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Consumer Protections in Conveyancing Cases

A Report to the Council of the Law Society of Scotland by Sheriff Principal Edward Bowen

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Introduction

1. I am asked to carry out a review of the circumstances of two separate conveyancing cases which have attracted substantial levels of publicity. The first of these concerns a housing development in Blackburn, West Lothian, known as Happy Valley, where a house builder constructed and sold four houses on land not owned by him shortly before going into liquidation. The second relates to a flat in Queens Gardens, Aberdeen, which was purchased by Mr Sinclair Brebner in 2002 from a company, Howemoss Ltd. Howemoss had obtained title to the subjects from one David Pocock, the disposition in his favour now being the subject of challenge in proceedings in the Court of Session. In both cases the purchasers have been unable to obtain a registered title to the subjects which were purchased and have had to resist court proceedings which may result in loss of the properties that they paid for entirely in good faith. The proceedings have been extremely protracted and stressful for those involved. It is worth emphasising at the outset that I have not been tasked with resolving these cases, and it is not appropriate for me to attempt to do so.

2. In conducting this review I have had the benefit of discussions with a number of members of the Law Society who have extensive experience of property law, the operation of the Guarantee Fund, and regulation of the profession with particular reference to claims arising under the Master Policy for Professional Indemnity Insurance. I have met with the director of Marsh, the Society's insurance brokers, who specialises in the insurance and management of professional risks for solicitors. I have had a meeting with representatives of The Registers of Scotland. I have met with two MSPs who have been

consulted in relation to the Aberdeen case, and a retired solicitor who has supported those involved in the Happy Valley case. I visited the Happy Valley site and met with Mr and Mrs Alan Waddell whose property is one of those affected, and I have met with Mr Brebner in Aberdeen. I have had the benefit of an exchange of views with three conveyancing experts. I also had a meeting (at his request) with Mr Jack Anderson, director of Crannog Ltd (now in liquidation), owners of the relevant land at Happy Valley. I have **not** interviewed or spoken directly to any solicitor involved in either of the two cases, partly because I did not wish to give any impression of interfering with the provision of legal advice. Council will be aware that a draft report was submitted by me on 26 September 2014. The delay in providing this revised Report arises from representations that certain matters in the initial Report might be regarded as commercially confidential or prejudicial to matters which are the subject of litigation. I am aware of certain developments since September 2014, but have not attempted a detailed update of my Report as I do not consider that my overall views are affected to a material extent.

3. I consider it necessary to stress at the outset of this report that the two cases arise from entirely different circumstances. As will become apparent, the Aberdeen case arises because of the deliberate alteration of a disposition in furtherance of fraud. Whether that alteration was carried out by a solicitor remains to be established, but on the assumption that it was the end result may have consequences for the Guarantee Fund. I say "may" because the potential for claims under the provisions of the Master Policy on a variety of grounds including those which protect an innocent solicitor from dishonesty on the part of his partner has yet to be totally excluded. As the Guarantee Fund can only meet a claim as a "final resort" the consequence is that, for the time being, the case falls into an unfortunate grey area where it remains unclear which form of compensation may be resorted to. But the case is not on any view representative of a typical "conveyancing blunder", if there is such a thing. The Happy Valley case is more of that character. It does not raise issues relating to the Guarantee Fund. There are, as I shall indicate, complications

relating to professional indemnity, but it is in that realm only that compensation for the affected purchasers may arise. I draw this distinction at this stage lest it be thought that there is a general "problem" of cases falling between the two schemes. I do not consider that to be the position.

4. There is no justification for any conclusion, or indeed perception, that the Guarantee Fund does not meet, or for that matter contrives to avoid, claims which fall within the ambit of its provisions. The Fund is established by, and governed by the terms of, section 43 of the Solicitors (Scotland) Act 1980. It provides that the Fund "shall be held by the Society for the purpose of making grants in order to compensate persons who in the opinion of the Council suffer pecuniary loss by reason of dishonesty on the part of…… (a) any solicitor, registered foreign lawyer ….in practice in the United Kingdom…or any employee of such solicitor…" Sub-section (3) provides that "no grant may be made in respect of a loss made good otherwise". The Guarantee Fund Guidelines describe the Fund as a "discretionary fund". They further state that: "The object of the Fund is to replace money misappropriated by a solicitor or his or her employee(s)." That view of the primary purpose of the Fund would appear to be unassailable in the light of judicial comments on the equivalent English fund in **R v Law Society ex parte Mortgage Express Ltd 1997 AllER 348** (Lord Bingham at p351). In **Billig and others, Petitioners [2006] CSOH 148** Judge J Gordon Reid QC, observed (at para 45) that "One cannot treat the Guarantee Fund as a commercial security or some form of insurance or commercial guarantee". It is, in short, a fund out of which the Law Society may make grants at its discretion, provided certain criteria are met and as a last resort where the loss cannot be recovered elsewhere. Those administering the Fund would be failing in their duty to operate it otherwise; my discussions with those who have had that responsibility lead me to conclude that the Fund has in general met claims except in cases where the Guarantee Fund Committee has concluded that there has been contributory negligence on the part of the applicant (as in **Billig**).

