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

F I N D I N G S

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY of SCOTLAND, Atria One, 144 Morrison Street, Edinburgh

Complainers

against

ROBERT FULTON FRAME, c/o Miller Beckett & Jackson Limited, 190 St Vincent Street, Glasgow

Respondent

1. A Complaint dated 31 July 2018 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Robert Fulton Frame, c/o Miller Beckett & Jackson Limited, 190 St Vincent Street, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was no Secondary Complainer.

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

4. In terms of its Rules, the Tribunal fixed a procedural hearing for 1 November 2018 and notice thereof was duly served upon the Respondent.

5. At the procedural hearing on 1 November 2018, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was not present but was represented by Jonathan Brown, Advocate. On joint motion, the Tribunal fixed a procedural hearing for 7 December 2018.

6. On 6 December 2018, of consent and on the Respondent's motion, the Chair, exercising the functions of the Tribunal under Rule 56 of the Scottish Solicitors' Discipline Tribunal Procedure Rules 2008, adjourned the procedural hearing fixed for 7 December 2018 and fixed a hearing for 6 March 2019.

7. At the hearing on 6 March 2019, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by Jonathan Brown, Advocate instructed by William Macreath, Solicitor, Glasgow. Of consent, the Tribunal granted the Complainers' motion to lodge late an Inventory of Productions for the Complainers. Of consent, the Tribunal granted the Respondent's motion to lodge three Inventories of Productions for the Respondent, a List of Witnesses for the Respondent and Adjusted Answers dated 4 March 2019. A Joint Minute of Admissions was lodged. The Fiscal confirmed that he did not intend to lead any evidence. The Respondent gave evidence. Both parties made submissions. The Fiscal indicated that he did not seek a conviction in respect of the averment of misconduct contained at Article 6(c) of the Complaint. Of consent, the Tribunal granted the Fiscal's motion to amend the Complaint by deleting the averment of professional misconduct contained at paragraph 6(c), deleting the words "The Prevention of" where they appeared in paragraph 6(e) and deleting "2003" where it appeared in paragraph 6(e) and substituting "2000".

8. Having given careful consideration to the terms of the Complaint, Answers, Joint Minute and Productions, The Tribunal found the following facts established:-

8.1 The Respondent's date of birth is 27 March 1959. He was enrolled as a solicitor on 11 January 1983. Between 1985 and 2003 the Respondent was a partner in Kidstons. Between 2003 and 2004 the Respondent was partner of Moore & Partners LLP and since 2004 he has been a partner or director of Miller Beckett & Jackson and latterly Miller Beckett & Jackson Limited.

8.2 Company 1 along with other companies was part of a group of companies controlled by Mr A. He enjoyed beneficial ownership of the relevant companies. As at the date of the administration of the companies hereinafter condescended upon in August 2011 he was the sole director of Company 1 and Company 2. He also acted as a shadow director of Company 3. His son, Mr B was the sole shareholder and director of Company 4. A secured facility in the region of £17.3 million had been

made available to Company 1 by Anglo Irish Bank ("AIB"). The other companies in the group, including Company 2 and Company 3, had cross-guaranteed the debt.

8.3 The group was involved in the development and letting of commercial and residential properties. Mr A had effective control of all of the companies, which were operated as one enterprise. The various companies operated on the basis of one bank account with the Bank of Scotland in the name of Company 3. At the material time Company 5 was 99% owned by Mr A. It later became wholly owned by him. The sole nominal director of Company 5 was Mr C. Company 4 was wholly owned by Mr B.

8.4 Mr A and the companies were represented by the Respondent's firm. The Respondent's partner Charles Jackson was the principal point of contact for Mr A, within the firm. He generally delegated the conveyancing work to the Respondent.

8.5 Company 1 owned a commercial property at Property 1. Prior to 10 November 2010 Mr A had concluded an agreement with Company 6 for the sale and purchase of that property. The Respondent's file contained heads of terms dated 23rd April 2010 which indicated that the seller was a company called Company 7.

8.6 On 10 November 2010 Company 1 disponed Property 1 to Company 5 for a consideration recorded as being £762,000. On the same day Company 5 disponed the same property to Company 6 for £2,100,000 plus VAT of £367,500. Both dispositions referred to a date of entry of 16 November 2010.

8.7 From the perspective of AIB, the sale of Property 1 was part of a wider series of property transfers which also involved Property 2, Property 3, Property 4 and Property 5. AIB held standard securities over all these properties. On 19 August 2010 the Respondent on behalf of the sellers wrote to AIB's solicitor, Mr D of Messrs McClure Naismith. The letter included details of the "relevant sale price" of the properties as follows: Property 1 - £762,000; Property 3 - £934,000; Property 4 - £450,000; Property 2 - £200,000. The Respondent stated "my clients are keen to settle as soon as possible, but accept that it may be next week before the sanction has been obtained from the bank's credit committee".

8.8 By letter dated 1st November 2010 the Respondent wrote to Mr D. The letter included details of the "relevant sale price" in respect of Property 5, which was stated as £68,000.

8.9 On or about 11th November 2010 Mr D sent five discharges to his clients Anglo Irish bank and asked that they be executed and returned.

8.10 On 16 November 2010 the Respondent received a letter signed by Mr C on behalf of Company 3 stating that the Respondent had authority to send to AIB the sale proceeds of Property 1, Property 2, property 3 and Property 4, plus that at Property 5. Once AIB received the funds, the executed discharges were delivered, all as agreed between the Respondent and Mr D.

8.11 Subsequently Property 3, Property 4 and Property 2 were disponed to Company 4, and Property 5 to Mr B. The dispositions in respect of those subjects were executed on 24 November 2010, with a date of entry given as 16 November 2010. They recorded that the consideration for each property was as set out in paragraphs 7 and 8 above, making a total of £1,652,000.

