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

F I N D I N G S

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY of SCOTLAND, formerly at 26 Drumsheugh Gardens, Edinburgh and now at Atria One, 144 Morrison Street, Edinburgh

Complainers

against

MALCOLM WELSH THOMSON, Solicitor, Marshall Wilson Law Group Limited, 2 High Street, Falkirk

Respondent

1. A Complaint dated 20 November 2015 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Malcolm Welsh Thomson, Solicitor, Marshall Wilson Law Group Limited, 2 High Street, Falkirk (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was no Secondary Complainer.

3. There had previously been before the Tribunal a Complaint against the present Respondent and two others. Following sundry procedure, that Complaint called for a procedural hearing on 23 November 2015. On that date the Complainers were allowed to withdraw that Complaint and lodge the current Complaint in place thereof. At the hearing on 23 November 2015 the agent for the Respondent accepted service of the present Complaint on behalf of the Respondent. The Respondent sought a period of three weeks to lodge Answers. On the motion of the Respondent, not opposed by the Complainers, the Tribunal continued the Complaint to a procedural hearing to a date to be afterwards fixed.

4. Answers were lodged for the Respondent.

5. The 16 February 2016 having been identified as an appropriate date, the Tribunal appointed the Complaint to be heard as a procedural hearing on that date and notice thereof was duly served upon the Respondent. When the case called on that date, the Complainers were represented by their Fiscal, Jim Reid, Solicitor, Glasgow. The Respondent was absent but was represented by William Macreath, Solicitor, Glasgow. On joint motion the case was continued to a full hearing on 14 April 2016 at 12pm.

6. When the Complaint called on 14 April 2016, the Complainers were represented by their Fiscal, Jim Reid, Solicitor, Glasgow. The Respondent was represented by William Macreath, Solicitor, Glasgow. Both parties indicated to the Tribunal that they believed the case could not be completed in one day. The Respondent indicated to the Tribunal that there were difficulties in securing the attendance of a witness on behalf of the Respondent, the witness being unwell. The Respondent moved the Tribunal to adjourn the hearing to a procedural hearing to allow him to ascertain the availability of the witness. Thereafter, the Respondent indicated he would intend asking the Tribunal to fix two days for a hearing. That motion being unopposed by the Complainers, the Tribunal adjourned the hearing to a procedural hearing on 14 June 2016.

7. At the procedural hearing on 14 June 2016, the Complainers were represented by their Fiscal, Jim Reid, Solicitor, Glasgow. The Respondent was absent but was represented by William Macreath, Solicitor, Glasgow. It was confirmed to the Tribunal that the witness referred to previously was fit to give evidence. Parties confirmed that the terms of a Joint Minute had been agreed. Mr Macreath confirmed that the Respondent had no objection to any of the members of the Tribunal which dealt with the former Co-Respondent of the Respondent sitting on the present case. On Joint Motion, the Tribunal continued the Complaint to a hearing on 4 and 5 October 2016 at 10:30am.

8. At the hearing on 4 October 2016 the Complainers were represented by their Fiscal, Jim Reid, Solicitor, Glasgow. The Respondent was present and was represented by William Macreath, Solicitor, Glasgow. Two Joint Minutes and a Record were lodged. The Fiscal moved to make a minor amendment in relation to averment 8.4. There being no objection on behalf of the Respondent, this motion was granted. Submissions were made on behalf of both parties with regard to the admissibility of Productions 27 and 28 for the Complainers. The Complainers led evidence from two witnesses before closing their case.

The Respondent himself began giving evidence. Due to the time of the day, the hearing was adjourned to the following day.

9. On 5 October 2016 the Respondent himself completed his evidence and the defence case was closed without the leading of any further witnesses. Both parties made submissions.

10. The Tribunal found the following facts admitted:-

10.1 The Respondent was born on 27 March 1965. From 1 April 1993 to 31 October 2008 he was a partner with Marshall Wilson, Solicitors, Falkirk. From 1 November 2008 he has been a Director of Marshall Wilson Law Group Limited, Solicitors, Falkirk.

10.2 The Complainers carried out an inspection of the Marshall Wilson Law Group Limited between 25 and 27 May 2009. The inspection noted the purchase of forty-eight flats at Otago Street, Glasgow on behalf of clients, Mr A and Ms A.

The Solicitor dealing with the transactions on behalf of Mr and Mrs A was Mr George Raymond Morton (hereinafter referred to as Mr Morton). Marshall Wilson were also acting on behalf of various commercial lenders who were providing finance for the forty-eight flat purchase.

The transaction was referred to Mr Morton by another Solicitor, James Turnbull of James Turnbull and Co, Solicitors, Falkirk.

10.3 The Marshall Wilson file contains a copy of a fax dated 6 August 2008 from Reith Lambert, Commercial Property Advisers, to Countrywide Residential Lettings setting out Mr A's intention to purchase the various properties, subject to Heads of Term set out in the letter. It advised that Mr A's Agent for the transaction would be Burness and that Mr A intended to set up a Special Purpose Vehicle for the purchase.

10.4 An email from James Turnbull to Mr Morton dated 2 September 2008 provided the initial instructions to Marshall Wilson and noted that Marshall Wilson would take the place of Burness in relation to the purchases.

A handwritten file note of 15 September 2008 reads "Flats 150k each. But valued at 200k (48)".

10.5 Subsequent correspondence in relation to the provision of Property Enquiry Certificates concludes with a letter from James Turnbull & Co to Marshall Wilson on 30 September 2008 confirming that the selling agents are only willing to meet the cost of providing five Property Enquiry Certificates on the basis that all the properties are identical.

Mr Morton replied on 1 October 2008 confirming "We are prepared to accept the position regarding the Property Enquiry Certificates."

10.6 In an undated fax bearing a note to the effect it was received on 10 October 2008, Mr Turnbull advised Mr Morton:-

"Raymond
We are on the verge of concluding this deal. Settlement may (I stress may) take place 17.10.2008.
Before I conclude, I must have your confirmation that you are satisfied as to the conditions attached to the mortgage offers already issued and that there are no impediments to your submitting the appropriate Certificates of Title to obtain the mortgage funds imminently.
Please let me have the necessary confirmation by return.
Regards
Jim"

By fax dated 14 October 2008 Mr Morton replied to Mr Turnbull advising:-

"I confirm that I have now gone over the conditions and the offer of loan in respect of the various properties. I attach hereto a schedule showing the various lenders and their requirements.

I also note that I am suppose to confirm to you that certain lenders that the purchase of each flat is £200,000, whereas of course it would appear that the 48 flats are being purchased for £125,000 each."

In a letter dated 15 October 2008 Mr Turnbull advised Mr Morton inter alia:-

"I refer to our telephone conversation when we agreed the position regarding the valuations and purchase prices of the properties.

I enclose, for your information, copy (poor) Money Laundering documentation.

I enclose copies of the Tenancy Agreements for all the flats. (The sellers) have been lax in maintaining rentals at the current levels. It is the client's intention to rectify the situations on matter of priority."

10.7 By letter dated 20 October 2008 Mr Morton wrote to Mr Turnbull advising:-

"I have to say that I have some concerns regarding the loans which Mr and Mrs A are receiving, in respect of in particular the Bank of Ireland, Birmingham Midshires and Bristol and West. In these three cases I have to submit a Report on Title and confirm that in particular the present rents are sufficient to cover the mortgage payments which are being made by Mr and Mrs A. Having checked the Short Assured Tenancy Agreements, this is obviously not the case in respect of any of the loans applying to these three societies. If I submit a Certificate/Report on Title to these lenders, it will be quite apparent to them that when they receive the Land and Charge Certificate and Tenancy Agreements, that I have falsely reported the position, which would then leave myself and my firm with the possibility of not only being reported to the Law Society but taken off their Solicitors panel."

10.8 Marshall Wilson received an offer dated 29 October 2008 to sell twenty-seven flats to Mrs A for £2,750,000. Missives were concluded on 14 November 2008.

On the basis of the Missives, the average price paid by Mrs A for the twenty-seven flats purchased by her was £101,851.

Of the twenty-seven flats purchased by Mrs A, twenty-one flats were subject to loans from commercial lenders, as detailed in the accompanying Schedule A.

The loans for the twenty-one flats totalled £3,060,000. At settlement 5 loans were not drawn down totalling £770,000 resulting in loans actually utilized totalling £2,290,000.

The total of the purchase prices of the twenty-one flats, as certified in the Certificates of Title, was £4,000,000.

10.9 Marshall Wilson received an offer dated 29 October 2008 to sell to Mr A twenty-one flats at Otago Street, Glasgow for £2,750,000. Missives were concluded on 14 November 2008.

On the basis of the Missives, the average price paid by Mr A for the twenty-one flats purchased by him was £130,952.

Of the twenty-one flats purchased by Mr A, eighteen of the flats were subject to loans from commercial lenders, as detailed in the accompanying Schedule B.

The loans for the eighteen flats totalled £2,861,596. The total of the purchase prices of the eighteen flats, as certified in the Certificates of Title, was £3,600,000.

10.10 The total actual purchase price for all forty-eight flats at Otago Street was £5,500,000. The average purchase price per flat was accordingly £114,583.33.

The total purchase price of the 39 flats as stated in the Certificates of Title was said to be £7,800,000 on the basis of £200,000 purchase price per flat.

The total of the loans for the 39 flats was £5,350,000. Only £150,000 was paid by Mr and Mrs A towards the actual purchase price.

Of the 48 flats, only 34 flats were subject to loans at settlement. As a result, 14 flats were purchased by Mr and Mrs A free from any loans.

10.11 The Council of Mortgage Lenders Handbook applied to transactions where loans in respect of various flats were received from Alliance & Leicester, Bank of Ireland, Birmingham Midshires, and the Chelsea Building Society, et separatim Loan Instructions applied in respect of the aforementioned Lenders and the Bristol & West Building Society all as detailed in the said Schedules A and B.

Alliance & Leicester

10.12 The offer of loan from the Alliance & Leicester provided that instructions to Marshall Wilson were based on the conditions set out in the CML Lenders Handbook for Scotland.

The offers of loan stated that the Solicitor was required to confirm "The purchase price stated in the mortgage offer is correct and the same amount will be stated in the corresponding contract of sale."

The Certificates of Title confirmed the relevant mortgage advance figure and that the "price stated in transfer" is £200,000.

Bank of Ireland

10.13 The offers of loan instructed Marshall Wilson to investigate the Title in line with the terms of Bank of Ireland's mortgage offer and the Mortgage Conditions (Scotland) and the CML Lenders Handbook, Parts I and II.

