

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

FINDINGS

in Complaint

by

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

against

**NIGEL STEPHEN KENNY of
Kenny & Associates, Solicitors, 22
Castle Street, Dumfries**

1. A Complaint dated 17 March 2006 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Nigel Stephen Kenny, of Kenny & Associates, Solicitors, 22 Castle Street, Dumfries (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 1 June 2006 and notice thereof was duly served on the Respondent.
4. When the Complaint called on 1 June 2006 the Complainers were represented by their Fiscal, Paul Reid, Solicitor, Glasgow. The Respondent was represented by his solicitor, James McCann, Clydebank. An amended Complaint was lodged with the Tribunal and a Joint Minute

was also lodged admitting the facts, averments of duty and averments of professional misconduct in the amended Complaint. The matter was then adjourned for a plea in mitigation until 29 June 2006.

5. When the Complaint called on 29 June 2006 the Complainers were represented by their Fiscal, Paul Reid, Solicitor, Glasgow. The Respondent was present and represented by James McCann, Solicitor, Clydebank.

6. The Tribunal found the following facts established

6.1 The Respondent was born 18th April 1964. He was admitted as a solicitor on 21st December 1989. He was enrolled as a solicitor in the Register of Solicitors in Scotland on 17th January 1990. Following his admission as a solicitor, the Respondent secured employment with the firm Gray, Robertson & Wilkie of 37 East High Street, Forfar from 17th January 1990 until 6th April 1990. Thereafter he was employed with the firm Carlton Gilruth of 30 Whitehall Street, Dundee from 9th April 1990 to 3rd May 1992. Thereafter he was employed with the firm AF & CD Smith, Solicitors of 17 North Strand Street, Stranraer from 4th May 1992 until 10th September 1993. Thereafter he was employed with the firm Whitelaw Edgar & Baldwin of 19 Bank Street, Dumfries from 13th September 1993 until 28th January 1994. Thereafter he was employed with the firm Seagrave & Co, 75 Buccleuch Street, Dumfries from 16th May 1994 until 5th November 2004. From 8th November 2004 to 6th January 2006, the Respondent has carried on business trading as the firm Nigel S. Kenny & Associates of 22 Castle Street, Dumfries. The Respondent ceased to practise on his own account as a solicitor on 6th January 2006, and commenced employment as a solicitor with DGHP, The Grierson House,

The Crichton, Bankend Road, Dumfries on 16th January 2006.

6.2 Inspection of 4th April 2005

In pursuit of their statutory duties, the Complainers carried out an inspection of the financial records and documentation operated by the Respondent at his place of business on 4th, 5th and 6th April 2005. This inspection revealed to the Complainers a number of breaches of the Solicitors (Scotland) Accounts Etc Rules 2001 and a number of concerns regarding the manner in which the Respondent dealt with his conveyancing practice. In particular the following was identified:-

6.3 In the course of their inspection, the Guarantee Fund Inspector recovered from the Respondent a sample of files and ledgers for their inspection. In the course of so doing during the inspection, the Inspector identified numerous transactions where the Respondent had allowed conveyancing documentation to remain unrecorded. On occasion the documentation to be recorded was seen on the file, on other occasions the documentation was absent. This would occur despite the transactions having settled. In particular:-

- (a) The Respondent acted for a Mr A in connection with a purchase transaction which settled on 23rd December 2004. The inspection revealed that the Disposition in favour of Mr A remained on the file unrecorded. In addition there was on the file a cheque for the sum of £22 dated 22nd December 2004 issued by the solicitors acting on behalf of the seller of the property. This payment related to the recording dues of the Discharge of a Standard Security by the sellers. This Discharge and cheque in respect of the recording dues remained on the file operated by the Respondent unrecorded.

- (b) The Respondent acted for a Mr and Mrs B in connection with a purchase transaction which settled on 12th November 2004. The purchase price was partially funded through the clients obtaining a mortgage from Northern Rock plc. An examination of the file revealed the Disposition in favour of Mr and Mrs B and the Standard Security granted by them remained unrecorded.
- (c) The Respondent acted for a Mr and Mrs C in connection with their purchase of heritable property. The transaction settled on 31st January 2005. The purchase price of the said subjects was partially funded through Mr and Mrs C obtaining a mortgage from Northern Rock plc. The inspection revealed the Disposition in favour and Mr and Mrs C and the Standard Security granted by them in favour of Northern Rock plc remained unrecorded.
- (d) The Respondent acted on behalf of a Mr D and Ms E in connection with their purchase of a heritable property which settled on 10th December 2004. The purchase price was partially funded with a loan from the National Westminster Bank. The inspection revealed the Disposition in favour of Mr D and Ms E and the Standard Security granted by them in favour of the Bank remained unrecorded.
- (e) The Respondent acted on behalf of a Mr and Mrs F in connection with their purchase of heritable property. The transaction settled on 3rd December 2004. The purchase price was partially funded through Mr and Mrs F obtaining a mortgage with the Nationwide Building Society. The inspection revealed that the Disposition in favour of Mr and Mrs F and the Standard Security

granted by them in favour of the Building Society remained unrecorded.