8.12 The following year Property 5 was purchased from Mr B by a Mr F for £125,000.

8.13 Company 3, Company 1, Company 2 and certain other companies in the group were placed in administration in August 2011. The dispositions of Property 3, Property 4 and Property 2 and Property 5 were challenged by the administrators as alienations not made for adequate consideration. The Court of Session reduced the dispositions on that basis. That decision was upheld on appeal by The Inner House of the Court of Session and, on further appeal, by the Supreme Court.

8.14 Notwithstanding the contract with Company 6, the information available to AIB was that Property 1 was being sold by Company 1 to Company 5 for a sum in line with its valuation at £762,000. AIB was not informed in advance of the transaction completing of the contemporaneous sale by Company 5 to Company 6 for the larger sum. Had AIB known that a sum in excess of £2.4 million was being paid by Company 6 for Property 1, it would have insisted on payment of the whole proceeds of sale to it. It would not have discharged the securities over the other properties unless additional funds were paid in respect of the valuations of each of them.

8.15 Company 6 were represented by Anderson Strathern. AIB were represented by McClure Naismith. The Respondent acted for all other parties in each of the transactions condescended upon. He did so entirely upon the instructions of Mr A. Mr A was not a director of Company 5 nor of Company 4. The Respondent was aware of this from company searches.

8.16 After settlement of the sale of Property 1 to Company 6, the Respondent remitted the sale proceeds to McClure Naismith as agents for AIB, under deduction of his firm's fees and outlays, and of £45,000 which he paid to Mr A.

8.17 Mr C of Company 5 provided a letter of authority dated 16 November 2010 to the Respondent to remit to Anglo Irish Bank's agent the sum of £2,414,000. The letter did not mention the payment of £45,000 to Mr A.

9. After considering the Complaint, Answers, Joint Minute, Productions, the parole evidence of the Respondent and the submissions made by both parties, the Tribunal did not consider that the Respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors. The test for professional misconduct was not met. However, the Tribunal considered that the Respondent's actions may amount to unsatisfactory professional conduct and accordingly remitted the matter under Section 53ZA of the Solicitors (Scotland) Act 1980 to the Council of the Law Society of Scotland in respect of the averments of professional misconduct contained in the Complaint at Articles 6(b) and 6(d). These were to the effect that the Respondent had prepared and registered dispositions which contained information as to price which he knew to be false, and remitted part of the sale proceeds of Property 1 to Mr A without authority from the director of Company 5, the seller, to do so.

10. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 6 March 2019. The Tribunal having considered the Complaint dated 31 July 2018 at the instance of the Council of the Law Society of Scotland against Robert Fulton Frame, c/o Miller Beckett & Jackson Limited, 190 St Vincent Street, Glasgow; Find the Respondent not guilty of professional misconduct; Remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980 in respect of the averments of professional misconduct contained in the Complaint

at Articles 6(b) and 6(d) namely that the Respondent prepared and registered dispositions which contained information as to price which he knew to be false, and remitted part of the sale proceeds of Property 1 to Mr A without authority from the director of Company 5, the seller, to do so; Make no finding of expenses due to or by either party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Eric Lumsden

Vice Chairman

11. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 23 APRIL 2019.

IN THE NAME OF THE TRIBUNAL

[redacted]

Eric Lumsden

Vice Chairman

NOTE

The Tribunal had before it a Complaint, Adjusted Answers, an Inventory of Productions for the Complainers, three Inventories of Productions for the Respondent, a List of Witnesses for the Complainers and a List of Witnesses for the Respondent. The parties lodged a Joint Minute of Admissions. The Fiscal did not lead any evidence. The Respondent gave evidence. The Tribunal inquired whether the Answers were to be withdrawn following receipt of the Joint Minute. However, the parties were content that the Answers did not contradict the Joint Minute which provided the agreed facts upon which the Tribunal should proceed.

EVIDENCE OF THE RESPONDENT

The Respondent gave evidence on oath. His practice is predominantly in commercial and residential property. The Respondent joined Miller, Beckett & Jackson in September 2004 and started working for Mr A's family and their companies in 2005. Mr A had a property portfolio of over 20 properties and a vehicle hire business. Mr A was one of the "larger players" in terms of the Respondent's clients. This kind of work was typical for the Respondent. Mr A was constantly acquiring, selling and refinancing properties. The Respondent was involved in refinancing in 2004/2005 and in 2007 to Anglo Irish Bank. The bank was represented by Mr D at McClure Naismith. Latterly, the finance was for £17.3 million and was split over about 20 properties. The Respondent had to exhibit title to the borrower's solicitors. There were various searches regarding properties, companies and charges. Mr A was the controlling mind of all the companies. He was also the majority shareholder or office bearer for many of them. The Respondent did not know why there were so many companies but thought that Mr A would have been very aware of any tax benefits of structuring business in this way. There was only one loan facility and the companies cross-guaranteed the debt. The companies operated using one single bank account in the name of Company 3. During the period up to the 2008 crash market conditions were buoyant. There were five or six acquisitions a year for several years. There were also an "incredible number" which were aborted. Lots of work was involved in getting these transactions to a certain stage and then the deal did not materialise. After the crash the level of acquisition changed significantly.

The Respondent was instructed by Mr A in the sale of Property 1. Mr A operated by making deals and then instructing the Respondent to implement them. About April 2010, draft heads of terms were circulated. The Respondent was aware that Company 6 was interested in land or property which Mr A owned. It had funds available to procure it as part of regeneration project involving the Commonwealth Games in Glasgow in 2014. A price was agreed.

The Respondent said he considered this transaction a "sale". He was aware that Mr A had discussions with Anglo Irish Bank regarding the release of Property 1 from the bank security, along with other properties. The initial contact came from McClure Naismith. The Respondent was told a deal had been done to release certain properties for certain prices. The Respondent knew Mr D well. He had been involved in the refinancing when Anglo Irish Bank became the lender.