The offers of loan stated that "The Solicitor must state the actual purchase price being paid. Any discount, cash back or allowance should be reported to us as soon as possible." In addition, the offers stated that the payment of rent should be

at least sufficient to cover the amount of the monthly instalments of interest due under the mortgage.

Birmingham Midshires

10.14 The offers of loan stated that Marshall Wilson were instructed in accordance with the CML Lenders Handbook for Scotland and Birmingham Midshires Part 2 instructions.

It was a condition of the offers of loan that the monthly rental income under the Tenancy Agreement must be greater or equal to a minimum of 100% of the monthly mortgage payment.

Bristol & West

10.15 The offers of loan stated that Marshall Wilson were instructed in line with the terms of the lenders Offer of Loan and Solicitors Instructions (Scotland).

The offers provided that "The Solicitor must state the actual purchase price being paid. Any discount, cash bank or allowance should be reported to the lender as soon as possible.

In addition, the conditions provided that the payment of rent should be at least sufficient to cover the amount of the monthly instalments of interest due under the mortgage.

The Solicitors Instructions (Scotland) provided that in all purchase cases the Solicitor was required to obtain a Property Enquiry Certificate.

Chelsea Building Society

10.16 The offers of loan stated that Marshall Wilson were instructed in accordance with the second edition of the CML Lenders Handbook for Scotland dated 1 January 2003 and Chelsea Building Society's Part 2 Instructions.

10.17 The total purchase price of the flats was £5,500,000. The Certificates of Title showed purchase prices totalling £7,600,000.

The purchase price covered forty-eight flats. Of the forty-eight flats, only thirty-four flats were ultimately subject to loans/mortgages. Fourteen flats were purchased subject to no borrowings.

The loans/mortgages provided totalled £5,350,000.

10.18 Flat purchases were progressed and Certificates of Title signed and/or completed, all as per the accompanying detailed Schedules in circumstances where:-

(a) The purchase price in the mortgage offer exceeded the amount stated in the contract of sale.

(b) Payment of rent was not sufficient to cover the amount of monthly instalments of interest due under the mortgage.

(c) The actual purchase price being paid for the flat was not stated.

10.19 Copy identification documents in respect of the purchasers Mr and Mrs A were sent by James Turnbull to Mr Morton. The documents were not "certified a true copy". There was no indication that Mr Morton had ever met the purchasers.

There was no indication that James Turnbull consented to being relied on by Mr Morton in terms of the Money Laundering Regulations 2007, Regulation 17(1)(a).

There is no indication that James Turnbull had carried out due diligence in terms of the 2007 Regulations.

A copy Bank Statement provided showed that one of the purchasers, Mr A, had £2,000,000 in the account. Mr Morton raised no queries re the source of these funds.

10.20 Marshall Wilson Money Laundering Compliance Risk Assessment Form was completed and signed by the Respondent on 4 November 2008. He noted the transaction was "high risk". It was the firm's then practice to assess all conveyancing transactions as high risk.

Mr Morton was responsible for identification but had not signed the verification section of the form.

Mr Morton had certified as a true copy photocopies of the copy identification documentation provided by James Turnbull although he had not met the purchasers and the original copy documentation was uncertified. The documentation was brought to the Respondent by the paralegal/assistant of Mr Morton.

10.21 The Respondent completed a Money Laundering Compliance Risk Assessment Form dated 4 November 2008. The transaction was described as "high risk". The form specified that Mr Morton was responsible for obtaining identification. Mr Morton had not signed the verification section of the form.

10.22 On 5 November 2008, at the request of the paralegal/assistant of Mr Morton, he being out of the office for lunch, the Respondent signed Certificates of Title in respect of three transactions:-

(a) Flat 3/2, 65 Otago Street, which had a loan of £170,000.
(b) Flat 2/3, 69 Otago Street, which had a loan of £170,000.
(c) Flat 3/1, 69 Otago Street, which had a loan of £170,000.

10.23 The loans in respect of the three said properties were from Birmingham Midshires. As averred, the offers of loan were in accordance with the CML Lenders Handbook for Scotland and Birmingham Midshires Part 2 Instructions.

In particular, it was a condition of the offers of loan that the monthly rental income under the Tenancy Agreement must be greater or equal to a minimum of 100% of the monthly mortgage payment.

10.24 In respect of each of the three properties, the monthly rental income was £595 and the monthly mortgage payment was £778.85.

The Certificates of Title in respect of each of the three properties stated the purchase price as £200,000. The actual purchase prices of each of the three properties were significantly less than the stated price and significantly less than the loans. The average purchase price of each of the forty-eight flats was £114,583.33.

11. Having given careful consideration to the established facts and the submissions made by both parties, the Tribunal found the Respondent not guilty of Professional Misconduct. Nor did the Tribunal consider that the conduct established met the test for unsatisfactory professional conduct and therefore declined to remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980.

12. Having heard further submissions from the parties in relation to expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 5 October 2016. The Tribunal in respect of the Complaint dated 20 November 2015 at the instance of the Council of the Law Society of Scotland against Malcolm Welsh Thomson, Solicitor, Marshall Wilson Law Group Limited, 2 High Street, Falkirk; Find the Respondent not guilty of professional misconduct; Find the Complainers liable in the expenses of the Respondent restricted by one half; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but shall not include the names of the firm's clients who were the purchasers. Having previously determined to publish the decision on further consideration the Tribunal decided to defer publishing until publication of its decision in parallel proceedings.

(signed)

Alistair Cockburn

Vice 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 16 NOVEMBER 2016.

IN THE NAME OF THE TRIBUNAL

[redacted]

Alistair Cockburn

Vice Chairman

NOTE

Prior to the hearing on 4 October 2016, the Complainers had lodged two Lists of Productions and a List of Witnesses. The Respondent had lodged three Lists of Productions, a List of Witnesses and a List of Authorities. At the hearing two Joint Minutes were lodged. The first of these agreed all of the Complainers' averments of fact and the Complainers' Productions 7 to 26 and 30 to 31. That Joint Minute together with the second Joint Minute agreed the Productions for the Respondent.

The Fiscal indicated to the Tribunal that he had prepared a Record which he would lodge if the Tribunal considered that helpful. There being no objection to this motion, the Tribunal allowed the Record to be received.

Thereafter, the Fiscal made a motion to the Tribunal to amend paragraph 8.4 of the Record where he said there were typographical errors. His motion was to amend line 6 of paragraph 8.4 to read "5.7, 5.8 and 5.9". The Respondent confirmed that he had no objection to the Fiscal's motion and accordingly this was allowed.

The Fiscal referred the Tribunal to his Second Inventory of Productions and identified that two Productions appeared to be numbered as 16.6. He moved to amend the first of these to 16.5. No objection being taken to this motion, the motion was granted.

The Fiscal indicated that he intended to lead evidence from two witnesses. Mr Macreath intimated to the Tribunal at this stage that he would be objecting to the admissibility of two of the Complainers' Productions namely 27 and 28. He clarified that these Productions were not agreed in the Joint Minutes because of the issue of admissibility. He explained that he was raising this issue now but could wait until the Fiscal sought to lead the evidence before taking his objection. Mr Reid indicated he was happy for the matter to be considered at this stage.

The Chairman indicated that if both parties were happy to discuss the issues at this stage in the proceedings, then the Tribunal would proceed to hear arguments.

Mr Macreath indicated that he was taking objection to Productions 27 and 28 for the Complainers, and the evidence of Mr Matthews and Ms Heywood in relation to these. Although these proceedings are an internal disciplinary tribunal, the rules regarding pleading and fair notice still apply. Production 27/1 is an interview before the Guarantee Fund held in 2005 and attended by the Respondent. Production 28/1

is a similar interview attended by the Respondent and his senior partner, Mr Morton, in 2007. It was Mr Macreath's submission that there was no reference in the Record before the Tribunal to these interviews being relevant to the proof of averments of misconduct. He submitted that the Complainers had set out their averments of duty at part 9 of the Record. Paragraph 9.4 in particular delineates the facts relied upon and this the Respondent had answered in full at answer 9.4. At paragraph 9.5 the Complainers had set out that they sought to prove the Respondent's failure to comply with his obligations in relation to three properties that (1) the purchase price being paid was substantially less than the price upon which the lenders had based the amount of loan (2) the actual loan funds received exceeded the purchase price paid and (3) the monthly rental income of the three properties was below the level required by the loan instructions. Averment 9.6 sets out professional responsibilities and duties as do the remaining paragraphs. Nowhere in the Record is there specific reference that seeks to rely on these specific Guarantee Fund interviews.

Mr Macreath clarified that the Respondent was taking no objection to Production 29, the note of the Guarantee Fund Committee interview of 15 October 2009 for the good reason that this interview forms the basis of the referral of the matter within this Complaint.

He submitted that the Tribunal Rules from 2008 were widely framed. Rule 6.1 sets out the form of the Complaint. To rely upon the two interviews objected to would impact upon natural justice. The current proceedings are adversarial in nature.

Mr Macreath referred to the case of Harris-v-Appeal Committee of ICAS [2005] where the Outer House had emphasised that it was important for tribunals to have regard to irrelevant and prejudicial matters not being included in papers that are submitted to tribunals. It was considered in that case that the hearing did not comply with Article 6 as such material would have been read and considered and could have influenced the tribunal in the proceedings. Mr Macreath emphasised that it was not his position in this case that the Tribunal had been influenced. He did however require to emphasise that fair notice is important.

Mr Macreath went on to refer to the case of Murphy-v-The General Teaching Council [1997] SLT 1152. In that case the committee had before it documents relating to an earlier police warning which was not part of the actual referral and was not referred to within the hearing. Even though there was no information that the Tribunal had been influenced by these documents, as there was no reference to the Tribunal being directed to ignore them, the appeal was upheld as justice had to be seen to be done.

Mr Macreath's argument, he said, rested on his entitlement to have fair notice of the case he required to meet. This case related to the signing of three reports on title in discreet circumstances. If the Fiscal is going to suggest that the two meetings of 2005 and 2007 put the Respondent on greater notice to take greater care with regard to the signing of these notices then Mr Macreath would have expected to see this in the pleadings. These interviews are not referred to in the pleadings at all. The interview of 2009 is in a different position – that must be relevant as that is what led to the reference for prosecution. He submitted that it was for Mr Reid to set out the essential facts that he wished to rely upon. It would have been a simple matter for him to set out these interviews within the averments to seek the Respondent's position.

