

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

FINDINGS

in Complaint

by

**THE COUNCIL OF THE LAW SOCIETY of
SCOTLAND, Atria One, 144 Morrison Street,
Edinburgh**

Complainers

against

**NIGEL WILLIAM FREW FORD, Fords Daly
Legal Limited, Office 1, Evans Business Centre,
1 Begg Road, John Smith Business Park,
Kirkcaldy**

Respondent

1. A Complaint dated 22 March 2019 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Nigel William Frew Ford, Fords Daly Legal Limited, Office 1, Evans Business Centre, 1 Begg Road, John Smith Business Park, Kirkcaldy (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was no Secondary Complainer.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 24 June 2019. The Complainer's having no objection, on 17 June 2019, the Chair, exercising the functions of the Tribunal under Rule 56, adjourned the hearing set for 24 June 2019 on the Respondent's motion. The Tribunal appointed the Complaint to be heard on 1 November 2019 and notice thereof was duly served on the Respondent.

5. At the hearing on 1 November 2019, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Jonathan Brown, Advocate, instructed by William Macreath, Solicitor, Glasgow. A Joint Minute was lodged which admitted the averments of fact, duty and professional misconduct within the Complaint. Given the extent of the agreement between the parties, evidence was not required and the Tribunal heard submissions from both parties.

6. The Tribunal found the following facts established:-

6.1 Mr Nigel William Frew Ford (the Respondent), was born on 1 August 1960. He was enrolled as a solicitor on the 20 September 1983. He became partner in Fords solicitors in 1991. He ceased practising as Fords on 31 October 2013 and became a director of Fords Daly Legal Limited on 1 November 2013. He was a director with that company until November 2014 at which time he became a consultant. He presently remains a consultant with the company. He practises from the address in the instance of the Complaint. Between 2006 and 2013 the Respondent was the anti-money laundering partner with Fords.

6.2 In the late 2000's the Society gave warnings and guidance to the profession on mortgage fraud in light of the prevailing financial crisis. Articles appeared in the Journal of the Law Society of Scotland in January and August in 2009. The Society also published a Financial Compliance update dated June 2010.

6.3 The Respondent practised predominantly as a private client solicitor. The Financial Compliance team (FCT) of the Law Society of Scotland inspected the Firm of Fords on the 28 April & 3 May 2011. The FCT completed a report which was sent to the Respondent for comment.

6.4 **Transaction/Property 1**

The Respondent received a letter from Natwest offering a buy to let loan to NBS dated 25 January 2010. The solicitor was instructed to act for Natwest “*in accordance with the CML Lenders' Handbook for Scotland (including our Part 2 instructions)*” in connection with the loan. The Respondent wrote to NBS on the

27 January 2010 with his terms of business letter indicating “(r)esponsibility for the handling of your work will rest with (the Respondent)...” in respect of the Purchase of Property 1.

- 6.5 The Respondent also acted for the seller CS. NBS was advised that should any conflict arise between them the Respondent would have to withdraw from acting for both. NBS was further advised that she should provide client ID. This request was despite the solicitor relying on the fact both CS & NBS were existing clients of the Firm to allow him to justify acting for both seller and purchaser.
- 6.6 The solicitor concluded missives on behalf of NBS for the purchase of the property on the 27 January 2015 by way of simple acceptance of an offer from his firm on behalf of CS. The date of entry was narrated as the “29 January 2010 or such other date as mutually agreed in writing”. There are no file entries or correspondence on the Respondent’s file detailing his advice relating to the obligations contained in the missives; offer of loan; or the obligations related to the property with NBS. There is no note of discussion regarding the source of NBS funds, to pay the balance of the purchase price, between NBS & the solicitor as required by Rule 24 of the “Accounts Rules”(The Solicitors (Scotland) Accounts, Accounts Certificates, Professional Practice & Guarantee Fund Rules 2001).
- 6.7 The solicitor signed the Certificate of Title for Property 1 on the 29 January 2010. He confirmed:

“We have investigated title to the Property in accordance with the Lender's Instructions set out in parts 1 and 2 of the Lenders' Handbook issued by the Council of Mortgage Lenders' ("the Instructions") and any other requirements of the Lender and the Borrower has acquired or will acquire on Settlement a good and marketable title which is free of defect other than as is detailed on the reverse hereof but which will constitute good security to the Lender and may safely be accepted by the Lender for mortgage purposes”.

The certificate of title notes the purchase price to be £135,000 and the gross loan as £102,749.

- 6.8 On settlement the lender only transferred £101,220 to the Respondent's client account, NBS transferred £33,500 from her own account to the Respondent. The Respondent then held funds of £134,720 on behalf of NBS. There was a shortfall of £280 in the purchase price.
- 6.9 The Respondent received a report of a search in the register of Inhibitions which reported that there was an inhibition on the dependence of a court action which had been registered against CS on the 15 July 2009. The Respondent made no enquiry as to which properties were included on the schedule of inhibition. The Respondent did not report the inhibition to NatWest.
- 6.10 The Respondent's firm purchased Property 1 on behalf of CS from OH on the 29 January 2010, the same day as CS's sale to NBS. The purchase price paid by CS to OH was £75,000. The Respondent on behalf of NBS paid over to CS £135,00 for Property 1 the same day. The difference in the purchase price was £60,000.
- 6.11 The transaction history for Property 1 is as follows. MCA Builders sold the property to CS & NM in September 2005 for £92,750. CS & NM sold the property to OH in December 2005 for £113,400. The next transaction was on CS's purchase on the 29 January 2010, when he bought the property back from OH before selling it to NBS the same day.
- 6.12 The Respondent transferred funds held in his client account on behalf of CS to the client account held on behalf of NBS in the amount of £2756.25 to "cover payment of fee VAT & outlays per agreement". The seller thus paid the fees incurred by the purchaser in the transaction. The entry is inaccurate as the funds transferred included the fees vat, outlays, and the £280 shortfall in the purchase price.
- 6.13 The solicitor was aware that the seller and purchaser were friends.
- 6.14 The CML Handbook (2006 edition) provides:

COMMUNICATIONS

- 2.1 All communications between you and us should be in writing quoting the mortgage account or roll number, the surname and initials of the borrower and the property address. You should keep copies of all written communication on your file as evidence of notification and authorisation. If you use PC fax or e-mail, you should keep a paper copy.