Production 1 for the Complainers was a letter from Mr D dated 12 August 2010 offering to release six properties. The handwritten annotations were made by the Respondent after speaking with Mr A. The Respondent understood that prices had been agreed based on valuations by the bank to allow the release of securities based on those valuations. The sale proceeds would go straight to the bank and the indebtedness reduced. The Respondent explained that in this letter Mr D asked him for a list of the properties and the "relevant sale price [for] each property".

The Respondent was referred to Production 2 for the Complainers dated 19 August 2010. He agreed that he had written in this letter to Mr D "please find undernoted details of the properties and the relevant sale price". Further below was a table with four properties and their corresponding "sale price". The Respondent said he obtained the sale prices from Mr A. He had no involvement in the negotiation but knew they were based on the bank's commissioned valuations. Mr A told him Company 4 was to be the new buyer. The object was to take these properties out of the ambit of the security. He understood that £762,000 would be paid to the bank for the release of Property 1 from the security. The Respondent knew by that stage that Mr A was speaking to Company 6 about a significantly higher sale figure. The difference between those sums was the origin of the funds to pay the consideration for the other three properties. The Respondent said that he was "slightly vague" on the stage at which the deals were structured as "back to back" transactions. He did not design the structure. However, he understood that if the bank had been aware of the onward purchase, there would have been no need for an intermediary. If the bank had known of the onward purchase, they would have wanted the whole £2.1 million for that property.

The state of the property portfolio in 2010 was "pretty disastrous". There was a huge change in the loan to value ratio. The bank was looking to get its money back and agreed to take £762,000 on the basis of its own property valuation. Mr Brown asked why Company 6 was prepared to pay so much more. The Respondent said it had funds available and was determined to get that property in that location. Company 6 knew that Company 5 had been interposed in the sale. They knew the sale was for £762,000 and they

brought for £2.1 million. They saw the disposition, registration forms and settlement items. Company 6 were aware that Company 1 and Company 5 were both controlled by Mr A.

The firm paid £762,000 to the bank. The balance above £762,000 was used to allow discharges of security to be released on the agreed figures for Property 3, Property 4 and Property 2 and a residential property in Property 5. These were deducted and a balance of £45,000 was paid to Mr A.

Mr Brown referred the Respondent to Production 4 for the Complainers which was a letter dated 1 November 2010 from the Respondent to Mr D. The Respondent said he had no explanation for the hiatus between August and November. The Respondent accepted that he wrote "my letter of 19 August provided the relevant sale prices in respect of the first four properties." The Respondent agreed that Production 2 for the Respondent was a series of emails between him and Mr D. On 10 November 2010 the Respondent confirmed that he would be sending "the agreed figure of £2,392,000." The Respondent spoke to various pieces of email correspondence regarding the properties to be released from the security and the eventual price to be paid, which was £2.41 million.

Production 9 for the Complainers was a letter dated 16 November 2010 to the Respondent from Mr C, the sole director of Company 5 and an employee of Mr A. He had no veto over Mr A. The Respondent said he had asked for this letter because the money was in a ledger in Company 5's name and the Respondent needed authority to transfer it. Production 3 for the Respondent was a letter dated 9 August 2010 from Cahill Jack Associates, Chartered Accountants, to the Respondent. It was confirmation that the use of Company 5 in the transaction was for taxed-related reasons. The Respondent did not see any significance of the substitution of one the family's company for another. Anderson Strathern, agents for Company 6, asked for the reasons behind it and so this letter was provided.

The Respondent said it was "absolutely not the case" that he misled Mr D about what was going on, and by implication, the bank. He had a good relationship with Mr D who was "well aware of exactly what was going on with Mr A and his companies, as indeed were the bank". The Respondent had no involvement in negotiating terms with the bank. It did not for one moment cross his mind that he should consider telling Mr D that there was an onward sale to Company 6 for £2.1 million. It was not his responsibility to volunteer that information. He was not at liberty to do that unless authorised. The Respondent said no questions were asked by the bank or Mr D which put him in a difficult position. The bank was completely uninterested in the sale. The Respondent had no difficulty with the fact that it was a related company of the same group which actually paid the money. After the settlement in subsequent litigation there was no suggestion from Mr D or the bank that the Respondent misled. The Respondent

said his relationship with Mr D remained good and Mr A's relationship with the bank was friendly. Unfortunately, Mr D has died and McClure Naismith no longer exists. However, at the time of these transactions, the bank was separately represented. At any time, Mr D could have picked up the phone if he or the bank had a concern.

Mr Brown asked the Respondent if he was aware of any suggestion that Property2, Property 3 and Property 4 were undervalued. The Respondent said he was not. The bank was "desperate to do the deal and get the money in". The companies were placed into administration and there was subsequent litigation regarding these transactions. The Respondent gave evidence in those proceedings. He said it was not put to him during that case that he had deceived Mr D. Mr Brown referred to the Respondent's description of these transactions as "sales". The Respondent said he understood that there was going to be a sale. He knew who the sellers were. There would be purchasers. The sale was for accurate consideration. This was a sale.

Mr Brown asked why the Respondent proceeded when the transactions could have been perceived as gratuitous. The Respondent said it was not his decision. These were the agreed terms. The price had to be recorded in the dispositions. Fees would be applied by the Registers. It would not have been accurate or appropriate to record in the dispositions that they were gratuitous.

The Respondent accepted that the letter provided by Mr C did not authorise payment of £45,000 to Mr A. However, if he had asked Mr C for authorisation it would have been given. Perhaps, with hindsight, he should have done this. However, he took instructions from the person able to give them.

Mr Brown noted that Mr B received a disposition for Property 5 as an individual although the purchase was funded by Company 5. The Respondent said the disposition was prepared by the grantors. The only thing he needed to speak to Mr B about was the registration of that disposition.

The Chair noted that the Respondent said the bank "agreed" the figures. He asked if this was formal agreement and if so, what was the harm in telling them about the onward sale? The Respondent said he was told the figures were agreed based on the bank's values.