- (f) The Respondent acted on behalf of client G in connection with the sale of heritable property. The transaction settled on 10th December 2004. The inspection revealed that the heritable security holders over the property, the Bradford & Bingley Building Society, had never delivered to the Respondent the Title Deeds relating to the said subjects. Despite not having the Title Deeds, the Respondent proceeded to settle the transaction. The solicitors acting for the purchasers wrote on a repeated and regular basis to the Respondent requesting that he deliver to them the Title Deeds. The Respondent failed to have the Title Deeds delivered to them. A Discharge of the Bradford & Bingley Standard Security had not been presented by him for registration or delivered to the solicitors acting on behalf of the purchaser.
- (g) The Respondent acted on behalf of a Mr H in connection with the sale of heritable subjects. The transaction settled on 16th December 2004. A mortgage with the Northern Rock plc was redeemed by the Respondent. The Respondent had failed to deliver to the purchasers solicitors certain settlement items including a formal Discharge of the loan.
- (h) The Respondent acted for a Mr and Mrs I in connection with their sale of heritable subjects. The transaction settled on 17th December 2004. An examination of the file operated by the Respondent revealed that a loan with Halifax plc had been redeemed but the formal Discharge of the Standard Security remained unrecorded. Further inspection of the file revealed the existence of an Inhibition affecting the sellers of the

property. A Discharge of the Inhibition had not been presented for registration.

- (i) The Respondent acted on behalf of a Mr and Mrs J in connection with the sale of heritable subjects. The transaction settled on 4th February 2005. There were two mortgages affecting the property, the first with the organisation, I Group and the second with the organisation AFPAA. An examination of the file revealed that a Discharge of the Standard Security with AFPAA had been presented by the Respondent for registration. There was nothing on the file to show the Discharge of the Standard Security with the organisation I Group had been recorded.
- (j) The Respondent acted on behalf of a Mr and Mrs K in connection with their purchase of heritable subjects. The transaction settled on 25th February 2005. The purchase price of the subjects was partially funded through Mr and Mrs K obtaining a mortgage from the Northern Rock plc. An examination of the file operated by the Respondent revealed the Disposition in favour of Mr and Mrs K and the Standard Security granted by them in favour of the Northern Rock plc remained unrecorded.
- (k) The Respondent acted for a Mr L and Miss M in connection with the purchase of heritable subjects. The transaction settled on 25th February 2005. The purchase price of the subjects was partially funded through Mr L and Miss M obtaining a mortgage with the Northern Rock plc. An examination of the file operated by the Respondent revealed the Disposition in favour of Mr L and Miss M and the Standard Security granted by them in favour of the Northern Rock plc remained unrecorded.

- (l) The Respondent acted on behalf of a Mr and Mrs N in connection with their purchase of heritable subjects. The transaction settled on 25th February 2005. The purchase price of the heritable subjects was partially funded through Mr and Mrs N obtaining from the Woolwich plc a mortgage. An examination of the file revealed the Disposition in favour of Mr and Mrs N and a Standard Security granted by them in favour of Woolwich plc remained unrecorded. Further there was on the file a cheque from the sellers solicitors for the sum of £22 dated 4th March 2005, which cheque related to the recording dues in respect of the Discharge of the Standard Security granted by the sellers in favour of the lending institution with whom they had a mortgage.
- (m) The Respondent acted on behalf of a Mr and Mrs N in connection with the sale of heritable subjects. The transaction settled on 25th February 2005. An examination of the file operated by the Respondent revealed a Discharge of the Standard Security granted by Mr and Mrs N in favour of Woolwich plc remained unrecorded.
- (n) The Respondent acted on behalf of a Mr K in connection with the sale of heritable subjects. The transaction settled on 25th February 2005. An examination of the file operated by the Respondent revealed the Discharge of a Standard Security with the Clydesdale Bank plc by Mr K remained unrecorded.
- (o) The Respondent acted on behalf of a Mr L in connection with the sale of heritable subjects. The transaction settled on 20th February 2005. An examination of the file operated by the Respondent revealed the Discharge of a Standard Security in favour of Nationwide Building Society remained unrecorded.

- (p) The Respondent acted in connection with a Mr and Mrs O in connection with their purchase of a heritable property. The inspection revealed that settlement of the transaction had been delayed until 1st April 2005 as a result of a delay in the Respondent receiving funds. Examination of the client ledger revealed a debit balance of £4,632.90 was noted on this client ledger with £2,000 having been transferred from the firm account on 1st April 2005 to raise the float operated by the Respondent. Further investigation has revealed that on 31st March 2005 a cheque for £145,750 to settle the transaction was sent out by the Respondent. Incoming funds to settle the purchase were only received by the Respondent on 1st April 2005. If the Respondent has accurately completed his client ledger a debit balance of almost £111,000 would have been shown to exist for a period of one day until the loan funds were received by the Respondent. Further the record would have shown a substantial deficit on 31st March 2005 calculated by the inspectors at £109,172.10.
- (q) The Respondent acted on behalf of client P in connection with the purchase of heritable property. The transaction settled on 28th October 2004. Inspection of the file revealed the Disposition and Standard Security had both been recorded. However a cheque from the sellers solicitors in respect of the registration dues of a Discharge of a Standard Security granted by the sellers had not been sent to the Registers of Scotland as a consequence of which the Discharge had not yet been recorded.

6.4 Whilst the Respondent was an associate in the firm of Seagrave & Company, he acted on behalf of a number of clients in connection with their conveyancing transactions.

