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

F I N D I N G S

in Complaint

by

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

against

NORMAN DOUGLAS PATON CATHCART, residing at "Orotava", Knockbuckle Road, Kilmalcolm, Inverclyde

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Norman Douglas Paton Cathcart, residing at "Orotava", Knockbuckle Road, Kilmalcolm, Inverclyde (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There is no Secondary Complainer.

3. In accordance of the Rules of the Tribunal, 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 appointed the Complaint to be heard on 29 August 2014 and notice thereof was duly served on the Respondent.

5. When the Complaint called on 29 August 2014, the Complainers were represented by their Fiscal, Elaine Motion, Solicitor Advocate,

Edinburgh. The Respondent was present and represented by Ian Ferguson, Solicitor, Glasgow.

6. A Joint Minute was lodged admitting the averments of fact, averments of duty and averments of professional misconduct in the Complaint as amended. The Tribunal agreed to allow the amended Complaint to be lodged and interponed authority to the Joint Minute. Ms Motion lodged a bundle of authorities.

7. The Tribunal found the following facts established:-

7.1 The Respondent is a solicitor enrolled in the Registers of Solicitors in Scotland. He was enrolled as a solicitor on 30 January 1976 and was a Principal in private practice from 1 January 1977 until 11 March 2014. He was a Partner in Campbell Cathcart, solicitors from 6 April 1994 until 11 March 2014. As from 10 May 1999 he was the designated cash room partner and as from 13 November 2006 the designated Anti Money Laundering Partner for that firm both until 11 March 2014. On 11 March 2014 Mr Cathcart was suspended from practice as a solicitor for a period of 3 years in terms of an Interlocutor of the Inner House of the Court of Session of 11 December 2013 (implementing a revised decision of the Scottish Solicitors Discipline Tribunal dated 23 January 2013).

<u>COUNCIL OF THE LAW SOCIETY OF SCOTLAND – MR A – PROPERTY 1</u>

7.2 On 2 September 2008 the Respondent acted on behalf of Mr A in relation to the purchase of property at Property 1 (the transaction). He also acted for Birmingham Midshires (BM) in relation to the transaction and the offer of a loan of £90,000 as against the purchase price of £125,000.

7.3 By letter of 27 August 2008 the Respondent was instructed by BM to act on its behalf in relation to the transaction and the offer of loan set out in the preceding paragraph. In doing so, the Respondent was instructed in accordance with the CML Lenders Handbook for Scotland and Part 2 instructions. Said Lenders Handbook and Part 2 instructions (the edition in place at the time December 2006) set out:-

(i) *If there is any conflict of interest, you must not act for us and must return our instructions*. (1.15)

(ii) *If you need to report a matter to us, you must do so as soon as you become aware of it so as to avoid any delay. If you do not believe that a matter is adequately provided for in the [CML] Handbook, you should identify the relevant [CML] Handbook provision and the extent to which the matter is not covered by it. You should provide a concise summary of the legal risks and your recommendation on how we should protect our interest. After reporting a matter you should not complete the mortgage until you have received our further written instructions…* (2.3)

(iii) *Solicitors must follow the current Solicitors (Scotland) Accounts Rules and, to the extent that they apply, comply with the Money Laundering Regulations 2007… and the Proceeds of Crime Act 2002…* (3.1)

(iv) *Please report to us if the proprietor has owned the property for less than six months, or the person selling to the borrower is not the proprietor, unless the seller is: a personal representative of the proprietor; an institutional heritable creditor exercising its power of sale; a receiver, trustee in sequestration or liquidator; a developer or builder selling a property acquired under a part-exchange scheme.* (5.1.1)

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

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

(vii) *If you are aware that any transaction of the title to the property may be open to challenge as a gratuitous alienation or an unfair preference, then you must be satisfied that we will acquire our interest in good faith and will be protected under the relevant statutory provisions against our security being set aside. You must also obtain clear personal searches against all parties to any such transfer…(*5.10.3)

(viii) *You must tell us (unless we say differently in Part 2) if the Missives provide for…. a cash-back to the buyer, or part of the price as being satisfied by a non-cash incentive to the buyer*….(6.3.1)

(ix) *You must report to us… if you will not have control over the payment of all the purchase money (for example, if it is proposed that the borrower pays money to the seller direct)*

other than a deposit held by an estate agent or a reservation fee of not more than £1,000 paid to a builder or a developer. (6.3.2)

