

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

FINDINGS

in Complaint

by

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

against

**JOY PATRICIA DUNBAR,
Solicitor, Solicitors Direct, 4
Golden Square, Aberdeen**

1. A Complaint dated 31 May 2011 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Joy Patricia Dunbar, Solicitor, Solicitors Direct, 4 Golden Square, Aberdeen (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 4 October 2011 and notice thereof was duly served on the Respondent.
4. The hearing took place on 4 October 2011. The Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow.

The Respondent was present and represented by Jonathan Brown, Counsel.

5. After obtaining clarification from the parties with regard to exactly which facts in the Record were admitted and having heard submissions from both parties, the Tribunal found the following facts established

5.1 The Respondent was born 17th September 1946. She was admitted as a solicitor and then enrolled as a solicitor in the Register of Solicitors Practicing in Scotland in December 1979. From on or about 1st July 1989 until on or about 31st December 1996 she was initially employed as an associate then latterly as a partner with the firm James & George Collie Solicitors, Aberdeen. From 1st January 1997 until 28th August 1998 she was a partner in the firm Aberdein Considine & Co Solicitors, Aberdeen. From 1st November 1998 until 30th August 2001 she was employed as an associate with Grant Smith Law Practice, Solicitors, Aberdeen. From 1st August 2001 until 1st March 2009 she was employed initially as a consultant then a partner and then latterly again as a consultant with the organisation Solicitors Direct, Aberdeen. From 2nd March 2009 until 30th April 2010 she was employed initially as a consultant then as an insurance mediation officer and latterly as a director of the entity Solicitors Direct Scotland Limited. From 1st May 2010 to date she has been a partner in the firm Solicitors Direct, 4 Golden Square, Aberdeen.

Purchase of Property 1

5.2 On 1st August 2008, the Respondent submitted an offer on behalf of her then client, Mrs A to purchase the heritable subjects known as Property 1 at a price of £75,000. The date of entry was to be mutually agreed in writing. Review of the

file maintained by the Respondent reveals that she had on her file prior to submitting the Offer a valuation by a surveyor of the subjects identifying a value of £77,000. The client, Mrs A sought and obtained mortgage finance from the Birmingham Midshires which is a division of the Bank of Scotland plc to facilitate the purchase. In accordance with established practice, the Respondent agreed to act on behalf of the lender. In so doing, the Respondent owed the lender certain duties, in particular a duty to secure a valid security over the subjects and to comply with their instructions. Loan instructions were received from the said Birmingham Midshires dated 13th August 2008. The loan instructions were addressed to the Respondent. They explicitly advised the Respondent “Please also act for Bank of Scotland plc on the mortgage of the property to us. You are instructed in accordance with the CML Lenders Handbook for Scotland and our part 2 instructions. The second edition of the CML Lenders Handbook for Scotland and our part 2 instructions are only available on the CML website.”

5.3 The seller of the subjects was the commercial entity known as Company 1. The Respondent proceeded with the conveyancing. On 19th August 2008, the Respondent submitted a Certificate of Title to the Bank of Scotland. The Certificate of Title was submitted without qualification. In particular the Respondent confirmed “the title is good and marketable and may be safely accepted by you”. This Certificate confirmed that completion would occur on 20th August 2008. On 27th August 2008, agents acting on behalf of the seller produced a Disposition from a Mr B in favour of the commercial entity, Company 1, being a Disposition of the subjects to that commercial entity for the sum of £54,250 with a date of entry being 27th August 2008. The Respondent settled the transaction on 27th August 2008. The Respondent

utilised the loan funds from the Bank of Scotland to settle the transaction. In the course of so doing, she failed to advise the Bank of Scotland, on whose behalf she was acting, as to the unusual circumstances surrounding the transaction. In particular she failed to advise the Bank of Scotland that the property being purchased had not been owned by the seller for a period in excess of six months and had been acquired by the seller shortly before settlement. Her failure to do so was in contravention of the conditions incorporated in the instructions issued to the Respondent by the lender contained in the Council of Mortgage Lenders Handbook. When she subsequently became aware that the sellers had acquired the property shortly prior to settlement, the Respondent failed to notify this unusual circumstance to the lender. The transaction in which the Respondent acted was for full value as disclosed by survey valuation. The preceding sale from Mr B to Company 1 was at an under value. The Respondent reported the matter fully to the lender by letter dated 17th September 2008.

