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

F I N D I N G S

in Complaint

by

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

against

WILLIAM MEECHAN, Solicitor, 19 Waterloo Street, Glasgow

1. A Complaint dated 30th March 2006 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, William Meechan, Solicitor, 19 Waterloo Street, Glasgow (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 by the Respondent.

3. In terms of its Rules the Tribunal appointed the Complaint to be set down for a procedural hearing on 18th July 2006 and notice thereof was duly served on the Respondent.

4. When the Complaint called on 18th July 2006 the Respondent was present and represented his solicitor, James McCann, Clydebank. The Complainers were represented by their fiscal, Valerie Johnston, Solicitor, Dunfermline. It was agreed that a Joint Minute with regard to the facts

would be submitted. The matter was adjourned for a substantive hearing until 4th October 2006.

5. When the Complaint called on 4th October 2006 the Complainers were represented by their fiscal, Valerie Johnston, Solicitor, Dunfermline. The Respondent was present and represented by Mr James McCann, Solicitor, Clydebank.

6. The Complainers led the evidence of two witnesses, the Respondent gave evidence on his own behalf and led the evidence of one witness. A Joint Minute was lodged admitting certain facts.

7. After hearing submissions from both parties, the Tribunal found the following facts established

7.1 The Respondent is a Solicitor enrolled in Scotland. He was born on 18th August 1964. He was admitted as a Solicitor on 20th September 1989 and enrolled on 2nd October that year. Between 1989 and 1993, he was employed by Messrs Neil Clark, Solicitors, Bird Semple Fyfe Ireland, Solicitors, and Messrs Mair Matheson, Solicitors becoming a Partner in the latter firm on 1st January 1994. He remained there until 31st December 1997 when he moved on to become a Partner at Messrs Campbell & Dickson, Solicitors in March 1998. He became a Partner in the firm as currently constituted of Messrs Campbell & Meechan, Solicitors, on 1st November 1999.

7.2 In 2004 Messrs Harper MacLeod LLP, The Ca'd'oro, 45 Gordon Street, Glasgow, acted on behalf of Mr A in an Employment Tribunal application against Company 1 and others. The Respondent acted on behalf of the three Respondents. A full Hearing was scheduled for 8th and 9th November 2004. The Respondent in correspondence with Harper McLeod repeatedly sought consent to the discharge of

the Hearing which was refused. He twice applied to the Tribunal for discharge of the full Hearing. Both applications were refused. By letter of 29th October 2004, the Respondent made an offer of £10,000 on behalf of his clients in full and final settlement of Mr A's claim. In a telephone conversation with the Respondent on 1st November 2004 Messrs Harper MacLeod LLP advised that the settlement must be in the amount of £15,000, it was to be paid gross, the settlement must be by COT3 Form and that it was a paramount issue that Messrs Campbell & Meechan, Solicitors, have settlement funds of £15,000 in their clients' account by Friday 5th November 2004 failing which Messrs Harper MacLeod LLP would not agree, on behalf of their client, to a discharge of the said Hearing.

7.3 On 2nd November 2004, the Respondent replied by telephone confirming his clients' agreement to settle on the basis stated by Messrs Harper MacLeod LLP. Messrs Harper MacLeod LLP confirmed the settlement terms by fax dated 3rd November 2004 including the requirement that the funds must be held in the clients' account of Campbell & Meechan, Solicitors, in trust for settlement by Friday 5th November 2004. The Respondent replied by fax dated 4th November 2004 requesting that Mr A accept payment by instalments. Messrs Harper MacLeod LLP replied by fax on the same date advising that an instalment arrangement was not acceptable and that the sum of £15,000 must be held in the clients' account of Campbell & Meechan by Friday 5th November in trust for settlement of the application. By fax dated 5th November 2004, well knowing that Messrs Harper MacLeod LLP would rely on his professional representation and that they would not agree to a discharge of the Hearing if they knew that he held an uncleared cheque from his clients, the Respondent advised them that his Firm were now in funds for the £15,000 and requested confirmation that

the Hearing assigned for 8th and 9th November would not be going ahead. The Respondent, on the same date, telephoned Messrs Harper MacLeod LLP confirming that he was in funds to the extent of £15,000. The Respondent had prior to the fax and phone call to Harper McLeod of 5th November 2004 uplifted a cheque for £15,000 from his clients and had no reason to believe that the funds would not clear or, as in the event happened, that the cheque might be stopped.

