

**THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
(COMPLAINTS UNDER THE 2005 AND 2008 PROCEDURE RULES)**

F I N D I N G S

in Complaint

by

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

against

**EILEEN A COOGANS, Residing at
60 Newark Crescent, Doonfoot, Ayr**

1. Two Complaints dated 22 February 2012 (under the 2005 Rules) and 29 March 2012 (under the 2008 Rules) were lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as the "Complainers") requesting that, Eileen Coogans, residing at 60 Newark Crescent, Doonfoot, Ayr (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statements of facts which accompanied the Complaints and that the Tribunal should issue such orders in the matters as it thinks right.
2. The Tribunal caused copies of the Complaints as lodged to be served upon the Respondent. Answers were lodged for the Respondent in relation to both Complaints.
3. In terms of its Rules the Tribunal appointed the Complaints to be heard on 2 July 2012 and notice thereof was duly served on the Respondent.

4. A procedural hearing took place in relation to both Complaints on 2 July 2012. The Complainers were represented by their Fiscal, Sean Lynch Solicitor, Kilmarnock. The Respondent was not present or represented. A letter from the Respondent was emailed to the Tribunal office on 2 July 2012 and received prior to the hearing. The letter advised that the Respondent would not attend the procedural hearing and it contained mitigatory information to be considered by the Tribunal. The Tribunal adjourned the hearing to allow the Respondent to consider obtaining legal representation. A substantive hearing was fixed for 14 August 2012 and notice thereof was duly served on the Respondent.
5. The hearing took place on 14 August 2012. The Complainers were represented by their Fiscal, Sean Lynch Solicitor, Kilmarnock. The Respondent was not present or represented. Mr Lynch advised that he had attempted to contact the Respondent by telephone earlier that morning and had received a text message in response from the Respondent advising that she was of the view that there was no requirement for her to attend the Tribunal that day.
6. The Tribunal heard from the Depute Clerk that she had confirmed from the Royal Mail website that the Notice of Hearing dated 3 July 2012 had been signed for by the Respondent on 4 July 2012. In addition, the Tribunal heard from the Depute Clerk that the covering letter attached to the Notice of Hearing had advised the Respondent that that it was in her interests to attend the hearing and to be legally represented. The Tribunal resolved to proceed in the Respondent's absence.
7. Mr Lynch lodged Joint Minutes in relation to both Complaints admitting the averments of fact contained in the Complaints. No evidence was led.
8. The Tribunal found the following facts admitted or proved:

8.1 The Respondent is a solicitor enrolled in Scotland. She was born on 25 February 1949. She was enrolled as a solicitor on 26 June 1985. The Respondent formerly carried on practice at 669 Cathcart Road, Glasgow and is not presently employed by any legal firm.

Mr A purchase of Property 1

8.2 The Respondent acted for Mr A in relation to the purchase of Property 1. Mr A had the assistance of a loan from Birmingham Midshires in relation to the purchase. The purchase of the property settled on 30 October 2007.

8.3 The Respondent submitted the disposition in favour of Mr A for registration shortly after settlement. She failed to submit the standard security in favour of Birmingham Midshires for registration until 26 February 2008.

8.4 The updated Land and Charge Certificates were sent by the Respondent to Birmingham Midshires on 18 April 2008.

8.5 In the meantime Mr A instructed Moore MacDonald, Solicitors in connection with the sale of Property 1. The subjects were sold with entry as at 22 February 2008. Moore MacDonald obtained and exhibited reports in Form 12 and Form 13 which confirmed that Mr A had acquired title to the property on 19 November 2007. The reports did not disclose any undischarged standard security affecting the property. Mr A told Moore MacDonald that the property had been purchased with the proceeds of an inheritance. He said that the solicitors who acted on his behalf in connection with the purchase were J Whyte & Co of 1185 Argyll Street, Glasgow. He did not

disclose the existence of the loan in favour of Birmingham Midshires, or that of the security.

8.6 The sale settled on 22 February 2008 and the free proceeds of sale were disbursed to Mr A. Thereafter the existence of the standard security came to the attention of the new purchaser's agents. They wrote to Moore MacDonald requiring them to clear the registers as undertaken in the letter of obligation granted by Moore MacDonald at settlement. Moore MacDonald have notified these circumstances to their professional indemnity insurers.