Purchase of Property 2

- 5.4 On 10th June 2008, the Respondent submitted an Offer to purchase the subjects at Property 2 on behalf of her client Mr C at a price of £115,000. The client, Mr C, secured lending finance from the Halifax plc to facilitate the purchase. In accordance with established practice, the Respondent agreed to act on behalf of the Halifax plc. In so doing, the Respondent owed the lender certain duties, in particular a duty to secure a valid security over the subjects and to comply with their instructions. On 12th August 2008, the Respondent received loan instructions from the Halifax plc. These loan instructions explicitly advised the Respondent “We have made a mortgage offer and would like you to act

for us in the transaction. These instructions are governed by and incorporate the current edition of the CML Lenders Handbook applicable to the jurisdiction in which the property is located and our Part 2 instructions.” The loan instructions further explicitly advised the Respondent “You must not release the mortgage advance....unless you have complied with these instructions and your obligations set out in the Lenders Handbook.”. The loan instructions further explicitly advised the Respondent “Your attention is drawn to the current edition of the applicable Lenders Handbook. The Handbook gives practical advice and sets out our policies on a variety of administrative and legal matters.” On 12th August 2008, the Respondent submitted a Certificate of Title to the Halifax plc. The Certificate of Title was submitted without qualification by the Respondent. The funds were delivered to the Respondent and the transaction settled on 14th August 2008.

5.5 Shortly prior to settlement, it was brought to the attention of the Respondent that the owner of the said subjects had not owned the subjects for a period of at least six months prior to settlement of the transaction. The Respondent on 17th September 2008 wrote to the Halifax plc advising that the seller purchased the subjects on the same day as the borrower purchased from the seller. The Halifax plc were unhappy with the apparent undervalue and required that the Respondent arrange indemnity cover in respect of the transaction. The property was previously owned by a Mr D. On the settlement date of the transaction, Mr D transferred his interest in the heritable property to the seller. The seller thereafter transferred their interest in the heritable property to the borrower, being the client of the Respondent. Subsequent investigations revealed that Mr D was sequestered on 12th November 2008. The Respondent settled the transaction

utilising the loan funds from the Halifax plc. The Respondent failed to advise the Halifax plc, on whose behalf she was acting, as to the unusual circumstances of the transaction and in particular failed to advise the Halifax plc that the property purchased had not been owned by the seller for a period in excess of six months and had been acquired by them shortly before settlement in contravention of the conditions contained in the Council of Mortgage Lenders Handbook and further when the Respondent became aware that the sellers had only acquired the property shortly before settlement, she had failed to notify this to the Halifax plc. The Respondent reported the matter fully to the lender by letter dated 17th September 2008.

Purchase of Property 3

- 5.6 On 1st April 2008, the Respondent submitted an Offer on behalf of clients, Mr and Mrs E to purchase the subjects at Property 3 at a price of £303,000. The date of entry was to be mutually agreed in writing. Mr and Mrs E had obtained lending finance from the Halifax plc. On 9th May 2008, the Respondent received loan instructions from the Halifax plc. In accordance with established practice, the Respondent agreed to act on behalf of the Halifax plc. In so doing, the Respondent owed the lender certain duties, in particular a duty to secure a valid security over the subjects and to comply with their instructions. The loan instructions explicitly advised the Respondent “We have made a mortgage offer and would like you to act for us in the transaction. These instructions are governed by and incorporate the current edition of the CML Lenders Handbook applicable to the jurisdiction in which the property is located and our part 2 instructions”. The loan instructions further explicitly advise the Respondent “You must not release the mortgage advance... unless you have complied

with these instructions and your obligations set out in the Lenders Handbook.”