Following his departure from that firm he took with him a number of clients and their files. An examination of the files maintained by the Respondent in connection with these clients revealed to the Complainers a number of matters of concern, in particular:-

- (a) The Respondent acted on behalf of the client Q in connection with the purchase of a heritable property. The transaction settled on 19th August 2004. The purchase price was partially funded through the client securing a mortgage from the Birmingham Midshires Building Society. On 14th February 2005 the Respondent tendered to the Keeper of the Land Register a cheque for the sum of £198 in respect of recording dues. This cheque was rejected by the Keeper on 21st February 2005. The Disposition in favour of the client and the Standard Security granted by the client in favour of the Birmingham Midshires Building Society remained unrecorded. Despite this being drawn to the attention of the Respondent, subsequent inspections carried out by the Complainers revealed that the Respondent had failed to take any action to resolve this problem by presenting the Disposition and Standard Security for registration.
- (b) The Respondent acted on behalf of a Mr and Mrs R in connection with the sale of heritable subjects. The clients had a mortgage with Bank of Ireland. The mortgage was redeemed on 3rd November 2004. An examination of the file operated by the Respondent revealed the Discharge remained unrecorded. Despite this problem being brought to the attention of the Respondent he had failed to take appropriate action to resolve the difficulty until a matter of days prior to a subsequent inspection. As at the date of the inspection of 9th November 2005 the Respondent had only then

written to the Bank of Ireland requesting a Discharge of their security.

- (c) The Respondent and his wife purchased a heritable property which settled on 31st March 2004. The purchase price of the said subjects was partially funded through the Respondent and his wife obtaining a mortgage with National Westminster Bank. A second Standard Security by Mr and Mrs N in favour of the Royal Bank of Scotland plc was arranged to be granted over the property. An examination of the file operated by the Respondent revealed the absence of a Form 4 which would have been evidence of the recording of the Disposition and Standard Securities.

6.5 The inspection also revealed that the Respondent had failed to comply with the obligations imposed upon him in respect of the Money Laundering Regulations. The Respondent had failed to copy cheques or otherwise record the source of funds which had been received from clients towards their transactions. In particular the following cheques had not been copied nor were details retained of the source of the following sums received:-

- (1) Mr and Mrs K, £34,187.40 received 23rd February 2005.
- (2) Mr S and Miss T, £5,450 received 14th January 2005.
- (3) Mr and Mrs U, £10,000, £8,500 and £1,491 received on 7th February 2005.
- (4) Mr A, £59,931 received on 16th December 2004.

6.6 An examination of the files operated by the Respondent in respect of these transactions failed to reveal any evidence obtained by the Respondent regarding the source of the funds received from clients. In addition, an examination of certain other client files revealed that the Respondent had failed to

secure evidence regarding the identification of clients, in particular Mr K, Mr and Mrs N, Mr S and Miss T.

- 6.7 The inspection revealed the Respondent had failed to properly reconcile the client bank account. The month end figures produced did not agree with the trial balance. The figures produced by the Respondent although balancing with the cash book balance did not balance with the figure shown on the firm trial balance. A difference of £695 was calculated by the Inspectors.
- 6.8 The Respondent failed to keep properly kept records or have in place proper book-keeping procedures. The Respondent was in the habit of backdating entries which had the effect of scrambling audit trails. For example, the inspection found the sum of £200 was received on 3rd February 2005 but was posted after the 28th February entries but dated 1st February. This created an erroneous impression. In addition the Respondent had failed to properly attend to the cancelling of cheques. Where a cheque was lost or returned to him he would simply score out the entry. He failed to have in place a correcting entry which would show the return of funds. In addition the narrative within the client ledger accounts prepared by the Respondent failed to fully explain a transaction, being in some cases inaccurate and in others insufficient.
- 6.9 The firm trial balance produced by the Respondent failed to disclose the true financial position of the practice. The inspection revealed that the client control figure shown on the firm trial balance was simply a credit entry of the same sum as the client bank account ledger balance. This was incorrect.

6.10 The Respondent failed to produce a statement of surplus on a monthly basis.

6.11 The procedures and evidence of the reconciliation of invested funds operated by the Respondent were not as required by the Accounts Rules. The Respondent had failed to carry out a reconciliation of invested funds on a quarterly basis.

6.12 Inspection of 7th July 2005

Following the earlier inspection and the numerous concerns raised by the Complainers, in pursuit of their statutory duties, the Complainers carried out a further inspection of the financial records and documentation kept by the Respondent at his place of business on 7th and 8th July 2005. The inspection again revealed to the Complainers a number of concerns in connection with the manner in which the Respondent finalised conveyancing transactions he was involved with. In particular the following was identified:-

- (a) The Respondent acted for a Mrs V in connection with a purchase and sale transaction both settling on 29th April 2005. An examination of the sale file operated by the Respondent revealed a failure to repay and discharge a loan with the Northern Rock plc as at the date of sale. An examination of the file revealed no correspondence or telephone notes reflecting effort on the part of the Respondent to ascertain the sums involved for redemption. As at the date of inspection the loan was still outstanding and was not repaid until 8th August 2005. The purchase file for Mrs V made reference to a new loan from the Abbey plc being handled by a separate firm, Nicholson O'Brien. The Respondent had only recently set up business as a sole practitioner and had not yet been assumed to the panel of that Building Society. As a consequence the work on behalf of the

Building Society required to be carried out by a separate firm of solicitors. The loan funds did not become available until 5th August 2005. The Respondent failed to deal with the sale transaction properly as a consequence of which the purchase transaction was financed by funds which were required to redeem the loan over the property that was sold. The Respondent dealt with the purchase and sale transaction on the one client ledger. The Respondent proceeded to settle the purchase transaction without having loan funds. He was able to do so because he had not discharged the secured loan of his client on the date of the sale transaction as required by the lender. If he had discharged the secured loan on that date then there would have been insufficient funds to meet the purchase price of the new property because the loan funds relative to the purchase had not been received. Between 29th April 2005 and 5th August 2005 there was a deficit of £13,000 on the ledger operated by the Respondent.

