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

JOHN ATUAHENE, Solicitor, formerly at 72 Hawkshead Road, Paisley and now at 16 Glentool Gardens, Moodiesburn, Glasgow

1. A Complaint dated 5th June 2006 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, John Atuahene, Solicitor, 72 Hawkshead Road, Paisley (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. Answers were lodged for the Respondent.

3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 12th September 2006 and notice thereof was duly served on the Respondent.

4. The hearing took place on 12th September 2006. The Complainers were represented by their Fiscal, Valerie Johnston, Solicitor, Dunfermline. The Respondent was present and represented himself.

5. A Minute of Amendment lodged by the Respondent was allowed and the Respondent was allowed to lodge a Third Inventory of Productions late. A Joint Minute of Admissions was lodged. The Complainers then led the evidence of two witnesses.

6. Due to lack of time the matter was adjourned to 13th November 2006. When the Complaint called for hearing on 13th November 2006, the Complainers were present and represented by their Fiscal, Valerie Johnston, Solicitor, Dunfermline. The Respondent was present and represented himself.

7. The Respondent gave evidence on his own behalf.

8. The Tribunal found the following facts established

8.1 The Respondent is a Solicitor enrolled in the Register of Solicitors for Scotland. He was born on 18th February 1957. He was admitted on 31st May 1988 and enrolled on 14th June 1988. He formerly worked for Cumnock & Doon Valley District Council between 3rd April 1989 and 14th February 1995. He then became a Partner in the firm of Atuahene, Sim, & Company, 536 Cathcart Road, Govanhill, Glasgow on 1st June 1995. On 8th November 2002, he acquired the practice of Murray & Co, Solicitors, 34 Argyle Arcade, Glasgow, and changed the name of the firm to Atuahene, Sim, Murray & Co on or about 1st December 2002.

8.2 He entered into an agreement to amalgamate his practice with that of Richard Thorburn, Solicitor, and create the firm of the Practical Law Partnership with effect from 1st November 2003. In August 2003, a judicial factor *ad interim* was appointed to the Respondent and was discharged on 5th November 2003. During this time, the Respondent continued to trade under the name of his previous firm effectively constituting the practice

of The Practical Law Partnership on 1st May 2004. He was then sequestrated by interlocutor dated 23rd August 2004 and ceased to practice as a Solicitor. From 5th July 2004 when the petition for sequestration was served on him and being the effective date of sequestration, the Respondent was unable to work due to ill health.

8.3 Mr A and Lender 1

On 12th December 2003, the Respondent while in the firm of Atuahene Sim Murray, Solicitors, made an offer on behalf of Mr A to purchase Property 1 at a price of £107,000. A qualified acceptance was received dated 19th December 2003 and the bargain concluded by correspondence dated 12th and 16th January 2004. Messrs Harper McLeod, Solicitors, wrote to the Respondent on 23rd and 29th January and 4th February, requesting the disposition for signature by their client and advising that their client was looking for penalty interest due to the failure to settle on the due date namely 29th January.

8.4 On 9th February, Messrs Robert Thomas & Caplan, Solicitors, wrote to the Respondent confirming that they were now in a position to provide a loan of £40,000 from their client Mr B to Mr A to assist in the purchase of the property and that a first charge was required over the property. They enclosed a draft Bond and Security for revisal and return. On 11th February 2004 Mr A signed only a personal bond for the loan of £40,000 from Mr B to be repaid on 10th February 2005. Settlement of the purchase took place on 13th February 2004 with the balance of the purchase price provided by way of bank draft. Messrs Harper Macleod held the cheque as undelivered pending resolution of the interest issue. They then wrote on 16th February confirming that they had instructions to settle and in exchange for the cheque enclosed the signed Disposition in favour of Mr A *inter alia.*

8.5 On 3rd March 2004, Lender 1 made an offer of a mortgage to Mr A in the sum of £85,600 in respect of the purchase of Property 1. Loan instructions were sent to the Respondent and he was instructed to act on behalf of the lenders. He replied to the lenders on 14th April with a Certificate of Title, a copy of the duly signed Standard Security and identification papers. The letter gave the date of settlement as 19th April although a manuscript amendment to the draft document from Lender 1 showed a completion date as 13th May. A revised offer was made by them on 7th May addressed to The Practical Law Partnership which had then taken over the work of Atuahene Sim Murray, Solicitors. They were also appointed to act on behalf of the lenders and the Respondent continued to deal with the transaction himself. He had written on 26th April from Atuahene Sim Murray, referred to as a division of the Practical Law Partnership, to the Select Partnership of Chester in England the Mortgage Specialists arranging the loan advising that the current registered owner of the property was Mr C and that "There is presently an undelivered duly executed disposition in favour of Mr A. This would be delivered to us upon settlement of the transaction." He advised that the completion date was the 29th April 2004. He also submitted a report on Title and confirmation that the conditions of the loan were being met. He well knew that settlement had taken place in February, that he held a duly executed disposition in favour of his client.