The principle of fair notice requires that the Respondent should have notice of what it is alleged he failed to do, to determine whether the conduct was consistent with his duties or what he should have done beyond what he did.

Mr Macreath submitted that there was potential prejudice to the Respondent as these adminicles of evidence could suggest that the Respondent should have been on notice of Mr Morton's continued recklessness.

The Chairman confirmed that it was not his practice to look at a Production until it was actually referred to in evidence. The Chairman addressed the Fiscal and stated that it was his view that a Production is an adminicle of evidence and although it is not necessary to plead evidence, the Fiscal needed to identify for the Tribunal the facts averred that he sought to prove by the Productions he sought to lodge.

The Fiscal submitted that this was not a question of pleadings but rather a question of evidence. The Respondent had signed three incorrect certificates of title. In Answer 9.4 the Respondent had averred that he was entitled to do so as the transaction was being handled by his senior partner and that he was entitled to rely upon that senior partner. It was the Fiscal's position that the Respondent was not so entitled. In that case Mr Reid submitted that he was perfectly entitled to lead evidence to support his contention that the Respondent was not so entitled. That could include for instance referring to Production 28. He believed he was entitled to challenge evidentially the matter set out in Answer 9.4. In his submission that included referring to these previous minutes.

The Tribunal asked Mr Macreath, if it was the case that the Fiscal was simply going to refer to the documents as evidence in rebuttal of the Respondent's Answer, that answered his objection.

Mr Macreath indicated to the Tribunal that he did not accept that that answered his objection. The Respondent had set out his explanation within Answer 9.4. It was open to the Fiscal to have responded to that indicating why he did not accept the Respondent's explanation. The Fiscal could have referred to these previous meetings and their significance and Mr Macreath would have expected that.

Mr Reid responded that this proposition would involve a procedure of adjustment *ad nauseam*. He stated that it was his understanding that the Tribunal did not encourage that procedure and he did not consider that he had had to adjust his pleadings or lodge a Minute of Amendment.

The Chairman suggested to the Fiscal that, if he was seeking to prove that the Respondent knew or ought to have known something, he could not stop there but had to set out on what basis the Respondent ought to have known it.

Mr Reid stated that he considered that he was entitled to challenge evidentially what was set out in 9.4.

The Chairman raised the issue of whether there required to be any redaction of the Productions, if any of their content was not relevant to the Answer 9.4.

The Fiscal responded that it was his submission that the whole thrust of Production 28 was relevant. Mr Macreath responded that he continued to object to the relevancy and admissibility of the Productions as he did not accept that it was open to the Fiscal to take the position that he could lead any evidence to rebut the Answer in 9.4 without fair notice.

The Chairman asked Mr Macreath to clarify what his position would be if his client gave evidence saying that he had no knowledge of the matters being referred to and then in cross-examination the Fiscal produced the minute of the interview. Mr Macreath responded that that was the reason he was raising the issue at this stage as he wanted to exclude reference entirely to these minutes. He submitted that it was not good enough for the Fiscal simply to say that the Respondent had answered 9.4 so the Fiscal can raise any issue at all to challenge the Respondent's credibility.

The Chairman suggested that the appropriate way forward might be if the Respondent gives evidence with regard to a set of circumstances, for the Fiscal to put it to the Respondent that his evidence is wrong and produce documents that prove the evidence to be wrong. It might be that the documents can only be put to the Respondent and not to the other witnesses for Mr Reid. The Chairman stated that he

accepted that there was some merit to the suggestion that the Respondent was entitled to fair notice but this way forward would allow the Fiscal to put the information to the Respondent in cross-examination. The Chairman asked the Fiscal if that way forward resolved the current difficulties and whether or not he required a formal ruling.

The Fiscal responded that he did not require a formal ruling and the Chairman confirmed that this indicated how the Tribunal would approach the issue as evidence was taken.

EVIDENCE FOR THE COMPLAINERS

WITNESS: GRAHAM MATTHEWS

The witness confirmed that he was a qualified solicitor and a partner in Peterkin Solicitors. He is currently the Vice President of the Law Society. He became a solicitor in 1979 and a member of the Law Society Council in 2005. He has been the convener and member of various committees and working parties. He confirmed that he has been the convener of the Professional Practice Sub Committee. He confirmed that he has attended the Guarantee Fund Committee meetings regularly over the last 10 years and convened meetings twice. He used to chair the Guarantee Fund interview panels.

The witness was referred to the Fiscal's Production 29 which he confirmed was a note of an interview before the Guarantee Fund on 15 October 2009. He confirmed that this interview had been split into two parts. One interview had involved five of the partners of the firm Marshall Wilson and the other interview had involved only the partners Mr Morton and Ms Pacitti. It was his understanding that the two groups of partners were at loggerheads. He had understood that they could not even meet in the building. He agreed that both interviews had been pretty much the same.

The interview had related to transactions involving Mr and Mrs A and Otago Street, Glasgow. He was asked if he had any recollection of the interview over and above the minute itself and he said that he did. He began to explain that he had interviewed Mr Morton and the Respondent in 2007 when Mr Macreath objected. The Fiscal clarified that he had not asked the witness a question directed to the 2007 meeting but that the response was the witness's evidence. The Chairman clarified that obviously the Respondent could only object to a question not an answer however there was a line and the Fiscal could only explore further with the witness that he could recollect Production 29 as a result of something that had happened in 2007.

The witness explained that he could not think of another occasion when the interview had had to be conducted in two separate parts and additionally the transactions involved were unusual.

The witness was asked to look at Production 29/2 paragraphs 4 and 6. His attention was then drawn to paragraph 2 of Production 29/3. He was asked if the minute was accurate and agreed it was. The Fiscal indicated to the witness that the Respondent did not accept that he had stated in the interview that he had "obtained and reviewed the files". The witness insisted that the Respondent had made that statement. He explained that he had been quite cautious to find out if the Respondent had in fact read the files.

The witness was asked by the Fiscal if the loans obtained had exceeded the actual purchase price paid. He indicated that he did not think that the loans had exceeded the purchase price but that they had equalled the purchase price as he recalled that not all of the flats were secured. He went on to explain that if one divided the whole purchase price paid by the number of flats then the average price for each flat came out at approximately £114,000. The witness could remember that there were some flats that had no mortgage over them. The witness agreed that, the way that this transaction was structured, Mr and Mrs A had purchased 14 flats with no loans at all and that if they had wished they could have sold the flats.

The Fiscal directed the witness's attention to the bottom of page 29/4 and thereafter paragraphs 1, 2 and 3 of Production 29/5. The witness confirmed that the letter referred to in paragraph 3 would have been in the papers in front of him at the time of the interview. He confirmed that was Production 15/1 for the Complainers. He confirmed that the letter/fax of 20 October 2008 (Production 15/1) was dated before the transactions settled. He accepted that he would have expected someone who had read that letter to be concerned and to ask questions.

The witness was then directed to Production 29/5 to 29/6 and confirmed that this was a record of the second part of the meeting. The witness was referred to paragraphs 2, 3 and 4 of Production 29/6 and confirmed that paragraph 4 contained a typographical error as the letter referred to was dated 20th and not 29th October. The witness was unable to say who concluded the missives. He accepted that in paragraph 5 of 29/6 Mr Morton claimed not to know the significance of the loans equalling the purchase price despite what Mr Morton had said in his letter of 20 October 2008.

The witness's attention was drawn to Production 29/7 paragraph 1. It seemed to the witness that Mr Morton had taken the view that this had simply been a wonderful deal for Mr and Mrs A. Although it

was not in the minute, the witness had some recollection that there was a report that some of these flats were rat infested. Mr Morton was adamant that this was a wonderful deal. He referred to the basement of the property being converted into other flats and there being a lot of ground around about the building that could be used for development. Mr Morton seemed to take the view that the lenders had protection as they had all these flats at a higher price.

The witness was referred to paragraphs 2 and 4 of Production 29/7. It was the witness's recollection that Mr Morton had been adamant that this presented a wonderful deal.

The witness was asked to clarify the procedure for drafting/revising the minutes of the interview. The witness explained that in those days the minutes were drafted either by Tina Heywood or Linda Lyall. The minutes were then sent to him for approval. Once he had revised them the minutes were sent to the Guarantee Fund Committee. He did not think that the draft minutes went to all of the attendees in 2009. The procedure has been changed and now draft minutes are issued to all of the attendees at the interview.

CROSS-EXAMINATION OF MR MATTHEWS

The witness confirmed that he had been present at this meeting where provision had to be made for one interview with five of the directors and another interview with Mr Morton and Ms Pacitti.

The witness was referred to the Respondent's Production 1, a letter dated 3 August 2009. The witness could not remember if he had a copy of that letter at the interview but accepted that it was likely to have been part of his bundle.

The witness was referred to Respondent's Production 1, at the foot of page 2 and confirmed that it was his experience as convener of the Guarantee Fund Sub Committee that sole practitioners often could not do security work. The witness said that in his opinion it was not good enough with regard to the Money Laundering Regulations for a solicitor to say that he was relying on a colleague with regard to identification evidence when the solicitor had not met the client face to face.

The witness was referred to Complainers' Production 18.2, 18.3 and 18.4. He agreed that to certify these as true copies the solicitor would have required to have seen the principals or the copies should have been certified by Mr Turnbull. If Mr Morton had certified these documents on the basis of the information given by Mr Turnbull then that would have been inappropriate. He accepted that if the

Money Laundering Officer had seen the certification by his Senior Partner he would have accepted it on face value that the Senior Partner had seen the originals.

It was the witness's recollection that the interview was held in two parts as a result of a request from the firm that the individuals could not be in the room at the same time. The witness accepted that he had a concern about the conduct of Mr Morton in relation to Money Laundering Regulations. The witness accepted that he asked the directors of the firm about the Otago Street transactions at the interview on 29 March. The Respondent had said at that interview that his first knowledge of the transactions was a note left on a scrap of paper left by Mr Morton. He did not accept that it was Mr Travers who had said that he had obtained and reviewed the files. He accepted that paragraph 2, 29/3 suggested that it was Mr Thomson who contacted the Law Society, a tax advisor and Mr Turnbull. The witness confirmed that procedures have changed and that all attendees at the interview now receive a copy of the minute to check for inaccuracies. At that time the interview was only minuted and not recorded. There were three panel members asking questions through the Convener.

The witness was asked to compare Production 29/4 paragraph 3 with 29/9 paragraph 4 regarding the date when the dispute arose between the partners/directors. The witness responded that it was not for the panel to cross check the dates put forward by the interviewees.

