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

against

DUNCAN MCKINNON BURD, Solicitor, MacDonald House, Somerled Square, Portree, Isle of Skye

1. A Complaint dated 10 June 2004 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that Duncan McKinnon Burd, Solicitor, MacDonald House, Somerled Square, Portree, Isle of Skye (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 to be served upon the Respondent. Answers were lodged by the Respondent.

3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 8 December 2004 and notice thereof was duly served on the Respondent.

4. The hearing took place on 8 December 2004. The Complainers were represented by their Fiscal, Valerie Johnston, Solicitor, Dunfermline. The Respondent was present and represented by Sir Crispin Agnew, Counsel.

5. A Joint Minute was lodged in which some of the facts and the content of the productions were admitted. The Complainers led the evidence of two witnesses. At the end of the Complainer's evidence a submission was made on the Respondent's behalf submitting that there was no case to answer. The Tribunal upheld the submission in respect of the averments of professional misconduct in Article 4.1(b) but not in respect of Article 4.1(a). The Respondent then gave evidence on his own behalf. The case was adjourned part heard to 6th January 2005.

6. The Tribunal reconvened on 6th January 2005. One member was absent but the Tribunal still had a quorum. The parties indicated that they had no objection to the Tribunal proceeding on this basis.

7. After hearing submissions, the Tribunal found the following facts admitted or proved.

7.1 The Respondent is a Solicitor enrolled in Scotland. He was born on 24th May 1962. He was admitted as a Solicitor on the 26th July and enrolled in the Register of Solicitors on 12th August both 1985. He is a Partner in the firm of Anderson, MacArthur & Co, Solicitors, MacDonald House,

Somerled Square, Portree, Isle of Skye. He became a Partner on 1st March 1990.

7.2 Ms A

By letter dated 15th May 2000, Ms A wrote to the Complainers regarding the conduct of the Respondent. She advised that this did not arise out of a Solicitor/client relationship with him but out of his actings in connection with the sale of her matrimonial home at Property 1 in 1998. At the time of the sale Ms A and her husband were separating. Throughout the period that the property was marketed, Ms A remained resident within the former matrimonial home. She and her husband instructed an Estate Agency to market the house. An initial offer was received from Mr B of Property 2, through Messrs MacLeod & MacCallum, Solicitors in Inverness. This offer for £90,000 was rejected. It was clearly understood that Ms A would not sell to Mr B who was her immediate neighbour. Ms A and her husband had purchased the property in 1992 and thereafter there had been antagonism and hostility and two separate legal actions within the local Court between Mr and Ms A and Mr B. These difficulties were well known within the area and were well known to the Respondent. The Respondent acted for Mr B at first in respect of one of the court actions.

7.3 The Estate Agency fixed a closing date for offers for Property 1, at 30th September 1998. Two offers were received on that date, one from Mr B, again through MacLeod & MacCallum, Solicitors, Inverness for £90,000 and one from Messrs Connelly & Yeoman, Solicitors, Arbroath on behalf of the Respondent in the sum of £88,950. The Respondent had intimated an interest and viewed the property after the date when Mr B's initial offer

was rejected. Ms A had shown the Respondent around the house and he had indicated to her that the purchase was to be for non-domestic use and that alterations might be made. When she learned of the offers, Ms A contacted the Respondent direct and asked him to increase his offer by £1,000 as she did not want to sell the property to Mr B. She advised him of the offer from Mr B and at no time did he indicate that he had any interest on behalf of Mr B. The Respondent advised her that it would be unethical for him to increase his offer. He suggested that she reject both offers and invite parties to re-submit but told her that she would be taking a gamble on whether or not he would do so. Ms A decided to accept the lower offer which she would not have done if she had been aware that it was made by the Respondent on behalf of Mr B. The Respondent was fully aware of this and his offer was in fact made on behalf of Mr B who was his client.