8.7 Guarantee Fund Inspectors employed by the complainers carried out an inspection of the books and records of the Respondent's practice on 6 & 7 October 2009. Inter alia, they found the following:-

Ms B and Mr C purchase of Property 2

The Respondent acted for Ms B and Mr C in the purchase of Property 2. Part of the declared purchase price was a gift of £35,000 from the sellers which was to be deducted from the amount to be tendered in respect of the purchase price at settlement. This was discussed with the lenders prior to the application being submitted. The Respondent was instructed to act for the lenders as well as for Ms B and Mr C. Her instructions from the lenders required her to observe the conditions contained in the Council of Mortgage Lenders' (CML) Handbook.

Condition 2.1 of the CML Handbook requires that all communications between the lender and the solicitor shall be in writing quoting the mortgage account or roll number, the surname

and initials of the borrower and the property address. The solicitor is required to keep copies of all written communication on the file as evidence of notification and authorisation. If the solicitor uses a PC, Fax or email a paper copy should be kept.

Condition 6.3.2 of the CML Handbook requires that the solicitor make a report to the lender if the solicitor will not have control over the payment of all of the purchase money (for example if it is proposed that the borrower pays money to the seller direct) other than a deposit held by an Estate Agent or a reservation fee of not more than £1,000 paid to a builder or developer.

In this case not all communications between the lender and the solicitor were in writing, the Respondent did not keep copies of all written communications with the lender on the file, and electronic correspondence was not retained in paper form as required by Condition 2.1 of the CML Handbook.

In particular, the Respondent wrote to the lenders on 4 June 2009 indicating that the property was being purchased from Ms B's grandparents and that £35,000 of the purchase price was deemed to be a gift. The lenders did not respond in writing to that letter until doing so by fax on 12 March 2010 when they indicated that they were happy to proceed on that basis. This was in response to a letter from the Respondent dated 12 March 2010 (prompted by the post inspection correspondence with the Complainers) referring to her previous letter of 4 June 2009, and to a telephone conversation with a member of the bank's staff on 5 June 2009, which was not noted on the Respondent's file, in which authorisation was granted orally.

As a consequence of her failure to obtain written authorisation from the lenders prior to intromitting with the loan funds, the Respondent placed herself in breach of Rule 6(1)(c) of the Solicitors (Scotland) Accounts etc. Rules 2001.

Mr D purchase of Property 3 A374/1

8.8 The Respondent acted on behalf of Mr D in connection with the purchase of Property 3. She also acted for the lenders who were providing the finance to enable the transaction to proceed. The CML Handbook requirements as previously referred to applied to the lenders' instructions in this case. The Respondent wrote to the lenders on 6 July 2009 advising that the balance of the purchase price would be paid by Mr D's partner, Ms E. The Respondent did not receive a response from the bank to that letter until she wrote to the lenders on 12 March 2010 asking, for compliance purposes, that the bank acknowledge the letter of 6 July 2009. The lenders in response wrote to the Respondent on 9 April 2010 confirming that it had been acceptable to proceed. The Respondent proceeded in 2009 to settle the transaction without first obtaining such written authority. In intromitting with the lenders' funds to effect settlement she thus placed herself in breach of Rule 6 (1) (c) of the Solicitors (Scotland) Accounts etc. Rules 2001.

Mr F purchase and sale of Property 4

8.9 The Respondent acted on behalf of Mr F in connection with the purchase and then the sale of Property 4. Mr F purchased the property from a builder at a price of £112,000. Settlement took place on 26 May 2009. Mr F resold the property at a price of £180,000.

Settlement of the resale took place on 29 May 2009. On Mr F's instructions, the net free proceeds of sale were paid to Mr G. The Respondent held on file a letter dated 29 May 2009 from Mr F authorising and instructing her to transfer £51954.95 from the proceeds of sale to Mr G "as per our agreement". This letter was dated 29 May 2009.

The Respondent also held on file a letter addressed "To whom it may concern" with the reference 48/5 (which was the Respondent's internal reference for the sale transaction) and the heading "Mr G". The body of the letter stated that the Respondent had transferred the sum of £51425.95 to Mr G and that this derived "from the sale of a property".

Regulation 7 of the Money Laundering Regulations requires that a relevant person (in this case the Respondent) apply "customer due diligence" measures when he or she establishes a business relationship or carries out an occasional transaction or suspects money laundering.

Regulation 8 requires that the relevant person conduct ongoing monitoring of the business relationship to ensure that the transactions are consistent with the relevant person's knowledge of the customer, his business and his risk profile.