8.6 On 8th June, following correspondence with Select Partnership, the Respondent wrote to Harper McLeod advising that the lender had concerns that the house had been valued at £120,000 but had been sold as a private transaction at £107,000 and wanted confirmation that Mr C, who had 4 Judgements against him, was not either bankrupt or sequestrated. Harper McLeod

confirmed that at the time of the sale, there were no sequestration proceedings against their client. Further correspondence followed between the Respondent and Select Partnership with the final letter addressed from The Practical Law Partnership dated 17th June stating that "4 or 5 completion dates have already been set without you being in a position to release the funds. As required by you, the proposed completion date is 24th June 2004". He went on to state it was ridiculous to keep on setting dates and seeking confirmation of when they would release the funds. Loan funds were received for settlement on 24th June 2004.

8.7 A handwritten note of instruction from Mr A and annotated by the Respondent was placed on the file stating that he was giving £80,000 to Mr D to enable him to purchase a bungalow at Property 2 with the loan to be repaid from the sale of the property and the profits split equally. This was confirmed in a letter by the Respondent to Mr D's Solicitors, Messrs Lynch & Company. Payment to Messrs Lynch & Company by CHAPS was made by the Respondent from the mortgage monies received from Lender 1 for the purchase of Property 1. After legal and other fees, the balance was then remitted direct to Mr A. The Respondent had prepared a Standard Security on behalf of Lender 1 over the property at Property 1 to the value of £85,995 but did not register this.

8.8 The Complainers removed from the offices of The Practical Law Partnership, client files which included that relating to this transaction and on review, discovered that the Disposition in favour of Mr A and the Security in favour of Lender 1 were still within the file and unregistered as at 14th April 2005.

9. Having heard submissions from both parties, the Tribunal found the Respondent guilty of Professional Misconduct *in cumulo* in respect of:

9.1 His failure between 16th February 2004 and 5th July 2004 to record or register the title to the premises at Property 1 on behalf of his client Mr A whereby Mr A remained uninfeft as at 14th April 2005 when the documents were discovered.

9.2 Between 3rd March 2004 and 5th July 2004, in correspondence and the report on title, his misleading his clients Lender 1 by

9.2.1 advising them that there was an undelivered duly executed disposition by the current registered owner in favour of Mr A whereas the truth was that the duly executed disposition had been delivered on 16th February 2004

9.2.2 advising them that the loan funds in the sum of £85,600 were to be used for the purchase of that property whereas the truth was that the purchase price had already been paid and the loan funds were not being used for that purchase

9.3 Between 23rd June and 1st July 2004, his intromitting with loan funds received from his clients Lender 1 for the purchase by Mr A of the subjects at Property 1 and utilising those funds for the provision of a loan to a Mr D from Mr A to enable Mr D to purchase Property 2 all without the knowledge or authority of his clients Lender 1.

10. Having heard the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 13th November 2006. The Tribunal having considered the Complaint dated 5th June 2006 at the instance of the Council of the Law Society of Scotland against John Atuahene, Solicitor, 72

Hawkshead Road, Paisley; Find the Respondent guilty of Professional Misconduct *in cumulo* in respect of his failure, over a period of almost five months, to record or register his client's disposition whereby his client remained uninfeft, his misleading his clients Lender 1 in correspondence and in the report on title between 3rd March 2004 and 5th July 2004 by advising them that there was an undelivered duly executed disposition when in fact the executed disposition had been delivered and by advising them that loan funds were to be used for the purchase of the property whereas in truth the purchase price of the property had already been paid and the loan funds were not being used for that purpose and his intromitting between 23rd June and 1st July 2004 with loan funds received from his clients Lender 1 for the purchase by his client of the property and utilising those funds for the provision of a loan to another party in connection with another property, all without the knowledge or authority of Lender 1; Censure the Respondent 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 three years and thereafter until such time as he satisfies the Tribunal that he is fit to hold a full practising certificate; 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)**

Alistair Cockburn

Chairman

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

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

Evidence was led over two days. On the first day a Minute of Amendment and Third Inventory of Productions were allowed to be lodged late by the Respondent. A Joint Minute of Admissions was lodged in relation to some of the productions. On the first day of the hearing the Tribunal heard the evidence of two witnesses for the Complainers. On the second day the Tribunal heard evidence from the Respondent.