- 5.7 During the course of the conveyancing, it was revealed that the seller had purchased the property direct from the original developer with that transaction settling on 27th March 2008. The seller purchased the property at a price of £279,000. On 23rd June 2008, the Respondent submitted a Certificate of Title to the Halifax plc advising that the price in the transfer would be £303,000 with a completion date of 22nd June 2008. The Certificate of Title was submitted to the Halifax plc by the Respondent was without qualification. The Respondent settled the transaction on 22nd June 2008. The Respondent utilised the loan funds from the Halifax plc to settle the transaction. In the course of so doing, she failed to advise the Halifax plc, on whose behalf she was acting, as to the unusual circumstances surrounding the transaction. In particular she failed to advise the Halifax plc that the property being purchased had not been owned by the seller for a period in excess of six months and had been acquired by the seller shortly before settlement. Her failure to do so was in contravention of the conditions incorporated in instructions issued to the Respondent by the lender contained within the Council of Mortgage Lenders Handbook. When she subsequently became aware that the seller had acquired the property shortly prior to settlement, the Respondent failed to notify this unusual circumstance to the lender. The Respondent reported the matter fully to the lender by letter dated 14th November 2008. Both the seller’s original acquisition of the subjects from the developer and the sale to the Respondent’s client were at arm’s length. The reason for the proximity of the two transactions was that the seller’s circumstances had changed after they purchased the subjects requiring them immediately to resell.

5.8 In each of the aforementioned conveyancing transactions, the Respondent agreed to act on behalf of the lender. She received from the lender loan instructions in writing which explicitly advised her that her terms of engagement was to be in accordance with the obligations imposed upon her in terms of the CML Lenders Handbook for Scotland. In particular the following conditions were applicable:-

(a) Condition (1.1) The CML Lenders Handbook is issued by the Council of Mortgage lenders. Your instructions from an individual lender will indicate if you are being instructed in accordance with the lenders handbook. If you are, the general provisions in part 1 and any lenders specific requirements in part 2 must be followed.

(b) Condition (1.4) The standard of care which we expect of you is that of a reasonably competent solicitor or independent qualified conveyancer acting on behalf of a heritable creditor.

(c) Condition (1.5) You must also comply with any separate instructions you receive from an individual loan.

(d) Condition (2.3) If you need to report a matter to us, you must do so as soon as you become aware of it so as to avoid any delay. If you do not believe that a matter is adequately provided for in the terms of the handbook, you should identify the relevant handbook provision and the extent to which the matter is not covered by it. You should provide a concise summary of the legal risks and your recommendation on how we should protect our interest. After reporting a matter you should not complete the mortgage until you have received our further written instructions. We recommend that

you report such matters before conclusion of missives because we may have to draw or change the mortgage offer.

(e) Condition (3.1) Solicitors must following the current Solicitors (Scotland) Accounts Rules and to the extent that they apply comply with the Money Laundering Regulations 2007.

(f) Condition (5.1.1) Please report to us if the proprietor has owned the property for less than six months or the person selling to the borrower is not the proprietor unless the seller is:-

- a personal representative of the proprietor; or
- an institutional heritable credit exercising its power of sale; or
- a receiver, trustee in sequestration or liquidator; or
- a developer or building selling a property acquired under a part-exchange scheme.

6. Having considered very carefully the submissions made by both parties in respect of whether or not the established facts were serious and reprehensible enough to amount to professional misconduct, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

6.1 her failure to comply with her contractual obligations to lenders in conveyancing transactions;

6.2 her failure to comply with the explicit instructions provided to her by her client being the obligations imposed upon her as provided for within the CML Lenders Handbook applicable to Scotland;

6.3 her failure to act with absolute propriety and to protect the interests of her client being the lender in respect of each transaction; and

6.4 her failure to comply with the terms of Rule 6(1) of the Solicitors (Scotland) Accounts Etc Rules 2001.

