

**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**

**IAIN DAVID HAYWOOD, 19  
Pitkevy Court, Glenrothes**

1. A Complaint dated 5 September 2013 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Iain David Haywood, 19 Pitkevy Court, Glenrothes (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. No Answers were lodged for the Respondent. A letter was received from the Respondent's agent indicating that pleas were being agreed between the Law Society and the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 10 January 2014 and notice thereof was duly served on the Respondent.
4. The hearing took place on 10 January 2014. The Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The

Respondent was present and was represented by William Macreath, Solicitor, Glasgow.

5. An amended Complaint dated 6 January 2014 together with a Joint Minute of Agreement admitting the averments of fact, averments of duty and averments of professional misconduct in the amended Complaint were lodged with and accepted by the Tribunal.
6. There was accordingly no requirement for any evidence to be led.
7. The Tribunal found the following facts established
  - 7.1 The Respondent was enrolled as a solicitor on 15 January 1981. Between 1 August 1984 and 30 June 2006 he was a partner with Baird & Company. Between 1 July 2006 and 1 October 2011 he was a partner with Baird & Company Lawyers and Estate Agents LLP.
  - 7.2 The Respondent was instructed in connection with the purchase of Property 1 by Ms A.
  - 7.3 The Respondent did not obtain instructions from the purchaser, Ms A, at the outset of this transaction. On 6 December 2010 Mr B of BM Financial sent the Respondent an e-mail which Mr B had received on 2 December 2010 from Mr C of Optimal Financial. This e-mail from Mr C to Mr B set out the conditions of the offer. These conditions included a purchase price of £105,000 and an anticipated date of entry of 10 January 2011. It was noted that the Lints Partnership, Solicitors would be acting for the seller. The e-mail advised “It’s really her husband Mr D who deals with everything – you can guess for yourself why this one is in her name!”. On 6 December Mr B also provided the Respondent with certified true copies of Ms A’s passport and a utility bill showing her address.

- 7.4 The purported seller was a company called Company 1. The Respondent made the purchase offer to the purported seller's agents, the Lints Partnership, on 7 December 2010. The purchase offer was acknowledged and a qualified acceptance sent by the Lints Partnership to the Respondent's office on 7 December 2010.
- 7.5 The Respondent did not obtain instructions direct from Ms A before submitting the offer. The first contact with Ms A was on 15 December 2010 after a qualified acceptance had been received from the solicitors for the purported seller. On 15 December 2010 the Respondent sent his firm's terms of business to Ms A confirming that the Respondent would be dealing with the purchase of property 1.
- 7.6 Ms A obtained a loan in connection with the purchase of property 1. The Respondent was instructed in connection with the loan by Birmingham Midshires on 1 December 2010. The offer of loan stated that the purchase price was £105,000. The loan required was stated to be £78,750, together with product fees. The offer of loan stated that the firm was "instructed in accordance with the CML Lenders' Handbook for Scotland and our Part 2 instructions."
- 7.7 At the date of instruction (1 December 2010) the 1 December 2010 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-
- “5.1.1 Please report to us if the proprietor has owned the property for less than six months, or the person selling to the borrower is not the proprietor...
- 5.2.1 If any matter comes to the attention of the fee earner dealing with the transaction which you should reasonably expect us to consider important in deciding whether or not to lend to the

borrower (such as whether the borrower has given misleading information to us or the information which you might reasonably expect to have been given to us is no longer true) and you are unable to disclose the information to us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.

5.9.1 You must ask the borrower how the balance of the purchase price is being provided. If you become aware that the borrower is not providing the balance of the purchase price from his own funds....you must report this to us if the borrower agrees...failing which you must return our instructions and explain that you are unable to continue to act for us as there is a conflict of interest.”

- 7.8 A copy of the 2010 edition of the Handbook was contained on the Respondent’s file recovered by the Complainers.
- 7.9 On 6 January 2011 the Respondent sent to Birmingham Midshires a signed Certificate of Title. In that Certificate of Title the Respondent confirmed to Birmingham Midshires that he had “investigated the title to the property offered to you as security for the advance under your instructions. The title is good and marketable and may safely be accepted by you.” On 10 January 2011 the Respondent’s firm received the loan funds of £78,715 from Birmingham Midshires.
- 7.10 On 11 January 2011 the Lints Partnership provided the Respondent with a form 10A report dated 10 January 2011 which confirmed that as at 6 January 2011 that Ms E was the owner of the property having recorded her title on 23 September 1998. The Respondent did not advise Birmingham Midshires that Company 1, the purported sellers to Ms A, did not hold title to the property at that time.