RE-EXAMINATION OF MR MATTHEWS

The witness confirmed that he was satisfied that the minute was accurate. The minute was taken on the day by an experienced individual and then revised by him. He was satisfied that he used reference to Thomson/Travers in the right order and that it was Thomson who had obtained the files and discussed them with Mr Travers.

He confirmed that as the missives were completed on 14 November 2008 logically this was after Mr Morton went on holiday.

At the end of the Fiscal's re-examination, Mr Macreath sought permission to ask a further question. The Fiscal took no objection to this. Mr Macreath referred the witness to Production 4 for the Respondent, at the penultimate paragraph on page 3 referring to the letter of 20 October 2008. The witness confirmed that he could remember Mr Macreath's shock at the reference to the content of this letter. The witness could not remember any of the partners saying anything. He certainly remembered Mr Macreath's shock but did not remember the partners saying anything at all.

WITNESS: CHRISTINA HEYWOOD

The witness confirmed that from May 2009 until March 2016 she was the Head of Financial Compliance at the Law Society. She is now retired. From 2006 to May 2009 she was the Operations Manager. Her duties of Head of Financial Compliance involved her heading up the inspection team. The inspection team carries out inspections of all lawyers' books and records. She discussed their reports and decided which ones required to be taken further including whether they required to be reported to the Guarantee Fund. She also attended Guarantee Fund interviews.

She was referred to Complainers' Production 29/1 and confirmed that this interview was held in two sections. She had attended this meeting along with Mr Matthews. The two groups of directors were at loggerheads. This interview was as a result of an inspection which she had then referred on to the Guarantee Fund and the Guarantee Fund had considered it appropriate to carry out this interview.

The witness was referred to Complainers' Production 29/2 at paragraph 6 and 29/3 at paragraph 2. She agreed that this indicated that at some time prior to settlement to the transaction there had been a partners meeting. Marshall Wilson were to do the security work for both the borrower and the lender. She agreed that what was set out within the minute was a narrative of events given to the interview panel. She explained that the minutes were written by Linda Lyall. She believed she would have looked over these minutes and that they would have also been revised by the convener. She took the view that the minutes were accurate. She understood that the minutes were correct that it was the Respondent who stated that he had obtained and reviewed the files.

She was referred to Complainers' Production 29/3 paragraph 3, Production 29/4 paragraphs 1, 2, 3, 4, 5 and 6. She confirmed that Complainers' Production 15 was the letter referred to in Production 29/5.

The inspection team were concerned about this transaction because the loans virtually equalled the purchase price – loans for 34 flats where 48 flats were being purchased.

The witness confirmed that the interview went on to discuss issues with Mr Morton and Ms Pacitti. She was referred to Complainers' Production 29/6 paragraphs 2, 3 and 4. She confirmed that reference to the letter dated 29/10/08 was a typographical error and should say 20/10/08. She confirmed that it was not correct that Mr Turnbull concluded the missives.

She was referred to Complainers' Production 29/6 paragraphs 5 and 6 and Production 29/7 paragraph 1. She indicated that she remembered this interview as it was unusual for so many directors to attend and in separate parts. The transaction itself stuck in her mind as it was very unusual. She has never seen another one like it. She was referred to Production 31 for the Complainers and confirmed that at this period the Respondent was Cashroom Partner and Money Laundering Reporting Officer.

She was referred to Production 19 for the Complainers and confirmed that this was a Risk Assessment Form completed by the Respondent dated 4 November 2008 for Mr and Mrs A. She confirmed that this assessed the transaction as high risk. She confirmed that the form was not properly completed with paragraphs that should have been deleted not deleted. She would have expected the person completing this assessment to have looked at the file.

She confirmed that Production 20, 21 and 22 were three certificates of title signed by the Respondent that each related to a flat where the borrower was Mrs A, involved a loan advance of £170,000 with a stated purchase price of £200,000.

She confirmed that it appeared that the Respondent had completed and signed Production 19, the risk assessment, on 4 November 2008 and then the following day had signed the three certificates on title. The transactions eventually settled below the stated price.

CROSS-EXAMINATION OF MS HEYWOOD

The witness was referred to Production 1 for the Respondent. She confirmed that this letter was part of the bundle for the Guarantee Fund interview. She confirmed that the certification of the identification documents for the purchasers did not comply with the 2007 Money Laundering Regulations. She was asked to look at Productions 18 and 19. She confirmed that the identification documents were certified on the same date as the Respondent had signed the risk assessment. Whilst she accepted that the form had been completed with the apparent expectation that Mr Morton would also sign it and that he was the person responsible for the transaction, the Respondent had completed the form as though he had checked the ID and been satisfied.

The witness remembered that when the letter of 20 October 2008 was referred to at the Guarantee Fund interview Mr Macreath had been surprised. She believed that the Respondent had expressed similar surprise.

The witness agreed that at the interview Mr Morton seemed to believe that his firm were only doing the security work and not actually acting for Mr and Mrs A in the transaction. She accepted that Mr Morton appeared to have written to her saying one thing and then indicated something different at the Guarantee Fund meeting. At the interview it appeared that Mr Morton did not understand the transaction at all.

She confirmed that as at 2009 minutes of Guarantee Fund interviews were not sent to all of the parties present. They are now and the parties have a time limit within which to respond.

The Fiscal confirmed that he had no re-examination.

The Chairman asked the witness if any explanation had been given at the interview as to why the Respondent signed the risk assessment on the same date as Mr Morton certified the identification documents. The witness responded that there had been no reference to the dates within the minutes of the meeting. Likewise there had been no enquiry made of the Respondent as to why he was signing the certificates on title some two days before Mr Morton went on holiday.

The Fiscal intimated that he had no further witnesses.

EVIDENCE FOR THE RESPONDENT

WITNESS: MALCOLM WELSH THOMSON

The witness confirmed that he is 51, married with two children. He confirmed that he had been with Marshall Wilson throughout his career commencing his traineeship in 1987. At that time it was Marshall Wilson Dean and Turnbull.

The firm was incorporated at the end of October, beginning of November 2008. He became an assistant with the firm and then was assumed as a partner in 1993. His area of practice in 1993 was family law, child law and some criminal work. He did not do any conveyancing work. He had only done a smattering of conveyancing in his traineeship. Raymond Morton became Senior Partner of the firm around 2006. Mr Morton's area of practice was residential and commercial conveyancing including wills and powers of attorney. Most of his work was residential conveyancing. The firm conducted some 30 to 40 transactions per month on average. The firm had three registered paralegals

and support staff. Mr Morton had an assistant who was a paralegal called Karen Thomson. She would have made the number of paralegals four.

The witness confirmed that he had been Cashroom Partner and Money Laundering Reporting Officer.

The witness explained that Mr Morton first raised this transaction some nine months or so before settlement. Mr Morton had mentioned to the other partners present at a regular partners meeting that Mr Turnbull had referred the transaction to him but gave no detail. The point he was making was that this would be a good fee for the firm. He did not identify the clients involved or the nature of the work. He was simply confirming that this was a large transaction and something he had garnered from James Turnbull.

Different departments of the firm had different ways of opening files. Matters were discussed at regular partners meetings and it would be determined at the meeting that a file was going to be opened. A file opening sheet would be attached to the inside flap of the file. Relevant proof of ID would be obtained and the terms of engagement letter sent.

The witness was referred to Production 6/1 for the Complainers and confirmed that this appeared to be a file opening sheet dated 12 September 2008 with Mr Morton's reference and a code for conveyancing. The witness was not aware of this file being opened on 12 September.

Mr Morton left the firm in January 2010. There had been a mediation process that resulted in agreement that Raymond and Ms Pacitti would stay with the firm until January 2010. The Otago Street files stayed with the firm until then. At that stage the witness believed that Mr Morton had taken the files with him and the firm had to retrieve them in relation to the Law Society proceedings.

The Respondent had not seen the letter Production 7/1 (offer to purchase) prior to completing the risk assessment. He had not been aware of the email from James Turnbull in September 2008. The file note of 15 September 2008 was Raymond Morton's writing. He had no idea if documents were signed by Mr Turnbull under the power of attorney. Raymond Morton had not raised any issues with the Respondent regarding the assessment of the transaction. None of the correspondence that had been lodged by the Complainers had been brought to the Respondent's attention by Raymond Morton. In particular Mr Morton had not drawn to his attention the letter of 20 October 2008. None of the problems mentioned within the schedules attached to the offer to sell at Production 16 were brought to his attention. The same applied to Production 17. Mr Morton had not told the Respondent that he had

not met Mrs A in a face to face meeting and that he was relying totally on information received from Mr Turnbull.

The witness confirmed that he had completed the Risk Assessment Form at Production 19/1. Karen Thomson opened up the majority of Mr Morton's files. While opening procedures were straightforward all partners were aware of the requirements. It was agreed by all that if any particular form of identification or any documentation was produced then that should be brought to the Respondent's attention to decide if the documentation could be accepted. It was important for each partner to be aware and to bring anything untoward to the Respondent's attention. Some 300-500 files were being opened per annum because of the conveyancing boom. Mr Morton also dealt with some commercial conveyancing.

The firm had a file for miscellaneous offers to purchase. If an offer to purchase was successful then a file would be opened. If the offer was unsuccessful the letter stayed in the miscellaneous file. The practice should have been that ID was obtained before any offer was submitted unless this was a known client. The Respondent would only get involved further on down the line. Any concern should have been brought to his attention.

In other areas of practice the solicitor meets at the outset with the client and the client brings the documentation with them. A different system applied within the conveyancing department. It depended on the nature of the transaction exactly what happened. Some offers are speculative. Some are based upon previous dealings and are known that they are going to be accepted. In these cases where the offer was going to end up in acceptance then the solicitor would get ID.

The identification documents were brought to his attention on 4 November 2008. Ordinarily it was Raymond Morton who provided the Respondent with identification documentation.

Raymond Morton had not brought to his attention that he had urgently asked for a file to be opened up (Production 6/1). Productions 18/1 and 18/4 were certified as true copies by Raymond Morton on 4 November 2008. Mr Morton was going on his holidays on 7 November 2008. These documents were brought to the Respondent's attention on 4 November 2008. Ordinarily Raymond would bring the identification documentation to the Respondent not the file. Mr Morton would not have completed a risk assessment matrix. Mr Morton did not indicate to him that he (Mr Morton) was going to be acting in the purchase of 48 properties. The Respondent's knowledge of this transaction was from a

discussion Mr Morton had had with Brian Travers regarding the level of fee that would be earned. This discussion had taken place months before the certification of the ID.