Under cross-examination, the Respondent indicated that he dealt with six to ten of the family's companies. He did not know how they were structured. Normally Mr A would be the majority shareholder but this was not always the case. However, regardless, he was the controlling mind of all the companies. Mr Lynch asked if the Respondent took any steps to investigate the structure of the

companies. The Respondent said he would have had all that information at the time, for example, the memorandum and articles for the companies. However, he did not have them now. The Respondent accepted that he did not make any enquiries about why Mr A had so many companies. He made some assumptions regarding tax. He "probably" did not make any enquiries into how the companies were funded or capitalised. He was "not particularly concerned".

The Respondent agreed that when he gave evidence at the Court of Session he confirmed that only he and Charles Jackson dealt with Mr A. The Respondent only took instructions from Mr A. Mr A would tell him what he had agreed and the Respondent would put it together. Mr A did not like to delegate or put things down in writing. The Respondent said that initially he thought this was a security release as this was in the heading of the letter from Mr D. He was later told of the inter-company transfers. He dealt with Company 1, Company 5 and Company 4 on the sole instruction from Mr A. He did not question the back to back sales or the purchase prices.

The Fiscal asked the Respondent why Company 5 would want to pay Company 1's debt. The Respondent said he was not aware of a reason perhaps than that contained in Mr I's letter which explains the connection between Company 1 and Company 5. He simply drafted the disposition as instructed by Mr A. Mr A used all these companies as his own.

Mr Lynch referred the Respondent to the last charge of professional misconduct which referred to breaches of the Proceeds of Crime Act, Terrorism Act, and Money Laundering Regulations. The Respondent said that he did not admit the charge. He knew his client and his companies implicitly through all their previous dealings. The regulations in 2010 were all about knowing the client. Anti-money laundering procedures are dealt with differently now. The regulations are a lot more stringent regarding the way risk to assessed and identification of companies. He would deal with identification and risk assessment differently today. He would make enquiries regarding shareholding, beneficial ownership etc. There would be a whole raft of things on the file which were not necessary in 2010.

The Fiscal questioned whether the Respondent's willingness to transfer money to a party who was not the seller, created a risk of tax evasion. The Respondent said that he did not consider the matter from a tax point of view at all.

The Fiscal questioned what information the Respondent had when he was first told that the vehicle would Company 7. The Respondent said he acted for the Company 7 previously. He did not research them when he was told they were to be used because they were only at the stage of draft heads of terms.

The Respondent did not know when Company 5 was incorporated. He thought it was about 1999 but the company had been inactive for a while. He did not know what kind of business it did previously. When the vehicle changed from Company 7 to Company 5 he did not ask any questions about the change. He did not consider the risk of money laundering.

The Respondent confirmed that Production 1 for the Complainers was the first contact the Respondent had about this case. He thought initially this was just a security release, based on this letter. The Fiscal asked why this would be his opinion when the letter referred to "free proceeds of sale". The Respondent said he had noted the letter heading but later spoke to Mr A. The Respondent agreed the letter was consistent with the lender believing these were a series of sales, albeit not at arm's length. The Fiscal asked whether in this letter Mr D was asking the Respondent as a fellow solicitor for information upon which he intended to rely. The Respondent agreed but said the deal was already done. Mr D had gone to the bank's credit committee to release the properties. There was clearly an understanding and the bank had identified these properties. Mr D could just as easily have set out the prices in the letter. The Fiscal suggested if there was not to be a sale, the Respondent should have disclosed this. The Respondent said there was to be a sale. The Fiscal suggested the Respondent's letter of 19 August 2010 was misleading. The Respondent rejected that proposition because the properties and sale prices were identified.

The Respondent confirmed he made no enquiries regarding missives. He made no enquiries regarding the purchasing entities or funding. He said this was normal in a commercial transaction where the client was in control and had put the deal together. The Respondent thought he was aware of the proposed onwards sale of Property 1 when he wrote the letter of 19 August 2010. He found out around that time. He could not be more specific on the timing without the files.

The Respondent said the whole proceeds were sent to the bank. There was never any intention to pass money through the firm.

The Fiscal referred to Production 4 for the Complainers and suggested that the Respondent could not represent that sales were taking place. The Respondent disagreed. He said sales did take place. These involved real parties, properties and considerations. It was unusual that the price did not go to the seller but went to the bank in reduction of indebtedness. He agreed that in his correspondence with Mr D he referred to "free proceeds of sale". He did not dispel Mr D's opinion that these were sales.

The Fiscal referred the Respondent to Production 9 for the Complainers, which was the letter from Mr C at Company 5. The Respondent said he had no input into the wording of this letter.

The Respondent was aware of the Court of Session case involving these transactions. He gave evidence. The administrators were successful because the companies were related and the transactions were regarded as being undervalued. The Fiscal suggested that the court rejected the argument that these were sales. The Respondent said he thought the Court was looking at different issues. Mr Brown objected to this Fiscal's question on the basis that he had not represented properly the ratio of the case or the defence. The Fiscal agreed not to pursue this issue.

The Respondent did not accept that he was criticised in Lord Malcolm's decision. The Fiscal quoted from paragraphs 38 and 39 of the judgement. The witness indicated that he did not take issue with the judgement but that he had not read it before. The Tribunal asked Mr Brown whether he wanted time to consider the opinion. Mr Brown indicated that this was not necessary. In his submission, what Lord Malcolm thought of the case before him was neither here nor there when considering the professional misconduct case against the Respondent. The judgement speaks for itself.

When the case resumed following lunch, the Fiscal quoted from paragraphs 39 and 42 of Lord Malcolm's judgement and said there was an implication that the information provided by the Respondent could not be trusted. The Respondent said that his conduct was not part of the court case. He was a witness giving evidence without legal advice.

The Fiscal said the Respondent's misrepresentation to Mr D was the vehicle by which the extra consideration for the back to back transactions was concealed. The Respondent said the sales took place and the consideration went to the bank. The dispositions accurately reflected the situation. The grantors were fully aware the price was to be paid to the bank. The dispositions were therefore accurate.