5. I now turn to the circumstances of both cases and my general conclusions arising from them.

Queen's Gardens, Aberdeen

6. In July 2000 David George Pocock , a developer/property speculator acquired the semi-basement and ground floor flats at 5 Queen's Gardens from Skene Investments (Aberdeen) Limited. A disposition conveying the subjects was delivered to his solicitors, Messrs Jamieson & Cradock, the partners of the firm at that time being Russell Taylor and Rory Cradock. Following inspection of the books of Jamieson & Cradock a judicial factor was appointed on the estates of Russell Taylor in the autumn of 2002. It appears that shortly thereafter Mr Pocock was sequestrated, a permanent Trustee being appointed to his estates in December 2003. Examination by the Trustee of the records available to him revealed that in a number of transactions Mr Pocock had acquired a heritable property with the assistance of Jamieson & Cradock, but the dispositions had not been registered. That was the situation in respect of the acquisition of the property at Queen's Gardens. Moreover, a second disposition, purporting to be a disposition of the property executed by Skene Investments in favour of Howemoss Properties Limited, had been lodged with the Keeper. The trustee further ascertained that certain transactions had taken place in reliance on the validity of the second disposition. These included a disposition of the semi-basement flat to Mr Brebner, he having purchased it for the sum of £136000 in December 2002, and a disposition of the ground floor flat to one Colin Torr. Mr Brebner and Mr Torr had, in turn granted standard securities over the subjects purportedly sold to them in favour of separate lenders, and in addition four standard securities had been granted by Howemoss in favour of Woolwich Limited.

7. Thereafter the Trustee raised an action in the Court of Session seeking decrees of declarator and reduction. In this action the Trustee contends that Skene did not execute the disposition in favour of Howemoss; that this disposition was in fact an unauthorised alteration of the first disposition, the name and purchase price having been altered by Jamieson & Cradock. The Trustee avers that this disposition is null and void and in consequence contends that Howemoss had no right to convey the two flats to Mr Brebner and Mr Torr. It is to be noted that the Trustee also has averments that, whilst he does not know the purpose of the alteration of the second disposition he believes that it might have been to avoid payment of stamp duty on the first transaction. He further avers that similar alterations were made to dispositions of four other properties in Aberdeen purchased by Mr Pocock with the assistance of Jamieson & Cradock. The declaratory conclusions include one for proof of the tenor of the first disposition; if granted that would have the effect of restoring the subjects into the estate of Pocock.

8. That action has been defended by Mr Brebner and by Abbey National who hold a standard security over Mr Torr's flat. (It falls to be observed that Mr Brebner, with the best of intentions, paid off a major part of his mortgage and does not in consequence have the benefit of the support of an institutional lender). The case was debated before Lord Uist who issued a lengthy and detailed Opinion on 1September 2011. The judgement was usefully summarised in an e-mail from Mr Robin Macpherson of Brodies LLP to the Society's Director of Financial Compliance on 6 September 2011. Endeavouring to put the matter succinctly, Lord Uist rejected the main lines of argument advanced on behalf of Mr Brebner, these being (1) that the Trustee had insufficient averments to succeed in proving the tenor of the first disposition because it had been destroyed deliberately; (2) that the Trustee could not be in a better position than the bankrupt himself and that because of his fraud and other actings the Trustee could not now seek to found upon the first disposition and (3) that there had been undue delay in proceeding with the

claim as now formulated. His Lordship ordered the deletion of significant parts of Mr Brebner's defence and allowed a proof before answer.