3 SAFEGUARDS

- 3.1 Solicitors must follow the current Solicitors (Scotland) Accounts Rules and, to the extent that they apply, comply with the Money Laundering Regulations 2003 (see the Law Society of Scotland's Simple Guide to those Rules and Regulations in the Parliament House Book) and the Proceeds of Crime Act 2002. Independent qualified conveyancers must follow any guidance issued by their supervisory body.

5.1 Surrounding Circumstances

- 5.1.1 Please report to us (see part 2) if the proprietor has owned the property for less than six months, or the person selling to the borrower is not the proprietor, unless the seller is:
- 5.1.2 If any matter comes to the attention of the fee earner dealing with the transaction which you should reasonably expect us to consider important in deciding whether or not to lend to the borrower (such as whether the borrower has given misleading information to us or the information which you might reasonably expect to have been given to us is no longer true) and you are unable to disclose that information to us because of a conflict of interest, you must cease to act

5.8 Other Loans

You must ask the borrower how the balance of the purchase price is being provided. If you become aware that the borrower is not providing the balance of the purchase price from his own funds and/or is proposing to give a second charge over the property, you must report this to us if the borrower agrees (see **part 2**), failing which you must return our instructions and explain that you are unable to continue to act for us as there is a conflict of interest

5.10 Inhibitions and Insolvency

5.10.3 If you are aware that any transfer of the title to the property may be open to challenge as a gratuitous alienation or an unfair preference, then you must be satisfied that we will acquire our interest in good faith and will be protected under the relevant statutory provisions against our security being set aside. You must also obtain clear personal searches against all parties to any such transfer. If you are unable to give an unqualified certificate of title, you must arrange indemnity insurance (see paragraph 9).

11.2 Explanation

You should explain to each borrower (and any other person signing or executing a document) his responsibilities and liabilities under the documents referred to in 11.1 and any documents he is required to sign.

6.15 The Respondent did not advise the lender that CS had owned the property for less than six months. The Respondent did not advise the lender that the sale by CS to NBS was a back to back, same day transaction. The Respondent did not advise the lender that the price NBS paid for the property was £60,000 greater than the price paid by CS on the same day. The Respondent did not advise the lender that CS & OH had previously transacted with the property. The Respondent did not advise the lender that the seller contributed to the purchase price and paid the purchasers legal fees and outlays. The Respondent did not advise the lender of the connection between the parties. The Respondent did not discuss the source of wealth of NBS's balance of the purchase price.

6.16 Transaction/Property 2

The Respondent acknowledged photocopy client ID documents from a financial adviser on the 15 October 2010. The identification was for GD who was to be the purchaser of Property 2. The day before, the Respondent had written in short terms to GD "We refer to instructions received on your behalf in connection with Property 2 .We now have a mortgage offer form Northern Rock Plc (the lender)..." There is no offer dated 14 October 2010 on the Respondent's file. The

Respondent received an offer of loan from the lender to GD by fax on the 28 October 2010. It was a buy to let loan.

- 6.17 The Respondent was instructed by the lender to act on their behalf. The lender advised “Please refer to your instructions in the CML Lenders Handbook ..Parts 1 & 2 ... You should not submit your certificate unless it is unqualified, we have authorised you to process notwithstanding any issues you have raised...you must not submit your certificate of title until you have received confirmation in writing from us that you may proceed”. On the 28 October 2010 the Respondent faxed the Certificate of Title confirming the purchase price was £70,000, the advance was £49,000 and reported that he had investigated the title of the property and certified that it was in order and constituted a good and marketable title. The Respondent certified that he had complied with the instructions set out in the CML Lender’s Handbook for Scotland.
- 6.18 The Respondent issued a terms of business letter to GD on the 28 October 2010. On the same day he submitted an offer to purchase Property 2. Missives were concluded on the 5 November confirming the date of entry as the 2 November 2010. There are no file entries or correspondence on the Respondent’s file detailing his advice relating to the obligations contained in the missives; offer of loan; or the obligations related to the property with GD. The Respondent did not enquire with GD the source of funds for the £21,000 balance of the purchase price prior to concluding missives. The Respondent sent the standard security and matrimonial homes affidavit to a firm of solicitors in Falkirk - where GD’s mother worked – for GD to sign, and for the solicitors to return on his behalf.
- 6.19 The Respondent’s file contains a file memo dated 28 October 2010 noting the Respondent called the lenders completion section and advised them this was a back to back transaction. The file note records he advised “Sarah” that the seller was buying the property for £42,500 and that the Respondent was advised that the lender was happy to proceed. The Respondent did not notify the lender in writing nor await instructions in writing before releasing funds.
- 6.20 GD bought the Property 2 from GL on the 5 November 2010. GL had bought the property from SM the same day. GL paid SM £42,500. GD paid GL £70,000. The

difference in purchase price was £27,500. The Respondent, on behalf of GD, received £49,000 from the lender. The Respondent transferred the funds from the client account held on behalf of GD to meet the purchase price

- 6.21 In respect of the balance of GD's purchase price, the Respondent received £22,065,25 into his client account from a limited company. He was advised, without any prior contact, the sum had been transferred into his client bank account by fax. The solicitor had not discussed with GD prior to this how the balance of the purchase price is being provided. The solicitor did not report this additional source funds/loan to the Northern Rock.
- 6.22 The Respondent had exhibited to him a search in the register of insolvencies dated 22 October 2010 which showed the seller GL had been sequestrated on 21 June 2005 and discharged on the 26 October 2009.
- 6.23 The CML handbook -2006 edition states:

2. Communications

- 2.1 All communications between you and us should be in writing quoting the mortgage account or roll number, the surname and initials of the borrower and the property address. You should keep copies of all written communication on your file as evidence of notification and authorisation. If you use PC fax or e-mail, you should keep a paper copy.

