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

ERIC ROBERT LUMSDEN, Sneddon Morrison, Clydesdale Bank Chambers, 16 East Main Street, Whitburn

Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Eric Robert Lumsden, Sneddon Morrison, Clydesdale Bank Chambers, 16 East Main Street, Whitburn (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 25 March 2020 and notice thereof was duly served upon the Respondent

5. By Interlocutor of 26 March 2020, due to the outbreak of COVID-19 (Coronavirus) and government advice, the Tribunal on its own initiative sisted the case under Rule 44 of the Scottish Solicitors Discipline Tribunal Procedure Rules 2008. The procedural hearing fixed for 25 March 2020 was discharged. The sist was recalled by Interlocutor dated 22 May 2020.

6. In terms of its Rules, the Tribunal set a procedural hearing to take place by video conference on 6 July 2020 and notice thereof was duly served upon the Respondent.

7. At the virtual procedural hearing on 6 July 2020, the Complainers were represented by their Fiscal, Elaine Motion, Solicitor Advocate, Edinburgh. The Respondent was not present but was represented by William Macreath, Solicitor, Glasgow. On joint motion, the Tribunal continued the virtual procedural hearing to 10 August 2020 and fixed a virtual hearing for 7 September 2020. Notice thereof was duly served upon the Respondent.

8. At the virtual procedural hearing on 10 August 2020, the Complainers were represented by their Fiscal, Sean Lynch Solicitor, Kilmarnock. The Respondent was not present but was represented by Callum Anderson, Solicitor Advocate, Glasgow. On the unopposed motion of the Fiscal, the Tribunal continued the case to the virtual hearing fixed for 7 September 2020.

9. At the virtual hearing on 7 September 2020, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by William Macreath, Solicitor, Glasgow. On the Fiscal's motion, the Respondent having no objection, the Tribunal received an amended Record. The Fiscal accepted the Respondent's plea of guilty to the averment of misconduct contained at paragraph 3.65 of the amended Record and accepted the Respondent's pleas of not guilty to the averments of misconduct contained at paragraphs 3.66 to 3.68. Mr Macreath withdrew the Respondent's Answers. No evidence was led. Parties made submissions.

10. The Tribunal found the following facts established:-

10.1 The Respondent is a solicitor enrolled in Scotland on 17 September 1991. He has practised as a partner in the firm of Sneddon Morrison (SM) since 1 December 1993. He was:-

(i) the Client Relations Partner from 30 November 1995 until 1 June 2005

(ii) the anti-money laundering partner and cashroom partner from 01 August 2006 to date respectively.

10.2 At all relevant times narrated below the Respondent as a solicitor and as the designated AML and/or cashroom partner, was responsible for:-

(a) Complying with and/or ensuring compliance by SM with the anti-money laundering legislation including the Proceeds of Crime Act 2002 and

(b) Complying with and/or ensuring compliance by SM with the provisions of the Solicitors (Scotland) Accounts etc. Rules 2001 (the Accounts Rules).

10.3 The Council carried out an inspection of SM's books and records between 10-12 August 2015. In doing so they identified a transaction of concern to it in relation to the sale and Joint Venture Agreement (JVA) set out below.

a. By letter of 24 December 2010 the Respondent wrote to MW indicating that he had been passed her details by a property investment club and enclosed terms of business in relation to the sale of her home (the property). By letter of 18 January 2011 the Respondent sent MW a further terms of business letter. The second letter of engagement was sent as the first letter of engagement had not been signed and returned by MW.

b. By e-mail of 21 February 2011 Firm A, a legal firm based in the south east of England, instructed the Respondent to act in relation to a distressed borrower, MW in the sale of the property. The heading of the e-mail was "New Joint Venture instruction". A request was made to the Respondent to call "Darryl". No such call was made.

c. In essence the email comprised an instruction to the Respondent as follows:

(a) that the seller (MW) sold the house to SB;

(b) that MW would receive a 41% share in the property after sale plus £120,000;

(c) that Ms SB would borrow £147,749 from the National Westminster Bank (Natwest);

(d) the purchase price was £195,000.

d. By letter dated 02 March 2011 the Respondent sent MW a Disposition to consider and revert with questions or to return the document duly signed to him.

e. By email dated 10 March 2011 the Respondent wrote to MW enclosing copies of the JVA and the explanatory notes.

f. The email indicated that the JVA was *"simply a draft for any comments or observations by you"*.

g. In the letter the Respondent advised MW in relation to a standard insurance policy. That advice was that there would be *"a substantial risk"* involved in not having insurance. The risk was explained as follows: *"You have to be aware there is a substantial risk to you in not having the insurance in the event that the property, in particular, is repossessed or the Owner Investor otherwise defaults on the terms of the Agreement in circumstances which would be covered by the insurance and a payment made by the insurance company"*. The letter stated *"it would be our very strong advice that you should take out the insurance even if the premium is quite large"* and that *"by signing and returning the acknowledgement of the explanatory notes you were agreeing that we have advised you that it is in your best interests to have as much protection as possible, which would include the insurance policy"*.

h. That advice was tendered to MW in relation to the transaction encompassed in the JVA and prior to MW signing his firm's terms of business.

i. On 16th March the Respondent wrote to MW in the following terms

"Dear [MW]

Joint Venture Agreement

Thank you for returning the Terms of Business for the Joint Venture Agreement. I need to receive from you the signed acknowledgment on the

explanatory notes. For convenience, I have enclosed another set of the explanatory notes which I would be obliged if you could sign and return to me.