Rule 24 of the Solicitors (Scotland) Accounts, Etc. Rules 2001 requires that every solicitor comply with the Money Laundering Regulations. Rule 24(3) of the Accounts Rules requires that every solicitor comply with the provisions of Part 7 of the Proceeds of Crime Act 2002.

The file relating to the sale contained a faxed copy of a letter from Mr F to the Respondent dated 29 May 2009 authorising the payment to Mr G of the sum of £51,954.95. The file also contained a letter addressed “To whom it may concern” confirming that the sum of £51,425.95 had been paid to Mr G. There was no explanation noted on file for the difference in these amounts. The Respondent’s sale file also contained a copy of an agreement between Mr F and Mr G which was in very general terms and indicated that Mr G would internally upgrade and redecorate “various properties” to be purchased by Mr F. This document was dated 10 January 2009.

There was insufficient evidence contained within the files to adequately explain the relationship between Mr F and Mr G and their agreement in respect of transferring part or all of the proceeds of sale of various properties. This amounted to a failure by the Respondent to exercise due diligence.

The letter addressed “To whom it may concern” suggested that the money was received by Mr G from the sale of a property belonging to him. There was no indication as to which property was sold, or on behalf of which client the property was sold.

9. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in cumulo in respect of:

9.1 Her failure to timeously record a standard security.

9.2 Her failure to comply on two occasions with Condition 2.1 of the Council of Mortgage Lenders’ Handbook having accepted instructions to act for lenders in relation to the purchase of two properties.

- 9.3 Her failure to comply on two occasions with the terms of Rule 6(1) of the Solicitors (Scotland) Accounts Etc Rules 2001 by intromitting with funds from a lender when she had not fully complied with the requirements of the Council of Mortgage Lenders' Handbook.
- 9.4 Her failure to comply with the terms of Rule 24 of the Solicitors (Scotland) Accounts Etc Rules 2001.
10. Having considered the letter from the Respondent and the previous findings against the Respondent the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 14 August 2012. The Tribunal having considered the Complaints dated 22 February and 29 March 2012 at the instance of the Council of the Law Society of Scotland against Eileen A Coogans, 60 Newark Crescent, Doonfoot, Ayr; Find the Respondent guilty of Professional Misconduct in cumulo in respect of her failure to timeously record a standard security, her failure to comply on two occasions with the terms of Condition 2.1 of the Council of Mortgage Lenders' Handbook having accepted instructions to act for lenders in relation to the purchase of two properties, her failure to comply on two occasions with the terms of Rule 6(1) of the Solicitors (Scotland) Accounts Etc Rules 2001 by intromitting with funds from a lender when she had not fully complied with the requirements of the Council of Mortgage Lenders' Handbook and her failure to comply on two occasions with Rule 24 of the Solicitors (Scotland) Accounts Etc Rules 2001; Censure the Respondent; Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that for a period of 3 years any Practising Certificate held or issued to the Respondent shall be

subject to such restriction as will limit her to acting as a qualified assistant to such employer as may be approved by the Council of the Law Society of Scotland or the Practising Certificate Sub Committee of the Council of the Law Society of Scotland, and thereafter until such time as she satisfies the Tribunal that she is fit to hold a full Practising Certificate; 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.

(signed)

Kirsteen Keyden

Vice Chairman

11. 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

Vice Chairman

NOTE

The Respondent was neither present nor represented. Mr Lynch advised that he had attempted to contact the Respondent by telephone earlier that morning and had received a text message in response from her advising that she was of the view that there was no requirement for her to attend the Tribunal that day. The Depute Clerk advised that it had been established from a check of the Royal Mail's website that the Notice of Hearing dated 3 July 2012 had been delivered on 4 July 2012 and signed for by the Respondent. It was noted that the covering letter from the Clerk which accompanied the Notice of Hearing had advised the Respondent that it was in her interests to attend the hearing and to be legally represented. The Tribunal therefore agreed to proceed in the absence of the Respondent.

Mr Lynch made a motion to amend the Complaint dated 29 March 2012 to delete Articles 4.1(d), (e) and (f) and to alter the figure contained in the third paragraph of Article 4.1(c) from £51,524.95 to £51,425.95. The Tribunal agreed to amend the Complaint accordingly.

SUBMISSIONS FOR THE COMPLAINERS

Mr Lynch advised that over the last couple of weeks he has had contact with the Respondent and she had agreed to enter into Joint Minutes agreeing the averments of fact in both Complaints.