The Respondent accepted that the 2007 Anti-Money Laundering Regulations were in force in 2010 and now. In 2010 solicitors had to verify the identity of companies and their beneficial owners before establishing a business relationship. The Respondent said he knew his clients intimately. He had to verify their identities to satisfy himself, the purchasers and lenders. In those days the firm trained staff to be aware of risk and there was a reporting structure. However, it is dealt with more formally today.

In re-examination, the Respondent confirmed that he had a cumulative build-up of knowledge regarding the companies in question. He had already acted in constitution of the securities. He had fielded the

bank's queries then regarding ownership. He had dealt with the cross-guarantee documents. The bank had its own regulatory obligations when advancing £17 million. He had gone through the same process when refinancing with Dunfermline Building Society and the Bank of Scotland.

The Respondent had seven or eight boxes of files for these companies in his office. These were forwarded to the administrators in 2011 or 2012. He has looked at some of the files with the Law Society but they have not been returned to him. To understand the totality of the case, you would have to interrogate the files. In 2010 the firm kept a lot of money laundering information on the file although they also had a central money laundering register. The Respondent had no doubt that Mr A was the beneficial owner of the lot. Mr C was not being presented as a nominal client as a front for Mr A.

The Chair asked if Company 6 being a public body, there was any expectation of press interest in the transaction. The Respondent said that there was not. In answer to the Chair's questions, the Respondent said it was relatively unusual to send funds directly to the lender but he would do it if given the instructions to that effect.

A Tribunal member asked for more clarification regarding why Company 5 would want to pay Company 1's debt. The Respondent said that Company 1 had required that Company 5 redeem the indebtedness to the bank. Company 1 required that payment on their behalf.

A Tribunal member asked whether the Respondent had not done everything he should have because of the forceful and demanding nature of Mr A. The Respondent said that even looking back with hindsight he would not say that was the case.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal referred the Tribunal to the five charges of professional misconduct on page 6 of the Complaint. He moved to delete the averment of professional misconduct contained at paragraph 6(c), delete the words "the prevention of" where they appeared at paragraph 6(e) and delete "2003" where it appeared in paragraph 6(e) and substitute "2000". Of consent, the Tribunal granted the Fiscal's motion.

The Fiscal said it was a general principle of law that a solicitor acting for a seller or borrower does not have any general duty to the lender. However, this is modified if there is reliance by the lender or the lender's solicitor on that solicitor. The Fiscal referred the Tribunal to Paterson & Ritchie "Law, Practice and Conduct for Solicitors" 2nd Edition, Chapter 3. Paragraph 13.01 refers to Rule B1.14.1 which states

that solicitors must act with other regulated persons in a manner consistent with persons having mutual trust and confidence in each other. Solicitors must not knowingly misled other regulated persons or go back on their word. The Fiscal quoted from paragraph 13.01 of Paterson & Ritchie as follows: *"The duty in the rule is not a duty of full disclosure but a duty not to mislead, although it can be a very fine line between not disclosing and knowingly misleading."*

The Fiscal also referred to one of the Tribunal's own decisions quoted at paragraph 13.02. He noted that, *"It is an essential feature of negotiations between solicitors that they are conducted in an atmosphere of mutual trust and a solicitor has a professional duty to respect that element of trust in all his dealings...The best interests of his clients...is not the only consideration. It is essential that at all times a solicitor has regard for his professional relationship with his fellow solicitors...The special relationship with mutual trust which subsists between solicitors [is] rightly expected by the public."*

The Fiscal quoted from paragraph 13.03 which is headed *"Not misleading colleagues"*. The authors refer to the variety of forms of misleading statements: intentional lies, reckless untruths and negligent statements. The Fiscal said Paterson & Ritchie's comments regarding the need to think about questions on forms and not tick boxes automatically applied equally to letters.

The Fiscal quoted from paragraph 13.03.02 which in turn quoted from a Tribunal decision and suggested that the Tribunal would not hold a solicitor as being culpable if he conveyed information to another party which ultimately turned out to be false unless it might be shown that the solicitor was acting in bad faith. Paterson & Ritchie, however, say it is too restrictive to say that bad faith is required before a conduct offence occurs.

The Fiscal referred the Tribunal to paragraph 13.04 of Paterson & Ritchie and their discussion of Frank Houlgate Investment Company Limited-v-Biggart Baillie LLP [2009] CSOH 165 and the duty to disclose fraud. The Fiscal said that he was not suggesting that the conduct in the present case was of the same order as that in the Frank Houlgate case. However, a duty of honesty is owed as a matter of ethics if not as a matter of law. The Fiscal said the Respondent accepted that the most likely interpretation of Mr D's letter was that he thought sales were taking place. He said the Respondent did not seriously dispute that Mr D was asking for information on which he intended to rely. But for that misrepresentation the back to back transaction would not have taken place.

The Fiscal invited the Tribunal to find the Respondent guilty in respect of the averments of professional misconduct contained at paragraphs 6(a), (b), (d) and (e) of the Complaint. The Fiscal emphasised that

the same Money Laundering Regulations apply now as in 2010. A solicitor's duties under these regulations are discussed at pages 302 – 320 of Paterson & Ritchie. If a solicitor does not comply with the regulations, he or she will breach the 2000 and 2002 Acts.

The Fiscal noted that the Respondent was not obliged to keep the files as the transactions were so old. He said that the Tribunal might think it unsatisfactory but the Fiscal could not ask it to make any findings regarding the records.