7. After having heard mitigation on behalf of the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 4 October 2011. The Tribunal having considered the Complaint dated 31 May 2011 at the instance of the Council of the Law Society of Scotland against Joy Patricia Dunbar, Solicitor, Solicitors Direct, 4 Golden Square, Aberdeen; Find the Respondent guilty of Professional Misconduct in respect of her failure to comply with her contractual obligations to lenders in conveyancing transactions, her failure to comply with the explicit instructions provided to her by her client being the obligations imposed upon her as provided within the CML Lenders Handbook applicable to Scotland, her failure to act with absolute propriety and to protect the interests of her client being the lender in respect of each transaction and her failure to comply with the terms of Rule 6(1) of the Solicitors (Scotland) Accounts Etc Rules 2001; Censure the Respondent; Fine her in the sum of £1,000 to be forfeit to Her Majesty; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

Alistair Cockburn

Chairman

8. 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

After an enquiry from the Chairman with regard to whether or not the Law Society accepted the facts averred in the Answers, the parties after an adjournment agreed to move to amend Answer 2.2 in the Record by deleting the sentence starting “Explained and averred” in line 12 and by deleting the words “at arms length” from the following sentence in Answer 2.2 of the Record. The parties also explained that it had been agreed that the sentence starting “Explained and averred” in line 15 of Answer 3.2 in the Record be deleted and the sentence starting “Explained and Averred” in line 15 of Answer 4.2 of the Record also be deleted. This was allowed by the Tribunal. It was clarified that the remaining facts in the Record were agreed by both parties.

SUBMISSIONS FOR THE RESPONDENT

Mr Brown clarified that the Respondent accepted that there had been failings and a departure from strict compliance with the contractual conditions of the loan which amounted to a breach of contract with the lender and would be sufficient to found a Complaint of Inadequate Professional Service by the lender. Mr Brown however submitted that while a breach of contract and a failure in service could sometimes become professional misconduct after a certain threshold was reached, this was not the case in all situations. Mr Brown submitted that the task of the Tribunal was to place the admitted failures on a scale of gravity and decide whether or not they were serious and reprehensible enough to meet the Sharp Test. Mr Brown submitted that the mischief in this case was the failure to report to the lender that the subjects of sale had changed hands within six months of settlement of the conveyancing transaction. The reason for this provision in the CML Handbook was to have solicitors be the lender’s watchdog and report certain matters to the lender. Sales within six months may lead the lender to look more closely at their lending decision especially if a different price is involved. Mr Brown stated that this problem was most pronounced in new build transactions and purchases off plan which were back to back transactions where profit was taken. Mr Brown referred to the wording of the CML conditions and pointed out that paragraph 5.1.1 states “please report to us” whereas in other paragraphs for example 4.2.1 the word “must” is used. Mr Brown submitted that this had a bearing on the culpability of the breach and suggested that it was not utterly

imperative that solicitors do this. Mr Brown clarified that the Respondent's position was that she saw it as a matter of professional judgement i.e. please report if anything needs to be reported. The Respondent in this case looked at matters in the round and used her judgement and did not consider that it was necessary to report matters to the lender. Mr Brown explained that these matters came to light when an inspection was done by the Law Society and the Respondent thereafter wrote to the lender retrospectively.

In connection with the particular transactions, Mr Brown stated that the third transaction had nothing in it which would have given cause for concern. The seller to the Respondent's client had bought a new build house from a developer, the seller's circumstances had changed and he had had to sell on. Although the transfer of ownership was within six months, the conclusions of missives by the seller to the Respondent's client and the conclusions of missives with the builder took place more than six months apart. It was the conclusion of the missives that set the purchase price. There was accordingly a reasonable explanation as to why the purchase price was different. There was no back to back element. Mr Brown submitted that the breach of contract in this case was at the very lowest end of the scale of gravity.