(x) *You should not submit your Certificate of Title unless it is unqualified or we have authorised you in writing to proceed notwithstanding any issues you have raised with us*. (10.1)

(xi) *We shall treat the submission by you of the Certificate of Title as a request for us to release the mortgage advance to you*. (10.2)

(xii) *You are only authorised to release the loan when you hold sufficient funds to complete the purchase of the property and pay it all stamp duty, land tax and registration fees to perfect the security forthwith as a first charge or, if you do not have them, you accept responsibility to pay them yourself. You must hold the loan on trust for us until settlement….(*10.3)

7.4 By e-mail of 28 August 2008, the Respondent advised Mr A that he had received an offer of loan from BM for the transaction.

7.5 By letter of 2 September 2008, the Respondent intimated interest on behalf of Mr A to Company 2, the selling agent, for the transaction. By letter of 4 September 2008 the Respondent wrote to Company 2 referring to a recent telephone conversation and stating that he understood Mr C would be instructed to transfer the property to an Mr D, a director of Company 1. The Respondent sought confirmation of this.

7.6 On 4 September 2008 the Respondent e-mailed a Mr B in respect of the transaction. He was not the client and had no involvement in the transaction. He also advised Mr B that Mr C of Company 2 had informed him that the remaining four properties within the

development were to be transferred to joint venture partners and that Mr C had prepared a Disposition which would state that the transfer was a result of work carried out at the development. The Respondent recognised in this e-mail that this would present a difficulty insofar as the offer of loan was concerned from BM as it proceeded on the basis that Mr A was to pay £125,000 for the property. The e-mail indicated that in terms of the instructions from BM and his CML obligations, the Respondent was obliged to disclose if the balance of the purchase price was not being paid to him for transfer to the sellers at settlement. He asked "if the intention is that Company 1(?) were to take the title" and then "sell" to Mr A and "we will need to discuss this".

7.7 By e-mail of 5 September 2008 (9.16am) from Mr D to the Respondent, copying in Mr A and Mr B, Mr D sought an update with the "buy to let mortgage" indicating it was a matter of "urgency". The Respondent replied by email on 5 September 2008 (9.25am) only to Mr D and attached the email referred to in the preceding paragraph asking him to call him "if you wish to discuss". The Respondent did not report any of the above to BM. Mr D was not a client of the Respondent in this transaction.

7.8 By letter of 8 September 2008 Company 1 confirmed the transfer to Mr D; enclosed a draft Disposition he intended to use and asked the Respondent to note the consideration to be paid. The draft Deed stated that the property was to be transferred "in a consideration of work done to the value of …£90,000".

7.9 The next document on the Respondent's file comprised a printout of the CML Lenders Handbook for BM as printed by the Respondent on 9 September 2008. Said document was highlighted in relation to parts 4.1.1; 5.1.1; 5.8; 6.3.1; 6.3.2; and 6.6.4 by the Respondent. In addition the Respondent held a Mortgage Valuation Report dated 15 August 2008 on Mr A's

file. The valuation was prepared by Company 3 which valued the property at £120,000.

7.10 The Respondent then proceeded to draft a Disposition from Mr D in favour of Mr A. The price stated in the Disposition drafted by the Respondent was £120,000.

7.11 On 16 September 2008 the Respondent signed off the unqualified Certificate of Title and sent this by letter of the same date to BM. The price stated in the Certificate of Title for the transfer was £125,000. The Certificate of Title indicated settlement would take place on 17 September 2008.

7.12 By e-mail of 16 September 2008, the Respondent contacted Mr A enclosing a State for Settlement confirming that £36,286.88 was required to settle the purchase on his behalf based on a purchase price of £125,000. He was requested to call at the Respondent's office on 17 September 2008 to sign the Security.

7.13 On the same date, namely 16 September 2008, the Respondent sent an e-mail to Mr D, "the seller". That e-mail requested £100 to register the link in title from Company 4 to him. It also confirmed an appointment with Mr D to attend the Respondent's office to sign the Disposition transferring the title in favour of his client, Mr A.

