

**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**

against

**JOHN CLARKE MUIR of Muir
Myles Laverty, Meadow Place
Buildings, Bell Street, Dundee**

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, John Clarke Muir, of Muir Myles Laverty, Meadow Place Buildings, Bell Street, Dundee (hereinafter referred to as "the Respondent") is a practitioner who may have been guilty of professional misconduct.
2. There was no Secondary Complainer.
3. In accordance with the Rules, the Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
4. A procedural hearing was fixed for 3 February 2014. At the procedural hearing the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was not present but was represented by Gregor Rolfe, Solicitor, Edinburgh. It was agreed that the matter be adjourned to a further procedural hearing on 17 March 2014.

5. The case called for a procedural hearing on 17 March 2014. The Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. He also appeared on behalf of Mr Peter Anderson, for the Respondent who was not present. It was agreed that a further procedural hearing be fixed for 14 April 2014 at which time parties indicated they would be in a position to advise the Tribunal what evidence was going to be required.
6. When the case called for a procedural hearing on 14 April 2014, the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was not present but was represented by Ms Davies, Solicitor, Edinburgh. The Tribunal was advised that there would be a number of witnesses required. Due to commitments of the Respondent and his Counsel, the case was set down for a substantive hearing on 15th and 16th September 2014.
7. When the case called on 15 September 2014 the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was present and was represented by Peter Anderson, Solicitor, Edinburgh and Mr Lake, Counsel.
8. A Joint Minute was lodged admitting the facts, averments of duty and averments of professional misconduct in the Complaint subject to some deletions.
9. It was accordingly not necessary for any evidence to be led.
10. The Tribunal found the following facts established
 - 10.1 The Respondent was born on 20 December 1958. He was admitted as a solicitor and then enrolled as a solicitor in the Register of Solicitors practicing in Scotland on 30th October 1986. From on or about 25th November 1986 until 31st May

1990 he was employed as a partner with the firm Findlay Muir & Co of 94 Commercial Street, Dundee DD1 2AJ. Thereafter from 1st June 1990 until 29th February 1992 he was employed as a partner at the firm JC Muir Solicitors, 94 Commercial Street, Dundee DD1 2AJ. From 1st March 1992 to date he has been employed as a partner with the firm Muir Myles Laverty Solicitors of Meadow Place Buildings, Bell Street, Dundee DD1 1EJ.

- 10.2 The Respondent is the senior partner in the firm Muir Myles Laverty. In addition at the material time he was the cashroom partner, money laundering and proceeds of crime compliance partner, client relations office partner and Scottish Legal Aid Board compliance partner.

Inspection: 31st May 2011

- 10.3 The Complainers acting in pursuit of their statutory duties of 31st May 2011 carried out an inspection of the financial records, books and ledgers maintained by the firm Messrs Muir Myles Laverty. As a result of the inspection a number of issues of concern were identified. These were intimated to the Respondent. He provided a reply which failed to alleviate the concerns of the Complainers and this complaint process commenced. A principal concern of the inspection related to the affairs of a long standing client of the firm, a Mr A and his associated companies. The Respondent had known Mr A and his father Mr B for approximately ten years. Mr A was awarded a substantial sum in respect of damages. He sought advice from the Respondent in or about late 2007 regarding the incorporation of a property company, entering the rental market and the provision of loan funds to individuals who wish to buy properties. After this meeting, Mr A through his various companies played an active part in the property market seeking

to acquire properties from persons who were in financial problems but wished to remain resident in their property.

10.4 The Council of Mortgage Lenders is a not for profit organisation and the Trade Association of the Mortgage Lending Industry, whose members account for around 94% of UK residential mortgage lending. It's stated aim is to foster a favourable operating environment in the UK housing and mortgage market. The CML Lenders Handbook (hereinafter referred to as the CML Handbook) is published on its website and provides guidance to conveyancing solicitors in respect of general practice and procedure when dealing with members of the CML.

10.5 Article 1.1 of the Handbook provides instructions from an individual lender will indicate whether a solicitor is being instructed in accordance with the CML handbook and if that is the case the general provisions in Part 1 of the Handbook and any lender's specific requirements in Part 2 of the Handbook require to be followed. For the purposes of these Findings the relevant sections of the Handbook applicable are as follows:

- (a) Article 1.15. If there is any conflict of interest you must not act for us and must return our instructions.
- (b) Article 2.3. If you need to report a matter to us you must do so as soon as you become aware of it so as to avoid any delay. If you do not believe that a matter is adequately provided for in the CML Handbook you should identify the relevant CML Handbook provision and the extent to which the matter is not covered by it. You should provide a concise summary of the legal risks and your recommendation how we should protect our interest. After reporting a matter you should not

complete the mortgage until you have received our further written instructions.

- (c) Article 3.1. Solicitors must follow the current Solicitors (Scotland) Accounts Rules up to the extent that they apply comply with the Money Laundering Regulations 2003 and the Proceeds of Crime Act 2002.

