

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

**FINDINGS**

**in Complaint**

**by**

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

**COMPLAINERS**

**against**

**CHRISTOPHER WILLIAM  
HALES, 74/1 Spottiswoode Street,  
Edinburgh**

**RESPONDENT**

1. A Complaint dated 14 January 2014 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Christopher William Hales, 74/1 Spottiswoode Street, Edinburgh (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 13 May 2014 and notice thereof was duly served on the Respondent.

4. The hearing took place on 13 May 2014. The Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Respondent was not present or represented.
5. Emails had been received from the Respondent confirming that he accepted the averments of fact, averments of duty and averments of professional misconduct in the Complaint and that he would not be attending the hearing.
6. In the circumstances the Tribunal found the following facts established as agreed between the parties:-
  - 6.1 The Respondent was enrolled as a solicitor on 6 November 1987. Between 1 June 1992 and 2 September 2011 he was a partner with Grigor Hales, Solicitors, 135 Gorgie Road, Edinburgh.
  - 6.2 Property 1 (“Transaction 1”)

On 29 April 2010 the Respondent wrote to Mrs A in connection with the purchase of Property 1 in the following terms “We refer to your recent telephone conversation with our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase and subsequent sale of the above property”. On 21 June 2010 Mrs A purchased the property for the sum of £245,000 from Mr and Mrs B of Property 2 (“the first transaction”). On the same day Mrs A sold the property to Mr C for the sum of £315,000 (“the second transaction”). The Respondent acted for the purchaser Mrs A in the first transaction. The Respondent acted for the seller Mrs A and the purchaser Mr C in the second transaction. In connection with the second transaction the Respondent sent letters dated 16 June 2010 to the seller and the purchaser respectively

stating that “should you decide that you are happy for this firm to act for both parties in view of your relationship with the [purchaser/seller] then we confirm that we would be able and willing to act for you in this capacity.” Mr C obtained a loan in connection with the second transaction from Birmingham Midshires. The Respondent was also instructed by the lender in connection with this loan by letter of 14 June 2010. In their letter of instruction the lender confirmed “You are instructed in accordance with the CML Lenders Handbook for Scotland and our Part 2 instructions”. The lender’s instruction enclosed an offer of loan dated 14 June 2010. It stated that the purchase price was £315,000. The loan required was stated to be £236,215. On 16 June 2010 the Respondent sent a Certificate of Title to the lenders stating “We have investigated the title to the property offered to you as security for the advance under your instructions. The title is good and marketable and may be safely accepted by you”. The loan funds were transferred to the Respondent’s firm on 17 June 2010. The balance of funds of £89,370 was received from Mr C on 18 June 2010. On 21 June 2010 the purchase price for the second transaction was transferred by the Respondent to Mrs A. On the same date, having received the purchase price of £315,000 from Mr C in connection with the second transaction, the Respondent applied £245,000 of these funds to meet the purchase price to be paid by Mrs A in the first transaction. The sum of £245,000 was transferred by the Respondent to the seller’s agents in connection with the first transaction after those funds had been received by Mrs A in connection with the second transaction. On 21 June, and on the instructions of Mrs A, the Respondent transferred £55,000 of the free sale proceeds from the second transaction to Company 1 a company incorporated under the Companies Acts and having a registered office at Property 3. The Respondent did not

carry out any due diligence in respect of Company 1 before transferring the sale proceeds. On the same date the Respondent transferred the remaining free sale proceeds of £13,827.55 to the bank account of Mrs A and Mr D. On 16 July 2010 Registers of Scotland acknowledged receipt of the Respondent's application for registration on behalf of Mr C. That application included the disposition in favour of Mrs A and subsequent disposition in favour of Mr C.

6.3 At the date of instruction (14 June 2010) the 1 December 2006 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-

“5.1.1 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...

5.1.2 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 the information to us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.”

6.4 The Respondent did not advise the lender that Mrs A had owned the property for less than six months. The Respondent did not advise the lender that the sale by Mrs A to Mr C was a back to back transaction. The Respondent did not advise the lender that the price Mr C paid for the

property was £70,000 greater than the same day purchase by Mrs A. The Respondent did not advise the lender of the relationship between the parties as referred to in his respective letters to the parties on 16 June 2010. The Respondent did not withdraw from acting. The Respondent completed the second transaction using the loan funds obtained from Birmingham Midshires. The Respondent subsequently used those loan funds to complete the first transaction on behalf of Mrs A.

#### 6.5 Property 4 – (“Transaction 2”)

On 30 September 2010 the Respondent wrote to Mrs A in connection with the purchase of Property 4 in the following terms “We refer to your recent telephone conversation with our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase and sale of the above property”. On 1 October 2010 Mr and Mrs E executed a disposition in favour of Mrs A for the sum of £100,000 (“the first transaction”). On 4 October 2010 Mrs A executed a disposition in favour of Mr C for the sum of £160,000 (“the second transaction”). The Respondent acted for the purchaser Mrs A in the first transaction. The Respondent acted for the seller Mrs A and the purchaser Mr C in the second transaction. In connection with the second transaction the Respondent sent letters dated 30 September 2010 to the seller and the purchaser respectively stating that “should you decide that you are happy for this firm to act for both parties in view of your relationship with the [purchaser/seller] then we can confirm that we would be able and willing to act for you in this capacity.” Mr C obtained a loan in connection with the second transaction from Birmingham Midshires. The Respondent was also instructed by the lender, in connection

with this loan by letter of 15 September 2010. In their letter of instruction the lender confirmed “You are instructed in accordance with the CML Lenders Handbook for Scotland and our Part 2 instructions”. The lender’s instruction enclosed an offer of loan date 15 September 2010. The offer of loan stated that the purchase price was £160,000. The loan required was stated to be £119,965. On 27 September the Respondent sent a Certificate of Title to the lenders stating “We have investigated the title to the property offered to you as security for the advance under your instructions. The title is good and marketable and may be safely accepted by you”. The loan funds of £119,965 were transferred by the lender to the Respondent’s firm on 28 September 2010. The balance of funds was transferred by Mr C to the Respondent’s firm on 2 October 2010. On 27 October 2010 Registers of Scotland acknowledged the Respondent’s application for registration of title on behalf of Mr C and provide a title number. That application included the disposition in favour of Mr C and the disposition in favour of Mrs A

6.6 At the date of instruction (15 September 2010) the 1 December 2006 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-

“5.1.1 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...

5.1.2 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 the information to us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.”

6.7 The Respondent did not advise the lender that Mrs A had owned the property for less than six months. The Respondent did not advise the lender that the sale by Mrs A to Mr C was a back to back transaction. The Respondent did not advise the lender that the price Mr C paid for the property was £60,000 greater than the price paid by Mrs A. The Respondent did not advise the lender of the relationship between the parties as referred to in his respective letters to the parties on 30 September 2010. The Respondent did not withdraw from acting. The Respondent completed the second transaction using the loan funds obtained from Birmingham Midshires

6.8 Property 5 – (“Transaction 3”)

On 15 October 2010 the Respondent wrote to Mr F in connection with the purchase of Property 5 in the following terms “We refer to your recent telephone conversation with our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase and sale of the above property”. Ms W executed a disposition in favour of Mr F for the sum of £64,000 on 16 November 2010 (“the first transaction”). On the same day Mr F executed a disposition in favour of Mrs A for the sum of £95,000 (“the second transaction”). The Respondent acted for the purchaser Mr F in the first transaction. The

Respondent acted for the seller Mr F and the purchaser Mrs A in the second transaction. Mr F and Mrs A were business partners. The Respondent sent letters dated 15 October and 8 November 2010 to the seller and the purchaser respectively stating that “should you decide that you are happy for this firm to act for both parties in view of your relationship with the [purchaser/seller] then we can confirm that we would be able and willing to act for you in this capacity.”

