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

F I N D I N G S

in Complaint

by

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

against

RODERICK G MICKEL, formerly of Graham Mickel & Co, 38 James Square, Crieff and now St Ives, Perth Road, Crieff

1. A Complaint dated 15 March 2013 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") requesting that, Roderick G Mickel, formerly of Graham Mickel & Co, 38 James Square, Crieff and now St Ives, Perth Road, Crieff (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.

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

3. In terms of its Rules the Tribunal appointed the Complaint to be set down for a hearing on 17 July 2013 and notice thereof was duly served on the Respondent.

4. When the Complaint called on 17 July 2013 the Complainers were represented by their Fiscal, Jim Reid, Solicitor, Glasgow. The

Respondent was present and represented by Derek Robertson, Solicitor, Alexandria.

5. A Joint Minute between the parties was lodged, making certain amendments to the Complaint and agreeing the statement of facts, amended averments of duty and professional misconduct. Given the full admissions by the Respondent, no evidence required to be heard. The Tribunal heard submissions from both parties.

6. The Tribunal found the following facts established:

6.1 The Respondent's date of birth is 17 October 1951. From 8 May 1993 to 3 June 2010 he was the sole partner of Graham Mickel & Co, WS, 38 James Square, Crieff.

6.2 The following facts came to light as a result of an inspection of Graham Mickel & Co carried out by the Complainers' Financial Compliance Department on 27 and 28 April 2010

6.3 <u>Mrs A</u>

The Respondent had a Client Ledger for Mrs A. On 10 July 2008 there was a credit balance of £15,038.20. Various transfers were made from other Client Accounts to Mrs A's Ledger totalling £50,000, giving a credit balance of £65,038.20.

On the same date £65,000 was transferred from the Ledger "to Mr B re payment".

On 11 July 2008 £65,000 was re-credited with a description "To ? re cancel". Thereafter, £65,000 was again debited with a description "To you re family payment".

6.4 On 22 December 2008 £65,000 was credited to Mrs A's Ledger with a description "From you re Abbey". Thereafter, on 26 May 2010 the Ledger was credited by £1,200 with a description "To Mrs A re as agreed".

6.5 The Respondent had been in communication with the Complainers in respect of issues arising from an earlier Financial Compliance inspection. On 12 April 2010 the Respondent wrote to the Complainers inter alia advising:-

> "I used funds belonging to Mrs A and her family so as to pay the sum of £65,000 to the beneficiary of an executry that I was handling in relation to Miss C and reimbursed Mrs A's Ledger Account upon receipt of executry funds on 22 December 2008. I explained to Mrs A that a temporary loan was made from her funds to the beneficiary."

6.6 Mrs A advised the Complainers in an undated letter received by the Complainers on 3 June 2010 that she could confirm she had been made aware of a loan to Mr B for £65,000 in July 2008, that she had received repayment of the sum in December 2008 and more recently, on 26 May 2010 had received an agreed sum of £1,200 by way of interest.

The Complainers wrote to Mrs A on 9 June 2010 acknowledging her letter and asking for additional information. By letter dated 21 June 2010 Mrs A advised the Complainers that she had had no knowledge of the loan prior to having been informed of it by the Respondent in a letter dated 10 July 2008, that she hadn't received any further correspondence from the Respondent in relation to the matter and had not received any legal advice in respect of the loan.

6.7 Notwithstanding the Respondent writing to Mrs A on 10 July 2008 advising that the money had been loaned to another client, the content was untrue. Effectively, the £65,000 was a loan from Mrs A to the Respondent.

6.8 Miss D's Executry

On or about 1 May 2009 the Respondent opened a Client Ledger for Miss D's Executry

6.9 On 17 November 2009 the Ledger was credited with £2,350. On the same date the matter was debited with £2,350 with the description "To Mr E re a/c".

6.10 On 7 April 2010 Fees plus VAT were debited totalling £2,937.50

6.11 On 14 April 2010 the Ledger was credited with £2,350, the description being "To cancel entry re Mr E 17.11.09". On the same date £2,937.50 was credited to the Ledger in respect of the gross fees taken on 7 April 2010. The subsequent credit on the Ledger was transferred to an interest-bearing account, leaving a matter balance of nil.

6.12 The Respondent wrote to the Complainers on 12 April 2010 confessing to misusing the payment of £2,350 "To Mr E re a/c" made on 17 November 2009.

