunal having considered the Complaint dated 29 November 2021 at the instance of the Council of the Law Society of Scotland against David Ewan McNeish, formerly of Optima Legal (now Alston Law) and now of DWF LLP, No. 2 Lochrin Square, 96 Fountainbridge, Edinburgh; Find the Respondent guilty of professional misconduct *singly* in respect that (a) in the period between 7 January 2015 and 3 February 2015 he failed to act in the best interests of Dr A by liaising directly with her and (b) in the period between 7 January 2015 and 3 February 2015 he failed to ensure that he had the authority of Dr A for his actings in the conveyancing transaction and *in cumulo* that (c) in the period between 7 January 2015 and 3 February 2015 he failed to communicate effectively with Dr A whilst she was a client of the firm; Censure the Respondent; 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; Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person; and Fix a compensation hearing to take place on 31 May 2022 at 10am within the Royal Society of Edinburgh, 22-24 George Street, Edinburgh.

(signed)

Kenneth Paterson

Vice Chair

9. 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

23 MAY 2022.

IN THE NAME OF THE TRIBUNAL

Kenneth Paterson

Vice Chair

NOTE

At the commencement of the hearing on 26 April 2022, the Fiscal lodged an amended Record and an amended Joint Minute. She invited the Tribunal to allow both of these documents to be received. The Respondent having consented to these motions, the Tribunal allowed those documents to be received. The Tribunal also had before it two Lists of Productions and a List of Witnesses for the Complainers and one List of Productions and a List of Witnesses for the Respondent. The amended Joint Minute and the Answers for the Respondent admitted almost all of the Complainers' averments of fact. To assist the Tribunal, the parties had prepared a list of issues which continued to be in dispute between them. Evidence was led from one witness for the Complainers and two witnesses, including the Respondent himself, for the Respondent.

EVIDENCE FOR THE COMPLAINERS

WITNESS: DR A

This witness confirmed that she was born abroad and that English was not her first language. She described her extensive qualifications and previous employment in the field of education. She confirmed that she had met Mr A in France and that they had both moved to Scotland when she secured employment here. They bought a flat together with a joint mortgage, married and had a child together. They had instructed a solicitor local to them to act for them in that purchase. After the birth of their child, they decided to move to a bigger property and they instructed a different solicitor to act for them in the purchase of that property. That solicitor's office was close by to where they lived.

She was told by Mr A that Firm 1 was not on the panel of approved solicitors for their mortgage provider and that they needed to instruct another firm of solicitors. She had been very much against this change for two reasons (1) Firm 1 had already carried out an amount of work for them which she thought they should be paid for and (2) Firm 1 was close to where they lived and the solicitor they were dealing with by this time was familiar with the family circumstances. She could not understand why they required to change to a complete stranger who was so far away from them. She did not think she knew the name of the new solicitor. The Fiscal referred to the Respondent's Production 7 at page 6 and the witness stated that the statement therein "the information of the solicitor and the firm were concealed from me" was a true statement. She only became aware of this information in the course of child maintenance proceedings in October 2019. Her husband had successfully argued that the award of child maintenance should be reduced to take account of the fact that she and their child were living in a property in his name. She considered this to be unfair as she had contributed to both the deposit and the ongoing mortgage payments. She appealed

to a tribunal and in the course of that appeal, the correspondence between her ex-husband and Optima Legal was revealed.

In January/February 2015, she did not know the name of the solicitor acting for her. She had understood that the purchase was to be in joint names. She was never told by the Respondent that the title was going to go in Mr A's name alone. She had signed the standard security because she was told that she needed to sign something in order to get things rolling. She was reassured by HS that she would not lose any rights. The deposit of £156,000 was paid from a joint account. At no stage did the Respondent ask to meet her, contact her by telephone or write to her alone. The first time she had spoken to him was in 2019. The Respondent did not tell her the mortgage was only in Mr A's name. No emails were sent to her alone. She did not see any emails sent by the Respondent. She did not open mail addressed to her husband or mail addressed to them both jointly if his name was the first in the address.