- 7.11 The missives for the sale of property 1 to Ms A concluded on 11 January 2011 and provided that the purchase price was £105,000 with a date of entry of 11 January 2011. On 13 January 2011 the Respondent's firm received the balance of the purchase price from Ms A's husband, Mr D. The Respondent did not advise Birmingham Midshires that the balance of the purchase price was not provided by Ms A.
- 7.12 On 14 January 2011 the Lints Partnership sent the Respondent a signed disposition in favour of their clients, Company 1, and a signed disposition in favour of the Respondent's client Ms A. The Respondent's file recovered by the Council contained a copy disposition by Ms E in favour of Company 1 providing a consideration of £74,500 and a date of entry of 10 January 2011.
- 7.13 On 25 February 2011 Registers of Scotland wrote to the Respondent's firm to acknowledge receipt of their application for registration of Ms A's title to property 1 and provided a title number.
- 7.14 On 8 July 2011 the Respondent wrote to Birmingham Midshires to confirm:-

“As a result of reviewing various files within our practice in co-operation with our regulator, the Law Society of Scotland we wish to report to you further details of the above transaction as follows:-

It has come to our attention the seller had not owned the property for more than six months prior to the sale to our client. We do not, however, believe there is any link or connection between the seller and the purchaser and would confirm that the full purchase price was paid to the seller's agents and we were satisfied as to the source of our client's deposit...”

- 7.15 The Respondent was instructed in connection with the purchase of Property 2 by Mr F.
- 7.16 The Respondent did not obtain instructions from the purchaser Mr F at the outset of this transaction. On 21 October 2010 the Respondent received an e-mail from Mr B of BM Financial which set out the conditions of the offer. These conditions included a purchase price of £75,000 and an anticipated date of entry of 5 November 2010. Mr B stated in the e-mail that Aikman Bell, Solicitors would be acting for the seller. That e-mail attached a copy of the photograph page of Mr F's passport and a copy utility bill showing his address.
- 7.17 The purported seller was a company called Company 2. The Respondent made the purchase offer to the purported seller's agents on 21 October 2010. The purchase offer was acknowledged and a qualified acceptance sent by Aikman Bell to the Respondent's office on 27 October 2010. The covering letter from Aikman Bell sending the qualified acceptance (also dated 27 October) stated "We also enclose a draft of the Disposition in favour of our clients to be used as a link in title in connection with your clients application for registration".
- 7.18 The Respondent did not obtain instructions direct from Mr F before submitting the offer. The first contact with Mr F was on 28 October 2010. On 28 October 2010 the Respondent's firm sent their terms of business to Mr F confirming that the Respondent would be dealing with the purchase of property 2.
- 7.19 Mr F obtained a loan in connection with the purchase of property 2. The Respondent was instructed in connection with the loan by Birmingham Midshires on 27 October 2010. The offer of loan stated that that purchase price of property 2 was £75,000. The loan required was stated to be £56,250, together with product fees. The offer of loan stated that the firm was "instructed in

accordance with the CML Lenders' Handbook for Scotland and our Part 2 instructions.”

7.20 At the date of instruction (27 October 2010) the 1 December 2006 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-

“5.1.1 Please report to us if the proprietor has owned the property for less than six months, or the person selling to the borrower is not the proprietor...

5.1.2 If any matter comes to the attention of the fee earner dealing with the transaction which you should reasonably expect us to consider important in deciding whether or not to lend to the borrower (such as whether the borrower has given misleading information to us or the information which you might reasonably expect to have been given to us is no longer true) and you are unable to disclose the information to us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.

5.8 You must ask the borrower how the balance of the purchase price is being provided. If you become aware that the borrower is not providing the balance of the purchase price from his own funds...you must report this to us if the borrower agrees...failing which you must return our instructions and explain that you are unable to continue to act for us as there is a conflict of interest.”

7.21 The missives for the sale of property 2 to Mr F concluded on 10 November 2010 and provided that the purchase price would be £75,000 with a date of entry of 12 November 2010. On 10 November Aikman Bell sent the Respondent an approved draft disposition in favour of Mr F confirming these terms.

- 7.22 On 11 November 2010 the Respondent sent to Birmingham Midshires a signed Certificate of Title dated 8 November 2010. In that Certificate of Title the Respondent confirmed to Birmingham Midshires that he had “investigated the title to the property offered to you as security for the advance under your instructions. The title is good and marketable and may safely be accepted by you.”
- 7.23 On same date the loan funds were received and the purchase price transferred to the seller’s agents to be held as undelivered pending completion of the conveyancing.
- 7.24 On 11 November the Respondent’s firm received a form 12A updated report dated 11 November 2010 which confirmed that as at 9 November 2010 that Mr G and Ms H were the owners of property 2 having registered their title on 13 November 2007. The Respondent did not advise Birmingham Midshires that Company 2, the purported sellers to Mr F, did not hold title to the property at that time.
- 7.25 On 18 November 2011 Registers of Scotland wrote to the Respondent’s firm to acknowledge receipt of their application for registration of Mr F’s title to property 2 and provided a title number.
- 7.26 On 23 June 2011 the Respondent wrote to Birmingham Midshires to confirm:-
- “As a result of reviewing various files within our practice in co-operation with our regulator, the Law Society of Scotland we wish to report to you further details of the above transaction as follows:-
- It has come to our attention the seller had not owned the property for more than six months prior to the sale of our client. [sic] We



do not, however, believe there is any link or connection between the seller and the purchaser...”