7.4 The Respondent in his letter to Jonathon Andrew Yeoman of Messrs Connelly Yeoman, Solicitors, Arbroath dated 4th September 1998, advised "my client Mr B wishes to buy Property 1". He further stated that Mr B was "under the distinct impression that the sellers will not entertain any offer from him although he has instructed an offer in his own name". He instructed Mr Yeoman to submit an offer for Property 1 "(on Mr B's behalf) in my capacity as his nominee" concluding "if you find any difficulty in receiving this instruction, then please do not hesitate to contact me". On 24th September 1998, he wrote to Mr Yeoman again confirming that a closing date had been set for 30th September and that an offer for £88,950 with entry 5 weeks after the closing date should be made. The letter was prepared on Anderson, MacArthur & Company, Solicitors, headed note paper and bore the heading "Duncan Burd

(nominee for Mr B)". On behalf of the sellers, Messrs Ferguson, MacSween & Stewart, wrote to Connelly & Yeoman on 2nd October 1998 confirming that the Respondent's offer was acceptable in principle and that a formal acceptance would follow. The Respondent wrote to Mr B on 8th October advising him that as he was going on annual leave on the 9th, Mr B should liaise with Connelly & Yeoman direct regarding the conveyancing while he was away and that a formal mandate confirming that he was the nominee would be needed. He also, on the same date, sent a copy of the letter to Mr Yeoman and advised that Mr Young, a Partner in his Stornoway Office, would cover during his absence stating that Mr Young "is familiar with what we are up to in this transaction".

7.5 Ferguson, MacSween & Stewart, Solicitors, sent a Qualified Acceptance to Connelly & Yeoman on 23rd October 1998 along with the Title Deeds and drafts. Mr Yeoman forwarded a copy of the Qualified Acceptance to the Respondent on 26th October with a request for instructions. The Respondent advised Mr Yeoman by letter dated 30th October that he had spoken to Mr B regarding the Qualified Acceptance and that it should be accepted subject to an amended date of entry of 27th November 1998. He advised that he had been contacted by Ms A direct to ask if the entry date could be put back as she felt she might otherwise be homeless. He observed in his letter "tongue in cheek I suggested that there be no difficulty with slipping this back to 27th November". Connelly & Yeoman sent a Formal Letter on 30th October 1998 to Ferguson, MacSween & Stewart and a copy to the Respondent on the same date. The Respondent continued his pretence of purchase in his dealings with Ms A. He responded to further discussions initiated by Ms A

regarding for example the carpets and the gas supply as if he were purchaser under missives of the property.

7.6 When further letters were exchanged between Ferguson, MacSween & Stewart and Connelly & Yeoman the provision for a nominee purchaser was not deleted. Donald Iain Ferguson, Solicitor, of Ferguson, MacSween & Stewart, Solicitors, drew the Memorandum for Search to disclose a Disposition by Ms A and Mr A in favour of Duncan MacKinnon Burd and the draft of Letter of Obligation showing Mr Burd as the purchaser and sent the drafts of these to Connelly Yeoman on 23rd October. Missives were concluded on 24th November 1998 and on that date, Messrs Connelly & Yeoman returned to Mr Ferguson the draft Letter of Obligation and Memorandum of Search, the latter having been revised to show *inter alia* "Standard Security by Duncan MacKinnon Burd in favour of the Bank of Scotland". The Respondent did not have any discussions with Donald Iain Ferguson with regard to the transaction. Mr Ferguson did point out the nominee provision to Ms A but from her evidence it was clear she did not fully understand the implications of this. Donald Iain Ferguson did not know the offer was on behalf of Mr B. He and the seller were thereby induced to conclude missives for the sale which enabled the Respondent's client to obtain ownership of a property which he would not otherwise have obtained from these sellers.

7.7 By letter dated 30th November 1998, Connelly & Yeoman, Solicitors, intimated that they had "now" received instructions from the Respondent confirming that title to the subjects was to be taken in the name of his nominee, Mr B, of Property 2. The letter also called for the instructions to the searchers to take account of the now nominated

purchaser and the change in the Standard Security substituting the grantor as Mr B in place of the Respondent. Also enclosed was a draft Disposition showing Mr B as the purchaser. On 1st December 1998, Mr Ferguson sent a Formal Missive to Connelly & Yeoman, Solicitors, on the instructions of his client Ms A rescinding the Missives on the basis of misrepresentation and concealment of material facts. He queried whether Connelly & Yeoman were aware that Mr and Ms A had already rejected a higher offer from Mr B. In reply dated 4th December 1998, Connelly & Yeoman, Solicitors, expressed their lack of comprehension at this turn of events and pointed to the nominee provision in the Missives. Thereafter, correspondence was entered into and Court action for implementation of the contract raised by the Respondent on behalf of his client against the Mr & Ms A. Said action was subsequently abandoned.