Yours sincerely
Eric R Lumsden

Enc Explanatory Notes"

j. The terms of business confirm that the Respondent was "*the principal person doing the work*" and called upon MW to "*advise us at the outset if you are aware of potential conflicts which may arise*".

k. In addition, the Respondent stated within the terms of business in clause 7:

'*We have not been involved in the negotiation of the terms of the Joint Venture Agreement. You wish to enter into the Joint Venture Agreement on the standard terms for such agreements and we will prepare the documentation on that basis. If there are any matters you require covered in the Agreement specifically you will confirm that in writing to us. You have made the decision to enter the Joint Venture Agreement after taking appropriate financial advice. You acknowledge that there are risks to you in entering the Agreement and that you may lose some or all of your money. You have been advised to take out insurance for this type of Agreement but have declined to do so. You confirm you understand the terms of the Agreement and accept the risks thereof*'. Clause 8 of the Letter of Engagement also provides under the heading "Proceeds of Crime" "*If we reasonably suspect, at any time, that any funds or assets which we are dealing with may be the proceeds of any criminal activity (e.g. from theft, drug dealing, tax evasions, benefit fraud etc) we are required under the Proceeds of Crime Act 2002 to make a report to the relevant authority. You cannot, by law, be informed of this. In the event that we require to make such a report this will require us to take no further actions for you for a period of seven days or until the authority authorises us to proceed, whichever is the earlier.*" Clause 4 of the terms of engagement

confirmed to the client that the Respondent could only act based on the information and instructions given by the client and there should be no assumption made by the client that the Respondent or any member of his firm knew something which has not been disclosed to them.

l. At the time of sending out said terms of business incorporating Clause 7 by the Respondent he had not met with MW nor in fact did he ever do so.

m. On 10 March 2011 the Respondent also wrote to the purchaser Ms SB sending her a copy of the JVA and a set of explanatory notes emphasising that he was not acting for her and that she should take independent legal advice.

n. Also on 10 March 2011 the Respondent wrote to MW with the redemption figure details. The letter said -

"*Dear [MW],*

[The Property]

We enclose a copy of the redemption figure provided by your lender. This is the amount that requires to be paid to the current lender when your transaction completes.

What if a payment is made between the date of the Redemption Figure and your Transaction Completing?

You must continue to pay your mortgage payments to your existing lender until your transaction is completed. If an overpayment is made the lender will have a procedure in place to reimburse the overpayment.

Insurance

Some lenders will automatically cancel any buildings insurance arranged through them on repayment of the mortgage. You should contact the

lender to discuss this and make any necessary alternative arrangements. It is your responsibility to arrange any necessary insurance.

What if you think that the Redemption Figure is incorrect or you believe you should be paying less.

The redemption figure is the amount which your lender has told us will be necessary to repay the existing mortgage with them. The figure may be higher than you expected because of:-

- *A product related charge, such as an early redemption penalty.*
- *The lender applying interest effectively one month in arrears which would mean that the redemption figure can be around one monthly payment greater than you expected.*
- *The lenders administrative and other charges, such as insurance, repayment formalities etc.*

Action Point

- *If you believe the amount stated as due is incorrect then please contact the lender directly and let us know. Please ask your existing lender to send us a new figure.*
- *Check the building's insurance position and arrange alternative insurance you require.*

Yours sincerely

Sneddon Morrison

Enc Copy redemption statement".

o. On 11 March 2011 the Respondent sent a further letter to MW with a draft insurance policy. He again gave advice to MW that she should seriously

consider obtaining said cover. It is believed that the draft insurance policy had been omitted from the letter of 10th March 2011.

p. On 14 March 2011, in terms of a telephone note of the Respondent, it is recorded that MW telephoned the Respondent complaining that "*no-one had spoken to [her] previously about the property insurance for the Joint Venture*". He then went on to provide his recommendation that MW should have this policy but the premium was, "hefty". The Respondent told MW to speak to VF. He followed this call up with a letter of 14 March 2011 to MW. VF was the contact at the property investment club. She was the person who dealt with the structure of the deal.

q. By letter dated 14 March 2011 the Respondent sent MW the offer received in relation to the sale of the property.

r. By letter of 15 March 2011 the Respondent sent the principal offer to MW for her safe retention.

s. On or around 16 March 2011 MW returned the terms of business relating to the JVA. The Respondent then asked her to send him signed confirmation that she had read and accepted the terms of the Explanatory Notes.