- (b) The Respondent acted on behalf of a Mr and Mrs W in connection with a purchase and sale transaction. Examination of the file operated by the Respondent revealed that he had concluded missives for the purchase of subjects at Property 1, which was the wrong address, the clients wishing to purchase Property 2. The transaction was due to settle on 3rd December 2004. The reference in the missives to the erroneous address had not been corrected by the Respondent until 2nd December 2004.
- (c) The Respondent acted on behalf of a Mrs X in connection with the purchase of a heritable property. The transaction settled on 16th September 2004 partly funded by a Northern Rock loan. An examination of the client ledger operated by the Respondent revealed

that recording dues in respect of the Disposition and Standard Security were not paid until 16th March 2005. Further examination of the ledger did not disclose the transaction to which the entry might relate. There was a delay in presenting the Disposition and Standard Security to the Land Register exposing the client and lender to unnecessary risk.

- (d) The Respondent acted on behalf of a Miss Y in connection with a purchase transaction. The transaction settled on 22nd April 2005 partly funded by a Natwest Loan. The inspection revealed the Disposition and Standard Security remained on the file operated by the Respondent and were unrecorded. The inspection also revealed the Respondent acted on behalf of the seller of the heritable property. The Discharge of their Standard Security remained on the file operated by the Respondent also unrecorded.
- (e) The Respondent acted on behalf of a Mr and Mrs Z in connection with a purchase transaction which settled on 28th April 2005 partly funded by a Northern Rock plc loan. Examination of the client ledger operated by the Respondent revealed an entry confirming payment of recording dues on 27th June 2005. An examination of the file revealed no indication that the Disposition and Standard Security had been presented by the Respondent for recording. The examination of the file revealed the Forms 2 and 4, Discharge and cheque in respect of the registration dues dated 5th May 2005 from the sellers solicitors were held on the file operated by the Respondent and remained unrecorded. Further examination of the client ledger disclosed a purchase price paid of £100,000. Of that amount the sum of £49,960 was paid to the sellers solicitor with £50,000 being paid to a separate firm of solicitors. An

explanation regarding this unusual apportionment of the purchase price was absent from the file operated by the Respondent.

- (f) The Respondent acted for a client AA in connection with the sale of a heritable property. The transaction settled on 31st May 2005. In settling the transaction the Respondent issued a Letter of Obligation dated 31st May 2005 which included his firm's undertaking to deliver a Discharge within fourteen days. An examination of the file revealed the executed Discharge was not held nor was there evidence that the Discharge had been presented by the Respondent for recording.
- (g) The Respondent acted on behalf of a client AB in connection with the sale of a heritable property. The transaction settled on 27th May 2005. On the date of settlement the Respondent issued a Letter of Obligation providing his firm's undertaking to forward a Discharge within fourteen days. There was an additional undertaking by the Respondent to forward the principal Title Deeds to the purchasers agents. Only on 6th July 2005 did the Respondent write to the Lender enclosing a Discharge for execution and asking for delivery of the Title Deeds.

6.13 Inspection of 29th August 2005

Following the earlier inspections carried out by the Complainers, a number of serious concerns were raised by the Complainers. In pursuit of their statutory duties the Complainers decided to carry out a further inspection of the financial records and documentation operated by the Respondent. On 29th August 2005, an inspection was carried out which revealed to the Complainers a number of breaches of the Solicitors (Scotland) Accounts Etc Rules 2001 and further concerns regarding the manner in which the

Respondent finalised conveyancing transactions. In particular the following concerns were identified:-

- (a) The Respondent acted on behalf of a client AC in connection with the sale of heritable subjects. The subjects were sold in May 2004 whilst the Respondent was employed by Seagrave & Company. The Respondent received a letter from the purchasers solicitors dated 30th March 2005. Only on 30th June 2005 did the Respondent forward a Discharge to the Land Register for recording.
- (b) The Respondent acted for a Miss AD in connection with the sale of heritable property. The transaction settled on 3rd December 2004. On 22nd December 2004 the Respondent redeemed the Building Society loan. Only on 21st July 2005 did the Respondent send the Discharge in respect of the Standard Security to the Land Register for registration.
- (c) The Respondent acted on behalf of a Mr and Mrs I in connection with the sale of heritable property. The transaction settled on 17th December 2004. On that date a loan with Halifax plc was redeemed. Only on 7th July 2005 did the Respondent forward to the Land Register a Discharge of the Standard Security.
- (d) The Respondent acted for a client AF in connection with a sale transaction. The transaction settled on 10th January 2005. On 19th January 2005 the Respondent redeemed a loan with the Royal Bank of Scotland plc. Only on 5th July 2005 was the Discharge of the Standard Security sent by the Respondent to the Land Register for registration.
- (e) The Respondent acted on behalf of a Mr and Mrs N in connection with the sale of heritable property. The transaction settled on 25th February 2005. On that date a loan with Woolwich plc was redeemed. Only on 7th

July 2005 was a Discharge of that loan presented to the Land Register by the Respondent for registration.