3 SAFEGUARDS

- 3.1 Solicitors must follow the current Solicitors (Scotland) Accounts Rules and, to the extent that they apply, comply with the Money Laundering Regulations 2003 (see the Law Society of Scotland's Simple Guide to those Rules and Regulations in the Parliament House Book) and the Proceeds of Crime Act 2002. Independent qualified conveyancers must follow any guidance issued by their supervisory body.

5.1 Surrounding Circumstances

5.1.1 Please report to us (see part 2) if the proprietor has owned the property for less than six months, or the person selling to the borrower is not the proprietor, unless the seller is:

5.1.2 If any matter comes to the attention of the fee earner dealing with the transaction which you should reasonably expect us to consider important in deciding whether or not to lend to the borrower (such as whether the borrower has given misleading information to us or the information which you might reasonably expect to have been given to us is no longer true) and you are unable to disclose that information to us because of a conflict of interest, you must cease to act

5.8 Other Loans

You must ask the borrower how the balance of the purchase price is being provided. If you become aware that the borrower is not providing the balance of the purchase price from his own funds and/or is proposing to give a second charge over the property, you must report this to us if the borrower agrees (see **part 2**), failing which you must return our instructions and explain that you are unable to continue to act for us as there is a conflict of interest

5.10 Inhibitions and Insolvency

5.10.3 If you are aware that any transfer of the title to the property may be open to challenge as a gratuitous alienation or an unfair preference, then you must be satisfied that we will acquire our interest in good faith and will be protected under the relevant statutory provisions against our security being set aside. You must also obtain clear personal searches against all parties to any such transfer. If you are unable to give an unqualified certificate of title, you must arrange indemnity insurance (see paragraph 9).

10 The Loan And Certificate Of Title

10.1 You should not submit your certificate of title unless it is unqualified or we have authorised you in writing to proceed notwithstanding any issues you have raised with us.

11.2 Explanation

You should explain to each borrower (and any other person signing or executing a document) his responsibilities and liabilities under the documents referred to in 11.1 and any documents he is required to sign.

- 6.24 The Respondent did not discuss the source of funds for the balance of the purchase price with GD; he did not confirm the source of the balance price to Northern Rock; he did not get written instructions from Northern Rock in respect of the back to back nature of the purchase; he did not get written confirmation from Northern Rock they were content to loan a greater sum than the purchase price to paid by the seller. The Respondent did not explain to GD his obligations in terms of the loan.
- 6.25 **Transaction/Property 3**
The Respondent acted for SH in the purchase of Property 3. The Respondent received an offer of loan to SH dated 1 July 2010 from Natwest. The instructions to the Respondent were in accordance with the CML Handbook for Scotland Parts 1 & 2. The offer of loan was in the sum of £127,500 based upon the purchase value of £170,000.
- 6.26 The Respondent sent a formal offer to purchase Property 3 to solicitors acting for the seller, a limited company (ZPSL), on the 5 July 2010. The Purchase price was £170,000. The Respondent met SH for the first time on the 16 July 2010. Missives were concluded on the 27 July 2010 with a date of entry of the 26 July 2010.
- 6.27 The Respondent completed the report on title which was sent to Natwest on the 20 July 2010. The report in title in which he confirmed he had “investigated the title to the Property in accordance with the Lenders Instructions set out in Parts 1 & 2 of the [CML Handbook] ...the borrower ... will acquire on Settlement a good & marketable title which is free of defect ...which will constitute good security to the lender... All the conditions of the offer of loan to the borrower ...have been...complied with..... the purchase moneys including any deposit will pass through our Firms’ Clients Account and will be paid in full to the sellers’

solicitors... ” The solicitor further undertook to “hold the funds comprising the Loan strictly to the order of the Lender and to apply them only when the Borrower has provided sufficiently cleared funds in order to complete the transaction...”.

- 6.28 The balance of the funds was received from another firm of solicitors (Firm B). The source of funds information received by the Respondent was as follows: initially the Respondent was advised the balance was to come from IH(S)L, IH(S)L advised the Respondent that Firm B were to represent it; the company advised they were to re-mortgage a property in Glasgow; later (within a 7 days) Firm B indicated to the Respondent the owner and re-mortgager of that property was ZD, accordingly, she would be the source of funds; Firm B actually received funds from Firm C who advised their client was MG. Firm B forwarded the sum of £43,756.25 to the Respondent on the 26 July 2010. There was no written loan documentation and ZD/MG did not insist upon any security over Property 3.
- 6.29 The sale of Property 3 to SH was a back to back sale. ZPSL bought Property 3 from GH Limited for the sum of £102,696 on the day it sold the property to SH for £170,000. ZPSL received an increase of £67,304 on the purchase price. The Respondent received £127,500 from his lender client, and sent £170,000 to the solicitors for ZPSL by CHAPS on the 26 July 2010. SD was a director of ZPSL.
- 6.30 ZD (a potential lender of the balance of the purchase price) and SD (the director of the seller company) are related.
- 6.31 There are no file entries or correspondence on the Respondent’s file detailing his advice relating to the obligations contained in the missives; offer of loan; or the obligations related to the property with SH.
- 6.32 The CML handbook -2006 edition states:

2 Communications

- 2.1 All communications between you and us should be in writing quoting the mortgage account or roll number, the surname and initials of the borrower and the property address. You should keep copies of all written

communication on your file as evidence of notification and authorisation. If you use PC fax or e-mail, you should keep a paper copy.