6.9 Mrs A obtained a loan in connection with the second transaction from the Mortgage Works. The Respondent was also instructed by the lender in connection with this loan by letter of 8 November 2010. In its letter of instruction the lender confirmed “You are instructed to act on our behalf in accordance with the CML Lenders’ Handbook for Solicitors...and our Part 2 instructions”. The lender’s instructions also provided “You are instructed on the basis that upon submitting your Certificate of Title you are confirming that you have complied with all such instructions.” The lender’s instructions contained the following specific requirements:-

“1. Ownership of Property

You must be satisfied that on completion of the advance the borrower will be in possession of the whole of the security subjects.

6. Information

If any matter comes to your attention which you should reasonably expect us to consider to be important in deciding whether or not to proceed with the advance to the borrower you must bring that matter to our immediate attention before



completing the advance. Otherwise you should proceed in terms of condition 5.1.2 of the Handbook.

## 7. Conflict of Interest

If you are also acting for the seller or if you consider that there are any other circumstances which might bring about a conflict of interest you must advise us immediately. In the event you should not proceed further without first obtaining our agreement that you may do so.”

The lender’s instructions enclosed an offer of loan which stated that the total loan required in connection with the second transaction was £75,885. On 15 November 2010 the Respondent sent a letter to the lender stating “We...now enclose Certificate of Title duly completed in accordance with your instructions and look forward to receipt of loan funds in time for settlement”. The loan funds of £75,885 were transferred by the lender to the Respondent’s firm on 18 November 2010. The balance of the funds was transferred by Mrs A to the Respondent on 19 November 2010. On 22 November 2010 the Respondent transferred the free proceeds from the second transaction of £28,181.80 to the purchaser Mrs A, rather than the seller Mr F. On 30 November 2010 Mr F sent an e-mail to the Respondent instructing him to pay the free proceeds from that sale to the purchaser Mrs A, and her husband. On 4 February 2011 Registers of Scotland acknowledged the Respondent’s application for registration of title on behalf of Mrs A. That application included the disposition in favour of Mr F and the disposition in favour of Mrs A.

6.10 At the date of instruction (8 November 2010) the 1 December 2006 edition of the CML Lenders Handbook for

Scotland applied to the Respondent. The Handbook contained the following instructions:-

“5.1.1 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...

5.1.2 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 the information to us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.

6.3.1 The purchase price for the property must be the same as set out in our instructions. If it is not, you must tell us...You must tell us...if the missives provide for:

6.3.1.1 a cashback to the buyer...”.

6.11 The Respondent did not advise the lender that Mr F had owned the property for less than six months. The Respondent did not advise the lender that the sale by Mr F to Mrs A was a back to back transaction. The Respondent did not advise the lender that the price Mrs A paid for the property was £31,000 greater than the price paid by Mr F. The Respondent did not advise the lender of the relationship between the parties as referred to in his respective letters to the parties on 15 October and 8 November 2010. The Respondent did not withdraw from acting. The Respondent proceeded to pay the loan funds to the seller Mr F.

6.12 The Respondent was aware that the purchaser in the second transaction, Mrs A, had received a payment of £28,181.80 from the seller Mr F after settlement. The Respondent did not advise The Mortgage Works of that fact.

6.13 Property 6 – (“Transaction 4”)

On 16 March 2011 the Respondent wrote to Mrs A in connection with the purchase Property 6 in the following terms “We refer to your recent telephone conversation with our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase of the above property”. The sellers, Mr and Mrs G, executed a disposition in favour of Mrs A on 17 March 2011. The purchase price was £150,000. The purchaser obtained a loan in connection with the purchase of the property from The Mortgage Works. The Respondent was also instructed by the lender, in connection with this loan by letter of 18 February 2011. In its letter of instruction the lender confirmed “You are instructed to act on our behalf in accordance with the CML Lenders’ Handbook for Solicitors...and our Part 2 instructions”. The lender’s instructions also provided “You are instructed on the basis that upon submitting your Certificate of Title you are confirming that you have complied with all such instructions.” The lender’s instructions contained the following specific requirements:-

“6. Information

If any matter comes to your attention which you should reasonably expect us to consider to be important in deciding whether or not to proceed with the advance to the borrower you must bring that matter to our immediate attention before completing the advance. Otherwise you should proceed in terms of condition 5.1.2 of the Handbook.”

The lender's instructions enclosed an offer of loan which stated that the loan required was to be £110,506. On 17 March 2011 the Respondent sent a letter to the lender stating "We...enclose herewith Certificate of Title duly completed in accordance with your instructions and look forward to receipt of loan funds in time for settlement". The attached Certificate of Title signed and dated by the Respondent 17 March 2011 stated "We undertake that we have and will comply with your instructions based upon the terms set out in the CML Lenders Handbook for Scotland and any additional instructions issued to us". The loan funds of £110,506 were transferred to the Respondent's firm by the lender on 18 March 2011. The balance of the purchase price of £42,134 was received from Company 3, an unincorporated body in which Mrs A and Mr H were partners, on 23 March 2011. The Respondent transferred the total purchase price to the seller's agents, Company 2 on 24 March 2011. On 5 May 2011 Registers of Scotland acknowledged receipt of the Respondent's application for registration on behalf of Mrs A.

- 6.14 At the date of instruction (18 February 2011) the 1 December 2010 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-
- "5.2.1 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 the information to us because of a conflict of interest, you must cease to act and

return our instructions stating that you consider a conflict of interest has arisen.

5.9.1 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.”.

6.15 The Respondent did not inform the lender that the balance of funds was not provided by the purchaser. The Respondent did not withdraw from acting. The Respondent proceeded to pay the loan funds to the seller.

6.16 Property 7 – (“Transaction 5”)

On 17 May 2011 the Respondent wrote to Mr D in connection with the purchase of Property 7 in the following terms “We refer to your recent telephone conversation with our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase of the above property”. Mr D is Mrs A’s husband. The seller Mr I executed a disposition in favour of Mr D on 2 June 2011. The purchase price was £75,000. On 24 May 2011 the lender Northern Rock sent a letter to the Respondent enclosing an offer of loan together with related documentation. The lender’s letter stated “Please refer to your instructions in the CML Lenders Handbook and our Part 2 replies concerning the submission of the [Certificate of Title]. You should not submit your certificate unless it is unqualified or we have authorised you to process notwithstanding any issues you have raised with us.” The offer of loan stated that that purchase price was £75,000. The loan required was stated to be £52,500. On 1 June 2011

the Respondent completed a Certificate of Title to the lender in which he certified that he had complied with the instructions set out in the CML Lenders Handbook for Scotland and any special conditions of advance imposed by Northern Rock plc. The loan funds of £52,500 were transferred by Northern Rock to the Respondent's firm on 2 June 2011. The balance of the purchase price of £23,365 had been transferred to the Respondent's firm by Company 3 on the previous day, 1 June 2011. The Respondent transferred the total purchase price to the seller's agents on 3 June 2011. On 21 June 2011 Registers of Scotland acknowledged receipt of the Respondent's application for registration on behalf of Mr D, and provided a Title Number.

6.17 At the date of instruction (24 May 2011) the 1 December 2010 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-

“5.2.1 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 the information to us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.

5.9.1 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.”

6.18 The Respondent did not inform the lender that the balance of funds was not provided by the purchaser. The Respondent did not withdraw from acting. The Respondent proceeded to pay the loan funds to the seller.