The Explanatory Notes stated:-

- That if the equity holder (ie. MW) sold the property before the end of the 10 year term then the benefit she would receive would be reduced on a sliding scale;
- That MW's name would "*not be on the Title Deeds themselves*".

t. By letter of 18 March 2011 the Respondent sent an amended offer to MW. The principal letter of amendment was sent under cover of the Respondent's letter of 21 March 2011.

u. On 22 March 2011 Firm A again wrote to the Respondent advising that they acted for Company B. That letter stated that "*a lender has provided a secured bridging facility to Ms SB ... an owner investor planning to enter into a Joint Venture in respect of the property*". They sent copy documents to the Respondent which had been sent to SB "*as evidence of the equity release that you will receive instructions to repay out of the Joint Venture completion monies*". They called upon the Respondent to issue an undertaking to send them £53,170 and they would arrange for funds to be released. They further indicated that "*Ms SB will undoubtedly give you instructions to repay her secured borrowings.*" The Respondent was to make the payment to Firm A with account details provided. No executed loan documentation was exhibited to the Respondent.

v. On 24 March 2011 property investment club sent a fax to the Respondent confirming that they were "*the packager of the Joint Venture and Trust Deed arrangement and that you have been instructed to draft on behalf of the equity holder Mrs MW*". They required him to "*take the signed authority by Ms SB to repay all sums over and above the repayment of the secured lending that you have been instructed to repay to the property investor*". He was required to provide an appropriate undertaking. That fax bore to have been signed by Ms SB although her signature is not dated.

w. Ms SB was the signatory of the mandate. Nonetheless the Respondent took no steps to verify in any way, manner or form whether or not this was a valid document and the signatory was indeed Ms SB. He made no contact with the solicitors instructed on behalf of Ms SB to seek such verification.

x. As at 24 March 2011 the Respondent was aware of apparent third party funding over and above Ms SB's mortgage lender. At all material times he was aware of the identity of the Scottish solicitor acting for Ms SB. On 24 March 2011 the Respondent e-mailed Firm A saying that he had "*now received instructions from Ms SB*" and that "*the secured lending is to be repaid from the sum she is receiving from the Joint Venture.*"

y. By e-mail of 25 March 2011 the Respondent confirmed with Firm A that "*the sum to be sent to [Firm A] is £53,170*".

z. The sale proceeds for the property were received by the Respondent on 25 March 2011, being a payment of £195,000 less £20 for the electronic transfer fee. Those funds were accepted prior to conclusion of missives. MW's mortgages were redeemed on 30 March and 1 April both 2011 respectively.

aa. At the date of settlement MW had not signed the JVA nor had Ms SB executed the Standard Security in favour of MW.

bb. At no time during the sale of the property did the Respondent make any disclosure, to Ms SB's agents, to enable them to report in terms of the Council of Mortgage Lenders handbook requirements, that a third party/ies who had provided the funding to enable Ms SB to purchase the property was then to be paid or had been paid the equivalent amount from part of the free proceeds of sale by the Respondent.

cc. At no time during the sale of the property did the Respondent make contact with:

a) The Serious and Organised Crime Agency (as was at that time) in terms of Section 330 of the Proceeds of Crime Act 2002;
b) Ms SB's Scottish solicitor to advise him of the instruction ostensibly received from his client, Ms SB;
c) Ms SB's solicitor to advise him of the JVA.

10.4 By e-mail of 28 March 2011 the Respondent e-mailed a completion statement to the property investment club indicating that he had £72,336.08 available and that he would send the first £53,170 to Firm A per Ms SB's instructions with the balance to come to the property investment club.

10.5 On 31 March 2011 the Respondent transferred £75,000 to the Joint Venture ledger and his firm took fees and outlays in relation to the sale of the property.

10.6 Two faxes issued by the Clydesdale Bank on 29 March 2011 confirmed that the Respondent had remitted £53,170 to MW and £19,166 to the property investment club.

10.7 By letter of 04 April 2011 the Respondent sent a cheque for £20,229.94 to MW being the balance due to her from the sale of the property. It also enclosed a cash account showing the make up of this sum which confirmed that £75,000 was paid to the joint venture.

10.8 The Standard Security by Ms SB in favour of the Respondent's client MW was signed on 14 April 2011 and was registered on 27 April 2011.

10.9 Said Standard Security was wanting in a number of respects namely:-

(1) It misstated the title of the Conveyancing and Feudal Reform (Scotland) Act 1970. The word "and" had been omitted.

(2) It referred to standard conditions in the Act as having been *"varied by the mortgage conditions"* but no conditions were attached to it.

(3) It bore to secure the debt due to MW together with *"any money, act or liability which may now or at any time in the future be due, payable or owed by the borrower to the lender"*; and it provided that the extent of the debt due could be determinable by *"a Certificate signed by a person duly authorised by the Lender to act on their behalf"* which *"shall conclusively ascertain the amount due to the Lender at any time"*. The lender is defined as MW.

The Respondent did not pick up on any of these points, nor provide advice to MW in relation to them. The standard security is registered in The Land Register of Scotland by The Keeper of The Land Register.

10.10 On 10 March 2011 the Respondent wrote to Mrs MW enclosing the JVA for subscription and return and stated that it was in order for her to sign the JVA as the sale had settled.

10.11 The JVA sent by the Respondent while substantially the same as that sent out originally to MW, did not contain a clause providing for its registration for preservation.