6.13 Mr F's Executry

The Respondent acted in relation to Mr F's Executry.

On 26 November 2009 the Client Ledger for the Executry was debited with fees plus VAT totalling £2,300. The feenote was addressed to the Executry care of the Respondent's firm. The

Ledger showed that the fees were uplifted on that date by the Respondent.

6.14 On 23 December 2009 the Ledger was debited with a further feenote for £2,300, including VAT. The feenote was again addressed care of the firm and the fees were uplifted on that date by the Respondent

6.15 On 30 April 2010 £2,350 was credited to the Executry Client Ledger with a description "Cancellation of fee 188/09 – duplication". This referred to the 23 December 2009 debit.

6.16 Mr G's Executry

A Client Ledger for Mr G's Executry was opened on 25 March 2009. On 26 November 2009 funds held on an Investment Account were transferred to the Executry Client Ledger and £5,750 was debited to the Ledger as fees and uplifted by the Respondent.

On 23 December 2009 there was a further transfer of £5,750 from the Investment Account to the Client Ledger and again £5,750 was debited as fees and then uplifted by the Respondent.

6.17 On 30 April 2010 £5,750 was credited to the Client Ledger with a description "Cancellation of fee 189/09 – duplication". This referred to the 23 December 2009 debit.

7. Having given very careful consideration to the facts as admitted and the submissions made by both parties, the Tribunal found the Respondent guilty of professional misconduct in respect of;

7.1 His breach of Rules 4, 6 & 21 of the Solicitors (Scotland) Accounts Etc Rules 2001, in taking a loan from Mrs A without her instructions and / or authority, without the client having taken

independent legal advice and advising the client that the loan was to another client when in fact the loan was to the Respondent;

7.2 His breach of Rule 6 of the Solicitors (Scotland) Accounts Etc Rules 2001 in that he uplifted sums as fees from the clients ledgers for the executries of Mr F and Mr G and the funds from the client ledger of Miss D, the funds being for his own use;

7.3 His failure to display the necessary qualities of honesty, truthfulness and integrity in using clients' funds for his own use.

8. Having heard from the Respondent in mitigation and having noted two previous Findings of misconduct against the Respondent, the Tribunal pronounced an interlocutor in the following terms:-

> Edinburgh 17 July 2013 The Tribunal, having considered the amended Complaint dated 15 March 2013 at the instance of the Council of the Law Society of Scotland against Roderick G Mickel, formerly of Graham Mickel & Co, 38 James Square, Crieff and now St Ives, Perth Road, Crieff; Find the Respondent guilty of Professional Misconduct in respect of; his breach of Rules 4, 6 & 21 of the Solicitors (Scotland) Accounts Etc Rules 2001 in taking a loan from Mrs A without her instructions and / or authority, without the client having taken independent legal advice and advising the client that the loan was to another client when in fact the loan was to the Respondent; his breach of Rule 6 of the aforesaid Accounts Rules in that he uplifted funds as fees from the client ledgers for the executries of Mr F and Mr G and funds from the clients ledger of Miss D, the funds being for his own use; and his failure to display the necessary qualities of honesty, truthfulness and integrity in using clients' funds for his own use; Order that the name of the Respondent be struck from the Roll of Solicitors in Scotland; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on

an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)
Dorothy Boyd
Vice Chairman

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

IN THE NAME OF THE TRIBUNAL

Vice Chairman

NOTE

When this matter called before the Tribunal on 17 July 2013, the Tribunal had before it Answers, the Joint Minute admitting the averments of fact, amended averments of duty and professional misconduct and productions on behalf of both parties. Given the extent of the agreement between the parties, no evidence was required to be led and the Tribunal proceeded on the basis of submissions made by both parties.

SUBMISSION FOR THE COMPLAINERS

Mr Reid commenced by lodging the signed Joint Minute and confirming that all the information necessary for the Tribunal was contained in the Complaint and the Joint Minute itself. He advised that the Respondent had two previous findings of misconduct by the Tribunal and lodged copies of these findings. Mr F for the Respondent indicated that these previous findings were admitted.

