**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, formerly of 26 Drumsheugh Gardens, Edinburgh and now at Atria One, 144 Morrison Street, Edinburgh**

**Complainers**

**against**

**MICHAEL THOMAS MCSHERRY, Solicitor, 51 Morven Road, Bearsden, Glasgow**

**Respondent**

1. A Complaint dated 11 April 2017 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 Michael Thomas McSherry, Solicitor, 51 Morven Road, Bearsden, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was no Secondary Complainer.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.

4. In terms of its Rules the Tribunal appointed the Complaint to be heard on 27 June 2017 and notice thereof was duly served upon the Respondent.

5. At the hearing on 27 June 2017, the Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Respondent was neither present nor represented. The Fiscal made a motion in terms of Rule 14(4) of the 2008 Tribunal

Rules for the Tribunal to proceed to hear and determine the Complaint in the absence of the Respondent. The Tribunal Clerk gave evidence on oath regarding service of the Complaint and Notice of Hearing. The Tribunal considered whether it was fair to proceed in the Respondent's absence. Thereafter it granted the Fiscal's motion. The Tribunal granted the Fiscal's motion in terms of Rule 14(5)(b) of the 2008 Rules to proceed upon evidence given by affidavit. The Fiscal lodged affidavits for three witnesses. The Fiscal made submissions to the Tribunal in relation to the affidavit evidence and the documentary productions lodged.

6. The Tribunal found the following facts established:-

6.1 The Respondent is Michael Thomas McSherry. He was enrolled as a solicitor on 5 September 1972. He has been a practitioner with several firms since the date of his enrolment, including Michael T McSherry, HBM Sayers and Hamilton Burns WS Ltd. From 1 July 2008 to 31 October 2013, the Respondent was a partner and latterly sole practitioner in the firm of Steen Bali McSherry in Glasgow.

6.2 The Respondent commenced practice as a sole practitioner in February 2014. At the time of the events narrated in this complaint, the Respondent was a sole trading solicitor and partner with SBM Law ("the Firm") between 24 February and 17 July 2014, where he also fulfilled the roles of Cashroom Partner and Client Relations Partner. The Respondent's practising certificate was suspended with effect from 17 July 2014. The Respondent has not renewed his practising certificate since his latest one expired on 31 October 2014.

6.3 The Council made a complaint about the Respondent alleging professional misconduct in relation to ten issues. Broadly, these related to acts of dishonesty and/or misrepresentations to the Firm's clients and to other solicitors; failure to carry out instructions; failure to comply with proper accounting practices; failure to comply with anti-money laundering rules and procedures; and failure to undertake adequate training in order that he could discharge his responsibilities as the Firm's

Cashroom Partner.

Background

6.4 The Firm was set up by the Respondent on 24 February 2014. The Firm employed two other full-time members of staff: Ms A, formerly a legal secretary but recently qualified as a paralegal; and Ms B, a paralegal and former conveyancing solicitor. Ms B had previously held a practising certificate, but had been sequestrated. The Respondent was the only member of the Firm to hold a practising certificate.

6.5 In or around March 2014, the Respondent was instructed by an individual client, Mr C. Mr C wished to acquire a portfolio of 57 low value residential and commercial properties at Property 1. Mr C was a director of two companies. He was the sole director and shareholder in Company 1 and also in Company 2. Company 2 was not a client of the Firm or of the Respondent. Company 2 regularly instructed another firm, Pinsent Masons, to conduct commercial property and corporate transactions on its behalf.

6.6 Property 1 was being sold by the receiver of Company 3, represented by estate agents Slater Hogg and Howison ("SHH") and by TLT Solicitors. In or around May 2014, Mr C instructed the Respondent to represent him in a blind auction for Property 1. There were 6 or 7 bidders participating in the blind auction. The successful bidder was required to pay a deposit of 10% of Property 1's value.

6.7 On 28 April and 24 June 2014, the Firm was inspected by the Law Society's Client Protection Fund. The inspection identified £200,000 in the Firm's client account. The beneficial owner of the funds could not be readily identified and no file had been produced by the Respondent. A number of other discrepancies (albeit for lower values) were noted in the Firm's client account.

6.8 On further inspection, the Firm's records showed that funds totalling

£200,000 were received from another client of the Firm and Respondent, Mr D, on 9 and 12 May 2014. The circumstances surrounding these deposits are described more fully in relation to the specific issues below. Stated briefly, it became clear to the investigators that there was no recorded reason for the payments in the Firm's client account ledgers. The records showed that the funds were immediately transferred out to Mr C or Company 1 on 9 and 13 May 2014 respectively, before being returned to the Company 1 client account relating to the Property 1 transaction one week later with an extra £30,000. £200,000 was then transferred to TLT on 2 June 2014, by way of the 10% deposit to allow Company 1 to participate in the blind auction for Property 1. The balance of £30,000 was returned to Mr C or Company 1 in two separate tranches of £15,000 on 28 May and 27 June 2014. The Respondent had no written client authority from Mr D to pay the £200,000 out to Company 1 in two separate tranches on 9 and 13 May 2014.