Raymond Morton provided the ID and he had carried out the necessary checks. The agreement within the firm was that all conveyancing transactions were assessed as high risk. At the point of completing the Risk Assessment Form the Respondent had no in-depth knowledge regarding the transaction. He had information from his partner that he had carried out the necessary checks. Mr Morton knew the office procedures and knew that he was to bring anything untoward to the Respondent's attention. Nothing was brought to the Respondent's attention at all regarding these transactions. In particular Mr Morton had not told the witness that the copy identification documents came from Mr Turnbull uncertified.

The witness was referred to section C of the Risk Assessment Form and confirmed that this referred to an electronic money laundering report. He believed one had been done in this case but that was up to the particular partner involved. He did however accept that the Money Laundering Reporting Officer had responsibility for this too. With regard to section E of the Risk Assessment Form relating to source of funds, the Respondent indicated he had the certified copy bank statement which was part of Production 18 before him.

Section F of the risk assessment regarding the nature of the transaction should have been completed by the fee earner, i.e. Raymond Morton.

Production 20, 21 and 22 were all certificates of title presented to the Respondent by Karen Thomson. There would have been other mail to sign at the same time. Mr Morton had gone to lunch. He had dictated those certificates and Karen Thomson had prepared them. As Mr Morton had gone to lunch he wanted another partner to sign them so they could be passed on to the lenders. The Respondent would have checked with Karen Thomson that these certificates had been checked, verified and were correct. He signed them and Karen Thomson took them away. The witness could not remember exactly what Karen Thomson had said but the main thing for him was that they had been checked and were correct. Certificates could have been presented to another partner but the Respondent was the one who was in the office at the time. The fact that the three certificates involved the same purchaser and three flats at the same address had not concerned him. He relied on his partner. Mr Morton had not alerted him to any difficulty so he did not feel the need to make any enquiries. He had not seen the loan instructions himself.

He is now aware, from checks that he has since made, that loan funds were received on 6 November 2008. It was not uncommon for any of the partners to subscribe for another partner if that person were out. There were occasions when a partner would have signed someone else's mail on the basis that the mail was checked and verified. All of the partners would check with the person presenting the item to be signed that it was correct. There could be a number of situations where a partner was asked by another to sign the mail of another partner, which from their perspective was correct. There could be situations where the mail had been verified regarding its content with the partner concerned.

In response to questions from the Chairman, the Respondent indicated that he understood Karen Thomson to be saying that the content of the certificates on title was correct on the understanding that they had been checked by Raymond Morton and her. He could not remember the specific words used but he must have been relying on her confirmation that the certificates were correct. He was asking her if she was satisfied that Mr Morton had got it right. Karen Thomson was a paralegal of 20-25 years experience. The Respondent was not on any notice that this was at all unusual. It was lunchtime, Raymond Morton was out and Karen Thomson came in with mail. The Respondent could not recollect if there were any other things to be signed. Ms Thomson asked the Respondent to sign the certificates. The Respondent asked her if the content of the certificates was correct. She said that she had verified the content with Raymond Morton and that they were correct. He could not recollect that she had gone into any major detail. The Respondent was not doing conveyancing work at that time. If nothing peculiar had been brought to his attention then he would not have investigated. The fact that the certificates were brought to him only one day after the risk assessment was signed by him did not concern him. It was not normal for a risk assessment to be completed only 24 hours before seeking funds from the lender.

The witness accepted that certificates on title were relied upon by lenders. The firm had just been incorporated but Mr Morton was still considered Senior Partner. There had been covering letters with the certificates but only simple ones. The dispute between the partners was not ongoing at that point. Karen Thomson gave him no cause for concern on 5 November.

The witness was asked what the urgency was in having the certificates signed given that Mr Morton was due back later in the day. The witness indicated that he believed that Mr Morton was anxious that all funds were brought in without undue delay. He believed that he had known that Mr Morton was going on holiday on 7 November. The first time the witness was able to look at the files was well after they had settled.

The Law Society came to the firm in May 2009 for an inspection. They highlighted issues of which the partners were oblivious until then. Mr Travers had tried to get the files but by then the company was in dispute and the partners were undergoing mediation. The files could not be found. He believed that Mr Morton had them. They were not on talking terms. Mr Travers had seen from the client ledgers that there was an issue. The Respondent retrieved the files in January 2009 and tried to work out what had gone on.

It was not until after the settlement of the transactions that the Respondent was aware that the only instructions regarding settlement left by Mr Morton after he had gone on holiday on 7 November was a scribbled note that the transactions were to be settled the week after the 14 November and for Karen Thomson to find someone in the firm to oversee and complete the transactions. There was no detailed note. It was the Respondent's understanding that Karen Thomson believed that the transactions were ready to settle.

Production 23/1 for the Complainers was a letter bearing Mr Travers' reference as Mr Travers dealt with the transaction after Mr Morton went on holiday. The Respondent was not aware of Mr Morton's letter of 20 October 2008 until it was brought to his attention at the Guarantee Fund interview in October 2009.

The Respondent was referred to Production 29/3 paragraph 2. He indicated that after the Law Society inspection the partners were aware that there might be certain difficulties. They had been invited to this Guarantee Fund meeting and so knew there were problems. He believed that it was incumbent upon him to find out what he could to help that meeting. He required to explain as best as he could what he was able to discover. Mr Travers obtained the ledgers and confirmed to the Respondent what steps he had taken. They were trying to unravel the circumstances after the event.

When they were first told about the business at the partners meeting, the partners were more concerned about doing the security work and getting the fee. It was not something that the partners would have given much further thought to.

The Respondent did not obtain or review the files. Karen Thomson had approached him to ask if someone could oversee the settlement. He had suggested Mr Travers given the Respondent's lack of experience and other commitments. Thereafter Mr Travers liaised with Karen Thomson. The Respondent did not obtain or review the files. He did not think he needed to as matters were being supervised by Mr Travers. It was Mr Travers who spoke to Harrison and Stella McCraw.

At the time the transactions settled there was no dispute amongst the partners. It was after the recession hit. There had been a couple of partners meetings to address what the firm should do. Mr Morton had some skewed ideas about borrowing more money. Mr Travers said the firm could not continue like that. Effectively there was a stand-off. Cracks began to show in March/April 2009. It was clear that matters were not going to be resolved to allow the partners to go forward.

They would not have incorporated the firm if there had been difficulties at that stage. It was around the beginning of 2009 that business suddenly stopped.

He had not received a copy of the minute of the Guarantee Fund interview of 2009 until this case had arisen. This was his first opportunity to correct it. Mr and Mrs A instruct another firm now. No claim has been made against the firm of Marshall Wilson and there is no claim from any lender.

(Hearing adjourned until the following day)

The Witness was asked to confirm the file opening procedure in 2008 and he confirmed that it was anticipated that ID would be obtained before a file was opened. There was, however, this miscellaneous file for offers made but not accepted. Depending on the partner dealing with it and the circumstances of the transaction, there should be ID on that file too. If the offer becomes successful then a file should be opened and formal ID seen. All residential conveyancing was deemed high risk whether large or small.

When the Respondent completed the risk assessment on 4 November 2008 he had no information from Mr Morton to put him on notice. The only information he had at that stage was what had been said at the partners meeting some month before the transaction. He first became aware of the nature of the transaction following the Law Society inspection in 2009.

When the Respondent signed the certificates on title he did not view the files. The paperwork was brought to him by Karen Thomson. It was Karen Thomson that brought him the ID paperwork. She did not tell him anything about the transaction. He made no enquiries of her.

On 5 November 2008 when he signed the three certificates he made no enquiries as to why there were three. He made no enquiries of Raymond Morton when he returned from lunch.

It was after the transaction settled and questions had arisen following the inspection that the files were retrieved and the Respondent ascertained that the certificates he signed were duplicates of certificates already completed by Mr Morton.

When Mr Morton went on holiday on 7 November 2008 he had simply left a note on a piece of scrap paper. The Respondent could not remember the exact wording of the note but recollected it was to the effect that the transaction was ready to settle.

The Respondent could not explain why Mr Morton at the Guarantee Fund seemed to believe that the firm was only acting in the security work. At the time Mr Morton had written Production 1 for the Respondent he was still a member of the firm. The dispute amongst the partners commenced in early 2009 and came to a head in April 2009. Mr Morton did not show the Respondent his letter dated 17 April 2009 (Production 1 for the Respondent) at the time it was sent. The first the Respondent knew of this letter was when the files were retrieved. The Respondent had not taken over the transaction when Mr Morton had gone on holiday. He had no knowledge of the issues surrounding SDLT and had not corresponded with anyone about it.

The Respondent confirmed that he had seen Respondent's Production 4 (letter dated 14 March 2012) before. He confirmed that Raymond Morton had not made material matters known to him. He had been unaware of the letter of 20 October 2008 until it was mentioned at the Guarantee Fund interview.

At the time he had signed the certificates on title he was aware of the CML Handbook but was not a residential conveyancer. His skill lay in family law, child law and he was bar reporter for court reports.

Even though the firm had been incorporated on 1 November 2008 he still perceived Raymond Morton to be Senior Partner. Mr Morton chaired the partners meetings. He referred to himself as Senior Partner.

CROSS-EXAMINATION OF MR THOMSON

The Respondent insisted that it was Karen Thomson who brought the ID documents on 4 November 2008. He indicated Ms Thomson would have brought the ID documents to him and he signed the risk assessment with a view to Mr Morton signing the form thereafter. The Respondent had not followed up.

With regard to the certificates of title, the Respondent insisted that there was no conversation regarding the nature of the transactions at the time these were presented to him. The fact that there were three certificates for the same client did not put him on notice.

All conveyancing transactions were assessed as high risk. If he was presented with ID, with no adverse comments being made, he would happily take the word of any partner and not make any further investigation. He agreed he had signed the risk assessment not knowing anything about the transaction. He would have taken Mr Morton's word that the documents were correct.

He denied that he was signing the risk assessment on the basis of being blind. He insisted he was signing on the basis of information produced by a partner. He did not ask any further questions but was working on the basis the partner dealing with the transaction knew what he was doing.

The Respondent accepted that if he had seen the file he would have seen the letter of 20 October 2008 (Production 15 for the Complainers).

He agreed that in the certificates of title the purchase prices were overstated, the loans exceeded the price paid and the rents were less than the mortgage repayments. He had signed the certificates without seeing the file.

