THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
(PROCEDURE RULES 2005 and 2008)

F I N D I N G S

in Complaints

by

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

against

IVAN ALEXANDER RALPH, Solicitor, McEwan Fraser Legal, 130 East Claremont Street, Edinburgh

1. Two complaints were lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that Ivan Alexander Ralph, Solicitor, McEwan Fraser Legal, 130 East Claremont Street, Edinburgh (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaints and that the Tribunal should issue such orders in the matters as it thinks right.

2. The Tribunal caused copies of the Complaints as lodged to be served upon the Respondent. No Answers were lodged for the Respondent in respect of either Complaint.

3. In terms of its Rules the Tribunal appointed both Complaints to be heard at a procedural hearing on 12 January 2015 and notice thereof was duly served on the Respondent.

4. The procedural hearing took place on 12 January 2015. The Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was not present but was represented by William Macreath, Solicitor, Glasgow.

5. Mr Macreath asked that he be allowed an additional period of two months to lodge Answers given the difficulties he was having with obtaining all the necessary papers. Mr Lynch indicated that he had no objection to this. It was agreed that Answers should be lodged by 13 March 2015 and that the matter would call for a further procedural hearing on 26 March 2015. No Answers were lodged.

6. The hearing took place on 26 March 2015. The Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by William Macreath, Solicitor, Glasgow. It was agreed that both Complaints be dealt with together. Mr Macreath advised that answers had not been lodged because agreement had been reached regarding the facts. Mr Lynch requested that a number of amendments be made to each Complaint. Pleas of guilty to the averments of fact, duty and misconduct in both Complaints as amended were tendered by Mr Macreath on behalf of the Respondent. No evidence required to be led. The Tribunal heard submissions from both parties.

7. The Tribunal found the following facts established:-

7.1 The Respondent was born on 26 June 1968. He was enrolled as a solicitor on 27 July 1992. From 1 February 2007 until 2 October 2009 the Respondent was a partner in the firm of Leslie Deans & Co., solicitors in Edinburgh. Since 1 November 2009 he has practised as a partner in the firm of McEwan Fraser Legal, 130 East Claremont Street, Edinburgh.

Client A
('Property 1')

7.2 The Respondent acted for Mr B who was an established client of his firm. Mr B employed Client A as a joiner. Client A was in a domestic relationship which broke down as a result of which he had to find alternative living accommodation. Mr B offered to help Client A to obtain a mortgage to enable him to purchase, rather than rent, a property.

7.3 Mr B asked the Respondent to prepare a power of attorney by Client A in favour of the Respondent. The Respondent proceeded to do so, without seeking instructions from Client A. The power of attorney authorised the Respondent to do everything on Client A's behalf, including executing all documentation, to complete the purchase of Property 1.

7.4 Mr B told Client A that he (Client A) had to go to the Respondent's offices to sign the power of attorney. Client A did so. He signed the power of attorney on 22 February 2008. Client A lived and worked in Edinburgh. The Respondent did not record in his file any advice which he gave to Client A as to why the power of attorney was necessary nor did he record on his file information given as to the import of the said power of attorney. This was the only occasion upon which Client A met the Respondent.

7.5 The Respondent did not issue any terms of business letter to Client A, then or at any other time.

7.6 On 19 May 2008 someone purporting to be Client A sent an email to the Respondent requesting that an offer be submitted

on his behalf to purchase Property 1 at a price of £260,000. Client A was not the author of the email.

7.7 Four days prior to the email condescended upon, the Respondent submitted an offer on 15 May 2008, on behalf of Client A to Warners, solicitors of Edinburgh. The offer was in the terms instructed by the email. The Respondent did not take instructions on the terms of the offer from Client A. The Respondent did not at any time during the currency of the transaction take instructions from Client A on the progress of the transaction, nor did he correspond with him, nor did he provide him with a title report containing a summary of the title conditions.

7.8 Alliance & Leicester plc issued to the Respondent an offer of loan in the name of Client A dated 13 May 2008. This recorded that the Property 1 was being purchased at a price of £260,000 and the amount of the loan was £235,054. The Respondent was instructed to act for Alliance & Leicester plc in the constitution of a first standard security over the Property 1. In doing so the Respondent was required by the terms of his instructions to follow the requirements of the Council of Mortgage Lenders' Handbook (2006 Edition).

7.9 On 22 May 2008 the Respondent received a fax which had been signed by Client A and which enclosed a mandate. The mandate required the Respondent from that date until the settlement of the transaction to retain the sum of £35,000 or the full balance of all funds of Client A, whichever was less, to use the funds only for settlement of the purchase, and not to release the funds affected by the mandate to Client A or anyone else unless the purchase did not settle within fourteen days of that date at which point the Respondent was instructed by Client A to transfer the funds affected by the mandate to

Mr C. The mandate continued by instructing the Respondent to accept instructions from Mr C as to how to deal with the funds in the event of any delay in settlement, including the transfer of the funds to Mr C as a deposit for a subsequent purchase from Mr C by Client A. The mandate concluded by saying that under no circumstances were the funds to be returned to Client A. The Respondent did not raise or discuss the terms of this mandate with Client A.

