

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

F I N D I N G S

in Complaint

by

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

against

**WILLIAM MICHAEL LEWIS,
Solicitor, 1 Hope Park Terrace,
Edinburgh**

1. A Complaint dated 10th August 2006 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, William Michael Lewis, Solicitor, 1 Hope Park Terrace, Edinburgh (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 this Complaint (06/36) as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
3. Another Complaint dated 10th August 2006 was lodged with the Scottish Solicitors' Discipline Tribunal by the Complainers requesting that 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.

4. The Tribunal caused a copy of this Complaint (06/37) as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
5. In terms of its Rules the Tribunal appointed both Complaints to be heard on 4th October 2006 and notice thereof was duly served on the Respondent.
6. When the Complaints called on 4th October 2006, the Complainers were represented by their Fiscal, Walter Muir, Solicitor, Ayr. The Respondent was present and represented by his solicitor, David Clapham, Glasgow.
7. A Joint Minute was lodged in respect Complaint 06/37. On the motion of the Fiscal both Complaints were adjourned to allow investigation into the Complaint where no Joint Minute had been lodged until 16th November 2006.
8. The Complaints called again on 16th November 2006. The Complainers were represented by their Fiscal, Walter Muir, Solicitor, Ayr. The Respondent was present and represented by his solicitor, David Clapham, Glasgow.
9. A Joint Minute was lodged in respect of certain aspects of the Complaint 06/36. Certain aspects of the Complaint were withdrawn by the Fiscal. The Tribunal heard submissions with regard to the remaining averments in the Complaint. All the facts in both Complaints as amended were agreed.
10. On the basis of this the Tribunal found the following facts established
 - 10.1 The Respondent is a Solicitor enrolled in the Registers of Solicitors in Scotland. He was born on 7th November 1957. He was admitted as a Solicitor on 31st March 1982 and enrolled as a solicitor on 22nd April 1982. He is at

present the sole principal of the firm of Gilmore Lewis which firm has a place of business at 1 Hope Park Terrace, Edinburgh.

10.2 **The Law Society of Scotland**

By letter dated 14th September 2005 Ms A wrote to the Complainers intimating a complaint against the Respondent. The Complainers subsequently identified seven issues where the Respondent had, on the face of it, rendered an inadequate professional service to Ms A in connection with work associated with the purchase of heritable property which she had instructed him to carry out on her behalf. By letter dated 14th October 2005 the Complainers wrote to the Respondent intimating to him the grounds of complaint and inviting his written response within 21 days from that date. The Respondent did not provide this written response. Accordingly and by letter dated 29th November 2005 the Complainers wrote to the Respondent giving him notice in terms of Section 15(2)(i)(i) of the Solicitors (Scotland) Act 1980 seeking his response and also an explanation for his failure to respond within 14 days from that date. The Respondent did not reply to this letter. Accordingly and by letter dated 14th December 2005 the Complainers wrote to the Respondent again giving him notice in terms of Section 15(2)(i)(i) aforesaid. The Respondent did not reply to this letter either.

10.3 **Complaint by Golds, Solicitors, Glasgow on behalf of Bank of Scotland**

Sometime in or about late 2002 the Respondent acted for Mr B in connection with the purchase of subjects known as Property 1. The purchase price of these subjects was £90,000. The transaction settled sometime on or about