6.19 Property 8 – (“Transaction 6”)

On 13 April 2011 the Respondent wrote to Mrs L in connection with the purchase of Property 8 in the following terms “We refer to your recent meeting with our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase of the above property”. The seller, Mr J executed a disposition in favour of Mrs K on 21 April 2011. The purchase price was £60,000. Mrs K obtained a loan in connection with the purchase of Property 8 from The Mortgage Works. The Respondent was also instructed by the lender, in connection with this loan by letter of 7 April 2011. In its letter of instruction the lender confirmed “You are instructed to act on our behalf in accordance with the CML Lenders’ Handbook for Solicitors...and our Part 2 instructions”. The lender’s instructions also provided “You are instructed on the basis that upon submitting your Certificate of Title you are confirming that you have complied with all such instructions.” The lender’s instructions contained the following specific requirements:-

“6. Information

If any matter comes to your attention which you should reasonably expect us to consider to be important in deciding whether or not to proceed with the advance to the borrower you must bring that matter to our immediate attention before

completing the advance. Otherwise you should proceed in terms of condition 5.1.2 of the Handbook.

#### 7. Conflict of Interest

If you are also acting for the seller or if you consider that there are any other circumstances which might bring about a conflict of interest you must advise us immediately. In the event you should not proceed further without first obtaining our agreement that you may do so.”

The offer of loan stated that the loan required was £47,885. On 19 April 2011 The Mortgage Works sent the Respondent a letter acknowledging the Certificate of Title and confirming that the loan funds of £47,885 would be transferred by CHAPS on 19 April. In fact the loan funds were transferred from The Mortgage Works to the Respondent’s firm on 18 April 2011. The balance of the purchase price of £12,970 was transferred from Company 3 to the Respondent’s firm on 20 April 2011. The Respondent’s firm transferred the total purchase price to the seller’s agents Company 2 on 21 April 2011. On 9 May 2011 Registers of Scotland acknowledged receipt of the Respondent’s application for registration on behalf of Ms L and provided a Title Number.

- 6.20 At the date of instruction (7 April 2011) the 1 December 2010 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-
- “5.2.1 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 the information to



us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.

5.9.1 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.”.

6.21 The Respondent did not inform the lender that the balance of funds was not provided by the purchaser. The Respondent did not withdraw from acting. The Respondent proceeded to pay the loan funds to the seller.

6.22 Property 9 – (“Transaction 7”)

On 13 June 2011 the Respondent wrote to Mrs L in connection with the purchase of Property 9 in the following terms “We refer to your recent telephone conversation with our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase of the above property”. The sellers were Mr and Mrs N. The purchase price was £55,000. Mrs L obtained a loan in connection with the purchase from The Mortgage Works. The Respondent was also instructed by the lender in connection with this loan by letter of 21 June 2011. In its letter of instruction the lender confirmed “You are instructed to act on our behalf in accordance with the CML Lenders’ Handbook for Solicitors...and our Part 2 instructions”. The lender’s instructions also provided “You are instructed on the basis that upon submitting your Certificate of Title you are confirming that you have complied with all such

instructions.” The lender’s instructions contained the following specific requirements:-

“6. Information

If any matter comes to your attention which you should reasonably expect us to consider to be important in deciding whether or not to proceed with the advance to the borrower you must bring that matter to our immediate attention before completing the advance. Otherwise you should proceed in terms of condition 5.1.2 of the Handbook.

7. Conflict of Interest

If you are also acting for the seller or if you consider that there are any other circumstances which might bring about a conflict of interest you must advise us immediately. In the event you should not proceed further without first obtaining our agreement that you may do so.”

The offer of loan stated that that the loan required was £43,885. On 11 July 2011 the Respondent sent a letter to the lender stating “We... enclose herewith Certificate of Title duly completed in accordance with your instructions and look forward to receipt of loan funds in early course”. The attached Certificate of Title signed and dated by the Respondent 11 July 2011 stated “We undertake that we have and will comply with your instructions based upon the terms set out in the CML Lenders Handbook for Scotland and any additional instructions issued to us”. The loan funds of £43,885 were transferred from The Mortgage Works to the Respondent’s firm on 12 July 2011. The balance of the purchase price of £11,980 was transferred from Company 3 to the Respondent’s firm on 13 July 2011. The purchase price of £55,000 was transferred to the seller’s agents Company 2 on 14 July 2011. The transaction settled on 19 July 2011. On 3 August 2011 Registers of Scotland acknowledged receipt of the Respondent’s application for registration on behalf of Mrs L and provided a Title Number.

6.23 At the date of instruction (21 June 2011) the 1 December 2010 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-

“5.2.1 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 the information to us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.

5.9.1 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.”

6.24 The Respondent did not inform the lender that the balance of funds was not provided by the purchaser. The Respondent did not withdraw from acting. The Respondent proceeded to pay the loan funds to the seller.

6.25 Property 10 – (“Transaction 8”)

On 6 June 2011 the Respondent wrote to Mr M in connection with the purchase of Property 10 in the following terms “We refer to your recent telephone conversation with

our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase of the above property”. The purchase price was £95,000. Mr M obtained a loan in connection with this purchase from Birmingham Midshires. The Respondent was also instructed by the lender in connection with this loan by letter of 3 June 2011. In its letter of instruction the lender stated “You are instructed in accordance with the CML Lenders’ Handbook for Scotland and out Part 2 instructions.” The offer of loan states that that purchase price of Property 10 was £95,000. The loan required was stated to be £71,215. The loan funds of £71,215 were transferred by Birmingham Midshires to the Respondent’s firm on 17 June 2011. The balance of the purchase price of £24,650 was transferred by Company 3 to the Respondent’s firm on 17 June 2011. The total purchase price was transferred by the Respondent’s firm to the seller’s agents Company 2 on 22 June 2011. On 30 August 2011 Registers of Scotland acknowledged receipt of the Respondent’s application for registration on behalf of Mr M

6.26 At the date of instruction (3 June 2011) the 1 December 2010 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-

“5.2.1 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 the information to us because of a conflict of interest, you must cease to act and

return our instructions stating that you consider a conflict of interest has arisen.

5.9.1 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.”

6.27 The Respondent did not inform the lender that the balance of funds was not provided by the purchaser. The Respondent did not withdraw from acting. The Respondent proceeded to pay the loan funds to the seller.

6.28 Property 11 – (“Transaction 9”)

On 16 March 2011 the Respondent wrote to Mr and Mrs O in connection with the purchase of Property 11 in the following terms “We refer to your recent telephone conversation with our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase of the above property”. The sellers, Mr and Mrs P, executed a disposition in favour of Mr and Mrs O on 22 March 2011. The purchase price was £110,000. Mr and Mrs O obtained a loan in connection with the purchase from The Mortgage Works. The Respondent was also instructed by the lender in connection with this loan by letter of 4 March 2011. In its letter of instruction the lender confirmed “You are instructed to act on our behalf in accordance with the CML Lenders’ Handbook for Solicitors...and our Part 2 instructions”. The lender’s instructions also provided “You are instructed on the basis that upon submitting your Certificate of Title you are confirming that you have complied with all such

instructions.” The lender’s instructions contained the following specific requirements:-

“6. Information

If any matter comes to your attention which you should reasonably expect us to consider to be important in deciding whether or not to proceed with the advance to the borrower you must bring that matter to our immediate attention before completing the advance. Otherwise you should proceed in terms of condition 5.1.2 of the Handbook.

7. Conflict of Interest

If you are also acting for the seller or if you consider that there are any other circumstances which might bring about a conflict of interest you must advise us immediately. In the event you should not proceed further without first obtaining our agreement that you may do so.”

The offer of loan stated that the loan required was £86,455. On 17 March 2011 the Respondent sent a letter to the lender stating “We... enclose herewith Certificate of Title duly completed in accordance with your instructions and look forward to receipt of loan funds in time for settlement”. The attached Certificate of Title signed and dated by the Respondent 17 March 2011 stated “We undertake that we have and will comply with your instructions based upon the terms set out in the CML Lenders Handbook for Scotland and any additional instructions issued to us”. The loan funds were transferred to the Respondent’s firm on 22 March 2011. The balance of the purchase price of £25,650 had been received from Company 3 on 21 March 2011. On 13 May 2011 Registers of Scotland acknowledged receipt of the Respondent’s application for registration on behalf of Mr O and provided a Title Number.