7.4 Due to the Respondent's representation that he was in funds, Messrs Harper MacLeod LLP contacted the Employment Office by telephone and by fax requesting that the Hearing be discharged and the application continued for disposal by COT3 as terms of settlement were agreed. They also wrote on 5th November by fax to the Respondent acknowledging his confirmation that his Firm was in funds to the extent of £15,000. The true position, which was well known to the Respondent, was that on 5th November 2004, he held an uncleared cheque from his clients dated 5th November 2004 which he collected from them himself and banked that day. At the time he procured the discharge of the hearing by Messrs Harper MacLeod LLP he did not hold cleared funds of £15,000. He was well aware that the only basis on which they and their client would agree to the discharge he sought. Harper McLeod did not specify cleared funds but made reference to funds in the solicitor's client account. The Respondent believed that the cheque would clear. The cheque was then stopped for some reason which was not anticipated and which was wholly outwith the knowledge of the Respondent at the time. The Respondent subsequently ascertained that the client did, in fact, have funds available well within the overdraft facility of the client company to pay the settlement but that the principal of the company, Mr B, was having second thoughts about paying the claimant, Mr A, the £15,000 as agreed. The Respondent

was then left in a difficult situation with a client altering instructions and stopping a cheque. The Respondent was thereafter in contact with the clients, advising them to return to the original terms of settlement and to release the funds. The Respondent, as a matter of judgement, took the view that since there was a fourteen day period contemplated within the terms of the COT3, it would be appropriate to use that time to try and persuade the client to return to and to implement the original terms of settlement.

7.5 On 11th November 2004, the cheque for £15,000 was returned to the Respondent by the Bank of Scotland unpaid as payment had been stopped by his clients. The Respondent failed to advise Messrs Harper MacLeod LLP and continued to adjust the terms of the settlement in the COT3 in the full knowledge that they were acting in reliance on his statement that he was in funds to effect settlement and were ignorant of the true circumstances. The COT3 agreement provided that payment of the £15,000 was to be made within fourteen days of the Respondent receiving the agreement signed by or on behalf of the claimant. Messrs Harper MacLeod LLP signed the three originals of the COT3 Form and forwarded them to Messrs Campbell Meechan under cover of a letter dated 17th November 2004 with a request that they remit payment of the agreed sum. Had they been aware of the true position they would not have done so without their client's further specific authority.

7.6 The Respondent wrote to his clients on 24th November enclosing the COT3 forms for signature and seeking clarification of the position regarding the funds. He did not advise Messrs Harper MacLeod LLP of the true position. The documents were signed on behalf of Company 1 on 30th November 2004 and returned to the Respondent confirming to him that "as he was aware" the cheque had been stopped due to

cash flow difficulties and instructing that he seek an instalment arrangement of £1,500 per month over 10 months. The Respondent sent the COT3 form signed by or on behalf of both parties to ACAS on 1st December 2004. The Respondent wrote to Messrs Harper MacLeod LLP on 1st December advising that the COT3 Forms had been sent to ACAS, intimating for the first time that the cheque had been stopped and that he had written and spoken to Company 1 on a number of occasions about remitting the funds. He explained that they could not pay £15,000 in one sum and asked if 10 monthly instalments would be acceptable. He wrote again on 9th December 2004 with copies of the cheque, the pay in slip and the Bank letter.

8. Having considered the evidence led and the submissions made, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

8.1 his misleading his fellow Solicitors at Messrs Harper MacLeod LLP and their client by representing to them that he was in funds to the extent of £15,000, well knowing that he did not hold those funds and that their client's agreement to settle his claims against his former employers was conditional on the Respondent holding funds cleared in his client account to permit settlement by one single payment within the timescale agreed and he did thereby induce them to advise their client to agree to settle his claim in ignorance of the true position and to discharge a Hearing which he would not otherwise have agreed to discharge.

8.2 Between 5th November and 1st December 2004, having induced his fellow Solicitors at Messrs Harper MacLeod LLP and their client to agree to settle his claim and to discharge a Hearing on the basis of settlement terms which required that he held

cleared funds in his client account on 5th November 2004, which would enable him to make payment in full, by stating that he was in funds, he failed to advise them that his clients had stopped their cheque and allowed his fellow solicitors at Harper McLeod to continue to adjust the terms of the COT3 and to sign it on behalf of their client in order to finalise proceedings before the Employment Tribunal in the belief that he held funds to settle, when from 12th November 2004 he well knew that the required funds were not held by him and on 1st December he delivered up to ACAS the COT3 form signed by or on behalf of both parties in the knowledge that the terms of the agreement would not be implemented by his clients, so far as payment was to be made within 14 days of the Respondent having received the COT3 executed by or on behalf of the claimant.