On 26 April 2011 the Respondent sent MW a receipted fee note in respect of *"all services rendered in connection with the JVA"*. The JVA was signed by MW on 28 April 2011. The work had been substantially completed. On 11 May 2011 the Respondent wrote to the National Westminster Bank plc (the Purchaser's Mortgage lender) with all relevant details to enable MW's Standard Security to be intimated and notified to them. It was acknowledged by National Westminster Bank plc on 20 May 2011.

10.12 The ledger for the sale of the property records that;

a) the sale proceeds were received on 25 March 2011
b) MW was paid £20,229.94 on 4 April 2011
c) £75,000 was transferred to MW's JVA ledger

10.13 The ledger for the JVA records that on 29 March 2011 the Respondent paid £53,170 to Firm A and £19,166.08 to the property investment club.

10.14 The purchaser, SB received a copy of the RICS valuation for the property which confirmed the value of it at £230,000. SB did not pay the deposit herself. It was paid by a third party vehicle to her solicitors who then made payment to the Respondent's firm.

11. Having considered the foregoing circumstances, the Tribunal found the Respondent not guilty of professional misconduct in respect of the averments of misconduct contained in paragraph 3.65(1) and (2)(a)-(e) of the amended Record. It declined to remit these matters to the Law Society for consideration of unsatisfactory professional conduct under Section 53ZA of the Solicitors (Scotland) Act 1980.

12. The Tribunal found the Respondent guilty of professional misconduct in respect of the averments of misconduct contained in paragraph 3.65(2)(f) and (3) of the amended Record in respect that:-

(a) He failed to advise of the risks and implications for MW in the sale of the property at the JVA in that he failed to advise that he had been requested to give and had given undertakings to make two payments from MW's ledgers totalling more than £70,000 to two third parties; and

(b) He failed to make a required disclosure in terms of Section 330 of the Proceeds of Crime Act 2002 in respect of the circumstances of the sale of the property and the subsequent buy back from the purchaser by his client of an interest in the equity thereof, including the disbursement of part of the free proceeds of sale to third parties, namely a property investment club and Firm A in circumstances where he ought reasonably to have known or suspected that another person or persons was or where engaged in money laundering in the context of the cumulative instructions. He failed in these circumstances (a) to advise the purchaser's Scottish solicitor of the contact with their client and (b) to make enquiries from the purchaser's Scottish solicitor as to the source of their client's deposit.

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

By Video Conference, 7 September 2020. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Eric Robert Lumsden, Sneddon Morrison, Clydesdale Bank Chambers, 16 East Main Street, Whitburn; Find the Respondent guilty of professional misconduct in that (a) he failed to advise his client he had been requested to give and had given undertakings to make two payments from her ledger totalling more than £70,000 to two third parties and (b) he failed to make a required disclosure in terms of Section 330 of the Proceeds of Crime Act 2002 and failed to advise the purchaser's Scottish solicitor regarding the contact with their client or make enquiries of the purchaser's Scottish solicitor regarding the source of their client's deposit; Censure the Respondent; Fine him in the sum of £1,000 to be forfeit to Her Majesty; Find the Respondent liable in the expenses of the Complainers and of the

Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

[redacted]

(signed)

Benjamin Kemp

Acting Vice Chair

14. 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 30 OCTOBER 2020.

IN THE NAME OF THE TRIBUNAL

[redacted]

Benjamin Kemp

Acting Vice Chair

NOTE

At the Hearing on 7 September 2020, the Tribunal had before it the amended Record (lodged on the morning of the hearing); a List of Witnesses for the Complainers; a List of Witnesses for the Respondent; five Inventories of Productions for the Complainers; five Inventories of Productions for the Respondent; a Joint Minute of Admissions; a Note containing the agreed plea; and six valuations for the property (lodged on the morning of the hearing). During the course of the hearing, the Respondent's agent also submitted a letter from NatWest to the Respondent dated 20 May 2011. The Fiscal had no objection to the Tribunal considering this document.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal acknowledged the cooperation given by the Respondent and Mr Macreath to reach agreement of evidence and the admitted position before the Tribunal. He referred the Tribunal to the extensive Joint Minute agreeing the facts.

With reference to paragraph 3.65(1) of the amended Record, the Fiscal noted that the Respondent's client was a distressed borrower vulnerable to exploitation. The Respondent now accepts that a solicitor cannot restrict the scope of his retainer. The Respondent's client had no previous connection to him. She was referred by English solicitors as part of a pre-packaged arrangement. In these circumstances, it was not sufficient to rely on terms of business or signed explanatory notes. The Respondent accepts he had a duty to explain the import of the documents on the Joint Venture Agreement (JVA) and explore alternatives, such as those in the Mortgage Rights (Scotland) Act 2001 and Home Owner and Debtor Protection (Scotland) Act 2010. There was a likelihood that the client would have been able to sell the property for full value. The client received £20,000. However, according to the Fiscal, if she had sold the property at the price paid by the buyer in a straightforward sale, she would have received £95,000. If the property had been sold at full value, she would have received £135,000.