7.10 The seller of Property 1 was the said Mr C. In May 2008 he was in the course of purchasing Property 1 from a heritable creditor acting under the power of sale contained in a standard security over the property. Mr C paid £160,000 to acquire Property 1. On 26 May 2008 Mr C's solicitors issued a qualified acceptance specifying a date of entry of 30 May 2008. They exhibited to the Respondent, *inter alia* a copy of the draft disposition in favour of Mr C showing the consideration of £160,000.

7.11 None of the foregoing was disclosed by the Respondent to Client A or to the Alliance & Leicester plc. The Respondent sent a Certificate of Title, in unqualified terms, to Alliance & Leicester plc, requesting transfer of the funds on 29 May 2008.

7.12 The Respondent issued a letter concluding the bargain on 30 May 2008. On the same day he settled the transaction using the loan funds received from Alliance & Leicester plc. The balance of the funds required to settle the purchase price, stamp duty land tax, registration dues and the Respondent's fees and the Value Added Tax thereon, amounting to £35,126.25 was provided by Mr B. The Respondent did not disclose this fact to Client A or to the lenders. He recorded the

receipt of the funds from Mr B in the books of his practice as having been received from his client, Client A.

7.13 The Respondent, acting under the power of attorney condescended upon, signed the standard security on Client A's behalf and having paid the stamp duty land tax, recorded the disposition and standard security and took his fees from the sums he held. On 6 June 2008 he sent Client A a statement of account which disclosed for the first time that funds had been provided by Mr B.

7.14 On or about 30 May 2008, prior to utilising the loan funds of £235,054 received from the Alliance & Leicester plc. for the re-mortgage of Property 1 on behalf of Client A, the Respondent failed to:

(i) Inform the lender that the borrower, Client A was not providing the balance of the purchase price from his own funds (having received £35,126.25 from Mr B);

(ii) Inform Client A or the lender that the seller, Mr C, had purchased the property in May 2008 at a price of £160,000, being £100,000 less than the price paid by Client A and being a matter which the Respondent ought to have advised Client A and also being a matter about which he should reasonably have expected the lender to consider important in considering whether to lend to the borrower;

(iii) Inform the lender that the seller, Mr C had owned the property for less than six months.

7.15 The proof of address for Client A which the Respondent held on file was dated 10 August 2005 being over two years before the Respondent received instructions to purchase Property 1.

Client B

('Property 2')

7.16 On 22 February 2007 the Respondent, on behalf of Client B, submitted an offer in respect of Property 2 to the seller's agents Marlborough & Co in the sum of £125,000. On 26 February 2007, Edeus Mortgage Creators Limited ('Edeus') instructed the Respondent to act on its behalf in relation to a loan of £112,000 which was to be made to Client B. The Respondent was instructed by Edeus to act *"in line with Part 1 and Part 2 of the Council of Mortgage Lenders' Handbook Scotland"*. Missives were concluded on 7 March 2007. On 9 March 2007 Company 2 transferred the sums of £13,000 and £665 to the Respondent's firm's client ledger representing the 'deposit' and payment of the Respondent's firm's legal fees. On 12 March 2007 Edeus released the loan funds of £112,000 to the Respondent's firm and on the same date the Respondent paid to Marlborough & Co the purchase price of £125,000. On 3 November 2008 the Respondent's firm transferred to Company 2 the sums of £11,770.06 and £20.

7.17 Prior to utilising the loan funds of £112,000 received from Edeus for the purchase of Property 2 on behalf of Client B, the Respondent failed to inform the lender that the borrower, Client B, was not providing the balance of the purchase price from his own funds (having received £13,000 from Company 2).

('Property 3')

7.18 On 19 April 2007 the Respondent received instructions from Company 2 to purchase Property 3 on behalf of Client B for the sum of £30,000. On 18 May 2007 the Respondent sent an

engrossed disposition to the seller's agents, Marlborough & Co in which the purchaser was stated to be Client B, the price was stated to be £30,000 and the date of entry was stated to be May 2007. The day of the month was not specified. On 25 October 2007 the Respondent's firm received the sum of £30,665 from Company 2 in respect of the purchase price for Property 3 together with legal fees. On 26 October 2007 the Respondent's firm transferred the sum of £30,000 to Marlborough & Co. On 13 December 2007, Birmingham Midshires issued loan papers to the Respondent for the "purchase/remortgage" of Property 3 and which advised that it was to lend to Client B the sum of £59,465 and that the Respondent was instructed to act on its behalf *"in accordance with the CML Lenders' Handbook for Scotland and* [its] *Part 2 instructions"*. On 13 December 2007, the Respondent wrote to Birmingham Midshires to advise that he required the mortgage funds on 14 December 2007 and on the same date the sum of £59,465 was received by the Respondent's firm from Birmingham Midshires. On 13 December 2007 the Respondent transferred the sum of £17,300 to Client C "to cover balance of PP". On 14 December 2007 the Respondent sent a draft statement to his firm's cash room to transfer to Company 2 *"Net proceeds"* of £31,865.22. On 19 December 2007 the remaining balance of £10,000 was transferred by the Respondent's firm to Client B.