19th December 2002. Mr B granted a Standard Security in favour of Bank of Scotland (hereinafter referred to as “the bank”) over these subjects. This Standard Security was registered in the Land Register of Scotland on 23rd January 2003. Sometime in or about the middle of 2003 the Respondent acted for Mr B in connection with the sale of these subjects to Ms C. The sale price was £250,000. The transaction settled sometime on or about 14th July 2003. Following settlement the Respondent remitted to the bank the sum of £45,987.14. This payment was made on or about 16th July 2003. The amount due to redeem the loan secured under this Standard Security was £61,707.58 as at 11th July 2003. There was therefore a sufficiency of funds following settlement of the price out of which the Respondent could have fully redeemed the amount due to the bank in respect of this loan at settlement. After the bank had corresponded extensively with Mr B in relation to the shortfall in the redemption funds in respect of which they sought payment and which Mr B did not in the event pay they instructed Golds to act on their behalf in connection with enforcement of their Standard Security which was still extant and, if necessary, repossession proceedings. On 12th, 26th and 31st August 2005 Golds wrote to the Respondent requesting the title deeds of these subjects as well as an explanation from him on why he did not obtain the bank’s consent to the sale to Ms C and the reason for partial redemption of the loan. He did not reply to this correspondence. On 4th October 2005 Golds wrote to the Respondent intimating a claim on behalf of the bank and requesting him to confirm by return that he had forwarded it to his professional indemnity insurers. The Respondent did not reply to this letter either. He had, moreover, failed to promptly return telephone calls which the bank had made to him on 23rd

December 2003 and 31st March, 8th, 13th and 22nd April and 4th May 2005.

10.4 **Complaint by Golds, Solicitors, Glasgow on behalf of Birmingham Midshires**

Sometime in or about October 2004 the Respondent acted for Ms D in connection with the purchase of subjects known as Property 2. The Respondent accepted instructions from Birmingham Midshires to act on their behalf in the constitution of a Standard Security over these subjects. The loan was £94,000. It was an express and essential condition of these instructions that the Respondent was to ensure that Birmingham Midshires were to hold the first charge over these subjects. A Standard Security by Ms D in favour of Birmingham Midshires was registered in the Land Register of Scotland on 15th November 2004. Sometime in or about July 2005 Birmingham Midshires instructed Golds in connection with repossession proceedings relative to these subjects. Golds then discovered that Birmingham Midshires did not hold a first charge over them and that they were still secured to iGroup Loans Limited under a prior ranking charge. At no time did the Respondent advise Birmingham Midshires that they did not have a first charge after he had intromitted with the loan funds at the settlement stage. He failed to register a Discharge of the iGroup Loans' Standard Security. The Respondent was unaware that the client had granted a second Standard Security in favour of iGroup Loans and, unfortunately, the Respondent's firm neglected to obtain the necessary Land Register report which would have disclosed the existence of the relevant Standard Security. Consequently, a situation emerged where the Respondent had neither obtained nor registered a Discharge of the

iGroup Loan Standard Security, of which the Respondent had been unaware and Birmingham Midshires thus became holders of a Standard Security ranking after that which had been granted in favour of iGroup Loans. The failure to obtain the necessary Land Register report was an unintentional oversight. On 25th July 2005 Golds wrote to the Respondent seeking his explanation for his failure to ensure that Birmingham Midshires' Standard Security was registered as the first charge and also information about the title deeds. The Respondent did not reply to this letter. Golds wrote to him again on 15th August 2005 seeking a response to their earlier letter. The Respondent did not reply to this letter either. Finally, on 29th August 2005 Golds wrote to the Respondent saying that in the absence of a satisfactory response from him to these letters within 48 hours they would advise their clients of this failure and the possible consequences thereof. The Respondent did not reply to this letter either.

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

11.1 His failure to reply to the reasonable requests of the Law Society for information in consequence of which the Law Society were seriously inconvenienced in their investigation of the complaint made to them by Ms A.

11.2 His persistent failure to respond to the reasonable enquiries and requests made of him by fellow agents and by his client, the Bank of Scotland.

Make no finding of professional misconduct in respect of his failure to implement an instruction from his client Birmingham

Midshires to ensure that their standard security was registered as the first ranking charge over heritable property.