9. It is perhaps worth observing that to a significant extent this judgement was founded on the decision of the House of Lords in **Burnett's Trustee v Grainger 2004 SC(HL) 19,** which restricted the application of the earlier decision of **Sharp v Thomson.** This whole area of the law – that is, the extent to which the holder of a registered title has predominance over a person who may subsequently, and in good faith, acquire an interest in the subjects, and the right of a trustee or liquidator to receive a "windfall" which has resulted from the bankrupt's fraud – is one which is regarded in many quarters as unsatisfactory. If Mr Brebner can rightly be described as being the victim of a law which allows "an offside goal", then it is for the Scottish Parliament to look at that in the light of due consideration by The Scottish Law Commission.

10. I am not aware of any attempt to appeal the decision of Lord Uist. It is not for me to attempt to identify grounds for doing so, but having regard to the decision in **Burnett's Trustee** it is fair to assume that any appeal would have been extremely difficult. There appears to have been little or no progress since Lord Uist's Opinion was issued, but a diet of proof has, I understand, been assigned for October 2014. Mr Brebner has been properly advised that his prospects of success are not good. (Postscript: I understand that the proof did proceed, and that Mr Brebner was not successful).

11. It is neither practical, nor within the scope of this review, for me to consider the possible remedies which may have been open to Mr Brebner against the estate of Pocock; Russell Taylor; his partner Mr Cradock; the firm of solicitors who acted as seller's agents in the purchase of his flat, or indeed his own solicitors in that transaction. Mr Brebner has, as I understand it, obtained advice in relation to potential claims against some if not all of these. Suffice it to say that he has been left to fund the obtaining of such advice as well as conducting more than one high level litigation entirely at his own expense. He has had

some help through solicitors and counsel being prepared to act on a speculative basis, but that has not covered his expenses by any means. Having paid for a professional service for what was a straightforward house purchase, he has had to cover those expenses yet still faces losing the property and financial ruin.

12. It is not difficult to envisage situations in which a purchaser's title will be found to be defective because of a solicitor's negligence. In such cases the pursuing of a claim will be relatively straightforward and I understand that the Law Society has in place a panel of solicitors with the relevant expertise to act in such cases. It may be said that consumers in this field are thus protected by the system of compulsory insurance and the willingness of solicitors to act against members of their own profession. What makes Mr Brebner's case unique, or at least highly unusual, is that a dishonest act, likely to have been that of a solicitor who did not act for him, appears to be the root cause of the problem. As it is not a case of misappropriation of funds an initial question arises as to whether the Guarantee Fund is engaged at all; but assuming that it is Mr Brebner has still been required, before resorting to the Fund, to go through the whole procedure of exhausting other possible remedies. The need to do that has protracted the situation as well as creating the perception of members of the legal profession pointing the finger of blame at each other with no one prepared to take ultimate responsibility.

13. As I have already observed the primary purpose of the Guarantee Fund is to replace client money misappropriated by a solicitor and at first glance that might imply that it cannot come to the rescue of Mr Brebner. I do not understand it to have been suggested, however, that any claim on the Fund by Mr Brebner is excluded, the view being taken - correctly, in my opinion – that the terms of section 43, in referring to compensation for "pecuniary loss by reason of dishonesty on the part of a solicitor" are sufficient to cover the present situation. I am aware that an application has been made on Mr Brebner's behalf resulting in meetings between the solicitor formerly acting for Mr Brebner and members of the Guarantee Fund Sub-Committee. I have

seen certain correspondence passing between that solicitor and Mr Macpherson in February 2014 in which certain issues were identified as requiring attention before the Sub-Committee. I do not know what action, if any, was taken following upon that. One critical question, yet to be determined, is what Pocock's Trustee will require to settle the Court of Session action.

14. I cannot, of course, commit the Guarantee Fund Sub-Committee to any conclusion, but my overall view is that if it can be demonstrated that Mr Brebner has no realistic prospect of a remedy elsewhere, his ultimate recourse will be to the Fund. That might be said to provide a form of consumer "protection" in the particular circumstances of this unusual case.

15. Given that this case is in essence one which was caused by fraud, and given that the manner in which frauds may be perpetrated is only limited by the imagination of fraudsters, it is not possible, in my judgement, to say that such a situation could not happen again. The real question is whether anything could have been done to assist Mr Brebner at an earlier stage. In this respect I consider that it may be desirable to consider widening the scope of the Guarantee Fund. I have already drawn attention to the provisions of sub-section (3) of section 43 of the 1980 Act: "no grant may be made…in respect of a loss made good otherwise". That is the provision which makes the Fund one of last resort, and inhibits the exercise of any discretion on the part of those operating it. I understand that in England rules of the Solicitors Compensation Fund established under the provisions of the Solicitors Act 1974 provide a discretion to those operating that Fund to make grants before requiring the applicant to resort to other means of recovery. Consideration should be given to amendment of the 1980 Act to bring it into line.