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

Edinburgh 4th October 2006. The Tribunal having considered the Complaint dated 30th March 2006 at the instance of the Council of the Law Society of Scotland against William Meechan, Solicitor, 19 Waterloo Street, Glasgow; Find the Respondent guilty of Professional Misconduct in respect of his misleading fellow solicitors and their client by representing to them that he was in funds to the extent of £15,000 well knowing that he did not hold cleared funds and that their client's agreement to settle his claims against his former employers was conditional upon the Respondent holding cleared funds in his client account to permit settlement by one single payment within the timescale agreed and thereby induced them to advise their client to agree to settle his claim in ignorance of the true position and to discharge a hearing which he would not otherwise have agreed to discharge and his failing to advise his fellow solicitors that his clients had stopped their cheque thus allowing his fellow solicitors to continue

to adjust the settlement terms in the belief that he held funds to settle when he well knew that the settlement proceeds were not held by him and delivered up to ACAS the executed COT3 agreement when he knew that the terms of the agreement would not be implemented by his clients so far as the timing of the payment of the funds was concerned; Censure the Respondent; Fine him in the sum of £2,500 to be forfeit to Her Majesty; 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 at 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

10. 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

A Joint Minute was lodged with the Tribunal admitting the terms of the productions lodged for the Complainers and the Respondent. The Respondent's answers admitted most of the facts in the Complaint. Mr McCann explained that the issue was whether the facts amounted to professional misconduct and it was necessary to lead the evidence of witnesses to establish exactly what had occurred.

EVIDENCE FOR THE COMPLAINERS

The Complainers led the evidence of Mr C, Partner at Harper McLeod Solicitors. Mr C stated that he had been acting for Mr A in an employment dispute with Company 1 who were represented by the Respondent. Mr C explained that he did not personally deal with the transaction himself but trainees dealt with it under his supervision. Mr C explained that there was an employment tribunal hearing scheduled for 8th and 9th November 2004 and the Respondent had applied to have this discharged, his applications had been refused. In late October 2004 they were asked to indicate on what terms Mr A would be prepared to settle. Mr C's trainee Ms D advised the Respondent on the telephone what the terms of settlement required to be. These were that settlement must be £15,000 paid gross. The settlement must be by COT3 form and it was paramount that the Respondent's firm have settlement funds of £15,000 in their client account by Friday 5th November, failing which they would not agree to discharge the hearing assigned for 8th and 9th November. Mr C referred to the Respondent's production number 7 being his letter to the Law Society. Mr C explained that they required funds to be in the hands of the Respondent by 5th November because they had concerns with regard to the solvency of the Respondent's clients. These terms were accepted by the Respondent's clients. Mr C explained that the letters sent were dictated by him to his trainee Ms D. Mr C indicated that his client would not have agreed to discharge the hearing if it had not been confirmed that funds were in the Respondent's hand. Mr C explained that there was no trust between Mr A and the Respondent's clients. Mr C referred to the fax sent on 3rd November which made it clear that the Respondent had to confirm that he held the requisite sum of £15,000 in his client account in trust for settlement of the application before the

hearing would be discharged. Mr C indicated that they had asked for the funds to be held in trust to protect their client against a situation if the Respondent's client became insolvent. Mr C indicated that his understanding of funds being held in a client account meant cleared funds i.e. that funds were available for settlement. Mr C was adamant that the client would not have agreed to discharge the hearing if he had known that the Respondent only held a cheque which had not been cleared. Mr C explained that after the hearing was discharged there was correspondence in connection with the COT3 form which was signed by his client on 16th November. The Respondent's clients signed it on 30th November. It was not until they received the Respondent's fax on 1st December that he learnt that the Respondent had not had cleared funds and that the cheque had been stopped. This letter indicated that the Respondent's clients has cashflow difficulties and offered to pay by instalments. It had previously been made completely clear that an instalments offer was unacceptable. Mr C stated that if he had known that the cheque had been stopped, his advice to his client would have been not to sign the COT3 form. Mr C stated that he was not told by the Respondent until after the COT3 form had been submitted to ACAS. The Respondent knew on 12th November that the cheque had been stopped and yet he still did not advise Mr C of this. Mr C stated that it was fraudulent or negligent misrepresentation by the Respondent which induced them to allow their client to sign the COT3 form.