12. Having heard the Solicitor for the Respondent in mitigation and having noted a finding of professional misconduct against the Respondent made by the Tribunal on 27th September 2006, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 16th November 2006. The Tribunal having considered the two Complaints dated 10th August 2006 at the instance of the Council of the Law Society of Scotland against William Michael Lewis, Solicitor, 1 Hope Park Terrace, Edinburgh; Find the Respondent guilty of Professional Misconduct in respect of his failure to reply to the reasonable requests of the Law Society for information and his persistent failure to respond to the reasonable enquiries made of him by fellow agents and the Bank of Scotland; Censure the Respondent and Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that for a period of three years with effect from 1 September 2007 any practising certificate held or issued to the Respondent shall be subject to such Restriction as will limit him to acting as a qualified assistant to such employer as may be approved by the Council or the Practising Certificate Committee of the Council of the Law Society of Scotland; 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 but excluding the expenses of attendance at the hearing on 16th November 2006 in respect of which there shall be a finding of no expenses due to or by either party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

Alistair Cockburn

Chairman

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

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

There were two Complaints before the Tribunal, both dated 10th August 2006. The Complaint relating to the failure to respond to correspondence from the Law Society is referred to as Complaint 06/37 and the Complaint relating to Golds and the Bank of Scotland is referred to as Complaint 06/36. The Complaints first called on 4th October 2006 when a Joint Minute was lodged in respect of Complaint 06/37. In respect of Complaint 06/36, the Fiscal asked that this be adjourned to allow the Law Society to investigate matters in relation to the issues in Article 2.1 and 5.2 of the Complaint. Both Complaints were accordingly adjourned until 16th November 2006. On 16th November the Fiscal indicated that the Law Society was to withdraw the averment of professional misconduct in Article 5.2 from Complaint 06/36. A Joint Minute was lodged admitting all the facts in Complaint 06/36 and also the averments of professional misconduct in Article 5.5. The Tribunal heard submissions with regard to whether or not Articles 5.3 and 5.4 were sufficient to amount to professional misconduct. Mr Muir clarified that as far as the averments of professional misconduct in Article 5.4 and the facts contained in Article 3.0 of Complaint 06/36, the Answers lodged by the Respondent in respect of Article 3.1 were admitted by the Law Society.

SUBMISSIONS FOR THE COMPLAINERS

Mr Muir explained that when the property was bought by Ms D with a loan from the Abbey Building Society and the Respondent was instructed in connection with a re-mortgage. The Respondent accepted instructions from Birmingham Midshires to act in connection with the re-mortgage and carried out the security work. He did not obtain a Form 12 Report before he intromitted with the loan funds. If he had done so he would have discovered that Ms D had a further loan from iGroup Loans who had a security postponed to the Abbey Security. When the Abbey Security was discharged the iGroup Loans became a first ranking security. This only came to light when Ms D defaulted on the Birmingham Midshires mortgage and Golds commenced repossession proceedings on behalf of Birmingham Midshires. Mr Muir indicated that it was agreed between the Law Society and the Respondent that the Respondent made a mistake by not obtaining the Form 12 Report but that this was an

unintentional oversight. Mr Muir however indicated that his submission was that the mistake was so grave that it did amount to professional misconduct. Mr Muir referred to the obiter comments by the court in the case of Law Society-v-Richard Douglas Shepherd 2005 CSI H77 and submitted that in this case the gravity of the failure to obtain a Form 12 Report meant that the mistake could be categorised as professional misconduct. Mr Muir referred to three factors in support of his argument. Firstly he indicated that a Form 12 Report is a critical document in the context of a conveyancing transaction because it was the means by which the solicitor acting for a purchaser and lender can know if the title is encumbered by any security or if the seller or borrower is encumbered. The second factor was that when you looked at the Complaint this was not a one-off mistake and it was clear that the Respondent was prone to making mistakes. Although the Law Society was not arguing that the failure to redeem the loan as set out in Article 2.1 of Complaint 06/36 was sufficient for professional misconduct it was an example of another mistake made by the Respondent. The third factor was the gravity of the consequence of the mistake. The Respondent's mistake meant that Birmingham Midshires did not get a first charge and it resulted in a claim for negligence and a claim on the master policy. Although Birmingham Midshires did not incur any loss the master policy had to pay out. This would affect the profession in general. Mr Muir advised that as at the end of June the costs of paying off the iGroup Loan was approximately £18,884. Mr Muir submitted that these factors taken together meant that the Respondent's mistake was a grave departure from the standards expected of a solicitor. In connection with Article 5.5 Mr Muir submitted that this was a clear deplorable and long standing failure by the Respondent to reply to the bank and solicitors acting on behalf of Birmingham Midshires.