In respect of the other two transactions, there was a middle man being Company 1 and the transactions were back to back. Settlement took place on the same day. Mr Brown explained that Company 1 buys properties quickly and targets people in financial distress and then places the property with investors. Ms A was an established client of the Respondent and the purchase price paid by the Respondent's client was supported by her surveyor's valuation. The property was an ex-local authority house and there was an established market for it. Company 1 received a discount but this transaction did not scream out mortgage fraud and the person who was scammed in this case was the original seller. Mr Brown stated that there was an obligation to report to the lender to allow the lender to take a view with regard to whether or not to continue to lend in the circumstances. The Respondent in this case took the view that the lender did not need to concern themselves with it. In respect of the Property 2, Mr C was the nephew of Ms A. In the Property 2 case the seller had been sequestrated which led to a risk of an A of reduction by the Trustee on the basis that the sale to Company 1 was under value but this might not have affected Mr C's title as he did pay full value. Mr Brown

submitted that the risk was small scale and there was modest exposure. He further submitted that breach of contract cannot in itself equal professional misconduct. Mr Brown pointed out that although the lender was a client, the lender was not of higher importance than the purchaser who was also a client. Mr Brown submitted that this was not a case where there was any obvious mortgage fraud facilitated by the non reporting.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid asked the Tribunal to look carefully at the circumstances of each transaction and referred the Tribunal to the Productions lodged. Mr Reid submitted that these Productions revealed that there was a deliberate act by the Respondent to avoid her obligation to comply with her obligations to the lender.

In connection with the first and second transactions, both of these took place in summer 2008 and were with the same firm. The dates of entry were not specified in the offers but were agreed in writing. The dates of entry were close to each other. The same financial advisor was used for the purchasers. Mr Reid referred the Tribunal to Production 8 being a letter by the Respondent to her client which enclosed a copy of the title which showed that the purchaser was not buying from Company 1 but from a Mr B. Mr Reid also referred the Tribunal to Production 11 being an email which referred to Cohen and Co Solicitors which was a different firm of solicitors to the firm that the Respondent was dealing with. Mr Reid submitted that this should have alerted the Respondent. Mr Reid then referred the Tribunal to Production 13 and the Form 12 Report dated August 2008 which was addressed to Cohen and Co. There was a search done against Company 1, the Respondent's client and Mr B. Cohen and Co were instructing searches against the Respondent's client. This should have set an alarm bell ringing for the Respondent and she was aware well in advance of settlement that there were others involved. Mr Reid submitted that the Respondent deliberately chose not to report because if she had done this might have put a stop to what was going on. Mr Reid also referred the Tribunal to Productions 25 and 26 in connection with the second transaction.

Mr Reid submitted that compliance with the CML Handbook was important in order to combat mortgage fraud. This was a deliberate course of conduct to avoid an obligation to report. Mr Reid referred the Tribunal to the previous case of Shahid Pervez where the Tribunal had found that breach of the CML Handbook did amount to professional misconduct.

Mr Brown clarified that he was not saying that the Respondent had excusable ignorance, it was accepted that the Respondent knew at an early stage that these were back to back transactions as it was clear from the title. The Respondent had misconstrued her obligation to report. She had exercised judgement and thought that it was not a mortgage fraud. Mr Brown pointed out that her knowledge of the price paid by Company 1 only came later on. Mr Brown confirmed in response to a question from the Tribunal that the Respondent dealt with the transactions herself. In response to another question from the Tribunal, Mr Brown confirmed that in respect of the second and third transactions the lender was content to leave matters as they were but in connection with the first transaction the lender asked for further information to be obtained due to the issue of Mr B being sequestered. In response to a further question from the Tribunal, Mr Brown confirmed that Company 1 was a private company trading for profit. Mr Brown also confirmed that the lenders had not asked for the Respondent's name to be removed from their panel. Mr Brown clarified that the Respondent was not aware of the in depth business of Company 1 but knew that they bought and sold properties and took profit. Also in response to a question from the Tribunal, Mr Brown confirmed that the Respondent only had these two transactions with Company 1 but had a number of transactions with the mortgage broker.