7.14 As at 17 September 2008 Mr A and Mr B were directors of Company 4. Mr A, Mr B and Mr D are all related.

7.15 On 17 September 2008, the Respondent received and initialled a credit entry for £35,000 from "Company 5" comprising part of the balance of the purchase price for the transaction. There is no information on file to show the Respondent investigated the source of said funds. On the same date he received the loan funds

from BM. He did not advise BM that part of the funds for the purchase price had been provided by a third party. Instead he proceeded with the transaction.

7.16 On 17 September 2008 the executed Disposition by Company 5 in favour of Mr D was delivered to the Respondent.

7.17 On 17 September 2008, the date of settlement, Mr D (not the client purchasing), instructed the Respondent's firm to remit the net sale proceeds for the transaction as follows :-

(a) £67,500 to a Mr E;
(b) £35,000 to Company 5.
(c) The remaining sale proceeds, less bank charges incurred by Chaps Transfer, to Mr D's own account.

Said instructions were in a hand-written, unsigned letter and then a typed and signed letter, both of the same date. BM was not advised of information/instruction set out above.

7.18 On 18 September 2008 the Respondent, in implementation of this mandate, transferred £67,500 to a Mr E. On the same date, £21,473.12 was transferred from Mr A's account to Mr D's account. No investigation was carried out by the Respondent.

7.19 On 19 September 2008 the Respondent, again in implementation of said mandate, transferred £35,000 to Company 5. Again no investigation was carried out by the Respondent.

7.20 The ledger card for Mr A inter alia indicates that the total sums held prior to the purchase were £124,965 for the purchase price of £125,000. It also shows the transfers out in terms of an apparent implementation of the mandate of Mr D, an individual not the client of the Respondent, for this transaction.

Accordingly, the purchase price was neither paid to any solicitor nor all to Mr D. Funds were simply transferred by the Respondent to Mr D's nominated beneficiaries amounting to £102,500 plus the £21,473.12 to Mr D. That included repayment to Company 5 of the balance of the purchase price of £35,000. The total sum therefore paid in relation to the transaction was £123,543.49, not £125,000. There was no authority from Mr A to make said payments.

7.21 In terms of the HMRC Land Transaction Return (IMS6/05) dated 18 September 2008 and signed by Mr A, the Respondent indicated that his firm were agents for Mr D confirming a consideration of £90,000.

7.22 The Disposition granted by Company 4 in favour of Mr D as executed confirmed the transfer to Mr D in return for works carried out to the value of £90,000. The date of entry was noted as being 17 September 2008. The Disposition granted by Mr D in favour of Mr A confirmed that the property had been transferred in return for the sum of £125,000. The date of entry was also 17 September 2008.

7.23 As at settlement, the Respondent's file disclosed that he had failed to advise BM:-

(1) that the mid purchaser, Mr D, had owned the property for less than 6 months prior to the date of the sale to Mr A;

(2) that in fact the transaction in favour of the mid purchaser settled on the same day as the purchase by Mr A;

(3) that the mid purchaser was granted a Disposition in his favour not in exchange for a purchase price but "in consideration of work done";

(4) that all parties involved in the sale; mid purchase and purchase were known to each other ;

(5) that the purchase price by Mr A was £35,000 higher than the exchange value indicated in the Disposition in favour of the mid purchaser Mr D;

(6) that a third party, Company 5, was paying the deposit of £35,000;

(7) that there was nothing on file to disclose that the Respondent had investigated the source of the deposit paid by Company 5 of £35,000;

(8) that on the date of settlement the Respondent received "instructions" from Mr D to distribute the sale proceeds when Mr D was not a client and that those net proceeds involved payments of £102,500 to two third parties including Company 5, the third party who had paid the £35,000 deposit for the purchaser, Mr A;

(9) that the loan was for the same as the exchange value stated in the Disposition in favour of the mid purchaser which settled on the same day;

(10) he had not carried out the appropriate money laundering checks as required in the transaction.

7.24 The Respondent's file did not disclose that the appropriate money laundering checks as required had been carried out.