The witness was referred to Production 29 – the note of the Guarantee Fund interview. He clarified when Mr Morton mentioned the transactions at the partners meeting that was before he had actually been instructed to do the work. The Respondent denied that he was the one who obtained and reviewed the files. He explained that it was Mr Travers who dealt with the transaction after Mr Morton went on holiday. The Respondent had had no discussions with Harrison, Turnbull or the Law Society and Mr Travers had not come back to the Respondent about any of the discussions he had had with these individuals. The last involvement the Respondent had with the transactions was when Karen Thomson had asked for someone to oversee the transaction whilst Mr Morton was on holiday. It was Mr Travers who took over the transaction. With reference to Production 3 for the Respondent (letter from Messrs Levy & McRae to the Complaints Investigator of the Law Society) the letter was wrong where it referred to both the Respondent and Travers being left to complete the transactions. It was Travers who spoke to the Law Society and the tax expert. The Respondent only knew about these discussions post-settlement. With regard to Production 4 for the Respondent (another letter from Messrs Levy & McRae to the Complaints Investigator for the Law Society) he insisted that he was not involved in the

discussions with the Law Society and the tax expert. That aspect of the letter was incorrect. He was not involved in these discussions.

The witness was asked whether or not it was incumbent upon him when he was completing the Risk Assessment Form to check the file given the past problems he had had with Mr Morton and money laundering procedures. The witness asked for clarification as to the nature of these problems and the Fiscal referred to the Respondent attending at a Guarantee Fund meeting together with Mr Morton. Mr Macreath restated his earlier objection. The Chairman restated that the earlier indication given by the Tribunal was that the document could be used to test the credibility of the witness rather than establishing any particular fact within the document. The Fiscal responded that dependent upon the witness's answer he might not even require to refer to the document itself.

The Respondent accepted that there was a past problem with Mr Morton in relation to a particular file which was more to do with the procedure of opening files. On further questioning the witness accepted that there were problems in relation with a series of transactions involving a Jersey firm that resulted in both the Respondent and Mr Morton attending at a Guarantee Fund interview. It was his recollection that the problems were more to do with the file opening. The Respondent accepted that the particular areas of concern discussed at that interview included the lack of documentation relating to the ID of clients, beneficial ownership of the company and payments made to third parties. He accepted that the Guarantee Fund was taking a serious view of these issues given that an interview had been held. He stated that this was a problem with one file against the background where there was some 500 files opened a year. He had no doubt of Mr Morton's ability in that regard despite the Guarantee Fund interview. Mr Morton had confirmed that he would open all relevant files properly and during the period between that meeting until 2008, some 14 months, there had been no issue. He accepted that meant there was no issue as far as he knew and that he had missed the problems with the current complaint because he had not checked the files. He explained that any complaints regarding Mr Morton's conduct would have been known to the firm or company as a whole. He accepted that the difficulties with the current transactions were not spotted until the Law Society inspection. When asked whether Mr Travers had spotted the difficulties or not spotted the difficulties, the Respondent indicated that was a question for Mr Travers to answer.

The witness was referred to the fourth paragraph of Complainers' Production 29/2 and did not accept that this was an indication that he should have been asking Mr Morton about the nature of any of his files. He explained that Mr Morton was dealing with hundreds of transactions.

In response to a question from the Chairman regarding the Respondent's duties as MLRO, the Respondent answered that he considered it his duty to ensure that relevant ID was obtained and he would rely upon his partners to ensure that a source of funds was put in place to ensure the smooth course of a transaction. He explained that the Risk Assessment Form used was one that the firm had brought in following attending a seminar. The form appeared to be a style that was accepted and was not modified by the Respondent's firm. He accepted that there was nothing on the Risk Assessment Form to indicate the value of the transaction involved. A transaction would only be low risk where there was no money involved. He was asked how he could assess a file as low risk and indicated that the assessment was made by the partners dealing with the file and he could not say that he read every file. The information given to him that would allow him to assess the level of risk on the file would be verbal. Each of the partners had had their separate workload and they trusted each other to deal with it appropriately. As MLRO he expected any partner to bring any concern to him whether it be in relation to ID or source of funds and that information would be brought to him verbally. He explained that the Risk Assessment Form in the style of Production 19 would normally be completed by the department dealing with the business and the ID would be brought to him. The form would normally be signed off by the person opening the file. These forms could be completed by the partners themselves and only brought to the Respondent if there was something that needed to be brought to his attention. The Respondent accepted that at Production 19/2 section c the form was wrongly completed as he had not obtained an MLE report. With regard to section a, Production 19/2, the handwriting "ML Report carried out" referred to Production 19 itself. He accepted on face value the certification of the documents by his senior partner. He accepted that what he had been given was correct and that the senior partner had carried out the relevant checks. He accepted that this was a tick box exercise to the extent that he had deemed that he had received acceptable information allowing him to tick the box.

With regard to the certificates on title, the witness accepted that he would have spoken to Mr Morton about the transaction if he had realised that there were 48 properties and he would have asked why he was being asked to sign the certificates when it was his transaction. He was not aware of the total value involved. He accepted that this was an unusual value for his firm. In relation to these three certificates they had been presented to him with a request to sign on the basis that they were correct. He had no doubt of their veracity and was quite comfortable in signing them in that there was nothing in his knowledge to suggest that they were not correct. He could not say at what point – number of properties or values involved – he would back off from signing such certificates.

RE-EXAMINATION OF MR THOMSON

The witness accepted that in 2008 it was not the firm's practice to complete a risk matrix. It now was the firm's practice and this was an extremely strict and stringent procedure. He would have expected something beyond mere ID in 2008 if there had been a particular difficulty required to be drawn to his attention.

The witness confirmed that it was anticipated that Mr Morton would sign the Risk Assessment Form which was Production 19 but some for reason he had not.

With regard to the Certificates of Title, the witness was unable to say at what number of certificates he would hesitate to sign. Now he would not sign five. If he had known on 5 November 2008 that 48 transactions were involved he would have made more enquiry. This would have alerted him to speak to Mr Morton who was back in the office in the afternoon.

In response to a question from the Chairman regarding section F of Production 19/8, the Respondent indicated that he completed this on the basis that he was reliant upon the information from Mr Morton. It was agreed within the firm that if there was any difficulty then the matter should be brought to the attention of the Respondent. If no matter was raised with the Respondent then he accepted that the partner dealing with the files was comfortable.

Mr Macreath closed his case.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid submitted that the Complainers' position was straightforward. The allegations of misconduct related to the signing of three Certificates of Title. There were no averments of misconduct in relation to a breach of Money Laundering Regulations. However, it was his position that the background was relevant when considering if the overall circumstances amounted to professional misconduct.

He said the actions upon which the Complaint sets out professional misconduct were fairly clear and were set out in paragraph 8.2 of the Record. It referred to the signing of three Certificates of Title, the Complainers' Production 20, 21 and 22. The figures in paragraph 8.2 should all read £170,000. Paragraph 8.3 set out the condition in relation to the rental income and paragraph 8.4 set out that the

actual purchase price of the three properties involved was significantly less than the price stated. Paragraph 7.2 of the Record set out the deficiencies of the Certificates of Title. Averments 9.1 to 9.8 set out the averments of duty and professional misconduct.

In this case Marshall Wilson were acting for both the purchasers and the lenders. The question he would ask the Tribunal was: Was the Respondent entitled to sign the certificates on the apparent assurance that everything was fine? The Fiscal submitted that the answer to that question was that he was not.

He submitted that it seemed that the thrust of the defence for the Respondent was that he was entitled to rely on the fact that the three transactions were being dealt with by an experienced practitioner. The Complainers argued that this was not appropriate in the circumstances of this particular case for two reasons.

Firstly, there was the background of previous money laundering problems involving Raymond Morton. Both Mr Morton and the Respondent had previously appeared at a Guarantee Fund interview in 2007. Various problems had been identified with Mr Morton's files at that interview on 17 May 2007. Mr Reid referred the Tribunal to the note of the Guarantee Fund interview of 2009 which was Production 29. In particular a question was put to the Respondent during that interview regarding whether or not he had gotten to the bottom of a problem. In other words there was a clear warning already of previous problems with Mr Morton's files. It was disclosed there that Mr Morton continued to have problems with Money Laundering Regulations as at the date of that interview.

The second reason suggesting that the signing of these Certificates of Title was not appropriate was the completion of a Risk Assessment Form by the Respondent on 4 November 2008 (Complainers Production 19). The Respondent had been questioned extensively over the two days of the hearing regarding the completion of this form. Taking the 4 November 2008 and 5 November 2008 together it appeared that the Respondent knew nothing whatsoever about this transaction. All the Respondent had were identification forms for Mr and Mrs A. He had had no transaction details given to him and he had not asked for them. Ultimately, this was not just a high risk transaction but had potential for being a mortgage fraud with the loans covering the actual purchase price.

Mr Reid asked the Tribunal to consider the form itself. He submitted that the Respondent's evidence today, in contrast to yesterday, was that the partner dealing with the transaction would normally complete the form. However, in this case the form was completed by the Respondent. At section F the

transaction had been classed as high risk. All conveyancing transactions were assessed as high risk by the firm. In fact it was not clear that the Respondent at the time he completed this form had information that it was a conveyancing transaction short of the fact that the identification documents were brought to him by Karen Thomson. Clearly it was important when completing such a form to determine the degree of risk. No further enquiry was made here.

The Fiscal reminded the Tribunal that the Chairman had raised the question of section F(a) where there was no information whatsoever given to the Respondent that would enable him to certify it.

Questions had also been asked in relation to the reference to an MLE report. The Respondent appeared to be suggesting that this Risk Assessment Form itself was the money laundering report referred to when it was stated "ML report carried out".

He submitted that, in other words, the situation appeared to be that the Respondent was presented with this form and certified aspects of it on the basis of no information of any kind and this he did despite the fact that he was Money Laundering Partner and should have been aware of potential problems and should have been asking what it was all about.

Then, following day, the Respondent was presented with three Certificates on Title for the same client, involving the same block of properties and in relation to the Risk Assessment that he had signed the day before. He made no enquiry regarding the nature of the transactions. Given the background of the previous problems with Raymond Morton, the issues with regard to the Risk Assessment Form, it seemed to Mr Reid that the conduct in signing the Certificates was sufficient for professional misconduct.

He posed the question whether the Respondent was entitled to sign the Certificates when he was not the person handling these transactions. As the money laundering reporting officer when the Respondent signed the Risk Assessment Form he should have been more aware of the risks of signing such an assessment form blind.

Mr Reid referred to the dispute regarding the accuracy of the minute of the Guarantee Fund meeting, Production 29. It was his position that this did not make a great deal of difference. Whether or not the Tribunal could rule on the accuracy of the minute did not detract from his submissions.