- (d) Article 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 unless the seller is.
 - (i) A personal representative of the Proprietor.

 - (ii) A institutional heritable creditor exercising its power of sale.

 - (iii) A Receiver and Trustee and Sequestration or Liquidator.

 - (iv) A developer or builder selling a property require under a part exchange scheme.

- (e) Article 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 to have been given to us is no longer true) and you are unable to disclose that information to us because of a conflict of interest, you must cease to act.

- (f) Article 5.8. 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.

- (g) Article 5.10.3. If you are aware that any transfer of the title to the property may be open to challenge as a gratuitous alienation or an unfair preference then you must be satisfied that we will acquire our interest in good faith and will be protected under the relevant statutory provisions against our security being set aside.

- (h) Article 10.10. You should not submit your certificate of title unless it is unqualified or we have authorised you in writing to proceed notwithstanding any issues that you have raised with us.

- (i) Article 10.3. You are only authorised to release the loan when you hold sufficient funds to complete the purchase of the property and pay all stamp duty, land tax and registration fees to perfect the security forthwith as a first charge or if you do not have them you have a certain responsibility to pay them yourself. You must hold the loan on trust until settlement. If settlement is delayed you must return it to us when and how we tell you. You must ensure that all stamp duty and land tax returns are timeously completed and submitted to allow registration of the security to take place forthwith.

- 10.6 The complainers were alert to the significance of the CML Handbook. An article appeared in the journal of the Law Society of Scotland by a Mr C in January and August 2009 which made reference to the proliferation of a number of mortgage fraud schemes which were in play and explained the circumstances as to how these schemes perpetrated. These issues were brought to the attention of the profession. In addition a number of decisions had been issued by the Scottish Solicitors Discipline Tribunal in relation to a solicitor's duty to advise lender clients in connection with issues arising during the course of a transaction and these had been published and made available to the profession.
- 10.7 The conditions of the CML Handbook supplemented the basic common law principle that a solicitor when acting on behalf of both a purchaser and a lender had a professional duty to act with the utmost propriety towards each client. The duty included that a solicitor must not withhold any relevant information from his client. These duties were necessary to ensure that a solicitor retained the trust of a lender therefore they must continue to act diligently and with the utmost propriety.
- 10.8 The inspection of 31st May revealed the existence of a number of concerns in transactions in which the firm of the Respondent was involved and in which they acted contrary to the conditions contained in the CML Handbook and its common law duty to his client the lender. The Respondent was the partner responsible for supervising the work of employees in respect of the aftermentioned transactions.

Purchase by Mr D of subjects at Property 1

- 10.9 The firm was instructed by Mr D in connection with the purchase of heritable subjects at property 1. On or around 28th September 2010. Terms of business were issued to a Mr E. These terms of business noted that instructions had been received “from your brother in law Mr A”. A mandate dated 30th October 2010 executed by Mr A in the capacity of Director of Company 1 authorised the transfer of £13,071.26 to Mr D (rather than Mr E on whose behalf the offer to purchase from the seller Mr F had been submitted) in respect of the purchase transaction. The funds were stated in the mandate to be due to the company from Miss G in respect of the sale of a different property.
- 10.10 Birmingham Midshires instructed the firm by letter dated 8th November 2010 the lender’s letter noted that the firm acted for a Mr D and confirmed that “you are instructed in accordance with the CML Lenders Handbook for Scotland and our Part 2 instructions”. Enclosed with the lender’s letter was a copy offer of loan to Mr D which detailed a net loan of £37500 was being taken in respect of a proposed purchase price of £50,000 which was said in the terms of the offer to match a valuation dated 27th September 2010.
- 10.11 The firm’s state for settlement compiled for Mr D suggested that the transaction had settled on 5th November 2010. The Certificate of Title was sent by fax to the lender on 10th November 2010. A letter from the lender to the firm dated 11th November 2010 confirmed that the loan advance had been released on that date. The Certificate of Title itself included certification that “we have investigated the title to the property offer to you as security for the advance under your instructions. The title is good and marketable and may be safely accepted by

you". The firm's ledger recorded that loan funds were received from the lender on 8th November 2010 and the balance of the purchase price had by then been received from a ledger operated in the name of Miss G from monies due by Miss G to Company 1. The purchase price was paid to the seller's agents on 12th November 2010.

10.12 Despite the apparent change of purchaser whereby Mr D had substituted Mr E, missives were concluded on 12th November 2010 with Mr F's agents still apparently under the misapprehension that their client was selling the property to Mr E. The contract in that respect was concluded between Mr F and Mr E. Mr F's agents letter of obligation related to a purchase by Mr E. A review of the file revealed no indication that they were informed that title was going to be taken by Mr D. Indeed the response sent by the firm to Mr F's agents on 16th November 2010 returning the draft letter of obligation continued to refer to Mr D. A copy draft Disposition by Mr F was nevertheless in favour of Mr D and recorded that a price of £50,000 was to be paid to Mr F by Mr D.