6.9 The Respondent was interviewed by the Client Protection Fund on 3 July 2014. During that interview, the Respondent advised that he specialised in immigration law and had no experience in conveyancing practice. The Respondent did not appear to have queried why Mr C, who instructed Pinsent Masons to deal with commercial property and corporate transactions for his other company, Company 2, chose to instruct an immigration sole practitioner with no experience in conveyancing or corporate law for another transaction.

6.10 Following this interview, the Respondent's practising certificate was suspended on 17 July 2014, the Firm's client accounts were frozen, and the Law Society petitioned the Court of Session to appoint a judicial factor to the Firm. The Respondent opposed the petition and lodged answers thereto. His opposition was ultimately withdrawn and the petition was granted.

6.11 The Council intimated the issues in the complaint to the Respondent by letter dated 25 June 2015. The Respondent was invited to respond to the complaint within 21 days.

6.12 As no response was received within that timeframe, on 25 June 2015 the Council served on the Respondent a notice under section 15(2)(i)(i) of the Solicitors (Scotland) Act 1980. The Respondent was required to respond to the complaint within 21 days, failing which he was advised that the Council would raise a further conduct complaint *ex proprio motu* in relation to his failure to respond to the Law Society.

6.13 Also on 25 June 2015, the Council served on the Respondent a notice under section 48(2) of the Legal Profession and Legal Aid (Scotland) Act 2007. The Respondent was called upon to deliver all books, accounts, deeds, securities, papers and other documents in his possession or control relating to the conduct complaint raised by the Council regarding Mr D, Mr C and Company 1. He was required to respond within 21 days, failing which he was advised that the Council would submit a further conduct complaint to the Scottish Legal Complaints Commission *ex proprio motu* and may apply for a court order requiring the documents to be delivered.

6.14 The Respondent emailed the Complaints Investigator on 29 June 2015. He advised that he did not have any papers. He stated that he wished to rely on the position as set out in his answers to the Court of Session petition to appoint a judicial factor to the Firm ("the Answers"). Following further email correspondence with the Complaints Investigator in June and July 2015, the Respondent provided copies of the documents he had lodged in the Court of Session proceedings, including the Answers. The Respondent's position on the specific issues is set out more fully below. In summary, he admitted breaching the client account rules leading to deficits in client accounts. However, he maintained that he always cleared deficits from his own personal funds.

6.15 The Respondent wrote to the complaints investigator on 22 October 2015 to provide one additional document which he said he had only recently discovered. This was a written indemnity purportedly signed by Mr C and dated 2 May 2015. This is referred to more fully in relation to issue 1 below.

6.16 The complaints investigator wrote to the Respondent on 22 February 2016, asking whether he had anything further to add to his response to the complaint. The Respondent was asked to respond within 10 days of the letter. The Respondent emailed the complaints investigator on 26 February 2016 to advise that he had no further comments to make.

Issue 1- Misrepresentation to Mr D about purpose for which funds were held

6.17 This issue relates to the sum of £200,000 that was paid to the Firm by Mr D and concerns a misrepresentation by the Respondent to Mr D about the purpose to which the funds would be applied. The broad timeline is as follows:

- On 9 May 2014, Mr D paid £100,000 into the Firm's client account.
- On the same date, the Respondent transferred that £100,000 from the client account to Mr C or Company 1. The funds were detailed in the Firm's client ledger for Company 1. The Firm's client account bank statement shows the funds being paid "To Company 1 014401 Mr C".
- On 12 May 2014, Mr D paid a further £100,000 into the Firm's client account.
- On 13 May 2014, the Respondent transferred the same £100,000 from the client account to Mr C or Company 1. The bank statement shows that the transfer was made "To Company 1 000782 Mr C".
- On 22 May 2014, Mr C transferred £230,000 into the Firm's client account. The bank statement shows the transfer coming "From Company 1 65622 Barclays B".
- On 28 May 2015, the Respondent transferred £15,000 to Mr C. The bank statement shows payment of "On-line Banking bill payment to Mr C Ref:-FUNDS DUE BACK".

- On 2 June 2014, the Firm transferred £200,000 to TLT's bank account on behalf of Company 1.

- On 27 June 2014, the Firm transferred the remaining client account balance of £15,000 to Mr C. On the Firm's bank statement, this is recorded as "On-line Banking bill payment to Mr C Ref:-PORTFOLIO OF 57 PR".

The Firm retained the handwritten records in relation to the clients Company 1, Mr C and Mr D. They have also been reproduced in typed format below. The ledger relating to Mr D was drawn up after the Law Society inspection visit in June 2014.