EVIDENCE FOR THE COMPLAINERS

The Complainers led the evidence of Catherine Russell, Depute Director of Interventions for the Law Society of Scotland. Ms Russell confirmed that she became involved with the insolvency of the Practical Law Partnership on 15 December 2004. Morna Grandison was appointed as Judicial Factor. Ms Russell stated that the Respondent had been sequestrated and accordingly did not have a practising certificate and that his partner, Mr Thorburn had also been sequestrated on the 8 October 2004 and accordingly the firm was not trading as at 15 December 2004. Ms Russell explained that when they attended the Practical Law Partnership offices on 15 December 2004 there was no-one there. Mr Thorburn then arrived and let them in. It was late in the afternoon and there was no power and it was accordingly dark. Ms Russell advised that the premises were in complete disorder with files randomly lying around the floor and on work surfaces and that 17 boxes of filing were ingathered. She confirmed that the Respondent's files were in slightly better order than Mr Thorburn's. Ms Russell explained that one of the files that was removed from the office was production 3 being the file relating to the Property 1 transaction. She advised that the file was not in chronological order because it had been left in the order that it was in when they retrieved it. There were a number of deeds that were not registered. The Law Society identified these and instructed new agents to take remedial action. McLure Naismith recorded the deeds in connection with the Property 1 transaction. Ms Russell confirmed that Lender 1 did obtain a security and did not suffer any financial loss and that Mr A did have his title registered. Ms Russell stated that when they were reviewing the files further concerns came to light. It became clear that the Respondent's client purchased the property with a loan from a

Mr B, he then obtained a loan from Lender 1. Correspondence in the file showed that the Respondent indicated to Lender 1 that the property was being purchased when in fact the property had already been purchased using money received as a loan from another person and Lender 1 were not told about this. She stated that there was correspondence on the file with regard to Mr B becoming the first secured creditor but there was no recorded security at that time. There was no record of a draft security. Mr B was represented by Robert Thomas & Caplan. Ms Russell referred to page 101 of Complainers production number 3 ("the file") being a letter addressed to the Respondent indicating 29 January 2004 as the date of entry but settlement did not occur on that date. Page 69 of the file indicated that the transaction would be settled without penalty interest and this letter suggested that the transaction settled on 16 February 2004. Ms Russell referred the Tribunal to page 158 of the file being Lender 1's special conditions which asked the solicitor to confirm that the owner was a Mr C, that the sale was a true transaction and that the balance of the purchase price was to come from the purchaser's own resources. Page 67 of the file is a letter from Practical Law Partnership dated 7 May 2004 to Select Partnership who were acting on behalf of Lender 1 and confirmed that Mr C would vacate the property on completion and indicated that the seller was threatening to pull out. Ms Russell stated that this letter did not make sense as it was clear that the transaction had already settled prior to this. The Respondent accordingly misled the lender. Ms Russell stated that although the disposition by Mr C a to the Respondent's client had not been recorded it had been delivered at settlement. Ms Russell also pointed out that the Respondent's letters to Lender 1 made no mention of Mr B's £40,000 loan to the Respondent's client. Ms Russell referred the Tribunal to page 94 of the file being a letter from Robert Thomas & Caplan indicating that they were enclosing a draft bond and security in connection with the loan from Mr B to the Respondent's client. Page 92 was a letter from the Respondent to Robert Thomas & Caplan delivering the personal bond although there was no mention of the security.

Ms Russell also referred the Tribunal to page 72 of the file being a statement in connection with the purchase which made it look as if the Respondent's client paid £109,500 when he had only actually paid £69,500. There was no mention in this statement of the £40,000 loan funds. Ms Russell also referred the Tribunal to correspondence from the Respondent to Select Partnership indicating that the loan

monies were needed for settlement. He did not tell Select Partnership that he already had a signed disposition. Ms Russell confirmed that the Respondent received loan funds of £85,750 from Lender 1, £80,000 of this was paid to Mr D in connection with the purchase of the Property 2. Ms Russell also advised that the personal bond in favour of Mr A by Mr D was sent for registration by the Respondent.