7.19 Prior to utilising the loan funds of £59,465 received from Birmingham Midshires for the mortgage of Property 3, on behalf of Client B, the Respondent failed to inform Birmingham Midshires that the seller, had:

(i) Owned the property for less than six months; and

(ii) Purchased the property on 26 October 2007 at a price of £30,000, being a matter which the Respondent should have reasonably expected a lender to consider important in deciding whether to lend to the borrower;

('Property 4')

7.20 On 10 July 2007 the Respondent received instructions from Company 2 to purchase Property 4 on behalf of Client B. On 10 July 2007 the Respondent sent an offer to the seller's agents Marlborough & Co in the sum of £102,000. On 26 July 2007 the Respondent was advised by email by Ms D of Company 2 that the purchase price of the property was now £70,000. On 6 August 2007 the Respondent received loan instructions from Edeus which advised that the sum of £85,500 was to be lent to Client B and that the Respondent required to comply with the provisions of the CML Handbook (Scotland), Parts 1 and 2. On 9 August 2007 the Respondent sent to Edeus an unqualified Certificate of Title and requested the loan funds on 14 August 2007 for settlement on that date. On 14 August 2007 the Respondent's firm received the sum of £85,500 from Edeus and on 17 August 2007 the Respondent's firm transferred the sum of £70,000 to Marlborough & Co.

7.21 On or about 17 August 2007, prior to utilising the loan funds of £85,000 received from Edeus, for the re-mortgage of Property 4 on behalf of Client B, the Respondent failed to:

(i) Inform the lender that the seller had owned the property for less than 6 months; and

(ii) Inform the lender that Client C had purchased the property that day at a price of £70,000, being a matter which the Respondent should reasonably have expected the lender to

consider important in considering whether to lend to the borrower.

Client C
('Property 5')

7.22 On 23 July 2007 the Respondent sent to the seller's agents, Marlborough & Co an offer to purchase Property 5 on behalf of Client C for the sum of £85,000. On 7 August 2007 the Newcastle Building Society issued loan papers to the Respondent whereby it offered to lend Client C the sum of £85,000. On 15 and 17 August 2007 the Respondent sent to the Newcastle Building Society a Certificate of Title and an amended Certificate of Title both of which referred to a 'Completion Date' of 21 August 2007. The Respondent then concluded missives for Property 5 on 20 August 2007 with entry at 21 August 2007. On 16 August 2007 Edeus issued loan instructions in respect of Property 5 to the Respondent where it offered to loan the sum of £90,000. The Respondent was instructed by Edeus to act *"in line with Part 1 and Part 2 of the Council of Mortgage Lenders' Handbook Scotland"*. On 20 August 2007 the Respondent requested loan funds from Edeus to arrive on 23 August 2007 for settlement that day. On 20 August 2007 Marlborough & Co sent to the Respondent a disposition with the date of entry as 21 August 2007. On 21 August 2007 the Respondent's firm received the sum of £85,000 from the Newcastle Building Society and on the same date the Respondent's firm paid the same sum to Marlborough & Co. On 23 August 2007 the Respondent's firm received the sum of £90,000 from Edeus and on the same date the sums of £86,309.55 and £2,895.45 were debited from the Respondent's firm's account with the latter being identified as the 'net free proceeds'. This sum (£2,895.45) was transferred to Company 2.

7.23 Prior to utilising the loan funds of £90,000 from Edeus for the purchase of Property 5 on behalf of Client C, the Respondent failed to:

(i) Inform the lender that the seller had owned the property for less than six months; and

(ii) Inform the lender that the proprietor, Client C, had purchased the property on 21 August 2007 at a price of £85,000, being a matter which the Respondent should reasonably have expected the lender to consider important in deciding whether to lend to the borrower.

7.24 At the date the Respondent received instructions from the lender in respect of Properties 1 to 5 inclusive (2007) the 1 December 2006 edition of the Council of Mortgage Lenders' Handbook for Scotland ('the CML Handbook') applied to the Respondent.

Client D
("Property 6")

7.25 On 26 May 2009, Abbey National plc ("Abbey") wrote to Leslie Deans & Co. with loan instructions in the name of the borrower, Client D ("the borrower") for the purchase of Property 6. Abbey's instructions were noted as *"set out in Parts 1 and 2 of the CML Lenders' Handbook"*. The borrower then instructed the Respondent to submit an offer to purchase Property 6 for £230,000. The Respondent in turn sent an offer to the seller's agents on behalf of the borrower and advised the borrower that he required £38,142.50 to settle the purchase. Thereafter, on 3 June 2009, the Respondent faxed a letter to Abbey together with a Certificate of Title ("the Certificate").

The Certificate was dated 29 May 2009 and was signed by the Respondent who certified that he had *"complied with, or would be the Settlement Date comply with, the relevant provisions of the CML Lenders' Handbook Scotland current at the date of the Certificate"*. The seller's agents issued a qualified acceptance on 9 June 2009 providing for entry the following day.

7.28 The client ledger for Leslie Deans & Co. confirmed that the firm received loan funds from Abbey in the sum of £195,715.00 on 4 June 2009 and the sum of £22,987.95 from a Mr A on 9 June 2009. The ledger also confirmed that Leslie Deans & Co. remitted £230,000 to the seller's agents on 9 June 2009. Leslie Deans & Co. subsequently confirmed to the council on 5 April 2013 that *"the sum of £14,836.09 credited to the ledger on the 11th of June 2009 was a journal transfer from B's account with us..."*

7.29 The Dispositions for Property 6 recorded that Company 1 (being the heritable creditors in possession) disponed Property 6 in favour of Mr B for the sum of £150,000 with entry as at 10 June 2009 and that Mr B disponed Property 6 in favour of the borrower for the sum of £230,000 with entry again as at 10 June 2009.