- (f) The Respondent acted on behalf of a Mr L in connection with the sale of heritable property. The transaction settled on 25th February 2005. On that date the Respondent redeemed a loan with the Nationwide Building Society. Only on 6th July 2005 was a Discharge in respect of that Standard Security presented by the Respondent to the Land Register for registration.
- (g) The Respondent acted on behalf of a Client AE in connection with the purchase of a heritable property. The transaction settled on 22nd March 2005. An examination of the client ledger revealed mortgage funds being received on 22nd March 2005. Only on 4th July 2005 did the Respondent forward to the Land Register the Disposition and Standard Security in respect of the conveyancing transaction.
- (h) The Respondent acted on behalf of a Mr and Mrs O in connection with the purchase of a heritable property, which transaction settled on 31st March 2005 and separately the sale of a heritable property, which transaction settled on 28th April 2005. Examination of the client ledger revealed on 31st March 2005 loan funds of £35,000 were received from the Halifax plc. Further on 1st April 2005, loan funds of £106,250 were received from the Halifax plc. On 15th May 2005 a loan with the Royal Bank of Scotland plc was redeemed. The Discharge in respect of the loan was only forwarded to the solicitor acting for the purchaser on 11th August 2005. In connection with the purchase, the Keeper of the Land Register had returned the paperwork to the Respondent concerning the Disposition and Standard Security on 16th July 2005 and 19th August 2005. An examination of the file did not reveal an explanation as

to why there was a delay in the redemption of the loan nor as to what, if any, remedial work had been carried out by the Respondent in connection with the application concerning the Disposition and Standard Security. Despite this difficulty being brought to the attention of the Respondent, he failed to take appropriate action to resolve the matter. A subsequent inspection was carried out by the Complainers on 9th November 2005 which revealed that two documents of Discharge had only been passed to the purchaser's agent on 8th November 2005. The executed Discharge relative to the Clydesdale Bank security had not yet been obtained.

- (i) The Respondent acted for a Mrs AG in connection with a mortgage over heritable property. The transaction settled on 5th April 2005. A Discharge in respect of the previous Standard Security was only presented for registration on 6th July 2005.
- (j) The Respondent acted for a Mr and Mrs AH in connection with the purchase of heritable property. The transaction settled on 22nd April 2005 partly funded by a Halifax loan. The Disposition and Standard Security were only sent for recording by the Respondent on 4th July 2005.
- (k) The Respondent acted for a Client AI and Mrs AJ in connection with the purchase of heritable property. The transaction settled on 28th April 2005. The Disposition and Standard Security were only sent by the Respondent for recording on 6th July 2005. The paperwork was returned and attended to by the Respondent with the deeds eventually having been recorded on 16th August 2005.
- (l) The Respondent acted on behalf of a Mrs and Mrs Z in connection with the purchase of a heritable property.

The transaction settled on 28th April 2005. The Respondent received from a solicitor acting for the seller a Discharge of the sellers Standard Security on 5th May 2005. This Discharge was only sent by the Respondent to the Keeper for registration on 29th July 2005.

- (m) The Respondent acted on behalf of a Mr and Mrs AK in connection with the sale of a heritable property. The transaction settled on 29th April 2005. A Discharge in respect of the Standard Security affecting the property was only sent by the Respondent for recording on 11th August 2005.
- (n) The Respondent acted for a Client AL in connection with the sale of heritable property. The transaction settled on 29th April 2005. An examination of the client ledger revealed on 5th May 2005 a loan with the Royal Bank of Scotland was redeemed. A Discharge in respect of that loan was only sent by the Respondent for recording in the Land Register on 19th August 2005.
- (o) The Respondent acted for a Mr and Mrs AM in connection with the sale of heritable property. The transaction settled on 29th April 2005. On 9th May 2005 a mortgage with First National was redeemed in addition to a separate security with Endeavour Personal Finance. Examination of the file revealed that the Discharges in respect of both Standard Securities still required to be recorded.
- (p) The Respondent acted on behalf of a Mr and Mrs AN in connection with a purchase of heritable property. The transaction settled on 18th May 2005. A separate firm of solicitors were acting on behalf of the lender. The Respondent forwarded the sum of £500 to the Keeper of the Land Register on 16th June 2005 with a further £22 being sent on 7th July 2005. There was no explanation

from the Respondent's file as to why this delay had occurred.

- (q) The Respondent acted on behalf of a Mr AO in connection with the sale of heritable property. The transaction settled on 31st May 2005. On 6th June 2005 a loan with the Northern Rock plc was redeemed. Only on 29th August 2005 did the Respondent forward a Discharge of the security together with appropriate cheque for registration dues to the purchasers solicitors.
- (r) The Respondent acted on behalf of a Miss AQ and Mr AR in connection with the purchase of heritable property. The transaction settled on 22nd July 2005. Examination of the file revealed on that date a Royal Bank of Scotland loan was received. An examination of the file revealed the Disposition and Standard Security remained thereon unrecorded. At a subsequent inspection it was revealed to the Complainers that the Land Register had returned the application to record the Disposition and Standard Security to the Respondent on 13th October 2005 because of difficulties regarding the designation of Mr AR. The subsequent inspection revealed the Respondent had taken no action to rectify matters identified by the Keeper and resubmitted the deeds to allow the process of registration to complete.