In cross examination Ms Russell confirmed that she had a lot of experience in conveyancing prior to going to work for the Law Society. Ms Russell accepted that the offer sheet in the file mentioned that there was a mortgage consultant. She also accepted that the Respondent had not received the mortgage papers at the time when he sent the qualified acceptance. Ms Russell also accepted that a bankers draft was received on the 11 February 2004 but she could not confirm that this came from the Respondent's client. She accepted that the £40,000 from Mr B plus the £69,500 bankers draft were used to settle the purchase price of £107,000. Ms Russell also accepted that the Respondent's client required to find money to pay for the property and that it was quite common to agree temporary bridging loans when loan funds were not available at the time of settlement. Ms Russell however stated that she would have expected to see a letter to Lender 1 explaining the situation to them. Ms Russell accepted that she did not see, within the file, any letter from the Respondent returning a draft or engrossed security in connection with the £40,000 loan. She also accepted that the personal bond within the papers was clearly signed in front of the Respondent as a witness. Ms Russell confirmed that £40,000 loan was paid to the Respondent but there was no evidence that this was done in exchange for a signed security document. Ms Russell stated that her position was that once loan funds were received these should be used to repay the bridging amount. In this case the money was not used to do this, it was used to provide a loan to a third party. Ms Russell stated that she did not agree that the Respondent's client was entitled to just keep the loan monies received from Lender 1. Ms Russell accepted that there was no loan documentation in the file in connection with the £69,500. She further accepted that the personal bond for £40,000 stipulated that the loan was to be repaid on 10 February 2005. Ms Russell also confirmed that she did see security documentation in respect of the loan from Lender 1. Ms Russell stated that her position was that Mr A received the funds from Lender 1 for a specific purpose and the Respondent should have told the lender what had happened to the funds. Ms Russell said that in her opinion the

loan funds from Lender 1 were not used to purchase Property 1. Ms Russell explained that her understanding of the position was that once documents were received by the Respondent at settlement he should then have paid the stamp duty, prepared forms 2 and 4 and submitted the disposition with the recording dues for registration. Ms Russell stated that the Respondent could have recorded the disposition and then recorded the standard security later once the loan funds had arrived. She however confirmed that she could not be unduly critical of the Respondent for waiting until the security documentation was ready to be recorded, provided the client was happy to so wait. She stated that the disposition was not in fact registered until October 2005. Ms Russell accepted that the Respondent's letter being page 67 of the file stated that the Respondent had not received a duly delivered disposition at that time. She however stated that the position as set out in this letter was incorrect. She further accepted that page 155 of the file was a letter dated 26 April 2004 from the Respondent indicating that the executed disposition was undelivered. She however indicated that this was also incorrect. In response to a question as to whether or not these two incorrect paragraphs would have had a detrimental effect on Lender 1, Ms Russell stated that lenders would require to get a security over the property and they could not do this if Mr A was not the registered owner. She indicated that the lenders required to know the correct position. Ms Russell accepted that page 158 of the file showed that the transaction was a genuine transaction. She indicated that she could not comment with regard to the Respondent's motive. Ms Russell also accepted that it was clear from pages 37 and 55 of the file that the Respondent had had phone calls with Select Partnership in connection with the loan from Lender 1. Ms Russell also accepted that page 143 of the file referred to a completion date of 3 May 2004, page 136 of the file referred to a completion date of 13 May 2004 and page 155 of the file referred to a completion date of 29 April 2004. Ms Russell accepted that page 51 of the file made it clear that the property had been purchased but she submitted that it would not have been clear to Select Partnership from this letter that the transaction had actually settled. She indicated that the letter in her opinion implied that there had been a concluded contract to purchase but that the price had not been paid and would not be until the loan funds were released and the transaction was completed. She however accepted that the only thing left to do in actual fact in this case was to receive the loan funds.

The Respondent went on to ask questions with regard to why recording dues were being held in the ledger for Mr A. The Chairman ruled that this line of questioning was not relevant.

Ms Russell stated that she did not know why there were files lying around on the floor. There were letters from solicitors and the Law Society, including mandates, and conveyancing and immigration letters all just lying around. Ms Russell explained that if letters were recent, the Law Society would respond to them and would file them in the file. She indicated that she had no knowledge with regard to the E files.

In re-examination Ms Russell stated that page 143 of the file showed that the certificate of title had been sent on 26 April 2004. Page 144 of the file showed that paperwork was ongoing prior to May 2004 in respect of the Lender 1 loan. Ms Russell also referred to page 110 of the file being a letter of 12 January 2004 to Mr A from the Respondent stating that it was noted that Mr A was to fund the transaction privately.