In relation to the Complaint dated 22 February 2012 under the 2005 Rules, Mr Lynch advised that the Respondent acted for an individual regarding the purchase of a flat in Glasgow with the assistance of a loan from the Birmingham Midshires. Mr Lynch stated that the standard security was not submitted for registration until 28 February 2008 although the transaction had settled in October 2007. By February 2008 the property had been resold by the purchaser and the reports obtained in relation to that sale did not disclose the existence of the standard security as it had not been registered by that date.

As a result of this the seller was paid the full free proceeds of the sale and the lenders have made a claim on the master policy.

Mr Lynch explained that the Respondent's client had misled his new solicitors in connection with whether or not there was a loan over the property and took advantage of the Respondent's failure to register the security timeously. Mr Lynch stated that in the Respondent's Answers, she explains that this was an administrative error and that a cheque for the combined registration dues of both the disposition and standard security was sent to the Registers of Scotland shortly after settlement. However as the standard security was not enclosed a refund notice was sent by the Keeper to the Respondent's office regarding the missing standard security and that notice was filed away. The error only came to light when a manual file check was carried out. Mr Lynch confirmed that he had seen the letter from the Registers of Scotland dated 17 December 2007 and was able to verify that the information contained in the Respondent's Answers in relation to this matter is factually correct. Mr Lynch advised that there has been a change in practice at the Registers of Scotland in relation to how they deal with a situation like this. He advised that previously the Keeper would have sent all the deeds back but advised that this no longer happens and accepted that there would have been nothing in the bank reconciliation to have alerted the Respondent to the error.

Mr Lynch stated that if the Respondent had done a manual check on a monthly basis that this error would have been picked up much earlier. He submitted that the Tribunal has always taken a serious view of failure to register deeds and stated that ultimately this error led to a claim against the master policy rather than the guarantee fund.

In response to a question from the Tribunal, Mr Lynch indicated that he was not in a position to quantify the amount of the claim however he was able to confirm that the claim was not settled by the Respondent.

Mr Lynch then referred to the second Complaint dated 29 March 2012. He advised that the first breach alleged in this Complaint is that of a breach of the conditions of the

Council of Mortgage Lenders' (CML) Handbook. He stated that condition 2(1) of that Handbook requires all correspondence between solicitors and lenders to be in writing and that the solicitor is required to keep copies. Mr Lynch advised that a solicitor acting for a lender is required to report to the lenders if the solicitor does not have control over the entire purchase price and explained that was the position in the transaction referred to at Article 4.1(a). He stated that the Respondent disclosed to the lenders on the 4 June 2009 that part of the purchase was to be a gift from grandparents. He advised that the Respondent failed to obtain written confirmation of the lender's consent to that until 12 March 2010. He explained that the confirmation received on that date was in response to a letter from the Respondent prompted by the post inspection correspondence.

Mr Lynch advised that this failure was a breach of condition 2(1) of the Handbook and that in turn was a breach of Rule 6(1) of the Accounts Rules. Mr Lynch submitted that in the case of Joy Dunbar (04/10/2011) the Tribunal had held that a solicitor who intromits with funds in circumstances where she knew she had not complied with the terms of the Handbook amounted to a breach of Rule 6(1) of the Accounts Rules.

Mr Lynch advised that Article 4.1(b) contained details of a similar breach by the Respondent in relation to another transaction. In that case the Respondent had put the lenders on notice that the balance of the purchase price was being provided by the purchaser's partner but again did not get written consent from the lenders until after this was picked up by the inspection. Mr Lynch stated that this was again a breach of Rule 6(1) of the Accounts Rules.

Mr Lynch advised that Article 4.1(c) narrated the circumstances where the Respondent was acting for the purchaser of a property from a builder who sold the property on within a matter of days for a profit of just short of £70,000. Mr Lynch stated that on the instructions of her client the proceeds were paid by the Respondent to a third party and the allegation was that the Respondent had failed to comply with Regulations 7 and 8 of the Money Laundering Regulations by putting in place the required due diligence procedures to monitor the transaction. Mr Lynch stated that the letter addressed "To

whom it may concern” referred to in Article 4.1(c) was written by the Respondent in response to an enquiry from a bank who wanted to be satisfied regarding the source of the funds. Mr Lynch submitted that there was insufficient evidence in the file to adequately explain the relationship between Mr F and Mr G and that this was a breach of Rule 24 of the Accounts Rules.

Mr Lynch submitted that in cumulo the breaches in both Complaints when considered together amounted to professional misconduct, although he accepted that it could be viewed as being at the lower end of the scale. Mr Lynch referred the Tribunal to previous Findings from 2008 in relation to the Respondent.