**Company 1**

| Date | Narrative | In (£) | Out (£) | Balance |
|---|---|---|---|---|
| 21.03.14 | Received from you to pay search dues | 64.80 | | 64.80 |
| 25.03.14 | Paid R.O.S. search dues with c-1000/7 | | 64.80 | 0.00 |
| 09.05.14 | Received from Mr. D deposit Part 1 | 100,000 | | 100,000 |
| 09.05.14 | Paid Client deposit funds (Mr C) | | 100,000 | 0.00 |
| 12.5.14 | Received from Mr. D deposit Part 2 | 100,000 | | 100,000 |
| 13.5.14 | Paid Client deposit funds (Mr C) | | 100,000 | 0.00 |

**Mr C - Portfolio of 57 properties**

| Date | Narrative | In (£) | Out (£) | Balance |
|---|---|---|---|---|
| 22.5.14 | Received from you Deposit funds for B2&B3 | 230,000 | | 230,000 |
| 23.5.14 | Paid Cheque 100044 to TLT for deposit of B2&B3 | | 205,000 | 25,000 |
| 28.5.14 | Refund client money back | | 15,000 | 10,000 |
| 30.5.14 | Received Cheque 44 uncashed | 205,000 | - | 215,000 |
| 02.6.14 | Paid TLT Chaps for deposit | | 200,000 | 15,000 |
| 27.6.14 | Paid to Mr C sum due back | | 15,000 | 0.00 |

**Mr C**

| Date | Narrative | In (£) | Out (£) | Balance |
|---|---|---|---|---|
| 01.08.14 | Received from Mr C refund of Mr. D funds | 200,000 | | 200,000 |

**Mr D**

| Date | Narrative | In (£) | Out (£) | Balance |
|---|---|---|---|---|
| 09.05.14 | Received from Mr. D sums re. Shares Interest | 100,000 | | 100,000 |
| 09.05.14 | Paid Company 1 sums due in respect of shares of interest of Mr D for development at Property 2. | | 100,000 | 0.00 |
| 12.05.14 | Received further funds from Mr. D re shares interest | 100,000 | - | 100,000 |
| 13.05.14 | Paid Company 1 sums due in respect of Mr. D's share interest for development at Property 2 | | 100,000 | 0.00 |

6.18 The two payments of £100,000 were deposited by Mr D on 9 and 12 May respectively for investment in a property development project at Property 2 owned by Company 2. Company 2 was the second company in which Mr C was the sole director and shareholder. No reason for the payments was recorded in the Firm's client account ledgers, as no ledger for Mr D was produced at the time. The Respondent did not appear to have kept a file in relation to this transaction.

6.19 The Respondent wrote to Mr D on 8 May 2014 (before the funds were deposited), noting that the £200,000 was being lodged in the Firm's client account to *"be held by us for the purchase of shares in [a development project at Property 2]. In the event that negotiations are not completed to your satisfaction the capital sum of £200,000 shall be returned to you on demand electronically."*

6.20 In fact, as condescended upon above, each of the deposits of £100,000 made by Mr D was immediately disbursed to either Mr C or Company 1 (on 9 and 13 May respectively), before being returned to the client account one week later by Company 1, together with an extra £30,000. £200,000 was then transferred to TLT, for participation by Company 1 in the blind auction for Property 1. £30,000 was reimbursed to Mr C. This was not the investment which Mr D had instructed the Respondent to make on his behalf.

6.21 The Respondent exhibited no written authority from Mr D for the payment of £200,000 to Mr C/Company 1. Solicitors acting for Mr D (Carr Berman Crichton) advised the Council that there were no discussions between Mr D and the Respondent regarding use of the funds for any purpose other than the purchase of shares in Company 2 for the purpose of Property 2. Mr D had expected the funds to remain in the Firm's client account from the date of transfer.

6.22 In the Answers, the Respondent admitted that £200,000 was paid into his client account by Mr D and that no reason for this payment was recorded in the Firm's books. He admitted that he had given mutually inconsistent explanations for the transfer, namely (a) that the money was paid for the purposes of a share purchase; and (b) that in fact the money was not paid under reference to any particular transaction. He admitted that he had written to Mr D on 8 May 2014 in the terms described in paragraph 6.19 above.

6.23 However, the Respondent claimed that Mr C told him that Mr D was prepared to allow Mr D the use of the £200,000 to pay the deposit to acquire Property 1. The Respondent claimed he checked the position with Mr D, who confirmed that he was comfortable with what was proposed. The Respondent was unable to produce a file note of any of his discussions with Mr D. The Respondent attempted to obtain written authority from Mr D, but was unable to do so. The Respondent obtained an indemnity from Mr C ("Indemnity A"). It is in the following terms: *"I Mr C residing at Property 3, hereby undertake to repay to SBM Law solicitors the sum of Two Hundred Thousand Pounds (£200,000.00) Sterling paid to me in respect of Mr D's interest in a proposed share agreement in Property 2 in the event that no agreement is reached."* It bears Mr C's signature, but is undated.