SUBMISSIONS FOR THE RESPONDENT

Mr Clapham submitted that applying the Sharp Test, the Respondent's conduct could not amount to professional misconduct when the degree of culpability was considered. Mr Clapham submitted that mistakes could be made in many areas of practice and human errors did occur. Some mistakes were more forgivable than others. Mr Clapham stated that the making of a mistake which was negligent did not necessarily amount to serious and reprehensible behaviour. Mr Clapham pointed out there was

only one failure to obtain a Form 12 Report. Mr Clapham also submitted that a Form 12 Report was not the only critical document in a conveyancing transaction. A mistake in a disposition or failing to get a property enquiry report could also have severe consequences. In connection with the facts in Article 2.1, the Law Society were not seeking to state that this was professional misconduct and Mr Clapham's position was that it could not accordingly be used to portray the Form 12 Report failure as more serious. Mr Clapham pointed out that the person who suffered most as a result of the mistake was in fact the Respondent as his master policy premiums were increased. In connection with the Shepherd case, Mr Clapham pointed out that in this case the Tribunal made no finding of misconduct where a solicitor failed to report accurately to the lenders. The mistake was inadvertent. Mr Clapham also indicated that a Form 12 Report was an easy matter to overlook. In a sale and purchase transaction there were two solicitors involved as a double check but in a re-mortgage there would only be one solicitor.

Mr Muir indicated that the Shepherd case was relevant because the Court stated that it was possible to have an act which was in error and unintentional which could amount to professional misconduct but it depended on the gravity of the failures. Mr Muir said that in the Shepherd case there was no evidence of any prejudice to the lenders as a result of the solicitor's failure to accurately report. In this case there was prejudice to the lender with financial consequences. Mr Clapham stated that any prejudice would eventually only be to the Respondent and asked the Tribunal to bear in mind that they had to be satisfied beyond reasonable doubt. In response to a question from the Chairman as whether an act resulting in a loss of £15,000 was more serious than the same act resulting in a loss of £150,000, Mr Muir stated that the Tribunal must confine itself to this particular case.

DECISION

The Tribunal considered that the consequences of the act are separate from whether or not the act or failure was so serious or reprehensible that it could amount to professional misconduct. Although the Tribunal would always take account of the potential consequences of any act or omission, solicitors are in control of their conduct but are not necessarily in control of the consequences of their actions. For

example, a solicitor's actions could result in a person committing suicide but this would not be something which a solicitor could foresee. In this case there was a one-off mistake caused by an unintentional oversight. The Tribunal noted the obiter comments in the Shepherd case but considered that in circumstances where it was accepted that the singular omission in discharge of instructions of the client causing the prejudice to others was an unintentional oversight, the Tribunal could not characterise that act as serious and reprehensible so as to meet the Sharp Test. To do otherwise would be to raise the duty on a solicitor in the discharge of his client's instructions from one of taking reasonable care to one of insurance. The Tribunal accordingly made no finding of professional misconduct in respect of Article 5.4 of the 06/36 Complaint. The result of this is that Article 5.3 falls as well and there is no professional misconduct found in respect of this. The Tribunal however found the Respondent guilty of professional misconduct in respect of Article 5.5 of the 06/36 Complaint and also in respect of the 06/37 Complaint.

Mr Muir asked for expenses. He indicated that the Law Society had been successful in respect of one Complaint and partially successful in respect of the other. In respect of Complaint 06/36 he indicated that he gave notice to the Respondent that he was to withdraw Article 5.2 a few weeks ago. Mr Muir referred the Tribunal to Baxingdale-Walker-v-The Law Society[2006] EWHC643 where the High Court had indicated that where a regulator brings a complaint in good faith in the public interest, the regulator should not be penalised in expenses.