8. Having considered the foregoing circumstances the Tribunal made no finding of professional misconduct

9. Having heard submissions regarding expenses, the Tribunal pronounced an Interlocutor in the following terms:-

> Edinburgh 6 January 2005. The Tribunal having considered the Complaint dated 10 June 2004 at the instance of the Council of the Law Society of Scotland against Duncan McKinnon Burd, Solicitor, MacDonald House, Somerled Square, Portree, Isle of Skye; Make no finding of professional misconduct; Find the Respondent liable in one half of the expenses of the Complainers and in one half of the expenses of the Tribunal as the same may be taxed by the auditor of the Court of Session on an agent and client indemnity basis in terms of Chapter Three of the Law Society's Table of Fees for general business; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)
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

The Respondent had raised certain human rights issues in his answers but it was indicated that these were not to be insisted on. A Joint Minute was lodged in which certain facts and the contents of some of the productions were admitted. Evidence was led.

EVIDENCE FOR THE COMPLAINERS

The Complainers led the evidence of Ms A who explained that she had purchased the property at Property 1 in May 1992 and had difficulties with her neighbour Mr B. Ms A stated that she knew the Respondent socially as they had served on a Hall Committee together. She knew he was a solicitor and Ms A explained that there were court actions against Mr B who was using their parking area for his offal bins from his restaurant. Ms A stated that the previous owner of the property had not wanted to sell to Mr B either and that none of the neighbours wanted him to have any more property in the area. Ms A stated that the Respondent had acted for Mr B in a court case and so knew of the problems between them. Ms A explained that she received an offer from Mr B for £90,000 but instructed her solicitors to refuse this because it was from Mr B, a closing date was then set and two offers were received, one from Mr B for £90,000 and one from the Respondent for £88,950. Ms A stated that she knew the Respondent was interested because he had come to view the property and she had showed him round. He had said that it was not to be used for domestic purposes but he did not say what it was to be used for and there were rumours that he was planning to de-merge from his firm of solicitors. Ms A stated that the Respondent did not say that he was looking round on behalf of Mr B and she gained the impression that he was going to buy it for himself. Ms A explained that when the offers came in she and her husband opened them together and her solicitor was not available. Because she didn't want to sell to Mr B she phoned the Respondent to see if he might increase his offer. He said that she was not supposed to do this and she could either take the offers or could remarket it but that he might not resubmit if she did remarket. She indicated to him that £1000 was a lot of money to her and he said that it was to him as well. She was definite that she told the Respondent that the other offer she had received was from Mr B. In the circumstances she decided to accept the Respondent's offer

but she would not have done this if she had known it was on behalf of Mr B. Ms A said that after this there were alterations to the date of entry and she had discussions with the Respondent with regard to this and he agreed there and then. She indicated that she met the Respondent on the street one day and had a discussion with him with regard to the new contract that was needed for the Calor Gas and he said to put it in his name and gave his home address. Ms A stated that her solicitor did not indicate that there was anything odd about the offer although she did remember him saying something about nominee clauses. She did not see why the Respondent would do anything like this to her. A week after she had moved out of the house she heard in the village that Mr B was saying that he had bought the property. She instructed her solicitor to rescind the contract and a court action was raised against her but was abandoned. Ms A stated that she felt that what the Respondent had done was wrong and she believes solicitors must meet certain ethical standards which the Respondent had breached by deceiving her. Ms A stated also that she considered the Respondent's conduct underhand and not right for a solicitor in a small town. In cross examination Ms A stated that she thought that her solicitor had mentioned the nominee clause to her before the missives were concluded. Ms A stated that her solicitor knew that she would not sell to Mr B and that her solicitor did explain the nominee clause to her but that she may not have taken in what it meant. She said that her solicitor had a healthy suspicion of the Respondent. Ms A stated that she did not know why the court action against her was abandoned and did not know that Mr B had gone abroad. Ms A stated that she accepted that she would not have been able to say that she had been deliberately deceived if the implications of the nominee clause had been fully explained to her. She confirmed that her solicitor never explained that the Respondent could purchase the property on behalf of Mr B. She stated that the offer was in the Respondent's name and all the way through she had negotiations directly with the Respondent and had no reason to think that the offer was not on behalf of the Respondent personally.