10.13 A further review of the file revealed a copy letter from Messrs Strefford Tulips to Mr F's agents dated 6th October 2010 which purported to accept an offer from Mr F to purchase the property. The letter bears to be a qualified acceptance of an earlier letter but makes no mention of the price which was to be payable for the property by Mr F. On the file there was a signed Disposition in favour of Mr F which recorded that the purchase price paid by him had been £35,000. There was no evidence of any searches having been obtained by the Respondent in respect of either Mr F or the individuals from whom he took title in October/November 2010.

- 10.14 A review of the file maintained by the firm revealed that they had failed to inform the lender that the seller of the property had owned the property for a period less than six months; that the subjects had recently been purchased by the seller for a considerably lower price; that the balance of the purchase price came from a lender in the name of a third party; that the balance of the funds were paid from Miss G's ledger in implementation of a mandate signed by Mr A in his capacity as director of Company 1. The Respondent himself was aware that there was a connection between Mr A, Mr D and Mr F and that there was therefore a connection between the seller and purchaser which should have been reported to the lender.

Purchase by Mr H the subjects at Property 2

- 10.15 The file maintained by the firm opens with an email dated 2nd November 2010 ostensibly from a Mr A of Company 2 which stated "Hi I as discussed details of new instruction is (b 2 b) offer from Mr F to Company 3 (Ms J has the details of Company 3 as this was one for Kilsyth also) to purchase Property 2 (deal has been done for £59,500) not subject to survey etc.

Colin will sell on to Mr H for £85,000".

The firm duly wrote to Mr H on 3rd November 2010 noting that "we understand from Mr A that you are to purchase the above subjects from Mr F at a price of £85,000".

- 10.16 Birmingham Midshires instructed the firm by letter dated 3rd November 2010. The lender's letter noted that the firm acted for Mr H and confirmed that "you are instructed in accordance with the CML Lenders Handbook for Scotland and their Part 2 instruction". Enclosed with the lender's letter was a copy offer

of loan to Mr H which detailed that a net loan of £63,750 was being taken in respect of the proposed purchase price of £85,000 which was said in the terms of the offer to match a valuation dated 29th September 2010.

- 10.17 The Certificate of Title was sent by fax to the lender on 15th November 2010. A letter from the lender to the firm dated 22nd November 2010 confirmed that the loan advance had been released from that date. The Certificate of Title itself included certification that “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”.
- 10.18 The state for settlement maintained in the file noted the transaction settled on 24th November 2010. The firm’s ledger reflected that position. Searches in the firm’s file in respect of Mr F and Mr K from whom Mr F bought the property were clear to the 22nd November 2010.
- 10.19 A review of the file maintained by the firm revealed that the firm had failed to report to the lender that the seller had owned the property for a period less than six months and that the subjects had recently been purchased by the seller for a considerably lower price.

Purchase by Ms L of subjects at Property 3

- 10.20 The firm was instructed by Ms L to purchase on her behalf heritable subjects at property 3 in or about October 2010. Birmingham Midshires instructed the firm by letter dated 9th November 2010. The lender’s letter noted the firm acted for the client and confirmed that you are instructed in accordance with the CML Lenders Handbook for Scotland and their part 2

instructions. The loan advanced was to be £45,500. An unqualified Certificate of Title was sent by facsimile transmission to the lender on 15th November 2010. Only an unsigned copy is retained on the file maintained by the firm. The Certificate of Title itself includes certification that “we have investigated the title to the property offered to you as security for the advance under your instruction. The title is good and marketable and may be safely accepted by you.

10.21 It is clear from the state for settlement on the file that the transaction settled at a price of £60,000 on 26th November 2010 and that the sum of £15,605.63 had been contributed to the purchase price by Mr F who was noted in the firm’s ledger to be the client’s brother. Elsewhere on the file a copy letter from Messrs Shield and Kyd to the seller’s agents dated 8th November 2010 purported to accept an offer from Mr A to purchase the property. The letter bears to be a qualified acceptance of an earlier letter and sets out that Mr A (whose full designation shall be disclosed prior to conclusion of missives) was purchasing the property for £39,000. A search against the Register of Insolvencies against Mr A and the party from whom he was purchasing the property was clear.

10.22 A review of the file maintained by the firm revealed that they failed to advise the lender that the seller had owned the property for a period less than six months; that the subjects had recently been purchased by the seller for a considerably lower price; that the balance of the purchase price had come from a third party; that the firm was aware there was a connection between the seller and the provider of the funds representing the balance of the purchase price and that therefore there was an increased risk of a connection between the seller and the purchaser and the transaction may not have been at arms length.