In cross examination Mr C stated that he was not asserting that the Respondent's conduct was fraudulent. He accepted that he wrote to the Respondent reserving the right to sue for fraudulent or negligent misrepresentation in order to protect his client's position. He however did not make this assertion to the Law Society. Mr C stated that from a banking viewpoint you were not in funds until the cheque had cleared. He also indicated that his understanding was that the profession understands "in funds" to mean cleared funds. He stated that it was different in a conveyancing situation because the cheque was a client account cheque and a client account cheque cannot be issued until the solicitor holds funds and accordingly a client account cheque is guaranteed money. Mr C indicated that in his view being in funds meant either cleared money or funds that you were entitled to treat as cleared. Mr C stated that interpretation of the words "in funds" should be read in the context of all the correspondence surrounding this letter. Mr C stressed that his firm had made it clear

that the hearing would not be discharged unless £15,000 was made available by 5th November. Mr C's position was that the Respondent knew, or ought to have known, that he must have funds available to him in his client account. He ought to have know that Harper McLeod required cleared funds before they could discharge the hearing. Mr C referred to the form COT3 which indicates that settlement must be made within 14 days of the Respondent receiving the COT3 signed by or on behalf of the claimant. Mr C stated that he just could not understand why the Respondent did not advise him once he knew that the cheque had been stopped. The Respondent did not tell him and continued to process matters as if he had cleared funds. This was despite the fact that he knew by this time that his client was suggesting instalments rather than being willing to pay within the 14 days. Mr C explained that his concern was that it was only after the COT3 form was lodged with ACAS that the Respondent advised them that he did not hold funds. Mr C indicated that if he had a client who had changed his instructions he would have withdrawn. He further indicated that the 14 days for payment would have started when the Respondent received the form which was 17th or 18th November and the money should have accordingly been paid by 2nd December. Mr C accepted that although they had requested confirmation of the funds being held in trust that was not accepted and was not a condition of the settlement.

The Complainers then led the evidence of Ms D, a solicitor with Harper McLeod who had been a trainee at the time of this transaction. She indicated that she had contact with the Respondent by phone and that she was working under Mr C's supervision. She indicated that she was aware that it was extremely important that she ensured that there was £15,000 in trust for settlement by 5.00pm on 5th November before the hearing could be called off. This was so that the transfer of funds to her client could not be interrupted. She indicated that after the submission of the signed COT3 form she tried to contact the Respondent approximately every three days with regard to payment but was not able to obtain a reply from him. She indicated that she was personally anxious to have matters resolved.

EVIDENCE FOR THE RESPONDENT

The Respondent gave evidence on his own behalf. He indicated that his firm consisted of himself and two secretaries and a mortgage broker and that he dealt with conveyancing and small businesses which involved some employment tribunal work. He stated that he had known Mr B of Company 1 for 10-15 years and had never had any problems with him. The Respondent indicated that he felt indignant with regard to what had happened but also felt a sense of blame and had sympathy with Mr C. He indicated that he had never intended to mislead him. The Respondent explained that when he said he was in funds he had no reason to think that the cheque would not clear. He stated that he was in a dilemma and that with hindsight perhaps he should have withdrawn from acting but he tried to resolve the situation and persuade his client to pay the money to settle things. The Respondent accepted that Mr C was entitled to take the view that he had cleared funds and his dilemma was to try and sort matters out. The Respondent submitted that even if the funds had cleared his clients could, at any time, have told him not to pay the money over. The Respondent explained that Mr B was reluctant to settle but he advised him that he should. The Respondent explained that he went to his clients' business to collect the cheque on the Friday morning and then lodged it in the bank by express deposit thus the pay in slip is unstamped. He stated that his understanding of the situation was that his clients were going to settle and he had no reason to think that the cheque would not clear. Until he received the letter dated 11th November from the bank confirming the cheque had been "stopped" he had no idea that the cheque would not clear. Once he received this information he was "gobsmacked" and spoke to Mr B on a number of occasions advising him to settle. The Respondent indicated that his client director did not say that he was not going to settle nor did he say that he was going to settle. The Respondent stated that he believed that he could persuade his client director to do the right thing. He indicated that with hindsight he should have been more careful as he knew how strongly his client director felt about matters. The Respondent explained that he was not clear what his clients were going to do in the period between 12th November and 30th November. He stated that he hoped that once his clients had signed the COT3 form they would realise that it was a done deal and they had to get on with it. When he received the letter from his clients dated 30th November 2004 suggesting payment by instalments he immediately contacted Mr C and advised him