The Complainers then led the evidence of Mr J Yeoman. Mr Yeoman confirmed that he had been instructed by the Respondent to make an offer on his behalf which potentially might be from Mr B. Mr Yeoman stated that he knew that Mr B was unlikely to be successful if he offered on his own behalf. Mr Yeoman explained that the standard form of offer which he used included a clause which stated that the

disposition would be taken in the name of the purchaser or his nominees. He said that this form of offer was based on a Dundee missive and was fairly standard. Mr Yeoman stated that it was unusual to remove the clause as it could be useful in a number of situations for example where parents bought property for their child who was at university and the title was taken in the name of the child. Mr Yeoman said that as far as he understood it this was legitimate conveyancing practice and could happen up to once a month. Mr Yeoman said that he would not, as a matter of practice, mention the nominee clause to his client if it was included in an offer. He stated that in this case the intention from the start was to have the title taken in the name of the nominee. Mr Yeoman confirmed that he was satisfied that the Respondent did not wish him to identify the name of Mr B until after the missives had been concluded. Mr Yeoman stated that he did intimate this to Mr Ferguson once missives had been concluded and he did not expect to receive the response which he got as he did not realise the level of antagonism between Mr B and the seller. Mr Yeoman stated that he was unaware that Mr B had made another offer at the same time in his own name.

Mr Yeoman explained that he had been out on the day of the closing date but when he came back into the office there was a message that the Respondent's offer had been accepted and the price was to exclude the carpets. Mr Yeoman indicated that he did not wish to answer questions with regard to the issue of the preparation of the security documents as this could have implications in connection with his own culpability. In cross examination Mr Yeoman stated that it was usual to only reveal the nominee's name after the contract had been concluded and although he was unaware of any guidance on this matter, so far as he could remember this is what he had been told in the diploma at university. Mr Yeoman stated that if the missive style had not included a nominee clause he would have added this to the offer. He said he would have expected Mr Ferguson to delete the nominee clause if he had been concerned to exclude the possibility of Mr B purchasing the property. In re-examination Mr Yeoman confirmed that the instructions he got from the Respondent did not cause him a problem. He did not think that the Respondent was deceiving anyone. He stated that the aim of obtaining the property for Mr B could have been achieved in a different way.

NO CASE TO ANSWER SUBMISSION

At this stage the Respondent's Counsel made a submission that there was no case to answer in respect of either of the averments of professional misconduct. Sir Crispin stated that even if the evidence was taken at its highest, the offer included a nominee clause. Ms A accepted that if the nominee clause had been fully explained to her she would not have considered that she had been misled. Ms A indicated that she assumed that the Respondent was to purchase the property on his own behalf because he did not say otherwise and because she had heard a rumour. Sir Crispin indicated that there was not sufficient evidence to show that the Respondent had induced her to believe anything. The Respondent did not tell Ms A that he would be purchasing it for himself. The offer clearly stated that the contract was for delivery of a disposition to the Respondent or his nominees. It was clear from the evidence that the existence of the nominee clause was mentioned to Ms A prior to the conclusion of missives. The lower offer was accepted under deletion of the carpets which explains the lower price. There was accordingly no evidence that the Respondent was able to obtain the property at a lower price.

With regard to misleading Mr Ferguson it was clear that the offer was made in the Respondent's name with a condition that delivery of the disposition could be to the Respondent or his nominee. Missives were concluded on that basis and there was no direct communication between the Respondent and Mr Ferguson. It was accepted that nominee transactions were common and the nominee was usually only revealed after the conclusion of missives. There was no evidence that the Respondent had indicated to Mr Ferguson that the purchase was intended for him personally.

Valerie Johnston submitted that there was a case to answer in respect of both averments of professional misconduct. She referred the Tribunal to the evidence from Ms A and the correspondence between Mr Yeoman and Mr Ferguson and the Respondent and Mr Yeoman. It was clear that Ms A had been induced to believe that the Respondent was purchasing the property in his own right. He viewed the property personally and was fully aware of the animosity between Mr B and Ms A. The offer was then submitted in the Respondent's name giving his home address. This misled Ms A. The Respondent also spoke on the phone with regard to the date of entry and

spoke to Ms A in the street with regard to the Calor Gas, again giving his home address. This conduct was designed to induce her to believe that he was the purchaser. Ms Johnston also referred the Tribunal to various letters and the phrases contained therein which were indicative of deception. It was clear from Ms A's evidence that she did not understand the implications of the nominee clause. Ms A stated that she accepted the lower price because she did not wish to sell to Mr B.