7.30 With reference to the foregoing averments the Respondent, on or about 9 June 2009, prior to utilising the loan funds of £195,715.00 received from Abbey, for the purchase of Property 6, on behalf of the borrower, failed to:

(i) Inform Abbey that the seller, Mr B, had owned the property for less than 6 months contrary to his instructions as provided by Clause 5.1.1 of the Council of Mortgage Lenders'

Handbook for Scotland ("the CML Handbook") (2006 Edition);

(ii) Inform Abbey that the seller, Mr B, had purchased Property 6 for £150,000, a sum less than the loan funds provided by Abbey and; on the same day on which he sold it to the borrower for £230,000, being a fifty five per cent uplift in the price and thus failed to follow the lender's instructions as provided by Clause 5.1.2 of the CML Handbook;

(iii) Inform Abbey that the borrower was not providing the balance of the purchase price from his own funds (having received £37,824.04 from Mr B) and also failed to inform Abbey that these funds were received from the seller. He thus failed to follow the lender's instructions as provided by Clause 5.8 of the CML Handbook.

8. Having given careful consideration to the facts as admitted and the submissions made by both parties, the Tribunal found the Respondent guilty of Professional Misconduct individually and *in cumulo* in respect of:

8.1 his preparation of a power of attorney in relation to a purchase of a property without obtaining the instructions of Client A and thereafter arranging the execution of that power of attorney by that client;

8.2 his failure to advise Client A of the fact that another client of his had paid a deposit towards the purchase price of the property;

8.3 his failure to advise Client A that the seller had paid £100,000 less for the property on the same day as it was sold to him;

8.4 his failure to take Client A's instructions regarding the purchase of that property, about the transaction generally and to provide him with a title report containing a summary of the title conditions;

8.5 his failure to provide Client A with a terms of business letter in breach of Rule 3 of the Solicitors (Scotland) (Client Communication) Practice Rules 2005;

8.6 his failure to properly identify Client A or to obtain an up to date proof of address for him in breach of Regulation 7 and 8 of the Money Laundering Regulations 2007;

8.7 his failure to discuss the terms of a mandate with Client A;

8.8 his failure in relation to five transactions to advise the lenders that the proprietors had owned the properties for less than six months and thus resulting in his failure to comply with the requirements set out at paragraph 5.1.1 of the CML Handbook;

8.9 his failure in relation to three transactions to advise the lenders that the borrowers did not provide the balance of the purchase price from their own funds resulting in his failure to comply with the requirement as set out at paragraph 5.8 of the CML Handbook;

8.10 his failure to act in the best interests of Client A and the lenders in respect of six properties in breach of Articles 2, 5 and 7 of the Code of Conduct for Scottish Solicitors 2002;

8.11 his failure in relation to four transactions to advise the lenders that the properties had recently been sold for significantly lower prices, being information which the Respondent should reasonably have expected the lenders to consider important in

considering whether to lend to the borrowers, resulting in his failure to comply with the requirements as set out at paragraph 5.1.2 of the CML Handbook;

8.12 his failure in relation to six transactions to make the necessary reports to the lenders as required by paragraph 2.3 of the CML Handbook; and

8.13 his transferring funds in respect of six transactions in breach of his instructions without the necessary authority of his clients, namely the lenders, in breach of Rule 6(1) of the Solicitors (Scotland) Accounts etc Fund Rules 2001.

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

Edinburgh 26 March 2015. The Tribunal having considered the amended Complaints at the instance of the Council of the Law Society of Scotland against Ivan Alexander Ralph, Solicitor, McEwan Fraser Legal, 130 East Claremont Street, Edinburgh; Find the Respondent guilty of Professional Misconduct individually and in cumulo in respect of the preparation of a power of attorney in connection with Client A in relation to the purchase of a property without obtaining the instructions of the purchasing client; his failure to advise Client A of the fact that another client of his had paid a deposit towards the purchase price of the property; his failure to advise Client A that the proprietor had paid £100,000 less for the property on the same day as it was sold to him; his failure to take his Client A's instructions regarding the purchase of that property, about the transaction generally and to provide him with a title report containing a summary of the title conditions; his failure to provide Client A with a Terms of Business Letter in breach of Rule 3 of the Solicitors' (Scotland) (Client Communication) Practice Rules 2005; his failure to properly identify Client A or to obtain an up to date proof of address for him in breach

of Regulations 7 and 8 of the Money Laundering Regulations 2007; his failure to discuss the terms of a mandate with Client A; his failure in relation to five transactions to advise the lenders that the selling proprietors had owned the properties for less than six months and thus resulting in his failure to comply with the requirements set out at paragraph 5.1.1 of the CML handbook; his failure in relation to three transactions to advise the lenders that the borrowers did not provide the balance of the purchase price from their own funds resulting in his failure to comply with the requirements set out at paragraph 5.8 of the CML handbook; his failure to act in the best interests of Client A and the lenders in respect of six properties in breach of Articles 2, 5 and 7 of the Code of Conduct for Scottish Solicitors 2002; his failure in relation to four transactions to advise the lenders that the properties had recently been sold for significantly lower prices, being information which the Respondent should reasonably have expected the lenders to consider important in considering whether to lend to the borrowers, resulting in his failure to comply with the requirements set out at paragraph 5.1.2 of the CML handbook; his failure in relation to six transactions to report these matters to the lenders as soon as he became aware of them in terms of the requirements set out at paragraph 2.3 of the CML handbook and his transferring funds in respect of six transactions in breach of his instructions without the necessary authority of his clients, namely the lenders, in breach of Rule 6(1) of the Accounts Rules; Censure the Respondent; Fine him in the sum of £10,000 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 deferred until the conclusion of any criminal proceedings regarding the Respondent and Directs thereafter that publicity will be given to this decision and that this publicity

should include the name of the Respondent and may but has no need to include the names of anyone other than the Respondent.