SUBMISSIONS FOR THE RESPONDENT

Mr Brown began by inviting the Tribunal to consider the objective reality of the situation. He submitted there was no tension between the Respondent's position and the court judgements at the instance of the administrators. Mr Brown referred to paragraph 43 of Lord Malcolm's decision in the Outer House. Mr Brown said this contained Lord Malcolm's judgement on the evidence. He quoted the following passage: *"Had the funds been the true sale price of the disponed properties, then all would be well – but they were the sale price of only one of them. The dispositions under challenge were gratuitous alienations. Where it otherwise, the bank would have received in excess of £4 million, and the overall indebtedness would have been reduced by that amount. The price obtained for [Property 1] was used to allow the other [Property 2, Property 3 and Property 4] to be transferred without consideration to another company, which nominally at least, was owned and controlled by [Mr B], and, in the case of [Property 5] to him personally. If it be the case that [Mr A] arranged the sale of [Property 1] for a sum well above its true value, one can understand the desire that the bank should not receive the benefit – but in my view, any such expectation falls to be disappointed."*

There was a mismatch between the price Company 6 was prepared to pay and the lower value the bank was prepared to accept to discharge the security. Company 6 was a special purchaser prepared to pay a premium price. The bank had reached its view regarding the value of the property on professional advice. The properties had been tried on the market with no success.

In Mr Brown's submission, logically, the first step for the Tribunal was to consider whether Mr A misled the bank. The evidence in his affidavit was that he went to them on a general level. Both were in trouble. The bank could not repossess without huge loss. Mr A asked the bank whether it would entertain him taking some of the properties out of the security because he could refinance them. We know now that Anglo was hopelessly insolvent and "screaming for cash". Mr A did not have an obligation to tell the bank about the onward sale. He was not in a trustee relationship with the bank. If the bank was prepared

to let him take the properties out at their valuation, that was the bank's lookout. They were free to refuse for policy reasons. They could have asked to see the missives. They could have asked for a share of the profits of any resale. They were in a situation where they knew that refinance was not going to happen and a loss would be triggered by repossession. The bank took a decision to get the cash in. If the bank was content with that dialogue and Mr A did not volunteer that he had Company 6 "on the hook", no one was misled. People buy property all the time and sell it on. Often parties will not reveal the margin they are prepared to take. There was no evidence that the bank was misled. In fact, on becoming aware of the onward sale the bank said this was a good piece of business and took Mr A for lunch afterwards.

Mr D died in 2013. McClure Naismith is in administration. Their partners are scattered. Mr Brown made no criticism of the fact that the files were not before the Tribunal but noted that the obligation was on the Society to prove its case.

Mr Brown noted that this was a deal done between principals. It was not a haggle between solicitors. The email exchange regarding Property 5 makes it obviously that things were being done without solicitors. Mr A did not mislead the bank. He saw a commercial opportunity and sought to exploit it. If Mr A had said that the bank should be repaid but the "change" left with Company 1, "when the music stopped", the administrators would have had no cause for complaint. The mischief was taking the surplus and using it to redeem the charges on the other properties. These were gratuitous because all the value came from Property 1.

Mr Brown referred to paragraph 27 of Lord Malcolm's judgement. The parties in that litigation had presented a joint minute stating that they were agreed that the open market values for the properties were lower than the sums the bank received. Mr Brown said that Mr A did not mislead the bank. He may have breached his duties to the companies, but this was not a matter for this forum.

The Respondent did not act for the bank. The bank was represented. Generally, there is no duty to the lender in a commercial transaction. Any reliance by the lender's solicitor would have to be reasonable. Where a bank is separately represented, its farcical to say that the Respondent owed a duty in damages to the lender's solicitor.

Mr Brown said the Respondent did not have a duty (legal or professional) to tell the bank's solicitors that Mr A had Company 6 "on the hook" for £2.1 million. The bank had its own representation. There was a duty not to mislead but not to volunteer the information about the onward sale.

The Chair asked Mr Brown about the Tribunal case referred to at page 37 of Paterson & Ritchie. Law Society of Scotland v Burd 6 January 2005, was said to test the boundaries of misleading behaviour. In that case a solicitor purchased a property as a nominee on behalf of a client. The behaviour was found to fall just short of misconduct but was unprofessional. Mr Brown said that it is difficult to transpose that case to these circumstances. In this case, the bank and the client had negotiated a deal without solicitors. They had found a solution to make a profit. It is accepted that the Respondent could not tell Mr D of the situation without breaching his duty of confidentiality to his own client. If the bank knew about the onward sale for the greater price, it would have negotiated a different deal. It is no different to cases of ransom strip sales to developers. Without actively misleading, a willing seller and buyer can agree anything they want. The present circumstances are different to the nominee case because the present case is just about price.

Mr Brown asked the Tribunal to consider whether this was a "sale". Company 5 paid money. It got a disposition from Company 1. Property exchanged hands for that consideration. This was a real-world sale. It would be an abuse of language to call it anything else. Mr A used the profit to redeem the borrowing and to remove other properties from the charge. The Outer House judgement suggests that the valuation for those properties was high given the terms of the joint minute.

The transaction for Property 1 completed. £2.4 million came in. £768,000 went to Anglo Irish bank. A discharge was received. The property was then disponed from Company 1 to Company 5 to Company 6. The firm's client account contained the difference between £2.4 million and £768,000. Proceeds of the Property 1 transaction in the hands of Company 5 were used to fund the acquisition by Company 2 and Mr B of four properties. However, there were no intermediate movements on the ledgers. Due to the bank's lack of interest, the whole amount was sent to it.

Mr Brown submitted that once you accept the bank had agreed to accept £768,000, the rest of the money had to be accounted for. It was paid in consideration of the other properties. The price of the disposition was the redemption of borrowing. How else would you describe this if not as a sale? There was a transfer of property in exchange for payment. This is not a misrepresentation. It is certainly not a gross or dishonest misrepresentation. This is not a Machiavellian scheme to con the bank. If it was, the language used would be more precise. It is fanciful in the extreme to say that the bank was relying on the Respondent's letter. If the bank wanted that comfort then they would have asked for it. The commercial consequences are the same if this had been a sale with missives. Nothing would have been disclosed to the bank. The mischief is entirely from the discrepancy in price. Once it is accepted that is not the solicitor's responsibility, everything else falls away.