Purchase by Ms L of subjects at Property 4

- 10.23 The firm was instructed by Ms L to purchase on her behalf heritable subjects at property 4 in or about 1st November 2010. Birmingham Midshires instructed the firm by letter dated 9th November 2010. The lender's letter noted the firm acted for the client and confirmed that "you are instructed in accordance with the CML Lenders Handbook for Scotland and their Part 2 instructions". The loan advanced was to be £45,500. An unqualified Certificate of Title was sent to the lender on 15th November 2010 although only an unsigned copy was retained on the firm's file. The Certificate of Title includes certification that "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.
- 10.24 The loan advanced was released on 22nd November 2010 and the transaction settled at a price of £60,000 on 26th November 2010. It is clear from the ledger on the state for settlement that the sum of £15,605.63 had been contributed to the purchase price by the seller Mr F who was stated in the ledger to be the purchasing client's brother.
- 10.25 Elsewhere in the file a copy letter from Messrs Shield & Kyd to the seller's agents dated 8th November 2010 purported to accept an offer from Mr F to purchase the property. The letter bears to be a qualified acceptance of an earlier letter and sets out that Mr F was purchasing the property for £39,000. A search in the Register of Insolvencies against Mr F and the party from whom he was purchasing the property was clear.
- 10.26 A review of the file maintained by the firm revealed that they had failed to advise the lender that the seller had owned the

property for a period less than six months; that the subjects had recently been purchased by the seller for a considerably lower price; that the balance of the purchase price came from the seller; that as the balance of the purchase price came from the seller there was a significantly increased risk of mortgage fraud that should have been brought to the attention of the lender.

- 10.27 In this transaction the firm received a deposit provided by the seller. This was an example of a mortgage fraud scheme prevalent at this time known as a “revolving deposit scheme”. In these circumstances the firm should have reported the matter to SOCA.

Purchase by Ms M of subjects at Property 5

- 10.28 The firm was instructed by Ms M on her behalf to purchase heritable subjects at property 5 on or about 9th November 2010. Birmingham Midshires instructed the firm by letter dated 5th November 2010. The letter noted that the firm acted for the client and confirmed that “you are instructed in accordance with the CML Lenders Handbook for Scotland and their Part 2 instructions”. The loan advanced was to be £48,993.
- 10.29 An unqualified Certificate of Title was sent to the lender on 24th November 2010 although only an unsigned copy is retained on the firm’s file. The Certificate of Title itself included certification that “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.
- 10.30 The loan advanced was released on 22nd December 2010 and the transaction settled at a price of £65,000 on 6th December 2010. The state for settlement on the file recorded the sum of

£13,461.26 had been contributed to the purchase price by the seller Mr A and that the sum of £3,394.37 had been contributed by Company 1 a company of which Mr A was then a Director. An undated mandate on the file executed by Mr A authorised transfer of this latter sum on the basis that it was owed to the company by other clients (Mr N and Ms O) in connection with the sale of a different property. The firm's ledger recorded the contribution of £3,394.37 had been transferred from a ledger operated in the names of Mr N and Ms O.

- 10.31 Elsewhere on the firm's file a copy letter from Messrs Shield & Kyd to the seller's agents dated 8th November 2010 purported to accept an offer from Mr A to purchase the property. The letter bears to be a qualified acceptance of an earlier letter and sets out that Mr A whose full designation shall be disclosed prior to the conclusion of missives was purchasing the property for £39,000. A search in the Register of Insolvencies against Mr A and the party from whom he was purchasing the property was clear.
- 10.32 A review of the file maintained by the firm revealed that they had failed to advise the lender that the seller had owned the property for less than six months; that the subjects had been purchased by the seller for a considerable lower price; that a portion of the balance of the purchase price came from a third party with a further portion coming from a ledger in the name of other parties; that as a portion of the balance of the purchase price came from the seller there was a significantly increase risk of mortgage fraud that should have been brought to the attention of the lender.
- 10.33 In this transaction the firm received a deposit provided by the seller. This was an example of a mortgage fraud scheme prevalent at this time known as a "revolving deposit scheme".

In these circumstances the firm should have reported the matter to SOCA.

Purchase by Ms L of subjects at Property 6

- 10.34 The firm was instructed by Ms L to act on her behalf in connection with the purchase of heritable subjects at property 6 on or around 29th October 2010. Birmingham Midshires instructed the firm by letter dated 9th November 2010. The lender's letter noted the firm acted for the client and confirmed that "you are instructed in accordance with the CML Lenders Handbook for Scotland and their Part 2 instructions" The loan advanced was to be £45,500.
- 10.35 An unqualified Certificate of Title was sent to the lender on 24th November 2010 although only an unsigned copy is retained on the firm's file. The Certificate of Title itself included certification that "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".
- 10.36 The loan advanced was released on 2nd December 2010 and the transaction settled at a price of £60,000 on 6th December 2010. The firm's state for settlement recorded the sum of £15,605.63 has been contributed by Company 1. An undated mandate on file executed by Mr A authorised transfer of this sum on the basis that it was owed to the company by other clients (Mr N and Ms O) in connection with the sale of a different property. The ledger confirmed that sum to have been transferred to the client account from a ledger operated in those names.
- 10.37 There is also in the firm's file a copy letter from Messrs Shield & Kyd to the seller's agents dated 8th November 2010 which

purported to accept an offer from Company 2 to purchase the property. The letter bears to be a qualified acceptance of an earlier letter and sets out that Company 2 whose full designation shall be disclosed prior to the conclusion of missives was purchasing the property for £39,000. A search against the Register of Insolvencies against Company 2 and the party from whom it was purchasing the property was clear.