3 Safeguards

3.1 Solicitors must follow the current Solicitors (Scotland) Accounts Rules and, to the extent that they apply, comply with the Money Laundering Regulations 2003 (see the Law Society of Scotland's Simple Guide to those Rules and Regulations in the Parliament House Book) and the Proceeds of Crime Act 2002. Independent qualified conveyancers must follow any guidance issued by their supervisory body.

5.1 Surrounding Circumstances

5.1.1 Please report to us (see part 2) if the proprietor has owned the property for less than six months, or the person selling to the borrower is not the proprietor, unless the seller is:

5.1.2 If any matter comes to the attention of the fee earner dealing with the transaction which you should reasonably expect us to consider important in deciding whether or not to lend to the borrower (such as whether the borrower has given misleading information to us or the information which you might reasonably expect to have been given to us is no longer true) and you are unable to disclose that information to us because of a conflict of interest, you must cease to act

5.8 Other Loans

You must ask the borrower how the balance of the purchase price is being provided. If you become aware that the borrower is not providing the balance of the purchase price from his own funds and/or is proposing to give a second charge over the property, you must report this to us if the borrower agrees (see **part 2**), failing which you must return our instructions and explain that you are unable to continue to act for us as there is a conflict of interest

10 The Loan And Certificate Of Title

10.1 You should not submit your certificate of title unless it is unqualified, or we have authorised you in writing to proceed notwithstanding any issues you have raised with us.

10.3 You are only authorised to release the loan when you hold sufficient funds to complete the purchase of the property and pay all stamp duty land tax and registration fees to perfect the security forthwith as a first charge or, if you do not have them, you accept responsibility to pay them yourself. You must hold the loan on trust for us until settlement. If settlement is delayed, you must return it to us when and how we tell you (see **part 2**). You must ensure that all stamp duty land tax returns are timeously completed and submitted to allow registration of the security to take place forthwith.

11.2 Explanation

You should explain to each borrower (and any other person signing or executing a document) his responsibilities and liabilities under the documents referred to in 11.1 and any documents he is required to sign.

6.33 The Respondent did not disclose the back to back nature the purchase to the lender. The Respondent did not disclose the source of funds to meet the balance of the purchase price. The Respondent did not disclose that SH was being loaned funds to meet the balance of the purchase price. The Respondent did not explain to SH the obligations contained in the offer of loan. The Respondent did not advise of the connection between the potential source of funds for the balance of the purchase price and the seller. The Respondent made insufficient enquires of, and failed to report, the source of funds of the balance of the purchase price.

6.34 Transaction/Property 4

The Respondent acted for RM in the purchase of Property 4. Godiva Mortgages issued a letter to Respondent's firm confirming an offer of loan to RM. The Respondent acted in the transaction. The loan was for the sum of £87,500, based upon the property value and purchase price of £125,000. The Respondent was instructed to act on behalf of Godiva in accordance with the Second Edition of the

CML Handbook for Scotland Part 1 and Godiva's part 2 Instructions. The offer was valid for 6 months from the 16 October 2009.

- 6.35 By letter dated 10 February the Respondent issued RM with a terms of business letter. The solicitor noted in his letter he already held up to date ID for RM. Next the Respondent wrote to RM on the 8 April advising that the standard security had been drafted. The standard security was signed on the 15 April 2010. There are no file entries or correspondence on the Respondent's file detailing his advice relating to the entering into or concluding a bargain for the purchase of the property; offer of loan; or the obligations related to the property with RM. The Respondent did not enter missives on behalf of RM for the purchase of the property.
- 6.36 By Disposition executed by GS and JM directors of TDP Limited on 14 October 2010, Property 3 was transferred to RM for the sum of £125,000 with a date of entry of 14 October 2010.
- 6.37 On the 26 November 2010 a fresh disposition was signed by GS and JM on behalf of TDP Limited in favour of RM. On the same day RM signed a further standard security in favour of Godiva. The purchase price remained the same and all documents were drafted by the Respondent.
- 6.38 TDP Limited were a client of the Respondent. The Respondent knew that JM was the son of RM.
- 6.39 TDP Limited bought Property 3 from Fife Council (FC) on the same day as selling it to RM. The purchase price was £70,000. The Respondent paid FC the purchase price from the funds held in his client account on behalf of RM which he had received from Godiva. The Respondent released the balance of the loan funds received from Godiva after fees etc (amounting to £15,800) to RM. No funds were transferred from the client account held on behalf of RM, to the client account held on behalf of TDP Limited. The transaction between TDP Limited and RM appears to be a fraud. The purchase price was not paid to TDP Limited, the Respondent has not explained why this occurred. The lender has loaned funds greater than the price paid to the seller.

6.40 The CML handbook -2006 edition states

2. Communications

2.1 All communications between you and us should be in writing quoting the mortgage account or roll number, the surname and initials of the borrower and the property address. You should keep copies of all written communication on your file as evidence of notification and authorisation. If you use PC fax or e-mail, you should keep a paper copy.

3 Safeguards

3.1 Solicitors must follow the current Solicitors (Scotland) Accounts Rules and, to the extent that they apply, comply with the Money Laundering Regulations 2003 (see the Law Society of Scotland's Simple Guide to those Rules and Regulations in the Parliament House Book) and the Proceeds of Crime Act 2002...

5.1 Surrounding Circumstances

5.1.1 Please report to us (see **part 2**) if the proprietor has owned the property for less than six months, or the person selling to the borrower is not the proprietor, unless the seller is:..

5.1.2 If any matter comes to the attention of the fee earner dealing with the transaction which you should reasonably expect us to consider important in deciding whether or not to lend to the borrower (such as whether the borrower has given misleading information to us or the information which you might reasonably expect to have been given to us is no longer true) and you are unable to disclose that information to us because of a conflict of interest, you must cease to act for us and return our instructions stating that you consider a conflict of interest has arisen.