The test for professional misconduct is set out in the case of *Sharp* which was number 11 on the Respondent's List of Authorities. He submitted that the conduct in this case amounted to professional misconduct. The Respondent was on notice regarding the previous problems relating to Mr Morton. He had signed the Risk Assessment Form the day before not knowing anything about the transaction even though he was Money Laundering Partner. Then the following day he was signing three certificates on title.

Mr Reid then turned to the averments of duty. He referred to paragraph 9.1 and submitted that the obligation to comply with the CML Handbook and individual requirements of the lenders was an obligation upon the individual solicitor. In response to a question from the Chairman, he clarified that it was his position that an individual solicitor could not blithely subscribe Certificate of Title and then fall back on the position that it was the firm's responsibility and not his.

He explained that paragraphs 9.2 and 9.3 described the duties of the Respondent to comply with the specific provisions and conditions of the offers of loan made by the lenders and that he failed in these duties by failing to provide material information to the lenders. Paragraph 9.4 of the Complaint/Record goes on to describe acts or omissions which taken together constitute professional misconduct and sets out three particular failures to inform the lenders of material facts. He submitted that the Respondent's Answer to 9.4 was based effectively on the contention that it was all the responsibility of Raymond Morton and that the Respondent was entitled to rely upon him. Paragraph 9.5 sets out the same matters as paragraph 9.4 and the Respondent's duties are further described in paragraphs 9.6 to 9.8.

It was his submission that the Respondent was not entitled to simply sign the Certificates of Title and send them off with a contention that he was entitled to rely upon these being Mr Morton's transactions. This was particularly the case given the previous history of difficulties with Raymond Morton and the completion of the Risk Assessment Form, which moved this particular case into a totally different category.

The Chairman asked the Fiscal if he was suggesting that no solicitor should sign a Certificate of Title without taking care that what was contained in the Certificate was accurate. The Fiscal responded that it was his position that it was true that no one should sign such a Certificate in those circumstances but that that was not automatically professional misconduct. The Chairman asked the Fiscal what it was in this particular case that converted the matter to professional misconduct – was it the value, the number of certificates, the money laundering issues or the previous form of Mr Morton? The Fiscal agreed that

it was all three but even without the previous form of Mr Morton it was his submission that what did or did not happen around the completion of the Risk Assessment Form made a significant difference.

The Chairman indicated that it was important for the Tribunal that the Fiscal define situations where the conduct would become serious and reprehensible and amount to misconduct. The Fiscal submitted that he could not say that someone signing a single Certificate of Title without knowing anything about the transaction would automatically amount to misconduct. All he could say was that the particular circumstances of this case together with the particular background circumstances of this case made the conduct misconduct. The Fiscal agreed that it was his submission in this case that the Respondent ought to have known the situation because of the previous conduct of his partner and because of the completion of the Risk Assessment Form and that was what took the conduct to the level of professional misconduct. Mr Reid submitted that he was not saying that if someone signs a Certificate of Title and the other background circumstances are in order that that would not in every case amount to professional misconduct. All he could say was that in this case the background circumstances against which the Respondent signed these three Certificates of Title turned the conduct into professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath submitted to the Tribunal that this case raised matters of significance for the profession in general and not just in respect of this Complaint.

He would ask the Tribunal to consider three questions. (1) What are the responsibilities of a solicitor in signing a report on title which obliges the firm to ensure compliance not only with the loan instructions but also the CML Handbook? (2) Can it be that a solicitor in signing a report on title for another partner is bound to check the file and to ensure that the loan instructions regarding for instance the disposition value, or who is paying any deposit etc are confirmed? and (3) Is there an issue of the standards that were applied in 2008 compared to the standards which apply now?

Before answering these questions, Mr Macreath stated he would address a number of issues. He would ask the Tribunal to look at the common law duties of a solicitor to a lender, the specific duties of a solicitor under the CML Handbook, a solicitor's duties under the Money Laundering Regulations 2007, duties under the Proceeds of Crime Act 2002 (albeit this is not in the Record) and the duties owed by one partner to another partner and duties owned by one director to another.

He submitted that at common law a solicitor owes a duty of care to his client. This is based on the terms express or implied of the contract between the solicitor and his client. He referred to an extract from Professor Rennie, Solicitors Negligence, paragraph 2.07 and the case of Hunter-v-Hanley [1955] SC200. The standard required is the ordinary level of care and skill of an ordinarily competent solicitor, irrelevant of the area in which the particular solicitor practises. He submitted that it was, however, relevant to this Tribunal that the Respondent's expertise lay elsewhere other than conveyancing, although he was at the time the firm's MLRO. Accordingly, Mr Morton, who opened this file in September 2008 and did not produce any documents to the MLRO for some three months, had all of the normal duties of a conveyancing practitioner.

Mr Macreath submitted to the Tribunal that the relationship between Mr Turnbull's firm and the firm of Marshall Wilson was also of interest. It appeared that originally it may have been contemplated that Marshall Wilson would act only in the security work which would have meant that the firm only had a duty to the lenders. It seems at some point that the role of Marshall Wilson was extended to acting for Mr and Mrs A themselves in respect of the loans, notwithstanding that the instructions were taken for the most part from Mr Turnbull. Indeed, it appeared that the securities themselves may have been completed on the basis of instructions from Mr Turnbull acting under a power of attorney.

He stated that at common law an agent owes fiduciary duties to his principal but this does not prevent one principal acting for another with fiduciary duties owed. There exists a potential for the duties owed to conflict with each other. The standards of conduct in 2008 permitted solicitors to act where there was only potential for conflict but required the solicitors not to act in a situation where there was an actual conflict. These duties are now enshrined in the Practice Rules 2011. The CML Handbook which has existed since 2003 preserves the common law position and refers to "any conflict of interest". This issue becomes most acute where the solicitor comes into possession of information from one party which is disclosed to the other party which might result in the latter, for instance the lender, seeking to alter their position in relation to the matters which are being conducted. This is discussed by Professor Rennie at paragraph 5.05 of Solicitors Negligence. The historical attitude to the preparation of securities can be seen in the case of Midland Bank-v-Cameron, Thom etc [1998] SLT 611. There it was stated that the solicitor only owed the lender a duty to ensure that the lender obtained a valid and enforceable security. In the case of Bank of East Asia-v-Shepherd & Wedderburn [1995] SLT 1074 the court indicated that the solicitor had a duty to disclose information to a lender which tended to suggest that the value of the security might be less than believed by the lender. Then in the case of Leeds and Holbeck Building Society-v-Alex Morrison [1999] GWD 9-434 it was clear that the duty of disclosure of material facts exists and where confidentiality prevented the disclosure of such facts to the lender

then the solicitor requires to withdraw from acting. It was his position that, in the instant case the inaccuracies in relation to the prices and the discrepancies on the rents payable were significant. He accepted that there was a duty of disclosure in relation to these matters.

He accepted that the CML Handbook has been in existence since 2003 and had been periodically updated since then. Any Scottish solicitor dealing with residential conveyancing ought to have been well aware of its terms. The first SSDT case relating to the CML Handbook was the case of Pervez [2008] SSDT 1427 which was unlikely to have been published on the SSDT website until after November 2008 and therefore would not have been in the public domain at the time of the events in question in the current Complaint. The Dunbar case was heard in 2011 and refers to back to back transactions and the report of that case refers to the solicitor taking "a deliberate conscious decision" not to report these matters to the lender. He was aware that this Tribunal has since the Dunbar case consistently referred to articles in the Journal which appeared in 2007 warning of back to back transactions and revolving deposits. These things are not involved in this case. No dishonesty is being suggested here.

He stated that there are specific duties set out within the CML Handbook. In particular, at 4.1.2, it sets out the duty to take reasonable steps to verify that there are no discrepancies between the description of the property's value in the title and other documents. In this case, the Tribunal was dealing with one circumstance, albeit it involved the signing of three certificates. The transaction being dealt with here was effectively broken down into two tranches with two offers to sell being Productions 16 and 17. The documents referred to the overall price to be paid and did not break the price up into the various properties. It was for Mr Morton to ensure that, as far as the lenders were concerned, the price paid for each property complied with the loan. Mr Macreath found it difficult to see how Mr Morton could comply with this, given that these were offers to sell the properties in two lumps and they related to properties that were let. The CML Handbook deals with properties that are let at settlement and puts a duty on the solicitor to check the prices to be paid. This is amplified in the loan instructions. He emphasised that there was no doubt that Mr Morton was not complying with the CML Handbook and that it must be within this Tribunal's knowledge that Mr Morton had already appeared before the Tribunal and been dealt with for that.

Turning then to the Money Laundering Regulations, Mr Macreath emphasised that there has been a duty upon the profession to comply with Money Laundering Regulations since 1995, although the due diligence Regulations have been tightened up beyond identity and address since then. The latest Regulations have been in force since 15 December 2007 and were obviously in force at the time of

these transactions. These Regulations impose an ongoing obligation of due diligence and if a transaction is assessed as high risk then there is an ongoing duty of monitoring. It was within Mr Macreath's knowledge that many other firms assess all residential conveyancing as high risk with an ongoing need to monitor.

He suggested that in this case, it appeared that the Fiscal was saying that it was the circumstances in which the Certificates were signed that give rise to the *Sharp* test being met and not simply the signing of the Certificates themselves.

He submitted that under the Proceeds of Crime Act 2002, it is the duty of any fee earner conducting a transaction to report any concerns he has to the MLRO. Here the firm had a highly discounted transaction – one reduced from over 9 million to over 5 million. Then there is the evidence of the Respondent that he was not informed of the nature of the transaction and months before the transaction came to light there was a partners meeting where Mr Morton raised the possibility of security work and Mr Morton raised the issue of the fee that would be attracted. At no point did Mr Morton prepare a matrix or any documentation for the MLRO that he was under an obligation to do. The obligation was on Mr Morton as the fee earner, in terms of the Proceeds of Crime Act, to raise all of these matters with the MLRO and yet it was only several months later that he produced identification documents certified both as a solicitor and notary public as if he had carried out these checks himself. Mr Macreath would describe this as the Respondent being "duped".

He submitted that partnership was a matter of trust. The Partnership Act 1890 section 28 sets this out in terms. Section 5 and 6 of the Act indicates that acts of a partner bind the firm. Here the signing of the Certificate of Title bound the firm and made the firm responsible.