The witness was shown Complainers' Production 1, the letter of engagement sent by the Respondent, and stated this was the first time she had seen this letter. In 2019, the Respondent had given her the telephone number for Alston Law and they had said they would give her copies of correspondence in her name but they never did.

The witness was directed to pages 145 and 262 of Production 4 for the Complainers, letters dated 20 January 2015, and the witness indicated she had not seen these before. She had been asked to sign the standard security and this had been done in her neighbour's house with the neighbour as witness. She confirmed the handwriting on page 262 was that of Mr A. She was not aware that her passport and residency card had been sent to the Respondent.

She was referred to Production 7 for the Respondent which she confirmed was her complaint form sent to the Scottish Legal Complaints Commission ("SLCC"). She explained that she had inserted the date 8 January 2015 at page 5 of that Production for procedural purposes and not as an indication that she was aware that Optima Legal were acting for her.

CROSS EXAMINATION OF DR A

Mr Ferguson began by intimating to the witness the Respondent's apology for not advising her to take independent legal advice when sending her the standard security for her to sign as a consenter and for not advising her in categoric terms that when paying her share of the deposit her name would not be on the title and she would have no security for that contribution.

The witness insisted that she did not receive any correspondence from the Respondent and that she would not have opened a letter addressed jointly if Mr A's name came first in the address.

She was referred to Production 7 for the Respondent and insisted that she never asked the Respondent to start working for her. She had only inserted the date of 8 January 2015 on page 5 for procedural reasons. She pointed to her detailed explanation given in the paragraph above that entry. She did not think she would be able to submit the online form without answering that question. She had got the date from Firm 1, who had confirmed the date from the formal letter sent to them. In fact, communication with the Respondent must have occurred before that date. All contact was between the Respondent and Mr A.

When asked if Firm 1 had written to her to tell her another firm had taken over, she responded that contact with Firm 1 was mostly face to face. She did have a conversation with her solicitor from Firm 1 to let him know that Mr A had decided to change solicitor. She felt very sorry for the solicitor from Firm 1 and asked her husband to get a bottle of wine and chocolates for him.

She did not accept that inserting the date on page 5 of Production 7 amounted to an admission by her that she had asked, even through her husband, for Optima Legal to act for her. She emphasised that she was from a different cultural background and had understood this to be a procedural question. Mr A had insisted on the change of solicitor. She had objected but he had insisted that they change to a solicitor on the panel for the mortgage lender and that Optima were the only ones in Scotland. She had wanted to know what her options were. She was not aware that her name was not going to be on the title papers. Mr A had told her a change in rules had meant that as she was a non EEA individual she would not be able to obtain a mortgage from any other lender in this country. She was opposed to the change of solicitor but Mr A ignored her opinion. She denied Mr A had given her the option of a mortgage from the Bank of Scotland which she had refused as the interest rate was higher. She insisted that she had asked him if they could change to a different lender.

She was not aware that the entry dates had been put back from 16 January 2015 to 30 January 2015. She explained that they had agreed a purchase with the seller in 2014 but the seller had decided to proceed by way of bids. The seller had then accepted another person's offer. That transaction had fallen through, and the seller came back to them. Most instructions were given to Firm 1 face to face. She was busy looking after a young child.

She stated that she did not see the letter enclosing the standard security. She could not therefore make comment to the Respondent in relation to something she did not know about. She did not know how Mr A had received the standard security. She thought he may have collected it in person. At the time of signing she had not known that the document was called a standard security. She had thought it was a form she needed to sign as she was told that she had no option if she wanted the purchase to proceed.

The witness accepted that she had stated in the SLCC complaint form that "a gang" had forced her to sign. She explained that the term "gang" simply meant more than one person. She had been given false information by HS when she had said that she would not lose any rights. When asked if she was pressured into signing she explained she had been seriously misinformed. Shortly after they moved into property 1, Mr A removed her name from all of the bills despite her objections. At that point, she felt something was quite wrong.