Mr Brown asked the Tribunal to consider what else the Respondent could have done. He was under an obligation to accurately describe the consideration for the purposes of recording dues etc. What he did was absolutely accurate. There was no other way to do it. The bank got £1.7 million in exchange for the discharge of its security. Between these five properties account had to be made for the £2.4 million. They were given the values as described by the bank. This was a legitimate exercise of professional judgement.

The Respondent accepted that no written authority existed for the transfer of £45,000 to Mr A. There should have been such written authority. However, Mr Brown urged the Tribunal to look at this transfer in context. There was authority for £2.4 million. It is accepted all around that Mr A was the controlling mind. Another paragraph would have been added to Mr C's letter if requested. Mr A was the 99% shareholder of Company 5. He could have removed Mr C if he wanted. It is a failure, but it is difficult to categorise it as professional misconduct. Mr Brown submitted that if that payment had been discovered in a Law Society inspection, the matter would not have come to the Tribunal.

With respect to the Money Laundering Rules, Mr Brown said professional misconduct was not made out. The Respondent had intimate knowledge of his clients and had worked for Mr A for many years.

Mr Brown submitted that the transactions were actually quite straightforward. The only question was whether there was any obligation to tell the bank. He said there was not. Mr Brown noted that the Complaint was one of dishonesty by misleading another solicitor. The Tribunal would have to determine that the Respondent had been deliberately deceptive. In Mr Brown's submission, it was not deliberately deceptive but accepted that there is a large middle ground. Language can be imprecise. On a proper view of the evidence, there was no basis to find professional misconduct and the finding should be that of not guilty.

The Chair asked Mr Brown in what circumstances a back to back transaction could take place legitimately. Mr Brown noted that "back to back" has become shorthand for wrongdoing. These transactions can be a problem because often a solicitor will also owe duties to the lender. In these circumstances the lender will ask if there were any sales in the last six months. Back to back transactions have been tarred with a sense of impropriety but in commercial transactions they are quite common. It might be a way to structure a sale to make a profit. The last thing a solicitor should do is tell a seller that another buyer is willing to pay more otherwise the seller will go straight to that buyer. These things happen when land has a "marriage value". The whole becomes greater than the sum of its parts.

The Chair asked the Fiscal whether a solicitor was always under a duty to reveal an onwards sale for a greater price. The Fiscal said that if the solicitor is not asked that question, he/she has no duty to disclose. If the Respondent had said the sale was for £768,000 and left it at that, everything would be alright. It does not matter that the same result was achieved. There was a deception in this case because of the misdescription of the transactions as "sales". The Fiscal said he made nothing *per se* of the transaction being of a "back to back" nature.

The Chair asked the Fiscal if the balance was not consideration, then what was it? The Fiscal said it was the sum presented to the bank as though it was a sale price. The Fiscal said the Respondent should have recorded in the dispositions that the consideration was payment from a third party to the bank to reduce the borrowing of the related companies.

DECISION

The Tribunal considered the Complaint, Answers, Joint Minute, Productions, the evidence of the Respondent, and the submissions made by the parties. It proceeded on the basis of the facts agreed by the parties in the Joint Minute. It found the Respondent to be a credible witness and accepted his evidence. He gave honest answers which were sometimes to his detriment. By his own admission, his memory was not reliable nine years after the event. The Tribunal decided that little weight could be given to the affidavit of Mr A. It was untested by cross-examination. The affidavit also raised questions about Mr A's honesty and integrity regarding payment of VAT and the fiduciary duties he owed to the companies. Therefore, the Tribunal did not place great reliance on his affidavit.

According to Sharp v The Law Society of Scotland 1984 SLT 313, there are certain standards of conduct to be expected of competent and reputable solicitors and 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. The Tribunal also had regard to definition of unsatisfactory professional conduct in Hood-v-The Law Society of Scotland [2017] CSIH 21. In that case Lord Drummond Young said:

"Unsatisfactory professional conduct is measured against the standard of the competent and reputable solicitor...Unsatisfactory professional conduct lies on a spectrum that runs from professional misconduct at the more serious end to inadequate professional service at the lesser end and determining where the conduct complained lies on that spectrum is a question for evaluation by the relevant

disciplinary tribunal, either the Council of the Respondents or the Scottish Solicitors Discipline Tribunal."

The Tribunal considered the first averment of misconduct contained at paragraph 6(a) of the Complaint, namely that the Respondent deliberately misled the secured lenders' solicitors as to the nature and value of the transactions so as to induce the lenders to grant the discharges. The Fiscal was unable to lead any evidence from the secured lenders' solicitors regarding the effect of the Respondent's correspondence. Mr D had unfortunately died and McLure Naismith no longer existed. The Tribunal was not satisfied beyond reasonable doubt on the evidence available to it in the joint minute and the productions spoken to by the Respondent, that the Respondent had deliberately misled Mr D or that his representations had induced the lenders to grant the discharges. The decision to grant the discharges was one of economic expediency in the context of a "deal" which had been done by Mr A and the bank which had independent legal representation. The Respondent owed no duties to the lender. The Tribunal accepted that had the bank known of the onward sale of Property 1, it is likely that they would have insisted on receiving the full purchase price and would not have released the other properties from the security. However, the Respondent was not under a positive duty to reveal that information. On the contrary, he was under a duty of confidentiality. To have revealed the information to Mr D would have been contrary to the interests of his client. The Tribunal did not consider that the Respondent's use of the terms "sale prices" and "free proceeds of sale" were misleading in the circumstances, or that by his correspondence, Mr D was seeking to place reliance on the Respondent's terminology. The use of words can be imprecise, for example a property exchange might still be described as "a sale". To have been accurate, the Respondent should have said in his correspondence with Mr D that the properties were going to be transferred to the related companies for the values suggested by the bank. The Tribunal was not satisfied beyond reasonable doubt that the Respondent's conduct amounted to a deliberate misleading of Mr D as to the nature and value of those transactions. The bank's legal representative chose not to make further inquiries regarding these transactions. The bank made no complaint once the onward sale was revealed. The Tribunal was of the view that there is some criticism of the Respondent implicit in Lord Malcolm's opinion. However, the issues in that case are different to those to be decided in this case, and the Respondent gave evidence in that case as a witness without legal advice. Lord Malcolm's criticism is obiter to his decision. Whether or not Mr D was misled, there was insufficient evidence to say that this was deliberate or reckless on the part of the Respondent. He was therefore not guilty of professional misconduct in relation to this charge. Without evidence of recklessness or negligence, there was similarly insufficient evidence to make an assessment that the Respondent might be guilty of unsatisfactory professional conduct which is professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor.