- 7.27 The Respondent was instructed in connection with the purchase of property 3 by Mr I.
- 7.28 The Respondent did not obtain instructions from the purchaser, Mr I at the outset of this transaction. On 3 November 2010 he received an e-mail from Mr B of BM Financial. This e-mail set out the conditions of the offer. The purchase price was to be £90,000. The e-mail stated “Father paying deposit but will come from clients account as dad transferring in”. The e-mail stated that the Lints Partnership would be acting for the seller.
- 7.29 The purported seller was Company 2. The Respondent made the purchase offer to the seller’s agents, the Lints Partnership, on 4 November 2010. The purchase offer was acknowledged and a qualified acceptance sent by the Lints Partnership on 10 November 2010.
- 7.30 The Respondent did not obtain instructions direct from Mr I before submitting the offer. On 11 November 2010 the Respondent’s firm sent their terms of business to Mr I confirming that the Respondent would be dealing with the purchase of property 3.
- 7.31 Mr I obtained a loan in connection with the purchase of property 3 from Birmingham Midshires. The Respondent was instructed in connection with the loan by Birmingham Midshires on 18 November 2010. The offer of loan stated that that purchase price of property 3 was £90,000. The loan required was stated to be £67,465. The offer of loan stated that the firm was “instructed in accordance with the CML Lenders’ Handbook for Scotland and our Part 2 instructions.”

- 7.32 At the date of instruction (18 November 2010) the 1 December 2006 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the instructions referred to at paragraph 7.20 above anent the Respondent's responsibilities in accordance with paras 5.1.1, 5.1.2 and 5.8 of the Handbook.
- 7.33 On 24 November 2010 the Respondent sent to Birmingham Midshires a signed Certificate of Title. In that Certificate of Title the Respondent confirmed to Birmingham Midshires that he had "investigated the title to the property offered to you as security for the advance under your instructions. The title is good and marketable and may safely be accepted by you."
- 7.34 On 1 December 2010 the Respondent's firm received the loan funds from Birmingham Midshires. On same date the Respondent wrote to the Lints Partnership to confirm that the purchase price of £90,000 had been transferred to the Lints Partnership to be held as undelivered pending completion of the conveyancing.
- 7.35 On 2 December the Lints Partnership provided the Respondent with a form 12A report confirming that as at 1 December 2010 Mr and Mrs J were the owners of property 3, having registered their title on 20 April 2001. The Respondent did not advise Birmingham Midshires that Company 2, the purported sellers to Mr I, did not hold title to the property at that time.
- 7.36 Missives between Mr I and Company 2 for the sale of property 3 were concluded on 3 December 2010. On that date the Lints Partnership sent the Respondent a disposition in favour of Mr I. The Lints Partnership letter of 3 December 2010 also referred to an executed disposition in favour of their clients, Company 2.

7.37 On 4 February 2011, Registers of Scotland confirmed to the Respondent's firm that the application for registration of Mr I title to property 3 was completed.

7.38 On 23 June 2011 the Respondent wrote to Birmingham Midshires to confirm:-

“As a result of reviewing various files within our practice in co-operation with our regulator, the Law Society of Scotland we wish to report to you further details of the above transaction as follows:-

It has come to our attention the seller had not owned the property for more than six months prior to our client. [sic] We do not, however, believe there was any link or connection between the seller and the purchaser...”

8. Having considered the foregoing circumstances and having heard submissions on behalf of the Complainers and on behalf of the Respondent, the Tribunal found the Respondent guilty of professional misconduct in respect of:

8.1 his failure to comply with his common law duties when acting for a purchaser and lender;

8.2 his failure to comply with paragraphs 3, 4 and 9 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008; and

8.3 his failure to comply with the requirements of the CML Handbook (editions 2006 and 2010).

9. Having heard the solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 10 January 2014. The Tribunal having considered the amended Complaint dated 6 January 2014 at the instance of the Council of the Law Society of Scotland against Iain David Haywood, 19 Pitkevy Court, Glenrothes; Find the Respondent guilty of professional misconduct in respect of his failure to comply with his common law duties when acting for a purchaser and lender, his failure to comply with paragraphs 3, 4 and 9 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 and his failure to comply with the requirements of the CML Handbook; Censure the Respondent; Fine him in the sum of £2,000 to be forfeit to Her Majesty; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and may but has no need to include the names of anyone other than the Respondent.