At the time she signed the standard security she believed it was a procedural, bureaucratic paper that she needed to sign to get the mortgage. She accepted that she referred to the form as a "consent form" in her SLCC complaint which was Production 7, at page 6, but insisted she had not seen the Respondent's letter of January 2015. She accepted that she had read the form but explained that she did not understand the terms used or the consequences of signing the document. She had felt uncomfortable signing the document and had asked if there was another option. The witness was asked if she had understood that she had no rights to the title of the property and she responded that she was told that her name would be put back on later. She did not really understand what "title" meant and still did not fully understand how this impacted on her rights.

Mr A did not tell her he was receiving letters and emails. It was Mr A who applied for the mortgage as she was busy dealing with other responsibilities. There had been no discussion about an alternative loan from the Bank of Scotland.

The divorce was not an amicable one. There was an agreement reached. She bought property 1 from Mr A. She accepted there was no outstanding mortgage on the property at the time of transfer from Mr A to her.

She had trusted Mr A to deal with the purchase but he was doing things where her objections were ignored. She had been given a lot of misinformation. Things would have been different if she had had legal advice.

Their child was born in November 2013. She had not had time to deal with the purchase. She did think that Mr A was coercive, but she had trusted him.

She accepted that she had written a number of research papers and she explained that none of these related to management or finance issues. She had not understood that the form was so important and at that time she was not rebellious enough to have insisted on speaking to a solicitor first. Mr. A had told her she had no choice but to sign the form if she wanted the purchase to proceed. She had been uneasy but she had been misinformed by Mr. A and their friend who acted as a witness.

RE-EXAMINATION OF DR A

The witness confirmed she had no legal training and relied upon and trusted her solicitor very much.

She had paid Mr. A some £20,000 to £30,000 to have the house transferred to her and settle the divorce financially.

In answer to a question from a member of the Tribunal, the witness confirmed that neither Mr. A nor the witness to the signing of the standard security had any legal qualifications. Mr. A studied in France and is trained to a management level.

She explained that she did not fully understand the terms "deeds" or "title". Between 8 January 2015 to the date of entry she had not really known what was going on. She knew that Mr. A wanted to change solicitors but she did not know what date that actually happened.

She confirmed that she and Mr. A had retained joint ownership of their first flat which had at some point been rented out. In the divorce agreement Mr. A was given ownership of that property.

EVIDENCE FOR THE RESPONDENT
WITNESS: DAVID EWAN McNEISH

The Respondent confirmed that the letter of engagement dated 8 January 2015 was emailed and posted. It was the practice of the firm to post these documents. Copy correspondence on file was not on headed paper. The only copies on file that would be on headed paper would be a copy of the signed missives and any faxed letters.

The Respondent received a telephone call from Mr. A instructing him to proceed with a joint purchase in joint names.

There was no indication at any stage that Dr A was not seeing any of the correspondence. The transaction appeared to be a perfectly normal one on behalf of a married couple. Dr A was welcome to contact the Respondent at any point. Mail sent by the firm had the firm's logo franked on it. It would be apparent from the envelope that it came from Optima Legal.

When asked if the swift turnaround time in this transaction was unusual and he responded that it was not. He would try to keep on with what the client had set in place. He conceded that in hindsight the pressure to get the transaction done may have played a part in what happened. The firm was busy and short staffed. There were fewer points of contact in a short transaction than in a longer one. He was employed as an assistant.

There were no queries from Dr A at any stage.

In hindsight, he conceded that he had taken the wrong approach with regard to the standard security. The transaction had started as a joint purchase and it was only later that it was changed to one going in the sole name of Mr. A. The Respondent conceded that he should have treated this as a greater divergence of interests.