In the case of *Sharp* it was held that the junior partners were not guilty of professional misconduct in circumstances where they did not have the opportunity to supervise accounting procedures of the firm, albeit they had a responsibility along with the senior partners. He submitted that the same should apply in relation to an MLRO – the MLRO is only as good as the information he receives. He would emphasise that an MLRO is not and cannot be a police officer.

There is a contrast between the fiduciary duties owed between partners and the duties owed by directors of a limited liability company. In an LLP the directors are employees of the company. As the facts of this case occurred on the cusp of the firm becoming an LLP, Mr Macreath was not asking the Tribunal to issue a judgement on this basis. The description of a director being an employee is the

closest analogy to this type of situation and it was for this reason he had referred on his List of Authorities to the case of Campbell [2013] SSDT and John Muir [2014] SSDT. It was his submission that the obligation imputed to Mr Morton was to disclose to his fellow partners, especially the MLRO, all of the details of this transaction. There were cross fiduciary requirements in place.

Mr Macreath asked what then were the responsibilities of the Respondent, whether the firm was a partnership or incorporated? The answer and the Respondent's position, he said, were set out in Answer 9.4. The Respondent acted in good faith. He had been misled by Mr Morton. He was entitled to proceed on the basis that the certificates could be signed. The Fiscal had invited the Tribunal to rely on other circumstances such as the Risk Assessment in order to make a finding of misconduct. Mr Macreath asked the Tribunal to put themselves in the Respondent's position where his Senior Partner had asked his paralegal to get the Respondent to sign these Certificates, while the Senior Partner was out for lunch and these Certificates could be seen as duplicates for ones already completed. Would you, in these circumstances, ask if these certificates were part of a bigger transaction? Additionally, would the reasonably competent solicitor in 2008 have had the knowledge of the profession now with regard to CML Handbook issues? Were these points that the reasonable practitioner in 2008 should have picked up when asked by a paralegal to sign for another partner?

Mr Macreath submitted that the Respondent had been duped by Mr Morton when it came to the procedures for identification of clients.

He confirmed that with regard to the specific averments, it was accepted that the Law Society inspected the books of the firm in 2009 and that they picked up the 48 transactions. It was accepted that these transactions were dealt with by Mr Morton who was acting as partner and then director. It was accepted that it was clear that the firm was acting for both the purchaser and lender.

He submitted that from the very outset no information was made known to the Respondent who was the MLRO of the firm. Not the email from Mr Turnbull dated 2 September, nor the handwritten file note dated 15 September 2008.

Mr Morton wrote to Mr Turnbull on 15 October 2008 (Complainers' Production 13) expressing concerns. Mr Turnbull responded on 15 October 2008 (Production 14) enclosing what he describes as poor copy money laundering documentation. All that Mr Morton produced to the Respondent as MLRO was the money laundering documentation.

He stated that it was clear from the Production 15 for the Complainers, his letter of 20 October 2008, Mr Morton clearly had concerns. Unfortunately Mr Morton had not picked up that the substantive discount and the misrepresentations regarding price were also of concern. None of his concerns were ever brought to the attention of the MLRO. Rather what he did was to certify the identification documents as true copies, even though Mr Turnbull had referred to these as poor.

Mr Macreath explained that the practice of the Respondent's firm has changed and he submitted that it should be recognised that much guidance is now given by the Law Society with regard to these matters, that was not available at the time of this conduct.

In relation to the requirements of the CML Handbook set out in Article 6.1 of the Record, and the associated averments of duty of the Respondent, Mr Macreath submitted that the Respondent was entitled to rely upon Mr Morton and his fiduciary duties as a partner to advise the Respondent of any difficulties. The duties averred are those for Mr Morton and he owed these duties to Birmingham Midshires. Any failure to comply was due to the lack of information being passed on by Mr Morton. It should be noted that Mr Morton was in the office between 5th and him going on holiday on 7th November. Whoever it is who signs the Certificates on Title binds the firm itself.

Mr Macreath submitted that the notes of the interview of 15 October 2009 were not accurate. Although he submitted that he did not believe that this mattered dramatically to the Respondent's case. He asked the Tribunal to bear in mind that at the time of that interview, minutes were not sent out by the Law Society to all of the parties who attended the interview for them to be checked. He submitted that, as at the date of the signing of the Certificates, the Respondent did not know the nature of the 48 transactions.

He asked the Tribunal to consider his letter of 14 November 2012 which set out his argument with regard to the facts of this case.

The Chairman asked Mr Macreath if the question here was not whether the Respondent ought to have known that questions should be asked. There was no suggestion that the Respondent actually knew there was something wrong but was he blind to the point of recklessness and proceeding to sign certificates of high value when there were factors that should have raised questions in his mind?

Mr Macreath submitted that here the situation involved a Senior Partner misleading his colleague, opening a file, certifying documents dishonestly and then dictating to get a junior partner to sign three

Certificates of Title when he was out of the office. As at the 5th November 2008 the risk assessment had been completed and showed that Mr Morton was in charge of the transaction and that he should have been signing off the Risk Assessment Form. The day following the completion of the Risk Assessment Form, the Respondent was presented with these three Certificates, where they were substitutes and there was a degree of urgency to get them out. In these circumstances should the Respondent have been suspicious? Mr Macreath submitted that this imposed an overly onerous burden. For some 15 or 16 months since the interview in 2007 it had appeared that Mr Morton was dealing with things appropriately. What would have alerted the Respondent here? If there had only been one Certificate of Title then this Complaint would not have been raised. Albeit there were three, the Tribunal should treat this as a single incident not as a serial course of conduct. He stated that the Fiscal had been fair in his presentation of the case and had made no suggestion of dishonesty.

He explained that the basis of his case was that the obligations referred to in the Complaint lay on Mr Morton as Senior Partner. Mr Morton owed the Respondent a fiduciary duty in particular when asking him to sign these Certificates. In ordinary practice, partners will sign mail for their partners. Mr Macreath has signed petitions for interim interdict for a partner as well as other mail. He submitted that the test for the Tribunal was; what would an ordinary practitioner do? The standard of proof for the Tribunal was a criminal one. The test for misconduct involved the element of culpability on the part of the individual solicitor. The concern for the Tribunal should be the reprehensibility of the action of the particular solicitor and the possible damage to the reputation of the profession.

He asked if it could really be said that, because the Respondent had attended a Guarantee Fund meeting in 2007 together with Raymond Morton, that the Respondent thereafter had to say that he could not sign correspondence for his Senior Partner? Admittedly, the transaction, being for 5.5 million pounds, was of an extremely high value for a Falkirk firm and there was evidence that another firm declined to do the work. Whilst these may be significant issues for the Tribunal, Mr Macreath submitted that it could not say that the Respondent ought to have known the problems which would have prevented him from signing the Certificates of Title. The Respondent accepts that essential matters were not disclosed to the lenders but his answer is that this was the responsibility of Mr Morton. It was Mr Morton who had failed to report these things when he arranged for the Respondent to be given the three Certificates to sign. He submitted that this was an important point for the profession as a whole. This case involved a Senior Partner deliberately duping his colleague.

DECISION

As was correctly identified by the Respondent, the standard of proof for the Tribunal is the criminal standard of beyond reasonable doubt. The test against which conduct requires to be measured to assess professional misconduct has been described in the case of *Sharp*.

The Tribunal found all three witnesses to be credible and doing their best to describe events from some seven or eight years ago. The accuracy or otherwise of the note of the Guarantee Fund interview dated 15 October 2009 (Complainers' Production 29) was considered at length in the evidence. Given the passage of time, and the procedure for preparing the note that existed in 2009, the Tribunal was unable to reach a conclusion in regard to this question. Ultimately, the Tribunal agreed with both parties that the accuracy or otherwise of the note was not essential to the final assessment of this case.

A significant part of the evidence had also related to the conduct of the Respondent in completing the firm's Risk Assessment Form. It is important to emphasise that it was not part of the Complainers' case that the Respondent had breached any duties in relation to the Money Laundering Regulations. The completion of the Risk Assessment Form and the assessment of the transaction as high risk were simply referred to by the Fiscal as background circumstances against which the Respondent's conduct in signing the three Certificates of Title had to be assessed.

The Tribunal was satisfied that it was established that Raymond Morton had previously acted inappropriately with regard to Money Laundering Regulations and had appeared at a Guarantee Fund meeting in 2007 in relation to that. The Respondent had been present at that meeting and therefore had knowledge of it.

The Tribunal was satisfied that the Respondent neither knew nor ought to have known that the identification documents bearing the notarial execution by his partner bore a false certification as to them being true copies.

The Respondent acted inappropriately in the completion of the standard document used by the firm in part compliance of the assessment of risk for money laundering purposes.

The unqualified personal assistant of Mr Morton presented the identification documents and bank statements to the Respondent causing him to prepare the money laundering form, which the Tribunal

deduced was for the purpose of opening the ledger, the file having already been opened without his knowledge.

The same individual presented to the Respondent three Certificates of Title each for the client Mrs A, each relating to a flat in Otago Street, each of the same declared value and each having the same extent of borrowing.

The Respondent signed these Certificates not as a skilled conveyancer, not even as a skilled family law solicitor, but on the basis that he was in partnership with Mr Morton and felt entitled to rely upon the trust he felt was reciprocated one to the other. This was a single occurrence.

It was accepted that the Respondent had not knowingly acted in a dishonest fashion or without integrity. This Tribunal would be slow to castigate a solicitor for a single failing, in terms of his performance of his duties to a lender client, in certifying a state of facts as correct when he merely believed they were correct having relied upon his trust in a fellow partner to carry out the work with proper diligence. The Tribunal found it difficult to reduce the right of a partner to trust a partner merely on the basis of a partner's failing almost two years before.

Whilst the Tribunal could not go as far as to say that one single incident could not be misconduct, it was not prepared to conclude that it was here. Accordingly, the Tribunal unanimously found the Respondent not guilty of professional misconduct.

The Tribunal also concluded that it was not appropriate to remit the Complaint back to the Council of the Law Society, the Tribunal having taken the view that the conduct did not meet the test for unsatisfactory professional conduct.

PUBLICITY AND EXPENSES

Neither party made any submission with regard to publicity. Both parties made submissions with regard to expenses. In the circumstances of this particular case the Tribunal concluded that the appropriate award of expenses was one in favour of the Respondent, modified by 50%. With regard to publicity, having regard to the potential damage to the interests of the purchasing clients, the Tribunal concluded that it was appropriate not to publish their names in accordance with rule 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. Having previously determined to publish the decision, on

further consideration the Tribunal decided to defer publishing until publication of its decision in parallel proceedings.

Alistair Cockburn

Vice Chairman