6.29 At the date of instruction (4 March 2011) the 1 December 2010 edition of the CML Lenders Handbook for Scotland

applied to the Respondent. The Handbook contained the following instructions:-

“5.2.1 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 the information to us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.

5.9.1 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.”

6.30 The Respondent did not inform the lender that the balance of funds was not provided by the purchaser. The Respondent did not withdraw from acting. The Respondent proceeded to pay the loan funds to the seller.

6.31 Property 12 – (“Transaction 10”)

On 8 January 2011 the Respondent wrote to Mr and Mrs O in connection with the purchase of Property 12 in the following terms “We refer to your recent telephone conversation with our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase of the above property”. The purchase price was £85,000. Mr and Mrs O obtained a loan in connection with the purchase from The Mortgage Works.

The Respondent was also instructed by the lender in connection with this loan by letter of 17 December 2010. In its letter of instruction the lender confirmed “You are instructed to act on our behalf in accordance with the CML Lenders’ Handbook for Solicitors...and our Part 2 instructions”. The lender’s instructions also provided “You are instructed on the basis that upon submitting your Certificate of Title you are confirming that you have complied with all such instructions.” The lender’s instructions contained the following specific requirements:-

“6. Information

If any matter comes to your attention which you should reasonably expect us to consider to be important in deciding whether or not to proceed with the advance to the borrower you must bring that matter to our immediate attention before completing the advance. Otherwise you should proceed in terms of condition 5.1.2 of the Handbook.

7. Conflict of Interest

If you are also acting for the seller or if you consider that there are any other circumstances which might bring about a conflict of interest you must advise us immediately. In the event you should not proceed further without first obtaining our agreement that you may do so.”

The offer of loan stated that the loan required was £67,885. On 10 January 2011 the Respondent sent a letter to the lender stating “We...now enclose our Certificate of Title duly completed in accordance with your instructions”. The attached Certificate of Title signed and dated by the Respondent 10 January 2011 stated “...we confirm that we have complied with your instructions contained in the Offer of Mortgage”.

The parties agreed that a cashback amount of £25,000 would be payable by the purchasers to the sellers at the date of settlement. The Respondent made no reference to the



cashback payment in the Certificate of Title. As a result The Mortgage Works offered lending of £67,885 when the actual price paid for the property was £60,000. On 20 January 2011 the Respondent sent a letter to the agents for the seller enclosing a cheque for the purchase price in the sum of £85,833 to be held undelivered pending receipt of a cashback cheque in the sum of £25,000. On 20 January 2011 the Seller's agents delivered the cashback cheque to the Respondent. On 20 January 2011 Company 3 transferred the sum of £14,000 to Mr & Mrs O's bank account under the reference "Property 12 funds". This transfer was recorded in an Company 3's bank statement held by the Respondent. The loan funds of £67,885 were transferred by The Mortgage Works to the Respondent's firm on 20 January 2011. Mr & Mrs O transferred the balance of the purchase price of £19,028 to the Respondent's firm on 21 January 2011. The Respondent's firm transferred the purchase price to the seller's agents, Neilsons on 21 January 2011. On 24 January 2011 the cashback sum of £25,000 received from Neilsons was credited to the Respondent's client ledger. By e-mail of 28 January 2011 Mr O instructed the Respondent to pay "the agreed finder's fee" of £2,200 to Company 3. The Respondent arranged for that sum to be deposited in Company 3's account on that date. On the same date the Respondent transferred the sum of £22,800 to Mr O by CHAPS outward payment. On 2 March 2011 Registers of Scotland acknowledged receipt of the Respondent's application for registration on behalf of Mr O and provided a Title Number.

- 6.32 At the date of instruction (10 January 2011) the 1 December 2010 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-

“5.2.1 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 the information to us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.

5.9.1 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.

6.3.1 The purchase price for the property must be the same as set out in our instructions. If it is not, you must tell us.

6.4.4 You must tell us...if the missives provide for or you become aware of any arrangement in which there is a cashback to the buyer...Any such arrangement may lead to the mortgage offer being withdrawn or amended.”.

6.33 The Respondent did not inform the lender that the balance of funds was not provided by the purchaser. The Respondent did not withdraw from acting. The Respondent proceeded to pay the loan funds to the seller.

6.34 The Respondent was aware that the purchaser would receive a cashback payment from the seller of £25,000 as a condition of settlement. The Respondent did not advise The Mortgage Works of that fact.

6.35 Property 13 – (“Transaction 11”)

On 1 December 2010 the Respondent wrote to Mr Q in connection with the purchase of Property 13 in the following terms “We refer to your recent meeting with our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase of the above property”. The purchase price was £90,000. The offer letter dated 3 December 2010 provided for a cashback of £27,000 payable to the purchaser at settlement. Mr Q obtained a loan in connection with this purchase from Birmingham Midshires. The Respondent was also instructed by the lender in connection with this loan by letter of 19 January 2011. In its letter of instruction the lender stated “You are instructed in accordance with the CML Lenders’ Handbook for Scotland and out Part 2 instructions.” The offer of loan stated that that purchase price was £90,000. The loan required was stated to be £67,465. On 10 February 2011 the Respondent sent to Birmingham Midshires a signed Certificate of Title in which the “Price stated in the transfer” was noted as £90,000. The Respondent made no mention of the cashback arrangement. The loan funds of £67,465 were transferred by Birmingham Midshires to the Respondent’s firm on 10 February 2011. The balance of the purchase price of £24,431, was transferred by Company 3 to the Respondent’s firm in three instalments of £10,000, £10,000 and £4,431 on 10 February 2011. On 11 February the Respondent sent a letter to the seller’s agents enclosing a cheque for the purchase price together with seller’s agents’ fees and outlays in the sum of £90,816 to be held undelivered pending receipt of a cashback cheque in the sum of £27,000. On 11 February the seller’s agents sent the Respondent a cheque in the sum of £27,000 in cashback. On 14 February the Respondent’s firm encashed the cashback cheque. A mandate signed by Mr Q and dated 3

February 2011 instructed the Respondent to pay the cashback received to Company 3. On 18 February 2011 the Respondent's firm paid the cashback sum to Company 3. On 9 March 2011 Registers of Scotland acknowledged the Respondent's application for registration on behalf of Mr Q and provided a Title Number..

6.36 At the date of instruction (19 January 2011) the 1 December 2010 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-

“5.2.1 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 the information to us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.

5.9.1 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.

6.3.1 The purchase price for the property must be the same as set out in our instructions. If it is not, you must tell us.

6.4.4 You must tell us...if the missives provide for or you become aware of any arrangement in which there is a cashback to the buyer...Any such arrangement may lead to the mortgage offer being withdrawn or amended.”

6.37 The Respondent did not inform the lender that the balance of funds was not provided by the purchaser. The Respondent did not withdraw from acting. The Respondent proceeded to pay the loan funds to the seller.

6.38 The Respondent was aware that the purchaser would receive a cashback payment from the seller of £27,000 as a condition of settlement. The Respondent did not advise the Lender of that fact.