5.8 Other Loans

You must ask the borrower how the balance of the purchase price is being provided... If you become aware that the borrower is not providing the balance

of the purchase price from his own funds and/or is proposing to give a second charge over the property, you must report this to us if the borrower agrees (see **part 2**), failing which you must return our instructions and explain that you are unable to continue to act for us as there is a conflict of interest

6.3 Purchase Price

6.3.1 The purchase price for the property must be the same as set out in our instructions. If it is not, you must tell us (unless we say differently in **part 2**)...

6.3.2 You must report to us (see **part 2**) if you will not have control over the payment of all of the purchase money (for example, if it is proposed that the borrower pays money to the seller direct) other than a deposit held by an estate agent or a reservation fee of not more than £1000 paid to a builder or developer.

11.2 Explanation

You should explain to each borrower (and any other person signing or executing a document) his responsibilities and liabilities under the documents referred to in 11.1 and any documents he is required to sign.

6.41 The Respondent did not advise the lender he was acting for the seller and purchaser in the transaction. The Respondent did not advise the lender the property had been owned by the seller for a period of less than 6 months. The file does not hold a certificate of title. Godiva would not have released the funds without receipt of the same. The file does not disclose any direct face to face meeting with RM, any formal instructions emanating from him in relation to the balance of funds; satisfaction of the source of funds; or the difference in the purchase price and sum to be paid for the property. The Respondent did not explain to RM his responsibilities and liabilities in respect of the loan and security. The Respondent did not advise the lender of the close connection between the director of the seller and the purchaser.

7. Having given careful consideration to the admitted facts and the submissions made by both parties, the Tribunal found the Respondent guilty of Professional Misconduct in terms of Section 53 of the Solicitors (Scotland) Act 1980 in respect that:-

(a) He acted contrary to the CML Handbook:

- (i) In transaction 1 he failed to report that the seller of the property had not owned the subjects for six months, he failed to report that the transaction was a same day transaction, he failed to report that the full balance of the purchase price was not being provided by the borrower from her own funds, he failed to report that the borrower's legal fees were being paid by the seller, he failed to report that there was a substantial increase in the purchase price paid by the borrower compared to the price paid by the seller on the same day, he failed to report that the loan was in excess of 100% of the price paid by the seller for the property on the same day as the borrower purchased the property, he failed to report that there was a history of transactions between the person selling to the borrower and the party who sold to the seller on the same day, he failed to report that there were considerable variations in the prices paid in the transactions between the person selling to the borrower and the party who sold to the seller on the same day, he failed to report that the seller and borrower were known to each other, he failed to explain the responsibilities and liabilities under the standard security to the borrower;
- (ii) In transaction 2, he failed to report that the seller had not owned the subjects for six months, failed to report that the full balance of the purchase price was not being provided by the borrower from his own funds, failed to report that there was a substantial increase in the purchase price paid by the borrower prepared to that paid by the seller on the same day, he failed to report that the seller was recently discharged from sequestration on 26 October 2009, failed to report in writing that the transaction was a back to back transaction and did not await written instructions before continuing, failed to explain to the borrower the responsibilities and liabilities under the standard security;

- (iii) In transaction 3, he failed to report to the lender that the seller of the subjects had not owned the subjects for six months, failed to advise the lender in writing that this was a same day transaction and did not await written instructions before proceeding, failed to report to the lender that the full balance of the purchase price was not being provided by the borrower from his own funds, failed to report to the lenders of the confusion of the source of the balance of the purchase price, failed to report the substantial increase in the purchase price paid by the borrower compared to the price paid by the seller on the same day, failed to report to the lender that the proposed provider of the balance of the purchase price was related to one of the directors of the seller, failed to explain to the borrower the responsibilities and liabilities under the standard security;
- (iv) In transaction 4, he failed to report the lender that the seller of the subjects had not owned them for six months, failed to report to the lender in writing that the transaction was a same day transaction, failed to report to the lender that the full balance of the purchase price was not being provided by the borrower from his own funds, failed to report to the lender that there was a substantial increase in the purchase price paid by the borrower when compared to the price paid by the seller on the same day, failed to report to the lender that the director of the seller was the son of the purchaser, failed to explain to the borrower the responsibilities and liabilities under the standard security, and he failed to report to the lender that he did not have control over the payment of all the purchase price and did not obtain the written authority of the lender to proceed.
- (b) In all four transactions, he acted in breach of Rule 6(1) of the Solicitors (Scotland) Accounts etc Rules 2001.
- (c) That by failing to report the matters referred to in paragraph (a), he failed to act diligently and with the utmost propriety in respect of dealings with his lender client while acting for both lender and purchaser.
- (d) By failing to report the matters as noted in paragraph (a), he failed to act in the best interests of his client.

- (e) He failed to communicate effectively with clients in some or all of the transactions in that he knowingly misled his lender clients by signing Certificates of Title when he had not complied with his obligations to each lender prior to doing so.

8. Having heard further submissions from both parties, the Tribunal pronounced an Interlocutor in the following terms:-

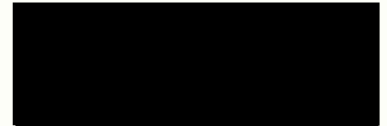
Edinburgh 1 November 2019. The Tribunal having considered the Complaint dated 22 March 2019 at the instance of the Council of the Law Society of Scotland against Nigel William Frew Ford, Fords Daly Legal Limited, Office 1, Evans Business Centre, 1 Begg Road, John Smith Business Park, Kirkcaldy; Find the Respondent guilty of professional misconduct in respect that he (a) acted contrary to the CML Handbook, (b) contravened Rule 6(1) of the Solicitors (Scotland) Accounts etc Rules 2001, (c) failed to act diligently and with the utmost propriety in respect of dealings with his lender client while acting for both lender and purchaser, (d) failed to act in the best interests of his lender clients, (e) failed to communicate effectively with his lender clients and knowingly misled them by signing Certificates of Title when he had not complied with his obligations to each lender prior to doing so; Censure the Respondent; Fine him in the sum of £2,500 to be forfeit to Her Majesty; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Nicholas Whyte
Chair

9. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on **7 JANUARY 2020.**

IN THE NAME OF THE TRIBUNAL



Nicholas Whyte

Chair

NOTE

At the commencement of proceedings on 1 November 2019, the Fiscal for the Complainers made a motion to amend the Complaint. This motion was not opposed by the Respondent and the Tribunal granted same.