- 10.38 A review of the file maintained by the firm in respect of this transaction revealed that they failed to advise the lender that the seller had owned the property for a period of less than six months; that the subjects had recently been purchased by the seller for a considerably lower price; that the balance of the purchase price had come from a lender in the name of a third party; and that as per the state for settlement the balance of the funds came from Company 1 and given previous transactions it would have been reasonable for the firm to have a suspicion that the transaction would be conducted not at arms length.

Purchase by Mr P of subjects at Property 7

- 10.39 The firm was instructed by a Mr P to purchase on his behalf heritable subjects situated property 7 on or about 10th November 2010. Birmingham Midshires instructed the firm by letter dated 9th November 2010. The lender's letter noted that the firm acted for the client and confirmed that "you are instructed in accordance with the CML Lenders Handbook for Scotland and their Part 2 instructions". The loan advanced was to be £44,750 against a purchase price of £60,000 which was said to have accorded with a valuation on 1st October 2010.
- 10.40 An unqualified Certificate of Title was sent by facsimile transmission to the lender on 24th November 2010. The Certificate of Title itself included certification that "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”.

- 10.41 The loan advanced was released on 8th December 2010 and the transaction settled on 9th December 2010. It is clear from the state for settlement and the client ledger that the sum of £15,855.63 had been contributed by Mr A who was at that time a Director of the seller company Company 2.
- 10.42 Elsewhere on the firm’s file a copy letter from Messrs Shield & Kyd to the seller’s agents dated 8th November 2010 bore to accept an offer from Company 2 to purchase the property. The letter bears to be a qualified acceptance of an earlier letter and sets out that Company 2 was purchasing the property for £39,000. A search against the Register of Insolvencies against Company 2 and the party from whom it was purchasing the property was clear.
- 10.43 A review of the file maintained by the firm revealed that they had failed to report to the lender that the seller had owned the property for a period of less than six months; that the subjects had recently been purchased by the seller for a considerably lower price; that the balance of the purchase price had come from a third party who was a director of the sellers.

Purchase by Mr P of subjects at Property 8

- 10.44 The firm was instructed by a Mr P to purchase on his behalf the heritable subjects at Property 8 in or about 29th October 2010. The National Westminster Home Loans Ltd instructed the firm by a letter dated 13th December 2010. The letter noted that it had made an offer of loan to the client and instructed the firm to act on its behalf “in accordance with the CML Lenders

Handbook for Scotland (including their Part 2 instructions)”. Attached to the letter was a copy offer of loan for £45,000 against an estimated valuation of £60,000.

10.45 On 17th December 2010 the firm submitted a Certificate of Title (a blank copy of which is on file) to the lender. Insofar as relevant a Certificate of Title included the following express provisions:

- (a) We hereby confirm to the lender that we have investigated the title to the property in accordance with the lender’s instructions set out in Parts 1 and 2 of the Lenders Handbook issued by the CML and any other requirement. The lender and the borrower has acquired or will acquire on settlement a good and marketable title which is free of defect which will constitute good security to the lender and safely be accepted by the lender for mortgage purposes.

- (e) All of the information in this Certificate of Title is correct and the lender may rely on the accuracy of each and every statement.

- (f) We hereby undertake to the lender to hold the funds comprising the loan strictly to the order of the lender and to apply them only when the borrower has provided us with sufficient cleared funds in order to complete the transaction and only then in order to secure a first ranking standard security of the property in favour of the lender.

10.46 The guidance notes on the signing schedule noted that “by signing this document you are committing your firm to

undertaking". The Certificate of Title, unqualified was sent by facsimile and post to the lender on 15th December 2010.

10.47 The loan advanced was released and the transaction settled on 21st December 2010 with £60,000 being paid to the seller Mr E. It is clear from the state for settlement and the firm's ledger that separate sums of £15,001.26 and £599.37 had been contributed by Mr A and Mr B understood to be the father of Mr A respectively. A mandate in respect of the £15,001.26 contribution authorised the firm to use funds which were said to be owed to the purchaser by Mr A. Elsewhere on the firm's file a copy letter from Shield & Kyd to the seller's agents dated 8th November 2010 bore to accept an offer from Ms Q to purchase the property. The letter bears to be a qualified acceptance of an earlier letter and sets out that Ms Q was purchasing the property for £39,000.

10.48 A review of the file maintained by the firm in respect of this transaction revealed that they had failed to advise the lender that the seller had owned the property for a period of less than six months; that the subjects had recently been purchased by the seller for a considerably lower price; that the balance of the purchase price had come from a ledger in the name of a third party namely Mr B; that given the series of transactions of which the firm had been instructed they should have been aware that there was a connection between the purchaser, the third party fund provider and the seller and therefore the transaction was not being conducted at arms length.