With regard to misleading Mr Ferguson, the nominee was not revealed until after the missives had been concluded. The Respondent used a legitimate conveyancing technique to deceive his colleague. Ms Johnston said it was accepted that there was no evidence of direct communication between the Respondent and Mr Ferguson.

DECISION IN RESPECT OF NO CASE TO ANSWER SUBMISSION

It was clear from the evidence that the Respondent knew that Ms A did not want Mr B to purchase the property and it was clear taking the evidence at its highest that the Respondent set out to engineer that this happened. It was clear from the evidence that the Respondent knew prior to missives being concluded that Mr B had put in another offer at the same time. In this case the Respondent knew Ms A, he had viewed the property personally and had also had discussions with her with regard to the date of entry and the Calor Gas and had given his home address in respect of his dealings with Ms A. The Tribunal was accordingly satisfied that there was a case to answer. There was however not sufficient evidence to satisfy the Tribunal that the Respondent had induced Ms A into selling the property to his client at a lower price than originally offered given the evidence of Mr Yeoman that the carpets had been excluded. The Tribunal accordingly found that there was a case to answer in respect of the averments contained in Article 4.1(a) under deletion of the words "and at a lower price than the client had originally offered".

The Tribunal did not hear evidence from Mr Ferguson with regard to his position. Given that the offer was in the name of the purchaser or his nominee and that there was no personal contact between the Respondent and Mr Ferguson, the Tribunal did not find that there was sufficient evidence contained in the letters to be satisfied beyond reasonable doubt that Mr Ferguson was deceived. Ms A did not say that Mr

Ferguson had been deceived and Mr Ferguson being a solicitor should have known the implications of an offer allowing for a disposition to be in the name of the purchaser or his nominee. The Tribunal accordingly found that there was no case to answer in respect of averment 4.1(b).

EVIDENCE FOR THE RESPONDENT

The Respondent then gave evidence. He explained that Mr B was a client although other solicitors also acted for Mr B. Mr B had approached him and stated that he wished to purchase the property but explained that the seller would not sell to him. He asked the Respondent for advice and the Respondent advised him that there were two ways to go about it, either by using a back to back transaction which would involve additional stamp duty and fees or by using an offer with a nominee clause. Mr B chose to use the nominee clause but stated he did not know anyone to use as a nominee and asked the Respondent if he would act as nominee. The Respondent stated that he agreed to this. The Respondent indicated that he knew there was some antagonism between Mr B and Ms A as he had been involved in a court case in connection with the refuse issue. The Respondent however stated that he now realised that the animosity was deeper than he had known at the time. The Respondent explained that he instructed Mr Yeoman, who was his solicitor, to lodge the offer. The Respondent explained that he went to view the house because Mr B could not describe the inside of the house and wished to use it to extend his fish restaurant. The Respondent stated that he thought the estate agent would show him round as indicated in the particulars of sale but it was Ms A who in fact showed him round. The Respondent said that he commented with regard to a possible extension at the back and Ms A stated that there were no carpets downstairs due to flood damage. The Respondent indicated that he said there seemed to be ample power points. The Respondent said he was uncomfortable being showed round by Ms A but he had to maintain his client's confidentiality and he spoke entirely in the third party.

When Ms A phoned on the day of the closing date indicating that she had not been able to speak to her solicitor and explaining that she had two offers and that the Respondent would know who the other one was from, the Respondent told her that it was improper to enter into negotiations. The Respondent said that she did not tell him