A Joint Minute between the parties was lodged with the Tribunal. Following enquiry by the Chairman, this Joint Minute was amended by the parties to include averment 4.40 of the Complaint. Consequently, the Joint Minute agreed all of the averments of fact, duty and professional misconduct contained within the Complaint.

A number of Productions had been lodged with the Tribunal prior to the hearing. The Chairman drew the parties' attention to these Productions and noted that they were not referred to within the Joint Minute. The Fiscal confirmed that he had no intention of referring to any of the Productions he had previously lodged. The Respondent indicated that in any case he was happy that the Tribunal could take them as accepted.

Given the extent of agreement between the parties, no evidence required to be led. The Tribunal proceeded to hear submissions by both parties.

SUBMISSIONS FOR THE COMPLAINERS

Mr Stewart explained that the Complaint involved four transactions that occurred between January and November 2010. He explained that he had set out within the Complaint the knowledge of the profession at the time of these transactions and warnings given to the profession by the Law Society that highlighted the use of solicitors by potential fraudsters. He invited the Tribunal to read the detailed averments of the transactions with that background in mind.

The four transactions were identified during an inspection of the Respondent's firm in 2011. The delay between the discovery and the Complaint being raised was due to no fault on the part of either the Complainers or the Respondent. The Complainers required access to the files for the transactions to progress matters. Two files were made available immediately. The other two files were in the hands of the police for some time in connection with an investigation against other individuals. These files were only made available to the Law Society in February and April 2018.

The Fiscal took the Tribunal through the averments of fact within the Complaint in relation to all four transactions. In answer to a query from the Chairman, the Fiscal confirmed that he took no issue of there being a conflict of interest between CS and NBS in transaction 1.

In relation to the averments of duty within the Complaint, the Fiscal confirmed that the Code of Conduct of 2002 and the Practice Rules 2008 ran in tandem for a short period of time which is why these were referred to within the Complaint. Whilst he had referred to Rule 9 of the Code of Conduct 2002, he accepted that he could not make much of that.

He lodged with the Tribunal a summary in table form of the breaches of the CML Handbook in relation to all four transactions.

The Fiscal then turned to the averments of misconduct. Firstly, he invited the Tribunal to hold that the weight and number of breaches of the solicitor's obligations in the CML Handbook amounted to professional misconduct. In support of this submission, he referred to pages 377 to 378 of Paterson & Ritchie: Law Practice & Conduct for Solicitors.

In the Complaint he also averred that the Respondent failed to act diligently with utmost propriety in respect of dealings with his lender clients while acting for both lender and purchaser by withholding relevant information from those various lender clients, at averment of misconduct paragraph 7. He referred the Tribunal to Paterson & Ritchie paragraph 7.16.01 in support of this being a basis of misconduct.

At paragraph 8 of the Complaint, he had libelled that the Respondent failed to act in the best interests of his client in relation to these transactions, his client being the lender. These were duties under Rule 2 of the Code of Conduct 2002 and Rule 3 of the Practice Rules 2008.

His final averment of professional misconduct was at paragraph 9 of the Complaint where it was stated that the Respondent had not communicated effectively with the lender clients and that he knowingly misled his lender clients by signing Certificates of Title when he had not complied with his obligations under the CML Handbook.

He submitted that the test of professional misconduct was set out within the case of Sharp-v-The Council of the Law Society of Scotland 1984 SLT 313. He submitted that there were a number of cases from the Discipline Tribunal that supported that this type of conduct was misconduct and referred to the cases of

Law Society v Goodban (2015), Law Society v Hales (2014) and Law Society v B (2019). In particular, the last case had held that even a single transaction could amount to professional misconduct.

The Fiscal invited the Tribunal to hold that the Respondent's failure to obtemper his obligations as described amounted to professional misconduct in terms of the test as set out in Sharp.

SUBMISSIONS FOR THE RESPONDENT

Mr Brown submitted to the Tribunal that it could and should be satisfied that the conduct admitted by the Respondent amounted to professional misconduct without any difficulty. He accepted that the question of professional misconduct was one for the Tribunal but emphasised that in no way was there a question of this plea being one of a plea of convenience.

He described that the CML Handbook had come into being as a result of more developed sharp practices taking place in England. He described the CML Handbook as a form of contractual risk management tool. Breaches of the CML Handbook can vary in degree of gravity and culpability. He submitted that historically breaches of the CML Handbook were seen more benignly by the profession. In many cases breaches of the Handbook were dealt with by the Guarantee Fund Sub Committee ordering the solicitor to notify any lenders of their breaches. He suggested that this changed from 2008 onwards following the dramatic upsurge in claims against solicitors. He said the view was taken that the failure to adhere to the CML Handbook was a systemic risk to the existence of the master policy as the number of claims would make it unsustainable. This would also be a systemic risk to the historic practice of solicitors acting for both lender and borrower. It was important to recognise the solicitor's obligations to both clients. The Law Society had recognised the requirement for public protection and the reputation of the profession and had taken the view that breaches of the CML obligations were more serious than had previously been perceived. This had been sufficiently publicised to the profession and the profession made aware that it needed to be dealt with. It was his submission that these matters were properly prosecuted as misconduct.

Mr Brown had provided his advice to the Respondent on the basis that like cases should be treated in a like manner. On that basis, advice that his conduct amounted to professional misconduct was consistent with previous cases. He submitted that there was no requirement for the Tribunal to delay in holding that this conduct amounted to professional misconduct.