Purchase by Ms M of subjects at Property 9

10.49 The firm was instructed by Ms M on her behalf to purchase heritable subjects at property 9 on or about 1st November 2010. National Westminster Home Loans Ltd instructed the firm by a

letter dated 2nd December 2010. The letter noted that it made an offer of loan to the client and instructed the firm to act on its behalf in accordance with the CML Lenders Handbook for Scotland including our Part 2 instructions. Attached to the lender's letter was a copy offer of loan for £41,250 against an estimated valuation of £55,000.

10.50 On 7th December 2010 the firm submitted a Certificate of Title to the lender. Insofar as relevant a Certificate of Title included the following express provisions:

- (a) We hereby confirm to the lender that we have investigated the title to the property in accordance with the lender's instructions set out in Parts 1 and 2 of the Lenders Handbook issued by the CML and any other requirement. The lender and the borrower has acquired or will acquire on settlement a good and marketable title which is free of defect which will constitute good security to the lender and safely be accepted by the lender for mortgage purposes.

- (f) We hereby undertake to the lender to hold the funds comprising the loan strictly to the order of the lender and to apply them only when the borrower has provided us with sufficient cleared funds in order to complete the transaction and only then in order to secure a first ranking standard security of the property in favour of the lender.

The loan advanced was duly released and the transaction settled on 13th December 2010 with £55,000 being paid to the seller Mr F. It is clear from the state for settlement and the firm's ledger that the sum of £14,350.63 had been contributed by Mr A.

Elsewhere in the firm's file a copy letter from Shield & Kyd to the seller's agents dated 8th November 2010 bore to accept an offer from Mr F to purchase the property. A letter bears to be a qualified acceptance of an earlier letter and sets out that Mr F was purchasing the property for £39,000.

10.51 A review of the file maintained by the firm revealed that they had failed to advise the lender that the seller had owned the property for a period of less than six months; that the subjects had recently been purchased by the seller for a considerably lower price; that the balance of the purchase price had come from a third party; that the balance of the funds were paid by Mr A and that the firm was aware there was a connection between Mr A, Mr D and Mr F and that as a result there was a connection between the seller and purchaser and that the transaction was not being carried out at arms length.

11. Having heard submissions from both parties, the Tribunal found the Respondent guilty of Professional Misconduct in respect of his failure to adequately supervise his employees who were then acting in the course of their employment in that these employees failed to abide by established practice and the duties which they owed to their clients, being heritable security lenders, and in particular a failure on their part to (a) report to the lenders unusual circumstances (b) to comply with explicit instructions provided to them by their clients being the obligations imposed upon them as provided for in terms of the CML Handbook applicable to Scotland and (c) to act with absolute propriety to protect the interests of their clients, being the lenders, in respect of each transaction.

12. Having heard the submissions in mitigation from Counsel on behalf of the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 15 September 2014. The Tribunal having considered the Complaint as amended at the instance of the Council of the Law Society of Scotland against John Clarke Muir, of Muir Myles Laverty, Meadow Place Buildings, Bell Street, Dundee; Find the Respondent guilty of Professional Misconduct in respect of his failure to adequately supervise his employees who were then acting in the course of their employment in that these employees failed to abide by established practice and the duties which they owed to their clients, being heritable security lenders, and in particular a failure to report to the lenders unusual circumstances, a failure to comply with obligations imposed upon them in terms of the CML Handbook applicable to Scotland and a failure to act with absolute propriety to protect the interests of their clients, being the lenders; Censure the Respondent; Fine him in the sum of £7,500 to be forfeit to Her Majesty; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and may but has no need to include the names of anyone other than the Respondent.

(signed)

Alistair Cockburn

Chairman

13. 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

Alistair Cockburn
Chairman

NOTE

The case called for a number of procedural hearings in order to ascertain what evidence was agreed and which witnesses would be required. The case was set down for a two day hearing due to the number of witnesses anticipated. On the morning of the hearing, parties advised that it had been possible for them to reach agreement and a Joint Minute was lodged.

The Joint Minute withdrew the Respondent's Answers and admitted the facts in the Complaint with the exclusion of those averments set out in Articles 3, 4, 5 and 7. Mr Reid, on behalf of the Complainers, confirmed that this plea was acceptable to the Complainers. It also confirmed in the Joint Minute that the Respondent admitted the averments of duty and averments of professional misconduct in the Complaint subject to the deletions.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid confirmed that the averments of fact set out in Articles 6, 8, 9, 10, 11, 12, 13, 14 and 15 were accepted by the Respondent. Mr Reid explained that the mischief was the back to back nature of the transactions coupled with the revolving deposits.

In response to clarification from the Chairman, Mr Reid confirmed that revolving deposits involved the seller contributing to the purchase price which was then refunded. Mr Reid stated that there were also relationships between the parties and the purchase price was disguised from the distressed seller.