(signed)
Alistair Cockburn
Chairman

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

IN THE NAME OF THE TRIBUNAL

Alistair Cockburn
Chairman

NOTE

It was agreed that both Complaints be dealt with together. Mr Lynch requested that a number of amendments be made to each Complaint namely:-

1. In relation to Complaint DC/14/20 under the 2005 Rules, that the following amendments be made:

   i) the address of the Respondent's firm be amended to 130 East Claremont Street, Edinburgh.
   ii) at Article 1.1 of the Complaint that the date contained in the fourth sentence be amended from 1 February 2005 to 1 February 2007.
   iii) at Article 2.3 of the Complaint the words "The Respondent offered no explanation to Client A as to why he required to sign a power of attorney. Nor did he give any advice to Client A as to the import of the deed." should be deleted and the following words inserted – "The Respondent did not record in his file any advice which he gave to Client A as to why the power of attorney was necessary nor did he record on his file information given as to the import of the said power of attorney."
   iv) Articles 2.5 and 2.13 are to be deleted.
   v) The whole of Article 6 is to be deleted.
   vi) In Article 8.3 the following words should be deleted – "and should provide full advice to the respective grantor as to the consequences of granting a power of attorney."
   vii) Article 8.5 is to be deleted.
   viii) The following words should be deleted from Article 10(a) "without giving him any advice to Client A on why this was necessary or as to the import of the deed".
   ix) Article 10(g) is to be deleted.
   x) At Article 10(i) the number 5 is to be deleted from the first line of that paragraph.
   xi) At Article 10(l) the number 5 is to be deleted from that paragraph.

xii) At Article 10(m) "1 to 6" shall be deleted and replaced with "1 to 4 and 6".

xiii) At Article 10(n) "1 to 6" shall be deleted and replaced with "1 to 4 and 6".

2. In relation to Complaint DT/14/21 under the 2008 Rules, that the following amendments be made:

i) The address of the Respondent's firm be amended to 130 East Claremont Street, Edinburgh.

ii) In relation to Article 3 of that Complaint, in the third sentence of that paragraph the date 1 February 2005 is to be changed to 1 February 2007.

iii) Article 4(d)(iv) shall be deleted.

iv) Article 6(iv) shall be deleted.

Pleas of guilty to the averments of fact, duty and misconduct in both Complaints as amended were tendered by Mr Macreath. The Tribunal allowed these amendments to be made to the Complaints.

SUBMISSIONS FOR THE COMPLAINERS

Mr Lynch indicated that he would first address the Tribunal regarding the larger of the two Complaints which was the one under the 2005 Rules. He referred the Tribunal to the Mr E case as set out in Article 2 of the Complaint. He advised that Mr B, who is mentioned in the Complaint, as well as being a client of the firm was the landlord of the firm's offices in Dunbar and carried out estate agency work in that office. Mr B introduced various clients to the firm and was involved in the funding of various transactions.

Mr Lynch referred the Tribunal to the terms of Article 2.3, and explained that although Client A lived and worked in Edinburgh, he had work commitments which took him away from Edinburgh from time to time.

Mr Lynch referred the Tribunal to the terms of Articles 2.4, 2.5 and 2.6 and stated that in relation to Article 2.6 Client A was not the author of the email referred to. Mr Lynch advised that he was not able to say if that would have been evident to the Respondent.

In relation to Articles 2.7 and 2.8 of the Complaint, Mr Lynch advised the Tribunal that the relevant parts of the CML Handbook were set out at Article 9 of the Complaint, namely:

a) Paragraph 2.3 states that "If you need to report a matter to us you must do so as soon as you become aware of it so as to avoid any delay…..After reporting a matter you should not complete the mortgage until you have received our further written instructions".

b) Paragraph 5.1.1 requires solicitors to "report to [the lenders] if the proprietor has owned the property for less than six months, or the person selling to the borrower is not the proprietor," unless the seller falls into certain categories, including the case where the seller is "an institutional heritable creditor exercising its power of sale".

c) Paragraph 5.1.2 states that "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 that information to us because of a conflict of interest, you must cease to act for us and return our instructions stating that you consider a conflict of interest has arisen".

d) Paragraph 5.8 states that "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 and/or is proposing to give a second charge over the

> property, you must report this to us if the borrower agrees (see part 2), 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".

Mr Lynch referred the Tribunal to the terms of Article 2.9 of the Complaint and stated that Mr C was the seller of the property. Mr Lynch advised that the Respondent did not raise or discuss the terms of the mandate with Client A notwithstanding the somewhat unusual nature of that document. In relation to Article 2.10 of the Complaint detailing the price paid by Mr C and the uplift in the price paid by Client A, Mr Lynch pointed out that the immediate uplift in the price was in the sum of £100,000.