At the time of sending out to the standard security the Respondent accepted that he regarded both Mr and Dr A as clients. He explained that if he had thought that Dr A was not a client, he would have advised her to take independent legal advice. He accepted that he should have written to her solely with regard to the contribution to the purchase price.

CROSS EXAMINATION OF MR McNEISH

The Respondent accepted that both Mr and Dr A were his clients. He accepted that he did not withdraw from acting for Dr A. He indicated that he regretted not telling her to get independent advice and thought that was the only area where he did not observe his obligations.

He conceded that he should have formally told Dr A that he was not acting for her.

At the time he regarded their interests as broadly aligned. The circumstances were quite different to those referred to in the Law Society guidance regarding conflicts of interest in couples. The situation here appeared to be one of not such a divergence of interests. It did not strike him that this was such an obvious

conflict that he should have withdrawn from acting for Dr A. In hindsight, he accepted that he should have written to Dr A to withdraw from acting.

He was referred to Rule B1.9 and stated that he considered it reasonable to write to both Mr and Dr A in joint names at their home address. The only exception was in relation to the forwarding of the standard security and whether he should have written to Dr A withdrawing from acting.

The Respondent was referred to Rule B2.1.7 and explained that at the time of sending the standard security for signature in his mind both Mr and Dr A were still clients. He explained that he now works in commercial conveyancing. In his experience, it was unusual for a married couple to buy a property in the name of only one of them.

The Respondent insisted that the letter of engagement was sent by post as well as email. As it was sent by standard post no evidence would be retained of that on file. He pointed to an email from him to Mr A confirming that he had sent these documents by post. He had never worked in an office where file copy correspondence would be on headed note paper.

All jointly addressed letters were sent to the home address. He did not have any face-to-face meeting with either Mr or Dr A. He did not remember any telephone conversation with Dr A (before 2019). He had seen the principal ID documents for Dr A and so he knew she existed. He had information linking her to the home address. He did not see Dr A in person.

The Respondent was directed to the averments of misconduct.

With regard to averment 5.1(a)(i), he conceded that this was probably a fair statement. With regard to (ii) he conceded that he ought to have contacted her solely when the issue arose of title going in the sole name of Mr A. He should have told Dr A formally that he was no longer acting for her. In relation to (iii), he indicated that he considered the advice he gave in the letter accompanying the standard security to be adequate. The letter was addressed to both Mr and Dr A and they were invited to contact him if there were any questions. He considered it reasonable to jointly address the letter when dealing with a married couple. When asked if this was consistent with the apology given on his behalf, he conceded that it was not. In relation to (iv), he accepted that he gave Dr A no advice regarding consequences of the property going into the sole name of Mr A. With regard to (v), the Respondent indicated that he had no knowledge of which account was going to be used to pay the mortgage. He was aware that the deposit for the purchase came from the joint account. He did not check how the mortgage was to be paid. He was not sure that it crossed

his mind that he required to give Dr A advice about the consequences of a joint deposit and the payment of the mortgage. He accepted that at the time he believed both Mr and Dr A to be clients. He accepted that he did not withdraw from acting for Dr A. He conceded in fact that paragraph (v) was a fair comment. He conceded that 5.1(a)(vi) was fair comment.

With regard to 5.1(b)(a), he stated that no material work was done to progress the transaction in joint names. The letter of engagement was sent to both Mr and Dr A jointly. The firm did not insist on the terms of business being signed and returned. He conceded that he had not had any discussions with Firm 1. He accepted that at no point did he clarify a change from the property going in joint names to the sole name of Mr A with Dr A. He conceded that 5.1(b)(a) was fair comment. He conceded (b). With regard to (c), he conceded this, subject to the qualification that he had sent the letter with the standard security indicating that the title was to go in the sole name of Mr A. He conceded (d) with the same concession. He conceded (e).

In relation to the qualifications made by the Respondent, the Fiscal directed the Respondent to consider the terms of his letter accompanying the standard security. He considered that the terms of his letter were reasonably clear and emphasised that it included an invitation to contact him if either client had any query.