6.39 Property 13 – (“Transaction 12”)

The Respondent received instructions from Mrs A in connection with the purchase of Property 13 by e-mail on 4 March 2011. Mrs A confirmed the identity and contact details of the sellers Mrs S and Mr T. She confirmed that the buyer would be Mrs R, wife of Mr Q. She advised that the purchase price would be £75,000 with a “remit back amount” of £25,000. Mrs A subsequently advised the Respondent that the new purchase price would be £78,000, the new “remit back amount” would be £38,000, and a fee of £4,150 was to be mandated to Company 3. On 8 April 2011 the Respondent wrote to Mr Q in connection with the purchase of Property 13 in the following terms “We refer to your recent meeting with our Mr Hales and are pleased to confirm that we will be acting on your behalf in connection with your proposed purchase of the above property”. Mr Q arranged a loan from Birmingham Midshires in connection with the purchase. The Respondent was also instructed by the lender in connection with this loan by letter of 11 April 2011. In its letter of instruction the lender stated “You are instructed in accordance with the CML Lenders’ Handbook for Scotland and out Part 2 instructions.” The offer of loan stated that that purchase price was £78,000. The loan

required was stated to be £58,465. On 14 April 2011 the Respondent sent to Birmingham Midshires a signed Certificate of Title in which the “Price stated in transfer” was confirmed as £78,000. The Respondent made no reference to the cashback arrangement in the Certificate of Title. The loan funds of £58,465 were transferred from Birmingham Midshires to the Respondent’s firm on 14 April 2011. The balance of the purchase price, £20,400 was transferred from Company 3 to the Respondent’s firm in two instalments. The first instalment of £17,400 was received on 13 April 2011. The second instalment of £3,000 was received on 15 April 2011. The purchase price of £78,000 was transferred by the Respondent to the seller’s agents on 15 April 2011 by CHAPS transfer. On 7 June 2011 Registers of Scotland acknowledged the Respondent’s application for registration on behalf of Mr Q and provided a Title Number.

- 6.40 At the date of instruction (11 April 2011) the 1 December 2010 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-
- “5.2.1 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 the information to us because of a conflict of interest, you must cease to act and return our instructions stating that you consider a conflict of interest has arisen.
- 5.9.1 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.

6.3.1 The purchase price for the property must be the same as set out in our instructions. If it is not, you must tell us.

6.4.4 You must tell us...if the missives provide for or you become aware of any arrangement in which there is a cashback to the buyer...Any such arrangement may lead to the mortgage offer being withdrawn or amended.”

6.41 The Respondent did not inform the lender that the balance of funds was not provided by the purchaser. The Respondent did not withdraw from acting. The Respondent proceeded to pay the loan funds to the seller.

6.42 The Respondent was aware that the purchaser was to receive a payment from the seller of £38,000 as a condition of settlement. The Respondent did not advise the Lender of that fact.

6.43 Property 14 – (“Transaction 13”)

On 15 June 2011 the Respondent received instructions from Mrs A by e-mail in connection with the purchase of Property 14. Mrs A advised that the purchase price would be £145,000 and the buyer would be Mrs U, but that “it will probably be her husband Mr V who will take care of the day to day queries – use him as 1<sup>st</sup> port of call...”. Mrs A provided e-mail and telephone contact details for Mr V. Mrs A advised that the offer was to be made to the seller’s agents as soon as possible. On 17 June 2011 the Respondent wrote to Mrs U in connection with the purchase in the following terms “We refer to your recent telephone conversation with our Mr Hales and are pleased to confirm that we will be

acting on your behalf in connection with your proposed purchase of the above property”. A loan was arranged with Birmingham Midshires in connection with the purchase. The Respondent was also instructed by the lender in connection with this loan by letter of 21 June 2011. In its letter of instruction the lender stated “You are instructed in accordance with the CML Lenders’ Handbook for Scotland and out Part 2 instructions.” The offer of loan stated that that purchase price was £145,000. The loan required was stated to be £108,715. On 27 June 2011 the Respondent sent to Birmingham Midshires a signed Certificate of Title. The loan funds of £108,715 were transferred by Birmingham Midshires to the Respondent’s firm on 28 June 2011. The Respondent received the balance of the purchase price of £38,720 from Company 3 on 28 June 2011. This sum included funds to meet the purchaser’s legal fees, stamp duty and outlays. On 1 July 2011 the Respondent arranged to transfer the purchase price of £145,000 to the seller’s agents by bank transfer. On 20 July 2011 Registers of Scotland acknowledged the Respondent’s application for registration on behalf of Mrs U, and provided a Title Number.

- 6.44 At the date of instruction (21 June 2011) the 1 December 2010 edition of the CML Lenders Handbook for Scotland applied to the Respondent. The Handbook contained the following instructions:-
- “5.2.1 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 the information to us because of a conflict of interest, you must cease to act and



return our instructions stating that you consider a conflict of interest has arisen.

5.9.1 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.”

6.45 The Respondent did not inform the lender that the balance of funds was not provided by the purchaser. The Respondent did not withdraw from acting. The Respondent proceeded to pay the loan funds to the seller.

7. Having considered the foregoing circumstances, having heard submissions from the Fiscal on behalf of the Complainers and having noted the Respondent’s responses included in the Executive Summary Report lodged with his letter of 7 February 2014, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

7.1 In transactions 1 – 3 his failure to advise the lender of the fact that the seller had not held title to the properties for a period of 6 months and that he was engaged in back to back transactions where the price paid by the second purchaser was substantially greater than the price paid by the first purchaser, contrary to the CML Lender’s Handbook.

7.2 In transactions 3, 10, 11 & 12 his failure to advise the lender that as a result of cash back arrangements agreed between the purchaser and the seller, the loan sought by the purchaser was greater than the total purchase price paid to the seller, contrary to the CML Handbook.

- 7.3 In transactions 4 – 13 his failure to advise the lender that the balance of the purchase price was paid by a 3<sup>rd</sup> party, Company 3 as opposed to the purchaser, contrary to the CML Handbook.
- 7.4 His failure to act with the utmost propriety towards his clients, the lenders, and failure to act in the best interests of his lender clients.
- 7.5 His breach of paragraph 3 of the Solicitors (Scotland) Standards of Conduct) Practice Rules 2008
- 7.6 His breach of Rule 6 of the Solicitors (Scotland) Accounts Certificate, Professional Practice and Guarantee Fund Rules 2001, by his intromitting with funds without the necessary written authority from his lender clients.
8. Having noted the Respondent's comments as contained in his letter and the Executive Summary Report and having heard submissions from the Fiscal, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 13 May 2014. The Tribunal having considered the Complaint dated 14 January 2014 at the instance of the Council of the Law Society of Scotland against Christopher William Hales, 74/1 Spottiswoode Street, Edinburgh; Find the Respondent guilty of Professional Misconduct in respect of his failure to comply with the requirements of the CML Handbook in respect of 13 different transactions, his failure to satisfy his common law duties when acting for a purchaser and a lender, his failure to act with utmost propriety towards his lender clients, his failure to comply with paragraph 3 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 and his failure to comply with Rule 6(1) of the Accounts Etc Rules 2001; Strike the name of the Respondent, Christopher William Hales from the Roll of Solicitors in Scotland; Find the Respondent liable in the expenses of the Complainers, with the exception of the costs of

preparation of the voluminous bundle of productions prepared by 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)**

**Alistair Cockburn**  
**Chairman**

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

**IN THE NAME OF THE TRIBUNAL**

**Chairman**

**NOTE**

The Respondent did not lodge Answers to the Complaint but referred in his letter of 7 February 2014 to his responses to the questions put to him by the Law Society as set out in the Executive Summary Report. The Respondent indicated by email that he accepted the statement of facts, averments of duty and averments of professional misconduct in the Complaint and that he would not be attending the hearing. The Tribunal accordingly proceeded in the Respondent's absence. It was not necessary to hear any evidence.

**SUBMISSIONS FOR THE COMPLAINERS**

Mr Marshall referred to his written submissions:

**6 Introduction: Respondent admits professional misconduct**

(i) The complaint was lodged on 16 January 2014 and service effected by the Clerk on 21 January. The Respondent has not lodged answers. He has however been in contact with the Tribunal and with the Law Society. He wrote to the Clerk on 7 February enclosing the Law Society's report following inspection of his practice on 28 and 29 July 2011 and his responses (albeit that report considers wider issues than those contained in the Law Society's decision to refer matters to a fiscal for prosecution).