Mr Lynch referred the Tribunal to the terms of Articles 2.11 to 2.16 of the Complaint as amended. He stated that when the Respondent sent a certificate of title in unqualified terms to the lenders, he was in other words asserting that the terms of CML Handbook had been complied with.

Mr Lynch then referred the Tribunal to the terms of Article 3 of the Complaint and advised that Company 2 was a Limited Company in which Client B had an interest.

Mr Lynch then referred the Tribunal to the terms of Article 4 of the Complaint and advised that Client C mentioned at Article 4.1 is a relation of Client B, but stated that he was not sure exactly how she was related to him.

Mr Lynch then referred the Tribunal to the agreed facts in Articles 5 and 7 of the Complaint. He then indicated that he did not intend to address the Tribunal regarding the averments of duty as detailed in the Complaint and stated that it was well established that solicitors should act in accordance with the upmost propriety for each of their purchaser and lender clients. Mr Lynch submitted that Rule 6 of the Accounts Rules is engaged when loan funds are drawn down in contravention of the requirements of the CML Handbook.

Mr Lynch then referred the Tribunal to the terms of the Complaint under the 2008 Rules. Mr Lynch indicated that this Complaint involved a single transaction. In

relation to Article 4(b) of that Complaint Mr Lynch stated that the figures taken together are slightly different to the exact amount of the deposit. However he submitted that it was clear that the deposit was made up of these two sums.

Mr Lynch submitted that the failures outlined in the Complaints amounted to professional misconduct. He stated that he wished to record his appreciation of the lengths that Mr Macreath had gone to in investigating the background and in agreeing that these matters could be dealt with by a plea of guilty to the Complaints as amended.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath advised that in the Tribunal's recent report to the profession in the year up to October 2014 out of 31 cases coming before the Tribunal, a third related to CML breaches. Mr Macreath stated that this Annual Report stressed how seriously the Tribunal views breaches of the CML Handbook. Mr Macreath advised that he had lodged with the Tribunal four sets of findings in relation to recent CML Handbook cases.

Mr Macreath stated that the Respondent's accepted failures dated from early 2007 to early 2009. He stated that he would be concentrating his submission on the Client A and Client D cases which he advised were the starkest failures.

Mr Macreath stated that it has been argued before the Tribunal that at one time the profession were blissfully unaware of their professional obligations in relation to the CML Handbook. However, he advised that the courts had previously highlighted what he referred to as "red flag" issues in conveyancing transactions and stated that the CML Handbook was put together to address these issues. Mr Macreath submitted that the obligations for the profession regarding conveyancing transactions were always present and solicitors had to guard against cases involving incentives, connections between sellers and purchasers and cases where deposits were not shown as paid through solicitors' records. Mr Macreath submitted that the purpose of the CML conditions is to highlight to the lender transactions where they might want to reconsider their decision to lend.

Mr Macreath submitted that back to back transactions have always been a feature of conveyancing. In relation to the Client A case, the property purchased was a new build which was originally sold for around £300,000. It was then repossessed and sold on. Mr Macreath submitted that new build flats are always very difficult to value. Mr Macreath advised that in all the cases involved in these Complaints the properties had been independently surveyed by reputable valuers. He submitted that part of the difficulty is that new build properties will eventually find their true value and that values were highest in 2006/07 at the height of the property boom. Mr Macreath submitted that the client A and Client D cases involved examples of properties being sold for much lesser values following the property crash. Mr Macreath advised that the deposits were provided by Mr B so that the lenders would provide funds at a much better rate.

Mr Macreath advised that the Respondent worked at Leslie Deans & Co. for a very short time. He stated that he accepted that the Respondent did not comply with the requirements of the CML Handbook in a number of cases and this amounts to professional misconduct. Mr Macreath stated that the Respondent accepts that as soon as he discovered that the deposits were not being provided by the purchasers that this was a "red flag" circumstance. Mr Macreath referred the Tribunal to the comments of Justice Laddie in the case of Credit Lyonnais -v-Russell, Jones & Walker [2002] EWHC 1310) where he stated:-

> *"A solicitor is not a general insurer against his client's legal problems, His duties are defined by the terms of the agreed retainer….. the solicitor only has to expend time and effort in what he has been engaged to do and for which the client has agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer."*

However Mr Macreath stated that a solicitor is obliged to be aware of the general risks in his profession. Mr Macreath referred the Tribunal to a quotation from Justice Bingham in the case of Eckersley and Others-v-Binnie and Others 1998 CML 1:-

> "*A professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinarily assiduous and intelligent members of his profession in knowledges of new advances, discoveries and developments in his field. He should have such awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks inherent in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon, combining the qualities of polymath and prophet."*

Mr Macreath submitted that solicitors do not need the CML Handbook to alert them to "red flag" circumstances. He stated that the Tribunal had as far back as 1989 issued warnings to the profession regarding the disclosure of material facts. Mr Macreath stated that a solicitor must report such circumstances back to his client and in this case the client was also the lender.