7.25 The Respondent failed to advise Mr D to take independent advice when he signed the Disposition in favour of Mr A.

7.26 In the whole circumstance the Respondent failed to submit a report to SOCA.

8. After hearing submissions from both parties, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

8.1 his failure to comply with the Code of Conduct for Solicitors holding practising certificates issued by the Complainers in 1989 and amended in 2002 and his failure to comply with the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 in that he failed to advise his client, Birmingham Midshires, that:-

(i) the proprietor(s) of the subjects being purchased had not owned the subjects for 6 months;

(ii) the mid purchaser settled his purchase on the same day as the Respondent's client;

(iii) the mid purchaser did not make any payment in exchange for a Disposition of the property in his favour;

(iv) the balance of the purchase price on the transaction was not being provided by the borrower(s) from their own funds but from a third party;

(v) he had not investigated the source of the balance of the purchase price from the third party;

(vi) the seller, mid purchaser and purchaser were all known to each other;

(vii) he had been instructed by the mid purchaser to make payment of part of the "sale proceeds" to third parties, one of whom was the third party who paid the balance of the purchase price to enable the transaction to proceed;

(viii) the loan was 100% of the consideration in the Disposition in favour of the mid purchaser/seller.

(ix) there was a substantial increase, namely £35,000, in value of the transaction in favour of the Respondent's client.

(x) he had not carried out the appropriate money laundering checks as required in the transaction.

(xi) he signed and submitted an unqualified Certificate of Title to BM in relation to the transaction when he knew or at least ought to have known that he could not so certify.

8.2 his failure to comply with the terms of the said Code of Conduct and Practice Rules in relation to his client, Birmingham Midshires, in that he:-

(i) did not communicate effectively with BM in relation to the transaction,

(ii) acted in a conflict or potential conflict of interest in the transaction.

(iii) knowingly mislead BM by signing off an unqualified Certificate of Title.

8.3 his failure to comply with the said Code of Conduct/Practice Rules in relation to his client, Mr D, in that he failed to advise him to see independent legal advice prior to signing the disposition in his client's favour.

8.4 his failure to comply with the Solicitors (Scotland) Accounts etc Rules 2001:-

(a) Rule 24 - in relation to the transaction the Respondent failed to comply with some or all of Regulations 7, 8, 9, 14 and 20 of the Money Laundering Regulations 2007;

(b) Rule 24 - in relation to the transaction the Respondent failed to comply with the provisions of part 7 of the Proceeds of Crime Act 2002

8.5 his failure to comply with the Proceeds of Crime Act 2002 in that he failed to report the transaction to the Serious Organised Crime Agency.

9. Having noted three sets of Findings of professional misconduct previously made against the Respondent and having heard mitigation on behalf of the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 29 August 2014. The Tribunal having considered the Complaint as amended at the instance of the Council of the Law Society of Scotland against Norman Douglas Paton Cathcart, residing at "Orotava", Knockbuckle Road, Kilmalcolm, Inverclyde; Find the Respondent guilty of Professional Misconduct in respect of his breach of the Code of Conduct for Solicitors holding practising certificates 2002 and the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 in relation to his client, Birmingham Midshires, in that he failed to comply with the requirements of the CML Handbook in numerous respects, his failure to communicate effectively with Birmingham Midshires in relation to the transaction, his acting in a conflict or potential conflict of interest situation in the transaction and his knowingly misleading Birmingham Midshires by signing off an unqualified certificate of title; his breach of the said Code of Conduct and Practice Rules in relation to Mr D in that he failed to advise him to

seek independent legal advice prior to signing the disposition in his client's favour; his breach of Rule 24 of the Solicitors (Scotland) Accounts etc Fund Rules 2001 in connection with his failure to comply with the Money Laundering Regulations and the Proceeds of Crime Act 2002 and his failure to report the transaction to the Serious Organised Crime Agency in terms of the Proceeds of Crime Act 2002; Suspend the Respondent from practice for a period of eight years to run concurrent with his existing three year suspension; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and may but has no need to include the names of anyone other than the Respondent.

(signed)

Nicholas Whyte

Vice Chairman

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

IN THE NAME OF THE TRIBUNAL

Nicholas Whyte
Vice Chairman

NOTE

The Complainers lodged an amended Complaint and the Respondent pled guilty to the averments of fact, averments of duty and averments of professional misconduct in the amended Complaint. No evidence was accordingly required.

The Complainers lodged a bundle of authorities and there was no objection by the Respondent.