**(signed)**

**Kenneth Paterson**

**Vice Chairman**

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

**IN THE NAME OF THE TRIBUNAL**

**Vice Chairman**

**NOTE**

Mr Macreath advised that the Respondent had admitted his culpability from the outset and that there was an agreement between the parties by 10 October 2013. Discussions had resulted in an amended Complaint and a Minute of Agreement being lodged. Mr Macreath clarified that the Respondent accepted that he was guilty of professional misconduct. The Tribunal allowed the new Complaint to be substituted.

**SUBMISSIONS FOR THE COMPLAINERS**

Mr Marshall then referred to his written submissions:-

**“1 Introduction****Respondent admits professional misconduct and Minute of Agreement agreed**

The complaint alleging professional misconduct against the Respondent was originally lodged with the Tribunal in September 2013. Following discussions with Mr Macreath, the Respondent has agreed to plead guilty to professional misconduct as set out in an amended version of the complaint. This agreement was reached at the beginning of this week. The Clerk to the Tribunal was informed of the agreement, and provided with a copy of the amended complaint together with a Minute of Agreement entered into by the parties which confirms that the Respondent accepts that he is guilty of professional misconduct. I ask the Tribunal to allow the amended complaint to be substituted for the original complaint.

From the terms of the Minute of Agreement it will be noted that the Respondent admits the facts, duties and averments of misconduct contained in the amended complaint. The Respondent admits that he is guilty of professional misconduct. That said, parties recognise that the question of professional misconduct is a decision for the Tribunal.

The test for professional misconduct is as set out in the decision of *Sharp v The Council of the Law Society of Scotland* 1984 SC 129 at 134:-

“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 made.”

I am asking the Tribunal to find the Sharp test satisfied and find the Respondent guilty of professional misconduct.

### Three back to back transactions

The complaint concerns three separate transactions in which the Respondent was instructed:-

1. Property 1
2. Property 2
3. Property 3

Each of these was a back to back transaction where the Respondent acted for an end purchaser who bought the property from the mid-purchaser who had themselves purchased the property no more than a few days previously. In each transaction the Respondent also acted for the lender in the end purchase, Birmingham Midshires.

In each transaction the failures are similar, but there are slight variations. In this submission I will briefly summarise the basic facts of each transaction, and identify the duties breached by the Respondent in that transaction.

Under a separate heading I will go on to submit why across these three transactions, the breaches of duty amount to professional misconduct.

## **1 Summary of each transaction and the duties breached**

### Property 1

The Respondent received instructions to carry out the purchase from an intermediary rather than the purchaser, Ms A (Production 4). The seller was to be an entity called Company 1. The Respondent made the offer to purchase to Company 1's agents without first confirming instructions with Ms A (Production 6). **That represents a failure to ensure that he had proper instructions and client authority in breach of Rule 4 of the 2008 Standards of Conduct Rules** (paragraphs 3.7 and 3.8 of the Complaint).

A loan for the purchase was obtained from Birmingham Midshires. The loan stated the purchase price was £105,000 and the loan would be £78,750 (Production 3).

On 6 January 2011 the Respondent reported to BM that the title was good and marketable (Production 8) and subsequently received the loan funds. On 11 January 2011 he received a form 10 confirming that on 6 January that the seller company 1 did not actually own the property (Production 9/4). This demonstrated that the seller had not owned the property for six months. **The Respondent did not report that fact to Ms A or to BM at that time.**

When the property was purchased by Ms A, the balance of the price came from her husband and not Ms A (Production 10). **The Respondent did not report that fact to BM at that time.**

The Respondent was aware that Company 1 purchased the property from the previous owner for £74,500 and sold it to Ms A on the following day for £105,000 (Production 11). The Respondent was aware that a loan of £78,750 was being provided on the basis of a purchase price of £105,000. **However he did not report the substantial increase in the second purchase to BM at that time.**

The three failures to report to the lender (1. No good title/title not held for six months; 2. Balance coming from third party; 3 uplift in price between mid and end purchase) demonstrate a **failure to comply with the common law duty to act with utmost propriety towards each client, and not to withhold relevant information** (paras 3.1- 3.3 of the Complaint).

These three failures to report also demonstrate a **failure to act in the best interest of the lender client in breach of Rule 3 of the 2008 Conduct Rules** (paras 3.5 and 3.6).



The failures to report are also a **breach of the CML Handbook** (paras 3.11-3.13).

And finally, the **failure to advise Ms A that at the time that the offer was made that the apparent “seller” did not actually own the property was a breach of Rule 9 of the 2008 Conduct Rules** which requires solicitors to communicate effectively with clients providing relevant information so that informed decisions can be made by clients (paras 3.9 and 3.10).