Mr Reid stated that the Respondent held significant positions within the firm. He was the senior partner, cashroom partner, money laundering and proceeds of crime compliance partner and client relations partner. Mr Reid explained that the matters came to the attention of the Law Society at an inspection in May 2011. There were nine transactions involving the client Mr A. They all settled in November 2010. The total sum of the loans was £372,000. The transactions involved the same parties. The conduct of the transactions was unusual and they all settled on the same day. The

revolving deposits meant that the lender was lending 100% of the price. The transactions were done by a paralegal but the Respondent failed to adequately supervise her. The Respondent had responsibility for supervision.

Mr Reid asked the Tribunal to make a finding of professional conduct and make the usual order with regard to expenses and publicity. He acknowledged that the Respondent had entered into a Joint Minute and pled guilty. This had come late in the day but Mr Reid advised that there had been regular discussions between Mr Anderson on behalf of the Respondent and himself in connection with reaching agreement. There was no evidence of any loss to the building society. Mr Reid explained that the Respondent had been advised against retrospective disclosure to the lenders. Subsequent inspections of the Respondent's firm had revealed that there was nothing further of concern and the processes had now been improved. Mr Reid however advised that it was of concern that the loan was more than the price paid by the mid purchaser.

SUBMISSIONS FOR THE RESPONDENT

Mr Lake emphasised that the Respondent accepted the facts and that his conduct amounted to professional misconduct. Mr Lake however emphasised that these transactions were not shams that had resulted in loss to the lender or any claims on the Guarantee Fund. The loans and the securities remained in place and the mortgages were being paid. Mr Lake stated that the essence of the conduct was set out in Article 2.6 of the Complaint. There was a failure to follow instructions and to comply with the contractual conditions of the CML Handbook. The Respondent was the partner responsible for supervising the work of these employees. There was a duty to the lender to keep them informed and to ensure that there was no conflict.

Article 6.6 of the Complaint set out the failure to inform the lender. It was in effect a failure to report and this was the same in all the transactions involved. Mr Lake submitted that although the transactions appeared irregular, they were not transactions where the lender was defrauded. The Respondent did not actively participate in any of the transactions but there was a failure to supervise. Mr Lake pointed out that in connection with the averment of misconduct at Article 17.1 the position was that the

Respondent did not know what had been happening in these transactions but he should have known. There was no question of there being any fraud by the Respondent. The Respondent and his firm were also victims of wrongdoings by the employees. Mr Lake submitted that it was highly unlikely that there would be any future loss as a result of these transactions. The transactions occurred against a background of independent valuations.

Mr Lake explained that the conveyancing department of the Respondent's firm stood alone, there was a paralegal and also a qualified assistant. Instructions would be passed on from any of the partners who, for example, might be involved in matrimonial work which resulted in the sale of the matrimonial home. The partner involved would transfer the sale to the conveyancing department. It was accepted that the Respondent was the partner responsible in respect of these transactions. The paralegal had worked for the Respondent for 20 years and he had no reason to doubt her honesty. The cashier, who gave advice on the work done, had also worked for the Respondent for 20 years and he trusted her. Mr Lake pointed out that the obligation to supervise is a matter of judgement of the solicitor in all the circumstances. It is legitimate and appropriate to have regard to the experience of the employee concerned. The employees in this case were both very experienced. Mr Lake submitted that it was an error of judgement on the part of the Respondent to place too much reliance on his employees.

There were now two qualified assistants working in the conveyancing department and there were weekly meetings attended by either the Respondent or Mr R who was the new cashroom partner. At these weekly meetings all the current transactions were discussed.

Mr Lake submitted that the Respondent was unduly reactive and not interventionist enough. He relied on his paralegal to raise any problems with him. He accepted that this was not adequate. Mr Lake explained that the cashroom employee had not accepted that there had been any wrongdoing and accordingly had left the firm. The paralegal did accept that there was wrongdoing and had been re-trained and remained with the firm. Mr Lake emphasised that the firm had taken the matter very seriously. The firm also took a very strong line against dishonesty. The Respondent had been

instrumental in bringing a dishonest solicitor to the attention of the police in the past. He had also discovered dishonesty by an employee of the firm and had brought this to the immediate attention of the police and the Law Society despite adverse publicity for the firm as a consequence of this.

Mr Lake submitted that professional misconduct covered a very broad range of conduct and invited the Tribunal to find that this case fell at the lower end of the scale of professional misconduct. The Respondent had had no active participation. It was a failure to implement adequate systems of supervision.

Mr Lake emphasised that the Respondent had no previous findings against him and had not previously been involved in any disciplinary matters. He was extremely upset by this and his reputation tarnished. He however was prepared to face up to it and accept his culpability. The Respondent had passed on being cashroom partner to his partner, Mr R. The Respondent had cooperated by entering into a plea and had treated the matter very seriously. Mr Lake emphasised that the Respondent had been greatly affected by this matter and found it very stressful.