SUBMISSIONS FOR THE COMPLAINERS

Ms Motion advised that the Complaint related to the Respondent's actings in one conveyancing transaction. The Respondent acted for Mr A in the purchase of Property 1 with a loan being obtained from Birmingham Midshires for the purchase price of £125,000. Ms Motion stated that it was abundantly clear from the file that the Respondent was well aware of his obligations in terms of the CML Handbook. The Respondent had highlighted Sections of the Handbook in the file. These were in relation to the issue of ownership for a period of less than six months, in relation to the purchase price and how it was being provided, relating to where the missives provided for a cash back to the buyer or part of the price is being satisfied by a non-cash incentive to the buyer, and the part relating to an obligation to report to the lender if he did not have control over payment of all the purchase money.

Ms Motion explained that Mr A was a director of the company, Company 4. That company was passing title in this property to Mr B's relative, Mr D. Another firm was being used by the company to transfer this to Mr D. No funds were to be exchanged in that transfer and it was to reflect "work carried out at the development". Mr D was then to transfer title to Mr A for the sum of £125,000. Before the Respondent received even an executed Disposition in favour of Mr D the Respondent signed off an unqualified Certificate of Title indicating settlement would take place on 17 September 2008. The executed Disposition by Company 4 in favour of Mr D was dated 17 September and was delivered to the Respondent.

On the same date, the Respondent received £35,000 by way of deposit towards the purchase price from "Company 5". No steps were taken by him to investigate this. There was no evidence of any attempt by the Respondent to investigate the origin of this. There was no money laundering information on the file. The Respondent then proceeded not to pay the purchase price to the seller or his solicitor in total and instead he acted on an instruction from someone who was not a client to move money from his client's ledger. Ms Motion referred the Tribunal to paragraph 3.17 of the Complaint. She emphasised that Mr D was not his client and yet he instructed the Respondent to pay the money to other third parties including himself. Ms Motion submitted that the figure of £35,000 was the same amount as the deposit and questioned how it could not be a revolving deposit scheme. The Respondent told the lenders nothing in relation to all of these issues. He also failed to advise Mr D to take independent legal advice. He failed to submit a report to SOCA and he intromitted with loan funds prior to the permission from the lender.

Ms Motion submitted that it was absolutely clear that the Respondent was aware of his CML obligations and it had to be asked why he did not question all this. Ms Motion's submission was that the Respondent deliberately chose not to and/or premeditatedly or recklessly omitted to advise his client, the lender, of what was clearly a transaction that had alarm bells ringing on many levels. Ms Motion questioned why the transfer had to take place from a limited company with another firm instructed to a third party and from that third party to Mr A who was the director in the initial limited company. Ms Motion submitted that this could not be anything other than an attempt at mortgage fraud. No funds were changing hands in the first transaction and then over and above this there were payments out on the instructions of an non-client from Mr A's ledger card. The "deposit" was repaid to Company 5. The Respondent took no steps to report this to the lender or any other appropriate authority. The Respondent also made no attempt to advise the lender that all the parties he was communicating with were related.

Ms Motion pointed out that the facts in paragraph 3.6 of the Complaint mentioned the company "Company 1". This was the company for whom the Respondent acted and it was placed into provisional liquidation on 31 March 2009 and was referred to in previous findings of misconduct against the Respondent.

Ms Motion submitted that the actions of the Respondent clearly amounted to professional misconduct. She went on to address the Tribunal in connection with sanction. She suggested that the Respondent's behaviour fell at the most serious end of the scale of professional misconduct and compromised of blatant disregard for his obligations to a client lender when it had been clear to the profession for decades the obligations that were required. Ms Motion stated that the Tribunal had to look to the protection of the public from risk and also consider the reputation of the profession. She referred in this regard to her bundle of authorities.

As far back as 1989 there was a decision of the Tribunal to the effect that a solicitor must not withhold relevant information from his client. Ms Motion also referred the Tribunal to the 1989 Law Society Journal where it was emphasised that a solicitor had a professional duty to act with upmost propriety towards each client including the lender. In this case the Respondent also failed to comply with the Money Laundering Regulations. Ms Motion referred the Tribunal to the Practice Guidelines issued by the Law Society in 2005 which pointed out that solicitors could be a target for money launders and gave advice on how to minimise these risks.