Paragraph 3.65(2) of the amended Record was broken down into six sub-sections. The Fiscal said the real problem in relation to (a) was not so much re mortgaging as taking further advances. The Fiscal noted that the Respondent had by letter of the 3 May 2011 put NatWest on notice of his client's standard security. However, there did not appear to be any response from them. There was no ranking agreement and a lack of protection for the client. In relation to (b), the Fiscal noted that the client was not protected from the buyer defaulting on the borrowing. Foreclosure was not attractive because of the equity share

arrangement described at (c). When £75,000 was paid for a 41% share, the value of the equity was £47,000. The Fiscal referred to Donald Reid's reports at Productions 21 and 22 in the Respondent's 4th Inventory of Productions. He directed the Tribunal to the summary at (a) to (h) on pages 4 to 5 of Production 21. The Fiscal noted that the Respondent had provided internet valuations of the property ranging between £257,000 and £327,000. It is not a foregone conclusion but it is likely the client will make a return on her initial investment. With reference to paragraph (f), the Fiscal noted that the Respondent failed to advise her that he had been requested to give and had given undertakings to make two payments from the client's ledgers totalling more than £70,000 to two third parties. The Respondent accepts it was not appropriate to treat the transaction as being on an execution only basis. However, if he had explained the other possibilities to the client, he might not have received any further instructions from the referrers.

With reference to paragraph 3.65(3) of the amended Record, the Fiscal noted it was a matter of agreement that by 24 March 2011, the Respondent was aware of third party funding over and above that from the buyer's lender. There was a 'red flag' in the initial instruction because the buyer was borrowing more than she was paying. The Fiscal said this could have been overlooked at that stage. However, by 24 March 2011, the Respondent certainly knew about it. The Fiscal noted that in terms of paragraph 3.65(3) of the amended Record, the Respondent accepted he had failed to make a disclosure to the purchaser's agents and to the Serious and Organised Crime Agency (SOCA).

The Fiscal referred to Law Society of Scotland-v-James Craig and Law Society of Scotland-v-John Lints. He also quoted extensively from paragraph 9.38.01 of Paterson & Ritchie's *Law, Practice and Conduct for Solicitors* headed "Revolving Deposits". He said the following section was critical:-

"Of course the essence of fraud is deception. If the true circumstances are made known to a lender and they still lend, there would be no fraud and therefore no criminal property. From the selling agent's perspective, they have no relationship with the purchaser's lender and do not need to inform them about third party mandates. The duty is to inform the agents acting for the buyer."

The Fiscal informed the Tribunal that there were no previous findings to place before the Tribunal. He also said there were no pending matters.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath highlighted that the transaction in question had taken place in 2011. It was discovered by the Complainers following a routine inspection in 2015. The Respondent provided full cooperation to the Law Society and its Sub Committees. Papers were remitted to the Regulation Department in November 2016 but the Professional Conduct Sub Committee only made a decision in 2019. The delay has placed huge stress on the Respondent. Mr Macreath said the Fiscal's cooperation had been very helpful in an anxious case.

Mr Macreath referred to the development of the law in this area. Firstly, he referred to Lord Jauncey's Opinion in Clark Boyce-v-Mouat [1992] 2 NZLR 59 in which it was said that the extent of the duties on a solicitor depend on the retainer and what the solicitor was instructed to do. Solicitors are under no duty to go beyond their instructions by offering unsolicited advice. However, according to Mr Macreath, the law has moved on in the last 25 years. Solicitors cannot wholly rely on their retainers. While there is no duty to volunteer legal advice which is not sought or paid for by the client, if that client is in full command of their faculties, sometimes a solicitor is under a duty to do more. Mr Macreath referred to Credit Lyonnais SA-v-Russell Jones and Walker [2002] EWHC 1310 and the "rotten tooth analogy" whereby if a dentist on looking into a patient's mouth notices an adjacent tooth in need of treatment, it is his duty to warn the patient. Similarly, if a solicitor notices or ought to notice a problem or risk for the client, the solicitor must advise only those risks. In Mortgage Express-v-Bowerman [1996] 2 ALLER 836, if a solicitor comes into possession of information of significance to the client, the client would reasonably expect him to pass it on. A solicitor should report back on issues of concern, for example in this case, the third party payments.

On the basis of Donald Reid's first opinion prepared for the Client Protection Sub Committee, the Respondent argued there was an express retainer. However, he now accepts that he ought to have been aware of the risk and advised the client accordingly. The client was a distressed seller. Her affidavit demonstrates she was in a vulnerable position and in need of advice. A solicitor must bear in mind the fiduciary duty to the client and have a single minded loyalty to that client. These concepts are not without difficulty, but drawing all that together, it is not illegitimate of itself to limit the scope of a retainer in the terms of engagement as the Respondent attempted. However, the limitation needs to be clearly spelled out and explained in context to a lay person such as this client. Detailed explanatory notes were submitted. However, there was a "rotten tooth duty" to warn the client this was something she might not want to proceed with and there were other avenues. She was under pressure. This could have been dealt

with by a straightforward scope letter setting out the advantages and disadvantages of the transactions. The first consideration would have been whether the client could sell the property then for more than £195,000. The lender would have been obliged to allow time to sell. Instead, the client got £120,000. £100,000 was to pay off her loan and she received £20,000 and a 41% interest in the property. Mr Macreath referred to the online reports he had lodged regarding the value of the property. These range from £250,000 to well over £300,000. The hope is that the client will receive her money when the property is sold.