#### Property 2

The Respondent received instructions to carry out the purchase from an intermediary rather than the purchaser, Mr F (Production 14). The seller was to be an entity called Company 2. The Respondent made the offer to purchase to Company 2's agents without first confirming instructions with Mr F (Production 15). **That represents a failure to ensure that he had proper instructions and client authority in breach of Rule 4 of the 2008 Conduct Rules** (paragraphs 3.7 and 3.8 of the Complaint).

A loan for the purchase was obtained from Birmingham Midshires. The loan stated the purchase price was £75,000 and the loan would be £56,250 (Production 16).

On 11 November 2010 the Respondent reported to BM that the title was good and marketable (Production 19) and subsequently received the loan funds. On the same day he received a form 12 confirming that the seller Company 2 did not actually own the property (Production 22). This demonstrated that the seller had not owned the property for six months. **He did not report that fact to Mr F or to BM at that time.**

This failure to report to the lender demonstrates a **failure to comply with the common law duty to act with utmost propriety towards each client, and not to withhold relevant information** (paras 3.1 and 3.2 of the Complaint).

This failure to report also demonstrates a **failure to act in the best interest of the lender client in breach of Rule 3 of the 2008 Conduct Rules** (para 3.5 and 3.6).

This failure to report is also a **breach of the CML Handbook** (paras 3.11-3.13).

And finally, the **failure to advise Mr F that at the time the offer was made that the apparent “seller” did not actually own the property was a breach of Rule 9 of the**

**2008 Conduct Rules** which requires solicitors to communicate effectively with clients providing relevant information so that informed decisions can be made by clients (paras 3.9 and 3.10).

### Property 3

The Respondent received instructions to carry out the purchase from an intermediary rather than the purchaser, Mr I (Production 25). He was advised that Mr I's father would be paying the deposit. **The Respondent did not report this to BM.**

The seller was to be Company 2. The Respondent made the offer to purchase without first confirming instructions with Mr I (Production 26). **That represents a failure to ensure that he had proper instructions and client authority in breach of Rule 4 of the 2008 Conduct Rules** (paragraphs 3.7 and 3.8 of the Complaint).

On 24 November 2010 the Respondent reported to BM that the title was good and marketable (Production 30) and subsequently received the loan funds. On 2 December he received a form 12 confirming that the seller Company 2 did not actually own the property (Production 32). This demonstrated that the seller had not owned the property for six months. **He did not report that fact to Mr I or to BM.**

The failures to report to the lender:- 1. that the seller did not have good title/had not owned the property for six months and 2. that the balance of the purchase price was not coming from the purchaser, demonstrate a **failure to comply with the common law duty to act with utmost propriety towards each client, and not to withhold relevant information** (paras 3.1, 3.2 and 3.4 of the Complaint).

These failures to report also demonstrate a **failure to act in the best interest of the lender in breach of Rule 3 of the 2008 Conduct Rules** (para 3.5 and 3.6).

These failures to report are also a **breach of the CML Handbook** (paras 3.11-3.13).

And finally, the **failure to advise Mr I that at the time that the offer was made that the apparent "seller" did not actually own the property was a breach of Rule 9 of the 2008 Conduct Rules** which requires solicitors to communicate effectively with clients providing relevant information so that informed decisions can be made by clients (paras 3.9 and 3.10).

## **2 Submission that the Respondent's breach of duties amounts to professional misconduct**

Against that background, at paragraph 4 of the Complaint it is submitted that the Respondent's breach of duties, singularly or in cumulo, amount to professional misconduct.

In these transactions the Respondent acted for both the lender and the purchaser. We can separate his failings into (a) the failures of duty owed to the lender and (b) the failures of duty owed to the purchaser.

### Duties owed to the lender

Beginning with the decision of *Dunbar* (4 October 2011) this Tribunal has decided a number of cases involving "back to back" transactions. It has repeatedly held that the following failures amount to misconduct:-

- i. failure to inform the lender that a seller has owned property for less than six months (that failure was aggravated in the current matter when the Respondent issued certificates of good title to the lender, later learned the sellers did not have good title, and failed to advise the lender of that fact)
- ii. failure to advise the lender that the purchase price paid by the borrower in the end purchase was a substantial increase on the purchase price paid in the mid purchase
- iii. failure to advise the lender that the deposit for the purchase price was not provided by the purchaser

These are failures to comply with contractual duties of the CML Handbook and the lender's instructions

However these failures represent a breach not just of contractual duties, but also a breach of the professional duties incumbent on a solicitor which pre-date and are broader than the CML Handbook. These are the professional duties owed by solicitors:-

- to act with utmost propriety towards clients by not withholding relevant information
- to represent their clients' best interests

Failures to comply with professional duties can damage the reputation of solicitors in the eyes of lenders and in the eyes of the wider public. Where a solicitor repeatedly breaches his professional duties and fails to provide relevant information to lender-clients that has a negative impact on the profession's reputation.