DECISION

The Tribunal noted that Condition 2(1) of the CML Handbook clearly states that all communications between a lender and the solicitor acting for them shall be in writing and that the solicitor is required to keep copies of all written communications on the file as evidence of notification and authorisation. The Tribunal noted that the Respondent accepted that she had not complied with this condition on two occasions. The Respondent’s statement in mitigation indicated that both lenders were fully aware of the situation regarding the transactions and she did eventually respond in writing. The Tribunal considered that the Respondent was cavalier in the way that she dealt with the lenders in these particular circumstances. When a solicitor takes instructions from a lender, the solicitor owes the lender a duty to ensure that they receive a valid title over the subjects and that she complies with the terms of their instructions. The CML Handbook conditions are part of the lender’s instructions. They are there to prevent potential fraud. Failure to comply with these conditions is damaging to the reputation of the legal profession. The Tribunal considered that in this case the Respondent has shown a reckless disregard for complying with her client’s instructions.

In addition the Tribunal noted that it was accepted by the Respondent that in two transactions she did not have authority to draw down the funds from the lender in circumstances where

she knew that she had not fully complied with the terms of the CML Handbook which explicitly prohibits the drawing down of funds other than where there has been full compliance with the handbook conditions and accordingly that this was a breach of Rule 6(1) of the Accounts Rules.

The Tribunal also noted that the Respondent accepted that she had breached Rule 24 of the Accounts Rules in respect of her failure to put in place due diligence procedures to monitor a conveyancing transaction. In addition, in another conveyancing transaction the Respondent accepted that there had been a delay of almost four months in registering a standard security to protect the lender's interest. In that case the property was sold on within a four month period after her client instructed new solicitors and the free proceeds were paid out in full to him by his new solicitors who were unaware of the existence of the loan over the property resulting in a claim on the master policy. A solicitor acting for a lender in a conveyancing transaction has a duty to register standard securities timeously to protect the interests of the lender. The Tribunal accepted that the failure to register the deed was an administrative error which only came to light following a manual file check almost four months after the settlement of the transaction but was of the view that manual checks should be done more regularly.

The Tribunal had regard to the definition of professional misconduct as outlined in the case of Sharp-v-The Council of the Law Society of Scotland [1984] SC 129. The Tribunal was of the view that the Respondent's failures as outlined above when considered together would be viewed by competent and reputable solicitors as serious and reprehensible and therefore are sufficient to meet the Sharp test. Although some of the elements of misconduct on their own may not have been sufficient to amount to professional misconduct, the Tribunal made a finding in cumulo. The Tribunal were referred to their previous findings in the case of Joy Dunbar in which it held a breach of condition 2(1) of the CML Handbook was a breach of Rule 6(1) of the accounts rules. However no further argument was heard in relation to the applicability of Rule 6 as the Tribunal did not consider it was necessary in the particular circumstances of this case.

In considering sanction, the Tribunal noted the explanations given by the Respondent and considered that in all the circumstances the Respondent's failures were at the lower end of the scale of professional misconduct. However, the Tribunal noted the details of the previous Findings against the Respondent. These Findings were from 2008 and outlined a number of analogous breaches of the Money Laundering Regulations and failures to register deeds timeously. The Tribunal was concerned that against a background of previous failures to register deeds timeously that the Respondent had not put in place a rigorous system for manually checking files. In addition the Tribunal was concerned that the Respondent should again breach the Money Laundering Regulations having previously assured the Tribunal that she and her staff had received training in this regard. The Tribunal noted from the Respondent's written submission that although she is not presently working as a solicitor she wishes to be able to return to the profession in future. Accordingly, in view of the previous Findings the Tribunal was of the view that a restriction of the Respondent's practising certificate was required to protect the public and lenders. The Tribunal decided that for a period of three years any Practising Certificate held or issued to the Respondent shall be restricted to limit her to acting as a qualified assistant to such employer as may be approved by the Council of the Law Society of Scotland or the Practising Certificate Sub Committee of the Council of the Law Society of Scotland, and thereafter until such time as she satisfies the Tribunal that she is fit to hold a full Practising Certificate. In considering a future request from the Respondent that this restriction be lifted the Tribunal would expect to see confirmation from her employers that the Respondent has shown insight into her failures and has fully complied with all legal requirements in relation to the work she has undertaken on their behalf. The Tribunal made the usual orders with regard to publicity and expenses.

Vice Chairman