Mr Macreath said in his view the retainer did include an explanation on the import of the deeds that the client was granting or receiving. Lord Jauncey's statement is still the law but it has evolved dramatically over the years. The Respondent was under a duty to explain where the deeds fitted in and the consequences and rights conveyed by the deeds granted within the context of the overall contract. Mr Macreath drew an analogy with solicitors acting for clients after they have signed articles of roup following an auction.

Mr Macreath said that the Respondent has always recognised that a report ought to have been made to SOCA. Mr Macreath referred to Law Society-v-James Craig as being similar to the circumstances of this case. Mr Craig was an experienced agent. There were three transactions in a chain. Mr Craig had not fully comprehended the full picture. He thought the lender was aware of the situation but failing to submit the report to SOCA was "a serious error".

Mr Macreath highlighted that this Complaint was raised *ex proprio motu* by the Law Society. No other party made any complaint. There have been no further issues arising. Mr Macreath accepted that there would be a body of solicitors who would have reported the matter to the purchaser's agent. However, the Respondent did make notification to NatWest on 3 May 2011 and they responded by letter of 20 May 2011. This letter was not contained in the Productions lodged with the Tribunal but was contained in the Joint Venture file. The Fiscal having no objection, this letter was provided to the Tribunal. The Chair confirmed with Mr Macreath that the correspondence with NatWest dealt with the lender's awareness of the standard security but not the third party funding.

A member asked about the restriction on the scope of the instructions. She noted there was correspondence in the papers and in the terms of engagement that the Respondent had not been involved in the negotiation of the terms of the JVA. She asked whether it had been established whether that advice had been given by anyone else, including the English solicitors. Her concern was the situation regarding

restriction of retainers could become circular. If a solicitor has to set out the implications of something, they will have to read and consider it carefully. They will have to spend time investigating the matter they wish to exclude. To say they had to do that in order to restrict the scope effectively seemed to go beyond what was required. Mr Macreath referred the Tribunal to Donald Reid's opinions. Firm A were solicitors in Ramsgate. The purchaser borrowed against her home. Two payments had to go back to Firm A and Company B. The concern is what advice was given to the Respondent's client at the stage when she entered that agreement. It is impossible to find out, other than from the client herself, the extent of the advice she received. Mr Macreath said he shared the member's concern. Where does the scope of a terms of engagement letter end? It might never end. However, in this case the third party payments were a red flag. Any solicitor of competence and repute would have asked why she was selling her property to receive £120,000 in the hope that £75,000 might come to her at a future date. It was clear she did not understand she would have to wait for 10 years. Mr Macreath and the Fiscal confirmed they did not know who advised the client. The Fiscal noted there was no evidence before the Tribunal of any advice having been given.

Another member asked if a 'red flag' appears and there is a financial implication for the client, who should give that advice? Mr Macreath said if a solicitor knows of third party payments, the solicitor is under a duty to explain this to the client and consider whether the transaction was in her best interests. How far that goes depends on the commercial sophistication of the client. She ought to have been told she was paying £75,000 for a 41% share which at that stage was worth less than £20,000. She did not need a financial advisor to tell her that. The Respondent ought to have made that clear.

The member noted that the deal had pros and cons. It was not in black and white terms "a bad deal". Mr Macreath said the issue for the Tribunal, standing the Craig case, was the best interests of the client. The client was unsophisticated. The Respondent did not meet her face to face. She needed a letter describing her options, for example, negotiation with the lender for a sale on a structured basis with a view to getting more money immediately in her hand. The Fiscal said that on any reasonable reading of Donald Reid's opinion, the cons outweighed the pros. He noted the Tribunal had not had the opportunity to hear from Mr Reid. The purpose of the report was to persuade the Law Society not to take the prosecution. It therefore did not have the status of an independent report prepared by an expert for the Tribunal.

A member noted the cases referred to in Paterson & Ritchie post-dated this transaction. He asked what guidance was in place for solicitors at the date of the transaction. The Fiscal said there was an article in the Journal of the Law Society of Scotland in 2009. There was also discussion of this point (the obligation

of the solicitor in relation to unusual or suspicious conveyancing transactions of this sort) in the Craig case. In that case, there were three transactions which were part of a series of five in 2010 and 2011. The view of the Tribunal in 2014 was that in 2011, an experienced solicitor should have been fully aware of the possible concern in relation to irregular/ unusual funding arrangements of this sort, including so-called 'revolving deposit schemes', and reacted to them.

The Chair noted that parties had not provided the 2009 article in the Journal of the Law Society of Scotland. The Fiscal referred the Tribunal to its views on the article in Law Society-v-James Craig. Mr Macreath noted that the article is also referred to in Donald Reid's opinion along with other articles.