In relation to the averments regarding Mrs A, Mr Reid read through the contents of his averments. He indicated that prior to the letter of 12 April 2010 Mr Mickel had been in communication with the Law Society. There had been an inspection in December 2009. Following that inspection there had been various correspondence between the parties. The compliance officer had attended at Mr Mickel's practice and was not satisfied that matters had been dealt with. The Guarantee Fund Committee had asked that a meeting be held between the Committee and the Respondent. A letter of 8 April 2010 was sent to the Respondent advising of this intention and that seemed to generate the letter from Mr Mickel dated 12 April 2010 where he made his admissions. Once the matter had been investigated by the Law Society Mrs A confirmed that she had been made aware of the loan and payment of sums previously described. The Law Society had written to her for additional information. She advised that she had no knowledge of the loan prior to the letter from the Respondent and that she had had no further correspondence from him and that she had received no legal advice regarding the loan. Mr Reid referred to his Production No 5 – the letter from the Respondent to Mrs A dated 10 July 2008. Paragraph 3 of that letter indicated "conscious of the fact that the funds held on your behalf on building society

are not getting a terribly high rate of interest, there is an opportunity now to make a temporary 3 month loan of £65,000 to Mr B, which is repayable no later than 30 October and will return an additional £1200 tax free." This was simply not true. In fact this was a loan to the Respondent. Mr B was a beneficiary of Miss C and the ledger for that executry had not been opened until December 2008.

With regard to the remaining averments, essentially the Respondent had used clients funds for his own benefit. Although ultimately all the funds had been repaid, this was not the point. There is an absolute prohibition of such use of clients' funds that the Respondent had ignored.

SUBMISSIONS FOR THE RESPONDENT

Mr Robertson indicated that the Complaint set out 4 items where the facts were accepted as stated.

Mrs A had been a long standing client and family friend of the Respondent. He had had a good relationship with her over many years, which could be seen in the cordial tone of the correspondence between the Law Society and Mrs A. It could be suggested that the tone of this correspondence indicated a degree of sympathy on the part of Mrs A. The money taken was a temporary loan which would involve a payment of £1200 net of tax to Mrs A. The Respondent had written to her on the same day as the money had been withdrawn from her ledger. The Respondent had to concede that there had been no prior agreement with this client and that the client had not received separate legal advice in relation to the loan. The loan was repaid and the interest payment was made in May 2010. At the end of the day Mrs A had not lost out.

The money had been required to make a payment to Mr B. He had been pressing Mr Mickel for payment in an executry where Mr B felt things were not progressing as quickly as they should be. He put Mr Mickel under pressure, as a result of which Mr Mickel took the money from Mrs A and loaned it to the Miss C executry. He had not been thinking clearly and did not consider the seriousness of his actions.

In relation to the Miss D executry, Mr Simpson was another client of the Respondent. The Respondent collected rents on behalf of Mr E and had fallen behind in these rent collections. Mr E had placed Mr Mickel under pressure to pass on the rental monies which in fact the Respondent had not yet collected. The easy way out was to take funds from this executry – without doing any of the proper procedure.

In the remaining cases the Respondent had taken fees twice but had repaid these fees voluntarily. No losses were sustained by any of the clients at the end of the day.

The Guarantee Fund was not involved in any of these matters and it was hoped that the Respondent would get some credit for that. Having said that, the Respondent had to accept and did accept that there was a prohibition on using funds in this manner.

This was the Respondent's 3rd appearance before the Tribunal. The other 2 matters were not analogous but did perhaps disclose a pattern. He had been a solicitor for many years without any difficulty. His grandfather had founded the practice that had then included his father and latterly the Respondent. He had very much enjoyed being in practice with his father.

His problems went back to 2003. The Respondent had been in partnership until 1993 when following difficulties with the partnership, he set out to practice on his own account. For 10 years there were no issues. He ran a small office carrying out a variety of legal work and complied fully with all of his obligations. He had had a first class cashier working with him who carried out the bulk of the bookkeeping work and administration. The practice ran well and problems started when the cashier married and moved away. The Respondent had to take on the bookkeeping and administrative work as well as the legal work. This had caused him to struggle. The Tribunal of 2008 involved a series of failures to do bank reconciliations. He had tried to resolve these difficulties unsuccessfully. Looking back, the Respondent can see that his mental health was spiralling down. The Respondent describes the situation becoming apparent to him in early 2010 when he felt he was drowning in a sea of treacle. His wife had been extremely supportive and although she was herself employed she had gone into the office in the evenings and weekends to try to help. Unfortunately the Respondent had kept the full nature of the problems to himself.

The Respondent has little recollection of the details of the inspection from 2009. He believes this is because of his mental health condition at the time – memory problems are a common symptom of severe depression. It was then that the Respondent sought help for the first time and was diagnosed with severe depression and prescribed medication.