Ms Motion then referred to the previous findings of misconduct against the Respondent. In the Findings dated 25 January 2007 the Tribunal indicated to the Respondent that it would take an extremely dim view if any further Complaint came before it in relation to the Respondent's continued failure to remedy the conveyancing issue highlighted in the case. The Tribunal decision of 17 June 2008 showed in Ms Motion's submission, both an ability and willingness on the Respondent's part to place the lender at risk. Ms Motion pointed out that in this June 2008 decision the conduct complained of related to a delay by the Respondent in registering a standard security between June 2002 and June 2008.

Ms Motion then referred the Tribunal to the Tribunal's decision of 23 January 2013 and pointed out that the conduct in that case related to the company called Company 1 which was also mentioned in the case the Tribunal was considering today. Ms Motion pointed out that the Tribunal considering the case in January 2013 considered that the Respondent had a lack of insight and remorse. Ms Motion indicated that the

Respondent appealed this decision of the Tribunal to the Court of Session who upheld the Tribunal and indicated that the Tribunal had to bear in mind inter alia the reputation of the solicitors' profession, in particular for integrity and trustworthiness. The court considered that the Tribunal's conclusion could not be criticised.

Ms Motion also referred the Tribunal to the case of Adcock-v-Archibold 12 March 1925 which showed that it was not necessary to show gain by an accused to be fraud. She pointed out that she was not alleging that the Respondent committed fraud but this related to the parties for whom he was acting. Ms Motion also referred to the case of Arfan Zia Dad [2010] CSIH 75 XA 65/10 where the court stated that in the context of professional misconduct it did not appear to be significant that the Appellant repaid the money which he had obtained by fraud.

Ms Motion asked the Tribunal to take into account the fact that the matter was not a one-off isolated incident, there was no sign of remorse or insight, there had been previous problems, there was a clearly a risk to the public and a risk to the reputation of the profession. There was no evidence of any rehabilitation/corrective steps taken. The full impact of the Respondent's conduct could not yet be known and she suggested that the facts suggested deliberate/premeditated behaviour. Ms Motion pointed out that there was no suggestion of ill-health of the Respondent at the time the transaction occurred. There was a pattern/trend.

Ms Motion however accepted that there had been an early plea of guilty and that the Respondent had cooperated and entered into a Joint Minute. Ms Motion pointed out that of the three testimonials provided, two were from solicitors who had acted for the Respondent and the third was based on information which had been given to him but was not strictly correct.

Ms Motion also highlighted the fact that the Respondent has still not met the expenses of the last Tribunal or the Appeal to the Court of Session and of more concern he had still not made payment of the compensation award to the Secondary Complainer.

Ms Motion also stated that as recently as 11th December, 2013 the Respondent had given an Undertaking to the Appeal Court that the compensation awarded in respect

of the Findings made in January 2013 would be paid immediately and yet this compensation has still not been paid.

In response to a question from the Chairman, Ms Motion said that paragraph 3.27 of the amended Complaint should have been deleted and this was accordingly removed from the amended Complaint.

SUBMISSIONS FOR THE RESPONDENT

Mr Ferguson stated that it was a great pity that this Complaint had not been dealt with at the same time as the previous Complaint. Mr Ferguson pointed out that the suspension of his client's practising certificate for three years at the age of 64 had effectively already ended his practice of law and ended his career. He had had to pass his clients on to other solicitors to deal with some months ago. There was no way back for him. Mr Ferguson submitted that it was probably a historical accident that the two Complaints were not dealt with together at one time. Mr Ferguson stated that he could not understand why the new prosecution was necessary in these particular circumstances. He made an offer of a written undertaking from his client not to practice law anymore and to surrender his practising certificate. However the Law Society indicated that they could not accept this offer because there was a Counsel opinion previously obtained by the Law Society that such an undertaking is not enforceable. Mr Ferguson stated that he could not understand this reasoning. A solicitor's written undertaking was taken seriously and even a single breach of an undertaking by a solicitor has led to prosecution by the Law Society before the Tribunal. Mr Ferguson submitted that such an undertaking would surely be enforceable.

Mr Ferguson submitted that it was not in the interests of the profession or the public for the Law Society to have proceeded with this prosecution. The Respondent was not a danger to the profession or the public. The practical effect of the suspension was that the Respondent could not practice law and would not practice again. Mr Ferguson pointed out that it was often the case that the Crown Prosecution Service looked at cases and decided not to take proceedings because they would not serve any useful purpose or have any public interest. Mr Ferguson submitted that it should not be the

case that solicitors charged with professional misconduct had fewer rights than criminals. Representations were made by the Respondent's Glasgow Council member representative, Mr F, who was a previous president of the Law Society to ask the Complainers to consider not proceeding with the prosecution but this was not granted.