The Respondent accepted his failure in terms of 5.1(c)(a). He accepted (b) but reminded the Fiscal of his terms of business. He did not accept (c) referring to the letters addressed jointly. He did not accept (d) on the basis that he considered this to be apparent from the letter enclosing the standard security. He accepted (e). He disputed (f).

With regard to 5.1(d), the Respondent conceded that Dr A was his client throughout the transaction. Even though the client questionnaire had been completed and returned by only Mr A, the Respondent understood that it was Mr and Dr A's preference for the title to be joint if possible. Correspondence continued to be issued addressed jointly to Mr and Dr A.

WITNESS: MR A

The witness confirmed that, in general, mail would arrive at their home address at around 12 noon. The witness left home for work at 5pm. He was the one who opened the mail. At the time his ex-wife was quite unwell.

He was asked who dealt with financial matters and explained that after 2013 his ex-wife gave him instructions to tell him what to do. She was dealing with childcare issues. At no point did he tell her not to open the mail. At the time of the purchase of property 1, Dr A was not physically working.

He was asked if he remembered seeing the quote from Optima Legal. He explained that he could not. He had not seen many of his documents since 2017 when his ex-wife came to his home and removed some of his belongings. He had obtained an interdict to prevent his ex-wife coming to his house and prevent her from molesting him.

He stated that he always had to obtain his ex-wife's instructions on what to do. If he did something incorrectly, he was in trouble. Dr A did not have access to his email. He told her about the emails that had arrived and asked what to do about them. He only had his work phone and work computer and she did not have access to either of these. Developments were discussed with her. He did not hide emails from her.

It was Dr A who completed the original application to Coventry Bank. She wanted to go with the Coventry because of the interest rate. She was aware that the joint application was refused and she told him to proceed in his name. They could have gone with the Bank of Scotland but the interest rate would have been higher. Dr A asked him to complete an application in his own name. She was aware that the joint application was refused because of her residency status.

When shown the letter of 20 January 2015 enclosing the standard security, the witness indicated that he could not remember seeing that letter.

He denied putting pressure on Dr A to sign the standard security. He explained that the only pressure that was present was their need to find another house.

Both of them were aware of how much money they had 'in the pot' and how much they required by way of mortgage. Both of them had transferred their savings from their own accounts to the joint account.

When asked if he had discussed the consequences of Dr A not being on the title, he explained that he did not think there were many consequences as they were married. He explained that they had planned to put her name on the deeds once the mortgage was paid.

The net effect of the agreement on their divorce was that property 1 was transferred to her and their original flat was transferred to him. Property 1 was some £100,000 greater in value and that together with a

calculation of their pensions and the fact that he had paid the mortgage on property 1 himself from August 2017 resulted in the calculation of a balancing figure to be paid to him. Until August 2017, the mortgage was paid from their joint account.

He insisted that it was Dr A that discovered that the mortgage from the Coventry Bank could not be in joint names. He explained that she was very angry at this. She had been in hospital in 2013 as a result of mental illness.

They had had two mortgage offers, the one from the Coventry and another from the Bank of Scotland. Dr A wanted to go with the Coventry offer and she knew that her name would not be in the title.

CROSS EXAMINATION OF MR A

The witness stated that both he and his wife dealt with the emails in relation to the purchase of property 1. He did not receive any emails from the Coventry Bank. At no point did he meet with the Respondent. He was not sure if he had ever spoken to the Respondent.

From approximately September 2014, Dr A did not want to receive any email correspondence.

The witness accepted that at the time of signing the standard security he said to Dr A that if she did not sign then they could not buy the house. He denied putting any pressure on Dr A and indicated that the opposite was true. He stated that Dr A wanted a bigger house and wanted them to move.