The recent Tribunal decision of *Aikman* (17 July 2013) concerned back to back transactions with the same failures to report as in the present matter (paragraph 7 of the decision). That decision should assist the Tribunal to find professional misconduct in this matter as a result of the Respondent's failures to report to the lender as noted above.

In deciding the conduct complained of amounted to misconduct the Tribunal said at page 28:-

*“It must be clearly obvious to any practitioner that he has a duty to report material and unusual features of any transaction to his client. In the transactions in this case the institutional lenders were clients of the Respondent in the same way as any other and were owed the same duties of care. The CML Handbook had been instituted to help prevent mortgage fraud and emphasise the reporting duties on the part of a solicitor. In each of the instances in this Complaint the lenders involved had explicitly advised the Respondent that he required to comply with the CML Handbook. It was **perfectly plain that the Respondent had a duty to report back to back transactions, increases in price, deposits being provided by third parties, and purchasers obtaining loans in addition to the finance being provided by the lenders. The Respondent had patently failed to report any of these matters...***

*The conduct described clearly fell below the standard of conduct expected of a competent and reputable solicitor and was so serious and reprehensible it amounted to professional misconduct.”*

The same concerns arise in the present matter and support a finding of misconduct.

In considering the failures to report to the lender in *Aikman* the Tribunal went on at page 29 to say:-

*“...the Tribunal also considered that it was important to emphasise the seriousness with which it viewed the Respondent's conduct. Although the Dunbar case [referred*

*to above] had not been raised until 2011, the CML Handbook had been in existence since 2006, and simply re-stated what was an obvious duty of care to a solicitor's client. The matters not reported by the Respondent in this case were clearly obvious – alarm bells should have been ringing taking into account the increases in price, especially in the transactions where the mid purchase and end purchase settled on the same date....The Respondent had overlooked his duty of care to the lenders in circumstances that put the lenders and consequently the profession at risk.”*

I rely on this passage in support of my submission that the Respondent's conduct is a breach of the CML handbook but is also a breach of the professional duties of care the Respondent owed to his clients.

I should note that in *Aikman* the Tribunal considered that the Respondent's actions fell towards the lower end of the scale of misconduct in “back to back” cases. The Tribunal placed particular significance on the fact that the Respondent had met face to face with all of the purchasers. **However in the present matter the instructions were provided by an intermediary and offers made without meeting the purchaser.** Therefore in considering where the Respondent's conduct sits on the scale of misconduct I would ask the Tribunal to take that into account.

In connection with failure (i) above: the Respondent's certification of good title, and his subsequent failure to advise the lender when he learned that the seller did not have good title, I also rely on the guidance in Smith and Barton at paragraph 7.04:

*“DUTY NOT TO MISLEAD CLIENTS:-*

*On a number of occasions the Tribunal has found a solicitor guilty of professional misconduct when the solicitor failed to inform a Building Society for whom the solicitor was acting, of a material change in circumstances in the loan transaction, as for instance where, after encashing the loan cheque, a problem occurs which prevents the immediate recording of the standard security in favour of the Building Society (Case 831/92).”*

I would submit that the Tribunal's observations around failing to inform of a material change in circumstances apply to the present matter: when the Respondent learned

that the seller did not hold title, having previously reported that title was good, he should have advised the lender. His failure to do so is misconduct.

Duties owed to the purchaser

*Failure to ensure authority of purchasing client - paragraph 4(1) of the 2008 Conduct Rules*

I have identified the failure of the Respondent to confirm his instructions direct with his purchasing clients and to ensure he had his purchasing clients' instructions to proceed to make offers.

In Paterson and Ritchie the authors state at paragraph 5.08 that solicitors who act outwith the scope of their authority risk a number of unpleasant consequences including among others a finding of professional misconduct or unsatisfactory conduct. The authors state:-

*“It is important to note that if a solicitor fails to check the authority of the client or intermediary who is purporting to provide the instructions of a client, the solicitor may incur all of the consequences set out above [including a finding of professional misconduct or unsatisfactory conduct] ...since the actual client has not authorised the solicitor’s acts.”*

And in Smith and Barton the authors state at paragraph 7.02:-

*“INSTRUCTIONS THROUGH AN INTERMEDIARY”*

*Solicitors act as agents of the clients and must have the authority of the clients for their actions (Code of Conduct para 5(a) [now contained in paragraph 4 of the 2008 Conduct Rules]*