16. That would in turn require consideration to be given to the Guidelines under which the Guarantee Fund operates. Under the heading "requirements to be satisfied" these set out that every applicant must satisfy the Council "that any alleged dishonesty is evidenced either by the conviction of the solicitor…or by

a finding of fraud in a civil action, or by evidence leading to an inevitable presumption of dishonesty". The circumstances of this case suggest that this may be asking too much. Mr Taylor was in fact prosecuted for fraud, but the prosecution floundered on a technicality. Mr Brebner could not found on a conviction, and could only found on an inference that Mr Taylor acted fraudulently, rather than a "finding of fraud" if the case against him (i.e. Mr Brebner) proceeds to a conclusion. That seems an odd thing to expect when it would make more sense to settle the action.

17. The guidelines under which any discretionary power is to be exercised would have to be given carefully consideration, but what I have in mind is that where there is strong *prima facie* evidence of dishonesty on the part of a solicitor, leading, or likely to lead to, pecuniary loss, there should be an ability on the part of those administering the Fund to provide assistance in restricting continuing losses and in bringing the matter to a swift conclusion. There would appear to me to be a certain pragmatism in such an approach. It cannot make sense to expect someone in the position of Mr Brebner to finance the throwing of every legal hurdle, some successful and some not, in the way of a claim directed against him if that claim seems destined to succeed.

18. Finally, it has been suggested to me that the "Guarantee Fund" is something of a misnomer as it does not provide any "guarantee" as that term has come to be understood. There is substance in that, and re-naming the Fund as a "Compensation" fund, as in England, might give it a more appropriate title.

Happy Valley, Blackburn

19. Mr and Mrs Alan Waddell purchased 34 Happy Valley Road in September 1999. A Glasgow solicitor acted for them in the transaction. The price was £71,250. This was a newly built house. The plot had been selected by Mr and Mrs Waddell on the southern edge of a housing site of 2.8 hectares being developed by Braid Homes. They selected that site to secure an open outlook

over an area designated as being subject to special landscape control. Mr and Mrs Waddell took entry to the house in November 1999. In due course a disposition of the subjects was granted in favour of the Waddells. This was granted by Braid Almond Park Limited, to which company Braid Homes had transferred the development site at some time in 1999.

20. In November 2000 the Waddells' solicitor was informed by the Keeper of the Registers that their house, along with four others had been built wholly or partly outwith the extent of the builders' title. Presumably similar intimation went to the solicitors for the other purchasers.

21. On 11 July 2001 that solicitor wrote to Mr and Mrs Waddell in the following terms: "There is a problem with the title to your new house. We have been trying to resolve this without bothering you, but we should now draw it to your attention. We do not think there is any need to panic however. It would appear that when building the houses the builder has overstepped the boundary line, and part of your house and plot is outwith the builders' technical title……we believe there are negotiations ongoing to rectify the problem and there are negotiations with an adjoining land owner".

22. I understand, although I have not seen the correspondence, that later in July 2001 the solicitors for Braid told the Waddells' solicitor that agreement had been reached between Mr Findlay, the farmer whose firm, R Findlay & Co, owned the ground on which the Waddells' house is partially built, and Braid Almond Park Ltd, for transfer of the ground, and that this would "remedy the situation". Be that as it may it appears that in November 2001 Mr Findlay concluded a bargain to sell a portion of the land, including that on which the four houses had been built, to Jordanvale Homes Limited who in turn conveyed it to Crannog (Scotland) Limited. The consideration was £150,000. It is difficult to avoid the conclusion that Mr Findlay (or his company) sold the subjects in clear knowledge that there was an ongoing dispute arising from the fact that four houses had been mistakenly built on it. It is likely that

Jordanvale/Crannog were also well aware of the problem. According to Mr Anderson, Crannog had legal advice that "solicitors' negligence" would be referred" to professional indemnity insurers and "reasonable compensation would be agreed." I conclude from this that Crannog anticipated payment for the land on which the houses had been built from professional indemnity insurers.