RE-EXAMINATION OF MR A

The witness accepted that it was his handwriting on the letter submitting identification documents for Dr A. He stated that Dr A was aware that these documents were being forwarded. The residency card and passport were hers, not his.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal invited the Tribunal to accept the evidence of Dr A as both credible and reliable. She pointed to the Respondent having made some concessions in his evidence. She submitted that little of Mr A's evidence was relevant. She did not dispute that he was a credible witness but did take some issue with questions being put to Mr A that had not been put to Dr A.

She argued that there was no evidence on the file that the letter of engagement was sent to Mr and Dr A by post. Nor was there any evidence in support of that from either of Mr or Dr A's evidence. She submitted, however, that even if that letter had been sent by post, that it was of little consequence.

She submitted that what was not in dispute was that, after the letter of 8 January 2015, nothing of consequence was sent solely to Dr A. The Respondent had not received back from Dr A a signed letter of engagement. He had proceeded on joint instructions given through Mr A. He had made no contact solely directed to Dr A after the instructions to put the title in joint names changed to the sole name of Mr A. She submitted that there was blackhole of communication between the Respondent and Dr A.

She thanked the Respondent for confirming which duties he accepted he had not upheld. She argued that his approach was the opposite to knowing his client. She submitted that Dr A was invisible to the Respondent throughout.

She submitted that the Respondent had conceded failing to act in the best interests of Dr A in respect of 5.1(a)(i), (ii), (iv) and (vi). He had conceded 5.1(b)(a), (b), (c), (d) and (e). He had conceded 5.1(c)(a), (b) and (e). The Respondent had conceded paragraph 5.1(d) if Dr A was not a client.

The Fiscal indicated that all heads of conduct had not been carried through to the standard required. This was a failure in terms of the Sharp test. The impression given was that the Respondent had not thought about these issues. He had considered this to be "a bog standard" conveyancing transaction involving a husband and wife where the Respondent was entitled to make various assumptions ignoring the requirement to stop and assess the transaction as it developed.

The Fiscal submitted that she was not sure if the Respondent was going to argue that the Secondary Complainer suffering no loss was significant to the question of misconduct. She explained that she had copy authorities that confirmed that this did not prevent the conduct from being professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

Mr Ferguson submitted that this case should have been a simple plea-in-mitigation. He submitted that the Respondent was forced to deny issues that were plainly wrong. The apparent position of Dr A that the four letters sent to both her and Mr A were either not sent, not received or hidden from her was an illusion with no basis in fact. This had led to the necessity to a proof in mitigation.

The Complaint is peppered with the word "directly". References suggesting that correspondence was not sent directly to Dr A are made in error. Letters were sent addressed to both Mr and Dr A and jointly addressed. They were directly to both of them.

It was accepted that the letter enclosing the standard security should have directed Dr A to take legal advice and should have given her advice regarding payment of the deposit.

Mr Ferguson directed the Tribunal's attention to the reporter's report and the Professional Conduct Sub Committee decision. He pointed to the Respondent's Production 13 relating to the timing of delivery of mail. He submitted that Dr A could have chosen to read the letters but she had made a wilful decision not to. This was self-imposed blindness.

He submitted that it was not usual practice to write to both members of a couple separately. He also did not accept that it was normal practice to insist on clients signing the terms of engagement.

Mr Ferguson submitted that it appeared that the Respondent was confused as to who he was acting for. He submitted that there was no doubt that the Respondent was acting on the authority of both clients. He was jointly instructed through Mr A. It all went sour when the Coventry Bank indicated that Dr A's residency status did not comply with their requirements.

He invited the Tribunal to hold that Mr A was straightforward in giving his evidence, and honest in his responses. He submitted that it was clear that Mr A had had detailed discussions with his ex-wife. He submitted that the idea that Dr A was not aware of the joint loan being turned down was a fantasy.