6.24 There is also a written indemnity purportedly signed by Mr C dated 2 May 2015 ("Indemnity B"). This was provided to the complaints investigator by letter from the Respondent dated 22 October 2015. The

Respondent's letter stated that he had only recently discovered the document. Indemnity B is in the following terms:

*"I Mr C hereby promise to pay back £200,000 lodged in Company 1 if the shares in Property 2 are not issued. This money is solely for the purpose of acquiring Property 2 only*

*[signature] Mr C 2/5/14*

*[signature] Mr E 2/5/14 Witness*

*[signature] Mr D 2/5/14*

*2 May 2014*

*£100,000 will be loged[sic] on Tuesday 6th May 2014*

*£100,000 " " " " Friday*

*9th May 2014 MrC[signature] 2/5/14*

*Mr E[signature] 2/5/14*

*[signature the same as signature next to the words Mr D above] ?/5/2014"*

6.25 In terms of Indemnity B, Mr C promised to pay back £200,000 lodged in Company 1 if the shares in Property 2 are not issued. It bears to have been witnessed by Mr D. Subscribed footnotes indicated that two separate payments of £100,000 would be lodged on 6 and 9 May 2014 respectively.

6.26 Finally, there is a signed mandate by Mr C authorising transfer of the £200,000 to TLT Solicitors *"from the sums lodged by Company 1 into SBM Law's Client account today 22 May 2014 in respect of the purchase by me or my nominees for a Portfolio of 57 Properties."* This mandate is

also undated.

6.27 Indemnity B which was produced by the Respondent and which he claims was signed by Mr C, misspells his client's name throughout. The terms of the document (which apparently pre-dated the payments by Mr D) are also inconsistent with the Respondent's letter of 8 May, in that it suggests the money was always to be paid over to Mr C, rather than being held by the Firm to Mr D's account.

6.28 The initial payment of £100,000 was received into the Firm's client account on 9 May 2014, one day after the Respondent's letter to Mr D. It was subsequently transferred to Company 1/Mr C on the same day. Within this timeframe, it is difficult to see how the Respondent could have attempted to obtain written or even verbal authority on many occasions, as is suggested by the terms of Indemnity A and Indemnity B. Even on the Respondent's own version of events, the letter of 8 May was misleading. He must have known at that point that there was a different purpose for the funds from that expressed in the letter namely payment of the 10% deposit for participation by Company 1 in the blind auction for Property 1, rather than the investment by Mr D in the development project relating to Property 2.

6.29 Mr D became a client of the Firm when the Respondent wrote to him confirming that he would hold funds in trust for him. From the use of the Firm's client account for the proposed transaction with Company 2, it can be reasonably concluded that the intention was to create a solicitor-client relationship.

6.30 The Respondent misrepresented to his client, Mr D, that the sum of £200,000 paid to the Firm would be held at the credit of Mr D's client account, pending a proposed purchase of shares in Company 2, and repaid on demand to Mr D in the event that negotiations did not complete. He did so in the knowledge that the funds were not in fact going to be held to Mr D's order and were instead going to be made over to Company 1 or otherwise to Mr C.

6.31 The Firm's ledgers show funds of £200,000 received from Mr C into the Firm's account on 1 August 2014. This payment was made by Mr C with the purported intention of refunding Mr D. However, by this stage a judicial factor had been appointed to the Firm and the account had been frozen. Accordingly, no funds were remitted to Mr D.

Issue 2 - Improper, incomplete and inaccurate recording in client ledgers

6.32 Issue 2 also relates to the receipt of the two separate sums of £100,000 from Mr D on 9 and 12 May. The relevant facts are those set out in relation to Issue 1 above. There are five separate sub-elements.

(i) The Respondent failed to open or maintain, or delayed unduly in opening or maintaining, a client ledger in Mr D's name.

6.33 It is admitted by the Respondent that the client ledgers of Mr D were not drawn up at the lime the funds were deposited and disbursed. When the funds were paid into the Firm's client account, the Firm kept no ledger in respect of Mr D and no ledger entry was drawn up at all for the two incoming payments of £100,000. The Respondent was alerted to the absence of any ledger in respect of Mr D by the Law Society's Financial Compliance Department on or around 25 June 2014 and took no steps to correct the ledger. The ledger appears to have been later amended to record a share purchase as the reason for the payments.

(ii) The Respondent paid out the said sums on or around 9 or 12 May 2014 to Company 1, or otherwise to Mr C, without the knowledge or in any event without the written consent of Mr D.

(iii) By virtue of having paid out the same sums to Company 1 or otherwise to Mr C without the consent of Mr D, and notwithstanding that a client ledger had not been opened for Mr D, the Respondent created a de facto deficit on the client account of the Firm.

6.34 These elements fall to be considered together, as they arise from the same action.

6.35 As explained in relation to issue 1 above, the Respondent's position is that he had Mr. D's consent to move the funds. The accounts rule requires that any such instructions be in writing. The Respondent admits that he did not obtain written consent. The Respondent's account of events highlights the importance of obtaining such instructions in writing. He claims that the purpose for which he was put in funds had changed.

6.36 Transferring £200,000 out of the Firm's client account either without written instructions for the purposes of a high risk investment created a de facto deficit of £200,000 on the client account.