The Tribunal then heard evidence from Ian Ritchie, Case Manager with the Law Society. Mr Ritchie indicated that he had dealt with the complaint about the Respondent and had sent him correspondence in connection with Mr & Mrs E. Mr Ritchie confirmed that the Respondent was no longer acting and the matter had been referred to Wilson Terris and he copied the files and sent copy papers to Wilson Terris sometime during 2005. Mr Ritchie indicated that he corresponded with the Respondent at the Practical Law Partnership address at Argyle Parade and also at 72 Hawkshead Road, Glasgow. Mr Ritchie stated that the interim Judicial Factor was appointed on 8 October 2004 by which time Mr Thorburn was a sole practitioner. The Respondent was sequestrated on 23 August 2004 which led to his certificate being suspended. Mr Ritchie stated that he continued to write to the Respondent at the Argyle Arcade address as this was his last known address in terms of Section 64 of the Solicitors (Scotland) Act 1980. The Respondent did not respond until January 2005. Mr Ritchie explained that he dealt with another matter and sent a letter to Practical Law Partnership on 11 October 2004 and the Respondent received that letter. The Respondent also sent a letter on 2 December 2004 indicating that he had not been in the office for 14 days and this suggested that he had been at that address prior to

this. Mr Ritchie also referred to production 2 for the Complainers being a letter from the Law Society to the Respondent at the Practical Law Partnership legal post address on 20 October 2004 referring to a phone call on the same date which showed that the Respondent was at the office then.

In cross examination Mr Ritchie accepted that the letter from Begbies Traynor indicated that the effective date of the Respondent's sequestration was 5 July 2004. Mr Ritchie also accepted that dates he had referred to in his examination in chief only proved that the Respondent was in the office on these particular dates.

At this point the matter was adjourned part-heard to 13 November 2006.

EVIDENCE FOR THE RESPONDENT

The Respondent gave evidence on his own behalf. In connection with the mandate he indicated that he did not receive any letters from Grace McGill, nor did he receive any faxes in the office. The Respondent explained that he had a professional relationship with Wilson Terris and often forwarded client's files to them. The Respondent explained that once he was sequestrated he was not in the office regularly or often and early in October 2004 he ceased going to the office altogether. The Respondent explained that his partner, Mr Thorburn, was in the office and that it was possible that the letters with regard to the mandate went to the office but that he did not receive them. The Respondent explained that there were difficulties at the office and it was possible that the letter had got lost in the office. The Respondent referred the Tribunal to the offer sheet in connection with Mr A's mortgage which showed that there was a mortgage consultant. The Respondent stated that Mr A lived close to the office and came in every other day to enquire as to progress and that was why there were not many letters in the file. The Respondent explained that he phoned the mortgage consultant with regard to the progress of the mortgage application prior to concluding missives. He was concerned with regard to where the money was coming from. On 2nd January 2004 Mr A called at the Respondent's office and explained to him that the lenders were looking for so many documents that it was unlikely that the loan funds would be available in time but he assured the Respondent that he would make arrangements to be in funds to settle the transaction. The Respondent indicated

that he spoke to the mortgage consultant who said that he was sure that the mortgage application would be successful and accordingly the missives were concluded on 16th January 2004. The Respondent explained that Mr A came to his office to hand him a bankers draft for £69,500 on the 11th February 2004. The Respondent also advised the Tribunal that on 6 January 2004 Mr A and a Mr B called at his office and advised him that Mr A was to borrow £40,000 from Mr B to fund the purchase as there was a delay in the mortgage funds coming through. The Respondent indicated that Mr B told him that he would not require any security over the property. The Respondent explained that Robert Thomas & Caplan sometimes acted for Mr A in connection with other matters. In connection with page 110 of the file, the Respondent stated that the letter dated 12th January 2004 contained a typing error. He indicated that the mortgage documentation was sent to him on 3rd March 2004. The Respondent explained that at this point he had entered into a new partnership with a Mr Thorburn and the Practical Law Partnership had started on 1 November 2003. The letterheads however were not ready and he phoned Select Partnership to say that he needed papers in the name of Practical Law Partnership and on 7th May 2004 a new set of papers were issued.

The Respondent explained that he forwarded a letter to Harper McLeod enclosing a cheque for settlement of the purchase price. The source of the funds was the bankers draft from Mr A and the £40,000 loan from Mr B. On the 16th February 2004 a letter was received from Harper McLeod indicating that their client was not continuing to seek interest and the cheque would be held as delivered and the documents would be sent in exchange. The Respondent referred to page 93 of the file being a letter from Robert Thomas & Caplan enclosing a bond and standard security in connection with the loan for £40,000. The Respondent indicated that when he got this letter he was surprised due to the conversation he had had in his office with Mr B and Mr A. He accordingly phoned Robert Thomas & Caplan and explained the situation and advised that there was to be no Standard Security as if there were it would be detrimental to the mortgage application. The Respondent indicated that Robert Thomas & Caplan stated that they would have to take further instructions with regard to this. The Respondent advised that the personal bond was signed by Mr A and sent to Robert Thomas & Caplan. The Respondent indicated that he had advised his client Mr A that he should not sign any documents at Robert Thomas & Caplan.