*The Tribunal has said:*

*In attending to the sale of a client’s property, the **solicitor’s duty is to inform his client fully in regard to any written offer received, advise him in regard to that offer and all other related circumstances and when he is satisfied that the client comprehends the whole position, to take the client’s clear and unequivocal instructions whether or not the offer is to be accepted and whether any qualifications are to be added to the acceptance. It is always preferable that such instructions are***

*taken personally whether at a meeting, or by telephone or by letter, but it is accepted that there are circumstances where such instructions may be given through a third party. An obvious example is where one spouse gives instructions in relation to a property in joint names. But if the instructions are conveyed through a third party, the solicitor must be satisfied that his client has been fully informed and advised that the instructions given are on the basis of the client's complete understanding of the position (Case 607/85)"*

In my submission these comments can be equally applied to a solicitor's duties when acting for a purchaser. He must satisfy himself that his purchasing client understands the position. The Respondent took no steps to satisfy himself in these three transactions.

*Failure to communicate effectively with clients – Paragraph 9 of the 2008 Conduct Rules*

I have also identified the failure of the Respondent to advise his purchasing clients that the apparent "sellers" did not own the properties once he learned of this fact. Offers had been made and loans had been being arranged by this stage. In connection with the failure to advise his client that the "seller" did not own the property, I refer to the guidance in Smith and Barton at paragraph 7.03:-

*"KEEPING CLIENT INFORMED*

*Failure to keep clients informed as to developments, particularly adverse developments, in the sale of their property, thereby depriving the clients of the opportunity to consider separate representation or taking other steps to safeguard their interests, has been found to constitute Professional Misconduct (Cases 828/92; 831/92 and 834/92)."*

I would submit that the same comments can apply to the purchase of a property. When the Respondent learned that the apparent sellers did not hold title he should have advised his purchasing clients of this fact to allow them to consider their position.

In each of the three transactions the Respondent failed to confirm instructions with his client before proceeding to make offers. In each of the three cases the Respondent

pressed on with the transactions without advising his clients that the apparent “seller” had no title.

In my submission, in back to back transactions these failures in duty towards the purchaser are the other side of the coin of the failures in duty towards the lender. I would submit these failures towards the purchaser amount to misconduct either in their own right or in cumulo with the misconduct concerning the lender.

**Conclusion: finding**

Parties are agreed that the Respondent is guilty of professional conduct as a result of his failure to comply with the each of duties set out in paragraph 3 of the Complaint and summarised in section 2 of this submission.

For the reasons that I have given in section 3 of this submission, I would ask you to find that the Respondent is guilty of professional misconduct in accordance with paragraph 4.1 of the Complaint which states:-

“The Council avers that the Respondent has been guilty of acts or omissions which, singularly or in cumulo, constitute professional misconduct on his part within the meaning of the Solicitors (Scotland) Act 1980 as amended, Section 53:-

The Council avers that as a consequence of the Respondent’s:-

1. failure to satisfy his common law duties when acting for a purchaser and lender,
2. failure to comply with paragraphs 3, 4 and 9 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008, and
3. failure to comply with the requirements of the CML Handbook (editions 2006 and 2010),

that the Respondent is guilty of professional misconduct.”

If you make that decision I would also ask that you make an award of expenses against the Respondent.”



In oral submissions, Mr Marshall clarified that he was not submitting that this case fell at the top end of the seriousness of professional misconduct. He stated that he was asking the Tribunal to also look at the perspective of the purchaser in this case as the purchasers had been deprived of the opportunity to take action to protect themselves.

### **SUBMISSIONS FOR THE RESPONDENT**

Mr Macreath explained that the firm of Baird & Company had had three offices in Cupar, Kirkcaldy and Glenrothes. There were Financial Compliance Inspections in 2011 which highlighted serious issues. The whole partnership was called to attend for interviews with the Guarantee Fund Committee. Mr McCann advised that the Respondent should have separate representation and Mr Macreath attended a meeting on 5 May 2011 with the Respondent when the Respondent spoke with complete candour and transparency and disclosed the three transactions concerned and their background.

Mr Macreath explained that the Respondent, at a very early stage, accepted his culpability. Mr Macreath referred to the testimony lodged from Mr K and advised that the Respondent was presently working as a self-employed consultant under his supervision. Mr Macreath outlined the Respondent's employment history and advised that the Respondent resigned as soon as these issues came to light to avoid any adverse effect on Baird & Company. However for a number of reasons the firm of Baird & Company ceased to exist in its original form with various split off partnerships being formed. Mr Macreath explained that all of the financial compliance issues had now been dealt with. Mr Macreath submitted that there was a delay from May 2011 when the Respondent accepted his breaches until the Complaint came to the Tribunal in October 2013. Mr Macreath stated that he wrote immediately and set out his client's position which resulted in a revised Complaint being submitted to the Tribunal today. Mr Macreath submitted that this case was not at the top end of seriousness in respect of professional misconduct. He indicated that the two cases referred to by Mr Marshall were both ones where he was involved and both had fines imposed. Mr Macreath had also dealt with a recent case on 6 December 2013 involving similar matters where a fine had been imposed. Mr Macreath referred the Tribunal to the up to date searches that he had lodged in respect of the three

transactions which showed that these people did exist and held a valid title to the properties.