the other offer was from Mr B and he had not known at that time that Mr B had made another offer at the same time. After she had gone off the phone he phoned Mr B and he said that he had submitted another offer. The Respondent said that at the time he was ambivalent on receiving this information. He indicated that he had suspected that the other offer would be from Mr B. With regard to the phone call with Ms A in connection with the date of entry the Respondent said that he knew the conveyancing was not advanced so he had no difficulty in agreeing to delay the date of entry. In connection with production 2/8 the Respondent said that the tongue in cheek comment referred to a discussion he had had the previous week with Mr Yeoman in connection with West Coast Solicitors. In connection with the discussion about the Calor Gas, the Respondent stated that he met her when she came out of her door and that he thought that he told her to tell the Calor Gas people to get in touch with him. The Respondent stated that in view of the limited viewing that he gave the property and the fact that no survey had been done Ms A should have smelt a rat. There was no Law Society guidance with regard to nominee transactions and he remembered from university that the nominee should only be revealed after conclusion of the missives. The Respondent stated that he did not set out to deceive and Mr Ferguson should have been alerted by the nominee provision. In cross examination the Respondent stated that there was only one higher duty than that to the client and that was the duty to the court. The Respondent stated that Mr B was somewhat flamboyant but he was happy to allow his name to be used on his behalf. The Respondent indicated that as far as the survey was concerned the bank did a drive by survey. The Respondent accepted that the nominee clause was contained in the schedule to the offer and was not on the front page. The Respondent however stated that it was up to Ms A's solicitor to guide her through the missives. The Respondent explained that he was in fact looking for other property in the area but he would not have bid against his client. After all the discussions were concluded he did in fact make an offer personally. In connection with production 2/5 the Respondent said that he was just using plain English and when he used the words "knows what we are up" he just meant that Mr Young knew what the mechanics of the transaction were. The Respondent stated he had no recollection of making a comment with regard to £1000 being a lot to him. In connection with the Calor Gas the Respondent said he would not have disclosed his home address although he accepted it was used in the offer. In re-examination the Respondent said that if Mr Ferguson has had a healthy suspicion with regard to the

offer he should have deleted the nominee clause or put in a stipulation that the house must not be sold to Mr B. The Respondent stated that he also had to view the house to solve any problems with regard to the boundaries and tell Mr Yeoman. The Respondent said that he could see how his personal viewing may have misled Ms A.

SUBMISSIONS FOR THE COMPLAINERS

Ms Johnston said that it had been a deliberate deception by the Respondent. This was clear from the productions lodged and the witnesses evidence. It was not a legitimate use of a conveyancing technique to utilise the nominee clause in a situation like this given the background and the fact that there had been a past attempt to buy which had been rejected and the Respondent accepted that he had been aware of this. The Respondent had advised his client of the option to use the nominee transaction and at this stage there was the issue of whether a professional person being asked to use their professional name had a duty not to disguise the identity of the purchaser which overrode his duty of confidentiality to his client. In this case the Respondent went personally to view the property, submitted an offer in his own name and had conversations with Ms A, all which resulted in Ms A feeling that she had been deceived. He made certain comments in letters which appear improper. All the paperwork indicated that the Respondent was the apparent true purchaser and this was not acceptable behaviour in terms of Rule 7 of the Code of Conduct for Solicitors holding practising certificates. It is imperative that solicitors act honestly at all times. The function of the solicitor is not just to act in the best interests of his client and Ms Johnston referred the Tribunal to the Council of the Law Society-v-Cesidio Di Ciacca 726/88 page 14 where the Tribunal had previously said that the profession must never stoop to the lowest levels of the marketplace and their professional duties must never be supplanted without the best possible reasons. Ms Johnston submitted that in this case this is what the Respondent did and he deceived a member of the public with whom he had direct contact.

SUBMISSIONS FOR THE RESPONDENT

Sir Crispin Agnew referred the Tribunal to his written submissions. He indicated that this was an important case for the profession as it concerned the right of a solicitor to