(ii) In an e-mail to the Law Society fiscal dated 14 March the Respondent stated:-

(iii) *"I confirm that I have considered the terms of the Complaint and that I accept the statements of fact (paragraph 2), averments of duty (paragraph 3), and averments of professional misconduct (paragraph 4) contained therein."*

(iv) The Respondent admits that he is guilty of professional misconduct. That said, the question of professional misconduct is a decision for the Tribunal.

(v) The test for professional misconduct is as set out in the decision of *Sharp v The Council of the Law Society of Scotland* 1984 SC 129 at 134:-

(vi) “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.”

(vii) I am asking the Tribunal to find the *Sharp* test satisfied and find the Respondent guilty of professional misconduct.

(viii)

## **7 Overview of failures of duty over the 13 transactions**

The complaint concerns 13 separate transactions in which the Respondent was instructed. There are three categories of transaction across the 13:-

(ix) (a) Back to back transactions

(x) Three back to back transactions where the Respondent acted for the first and second purchaser, and the second purchaser’s lender. In these transactions there was a substantial uplift in the price paid by the second purchaser compared to the price paid by the first purchaser. (Transaction 1 – same day uplift £70,000; Transaction 2 – three days later uplift £60,000; Transaction 3 – same day uplift £31,000)

(xi) The CML Handbook (2006 Edition) applied to these transactions and required:-

- The solicitor to report to the lender if the proprietor had owned the property for less than six months (para 5.1.1 of 2006)

- The solicitor to withdraw from acting if information comes to his attention which he should reasonably expect the lender to consider important in deciding whether or not to lend and which he cannot disclose due to a conflict of interest (para 5.1.2 of 2006)

(xii)

(xiii) The Respondent failed to report to the lender or withdraw from acting in these three transactions.

(xiv) (b) Cashback transactions

(xv) In four transactions the Respondent acted for a purchaser and lender and failed to advise the lender of cashback arrangements whereby on completion the seller would return part of the purchase price to the purchaser. Transaction 3 price £95,000 – cashback £28,181.80. Transaction 10 price £85,000 – cashback £25,000. Transaction 11 price £90,000 – cashback £27,000. Transaction 12 price £75,000 – cashback £25,000.

As a result in each of these transactions the loan obtained was greater than the actual purchase price after the cashback payment. Transaction 3 loan £75,885 – purchase price after cashback £65,818. Transaction 10 loan £67,885 – purchase price after cashback £60,000. Transaction 11 loan £67,465 – purchase price after cashback £63,000. Transaction 12 loan £58,465 – purchase price after cashback £50,000.

The CML Handbook (2006 Edition/2010 Edition) applied to these transactions and required:-

- The solicitor to tell the lender if the purchase price for the property was not the same as set out in the lender's instruction and to tell the lender if the missives provided for a cashback to the purchaser (paras 6.3.1 and 6.3.1.1 of 2006 Edition/paras 6.3.1 and 6.4.4 of 2010 Edition).

(xvi) The Respondent failed to tell the lender about the cashback arrangement.

(xvii)

(xviii) (c) Balance of purchase price paid by third party

(xix) In nine transactions the balance of the purchase price was paid by a third party, Company 3, as opposed to the purchaser. (Transactions 4-13).

The CML Handbook (2010 Edition) applied to these transactions and required:-

- The solicitor to ask the borrower how the balance of the purchase price was being provided. If the borrower was not providing the balance the solicitor was required to report this to the lender or return the loan instructions. (para 5.9.1 of the 2010 Edition).

(xx) The Respondent failed to report to the lender that the balance was coming from Company 3 or return the loan instructions.

(xxi) Professional duties above and beyond the CML Handbook

(xxii) The range of failures identified across the 13 transactions represents more than a breach of the CML Handbook.

(xxiii) They also represent a failure by the Respondent to fulfil the professional duty to act with utmost propriety to the lender client where a solicitor acts for lender and purchaser. A solicitor must not withhold any relevant information from a client. If solicitors are to retain the trust of lenders they must continue to act diligently and with the utmost propriety. The Respondent withheld relevant information from his lender clients and continued to act.

The failures set out above also represent a failure in the professional duty to act in the best interests of the lender client as required by paragraph 3 of the Schedule to the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 which provides:-

(xxiv) *“The interests of the client*

*(xxv) 3 (1) Solicitors must act in the best interests of their clients subject to preserving their independence and complying with the law, professional practice rules and the principles of good professional conduct.*



### Breach of Rule 6(1) of the Accounts Rules

Rule 6(1) of the Accounts Rules require a client's written authority before money can be drawn by a solicitor to meet a payment on behalf of another client. The CML Handbook which applies to all of these transactions – whether the 2006 or the 2010 edition – provides at para 2.3 that where a solicitor requires to report any matter under the CML handbook he must do so as soon as he becomes aware of the matter, and after reporting the matter should not complete the mortgage until he has received further written instructions. In failing to comply with the requirements of the CML handbook the Respondent proceeded to intromit with lender funds without the necessary written authority. As a result he is in breach of Rule 6(1) of the Accounts Rules.

### **8 Summary of selected transactions and the duties breached**

(xxvi) The Respondent admits the facts of the 13 transactions. Rather than review each transaction separately I have selected two transactions which together capture the range of failures of duty which I submit make up the misconduct in this matter. The two transactions are:-

- Transaction 1 – Property 1
- Transaction 11 – Property 13

(xxvii) I will briefly summarise the basic facts of these two transactions, and identify the duties breached by the Respondent in each transaction. In this way I will draw out examples of all of the duties which I have submitted have been breached across the thirteen transactions.

(xxviii) Under a separate heading I will go on to submit why these breaches of duty amount to professional misconduct.

(xxix) Transaction 1 – Property 1

(xxx) This was a back to back transaction. The Respondent acted for the first purchaser Mrs A when she bought the property. He then acted for Mrs A when she sold the property to the second purchaser Mr C. He also acted for Mr C in that second

purchase. In connection with the second purchase Mr C obtained a loan to purchase the property and the Respondent also acted for the lender Birmingham Midshires (“BM”) in that loan. BM’s letter of instruction to the Respondent contained the offer of loan and confirmed that he was instructed in accordance with the CML Handbook (Production 4).

(xxxix) He had received instructions on 29 April 2010 from Mrs A to purchase and then sell the property (Production 3). The purchase for Mrs A was completed for £245,000 on 21 June (Disposition – Production 9). The sale to Mr C was completed for £315,000 on the same day (Disposition – Production 10). A same day price increase of £70,000. The respondent did not report that fact to the lender at that time.

(xxxix) The Respondent knew that Mrs A and Mr C were connected – he wrote letters to both of them on 16 June stating “should you decide that you are happy for this firm to act for both parties in view of your relationship with the [purchaser/seller] then we confirm that we would be able and willing to act for you in this capacity.” (Productions 5 and 6). The respondent did not report that fact to the lender at that time.

(xxxix) The offer of loan stated the purchase price was £315,000 and that the net loan was £236,215 (page 2 of Production 4). The Respondent completed the certificate of title on 16 June (Production 7). However at that time the purported seller Mrs A did not yet hold title to the property – her purchase did not complete until 21 June. The respondent did not report that fact to the lender at that time.

In connection with the second purchase the Respondent received the loan funds on 17 June (Production 16). The balance of the purchase price was received from Mr C on 18 June (also Production 16). The Respondent then used £245,000 of the funds from the second purchase to fund the first purchase of the property by Mrs A (Production 17).

On the completion of the second purchase the Respondent transferred £55,000 of the free proceeds to Company 1. The Respondent did not report this unusual information to the lender. Following both completions the Respondent sent both dispositions to Registers of Scotland as part of an application for registration for Mr C.