Mr Clapham indicated that he was not asking for expenses but pointed out that both the Complaints were before the Tribunal in October and were adjourned because the Law Society wished to investigate one of them. In October the Respondent accepted professional misconduct in respect of Article 5.5 of Complaint 06/36 and this was the only one for which the Respondent had eventually been found guilty of professional misconduct.

Mr Muir lodged findings against the Respondent by the Tribunal dated 27th September 2006. These findings had not yet become final as the time limit for appeal had not expired but both the Respondent and the Law Society indicated that they were not to appeal the findings.

MITIGATION

Mr Clapham indicated that his client accepted his failures to respond to the Law Society in respect of Ms A. Mr Clapham explained that there was a finding of inadequate professional service and compensation order made and the Respondent had paid this. The Respondent had co-operated with the Law Society and lodged a Joint Minute in respect of the Complaint. The Respondent also accepted his failures to respond to the bank and fellow agents in respect of Complaint 06/36. In connection with the findings made by the Tribunal on 27th September 2006, Mr Clapham indicated that the issues in the Complaint before the Tribunal at that time were more substantial. Mr Clapham referred the Tribunal to the psychiatric report and advised that the Respondent's illness had caused the problems and that he became overwhelmed and under par. Mr Clapham advised the Tribunal of the Respondent's personal circumstances. Mr Clapham submitted that the findings made on 27th September 2006 were not really previous findings as the Complaints being dealt with today were initiated in August and the findings were not issued until September. Mr Clapham asked the Tribunal to dispose of matters in such a way that the Respondent could continue in practice. In response to a question from the Chairman as to what was different in the Respondent's firm today from when the problems occurred, Mr Clapham advised that the Respondent had a part-time assistant to help with conveyancing and a full-time court assistant since September 2005.

PENALTY

The Tribunal was extremely concerned by the Respondent's overall conduct as set out in these two Complaints and in the findings of 27th September 2006. The Tribunal noted from the previous findings and Complaints today that the Respondent failed to respond over a very long period of time was still failing to respond to Golds as late as 29th August 2005. The Tribunal was also concerned to note that the psychiatric report on the Respondent detailed a failure to attend an appointment in May 2005 and also indicated that the Respondent was not yet completely back to normal. The report indicated that the Respondent was keen to do all that he could to reduce the possibility

of reoccurrence. However, despite the Tribunal Chairman advising the Respondent on 27th September 2006 that he should employ extra staff, it was clear from what the Respondent advised the Tribunal today that he had not done anything about this. The Tribunal were accordingly not persuaded that the Respondent was attempting to deal with his difficulties and make the necessary changes in his firm. Given this the Tribunal could not be satisfied that the Respondent would not re-offend. The Tribunal also noted that the Tribunal that dealt with the matters on 27th September 2006 narrowly stopped short of restricting the Respondent's practising certificate and the Tribunal consider that if these other matters had been before the Tribunal in September it is likely that the Respondent's practising certificate would have been restricted. In all the circumstances in order to protect the public the Tribunal considered that a Restriction on the Respondent's practising certificate was necessary. The Tribunal Ordered this to run from 1 April 2007 to allow the Respondent time to dispose of his business.

In connection with the expenses the Tribunal considered that the Respondent had no-one to blame but himself for having been brought before the Tribunal and accordingly, although some of the averments had not been proved, the Tribunal made an award of expenses against the Respondent. However given that the adjournment of the October hearing was for the Fiscal to investigate averments which the Respondent has not been found guilty of, the Tribunal considered it appropriate to exclude the expenses in respect of the attendance at the hearing on 16th November. The expenses of the investigation which were necessarily made by the Fiscal between the two hearings however are awarded against the Respondent. The Tribunal made the usual order with regard to publicity.

Chairman