act as a nominee for his client in a contract and the parameters within which a solicitor may act as nominee. Sir Crispin asked the question of whether or not a solicitor may act as a nominee for his client in a contract in circumstances where it is known that the other party would not be willing to contract with the individual. If not it would mean that a solicitor could then never act for a client to conclude a contract for the benefit of someone else without disclosing that fact to the other solicitor in circumstances which would breach his own client's confidentiality. Sir Crispin submitted that nominee transactions are a regular feature of modern commercial life. Sir Crispin stated that the Tribunal would have to be satisfied that the Respondent's conduct was serious and reprehensible in the whole circumstances and had the degree of culpability to amount to professional misconduct. Sir Crispin pointed out that breach of the Code of Conduct may be professional misconduct. It was not necessarily so. Sir Crispin emphasised that standard of proof was beyond reasonable doubt and suggested that although the Tribunal did not require corroboration where the evidence of one party is uncorroborated the Tribunal should be very slow to accept that evidence particularly if there is contrary evidence by the other party. Sir Crispin accordingly suggested that the Tribunal should not accept Ms A's evidence where it was disputed by the Respondent. Sir Crispin emphasised that the Respondent was not acting as a solicitor in the conveyancing transaction but was the agent for his client. Sir Crispin submitted that there was no legal objection to missives being concluded in the name of a particular person with an obligation to deliver a disposition to "the purchaser or his nominee". This was standard clause in a lot of offers. Sir Crispin referred the Tribunal to Missives by Cuisine & Rennie 2nd Edition page 203 where it stated "careful thought is required before accepting a provision referring to the party or its nominee". Sir Crispin pointed out that Mr Ferguson did not delete the nominee provision. Sir Crispin stated that there was no legal objection to a person acting as an agent for an undisclosed principal and that if the seller wanted to exclude a particular person from being a buyer when they knew that he was in the market then it would be up to the seller to make it a stipulation of the contract that the subjects could not be sold to that particular person. Sir Crispin emphasised that there was no Law Society guidance with regard to nominee transactions. A solicitor has a duty of confidentiality to his client and Sir Crispin pointed out that the Respondent owed Mr B a duty not to reveal that Mr B was the true purchaser. Sir Crispin stated

that a solicitor is not acting dishonestly by not revealing to the other solicitor who his true client is where the client has asked not to be named.

Sir Crispin pointed out that the Respondent did not initiate communications with Ms A on any of the occasions concerned. Given the Respondent's duty of confidentiality the Respondent could not reveal the fact that there was a nominee and the identity of that nominee. Sir Crispin stated that it was reasonable for the Respondent to view the property so that he could advise his solicitor of any particular points that required to be in the missives. It was not possible for Mr B to view the property. The Respondent did not indicate to Ms A that he was buying the property on his own behalf she just made this assumption. When the Respondent made the offer in his name he did not know that Mr B was making an offer again on the same date. The first he knew of this was when Ms A told him she had had two offers. Sir Crispin submitted that Ms A's solicitor should have told her that the offer included a nominee provision and any belief Ms A had at this stage was induced by her solicitor's failure to explain this to her. Sir Crispin submitted that if Ms A had been properly advised by her solicitor that the offer included a provision for a nominee she would have realised that the Respondent was entitled to nominate Mr B or anyone else to take title. Ms A in fact stated that if this had been fully explained to her she would not consider herself to have been misled. Sir Crispin stated that it was quite normal in nominee transactions not to reveal the identity of the nominee until after the conclusion of the missives. Sir Crispin alleged that it was reasonable for Connelly & Yeoman to continue with the conveyancing procedures such as the search in the name of Duncan Burd until such time as they could reveal the nominee which would not be until after the conclusion of missives. Sir Crispin stated that if the Tribunal considered that there was an element of deception where it was known that the seller does not wish to sell, the question that must be asked is it professional misconduct because the conduct could not be reprehensible due to the assumption that the solicitor acting on the other side would protect his client's interests. This was especially so in this situation where Mr Ferguson had a suspicion. It was accepted that the fact that there were two offers may have meant that Mr Ferguson was not alerted to what was happening but because he did not react properly did not mean that the Respondent was guilty of professional misconduct. The Respondent did not know of the second offer at the time that the offer was submitted in his name. Perhaps when

he learnt of this it was not wise to go on but it could not be regarded as serious and reprehensible. With regard to case 726/88 Sir Crispin submitted this was a general statement and this case was different as it concerned a solicitor who was willing to act for a client who did not want to disclose his identification. At this stage the case was adjourned part-heard until 6 January 2005 due to lack of time.

When the Tribunal reconvened on 6 January 2005 one of the lay Tribunal members was not present but the Tribunal still had a quorum. The parties indicated that they had no objection to the Tribunal proceeding to make a decision on the matter.