(iv) Having paid out the said sums to Company 1 or otherwise to Mr C without the consent of Mr D, and having had the impropriety of that distribution of funds drawn to his attention by the Law Society's Financial Compliance Department on or around 25 June 2014, the Respondent failed or at least delayed unduly in re-crediting to a client ledger maintained for Mr D the said sums.

6.37 As outlined above, regardless of whether the Respondent did or did not have Mr D's verbal consent to transfer the funds, he accepts that he did not have written consent. This was a breach of the accounts rules (set out in more detail below). Breaches of the accounts rules must be remedied promptly upon discovery and any money improperly withheld or withdrawn from a client account must be replaced without limitation. The Respondent did not put an additional £200,000 into the client account. Although Mr C did later try to refund the sums to Mr D through the Firm's client account, that was not possible as by that point a judicial factor had been appointed and the account was no longer being operated.

(v) The Respondent failed to undertake a risk assessment of the proposed transaction or investment, or to undertake sufficient

enquiry in respect of the source of the funds introduced by Mr D, or to retain records of having undertaken such a risk assessment or enquiry, such as would demonstrate compliance with Part 7 of the Proceeds of Crime Act 2002, Part 3 of the Terrorism Act 2000, or the Money Laundering Regulations 2007.

6.38 The Respondent has admitted this. He has retained no records in relation to the proposed transaction. He carried out no money laundering or other checks whatsoever in respect of the transaction and the source of funds from Mr D.

Issues 3 and 5 - Failure to carry out proper money laundering checks on Company 1 and Mr C

6.39 The third and fifth issues in the complaint fall to be considered together.

6.40 The third issue is that the Respondent failed to obtain, or having obtained failed to retain records of, identification documentation relating to Company 1 such as would demonstrate compliance with the Money Laundering Regulations 2007.

6.41 The fifth issue is that the Respondent failed to obtain, or having obtained failed to retain records of, identification documentation relating to Mr C such as would demonstrate compliance with the Money Laundering Regulations 2007. In particular, he failed to do so in relation to the proposed purchase by Mr C of Property 1, in respect of which transaction no risk assessment was undertaken, no enquiry was made in respect of the source of the client's funds, and no records were retained in respect of any risk assessment or enquiry into the source of the funds having been undertaken, such as would demonstrate compliance with Part 7 of the Proceeds of Crime Act 2002, Part 3 of the Terrorism Act 2000, or the Money Laundering Regulations 2007.

6.42 In addition to the transaction relating to Property 1 described above, the Respondent also acted for Mr C as an individual in relation to the potential

purchase of an Indian restaurant at Property 1. The restaurant was owned by the sellers of Property 1, but had been separated from the main portfolio due to its greater value.

6.43 The Judicial Factor recovered some limited correspondence from TLT relating to the sale of the restaurant, including some correspondence with TLT, solicitors for the sellers, draft missives and title documents. However, there was no complete file in relation to the transaction.

6.44 The Respondent has produced no documentation in relation to due diligence or anti-money laundering checks performed on Company 1 or Mr C. The Respondent admits that he did not obtain proper records. In relation to Company 1, initial background information was easily obtainable from Companies House. The company record would have shown that the director and beneficial owner of the company was Mr C. Thereafter, the Money Laundering Regulations would have required the Respondent to obtain the same identification documentation in issue 3 from Mr C as in issue 5. He failed to obtain anti-money laundering identification in respect of either client.

Issue 4 Failure to investigate the source of funds from Mr D

6.45 Issue 4 is that the Respondent made over to Company 1 or otherwise to Mr C two separate sums of £100,000 paid into the Firm's client account on 9 and 12 May 2014 without having undertaken a risk assessment of the proposed transaction or investment, or sufficient enquiry in respect of the source of the funds deposited by Mr D, and without retaining records of having undertaken such a risk assessment or enquiry, such as would demonstrate compliance with Part 7 of the Proceeds of Crime Act 2002, Part 3 of the Terrorism Act 2000, or the Money Laundering Regulation 2007.

6.46 The relevant facts relating to the transfer of funds are set out under Issue 1 above.

6.47 The information held by the Firm indicated that the source of the funds was Mr D, who was seeking to invest in commercial property in Glasgow which had been purchased out of insolvency by Company 2 for cash in March 2014. The Respondent failed to make even the most basic enquiries as to where the funds had come from prior to their arrival in the Firm's client account. Any risk assessment carried out by a competent and reputable solicitor would have deemed the risk of money laundering as high, thus triggering a duty on the Respondent under the Money Laundering Regulations to carry out enhanced checks.

Issues 6 and 7 - Misrepresentations to SHH and TLT

6.48 Issues 6 and 7 both arise from a misrepresentation by the Respondent to SHH relating to claims he made about the receipt of funds into his client account from Mr C. Because they relate to the same conduct, they fall to be considered together.