DECISION ON PROFESSIONAL MISCONDUCT

In terms of the Solicitors (Scotland) Act 1980, Section 53(1)(a), the Tribunal must be satisfied that the Respondent has been guilty of professional misconduct. Therefore, although the Respondent admitted he was guilty of professional misconduct, the Tribunal had to be satisfied that the facts admitted meet the test that is described in the case of Sharp v The Law Society of Scotland 1984 SLT 313 as the following:

“There are certain standards of conduct to be expected of competent and reputable solicitors and a departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of Rules or some other actings or admissions, the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is to be made.”

The Complaint described four transactions over a period of 11 months where the Respondent failed to disclose a number of material matters to the lending institutions. These failures to disclose essential information are said by the Complainers to be (a) a breach of the CML Handbook, (b) a breach of the common law duty of a solicitor to act with the utmost propriety to a lender client where he acts for both lender and purchaser (c) a breach of the Code of Conduct 2002/Practice Rules 2008 and (d) a breach of Rule 6 of the Accounts Rules by not complying with his instructions in the CML Handbook.

The materiality of the information not passed on to the lenders must have been obvious to the Respondent. As described by the Fiscal and conceded by Mr Brown, the Law Society had made plain to the members of the profession the importance of complying with the obligations under the CML Handbook. The CML Handbook was introduced in order to help to prevent mortgage fraud. Even though the solicitor may not himself be a party to such a fraud, if he fails to obtemper the obligations set out within the CML Handbook he may unwittingly facilitate the execution of such fraud.

In all of the circumstances, given the amount of information and nature of information not disclosed to the lenders, the Tribunal had no hesitation in holding that the standard of conduct of the Respondent fell well within the test set out within the case of Sharp. Accordingly, the Tribunal found the Respondent guilty of professional misconduct.

The Tribunal invited both parties to make submissions with regard to mitigation, expenses and publicity.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal lodged an extract from the record held for the Respondent by the Law Society. He moved for expenses.

SUBMISSIONS FOR THE RESPONDENT

Mr Brown submitted that he was not suggesting that any of the four transactions was in any way defensible. He submitted that there was however within the averments a misplaced emphasis on identifying the mischief. He wanted to be sure to identify properly the mischief or failing of the Respondent in each transaction.

The Respondent was admitted as a solicitor in 1983 and had practised for many years without difficulty. This case involved a cluster of transactions measured in the course of months. At the time of these transactions, the Respondent was dealing with profound family difficulties including the illness of both of his parents and the death of his mother. This had included the Respondent having to deal with the worst kind of dementia. The Respondent suffered a depressive episode which the Tribunal can see is mentioned within the medical report produced for him. This had been a buoyant and successful chamber practice and these transactions occur in the eye of the storm of 2008/2009. This was an episode that had occurred when the Respondent was operating below optimum functioning, in a state with a depressive overlay. Other things were going on and the Respondent was getting through the day slightly on autopilot. This was not a case involving someone who did not understand his business, nor was it someone who was a weak character who had been prevailed upon by ne'er-do-wells. Rather this was a case of someone who did not properly deal with the details of the transactions described.

With regard to transaction 1, reference to obtaining ID for the purchaser were of no relevance. Mr Brown understood it was the Respondent's practice to always ask for ID and this was in no sense a regulatory concern. Nor was it of any interest to the lender that there had been an inhibition. There is no suggestion that this inhibition caught the property that was sold. Additionally, with regard to previous transactions relating to the sale property, it is not said within the averments that the Respondent acted in any of the 2005 transactions. The Respondent says that he did not. Nor it is averred that the Respondent should have known about these transactions. It was not part of the Respondent's obligations to go back and look

at historic prices for the property. He accepted that if the Respondent had existing knowledge then he would have required to bring that to the attention of the lender.

Mr Brown submitted that the mischief lay in the absence of a report of the index circumstances of the transaction, required to be reported by the CML Handbook, in particular the back to back nature of the transaction. The solicitor is the lender's lowly paid watchdog.

The issues to be reported in terms of CML are things which are markers in high risk transactions for instance, back to back transactions have a high risk of fraud. The usual reason for a degree of scepticism, about back to back transactions is that lenders are induced to lend on the basis of a valuation. Where the transaction involves a new build flat, it is often difficult to precisely value the property. Surveyors do the best they can. Sometimes the reality is that no one is buying property in the area. The mischief is that the borrower obtains funding based on the high valuation but pays below market price. Not all transactions have these risks. The report under the CML Handbook is supposed to advise the individual lender that it is reasonable or not and on what basis they are to make the loan.

There is no record on the file for this transaction of a report to the lender. The Respondent had no recollection of a discussion with anyone at the lender. The Respondent is aware that both CS and OH are well known property developers. It is the Respondent's position that the actual price paid is closer to the market value for the property and that the price paid by CS was closer to a discount. It could be that OH had a requirement for liquidity or there was some other *quid pro quo* in play. No one can tell what the bank would have made of the information.

There is no explanation within the pleadings as to the mismatch in the loan funds paid over. There can be many reasons for that i.e. fees charged by the lender. In fact, there has been no known loss in connection with this transaction. The title for the property remains in the name of NBS and the security remains on the Register. There has been no intimation of any claim.

Similarly, with regard to transaction 2, there are matters that are not directly part of the mischief struck at. The issue of the dates of the offer of loan is a curiosity which could be explained by this simply being a broker who was aware of an offer of loan informally. The Certificate of Title being submitted before missives were concluded is not significant. Often in the current market, missives are not concluded until the date of entry. Title is examined before missives are concluded in any case. The mischief in this case was the Respondent's non-compliance with the lender's risk management procedures – the lenders made it clear that reporting required to be in writing. There is no written report on the file and no proper record

of the source of the balance of the purchase price. The Respondent cannot say honestly that he made enquiry into the source of the balance. If he did, there should be a record but there is not. This transaction occurred some five or six weeks within the death of his mother. Current investigation discloses that the purchaser and lender remain in the Register.