23. On 6 February 2002 Mr and Mrs Waddell's solicitor wrote to them stating that he had made further enquiries in connection with rectification of the title. He said: "It would appear that there are four houses including your own which are affected by a title defect, but the whole estate might be affected by another problem in relation to wayleaves. There is a potential negligence action against the original solicitors who acted for Braid when they purchased the site…….for your own part we think you have a claim against Sturrock & Armstrong…. who gave us an undertaking at settlement to produce a clear Land Certificate." He went on to say that "the time has come to intimate a formal claim against Sturrock & Armstrong and actually raise an action against them." He said that it would be advisable for this to be done by an independent solicitor. According to the Waddells, their solicitor indicated shortly thereafter that he could not continue to act for them, and arranged for them to meet Paul Reid, Solicitor, of Fleming & Reid, Glasgow, and in April 2002 the Waddells formally engaged Mr Reid to act for them. In October 2002 ten households affected by the dispute agreed that Mr Reid should act for all of them.

24. In July 2002 the first of what was to become a proliferation of court actions was raised. This was an action in the Court of Session at the instance of Crannog against Braid Almond Park Ltd seeking *inter alia* to have the defenders remove from the pursuer's property. The action was intimated to the Waddells as "persons believed to have an interest". The prospect of this action had been intimated to the Waddells' solicitor in a letter from Crannog's agents dated 31 May 2002. That letter stated that Braid Almond Park Limited

had built houses, and sewer outlets, on land now owned by Crannog, and were being "called upon to remove the encroachments". Mr and Mrs Waddell were advised not to enter the process. This action was presumably raised by Crannog on the basis of legal advice, although the purpose of raising it at that stage is not clear to me.

25. In the course of 2003 certain advice was obtained for Mr and Mrs Waddell as to the tactics which they should adopt and in particular whether claims should be directed against solicitors who acted for them in the purchase transaction, or against the sellers' solicitors. In the event, as I understand it an action was raised on behalf of the Waddells against their former solicitors and in due course actions were raised by three other proprietors against three other firms of solicitors all of whom acted on behalf of purchasers. This brought into the picture Royal & Sun Alliance as insurers under the Master Policy. These actions were all sisted, and remain so; it follows that any question of professional negligence on the part of purchasing solicitors has not been judicially determined.

26. On 27 April 2004 one of the houses affected was conveyed to the proprietors by Crannog. I am not wholly clear as to the circumstances of this settlement, which came about according to Mr Anderson because Crannog owned both the house itself and the land on which it was situated, but if left four houses on the affected strip, namely numbers 30, 32, 34 and 36 Happy Valley Road.

27. In January 2005 a Court of Session action was raised by Crannog against Mr and Mrs Waddell. This sought declarator that the pursuers were proprietors of the ground on which the Waddells' house is built; reduction of the Disposition granted in their favour by Braid Almond Park Ltd, and advanced various claims for damages. Similar actions were raised against other proprietors, and indeed separate actions of ejection were subsequently raised in the Sheriff Court at Linlithgow.

28. In June 2005 some attempt appears to have been made to resolve the situation at a meeting held in Glasgow. It was attended by Mr Reid on behalf of those proprietors in the Happy Valley development who had instructed him; by representatives of the professional indemnity insurers, the solicitor for Crannog and the solicitor for Braid Almond Park Limited. Mr Reid reported on this meeting to Mr and Mrs Waddell by letter dated 29 June. The outcome was that agreement was reached to settle the wayleave issue. This involved a payment to Crannog of £5000 in respect of each house affected, a total, as I understand it, of £85,000.

29. Mr Reid further informed the Waddells that "… in so far as the title deficiency is concerned, the solicitor on behalf of Crannog indicated that they were seeking payment not only for the market value of the property, they were seeking a payment for loss of profit and loss of rental income…..in total the figure which was sought by Crannog in relation to the title deficiency was a figure of approximately £1,000,000. The solicitors and representatives of the indemnity insurers made it perfectly clear that there was no prospect of such a sum being paid".

30. On 6 November 2006 Mr Reid reported to Mr and Mrs Waddell that he had met with the solicitor acting on behalf of the professional indemnity insurers. Mr Reid set out that the insurer had an Opinion "from a recognised conveyancing expert" which expressed the view that their solicitors had not been negligent in connection with the purchase of their home. However, Mr Reid went on to say that he had obtained a contrary Opinion from a Professor of Conveyancing, and went on to express a strong view in support of the Professor's Opinion. Mr Reid then proceeded to point out the expense involved in the current court actions, and that his firm was acting on a speculative basis. He said: "We have spoken at length with the solicitor for the insurers, explained to them the predicament and asked them to persuade the indemnity insurers that in the interests of public policy your continued opposition to these court actions should be funded by the indemnity insurers."