He stated that this was well put by Justice Laddie in the Credit Lyonnais decision:-

> *"If a dentist is asked to treat a patient's tooth and, on looking into the latter's mouth, he notices that an adjacent tooth is in need of treatment, it is his duty to warn the patient accordingly. So too, if in the course of carrying out instructions within his area of competence a lawyer notices or ought to notice a problem or risk for the client of which it is reasonable to assume the client may not be aware, the lawyer must warn him."*

Mr Macreath submitted that solicitors have a duty to warn their clients about "red flag" issues whether or not the CML Handbook mentions that particular issue. He stated that many solicitors have argued ignorance of the terms of the CML Handbook before the Tribunal and stated that they had thought that the property boom in 2007

would continue. He stated that the Respondent was not aware of the Guarantee Fund inspection undertaken by the Law Society at Leslie Deans & Co. in 2010 as he had left the firm by then. He further stated that the complaint by Client A was made in 2010 which was five years ago. This was the first time in the Respondent's professional career he had been the subject of a complaint, even regarding service. He advised that it was only because of the inspection of Leslie Deans & Co. that these failures came to light.

Mr Macreath stated that there are significant Police Scotland enquiries ongoing regarding Leslie Deans & Co. and other solicitors who operated in that firm. He explained that the Respondent was questioned by the police in relation to these enquiries. Mr Macreath stated that an award of £1,500 was made to Client A in relation to inadequate professional service and he advised that the Respondent paid half of this and Leslie Deans & Co. paid the balance.

Turning to the Respondent's personal circumstances, Mr Macreath stated that the Respondent had been a partner for a very short time in the firm of Leslie Deans & Co. He advised that the Respondent is 46 and has been married for 23 years and has four children. He is the senior partner of McEwan Fraser Legal which is a well-respected and established firm. He studied law at Dundee University and completed his Diploma in Legal Practice there in 1991. He trained with Menzies Dougal & Milligan and then went to work at the firm of Morison Bishop for six years.

At this point the Chairman advised that he is a consultant with the firm of Morisons. He stated that he did not know the Respondent and has had no previous dealings with him. He stated that he did not think he needed to recuse himself and asked the parties if they had any comments. Both Mr Lynch and Mr Macreath stated that they had no issues with the Chairman continuing to hear the case.

Mr Macreath stated that the Respondent left Morison Bishop to go to work for the firm of Blair Cadell, firstly as an assistant and then as a partner until 2007. He stated that he was then directly approached by Leslie Deans & Co. as they had opened a new branch office in Corstorphine. Mr Macreath stated that the Respondent was a salaried partner of Leslie Deans & Co. and did not participate in the profits of the firm. Mr

Macreath advised that one of the reasons the Respondent left Leslie Deans & Co. was that Mr Deans sold his practice to relatives who were not solicitors.

Mr Macreath stated that when the Respondent left Leslie Deans & Co. he set up the firm of McEwan Fraser Legal. He explained that the firm now has three partners and a number of solicitors and paralegals and in total employs 150 people.

Mr Macreath emphasised that when Client A made his complaint, it was the first time that the Respondent had been a subject of a complaint. The Respondent responded immediately and openly to the Law Society without seeking advice. The Respondent confirmed to the Society that he had been asked to produce a power of attorney and that he had met the client.

Mr Macreath stated that although the complaint was made in 2010 it was not until 7 June 2012 that a decision was taken by the Law Society that a fiscal should be appointed to prosecute him. Despite the strain of this matter hanging over him, the Respondent has been running his practice effectively. Mr Macreath stated that this was demonstrated by the fact that the firm has been subject of a number of Guarantee Fund inspections and has been given a clean bill of health.

Mr Macreath submitted that the Respondent is acutely aware of CML compliance and assiduously uses the CML checklist. Mr Macreath further submitted that the Respondent acutely understands the need to protect the profession's reputation and is contrite and hugely embarrassed by his failures. Mr Macreath stated that the Respondent categorically assures the Tribunal that if he is allowed to retain his full practising certificate he will never appear before the Tribunal again.

Mr Macreath stated that in preparing for this hearing he went through the transactions with the Respondent and it became clear that the Respondent did not fully understand the relationship between Mr B and Leslie Deans & Co.

In 2009 the Respondent had understood that he had to leave the firm of Leslie Deans & Co. and other solicitors have left the firm with no stain on their characters. Mr Macreath stated that his client was not the cashroom partner at the time of these

failures. He advised that the firm's cashroom was in a separate office and although the Respondent had a duty to check the source of funding he did not, and relied upon information from the cash office. He accepts that this was wrong and that he should have been aware of the "red flag" circumstances. He accepts that there is no note on the file regarding the meeting with Client A. Mr Macreath stated that these files are now in the hands of Police Scotland and that it had been very difficult to obtain the information from the files as a result.

Mr Macreath submitted that his client did meet face to face with Client A and did issue a letter of engagement. He stated it was a "red flag" transaction because of the circumstances in which an employee was purchasing property from his employer and stated that the Respondent sees that now with hindsight, but did not at the time. Mr Macreath confirmed it was his client's position that Client A worked all over Scotland although he lived in Edinburgh.

In relation to the email which was purportedly sent by Client A, the Respondent now accepts that he should have questioned whether a joiner would have written to him in such terms.

In response to a question from the Chairman regarding the preparation of the statement recording the source of the deposit, Mr Macreath advised that the cashroom provided the statement. Mr Macreath accepted that the Respondent found out later in the transaction where the deposit had originated from and accepts that he should have informed the lender about this. Mr Macreath stated that Client B is the sole director of Company 2 and was an established client of Leslie Deans & Co. He advised that Client C is the adult daughter of Client B and part of a family of significant means. He stated that Company 2 purchased properties at low prices where there was an opportunity of adding value to them and either sold them on or let them.