of the situation. The Respondent stated that he accepted that Mr C was put in a dreadful position. In connection with holding the funds in trust the Respondent stated that he did not accept this and this was never done. He indicated that he did not believe that Mr C thought that he held the funds in trust. The situation accordingly was that even if the funds had cleared and his client had then phoned to ask for the money back he would have had to do that. The Respondent stated that his position was that the correspondence did not set up a guarantee that the funds would be available for settlement although he accepted that Harper McLeod was trying to obtain this guarantee. The Respondent stated that he would not have had time to get a certified cheque from his client although he later accepted that his receipt of cleared funds by electronic transfer might perhaps have been possible. The Respondent stated that his clients' failure to settle was nothing to do with their ability to pay. The Respondent indicated initially that he received the letter of 30th November from his clients after he had sent the COT3 form off but then accepted that he must have sent the form off after he had received the letter of 30th November.

In cross examination the Respondent accepted on reflection that he should have told Mr C that he did not hold cleared funds. The Respondent however stated that when he phoned them at 9.30am on the Friday morning to say he had funds it would not have been possible for him to have had time to obtain cleared funds. He explained that he sent the COT3 forms off because he thought it would lead to him receiving the money from his client quicker. The Respondent also explained that he had paid to Mr A on a wasted costs order the sum of £9,000.

The Respondent then led the evidence of his witness, Mr B. Mr B confirmed that he was the major shareholder in Company 1 and that he had had problems with an employee which had led to employment tribunal proceedings and the Respondent had been his solicitor. Mr B stated that it was the other side that had kept putting the tribunal dates off. Mr B indicated that he knew that the other side would accept £15,000 but he was reluctant because he was aggrieved that he had to pay this large amount. He however indicated that he accepted the Respondent's advice and instructed the Respondent to settle. The Respondent came to his premises at Coatbridge and picked up the cheque on the Friday morning. He said that that afternoon he changed his mind and told the company accountant to stop the cheque.

Mr B indicated that he did not advise the Respondent of this. The Respondent contacted him once he received the letter from the bank and the Respondent was angry and told him to get it sorted out. Mr B said that the Respondent told him that he had put him in a difficult position. Mr B explained that he wanted to settle on his terms and pay by instalments. He indicated that he had had enough money to pay it and that cash flow problems were referred to in accountants speak as an excuse. Mr B indicated that Mr A was contacting his staff and suppliers saying that the company was in trouble. Mr B confirmed that he did not instruct the Respondent to renegotiate until the letter of 30th November. In cross examination Mr B indicated that he did not know how many times the Respondent called him with regard to getting matters sorted out. Mr B indicated that he told the Respondent that it was not due to cash flow problems that he couldn't settle but that he didn't want to settle. In response to a question from the Chairman, Mr B indicated that he knew that the Respondent needed funds on the Friday to have the hearing put off on the Monday. He however indicated that when he gave the Respondent the cheque Mr B knew that it would never be paid.

SUBMISSIONS FOR THE COMPLAINERS

Ms Johnston indicated that the facts were not in dispute but it was the interpretation of the facts that was disputed. Ms Johnston stated that it was essential that solicitors comply with Article 9 of the Code of Conduct because solicitors must be able to trust each other. This was especially important in litigation where clients were at loggerheads. Ms Johnston stated that it was accepted that the obligation not to mislead solicitors had to be looked at along with the duty to clients and protection of the client's interests. Ms Johnston stated that it was important to look at the conduct of the Respondent in the overall context. This was a contested litigation and the Respondent had no doubt about what conditions were necessary in order to have the hearing discharged. It must have been clear to the Respondent that Harper McLeod would not have agreed to discharge the hearing unless they understood that he had funds to be able to settle the claim. The Respondent knew that he only had an uncleared cheque and knew that he was misleading Mr C because this was not what their expectation was. The Respondent achieved the aim of having the hearing discharged when he was unable to meet one of the conditions and he knew this. Ms Johnston submitted that it was relevant to look at the fact that there had been two