The Respondent was involved in a snapshot of this transaction between 8 January and 3 February 2015. By the time of his involvement, offers had been made and loan applications had been made. The parties were still pretty much in disarray. He submitted that Mr A did not try to cut out his ex-wife. He invited the Tribunal to prefer Mr A's evidence that he was taking instructions on what to do from Dr A. Dr A is a learned lady having written dozens of research papers. She would know she should read a document before signing it. He submitted that it was not credible that this transaction began on a joint basis before Mr A then chose to "go off piste". It was not credible that Dr A did not know that the joint application had been refused. It was she who collected the keys for the property. She was not 'an innocent abroad', being taken for a ride. She could have refused to sign the standard security until she had spoken to her solicitor.

He submitted that it was not credible that Dr A did not know the name of the lawyer. There was no "gang" making her sign the standard security. She had doubts about signing the document but went ahead and signed it anyway.

A number of pieces of correspondence were sent to Dr A's home. Some of these were bulky. There were many opportunities to find out who the solicitor involved was.

DECISION

The first step for the Tribunal was to determine which facts had been established. Most of the averments of fact within the Complaint had been agreed either in the Joint Minute or in the Respondent's Answers. For the remainder, the Tribunal required to look to the parole evidence and Productions.

The standard of proof for the Tribunal is that of beyond reasonable doubt. The onus of proof rests with the Complainers throughout.

The Tribunal required to assess the evidence led before it. It considered carefully the evidence of both Dr and Mr A. Both witnesses appeared to the Tribunal to be credible and doing their best to give their recollection of events. Unfortunately, much of their evidence was in direct contradiction and could not be reconciled. The Tribunal considered there was insufficient evidence from other sources before it on which it could base a preference to one version over the other.

Little of the conflicting evidence was of direct relevance to the essential facts of this case. Both witnesses agreed that they had set out to jointly purchase the property and that the deposit was to be financed jointly. Both agreed that it was Mr A who contacted the Respondent and that it was Mr A's email address that was used for email correspondence. Mr A agreed that his wife did not have access to his emails. He gave evidence that he opened mail sent to the house. There was no dispute that the instruction for the title to go in the name of Mr A solely was given and that this was sent in an email from Mr A.

The Tribunal also considered the Respondent to be a credible witness who, although confused at times, was doing his best to give his recollection of events. Much of his evidence centred around whether the letter of engagement and enclosures were sent by post as well as email. Neither of the other witnesses could help in this regard. However, the Tribunal accepted the Respondent's evidence that it was his firm's practice to send these documents in the post. There is an email on the file indicating that these documents had been mailed and a completed client questionnaire is on the file. The Fiscal placed great emphasis on the file copy

letter not being on headed paper as suggesting that this was only emailed. The Tribunal did not accept the proposition and preferred the evidence of the Respondent that file copy letters would not normally be on headed paper. The Tribunal was satisfied that the letter of engagement and enclosures were in fact sent by post addressed to Mr and Dr A.,in one jointly addressed letter.

There also appeared to be disagreement between the parties regarding the use of the word "directly". This the Tribunal considered to be a question of difference of interpretation between the parties and whether the word was being used in the context of "solely". Ultimately, the Respondent agreed that: he did not meet either of the spouses; only had one conversation with Mr A and none with Dr A (pre-2019); sent all emails only to Mr A's email address and at no stage wrote to Dr A solely in her own right. He accepted that this was an instruction from two clients to jointly purchase a property with a deposit coming from a joint account funded by both. He accepted that he received instructions to proceed on the basis of title going into the name of Mr A solely in an email sent by Mr A. He accepted that he was aware that the deposit was still to be paid from the joint account. He accepted that he had no direct communication from Dr A that this was in accordance with her wishes. He accepted that he did not give Dr A any advice regarding the consequences of this change in instructions. The only information given to Dr A, according to the Respondent's evidence at its highest, was the letter accompanying the standard security sent by post addressed to both clients jointly. The Tribunal considered this letter to be less than clear. Whilst addressed to both, it refers to "your loan" and "your lender". No advice was offered to Dr A. individually regarding the significance of the title going into MrA's sole name. An invitation to contact him if in any doubt was no substitute.