DECISION

The Tribunal was satisfied beyond reasonable doubt that the Respondent had acted according to the facts agreed in the Joint Minute and it used these as the basis for its own findings in fact. The Respondent admitted that he was guilty of professional misconduct in the terms set out in paragraph 3.65 of the Record as amended. However, as the parties acknowledged, and has frequently been stated by this Tribunal, it is the Tribunal's role to determine whether admitted facts constitute professional misconduct. Section 53 of the Solicitors (Scotland) Act 1980 contains the Tribunal's powers. Section 53(1)(a) provides that those powers are exercisable if after an inquiry into a complaint against a solicitor the Tribunal is satisfied that he has been guilty of professional misconduct (emphasis added). If the Tribunal accepts pleas of guilty without holding an inquiry and satisfying itself with regard to professional misconduct, standards of conduct for the profession would be set not by the Tribunal, but by agreement of parties in individual cases. This would create difficulties where parties entered into a plea of convenience or if conflicting pleas were accepted in different cases.

The Tribunal considered the test for professional conduct contained in Sharp-v-Council of the Law Society of Scotland 1984 SLT 313. It provides that:-

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

whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is to be made."

The Tribunal considered a solicitor's duties in the light of the agreed facts. A solicitor must act in his or her client's best interests. A solicitor must give independent advice free from external influences. A solicitor must communicate effectively with his/her client.

The Tribunal considered the development of the case law of professional negligence described by Mr Macreath. It also had regard to Law Society-v-James Craig and the related cases of Lints, McCusker and Tulips. These Tribunal cases were not binding precedents on this Tribunal and those cases involved transactions which were more obviously suspicious than the circumstances in the present case. References to the profession being aware of these types of transactions have to be seen in that context.

The first part of the agreed plea related to the advice the parties agreed the Respondent ought to have given to his client. The second part of the agreed plea related to the Respondent's failure to advise his client of the risks and implications of the sale of the property and the JVA.

Between February and April 2011, the Respondent acted as agent for his client who was party to a series of transactions involving the sale of her property and the purchase by her of an interest in that property. In the knowledge she was a distressed borrower, the Respondent did not advise her of the alternatives to the JVA. The Tribunal considered that there were circumstances where a solicitor ought to do this. Indeed, even in this case, it might have been considered best practice.

There was evidence in the client's affidavit that she was experiencing financial difficulties. However, there was no evidence before the Tribunal that the loan was in danger of being called up by the lender. It was not obvious that the Respondent ought in the circumstances to have advised the client on possible statutory protections available to her in the event that the loan was called up.

The Tribunal noted the parties' agreed position that the Respondent owed a duty to provide advice on alternatives to the client. However, the client did not come to the Respondent looking for options. She was referred by other solicitors and this was a "pre-packaged" deal in which the Respondent was asked to perform what had already been agreed by the parties. This is not comparable to circumstances where a client seeks advice of new on his or her options or even a particular course of action. In those circumstances a "rotten tooth duty" may exist. However, in this case, the client may not have thanked

the Respondent for unsolicited advice provided after the terms of business set out his remit very clearly. The client indicated that she had received financial advice on the JVA. Best practice might have been for the Respondent to provide more detail on the available options but in these circumstances, it did not consider the failure to do so to be a serious and reprehensible departure from the standards of competent and reputable solicitors.

The Respondent did give advice independent from external influences. It could not be said that he did not act in the client's best interests. He did communicate effectively with her. Advice was tendered to the client on more than one occasion about the desirability of an insurance policy. The Respondent was clear that there was a *"substantial risk"* to her if the property was repossessed or the purchaser defaulted on the terms of the agreement. The Respondent's Terms of Business clause 7 noted that the Respondent had not been involved in the negotiation of the JVA and that the client had made the decision to enter it after taking appropriate financial advice. Clause 7 also provided that there were risks to the client in entering into the agreement and that she *"might lose some or all of her money"*. The explanatory notes provided to the client noted that if the property was sold before the end of the 10 year term, the benefit she received would be on a sliding scale and that the client's name would not be on the title deeds.

The parties' position was that in addition to this, the Respondent ought to have provided a specific scoping letter or included more detailed provision in the Terms of Business. In the Tribunal's view, the Terms of Business were fairly advanced for 2011. There was an attempt to set out the scope of the work. The Respondent did more than some solicitors would have done at this time. The Tribunal had regard to the time when this transaction occurred. In 2011, the country was recovering from recession. Unscrupulous parties took advantage of many distressed borrowers. The level of awareness among solicitors of these deals was not yet high however and the conduct ought not to be judged by 2020 standards. The Tribunal noted that the deal had some advantages for the client, although there were also significant disadvantages. It is not possible to say on the evidence and agreed facts before the Tribunal that the transaction was not in the client's best interests. She was able to repay her mortgage, receive a cash payment and keep a form of investment in the property. There was no evidence the Respondent did not consider the deal to be in her interests. He did warn her of the risks. The deal, while unusual and risky, was not doomed to be unsuccessful from the client's point of view. Indeed, as property prices currently stand, it looks likely that the client will make a return on her investment. The JVA arrangement was out of the ordinary but on the surface it could have appeared plausible. In 2020, solicitors might find this type of arrangement more worrying, having seen people lose out in such arrangements following the 2008 recession. Much of the guidance on these kinds of agreements post-dates this transaction.