previous attempts by the Respondent to discharge the hearing that had been unsuccessful. When the Respondent was told by the bank that the cheque had been stopped it was incumbent upon him to let Mr C know the situation. If the client would not allow this he should have withdrawn as he was no longer able to meet his professional undertaking. The Respondent sent the COT3 form to ACAS just prior to notifying Mr C that his clients could not meet their obligations under the COT3. Mr C's client was accordingly not given the option to make a decision as to whether to continue with the employment tribunal application or obtain an order for payment as set out in terms of the COT3 form. Ms Johnston indicated that she accepted that each case had to be considered on its own circumstances. She however distinguished the case of R Summerbell-v-Alexander Andrew Boyd 25 February 1981 because in the Summerbell case the solicitor could not have known one way or another what the situation was and there was no personal assurance given by the solicitor. She also distinguished the recent Discipline Tribunal decision in the case of Law Society-v-Douglas Winchester where parties were represented by the same solicitor. Ms Johnston referred the Tribunal to previous findings of the Tribunal in the Law Society v Cesidio di Ciacca which made it clear that solicitors were entitled to rely on other solicitors' assurances. In this case the Respondent knew by 12th November that his client had changed his mind but he did not notify Harper McLeod until after the COT3 forms had been sent off, despite his duty to alert Harper McLeod.

SUBMISSIONS FOR THE RESPONDENT

Mr McCann stated that it was accepted that solicitors have a duty not to intentionally mislead colleagues but that this sometimes conflicted with their duty to their clients. The primary duty of the solicitor was to his client. It was Harper McLeod's job to look after their client and no solicitor could warrant solvency of their client. Mr McCann stated that the Respondent in no way sought to take advantage of the lack of precise wording in the correspondence from Harper McLeod. However, Mr McCann stated that in his opinion this wording could be criticised. Harper McLeod interpreted the words "in funds" to mean cleared funds but it would not have been possible for the Respondent to have cleared funds by so early on the Friday morning. The Respondent did not intend to mislead Harper McLeod. He went and got the cheque from his client and paid it into the bank immediately. The cheque would not have

been cleared until the following Thursday. The Respondent had knowledge of his clients' business and had no reason to think that the cheque would not clear. When he told Harper McLeod that he had funds he did this in good faith. It was unseen by both Harper McLeod and the Respondent that the cheque would be stopped. For this situation to be avoided the Respondent would have required the money and irrevocable instructions from his client. His client however changed his mind but did not tell the Respondent. Mr McCann emphasised to the Tribunal that professional misconduct required proof beyond reasonable doubt and it was not enough to say that something could have been done differently. It was only if the only inference that could be taken was that it was dishonest that it would be possible to infer this. This test was not passed in this case. Mr McCann submitted that the Respondent's conduct in this matter was not reprehensible. He thought the case had settled but then he got the letter from the bank dated 11th November. Mr McCann referred to the Code of Conduct which strongly suggested that solicitors should not withdraw and leave their clients on their own. Mr McCann accepted that there was no imminent court or tribunal date at this time but indicated that the Law Society took a dim view of solicitors who withdrew from acting for their clients. Once the cheque was stopped the Respondent could have withdrawn but this would have resulted in a risk that this in itself was a conduct issue. He could have stayed in the case and told Harper McLeod but if he had done this there would have been a complaint anyway or he could have tried to resolve matters which is what he did. Mr McCann pointed out that the timescale was tight and if the Respondent had managed to persuade his client to settle then the terms of the COT3 form could have been implemented. Mr McCann stated that the Respondent felt dreadful about what had happened and he advised the Tribunal that Mr A did eventually get payment. Mr McCann referred the Tribunal to the opinion of the Lord President in the Summerbell case. He also referred the Tribunal to the case of the Law Society against Douglas Winchester. Mr McCann stated that it was accepted that the Respondent would not need his client's instructions to be able to tell Mr C that the cheque had stopped but he would need his client's instructions to be able to tell Mr C why the cheque had been stopped. Mr McCann also referred the Tribunal to the case of McKinstry-v-Council of the Law Society of Scotland SLT 1997 where it was held that it could not be professional misconduct where something happened as a consequence of a genuinely held but wrong view of the position. Mr McCann stated that there was no obligation on the Respondent to

have set up a trust and that Harper McLeod should have been more precise in their request. Mr McCann invited the Tribunal to make no finding of professional misconduct.