6.14 The books kept by the Respondent were not in accordance with his obligations in terms of the Accounts Rules. He failed to keep proper and accurate records. He failed to ensure that his client ledger explained each transaction without the need to refer to the client file for detail. The Respondent was in the habit of making late postings. The inspection revealed in July numerous occasions where the Respondent had made postings which had not been posted timeously. These postings were backdated and the inspection

identified a number of missed postings. The narrative in respect of certain entries failed to include accurate information. The inspection revealed several instances where cheques had been written by the Respondent and posted to the client record but not sent out of the office. In particular:

- (a) Mr and Mrs O. The ledger revealed on 17th May 2005 a cheque for £5,290.50 being paid to the client, written and posted. Not issued. Cancelled 7th June 2005 when a lesser cheque was then sent to the client. Examination of the file was silent on the matter. An incorrect cash account had been prepared by the Respondent.
- (b) Mr and Mrs AH. On 22nd April 2005 a cheque for £1,580 to the Inland Revenue. This cheque was not actually sent until 4th July 2005 due to the appropriate form having been mislaid.
- (c) Mr AS. The ledger here was confusing and misleading. Loan funds were received on 18th May 2005. They were posted as having been returned to the lender on 30th May 2005 and received back by the Respondent on 22nd June 2005. This was not the case. The funds had not been returned but were held by the Respondent and invested. The file was silent as to an explanation as to why this had occurred.

6.15 The inspection also revealed a number of instances where the Respondent had issued client account cheques which had not been presented for payment. The Respondent had failed to carry out a reconciliation properly as a review of these cheques would have picked up instances of cheques written but not issued and others purporting to be payments to the Registers. In particular the Respondent acted for a Mr and Mrs AT. The inspection revealed that a cheque dated 20th December 2004 was recorded by the Respondent as having

been paid to the Registers of Scotland but in actual fact had not been presented for payment. Mr and Mrs AT sold subjects at Property 3 on 2nd December 2004. An inspection of the Land Register showed the purchasing clients title and Standard Security thereon, however their security ranked third after two securities granted by Mr and Mrs AT which almost a year after settlement had not been recorded as discharged.

6.16 There were a number of credit balances held by the Respondent uninvested. Examples included:-

- (a) Client AS, £28,500 from 18th May 2005 to 22nd June 2005.
- (b) Client AI/Mrs AJ, £798 from 26th April 2005 to 25th August 2005.
- (c) Client AT – the sum of £1,587 from 11th November 2004 until 5th July 2005.
- (d) Client AV – the sum of £8,840.94 from 26th July 2004 to date.
- (e) Client AW – the sum of £705.62 from 7th May 2005 to date.

6.17 There was a failure on the part of the Respondent to properly scrutinise a list of client balances as a consequence there were a number of balances which no longer required to be held and could be dealt with in accordance with the guidance notes issued by the Complainers. Examples included:-

- (a) Client AW – the sum of £705.62 from April 2005.
- (b) Client AX – the sum of £294.25
- (c) Client AY – the sum of £136.99
- (d) Client AZ – the sum of £122.
- (e) Client BA – the sum of £251.48
- (f) Client BB – the sum of £44

- (g) Client BC – the sum of £44
- (h) Client AT – the sum of £205.59

6.18 The Respondent acted for a Miss BD in connection with a transfer of title of heritable property. An examination of the file revealed that the clients parents were giving her £20,000 to reduce her mortgage. The funds were received by the Respondent and initially held by him as uninvested and thereafter uplifted and then paid to his client. The file was silent as to why this transaction was carried out.

6.19 Inspection of 9th November 2005

Following the earlier inspections carried out by the Complainers which identified a number of serious concerns, in pursuit of their statutory duties, the Complainers carried out a further inspection of the financial records and documentation operated by the Respondent. On 9th November 2005 an inspection was carried out which revealed to the Complainers further breaches of the Solicitors (Scotland) Accounts Etc Rules 2001 and further concerns regarding the manner in which the Respondent finalised conveyancing transactions. In particular the following matters were identified:-

- (a) A serious shortage on the client account had been drawn to the Complainers attention by a third party about a week after it arose. On 20th October 2005 a client of the Respondent had been paid free proceeds of some £60,000 in excess of that which was due to or held for them. Following this information the Complainers considered the appointment of a Judicial Factor. This was averted when the client repaid certain of the monies to the Respondent with the balance being paid by the Respondent on 31st October 2005 to reinstate the surplus.