Having regard to all of the admissions and evidence before the Tribunal, it was satisfied that all of the averments of fact noted above in paragraph 6 were established beyond a reasonable doubt.

The next step for the Tribunal was to consider whether the established facts were sufficient to support the averments of misconduct. In this regard, the Respondent had made significant concessions in his evidence.

The Tribunal was satisfied that the facts before it were sufficient to support parts (i) to (v) of paragraph 5.1(a) and that these all represented a failure to act in the best interests of Dr A. The Tribunal was satisfied that the facts did not support (vi). The Respondent did not in fact withdraw from acting for Dr A. In his own evidence, he stated that he believed Dr A was still his client.

The Tribunal found the facts supported each of sub-paragraph (a) to (e) inclusive of paragraph 5.1(b) and that each of these amounted to a failure to ensure that the Respondent had the authority of Dr A for his actings.

With regard to paragraph 5.1(c), the Tribunal was satisfied that the facts established supported sub-paragraphs (a), (b), (d), (e) and (f) and that each of these amounted to a failure to communicate effectively with Dr A. The Tribunal was not satisfied that (c) was sufficiently supported by the facts.

Paragraph 5.1(d) was not supported by the facts. Dr A was the Respondent's client throughout.

The Tribunal required to consider if the conduct established amounted to misconduct. The test for professional misconduct is contained in Sharp-v-Council of the Law Society of Scotland 1984 SLT 313, where it is said:

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

The Tribunal was satisfied that paragraphs 5.1(a) and 5.1(b) independently amounted to conduct that fell below the standard of conduct to be expected of a competent and reputable solicitor and could only be described as serious and reprehensible. There had been a failure by the Respondent to recognise that these were two separate clients with separate interests. It considered that in many respects paragraph 5.1(c) was an aspect of each of paragraphs 5.1(a) and 5.1(b) and that this amounted to misconduct *in cumulo* with 5.1(a) and 5.1(b).

It should be noted that the Tribunal is not saying that instructions cannot be taken through one of two clients. However, the solicitor must ensure he has the authority of all clients to take instructions in this way and that this continues throughout the transaction, particularly when there are material changes to the nature of the transaction.

The Tribunal heard further submissions from both parties. The Fiscal produced a record card for the Respondent which disclosed no previous disciplinary matters. She moved for expenses on the usual basis and invited the Tribunal to order publicity of the decision which named only the Respondent and not Mr or

Dr A. Mr Ferguson indicated he had no objection to the Fiscal's motion for expenses and no comment regarding publicity.

The Tribunal noted that the Respondent had been in practice for some 24/25 years and had no disciplinary record. The Tribunal agreed with the Fiscal's assessment that the Respondent's conduct was thoughtless rather than being a deliberate course of conduct. Whilst the Tribunal accepted the Respondent's explanation that the speed at which the transaction was concluded may have played a part, the Tribunal considered it important to note that this did not excuse his misconduct. The Respondent had failed to recognise that the change in instructions had potential detrimental consequences for Dr A whilst being more advantageous to Mr A, his point of contact. Taking all of the circumstances into account, the Tribunal concluded the conduct could be dealt with appropriately by way of censure. Given the parties' position, the Tribunal considered it appropriate to make an award of expenses in favour of the Complainers on the usual basis. With regard to publicity, given the personal and private nature of the evidence given before the Tribunal and the involvement of a child, the Tribunal considered it appropriate to order publicity including the name of the Respondent only.

Prior to the Hearing Dr A had submitted to the Tribunal Office and intimated to the Respondent a Compensation Claim form. It had been agreed between the parties that the hearing of this claim could proceed immediately following any finding of professional misconduct, if time permitted. Unfortunately, given the late hour of the day, this was not possible and, accordingly, the Tribunal fixed a Compensation Hearing for 31 May 2022 at 10am. at the Royal Society of Edinburgh, George Street, Edinburgh.

Kenneth Paterson

Vice Chair