With regard to transaction 3, the mischief here was that the lender was not told circumstances that might have caused it to reassess the offer of loan i.e. that this was a back to back transaction and that the client had negotiated top up funding directly. Perhaps the Respondent should have been aware of the relationship between ZD and a director of the selling company, but Mr Brown was not sure that this was apparent at the time. The property was sold in July 2019 and the disposition discloses a price of £183,100. Given the borrowing was for a little over £100,000, one would assume that the loan had been redeemed.

The first three transactions were common place residential properties. Unfortunately, the Respondent's files are sparse. His files should contain record of advice given in relation to necessary matters for instance the import of missives or a standard security. The Respondent confirms that it is his practice to give the necessary advice. Unfortunately, the files in this case do not record that. There is no suggestion from any of the clients in these transactions that they were not told something necessary.

Transaction four, Mr Brown submitted, was not a typical back to back transaction. In a typical back to back transaction, the lender borrows on the basis of a valuation which is overstated. In this transaction, it was the reverse. The property to be sold was a disused property which the council chose to dispose of "as is". TDP Limited identified this as a significant development opportunity with the intention of purchasing the property to knock it down and build a local convenience store. Their intention was to buy the property quickly before the seller realised its potential value. Ultimately, in 2017 the property sold for in excess of £700,000. All of the parties involved were related. They took the view that the easiest way to finance the transaction in the short term was to finance it on the basis of purchasing the property as a residential property and borrow the funds from Godiva. This was a father, son and family company borrowing money from Godiva on a holding pattern until it could move forward. It was impossible to say how Godiva would have responded if it had known the facts.

In relation to the whole case, Mr Brown submitted that the Complaint was not in the shallows of this type of case. He invited the Tribunal to have in mind that the purpose of disciplinary proceedings was (a) to protect the public and (b) to vindicate the good name of the profession. These proceedings were not punitive in nature. He submitted that the process required the Tribunal to conduct a risk assessment

and ask whether the Respondent was in one of the categories of people where the Tribunal needed to prevent him from putting other interests at risk. The Respondent was not a dishonest man and nor was he a man lacking in character who had been put upon by crooks.

The Respondent has been in practice for years and has only one other disciplinary matter on his record. The Complaint before the Tribunal contained a cluster of transactions coinciding with personal crisis. Although he accepted that these were failures of some significance, fortunately, no loss had been incurred by any party. He drew the Tribunal's attention to the references that had been produced for the Respondent and described these as a string of references from members of the profession that disclosed a pattern of integrity and trustworthiness over many years.

The other disciplinary matter referred to was non-analogous to the Complaint before the Tribunal and involved an issue of undue delay in resolving what was a difficult family transaction which had unfortunately been dragged out.

The Respondent now practises as a consultant for the firm rather than as a partner. His two children are solicitors in the firm. His firm was inspected as recently as 2017 without concern. The Respondent was not someone who presented any risk to the public. It was evident that proceedings had taken a toll upon him. Due to no one's fault, there was a delay in the Complaint proceeding to the Tribunal. This was caused because of the investigation into OH which had not resulted in a prosecution. These matters had been hanging over the Respondent for a decade. The Tribunal could be confident that the Respondent was now more likely to double check and tick any box twice as a result. The Tribunal could take comfort in the range and quality of references. He invited the Tribunal to deal with this matter in a way that did not prevent him from practising as a principal. Mr Brown conceded that this could result in a significant fine being imposed. He had no submissions to make regarding publicity and did not oppose a motion for expenses.

In conclusion, he invited the Tribunal to take the view that the Respondent had faced up to his conduct and that there was no risk of any repetition. In response to a query from the Chairman, it was clarified that the Respondent's current firm was inspected at the end of 2016 but had also been inspected some six months after starting up in 2013. No issues had been raised. Mr Brown submitted that it could be said that this satisfied the question of there being any risk to the public, profession or master policy.

DECISION ON DISPOSAL, EXPENSES AND PUBLICITY

The Tribunal firstly required to assess where it considered this case lay on the scale of seriousness of this type of conduct. Having regard to the particular circumstances of these four transactions, and the other cases referred to, the Tribunal concluded that this case lay at the middle of the scale. Consequently, the Tribunal put out of its mind any question of suspension or strike off.

This type of conduct has the potential for placing others at risk. The Tribunal therefore considered whether it was appropriate to restrict the Respondent's practising certificate in any way. This case was somewhat unusual in its circumstances, given the delay between the conduct and the Respondent appearing before the Tribunal. The Respondent has been in practice for 36 years. He has only one other disciplinary matter which was dealt with by the Law Society and was not analogous to this Complaint. The Tribunal accepted the description of these transactions being a cluster of transactions occurring at a time when the Respondent was dealing with difficult personal issues. Prior to these transactions, the Respondent had been in practice for a large number of years without difficulty. In the years following these transactions, again, the Respondent has been in practice with little difficulty. In all the circumstances, the Tribunal was satisfied that the Respondent does not present a risk to the public. No restriction of his practising certificate would appear necessary.

The Tribunal was however concerned to mark the seriousness of the Respondent's conduct. The Tribunal had regard to the extensive favourable references for the Respondent. The Respondent had shown remorse and insight into the conduct. He had indicated at an early stage his intention to plead guilty to the charges. The Tribunal accepted that at the time of these transactions, the Respondent was dealing with very difficult personal circumstances, including issues with his own health and the health of his parents. However, the Respondent's failures to comply with his obligations in these four transactions could have resulted in serious consequences and are seriously damaging to the reputation of the profession. In all of the circumstances, the Tribunal considered that the appropriate penalty was one of Censure and a Fine £2,500.

The Tribunal decided that the appropriate award of expenses was one in favour of the Complainers. With regard to publicity, the Complaint contained extensive information in relation to other individuals who were not a party to the proceedings and whose details were not necessary for the decision. In these

circumstances, the Tribunal ordered that publicity should include the name of the Respondent but should not include the name of any other person.



Nicholas Whyte
Chair