The Tribunal considered the second averment of misconduct contained at paragraph 6(b) of the Complaint, namely that the Respondent prepared and registered dispositions of the properties which contained information as to price which he knew to be false. The Tribunal accepted the Respondent's evidence that he had thought these were genuine transactions and it was appropriate to record the price as the valuations agreed by the bank. To do otherwise would not have accounted for the money paid to the bank to reduce the debt. The Tribunal considered that reduction of a debt could constitute "consideration". However, the purchase price was contrived and they were gratuitous alienations. The "prices" represented the value of the sale but the seller did not receive the money. The Tribunal considered that a competent and reputable solicitor in these circumstances would have made clear in the dispositions that the consideration was not a price that was being paid but the consideration was for certain good and onerous causes. However, the Tribunal was not satisfied that failure to do so represented a serious and reprehensible departure from the standards of competent and reputable solicitors. Therefore, the Tribunal was not satisfied that the Respondent was guilty of professional misconduct in relation to this allegation. However, it considered that he may be guilty of unsatisfactory professional conduct which is professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor. Therefore, it considered that it must remit the complaint to the Council under section 53ZA of the Solicitors (Scotland) Act 1980.

The Tribunal did not consider the third averment of misconduct contained at paragraph 6(c) of the Complaint as the Fiscal did not seek a conviction in respect of this averment.

The Tribunal considered the fourth averment of misconduct contained at paragraph 6(d) of the Complaint, namely that the Respondent remitted part of the sale proceeds of Property 1 to Mr A without authority from the director of Company 5, the seller, to do so. This conduct was admitted in the Joint Minute and by the Respondent in his evidence. The Respondent should not have done this. It is essential that solicitors obtain written instructions from the correct person in these circumstances. Failure to do so creates conditions where money laundering, tax evasion and terrorist financing can occur. It also leaves the solicitor open to criticism and liability regarding wrongful disposal of money. However, the Tribunal was of the view that while competent and reputable solicitors in 2019 would not make such a transfer in these circumstances, the issue was not so clear when the transaction was put in its 2010 context. Such transfers to third parties were more common then. Also, the transfer in this case was to the beneficial owner of the companies. The joint minute made it clear that it was accepted by both parties that these companies were controlled by Mr A who was the beneficial owner of them all. It was agreed that Mr A had "effective control of all the companies, which were operated as one enterprise".

This payment should not have been made without written authority from the appropriate person, but the Tribunal was not satisfied it represented a serious and reprehensible departure from the standards of competent and reputable solicitors in these circumstances. There was no allegation that the Respondent was guilty of any accounts rules failures in this regard. Therefore, the Tribunal was not satisfied that the Respondent was guilty of professional misconduct in relation to this allegation. However, it considered that he may be guilty of unsatisfactory professional conduct which is professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor. Therefore, it must remit the complaint to the Council under section 53ZA of the Solicitors (Scotland) Act 1980.

The Tribunal considered the fifth averment of misconduct contained at paragraph 6(e) of the Complaint, namely that the Respondent failed to comply with his obligations under the Proceeds of Crime Act 2002, Terrorism Act 2000 and the Money Laundering Regulations 2007. The Tribunal considered that there was insufficient evidence on which it could make a decision to the requisite standard of proof regarding this averment of misconduct. The joint minute contained no admissions with regard to a failure to comply with obligations under these Acts. The Respondent said he was "a bit vague" on the company structure and the checks he had undertaken to satisfy himself regarding identification of his client. However, this was not surprising given the passage of time and the absence of the files to support the Complainer's averment of misconduct. The standards of risk assessment and identification of clients by the profession have risen considerably in the last nine years. Now, the Tribunal would expect there to be documented risk assessments with regard to money laundering. However, in 2010, documented risk assessments were not as comprehensive. It would be expected that a solicitor verify the name and address of the client and the source of funds. The solicitor should consider the nature of the transaction and the means of the client. The solicitor should take measures to understand the ownership and control of legal persons. Now, the Tribunal would expect a change in the structure of a deal to be an indicator to a solicitor to look more closely at the transaction and the parties in order to satisfy him or herself regarding potential money laundering. The Tribunal accepted that the Respondent had dealt with the Mr A and these companies on many occasions over the years and that he would have known his clients well, particularly after the debt had been refinanced on at least two occasions with the Respondent's assistance. Based on the admission on the Joint Minute, the Respondent was correct to identify Mr A as the controlling mind of the group of companies and he had effective control of all of them. As the beneficial owner he would have to be identified and vetted. However, it was not clear what the Complainers alleged that the Respondent should have done and what it was alleged he had not done. The companies were all being run as one entity with one bank account. The relevant files were unavailable for the Tribunal to assess the Respondent's compliance with the relevant statutory

provisions. There was therefore insufficient evidence even to make an assessment that the Respondent might be guilty of unsatisfactory professional conduct.

Following submissions on expenses and publicity, the Tribunal decided that no expenses should be due to or by either party. Both parties had experienced partial success. The Tribunal made no criticism of the Complainer's decision to prosecute the case. The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent. The Respondent's partner is named in accordance with the Tribunal's obligations in paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. However, there was no requirement to identify any other person as publication of their personal data may damage or be likely to damage their interests.

Eric Lumsden

Vice Chairman