6.49 SHH, the estate agents representing the seller of Property 1, requested confirmation of proof of funding to the value of £2,050,000 before they could proceed with any part of the transaction. On 1 May 2014, the Respondent wrote to SHH stating, *"We confirm that proof of funding is required. We can confirm that £2,050,000.000 has been placed in our client account by our client Mr C"*.

6.50 This statement by the Respondent was false. The Respondent was aware that it was false. His statement was dishonest. At no point had Mr C, or indeed anyone else, placed sums totalling £2,050,000 (or anything close to that) in the Firm's client account. The Firm was instead placed in funds by Company 1 to the value of £230,000 on 22 May 2014.

6.51 The Respondent's position on this issue, as set out in the Answers, is that Mr C told him that the sum of £2,050,000 would be transferred to the Firm's client account on 1 May 2014. It was on the basis of this representation by his client that the Respondent wrote the letter to SHH. After writing that letter, the Respondent subsequently discovered that

the only requirement at that stage was for a 10% deposit payment totalling £200,000. Mr C did not then transfer the £2,050,000 sum to the Firm's client account. The Respondent further stated that he was preoccupied with personal issues at the time, as his son was unwell.

6.52 TLT subsequently wrote to the Firm on 22 May 2014. TLT's letter referred to the Firm's letter of 1 May 2014 to SHH, in which the Respondent had confirmed his client's offer for Property 1 in the sum of £2,050,000 and that his client had placed him in funds to that amount. It was therefore clear that TLT had placed reliance on the Respondent's earlier misrepresentation to SHH. The Respondent admitted in his interview with the Guarantee Fund Panel on 3 July 2014 that he did not go back to TLT to advise that he did not hold such funds. He simply said that he wished he had done so. He failed do so and consequently acted dishonestly.

Issue 8 - Poor record-keeping and accounting practices

6.53 This is a more general complaint about the Respondent's record keeping and accounting practices. Between 28 April and 17 July 2014, the Respondent failed to keep properly written up accounting records in respect of the Firm's business. On inspection by the Law Society, it became clear that the list of client balances was incorrect, a trial balance had not been prepared, and the Firm's ledgers were not kept up to date, such that the Firm's ostensible surplus of funds could not be relied upon as accurate.

6.54 The Respondent has admitted this aspect of the complaint in his interview with the Law Society's Client Protection Fund on 3 July 2014.

Issue 9 - Failure to reconcile bank statements

6.55 Between 28 April and 17 July 2014, the Respondent failed to reconcile the Firm's bank statements.

6.56 This was also admitted by the Respondent in his interview with the Law Society's Client Protection Fund on 3 July 2014.

Issue 10 - Failure to undertake training in connection with role as Cashroom Manager

6.57 The Respondent failed to use reasonable endeavours to acquire and maintain the skills necessary to discharge his responsibilities throughout the period during which he was designated as the Firm's Cashroom Manager.

6.58 This issue follows logically from issues 1-9. The Respondent's position is that he sent one of his employees and also an employee of Mr C on the Law Society's book-keeping course. However, he failed to advise on how this might assist him with his responsibilities or whether he was satisfied that his employee had gained the requisite skills.

6.59 In any event, the Accounts Rules make no provision for a solicitor to hand over responsibility for the accounts to a member of staff; the person in charge of the accounts must be a solicitor, and must be of the level of partner. This was ultimately the responsibility of the Respondent as a sole trader.

7. Having given consideration to the facts and the Fiscal's submissions in relation to the question of professional misconduct, the Tribunal found the Respondent guilty of Professional Misconduct as follows:-

7.1 Singly in respect of his misrepresentation to Mr D about the purpose for which funds were held (issue 1); the improper, incomplete and inaccurate recording in the client ledgers (issue 2); and his misrepresentations to Slater, Hogg and Howieson and TLT Solicitors (issues 6 and 7); and

7.2 *In cumulo* in respect of his failure to carry out proper money laundering checks on Company 1 and Mr C (issues 3 and 5); his failure to investigate the source of funds from Mr D (issue 4); his poor record-keeping and

accounting practices (issue 8); his failure to reconcile bank statements (issue 9); and his failure to undertake training in connection with his role as cashroom manager (issue 10).

8. The Tribunal heard submissions from the Fiscal in relation to disposal. Having given careful consideration to these submissions, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 27 June 2017. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland dated 11 April 2017 against Michael Thomas McSherry, Solicitor, 51 Morven Road, Bearsden, Glasgow; Find the Respondent guilty of professional misconduct singly in respect of his misrepresentation to Mr D about the purpose for which funds were held (issue 1), the improper, incomplete and inaccurate recording in the client ledgers (issue 2), and his misrepresentations to Slater, Hogg and Howieson and TLT Solicitors (issues 6 and 7); and *in cumulo* in respect of his failure to carry out proper money laundering checks on Company 1 and Mr C (issues 3 and 5), his failure to investigate the source of funds from Mr D (issue 4), his poor record-keeping and accounting practices (issue 8), his failure to reconcile bank statements (issue 9) and his failure to undertake training in connection with his role as cashroom manager (issue 10); Order that the name of the Respondent be Struck Off the Roll of Solicitors in Scotland; Direct in terms of Section 53(6) of the Solicitors (Scotland) Act 1980 that this order shall take effect on the date on which the written findings are intimated to the Respondent; 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.