In connection with the Certificate of Title, the Respondent explained that although normally the completion date was the date of entry, in this case the transaction settled earlier and the completion date was the expected date of the completion of the mortgage application and release of loan funds. The Respondent explained that the lenders had various queries, one of them being that the purchase price was below the market value put on the property by the lender's valuer. This resulted in questions being raised in connection with indemnity insurance. The Respondent also advised that the lenders wanted confirmation that the seller was not sequestrated and the Respondent had this confirmed by the seller's lawyers. The Respondent indicated that he advised Select Partnership on the telephone that the transaction had already completed, partly funded by his client and partly by a loan. The Respondent indicated that he admitted that he made a mistake when he got the loan funds and that he should have told his client to pay off the £40,000 loan with the funds received from Lender 1. Alternatively the Respondent accepted that he should have gone to Lender 1 to explain that the balance of the purchase price had been a loan and ask them whether this was acceptable. He accepted that it was an oversight on his part that he did not do this. The Respondent explained that when he received the loan funds from Lender 1 he deducted the outlays and the rest of the money, £80,000, was sent to Lynch & Company in connection with a loan by Mr A to a Mr D. The Respondent explained that his client, Mr A, did not require a security for the £80,000 and he prepared a personal bond by Mr D in favour of his client.

The Respondent emphasised that his client obtained title to the property and granted security to the lender and the lender's interest was secure, there was no loss to Lender 1. The Respondent confirmed that he sent the personal bond by Mr D to be registered in the books of Council in Session on 1st July 2004. The Respondent referred to the First Inventory of Productions for the Respondent number 19 which showed that the disposition in favour of Mr A and a Standard Security in favour of Lender 1 were registered on 11th July 2005. There were also two Standard Securities by Mr A in favour of Mr B registered thereafter. The Respondent indicated that these two Standard Securities were done behind his back and he was unaware of them, they were dated 13th February 2004 and 27th August 2004. The Respondent explained that the delay in his recording the disposition in favour of Mr A had protected Lender 1's

position as Robert Thomas & Caplan were unable to record the Standard Securities until after a disposition had been recorded. The Respondent indicated that in connection with the letters sent on 26th April 2004 and 7th May 2004 the errors in the letter were due to standard letters being used and he did not spot the fault. In response to a question from the Chairman the Respondent indicated that as he had got the Form 12 forms at settlement but had not registered the disposition in favour of Mr A he did not think it necessary to check the up to date position in connection with Form 12 when he received the loan funds. The Respondent explained that on 5th July 2004 he received a petition for his sequestration. He was going through a lot of problems at this time and explained the history with regard to his purchasing Murray & Co. There were difficulties and this caused stress and the Respondent referred the Tribunal to the doctor's report which detailed his health problems. The Respondent explained that his condition made it impossible for him to operate properly. He was forced to go into the office but when he received the petition for sequestration this was the last straw and he was unable to work and that was why the disposition and Standard Security were not recorded in good time.

In cross examination the Respondent confirmed that Complainers Production No 3 was the file relating to Mr A and included the loan documentation for Lender 1. The Respondent confirmed that the error in the letter sent on 7th May 2004 was caused due to the use of standard letters and the fact that it was typed by a part-time member of staff. The Respondent did not accept that the letters of 7th May and 26th April 2004 misled Lender 1. In connection with pages 75 and 77 of the file, the Respondent stated that the Mr C shown up in the Register of Inhibitions was not the seller but someone else with a similar name. The Respondent confirmed that he did not mention the personal bond signed by his client in favour of Mr B to Lender 1. The Respondent accepted that the personal bond stipulated payments of £530 per month to be paid by Mr A to Mr B. The Respondent was adamant that he did not type the letters of 26th April and 7th May 2004 himself despite the fact that there were only his initials on the top of the letters and did not appear to be any typist initials. The Respondent confirmed that Mr A accepted the offer of loan on 17th March 2004. The Respondent advised that the loan funds from Lender 1 were received a few days before the 25th June and he did not check with Lender 1 with regard to the use of the funds for an £80,000 loan to Mr D. The Respondent indicated however that if Mr A

had used private funds only to settle the Property 1 transaction it would not have necessary to tell Lender 1 about this so long as there was a disposition and a Standard Security. The Respondent indicated that he registered the bond for £80,000 because it was a lot of money and he was afraid it would go missing. The Respondent explained that after his sequestration he did go into the office from time to time as an unqualified assistant to help his partner, Mr Thorburn, because his clients would phone him on his mobile. He however indicated that after 5th July ill health prevented him from doing much work at all.