The breaches of CML handbook this transaction demonstrates are:-

- Failure to advise lender that the seller had not held title for a period of 6 months (para 5.1.1) – the respondent also committed this failure in transactions 2 and 3;
- Failure to advise lender this was a back to back transaction where the price paid by the second purchaser was substantially greater than the price paid by the first purchaser – the respondent also committed this failure in transactions 2 and 3;
- Failure to advise lender of the relationship between the seller and the first purchaser which allowed him to conclude he could act for both parties – the respondent also committed this failure in transactions 2 and 3.

(xxxiv) These failures also amount to breaches of the professional duties which exist above and beyond the CML Handbook which are referred to under heading 2 above: duty to act with utmost propriety to lender clients and duty to act in the best interests of lender clients.

#### Transaction 11 – Property 13

This was not a back to back transaction. It was an example of the cashback transaction and of the balance of the purchase price being paid by the third party, Company 3. In this transaction the Respondent acted for the purchaser Mr Q. Mr Q obtained a loan from Birmingham Midshires (“BM”) and the Respondent acted for

BM in connection with that loan. BM's letter of instruction to the Respondent contained the offer of loan and confirmed that he was instructed in accordance with the CML Handbook (Production 102).

On 3 December 2010 the Respondent issued an offer letter to the Seller's solicitor Neilsons. The offer letter stated "The Price is NINETY THOUSAND POUNDS (£90,000) STERLING with a cashback of £27,000 being paid to the purchaser at settlement" (Production 101). On 3 February the Respondent received a mandate from Mr Q to pay the cashback sum to Company 3 (Production 103).

The offer of loan from the lender stated the purchase price was £90,000 and that the net loan was £67,465 (page 3 of Production 102). The Respondent completed the certificate of title on 10 February 2011 again stating that the price was £90,000 (Production 104). The Respondent did not report the cashback arrangement whereby £27,000 was to be repaid to Mr Q at completion which he would pay to Company 3. The Respondent received the loan funds from BM on 10 February 2011 (Production 108).

The Respondent received the balance of the purchase price of £24,431 from Company 3 in three instalments on 10 February (Production 108). The respondent did not report that fact to the lender at that time. On 11 February the Respondent sent the settlement funds to the seller's agents Neilsons to be held undelivered until receipt, among other things, of the cashback cheque of £27,000 (Production 106). The cashback cheque was sent to the Respondent on the same day (Production 107). It was encashed by the Respondent on 14 February (Production 108). He paid the cashback to COMPANY 3 on 18 February (Production 108).

The breaches of CML handbook this transaction demonstrates are:-

- Failure to advise lender that as a result of cashback arrangements agreed between the seller and purchaser that the loan sought from the lender was greater than the purchase price paid to the seller – the respondent also committed this failure in transactions 3, 10 and 12; and

- Failure to advise lender that the balance of the purchase price was paid by a third party, Company 3, as opposed to the purchaser – the respondent also committed this failure in transactions 4-10, 12 and 13.

(xxxv) These failures also amount to breaches of the professional duties which exist above and beyond the CML Handbook which are referred to under heading 2 above: duty to act with utmost propriety to lender clients and duty to act in the best interests of lender clients.

(xxxvi)

9 Submission that the Respondent's breach of duties amounts to professional misconduct

At paragraph 4 of the complaint it is submitted that the Respondent's breach of duties, singularly or in cumulo, amount to professional misconduct. In this section I will provide reasons and authority to enable the Tribunal to make that decision.

Beginning with the decision of *Dunbar* (4 October 2011) this Tribunal has decided a number of cases involving "back to back" transactions conducted by solicitors in breach of the CML handbook and other professional duties. It has held that the following failures amount to professional misconduct:-

- a) failure to inform the lender that a seller has owned property for less than six months
- b) failure to advise the lender of important information which would be relevant to the decision to lend
- c) failure to advise the lender that the deposit for the purchase price was not provided by the purchaser

It should be noted that in the present matter only Transactions 1-3 are "back to back" transactions, but the remaining transactions demonstrate the same failures of duty which are usually demonstrated in "back to back" transactions.

Another failure found in the current matter is the failure in four transactions (Transactions 3, 10, 11 and 12) to advise the lender that the actual purchase price was not in fact as set out in the lender's instructions because of a cashback payment paid

by the seller to the purchaser at settlement. As a result the loan made was greater than the purchase price paid by the purchaser.

All of the failures referred to are failures to comply with the contractual duties of the CML Handbook and the lender's instructions.

The Tribunal decision of *Aikman* (17 July 2013) concerned the same failures to report as in the present matter (paragraph 7 of that decision). In deciding the conduct complained of amounted to misconduct the Tribunal said at page 28:-

*“It must be clearly obvious to any practitioner that he has a duty to report material and unusual features of any transaction to his client. In the transactions in this case the institutional lenders were clients of the Respondent in the same way as any other and were owed the same duties of care. The CML Handbook had been instituted to help prevent mortgage fraud and emphasise the reporting duties on the part of a solicitor. In each of the instances in this Complaint the lenders involved had explicitly advised the Respondent that he required to comply with the CML Handbook. It was perfectly plain that the Respondent had a duty to report back to back transactions, increases in price, deposits being provided by third parties, and purchasers obtaining loans in addition to the finance being provided by the lenders. The Respondent had patently failed to report any of these matters...*

*The conduct described clearly fell below the standard of conduct expected of a competent and reputable solicitor and was so serious and reprehensible it amounted to professional misconduct.”*

The same concerns arise in the present matter and support a finding of professional misconduct.

It considering what *Aikman* refers to as “material and unusual features” it is also worth noting that in the current matter the Respondent received instructions from Mrs A in five of the transactions (Transactions 1, 2, 4, 12 and 13). He received instructions from Mrs A's husband Mr D in another transaction (Transaction 5). He received instructions from Mrs A's business partner Mr F in another transaction (Transaction 3). At the same time as noted above the entity Company 3 provided the balance of the purchase price in nine of the 13 transactions. In his response to a Law Society inspection the Respondent noted that “Mrs A and Mr F were the partners of

this unincorporated body”. In my submission this is clear evidence of “material and unusual” features which the Respondent should have reported to his lender client.

#### Breach of professional duties which pre-date CML Handbook

However these failures represent a breach not just of contractual duties, but also a breach of the professional duties incumbent on a solicitor which pre-date and are broader than the CML Handbook. These are the professional duties owed by solicitors:-

- to act with utmost propriety towards lender clients by not withholding relevant information; and
- to represent their lender clients’ best interests

Failure to comply with these professional duties can damage the reputation of solicitors in the eyes of lenders and in the eyes of the wider public. Where, as here, a solicitor repeatedly breaches his professional duties and fails to provide relevant information to lender-clients that has a negative impact on the profession’s reputation. It impacts on the confidence that lenders and the public have in the profession.

In considering the failures to report to the lender in *Aikman* the Tribunal went on at page 29 to say:-

*“...the Tribunal also considered that it was important to emphasise the seriousness with which it viewed the Respondent’s conduct. Although the Dunbar case [referred to above] had not been raised until 2011, the CML Handbook had been in existence since 2006, and simply re-stated what was an obvious duty of care to a solicitor’s client. The matters not reported by the Respondent in this case were clearly obvious – alarm bells should have been ringing taking into account the increases in price, especially in the transactions where the mid purchase and end purchase settled on the same date....The Respondent had overlooked his duty of care to the lenders in circumstances that put the lenders and consequently the profession at risk.”*

I rely on this passage in support of my submission that the Respondent’s conduct is a breach of the CML Handbook but is also a breach of the professional duties the Respondent owed to his clients.