**(signed)**
**Alan McDonald**
**Vice Chairman**

9. 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 14 AUGUST 2019 .

**IN THE NAME OF THE TRIBUNAL**

[redacted]

**Alan McDonald**
**Vice Chairman**

**NOTE**

The Complaint was served by Recorded Delivery Post at the Respondent's home address on 19 April 2017. No Answers were lodged for the Respondent. The Tribunal appointed the Complaint to be heard on 27 June 2017 and notice was served at the Respondent's home address by Recorded Delivery Post on 11 May 2017. In the course of two telephone conversations between the Respondent and the Tribunal Clerk on 15 June 2017 and 16 June 2017, it was established that the Respondent did not intend to be present or represented at the hearing on 27 June 2017 and that he was content for the case to proceed in his absence.

The Fiscal made a motion in terms of Rule 14(4) of the 2008 Tribunal Rules for the Tribunal to proceed to hear and determine the Complaint in the absence of the Respondent. The Tribunal heard evidence from the Clerk with regard to service of the latest Notice of hearing and considered whether it was fair to proceed in the Respondent's absence. The Tribunal had regard to R v Jones [2002] UKHL 5 and the need to exercise its discretion in this matter *"with great caution and with close regard to the overall fairness of the proceedings."* The Tribunal considered fairness to the Respondent. There would be a disadvantage to the Respondent in being unable to give his account of events. However, he had chosen not to attend and had instead provided a letter to be considered. The Tribunal was of the view that it is in the public interest that regulatory proceedings take place within a reasonable time. The Respondent had not indicated any desire to adjourn the proceedings. In these circumstances, the balance lay in favour of proceeding in the Respondent's absence.

The Fiscal asked the Tribunal in terms of Rule 14(5)(b) of the 2008 Rules to proceed upon evidence given by affidavit and this motion was granted. The Fiscal lodged affidavits for three witnesses. The Fiscal made submissions to the Tribunal in relation to the affidavit evidence and the documentary productions lodged. The Fiscal indicated that Production 13 for the Complainers which had been provided to the Tribunal was not the correct document and should instead have been a letter dated 1 May 2014 from the Respondent's firm to Slater Hogg and Howieson as was indicated on the List of Documents for the Complainers. The Tribunal allowed the Fiscal to substitute the correct letter.

**EVIDENCE FOR THE COMPLAINERS**

The Fiscal lodged affidavits for Mr D, Brian Armour and Christina Heywood. Mr D set out in his affidavit his evidence that he lodged £200,000 with the Respondent to be held in trust ultimately to be

used to purchase Property 2. He said that *"without my knowledge or consent, Mr McSherry moved the money elsewhere."*

Brian Armour indicated in his affidavit that he was a partner with TLT LLP. In 2014 he acted for the receivers in a transaction to sell Property 1. The properties were marketed by Slater Hogg and Howieson Estate Agents and Mr Armour became involved after a successful bid was made. Given the scale of the transaction, the sellers required a non-returnable but deductible deposit from the successful bidder and proof of funding. Mr Armour noted that he received a letter from the Respondent's firm dated 1 May 2017 via Slater Hogg and Howieson. This letter confirmed Mr C's offer and his proposal to pay a 10% deposit of £205,000. On the same day Mr Armour was aware that the Respondent's firm had written to Slater Hogg and Howieson confirming that Mr C had put SBM Law in funds to the full value of the offer, namely £2,050,000. He noted that *"it was on the strength of this assurance that the sellers were content to proceed with the transaction."*

Christina Heywood was the Head of Financial Compliance at the Law Society of Scotland from May 2009 until March 2016. In her affidavit she noted that the Financial Compliance Department carried out an inspection of the Respondent's firm in April, May and June 2014. Her team had concerns about two payments totalling £200,000 which came into the firm and were sent out again. The funds were paid in by Mr D and were to be held to his instructions but these did not appear to have been followed. Instead, the bank statements showed that the funds were paid out to Mr C or his company, Company 1, both clients of the Respondent's firm. There was no written authority to transfer the funds in this way. The bank statements showed a payment of £230,000 back into the firm's account. £200,000 was paid to TLT. It was not clear why £30,000 was returned to Mr C.

Christina Heywood saw ledgers recovered from the firm. She explained in her affidavit that some of these were created by the firm after the inspection had started at the Law Society's request. For example, initially there had been no ledger relating to Mr D at all and no record of the funds having been received. She noted that *"There was never a time when we could see a full book-keeping record that matched completely with the activity in the firm's bank account."* It was her opinion that the Respondent was confused about the nature of the transaction and whether Mr D was a client. No documents she saw resolved the problem of £200,000 coming in and out of the firm without being properly recorded in the ledgers. She had to conclude that the client account was in deficit as a result.