Mr Reid also submitted that the Respondent's actings amounted to a breach of Rule 6 of the Accounts Rules. The lender had not given written authority because the terms of the loan were that the loan funds should not be intromitted with unless all the obligations as contained in the CML Handbook had been complied with. Mr Reid submitted that the authority from the lender was not there and it was a breach of the Accounts Rules. Mr Brown stated that the lender must make it explicit that the funds cannot be used otherwise it would not be a breach of the Accounts Rules. Complainer's Production 28 being the loan documentation from the Halifax explicitly states that the funds cannot be released unless all the conditions have been complied

with. The Halifax was the lender in respect of the second and third transactions but the situation with regard to Birmingham Midshires is not as explicit.

DECISION

It was clear from the facts established and the Productions before the Tribunal that the Respondent was acting on behalf of lenders in respect of all three transactions and that the lender's instructions explicitly advised the Respondent that she required to comply with the conditions as set out in the CML Lenders Handbook. In this case there were a multiplicity of cases within a short time span. The Tribunal did not accept that the wording of Condition 5.1.1 of the Handbook made her obligation to report matters less imperative. Condition 5.1.1 is there in order to help prevent potential fraud. The Respondent had a duty to report to the lender that the properties in question had been owned by a seller for a period of less than six months prior to the transaction settling. The Tribunal had particular concerns with regard to the two transactions which settled on the same day and were back to back transactions. The difference in price in respect of these transactions suggests that either the first purchase was under value or the second purchase was over inflated. It is clear from the facts established and Productions lodged that the Respondent was aware that the first two transactions were back to back transactions for some time prior to the settlement date. It is also clear from the submissions made on behalf of the Respondent that she knew the purpose of Rule 5.1.1. Her position is that she did not think that there was anything suspicious and accordingly it was not necessary to report the matter to the lender. The Respondent however had wholly insufficient information on which to make this judgement properly and she was bound to disclose the nature of the transactions to the lender prior to drawing down the funds. The Tribunal considered that the Respondent made a deliberate and conscious decision not to report rather than being negligent. It was within the Respondent's knowledge that something was up and yet she breached her obligations while being aware that there was a potential risk and she chose not to report it. The Tribunal consider that this was reckless. In the Tribunal's view a competent and reputable solicitor would not have acted in this way. The Tribunal accordingly considered that the Respondent's conduct was serious and reprehensible enough to meet the Sharp Test and made a finding of professional misconduct.

In terms of the second and third transactions, it is clear from the Productions lodged that the solicitor could not have had an understanding that she had authority to draw down the funds in circumstances where she knew that she had not complied with the terms of the CML Handbook and the instructions explicitly prohibited the drawing down of funds other than where there had been full compliance and accordingly the Tribunal also find a breach of Rule 6(1) of the Accounts Rules and consider that this amounts to professional misconduct. The Tribunal do not consider it necessary to consider in detail the situation with regard to the Birmingham Midshires loan whose terms of instruction were less explicit.

SUBMISSIONS IN MITIGATION

Mr Brown lodged two references with the Tribunal and submitted that the Respondent was held in high regard by the profession and had been involved in tutoring on the Diploma at Aberdeen for 20 years. Mr Brown submitted that the cases concerned were isolated incidents and lessons had been learned and asked the Tribunal not to restrict the Respondent's practising certificate. It was clarified in response to a question from the Tribunal, that there had been a follow-on inspection of the Respondent's practice but nothing had arisen which was relevant to today's proceedings.

PENALTY

The Tribunal is concerned to note that matters only came to light due to an inspection by the Law Society. The Tribunal however also took account of the fact that there had been no further incidents like this since 2008 and accordingly did not consider that a Restriction on the Respondent's practising certificate was necessary. It is however important in order to preserve the reputation of the profession that solicitors deal with conveyancing transactions appropriately. The Tribunal accordingly imposed a Fine of £1,000 in addition to a Censure. The Tribunal made the usual order with regard to publicity and expenses.

Chairman