DECISION

The Tribunal found this to be a very difficult case. It is accepted that there is a long established practice of using nominee provisions in missives in certain situations and there is nothing wrong with this in principle. The Tribunal also accept that the identity of the nominee may not be revealed in some circumstances until after the conclusion of the missives. However in this case the nominee provision was used in order to disguise the identity of the purchaser and it was known that if the offer had been in the name of Mr B it would not have been accepted. The Tribunal has to look at the whole course of conduct of the Respondent and his intent. It was clear in this case that the Respondent advised his client to use the nominee clause in order to obtain his objective of purchasing the property. It was however pointed out by the Respondent's agent that Ms A's solicitor could have protected her interests by refusing to accept the nominee clause or by amending the missives to prevent Mr B being a nominee. Ms A stated in her evidence that if the nominee clause had been fully explained to her by her solicitor, she would not have considered herself to have been deceived. The Tribunal considered this to be a very important factor in considering whether or not the Respondent's conduct amounted to professional misconduct. The Tribunal however had to consider the Respondents whole actings in his various communications with Ms A. The Respondent went to view the property personally and was shown round by Ms A. There was no evidence however that the Respondent actually told Ms A that he was purchasing the property on his own behalf and the Respondent did not expect Ms A to show him round as the sales particulars stated that it would be the estate agent that did the viewing. Ms A made an

assumption that the Respondent was to purchase the property for his own purposes based on information she had heard locally. At no stage was this assumption rebutted by the Respondent. The Respondent's counsel however pointed out that the Respondent could not disclose that it was for Mr B without breaching his duty of confidentiality to his client. All the contact between the Respondent and Ms A was initiated by Ms A. The Tribunal accept that at the time when the offer was submitted by the Respondent, he did not know that Mr B was submitting another offer. The Respondent clearly did know this prior to the conclusion of missives. The Tribunal do not attach particular weight to the two comments made by the Respondent in his letters as the "tongue in cheek" comment was explained by the Respondent as relating to a joke with regard to the slowness of West Coast solicitors and the comment, that Mr Young "knows what we are up to", is not in itself evidence of a conspiracy, it could just have meant that Mr Young knew the mechanics of the transaction.

Rule 7 of the Code of Conduct for Solicitors Holding Practising Certificates issued by the Law Society in 1989 states "solicitors must act honestly at all times and in such a way as to put their personal integrity beyond question". In this case the Respondent's actings did result in Ms A assuming that he was purchasing the property on his own behalf. This was added to by three instances of personal contact initiated by Ms A between the Respondent and Ms A. However Ms A was legally represented and her solicitor had apparently explained the implications of the nominee clause to her but she had not understood it. Since one was from Mr B they probably did not expect the other offer was also from him. The Tribunal accordingly do not find that the Respondent's conduct is so serious and reprehensible so as to amount to professional misconduct. Notwithstanding this decision, the Tribunal would wish to disassociate itself from the Respondent's conduct. The Tribunal considered that it was not wise for the Respondent to use his own name as nominee in the circumstances. This is a small community, he knew Ms A from previous dealings, he knew she did not want to sell to Mr B. Allowing the use of his name only led to him having to continue to take a position with Ms A that was not open with her in order to protect client confidentiality. He saw this as maintaining his position as purchaser under missives. She thought he was the real buyer. When the nominee provision was exercised Ms A complained she had been deceived. In the circumstances it was not surprising that the use of his name, together with his subsequent actings and with other occurrences not

induced by him, led to the misleading of Ms A, and induced her to believe he personally was purchasing the property. The Tribunal considered the Respondent's actings could not be approved and amount to unprofessional conduct.

The Tribunal then asked for submissions with regard to expenses. Miss Johnston asked that the Tribunal consider awarding expenses in favour of the Law Society if the Tribunal were of the view that the Respondent's behaviour had been at a higher end of unprofessional conduct. The Tribunal had clearly not approved of the actings of the Respondent. Sir Crispin suggested that expenses be awarded to the Respondent, especially given that the Tribunal had found no case to answer with regard to one of the charges in the Complaint or alternatively that there be a finding of no expenses due to or by either party. Sir Crispin also pointed out that the Respondent had already incurred substantial expenses in connection with the whole matter and that matters had dragged on for a period of four years and account should be taken of this.

The Tribunal considered that the Law Society had no alternative but to prosecute and had been fully justified in taking this Complaint to the Tribunal. As the Respondent's conduct had fallen very narrowly short of professional misconduct, even taking the no case to answer finding into account, the Respondent should be liable for 50% of the expenses of the Complainers and of the Tribunal. The Tribunal made the usual order with regard to publicity.

Chairman