- (b) The Respondent acted on behalf of a Mrs V in connection with the sale of Property 4 and purchase of Property 5. The manner in which the Respondent dealt with this transaction was raised by the Complainers following an earlier inspection. The concerns of the Complainers was brought to the attention of the Respondent. A reply was received presenting a version of events which the Respondent could not substantiate by reference to his files. This was further evidence of a failure on the part of the Respondent to properly attend to his client's affairs displaying delay, neglect and misleading of clients on the part of the Respondent. The Respondent acted in connection with the purchase of Property 5. Three Discharges of securities were required from the sellers for whom the Respondent also acted. An examination of the file operated by the Respondent revealed that these Discharges had not yet been obtained let alone recorded. This was raised previously with the Respondent in relation to both the purchase and the sale transactions, individually, and he had failed to take any action in connection with the matters raised.
- (c) The Respondent acted for a Miss Y in connection with the purchase of Property 6 from Mr and Mrs BE, for whom the Respondent also acted in relation to the sale. This is a transaction which came to the attention of the Complainers as a result of earlier inspections. There was a failure on the part of the Respondent to properly press the Building Society to deliver to him the Land and Charge Certificate to allow the process of registration to be completed. A search of the Land Register as at the date of the inspection showed the property still recorded under the names of the seller with two securities recorded against that title. The

application record bore no entry for this property. This suggests that the Disposition and Standard Security presented on behalf of the client Miss Y had either been withdrawn or cancelled.

- (d) The Respondent acted for a Mr and Mrs BE in connection with the sale of Property 6 to Miss Y. This again was a matter which arose from earlier inspections. Despite it being brought to the attention of the Respondent that it would be necessary to obtain a Discharge of the Igroup Loan and despite the financial records apparently disclosing that the principal sum had been paid, the Discharge had not been obtained by the Respondent.
- (e) The Respondent acted for a Mr A in connection with his purchase of subjects at Property 7. Mr BF changed his name to Mr BG. Despite the need for a Disposition to be presented for recording in favour of his client being brought to the attention of the Respondent, he failed to do so. The initial delay arose partially because the client was changing his name to Mr BF. The Respondent forwarded to the seller's solicitors a fresh Disposition for execution but had failed to press them for its delivery. The inspection revealed that a new Disposition in the name of Mr BF had never been obtained. The client had no recorded title to the property. The client had subsequently died without a recorded title to the property.
- (f) The Respondent acted on behalf of a Mr and Mrs I in connection with the sale of a heritable property. This was a matter which arose as a result of an earlier inspection. The concern of the Complainers related to the Discharge of a Standard Security and the Discharge of an Inhibition. The Respondent produced a Form 4 which was not receipted. The file was reviewed and a

received Form 4 was found on the file dated 12th July 2005, some seven months after settlement and three months after it was raised at the original inspection. The Form 4 did not contain complete and full information. On the same date that the Discharge was sent for recording there is a copy of a letter to Scott & Company Sheriff Officers asking for a Discharge of the Inhibition and complaining that it had not been received. There is no other entry on the file operated by the Respondent to suggest that the Inhibition has been discharged and at the date of inspection the Register of Inhibitions did not record a discharge.

6.20 Repeated Breaches of Accounts Rules

The Respondent commenced practice on his own account on 8th November 2004. Since the date of him commencing in practice the Complainers required to carry out a number of examinations of his financial records and books because of his repeated breaches of the Accounts Rules and the serious concerns held by the Complainers regarding the manner in which he failed to properly finalise conveyancing transactions. The Complainers following each inspection wrote to the Respondent in great detail explaining to him their concerns and offering a solution and advice to the Respondent. This encouragement to maintain proper books and records and to have in place a system to allow for the proper management of the conveyancing practice was not sufficiently heeded by the Respondent as evidenced by his further failures to abide by the Accounts Rules and further conveyancing difficulties as the inspections occurred. The Respondent displayed a repeated ignorance and lack of understanding of his obligations in terms of the Accounts Rules and as a solicitor acting in conveyancing transactions throughout each of the inspections to which he was subject.

7. Having heard submissions from the parties, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

- 7.1 his breach of Rules 8, 9, 10, 11, and 24 of the Solicitors (Scotland) Accounts etc Rules 2001
- 7.2 his repeatedly acting in breach of the Accounts Rules despite his shortcomings in this respect being brought to his attention
- 7.3 his unreasonable delay in recording or having registered titles in favour of his clients who thereby remained uninfected, his failure to record or have registered standard securities in favour of lending institutions over properties which meant that the lenders remained unsecured for long periods of time and his unreasonable delay in having discharges recorded.

8. Having heard the Solicitor for the Respondent and a witness on behalf of the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 29 June 2006. The Tribunal having considered the Complaint dated 17 March 2006 at the instance of the Council of the Law Society of Scotland against Nigel Stephen Kenny of Kenny & Associates, Solicitors, 22 Castle Street, Dumfries; Find the Respondent guilty of Professional Misconduct in respect of his breach of Rules 8, 9, 10, 11 and 24 of the Solicitors (Scotland) Accounts etc Rules 2001, his repeatedly acting in breach of the Accounts Rules despite his shortcomings being brought to his attention and his unreasonable delay in recording and registering dispositions and standard securities and discharges; Censure the Respondent; Fine the Respondent £2000 to be forfeit to Her Majesty and Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that any practising certificate held or to be issued to the Respondent shall be subject to such restriction as will limit him to acting as a qualified assistant to and to being supervised by such employer or successive employers as may be approved by the Council of the Law Society of Scotland or the Practising Certificate

Committee of the Council of the Law Society of Scotland and that for an aggregate period of at least seven years; Find the Respondent liable in the expenses of the Complainers and in the expenses of the Tribunal as the same may be taxed by the auditor of the Court of Session on a solicitor and client indemnity basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £11.85; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