Christina Heywood also gave evidence by way of affidavit that as part of the Law Society inspection the team looked at money laundering compliance. The transaction described above was of concern from an

anti-money laundering perspective because money had come from different people and there was insufficient evidence of money laundering checks having been carried out. There was no evidence of any checks carried out in relation to Mr D, either to verify his identify or the source of the funds. She also noted that the Respondent was the cashroom manager but did not appear to have the skills or training necessary for that role.

**SUBMISSIONS FOR THE COMPLAINERS**

The Law Society Fiscal made reference to his written submissions, copies of which were provided to the Tribunal members. He reviewed the facts and duties in relation to each issue identified in the Complaint and submitted that these were sufficient for the Tribunal to find the Respondent guilty of professional misconduct. He suggested that the facts disclosed fundamental breaches of the Accounts Rules which related to the general poor state of the firm's financial management. He noted the specific money laundering failures in relation to Mr D and Mr C, in particular the lack of evidence of any action taken to identify these clients or verify the source of their funds. He also drew the Tribunal's attention to the Respondent's misrepresentations regarding funding to Mr D and to Slater Hogg Howieson and TLT Solicitors.

**SUBMISSIONS FOR THE RESPONDENT**

The Respondent submitted a letter for the Tribunal's attention which was received by the Tribunal office on 8 June 2017. He submitted that he was not dishonest and *"never took any money"*. He indicated that he *"managed to place the money to the Law Society"* and met with the Judicial Factor to explain what had happened. He noted that he had little knowledge of conveyancing and relied upon others. He also provided mitigation regarding his personal circumstances in 2014.

**DECISION**

The Tribunal gave careful consideration to the Complaint, Affidavits, Productions, the submissions made on behalf of the Complainers and the Respondent's letter. Where the evidence contained in Brian Armour's affidavit contradicted the averments in the Complaint regarding deposits for Property 1, the Tribunal preferred the evidence of Brian Armour and made the relevant findings in fact. It concluded that the above noted facts had been proved beyond reasonable doubt.

The Tribunal considered the test for professional misconduct contained within Sharp v Council of the Law Society of Scotland 1984 SLT 313, namely 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 made."*

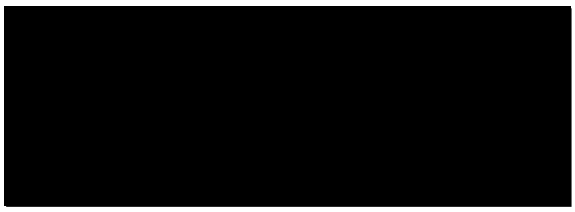
The Tribunal was satisfied that the Respondent's behaviour constituted a serious and reprehensible departure from the standards expected of competent and reputable solicitors and therefore met the test for professional misconduct. The most serious aspects of the Complaint were contained within issues 1, 2, 6 and 7 and these individually constituted professional misconduct. Issues 3, 4, 5, 8, 9, and 10 represented professional misconduct *in cumulo*.

The Respondent's conduct was at the higher end of the scale of misconduct. The Tribunal considered that the Respondent's misrepresentations regarding funding which he made to his client, the estate agent and TLT Solicitors met the objective and subjective tests of dishonesty. The Respondent was aware of the purpose to which Mr D's money was to be held but did not comply with his client's written instructions. He knew that he did not hold £2,050,000 in his client account when he made that claim to the estate agent and the solicitor. He made no attempt to clarify the situation with those parties when it became clear that he was not going to receive that money. The Tribunal accepted that there was no evidence that the Respondent had received any personal financial gain from his conduct. However, his misrepresentations to Mr D, Slater Hogg and Howieson and TLT Solicitors were dishonest and could have had very serious consequences. It is imperative that if the public is to have confidence in the legal profession that solicitors maintain the standards of conduct expected of competent and reputable solicitors.

When considering sanction, the Tribunal had regard to its previous finding of misconduct against the Respondent for analogous matters on 21 January 2016. Further aggravating factors were the lack of remorse and insight displayed by the Respondent and his failure to engage adequately with the Tribunal process. The Tribunal considered other disposals but was of the view that in this case the ultimate sanction could not be avoided. The Respondent's conduct demonstrated that he was not fit to be a

solicitor. If he continued to practise he would be a significant risk to the public. Therefore, the Tribunal ordered that the Respondent's name be struck off the Roll of Solicitors in Scotland. In terms of Section 53(6) of the Solicitors (Scotland) Act 1980 the Tribunal directed that the order shall take effect on the date on which the written findings are intimated to the Respondent.

The Fiscal moved for expenses to be awarded against the Respondent. The Tribunal found the Respondent liable in the expenses of the Complainers and of the Tribunal. It directed that publicity would be given to the decision and that publicity should include the name of the Respondent but should not identify any third parties as publication of their personal data is likely to damage their interests.



**Alan McDonald**

**Vice Chairman**