When he received the letter from the Guarantee Fund in April 2010 he realised he could not continue and sought advice from a former senior accountant with the Law Society. The Respondent was advised to contact the Law Society and explain what had happened. The Respondent had telephoned the Law Society to explain the situation. He then wrote the letter that is Production 1 on the Fiscal's list – the letter from the Respondent to the Law Society dated 12 April 2010. It could surely be said that there have not been too many occasions that the Law Society has received a letter of this nature. The admissions made by the Respondent within that letter took great courage on his part. It was hoped that the Tribunal would give the Respondent credit for him bringing the matters to the attention of the Law Society in the way that he had. The Respondent describes this as a cry for help. He had thought that he would be provided assistance and support by the Law Society. He had expected someone to come to discuss matters with him. The first indication of anything being done was when his client account was frozen at the bank. Then a Judicial Factor was appointed without any prior warning. Mr Robertson believed this was the normal methodology in appointing a Judicial Factor. The Respondent had been hoping for help.

The Respondent was suspended from practice in May 2010 and was subsequently sequestrated. Whilst all of this was happening, the Respondent had inherited a sum of money. The Respondent could have diverted this sum of money by entering into a deed of variation but he did not. The money had gone to pay all of his creditors. Any surplus funds went to the Trustee in Sequestration for his fees and expenses.

Mr Robertson referred to the psychiatric report which as it had been produced, he said he would not repeat. It had been commissioned in September 2010 and was a contemporaneous account of his situation at that time. The report exposed what was going on in the Respondent's life at that stage. There was reference within the report

to the Respondent's plan to take his own life. This had gone as far as the Respondent getting into a car and driving towards a wall but stopping only at the last minute. The Respondent had hit bottom in April 2010.

Mr Robertson submitted that whatever sanction the Tribunal could impose it could not be more punishing for the Respondent than what had already happened to him. The Respondent is a conscientious man, arguably too conscientious, which was part of his downfall. He took his failings seriously, arguably too seriously. He found himself before the Tribunal, a third generation solicitor who had already been suspended from practice and sequestrated and was now facing severe sanctions.

The Respondent lives with his wife and has adult children who are not dependent upon him. He works as a driver earning £250 per week. The Respondent's wife works part time two afternoons a week as a physiotherapist. Finances are stretched and the Respondent could not seriously meet a fine. The Respondent accepted that his days of practice were numbered as a result of this appearance.

The Chairman of the Tribunal sought clarification from the Fiscal Mr Reid of his position with regard to the plea in mitigation relating to the funds taken from Mrs A. Mr Reid indicated that what was being suggested did not appear to be supported by the information available. The payment taken from Mrs A's ledger was taken in July 2008 where the executry for Miss C did not appear to commence until 6 November 2008. Additionally, the payment to Mr B made in December 2008 was £50,000 and not £65,000.

Mr Mickel then went on to explain that there had been 2 or 3 executries involved here. Mr B senior had died leaving funds to his wife who had then died leaving funds to Miss C. Miss C had then died. He believed that he had not resolved the issues of the earlier deaths prior to Miss C dying. At the time the funds were taken from Mrs A he had not done anything about the Miss C executry, although he believed Miss C had died by that stage. He had not opened the ledger for the Miss C executry until quite some time following her death. He had chosen to pay the figure of £65,000 to Mr B Jnr because he knew there was a bond for £65,000 in one of the Miss C executries where if he "took the finger out" he could get hold of the money. The money had

been taken from the A ledger and the cheque made payable to Mr B. When the bond had been encashed the money had gone straight back on to the A ledger without being mentioned in the Whyte executry. Mr Mickel believed that he had made the original entry on the A ledger "payment to Mr B" and then the following day had asked himself whether he really should have had an entry in this ledger under that name. He had therefore re-credited the payment and made a new entry "to you re family payment". The later payment back to Mrs A was described as "Abbey" – the bond had been with the Abbey National.

The Chairman asked Mr Mickel further if he had any extraneous evidence of the transactions. Mr Mickel indicated that he believed there should be a letter on the Miss C file indicating that a cheque had been paid to Mr B for £65,000. There would also be a cashed cheque.

The Chairman asked Mr Reid for his comments. Mr Reid indicated that he could neither accept nor deny what was being described.