Coming out of the recession it could have been plausible to the Respondent that this unusual arrangement was above-board and in the client's best interests by allowing her to release equity in her property and potentially stay in her home, or to move somewhere cheaper while maintaining an interest in the property. Nowadays, solicitors would be expected to take a much more critical approach to these kinds of transactions.

However, the Tribunal did have concerns regarding the conduct referred to at paragraph 3.65(2)(f) of the amended Record. The Respondent failed to advise that he had been requested to give and had given undertakings to make two payments from the client's ledgers to third parties. It is never acceptable to pay a client's money to a third party without the written instruction of the client. Clients and the public must have confidence that solicitors will deal properly with their money. It was not enough to rely on the spirit of the JVA particularly when at that stage it had not been signed. The importance of transparency when handling clients' money has been fundamental for many years. Paying off a purchaser's loan (particularly when acting for the seller) is very unusual and should have raised suspicion. Any payments to the purchaser ought to have been paid to her solicitor. The client's money was sent out without express authority of the client. The Respondent took no steps to verify the purchaser's mandate. This created a risk for the client. There was a need for an informed instruction from her. This conduct was a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore constituted professional misconduct.

According to the averment of misconduct at paragraph 3.65(3) of the amended Record, the Respondent failed to make a required disclosure in terms of Section 330 of the Proceeds of Crime Act 2002. He failed to advise the purchaser's agent about his contact with the purchaser and did not make enquiries with them about the source of their client's deposit. The property investment club provided a mandate from the purchaser which bore to be signed by her. The Respondent took no steps to verify this document. He was aware of apparent third party funding over and above that provided by the purchaser's lender. He ought in the circumstances to have disclosed this arrangement to the purchaser's solicitors and to SOCA. It was unclear whether the purchaser's lending bank was aware of the additional third party funding and source of purchase deposit. It seems likely that they were not. The Respondent did not make the required disclosures to the purchaser's solicitors or SOCA, which was a significant error of judgement. Making these disclosures is essential in the prevention of money laundering. It is essential that the public can have confidence that the profession will adhere to anti-money laundering provisions which exist to protect society from criminal acts. The Tribunal considered the failure to make the

disclosures to be a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore constituted professional misconduct.

The Tribunal considered the conduct at paragraphs 1 and 2(a) to (e) of the agreed plea. Having decided that the Respondent was not guilty of professional misconduct, the Tribunal was obliged to consider if he might be guilty of unsatisfactory professional conduct. Unsatisfactory professional conduct is professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor. The Tribunal considered that in relation to these averments of misconduct, a competent and reputable solicitor in 2011 may have acted as the Respondent did. Therefore, the Tribunal declined to remit the Complaint to the Council of the Law Society of Scotland under Section 53ZA of the Solicitors (Scotland) Act 1980.

SUBMISSIONS IN MITIGATION

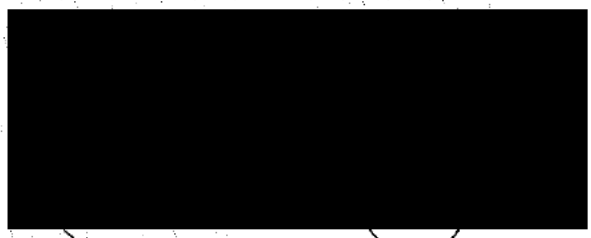
Mr Macreath noted the Respondent was highly experienced and competent. Like many conveyancing solicitors he would be more aware of potential issues when acting for the purchaser. The Respondent committed an omission of analysis in an unusual transaction and the level of culpability was relatively modest. He submitted that the case was similar to the Law Society of Scotland-v-James Craig. The Respondent has had a lengthy career without blemish. There is no risk of reoccurrence and the public and profession are not at risk. The Respondent has had cause to reflect and has substantial insight into his conduct. The finding itself is the matter which will weigh most heavily on him. Mr Macreath provided details of community roles undertaken by the Respondent. He described the Respondent's family and business situation. He is highly regarded by fellow professionals as was demonstrated by the references produced on the Respondent's behalf.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal noted that the established misconduct went to the heart of fundamental professional duties, namely client money and anti-money laundering. However, it also had regard to the fact that the Complaint was about one transaction in an otherwise unblemished career. The Tribunal considered the Respondent's conduct was not so serious as that in Law Society of Scotland-v-James Craig. The transactions in that case were much more organised and obviously suspicious. The Respondent in the present case was naïve and misguided but he was not organising or complicit in a scam. He was too passive but there was no dishonesty or lack of integrity. The Respondent was said to have reflected on

his conduct and had insight into what went wrong. The Tribunal was persuaded the conduct was unlikely to be repeated. The appropriate sanction in these circumstances was a censure and a fine of £1,000.

The Fiscal moved for the usual orders on publicity and expenses. Mr Macreath had no objection. The Tribunal found the appropriate award of expenses was one in favour of the Complainers. The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent and his firm. 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. There was some criticism made of this type of transaction during the course of the hearing, but the clubs, firms and companies involved had no opportunity to address the Tribunal regarding their actions. Therefore, they have also been anonymised. MW was not a Secondary Complainer and the Complaint was brought by the Complainers *ex proprio motu*.



Benjamin Kemp

Acting Vice Chair