SUBMISSIONS FOR THE COMPLAINERS

Ms Johnston indicated that having heard the evidence she would not be proceeding with the averments of professional misconduct as set out in Articles 5.2, 5.3 and 5.6(d) and asked that they be withdrawn from the Complaint. This was agreed. In connection with the averments of professional misconduct in Articles 5.4 and 5.5 Ms Johnston submitted that they related to failure to register title to the property and failure to register a Standard Security. Settlement of the purchase took place on 16th February 2004 but the loan funds were not received until 24th June 2004. Ms Johnston accepted that his ability to effect registration of the documents ceased on 13th October 2004 but the documents were not discovered until April 2005 and were not registered until 11th July 2005. Ms Johnston stated that this was not acceptable and that the Respondent had failed in his duties. In connection with Article 5.6 Ms Johnston submitted that between 3rd March 2004, the time when the loan instructions were issued, and 13th October 2004, the last date when the Respondent went into the office, he had misled the lender by way of correspondence and the report on title. There was clear evidence that the letters of 24th April 2004 and 7th May 2004 advised the lender that the property was to be purchased when it had already been purchased and this significant material factor should have been disclosed to the lender. Ms Johnston indicated that the Respondent advised that he had an undelivered disposition when in fact it was delivered on 16th February 2004. The letter of 7th May contained an additional untruth that the sellers were threatening to pull out. In addition the certificate of title and correspondence advised the lender that the loan funds were to be used for the purchase of a property when the price had already been paid. In connection with Article 5.7, the lack of information given to Lender 1 was contrary to

the loan instructions, the funds were used for a loan to another party. Ms Johnston invited the Tribunal to find the Respondent guilty *in cumulo* of professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

In connection with Articles 5.4 and 5.5, the Respondent indicated that there would be no reason for him not to wish to register the deeds but due to his medical condition he was unable to work and had to avoid stress. He was accordingly not in a position where he could effectively register the title. The Respondent submitted that he went into the office from time to time because he felt so guilty and looked out files to try and show clients that he cared. He however was not operating effectively. When he was sequestrated he ceased to be a partner and accordingly could not register deeds. The Respondent referred to his health difficulties and advised that he was in the office very irregularly. In connection with Article 5.6(a) and (b) the Respondent indicated that he accepted that it was important to give accurate information in conveyancing transactions but he asked the Tribunal to assess the seriousness of the error and consider that there was no negative impact on the lender as a result of the errors in the letters. The Respondent submitted that the errors were inadvertent. In connection with Article 5.6 (c) the Respondent referred to Rule 20 of the Accounts etc Rules 2001 and submitted that the £40,000 loan was similar to a bridging loan and that the only difference was that Mr A borrowed the money from an individual. The Respondent indicated that he accepted that his mistake was his failure to tell the lender about the £40,000 loan and failure to tell Mr A that he should pay this off when he received the money from Lender 1. The Respondent however submitted that there was nothing in the averments of professional misconduct alleging that he failed to comply with Lender 1's instructions or failed to disclose that the balance of the purchase price was a loan and not from private funds. In connection with Article 5.7 the Respondent submitted that this was without factual basis. The Respondent's position was that if there had been no £40,000 loan it would not have been necessary to advise the lender. The Respondent submitted that he would not be required to tell Lender 1 that his client had already paid the purchase price, all they needed to know was that they had title and a Standard Security. Although it was a condition of the offer of mortgage that the balance of the funds were to come from private funds the

Respondent submitted there was no obligation to tell the lenders that the funds were being used for a loan to Mr D.