Mr Reid was asked if he had any further comments with regard to the plea in mitigation. He indicated that he had to point out with regard to the Law Society's action with the appointment of a Judicial Factor, that the Law Society had done what it required to do, given the actions of the Respondent in intromitting in this manner with clients' funds.

Mr Robertson indicated that he had to concede that the Law Society have to have a mind to the rules of conduct for solicitors and had to act quickly. He submitted to the Tribunal that it was an issue for the profession that there was a higher than normal rate of suicides for solicitors.

In response to a request for further information from the tribunal, Mr Reid indicated that there had been no cause for him to investigate the matter of the A ledger further. It had appeared quite straight forward, that funds had been wrongly removed from this client ledger and it was only today that further explanation was given. The Law Society had no cause to look behind what was in the ledger card.

The Chairman then asked Mr Robertson to clarify the issue of the duplication of fees in the remaining two incidents and questioned if these funds were used in a similar manner. Mr Robertson confirmed that this was the case and the Respondent had taken fees twice when he should not have done and that that was part of his problems relating to his mental state at the time.

The Chairman asked Mr Robertson to confirm whether the payment of interest to Mrs A had been made considerably later than had been suggested in his letter – the letter to Mrs A was dated 10 July 2008 and suggested a 3 month loan and the payment of interest appeared to be May 2010. Mr Robertson confirmed that to be the case.

DECISION

Whilst both parties had agreed that the Respondent's conduct amounted to professional misconduct, it was a matter for the Tribunal to decide whether the conduct admitted met the required standard set out in the case of Sharp. The Respondent's conduct in this case was clearly a serious and reprehensible departure from the standard of conduct expected of a competent and reputable solicitor. The Accounts Rules breached repeatedly in this case are clearly in place to protect clients and represent a fundamental duty on the part of any solicitor. Accordingly, the Tribunal made a finding of professional misconduct.

Thereafter, the Tribunal considered the penalty appropriate for such misconduct. It gave very careful consideration to the robust plea on behalf of the Respondent and the medical report lodged on his behalf. It was clear that the Respondent had cooperated with this prosecution from the outset. It was appreciated that at the end of the day no client sustained an actual loss and there was no claim on the Guarantee Fund. The Tribunal had a degree of sympathy with the Respondent in relation to the matters set out within the medical report.

All that being said, the Respondent's misconduct here was at the highest end of the scale. There were 4 separate instances of misuse of client's funds over a period of just under 2 years. These were not spontaneous actions on the part of the Respondent but involved wilful and deliberate consideration on his part. The Respondent himself

had described how he had corrected the entries in Mrs A's ledger to cover the nature of the payment taken. He had selected Mrs A's ledger because she had been a long standing client. He had identified the figure or £65,000 because of a bond he knew existed in the Miss C executry.

The Tribunal gave careful consideration to the health problems of the Respondent at the time but it had to note that the Respondent had conceded that his problems had commenced in 2003, that he had been before a Tribunal in July 2008, that he did not seek any help until April 2010. Whilst the Respondent had sent a letter to the Law Society making admissions to some of his conduct, that letter was only sent after he had received intimation from the Guarantee Fund Committee of an interview to be held. The agreed interest that was to be paid to Mrs A was not paid until after the Respondent's letter to the Law Society.

Whatever the explanation for the Respondent removing the funds from the A ledger, at the end of the day it still represented a loan to the Respondent that was misrepresented to his client only after the funds were removed and without her being advised to take independent advice in connection with the matter.

The Respondent's conduct in all of the matters before the Tribunal was clearly dishonest. This represented an ongoing course of conduct over a considerable period of time. The Tribunal could not emphasise enough how important these Rules are to protect the public and to protect the reputation of the legal profession. By breaching these Rules in the way he had, the Respondent had presented a clear danger to the public and had behaved in a manner which is likely to seriously damage the reputation of the profession.

A solicitor must behave at all times with honesty, truthfulness and integrity. The Respondent's conduct here displayed none of these things and could only be viewed as disgraceful and dishonourable to an extent that demonstrated that he was not a fit person to be a solicitor. The only conclusion that could be reached was that the name of the Respondent be struck from the Roll of solicitors in Scotland.

Whilst it might appear on one view that the Law Society had acted abruptly with the Respondent, the Tribunal took the view that given the nature of the misconduct on the part of the Respondent, the Law Society had had little option but to proceed in the way they did in appointing a Judicial Factor.

After hearing the parties in relation to expenses and publicity, the Tribunal made the usual orders.

Dorothy Boyd
Vice Chairman