#### Duty not to withhold relevant information as a duty not to mislead clients

The professional duty to clients not to withhold information can be expressed as a duty not to mislead clients. It is considered under that heading in *Smith and Barton: Procedures and Decisions of the Scottish Solicitors Discipline Tribunal* at para 7.04, page 65:-

*“It is an essential feature of the relationship between a solicitor and a client that there is absolute trust between them and this can only be achieved if the solicitor is frank and open with his client and keeps his client fully informed in relation to the transaction in which the solicitor is engaged on behalf of the client, particularly if any difficulty arises (Case 815/91)”*

I would submit that this duty applies to dealings with lender clients in the same way as private clients. The authors in *Smith and Barton* go on to say:-

*“The solicitor has a duty to advise his client if a transaction is taking an unusual turn, detrimental to the interests of the client. In addition to keeping the client informed of the position, such communication permits the client to consider any steps he should take to safeguard his interests...On a number of occasions the Tribunal has found a solicitor guilty of Professional Misconduct when the solicitor failed to inform a Building Society for whom the solicitor was acting of a material change in circumstances in a loan transaction...”*

Therefore we can see that the CML obligation to report material or unusual circumstances to the lender is a re-stating of the common law duty owed by solicitors to lenders not to withhold information from clients or mislead clients. In the present matter the Respondent failed to inform the lender of material or unusual circumstances.

#### Duty to inform of cashback payment pre-dated CML Handbook

In connection with the failure to advise of the cashback payments referred to in the complaint, again the solicitor's duties were not created by the CML Handbook. The authors of *Paterson and Ritchie*, at para 7.16.01, refer to a case considered in the *Journal* in 1989:-



*“A further solicitor was found to be culpable for failing to inform the building society that the loan they advanced was in excess of the true market value of the property. A house had been advertised with availability of 100 per cent loan, together with funds to meet legal fees. In addition the sellers would give a discount of £2,000 to the purchaser. When the solicitor submitted his report on title and requisitioned the loan cheque, he failed to disclose that the notional purchase price was subject to a discount. The Tribunal found that in reality the discounted price reflected the true market value of the property, and the effect of calculating the loan on the notional price resulted in the society granting a loan in excess of this. While there was no suggestion that the solicitor had been involved in formulating the arrangement, he had a duty to disclose the discrepancy to the building society and in failing to do so he was guilty of professional misconduct”.*

In my submission the same judgement can apply to the Respondent. In each of the four cashback transactions he knew that the purchase price was subject to a discount. He had a duty to disclose that fact to the lender and his failure to do so is professional misconduct.

#### Breach of Rule 6 of the Accounts Rules

In connection with the breach of Rule 6 of the Accounts Rules alleged in the complaint, in *Aikman* the Tribunal noted:-

*“The Respondent had intromitted with the lender’s finance where he had specific instruction from the lenders that he could only do so if he had complied with the CML Handbook which amounted to a clear breach of Rule 6 of the Accounts Rules.”*

In my submission the same judgement can apply to the Respondent. In each case he was instructed in accordance with paragraph 2.3 of the CML Handbook which makes clear that if a matter comes to the attention of a solicitor which he should make the lender aware of, he must do so at once, and not proceed until he has further written instructions. The Respondent did not report matters to the lender and intromitted with the funds. In *Aikman* this was found to be professional misconduct (para 7.1 of decision) and should be viewed in the same way in this matter.

#### Relevance of Tribunal’s indicative sanctions guidelines

With reference to the Tribunal's Indicative Sanctions Guidelines I would submit the current matter demonstrates:-

- ongoing course of conduct (beginning April 2010 until Law Society inspection in July 2011)
- conduct which is likely to seriously damage the reputation of the legal profession (for the reasons noted above);
- a large number of transactions involved (thirteen transactions); and
- other aggravating factors – include the Respondent's knowledge of the central role of Mrs A and Company 3 in a number of these transactions which should have set alarm bells ringing

**Conclusion: finding**

(xxxvii) Parties are agreed that the Respondent is guilty of professional conduct as a result of his failure to comply with each of duties set out in paragraph 3 of the complaint and summarised in this submission.

(xxxviii) For the reasons that I have given under heading 4 of this submission, I would ask you to find that the Respondent is guilty of professional misconduct in accordance with paragraph 4.1 of the complaint which states:-

“The Council avers that the Respondent has been guilty of acts or omissions which, singularly or in cumulo, constitute professional misconduct on his part within the meaning of the Solicitors (Scotland) Act 1980 as amended, Section 53:-

The Council avers that as a consequence of the Respondent's:-

1. failure to comply with the requirements of the CML Handbook (editions 2006 and 2010),
2. failure to satisfy his common law duties when acting for a purchaser and lender,
3. failure to comply with paragraph 3 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008, and

4. failure to comply with Rule 6(1) of the Accounts Rules

that the Respondent is guilty of professional misconduct.”

In response to a question from the Chairman, Mr Marshall stated that he could not go as far as saying that the Respondent was involved in a revolving deposit scheme. A number of the transactions however involved price discounting and the loans were higher than the purchase price.

In response to a further question from the Chairman with regard to whether or not the Law Society had investigated the position of the selling solicitor in these cases and a question from one of the members as to whether or not there had been any investigation with regard to the surveyor's different valuations, Mr Ritchie advised the Tribunal that a lot of the sellers in these cases were distressed sellers.

## **DECISION**

The Tribunal had no hesitation in making a finding of professional misconduct. There were numerous breaches of the CML Handbook in respect of 13 different transactions involving an ongoing course of conduct which continued for a period of over one year. The Tribunal has made it clear on numerous occasions that institutional lenders are clients of Respondents in the same way as any other clients and are owed the same duties of care. The CML Handbook has been instituted to help prevent mortgage fraud and emphasise the reporting duties on the part of solicitors. In this case the Respondent had a clear duty to report the back to back transactions, cash backs, increases in prices and deposits being provided by a third party to the lender. These matters would have been very likely to have had a material effect on the lender's decision to lend. The Tribunal consider that the features of these transactions were such that the Respondent must have been aware that there was a possibility that he was facilitating mortgage fraud, whether or not this actually occurred. He generated fees on the basis of allowing this to occur. It must have been glaringly obvious to the Respondent that something was amiss when cash backs of £27,000 or £28,000 from the seller to the purchaser were involved.

There were so many breaches of the CML Handbook in these cases that the Respondent would have known that he did not have his client's authority to draw down the funds and accordingly the Tribunal also found it a breach of Rule 6 of the Accounts Rules. The Tribunal considered that not only did the Respondent fail to act in the best interests of his lender clients but he failed to act with the utmost propriety towards these lender clients. This is extremely damaging to the reputation of the legal profession.

The Tribunal took account of the Respondent's responses contained in the Executive Summary Report but did not consider that these provided any satisfactory explanation for what had happened. The Tribunal note that the Respondent has ceased practice and took account of the fact that the Respondent had cooperated by admitting the averments of fact, duty and misconduct. The Respondent however did not attend at the Tribunal to provide any mitigation in person.

In the whole circumstances, given the ongoing course of conduct, the large number of transactions involved, the Respondent's knowledge of the central role of Mrs A and Company 3, which should have set alarm bells ringing and the fact that this type of conduct is likely to bring the profession into disrepute, the Tribunal considered that it had no option other than to strike the Respondent's name from the Roll of Solicitors in Scotland.

The Tribunal made the usual order with regard to expenses and publicity but considered that it had been unnecessary for the Fiscal for the Complainers to prepare the voluminous bundle of productions at the time of preparing the Complaint when it was not known whether or not the Complaint would be defended. In this case it had proved to be unnecessary and the Tribunal did not consider it reasonable to expect the Respondent to pay for the production of this large bundle of documents. These expenses were accordingly excluded from the award of expenses.

**Alistair Cockburn**  
**Chairman**