In respect of the Complaint, Mr Ferguson pointed out that the Respondent had cooperated with the process from the beginning. He indicated that the Respondent wished to express his regret to the Tribunal for his error of judgement in not seeing the position clearly and acting differently. The Respondent had cooperated fully with the Fiscal and the Law Society through Mr Ferguson.

Mr Ferguson pointed out that there had been a long serious series of cases concerning the CML Handbook but submitted that there were a number of things which differentiated this Complaint from the others which went to mitigation. Mr Ferguson pointed out that the transaction occurred in 2008 which was not long after the Money Laundering Regulations came into force and was well before the Joy Dunbar case in 2011 which was the case which seemed to wake conveyancers up to what was now expected. Prior to this there was widespread ignorance among the profession with regard to the extent of the obligations under the CML Handbook. This case was a single transaction not multiple of transactions as had been the case in a lot of the other CML Handbook Complaints which had been considered by the Tribunal. This case did not involve the channelling of multiple cases from a party who was not an existing client. Mr Ferguson pointed out that the education of solicitors with regard to the CML and AML Handbook requirements was completely deficient at the time when this conduct occurred. Solicitors did not realise at the time that the requirements of the CML Handbook would be construed so strictly by the Tribunal. Mr Ferguson submitted that the Handbook was more of a commercial document and pointed out that its terms could not negotiated or varied. He however accepted that the legal rule of construction had not been recognised by the Tribunal.

Mr Ferguson pointed out that this case did not involve dishonesty or alleged Accounts Rules breaches. Mr Ferguson stated that the Respondent did not understand the situation to be the way it was narrated by the Fiscal. The property at Property 1 was still owned by Mr A and still has the original security in favour of the Bank of

Scotland secured over it. Mr Ferguson pointed out that no client had complained and no client had made a loss. Mr Ferguson also pointed out that there was an independent valuation by the bank which confirmed the value of the property at £120,000 which was £5,000 below what Mr A paid for it. Mr Ferguson further explained that the Respondent knew Mr A personally and very well since the age of 15 and had also acted for Mr A's father, Mr D and that the firm had previously acted for Company 5 over many years. The Respondent was sure he had seen ID on a previous file but had been unable to find this. Mr Ferguson stated that this is not the type of transaction where a solicitor was hooked by greed, they were real clients and well known but unfortunately the Respondent did not ask enough questions. The Respondent was not able to express remorse to anyone because no client had complained. Mr Ferguson stated that there were mandates with regard to the payments to third parties. The Respondent had intended to comply with the terms of the CML Handbook which was why the copy was on the file. It was not part of a conspiracy. It was accepted that the Respondent should have reported more of the circumstances to the lender who may or may not have been concerned. The Respondent had acted for the family and knew the setup. The money came back to Company 5 but Mr D and other family members were shareholders. The Respondent thought that the accountants would sort out the paperwork. There was no intention to flout the regulations and the Respondent had fully cooperated with the Complaint process.

Mr Ferguson asked the Tribunal to take into account all the factors and to treat the case as if it had been part of the previous Complaint leading to his client's suspension. He submitted that there was a connection between the cases. Mr Ferguson submitted that the Law Society should have used their discretion and not taken the Complaint to the Tribunal. Mr Ferguson explained that his client had been humbled greatly by the suspension that had ended his career. He was facing the costs of this Complaint and had no means of earning money to pay for his defence or the prosecution costs. Mr Ferguson asked the Tribunal to allow the Respondent some dignity by imposing only a Censure. Mr Ferguson advised that the Respondent was a shadow of his former self and was presently suffering from depression and referred the Tribunal to the medical report lodged. Mr Ferguson submitted that the profession failed solicitors and did not help with spotting the signs of depression. Mr Ferguson clarified however that he was not submitting that the Respondent was depressed at the time the conduct occurred.

Mr Ferguson stated that the three year suspension was totally unexpected and the Respondent was devastated by it.