DECISION

The Tribunal found the witnesses for the Complainers to be credible and reliable and accepted their evidence. In connection with Article 5.4 the Tribunal was satisfied beyond reasonable doubt that the Respondent had deliberately chosen not to record or register the disposition at the time of receipt thereby exposing his client to risk for every day that it was not recorded. Although it is understandable that there might be a wish to record the disposition and standard security at the same time it cannot be acceptable to wait when it is not known how long it will be before the loan funds will come through. The Tribunal accordingly considered that this conduct did amount to professional misconduct but amended the date in the Complaint because the Tribunal was satisfied on the basis of the Respondent's evidence and the medical evidence provided that after he was served with the petition for sequestration on 5th July 2004 the Respondent's health prevented him from operating effectively and he was unable to attend to client's business. In connection with Article 5.5 the loan cheque was cashed on 24th June 2004 and given that the Respondent became unable, due to illness, to attend to clients business on 5th July 2004 the Tribunal did not consider that a delay of 11 days in these circumstances could amount to professional misconduct. In connection with Article 5.6(a), given that the term "purchasing" in conveyancing transactions can be used to describe a continuing process and given that the loan transaction had not been completed, the Tribunal could not be satisfied beyond reasonable doubt that the Respondent was deliberately misleading his client Lender 1 as set out in Article 5.6(a). However in relation to Article 5.6(b) from the terms of the letters of 26th April 2004 and 7th May 2004 the Tribunal was satisfied beyond reasonable doubt that the Respondent advised Lender 1 that he was holding an undelivered duly executed disposition when it was quite clear that he had a duly executed disposition which had been delivered on 16th February 2004. The Tribunal did not accept the Respondent's submission that this was a standard letter. It was clearly not so from the terms thereof. The Tribunal was accordingly satisfied beyond reasonable doubt that the Respondent did deliberately mislead his client Lender 1 as set out in Article 5.6(b) of the Complaint. In connection with Article 5.6(c) of the

Complaint the Tribunal consider that a solicitor has an overriding duty to advise the lender of any circumstances that would affect the decision to lend. In this case there was a loan of £40,000 which was not disclosed to the lender. The Respondent's client signed a bond to pay £535 per month and if this was known about by the lender it might have affected their decision to lend. It was clear from the evidence that the lender was under the impression that the loan monies were to be used to purchase Property 1 and the Respondent gave them this impression by the terms of his correspondence and his report on title. The Tribunal considered that the Respondent had a duty to advise the lender of the actual circumstances that the purchase price had already been paid and that part of the price had been paid for by way of a private loan for £40,000. The Tribunal considered that there was an obligation on the Respondent to advise the lender of this information as Mr A's ability to service his loan from Lender 1 would be affected by the fact that he already had a loan in connection with the purchase. In connection with Article 5.7 it was clear from the evidence that if the £40,000 loan to Mr B had been repaid there would not have been sufficient funds left to give the £80,000 loan to Mr D. If the £40,000 loan had been akin to a bridging loan, as suggested by the Respondent, it should have been repaid immediately that the loan funds from Lender 1 were received. In this case the Respondent intromitted with the loan funds and utilised them for the provision of a loan to Mr D knowing full well that the £40,000 loan was still extant. This was all without the knowledge or authority of his client Lender 1. The Tribunal found these actings sufficient *in cumulo* to amount to professional misconduct.

MITIGATION

The Respondent asked the Tribunal to take account of his health problems and the difficulties which he faced at the time. The Respondent advised the Tribunal of his personal circumstances and indicated that he was presently unemployed.

The Fiscal made a motion for expenses. The Respondent asked that expenses be limited due to the fact that some of averments in the Complaint had been withdrawn and also indicated that he did enter into a Joint Minute of Admissions with regard to the productions.

PENALTY

The Tribunal was concerned by the Respondent's conduct. A solicitor acting for a purchaser in a conveyancing transaction has a duty to prepare and record perhaps as soon as practicable and in any event within a reasonable time after payment of the price, a valid disposition. If solicitors fail to do this it exposes the client to loss and thus brings the profession into disrepute. It is also imperative that solicitors represent the interests of the lender and act in accordance with the lender's instructions. If solicitors are to mislead lenders it will undermine the crucial element of trust between lenders and their solicitors. It was also of concern to the Tribunal that it was clear from the Respondent's evidence that he did not appreciate the implications of what had happened or what could have happened. He displayed a lack of appropriate knowledge in dealing with conveyancing matters. The Tribunal was of the view that the Respondent required to be supervised in order to protect the public. The Tribunal accordingly imposed a Censure and a Restriction for an aggregate period of three years. The Respondent will require to work under supervision for a period of three years and at the end of that period he will require to show the Tribunal that he has gained the necessary awareness and knowledge and competence to be fit to hold a full practising certificate.

The Tribunal did not consider that the items deleted from the Complaint contributed significantly to the length of the proceedings. The Tribunal also took account of the fact that the Law Society have a public duty to bring matters before the Tribunal. The Tribunal accordingly awarded expenses against the Respondent. The Respondent indicated that he was concerned with regard to the effect that publicity may have on his health but in terms of Section 14A of Schedule 4 to the Solicitors (Scotland) Act 1980, the Tribunal cannot refrain from giving publicity due to the effect on the solicitor concerned. The Tribunal accordingly made the usual order with regard to publicity.

Chairman