DECISION

The Tribunal found the witnesses for the Complainers to be credible and reliable and accepted their evidence. It was clear from this evidence that Harper McLeod made it absolutely clear that in the particular circumstances of this case they required an assurance that the Respondent would have sums in his hands which would be available for settlement prior to them agreeing to have the tribunal date discharged. The Tribunal was satisfied beyond reasonable doubt, on the basis of the evidence heard, that the Respondent's perception at the time was that Harper McLeod would understand him to have been in possession of cleared funds before they would have agreed to the discharge of the tribunal hearing. The Tribunal did not consider it necessary to determine what the phrase "in funds" means because the Tribunal was satisfied that in these particular circumstances, in the context of the correspondence and phone calls made, the Respondent knew that Harper McLeod would only discharge the tribunal hearing if they understood the Respondent held cleared funds from his client on Friday 5th November. It was clear from the Respondent's evidence that he knew that Harper McLeod required this and accordingly he must have known that Harper McLeod understood him to be holding cleared funds when on 5th November the Respondent advised them he was "in funds". The Tribunal considered that the Respondent had been reckless and had taken a chance on the basis that he thought that the cheque would clear. The Tribunal consider that the Respondent must have been aware that if he had told Harper McLeod the true position, that he only held a cheque from his clients which had yet to clear, Harper McLeod would not have discharged the tribunal hearing date. The Respondent indicated that even if the funds had cleared his client could then still have changed his mind and asked for the money back. If this had happened however, the Respondent would have required to advise Harper McLeod and would have been put in a position where he ought to have withdrawn from acting. Rule 9 of the Code of Conduct states that solicitors shall not knowingly mislead colleagues or where they have given their word go back on it. It is imperative that solicitors act with fellow solicitors in a manner consistent with

persons having mutual trust and confidence in each other. This is particularly the case in a situation such as this.

When the Respondent found out on receiving the letter of 11th November from the bank that the cheque had been stopped he continued to act as if he held cleared funds. He adjusted the terms of the COT3 and did not advise his fellow colleague of his clients' change of mind of which he was made aware when he failed to obtain an explanation for payment of the cheque having been stopped. The Respondent explains this by stating that he hoped that he could sort matters out and get his clients to adhere to the terms of settlement. The Tribunal was particularly concerned to note however that when the Respondent received the letter of 30th November from his clients which made it quite clear that his client was not going to obtemper the terms of settlement he still sent the COT3 form off to ACAS when he knew that there was no reasonable expectation that its terms would be implemented. He did this prior to advising his colleague of his clients' change of instructions. The Tribunal considered this an abuse of professional trust and contrary to the principles of openness, honesty and integrity. The Respondent should have told Harper McLeod of his clients' change of instructions prior to submitting the form COT3 to allow them to decide whether or not to continue with settlement in terms of the COT3 form or to go back to the employment tribunal. The Tribunal considered the case of Summerbell but this was a completely different situation as the solicitor in that case had been told something by his client which he passed on in good faith whereas in this case the solicitor had personal knowledge of the fact that he did not hold cleared funds and that his clients had changed instructions. The Tribunal also do not accept that the case of McKinstry is in point as the Respondent, by his own evidence, accepted that he knew he was in a dilemma and was aware of his professional duties. The Tribunal was accordingly satisfied beyond reasonable doubt that the Respondent's conduct singly and in cumulo amounted to professional misconduct.

MITIGATION

Mr McCann advised the Tribunal that the Respondent was a sole practitioner. He also emphasised that the Respondent had already paid £9,000 in terms of a wasted costs

order to Mr A. Mr McCann asked the Tribunal to deal with the matter in such a way that it would not affect his capacity to carry on as a sole practitioner.

PENALTY

The Tribunal did not consider that there was any need to restrict the Respondent's practising certificate to protect the public. The Respondent had acted recklessly in not advising Harper McLeod that he did not have cleared funds and then got himself into greater difficulty by concealing the true position. It was clear however that the Respondent was contrite and concerned with regard to what had happened and the Tribunal considered it unlikely that anything similar would happen again in future. The Tribunal also took account of the fact that the Respondent had already paid £9,000. In the circumstances the Tribunal Censured the Respondent and Fined him £2,500. The Tribunal made the usual order with regard to expenses and publicity.

Chairman