David Coull

Chairman

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

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

An amended Complaint was lodged with the Tribunal on 1 June 2006 and a Joint Minute was lodged admitting the facts, averments of duty and averments of professional misconduct in the amended Complaint. The matter was then adjourned for mitigation until 29 June 2006.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid stated that the Respondent had been in the profession for 16 years. The problems arose from the April 2005 inspection in connection with the Accounts Rules and conveyancing. There were 17 transactions which had settled but the documents had not been sent to the Land Register. These involved dispositions, standard securities and discharges. The Respondent also had a debit balance on his client account of £109,172.10 for one day. Mr Reid explained that the Respondent had taken some files from Seagrave & Company which were a cause of concern to the Law Society. In one case deeds were unrecorded for a period of 20 months. The matter was brought to the Respondent's attention but he still did not resolve it. The Respondent also failed to comply with the Accounts Rules and while the individual breaches themselves were not particularly serious taken together with the rest it showed mis-management by the Respondent. There was another inspection in July 2005 which showed that the Respondent had failed to recognise the deficiencies in his practice or heed the warnings from the Law Society inspectors. The Respondent had a deficit on his client account of £13,000 from 29 April 2005 till 5 August 2005. There was another inspection in August 2005 where more files were examined and 18 gave cause for concern. The Respondent had not been finalising conveyancing transactions. More breaches of Accounts Rules were also identified. There was another inspection in November 2005 and the Law Society was concerned that the matters identified earlier had still not been sorted out. The Respondent's conveyancing practice was chaotic and caused the Law Society concern. Over the period of 14 months when the Respondent was in practice on his own he had four inspections by the Law Society and there were 51 conveyancing transactions which were a cause for concern. Mr Reid thanked the Respondent and his agent for their co-

operation from an early stage in the Complaint. Mr Reid indicated that he understood that matters were now resolved and there had been no financial loss to any client.

SUBMISSIONS FOR THE RESPONDENT

Mr McCann emphasised that there was significant disorder with the Respondent's practice but there was no dishonesty. There had been no claim on the Guarantee Fund and no client had lost out. Mr McCann referred the Tribunal to the numerous references lodged on behalf of the Respondent indicating that the Respondent was competent, hard working, honest and trustworthy. The Respondent's difficulty was that he did not have management capabilities. The Respondent had realised this and accepted advice to wind up his practice. Mr McCann emphasised that none of the Respondent's clients had suffered and in a number of instances the damage had fallen on the Respondent. Mr McCann explained that in connection with the deficit of £109,172.10, this occurred because the Respondent sent a cheque for settlement the next day expecting loan funds also to come in the next day but the cashier posted matters the wrong way round. In connection with the shortfall of £13,000 the Respondent had advanced this money to his client thinking that the borrowing funds would be available but as the new lender instructed another firm of solicitors this was outwith the Respondent's control. Mr McCann explained that in connection with Article 5.1(a) the client's house was sold and the Respondent redeemed their loan but did not include this on the statement and accordingly overpaid his client by £60,000. His client repaid it less £10,000 which was retained due to a dispute with him with regard to another matter.

Mr McCann stated that the Respondent had been in an unfortunate position at Seagrave's and the problem files had come with him. He had been successful and had obtained a lot of new business which resulted in him struggling to keep up from the very start. Mr McCann then led the evidence of a witness in mitigation, Hilary Grieve, who was Vice Dean of the local faculty in Dumfriesshire. Mrs Grieve indicated that she had known the Respondent for many years and he was competent and hard working but was not good at management. Mrs Grieve stated that the Respondent was completely honest. She explained that when he first started his own business he had baggage from his former firm, Seagrave and Company. Things

weren't too bad to start with, however over the year members of the faculty became concerned with regard to his ability to focus and he appeared to be to fire fighting. The Respondent also had difficulties retaining good staff. Mrs Grieve indicated that she tried to get him to see that continuing with his practice was not an option. The Respondent gave up his practice on 6 January 2006. When he obtained his job with DGHP they were advised with regard to this matter and were told that the Respondent needed to work in a supervised environment. Mrs Grieve explained that a consortium of local firms worked with the Respondent and the Law Society to resolve the situation. The Respondent handed over the keys to his office and matters were sorted out. The local consortium undertook this because of the high regard they had for the Respondent.

Mr McCann asked the Tribunal to allow the Respondent to continue to work as a solicitor provided that he was supervised.

DECISION

The Tribunal was concerned by the number of breaches of the Accounts Rules and delay in recording of deeds over a period of time. It is imperative that solicitors deal with conveyancing in a proper manner to ensure that the interests of clients and lenders are safeguarded. It is also essential that solicitors should have regard to the obligations expected of them in terms of the Accounts Rules. The Respondent was clearly not coping with running his own practice. The Tribunal however took account of the references lodged and the obvious support for the Respondent from the local faculty. The Tribunal also took account of the fact that the Respondent had voluntarily given up his practice and had realised that he was unable to continue. The Tribunal also noted that no client had suffered loss as a result of the Respondent's actions. The Tribunal commends the action of the local faculty in helping to resolve matters. It was clear that the Respondent required to work under supervision and the Tribunal felt that it was necessary to restrict his practising certificate in order to ensure protection of the public. The Tribunal Ordered a Restriction for an aggregate period of seven years to ensure that the Respondent works under supervision for a seven year period prior to being able to apply again for a full practising certificate. Given the number of breaches of the Accounts Rules and delay in recording deeds the

Tribunal also imposed a Fine of £2,000. The Tribunal made the usual order with regard to publicity and expenses.

Chairman