Mr Ferguson also explained to the Tribunal the position with regard to the Respondent's wife's health. The matrimonial home had now had to be put up for sale to pay court and other expenses. He asked the Tribunal to deal with the Respondent in a just and compassionate way. Mr Ferguson then read out a statement from the Respondent's wife detailing the effect all this had had on the Respondent and the change in him since 2004 due to her illnesses, difficulties at his firm, the emotional impact of helping their goddaughter, incessant work, weight loss and his inability to share his anxieties. The Respondent's wife advised that the effect on the Respondent was beyond description.

DECISION

There was no hesitation in finding that the Respondent's conduct was serious and reprehensible and amounted to professional misconduct. The Tribunal has made it clear on numerous occasions that solicitors must always act in the best interests of their clients including their lender clients. The Respondent was an experienced conveyancer and must have been aware that there was a strong possibility that this transaction amounted to mortgage fraud and therefore he should have carried out the appropriate due diligence. The Respondent's representative submitted that this transaction occurred prior to there being as much publicity about solicitors' obligations under the CML Handbook but at the time the Respondent's conduct occurred there had already been guidance in the Law Journal in 2005. It was also clear from the highlighted copies of the CML Handbook in the file that the Respondent was fully aware of his obligations under the CML Handbook.

Although there was only one transaction in this case, the Tribunal considered that the number of unusual features in the transaction must have raised alarm bells. The Tribunal accordingly considered that the Respondent acted extremely recklessly by omitting to advise his client, the lender, of the details of this transaction. The Tribunal cannot understand why the Respondent, as an experienced conveyancer, did not question the various steps which occurred in this transaction. When solicitors are

acting for clients who are well known to them they should be particularly aware of their conduct and guard against acting any differently.

The Tribunal was very concerned by the number of times the Respondent has been before the Tribunal in relation to conveyancing matters. In the findings issued on 25 January 2007, the Tribunal indicated that an extremely dim view would be taken if any further Complaint came before it in relation to the Respondent's continued failure to remedy the conveyancing issue. Despite this the Respondent was back at the Tribunal on 17 June 2008 because matters had not been sorted out. The Tribunal noted that the conduct contained in the Tribunal Findings dated 23 January 2013 occurred prior to the conduct that the Tribunal is considering today. However if this conduct together with the conduct considered by the Tribunal on 23 January 2013 had been considered by the Tribunal at one time a much harsher sentence might have been imposed.

The Tribunal considered the Respondent's conduct in this case to fall at the more serious end of the scale of professional misconduct. It discloses a clear risk to the public and is damaging to the reputation of the legal profession. It also appeared to the Tribunal, from the submissions made by the Respondent's representative, that the Respondent still does not have full insight into how serious his conduct in this transaction was. His representative indicated that the Respondent still did not see matters the way they had been narrated by the Fiscal. The Respondent still does not seem to understand the serious risk that he exposed his client to. This Tribunal has previously been concerned with regard to the Respondent's lack of insight.

The two previous Findings of misconduct in 2007 and 2008 are analogous in that they also put the lender at risk. The Respondent's failure to advise the lender of matters which clearly should have been disclosed denied the lender the opportunity to make an informed choice about whether to lend. The fact that there have not yet been any losses is not considered to be relevant.

In the whole circumstances the Tribunal seriously considering striking the Respondent's name from the Roll of Solicitors. The Tribunal however took into account the fact that the Respondent had cooperated fully with the Law Society and

the Fiscal from the start of the process and had entered into a Joint Minute. The Tribunal also took account of the Respondent's health and the plea made by his wife on his behalf. The Tribunal however had concerns about the Respondent returning to practice on his own account due to the risk to the public. In the circumstances the Tribunal imposed a suspension for a period of eight years to run concurrent to his existing three years' suspension.

Mr Ferguson made submissions with regard to the fact that the Respondent should not be found liable in the expenses because the Law Society should have used their discretion not to take the Complaint to the Tribunal in the first place. The Tribunal however found absolutely no merit in this submission. Although the Tribunal had sympathy for the Respondent and note that he will not find it easy to meet another award of expenses, it is the Respondent's conduct that brought him before the Tribunal in the first place and accordingly the Tribunal made the usual order with regard expenses. Publicity was ordered in the usual manner in terms of the statute.

Nicholas Whyte
Vice Chairman