Mr Macreath emphasised that the Respondent was conscious of his responsibilities and of the importance of face to face meetings with clients and the disclosure of all material facts. Mr Macreath stated that as far back as 1989 the Tribunal had stated that the solicitor's duty was to disclose all material facts which might affect a lender's decision to lend.

Mr Macreath explained that following the meeting on 5 May 2011, letters were written to the lenders explaining the position and asking what they wanted the Respondent to do but the lenders did not reply. Mr Macreath submitted that this was a common occurrence. Mr Macreath pointed out that the parties involved in these transactions had also been involved in a number of other cases that had been before the Tribunal. Mr Macreath stated that it was accepted that there was a duty to the purchaser but pointed out that in this case the searches lodged showed that all of the purchasers owned the properties and there had been no loss.

Mr Macreath submitted that it was naivety, the constraints of the market and the fact that Baird & Company did not assess the risks appropriately or provide the necessary training that led to these occurrences. The Respondent was a very experienced conveyancer and had good technical skills but had an issue in connection with his administration skills. The Respondent had accepted responsibility as soon as he became aware of the issues and resigned. Mr Macreath stated that it was appreciated that the Tribunal would have concern with regard to the reputation of the profession. There had been a number of CML Handbook cases dealt with by the Tribunal in recent times. In this case however there was no relationship between the various sellers and no dishonesty. Mr Macreath distinguished this case from some of the cases where people had bought from sellers desperate to sell at a discount and then shortly thereafter sold the property on. Mr Macreath stated that there was no collusion here with the intermediate purchaser. There had been full disclosure and the Respondent had resigned once it was brought to his attention. Mr Macreath stated that it was the pressure to get business which led to these transactions occurring. He indicated that it

was grave but asked the Tribunal to allow the Respondent to continue with a full practising certificate and continue working under the supervision of Mr K.

In response to a question from the Tribunal in respect of the email at Production 4/1, the Respondent stated that he did not understand what the email meant. He further indicated in response to a question from the Tribunal that he only spoke on the phone with the clients rather than having met them face to face.

## **DECISION**

The Tribunal has unfortunately had to deal with a number of cases involving failure to comply with the CML Handbook. In this case the Respondent failed to inform the lender that the seller had owned the property for less than six months and in one of the transactions failed to advise the lender that the purchase price paid by the borrower in the end purchase was a substantial increase on the purchase price paid by the mid-purchaser. The Respondent also failed to advise the lender that a deposit for the purchase price was not provided by the purchaser. The Tribunal also noted that in this case the instructions were provided by an intermediary and offers to purchase made without having met the purchasers. This is of concern because the Respondent failed to ensure that he had the authority of his purchasing clients before proceeding to make offers on their behalf. The Respondent owed duties of care to both the purchaser and the lender who were both his clients. The Tribunal considered it unfortunate that the Respondent got involved in the transactions due to the downturn in the economy and the pressure to get business but this is no excuse. The Tribunal accordingly had no hesitation in finding that the Respondent's conduct amounts to professional misconduct.

In considering sanction however, the Tribunal particularly noted that the Respondent had accepted his culpability as soon as matters were brought to his attention and resigned. The Tribunal considered that this shows remorse and insight and the Respondent has cooperated fully with the Law Society, the Law Society Fiscal and the Tribunal. The Tribunal also noted that the Respondent is presently working as a self-employed consultant under supervision of another solicitor and took into account the detailed reference provided by this solicitor. In the circumstances the Tribunal did

not consider that there would be a risk to the public if the Respondent was allowed to continue with a full practising certificate. The Respondent's misconduct in this case falls towards the middle to lower end of the scale but the Tribunal considered that a fine in addition to a Censure was required to show the seriousness with which the Tribunal views the breaches of the CML Handbook and breaches of the common law duty of care to clients.

The Tribunal considered that the Respondent had learnt his lesson and accordingly that a Censure and a Fine of £2,000 would be a sufficient penalty. The Tribunal made the usual order with regard to publicity and expenses but noted the Respondent's agent request that the identity of the Respondent's previous senior partner and his present employer not be included in the findings. The Law Society Fiscal made no objection to this and the Tribunal accordingly agreed that in this particular case these details did not require to be included in the published findings.

**Kenneth Paterson**  
**Vice Chairman**