Mr Lake then referred the Tribunal to the letters of support vouching for the Respondent's standing and integrity. The letters were from fellow professionals, a sheriff and the local bar. Mr Lake submitted that the Respondent had made a significant contribution to the legal profession. He invited the Tribunal to consider a Censure and suggested that any Fine should reflect that the conduct was at the lower end of the scale. It should also reflect that the Respondent had accepted his wrongdoing and had cooperated by entering a plea of guilty. He had also introduced changes to prevent anything similar happening in the future. The Respondent also had a clean record. Mr Lake submitted that a finding of misconduct in itself would be a substantial penalty. He indicated that he accepted that the normal award of expenses and the normal direction of publicity would be appropriate.

In response to a question from the Chairman with regard to whether there was any supervision by the Respondent, Mr Lake indicated that there was no effective supervision. He then clarified that the Respondent had discussions with the staff but was reliant on matters being brought to his attention. There was a senior solicitor who

was in day to day charge of the transactions but the Respondent was the partner responsible for supervision. The Respondent's judgement with regard to supervision had been incorrect.

In response to a further question from the Chairman with regard to the responsibility of the cashier when the Respondent was the cashroom partner, Mr Lake stated that the Respondent had placed reliance on his cashier as she was SOLAS trained and Chair of SOLAS. There was no misappropriation of funds. The cashier was no longer with the firm because she did not acknowledge that she had done anything wrong. Mr Lake pointed out that there was nothing in the Complaint relating to any failings as cashroom partner.

DECISION

The Tribunal had no hesitation in finding that the Respondent's conduct was serious and reprehensible and amounted to professional misconduct. The Tribunal has made it clear on numerous occasions that solicitors must always act in the best interests of their clients including the lender clients. These transactions involved back to back transactions and the price paid by the mid purchaser was less than the amount of the loan, there were connections between the seller and the purchaser and there were elements of a revolving deposit scheme with the seller contributing to the purchase price which was then refunded. None of this was reported to the lender which would allow the lender the option of considering whether they should be lending in these particular circumstances or whether there was a possibility that the seller was *vergens ad inopiam* and was participating in a gratuitous alienation which could later be challenged. Counsel for the Respondent indicated that there had been no losses and would not be likely to be. The Tribunal however consider that the fact that there has not yet been any loss is not relevant and does not mean that the schemes involved were not fraudulent.

The unusual features in these numerous transactions ought to have raised alarm bells. The Respondent seriously let down his clients, the lenders. In some of these transactions the circumstances were such that the Respondent should have reported these matters to SOCA and this caused the Tribunal particular concern. The fact that

solicitors get involved in these types of transactions without complying with their obligations in terms of the CML Handbook is extremely damaging to the reputation of the profession. Had the Respondent been personally involved in all these transactions the Tribunal may have considered striking his name from the Roll.

The Tribunal however accept that it was not the Respondent personally who undertook these transactions. It is however quite clear, as is accepted by the Respondent, that the Respondent as senior partner, cashroom partner and money laundering and proceeds of crime compliance partner has a duty to adequately supervise his employees. The Tribunal has previously made it quite clear that a solicitor is not expected to carry out personally all work which he is instructed to undertake but if he decides to delegate any work, there remains a duty of reasonable supervision and the solicitor must accept personal responsibility for any improper actions which result from a failure of reasonable supervision, which is a matter for the professional judgement of the solicitor and will take into account the importance of the work and experience of those being supervised. A supervising partner is not to be held guilty of professional misconduct for every wrongful act of an individual who is under his supervision. The system of supervision must however be such that the supervision can be said to be reasonable having regard to the nature of the work undertaken and the skill and experience of the individual employee in relation to that type of work.

The Tribunal find that in this case the Respondent treated his roles as supervising partner, cashroom partner, and proceeds of crime compliance partner in a cavalier fashion which had the potential for lending clients to suffer loss. In this case it appears to the Tribunal that there was no supervision and the Respondent was not aware of what was going on. The Respondent would only be involved if difficulties were reported to him by those he was meant to supervise. The Tribunal noted that the paralegal and cashier had worked for the Respondent for 20 years but it is unacceptable and inappropriate that the responsibility for such important matters was left mainly in their hands. The Tribunal consider this to be of serious concern.

The Tribunal however took account of the Respondent's previously unblemished record, the fact that the Respondent pled guilty to the Complaint as amended (albeit

on the day of the Tribunal) and that he appeared to be genuinely remorseful. The Tribunal also noted that there have not been any further similar problems at the Respondent's firm and that steps have been taken to ensure that nothing like this happens again in the future. The references were also noted. In the circumstances the Tribunal did not consider that there was any requirement from the point of view of protection of the public interest for the Respondent to be supervised and imposed a Censure plus a Fine of £7,500. The level of the Fine reflects the Tribunal's view on the total lack of supervision by the Respondent.

The Tribunal made the usual order with regard to publicity and expenses.

Alistair Cockburn
Chairman