Mr Macreath stated that these were the only outstanding cases that related to the Respondent and there are no other complaints relating to the Respondent. Mr Macreath stated that at the time of these failures the volume of conveyancing dealt with by the firm was enormous and all staff were worked very hard by Mr Deans.

In response to a question from the Chairman, the Respondent confirmed that he was aware of the £100,000 uplift in price as he had seen the deeds. The Respondent stated that there were more emails on the file but he did not have access to them. He stated that the Client A transaction did not appear fraudulent; he advised that Client A picked up the keys and moved into the property.

Mr Macreath stated that he was not arguing that the Respondent was naïve as the Tribunal has heard that before in the Tulips case and in other cases. Mr Macreath stated that he has had personal dealings with Mr Deans and found him very difficult to deal with. He further stated that the Respondent was working all hours for Mr Deans and so were all the solicitors who were working at the Corstorphine office. He advised that Mr Deans was an autocratic leader which is unhelpful in a professional sense and accepted that things were done which should not have been done. Mr Macreath stated that these failures go back to a short period between 2007 and 2009 and we are now five years on from that. He submitted that his client has moved on and his client's firm is highly regarded. He accepted that the "red flag" circumstances should have been reported, but they were not. He submitted that other solicitors across the profession were dealing with similar cases and not all were referred to the Tribunal.

Mr Macreath advised that the Tribunal now had to assess whether there was a continuing risk by allowing the Respondent to remain in practice. Mr Macreath argued that there is now no risk and this has been proven by the fact that the Respondent is running a successful practice which has been audited by the Law Society. Mr Macreath referred the Tribunal to the findings in the case of Baillie which involved ten transactions where the solicitor never met the clients and there was no proper certification. He submitted these transactions were a disgrace to the profession and could be distinguished from this case.

Mr Macreath submitted that the Tribunal could trust his client and asked the Tribunal to impose a significant fine and allow him to keep practising.

In response to a question from a Tribunal member as to the reasons for these failures, Mr Macreath submitted that his client was worked very hard and that he received a

bonus for achieving a certain target and commission for bringing in business. He stated that there was great pressure to push through conveyancing transactions. Mr Macreath submitted that his client has learned a hard lesson and that the reporting of this case will be very damaging to his professional reputation.

In response to a question from the Chairman regarding how many inspections there have been of McEwan Fraser, Mr Lynch stated that he was not aware of the position. The Respondent stated that there had been an inspection in 2010 and a follow up inspection in 2011 in relation to back to back transactions then another inspection in 2015 and there had been no issues highlighted. The Respondent confirmed that he was the sole equity partner in McEwan Fraser and the other two partners are salaried.

DECISION

The Tribunal first considered whether or not the Respondent's conduct was serious and reprehensible enough to amount to professional misconduct. It was clear to the Tribunal that the Respondent's conduct would be viewed by other members of the profession as serious and reprehensible. The Tribunal has made it clear on numerous occasions that solicitors must always act in the best interests of all their clients including their lender clients. When a solicitor takes instructions from a client who is a lender he owes that lender the same duty of care as he does any other client. The six transactions detailed in the Complaints disclosed failures to report properly to the lenders to such a degree that the Respondent's conduct was clearly reckless. In the case of Client A the interests of the borrower were ignored. In view of this the Tribunal considered the failures admitted by the Respondent amounted to professional misconduct in terms of the test set down in the Sharp case.

The Tribunal noted that there was no suggestion of any dishonesty on the part of the Respondent. However the CML Handbook is a fundamental part of the lender's instructions and its conditions are designed to safeguard the lender's interests and it is thus vital that solicitors fully comply with these conditions.

In considering penalty, the Tribunal took account of the fact that the six transactions were undertaken over a short period of time. In addition the Tribunal noted that the

Respondent had been candid with the Law Society from the start of proceedings and had appeared before the Tribunal and had accepted that he is guilty of professional misconduct.

In addition the Tribunal noted that the Respondent had shown remorse and demonstrated tangible insight into his failures. The Tribunal noted that there had been a number of Law Society inspections of the Respondent's practice since 2010 which had not disclosed any further repetition of these failures.

The Tribunal was of the view that had this case come before the Tribunal shortly after the failures, the Tribunal would have undoubtedly imposed a restriction on the Respondent's practising certificate. Given he is the sole equity partner in McEwan Fraser Legal any such restriction would potentially result in the firm ceasing to trade and a significant number of individuals lose their livelihoods. Additionally, the Respondent has demonstrated over the last five years that there has been no repetition of these failures. In view of this the Tribunal consider there is no ongoing risk to the public and therefore no requirement for supervision. However, in view of the Respondent's failures in relation to Client A and his blatant disregard for the CML Handbook conditions referred to above in that and five other transactions the Tribunal was of the view that a significant fine in addition to a censure was appropriate in this case. Due to the serious and reckless nature of the Respondent's repeated failures to report key matters to clients as required in order to protect their interests, the Tribunal considered that the maximum fine of £10,000 was appropriate.

The Tribunal made the usual order with regard to expenses and agreed to defer publicity until it has been clarified whether there are to be any criminal proceedings involving the Respondent.

Alistair Cockburn

Chairman