31. It appears to have taken some time to put such an arrangement in place, but ultimately agreement was reached whereby RSA agreed to conduct the defence of the Court of Session actions at the instance of Crannog against the Happy Valley proprietors. The exact nature of that arrangement may be confidential. The proprietors retain their own legal representation for other purposes, the Waddells now being advised by solicitors other than Fleming & Reid.

32. The Crannog case against the Waddells – as the lead case - in the Court of Session appears to have proceeded without undue haste. A Procedure Roll debate was fixed for 30 May 2008 but was discharged shortly before it was due to take place. Notes of argument were lodged in January 2011. On 16 June 2011 the case was withdrawn from Procedure Roll and proof before answer allowed. A diet of proof was assigned for 30 April 2013. Despite that having been agreed, an attempt was made by Crannog to obtain summary decree in terms of the fourth and fifth conclusions. These sought declarator that the defenders had no right or title to occupy the subjects and an order to remove. The motion was opposed by Senior Counsel, instructed by the insurers, and was refused by Lord Kinclaven on 17 August 2011.

33. The case was scheduled for proof on 30 April 2013. On 12 April the pursuers, whose agents had withdrawn, sought to have the proof discharged, ostensibly on the grounds that various preparations by way of obtaining reports etc., required to be completed. That motion was refused. When the case did call for proof on 30 April Crannog were not represented other than by their director Mr Jack Anderson. After some exchanges decree of absolvitor was pronounced.

34. I understand that thereafter the defenders' accounts of expenses were taxed at a sum in the region of £250,000. Decree was extracted and charges for payment served. In the absence of payment of those expenses a Petition was presented to the Court of Session in the name of Mr and Mrs Waddell for the

winding up of Crannog Ltd. This was granted and liquidators appointed on August 2014.

35. By letter dated 6 May 2014 Mr and Mrs Waddell, and I assume the other residents, had been informed by Mr Anderson that "Crannog finds itself unable to continue". Amongst a series of observations regarding Crannog's original intention in acquiring what is described as the "hammerhead of land" Mr Anderson makes three main points. These are, first, that responsibility for failure to settle matters and "agree compensation" rests with RSA and the solicitor acting for them for "avoiding legal negligence", and second, that "we would have settled as far back as 2004 for £300,000". This latter observation contrasts somewhat starkly with Mr Reid's report in June 2005 of Crannog's position at a meeting in Glasgow at that time; neither does the conciliatory tone of Mr Anderson's letter sit well with much of the action taken by Crannog over the years which has included demands from the proprietors for rent of £600 per month, threats of arrestment and use of debt collection agencies, and the separate actions of ejection in the Sheriff Court. Thirdly, Mr Anderson informs the proprietors that Crannog have borrowed from two private lenders who have "charges" over the land; that a statutory demand for payment has been issued by the first charge holder and that "the only way to prevent the charge holders from taking possession will be for the insurers to meet their obligations immediately".

36. My observations on the case, on the basis of the information available to me at this stage, are as follows. The initial problem for the Waddells and other residents was caused by the housing developer building on land he had not bought. He caused the problem at the outset. Whilst there is an obligation in law on the seller of heritable property to deliver a good title in general any claim which a purchaser of property may have against default on the part of the seller depends on the continuing solvency of the seller. The fact that the developers caused the initial problem was compounded in this case by the fact that they became insolvent. Even if one were to consider some form of statutory duty on the part of a seller to provide good title the effectiveness of

that would still depend on the seller's solvency unless backed by some form of Government guarantee (an unlikely prospect, some might think.)

37. Whether there should be some improved system of protection for the purchasers of newly constructed houses to protect them from insolvency on the part of the builders would be a matter for the building industry and possibly the Scottish Government. In terms of securing the provision of good title, improvements in the system of land registration may go some way to preventing a recurrence of what occurred here. In particular the new Development Plan Approval Service provided by the Registers of Scotland exists to give greater clarity to both developers and purchasers as to the precise legal extent of an area of development by comparing development plans with legal title. I understand that this service is used by a number of major housebuilding companies, and indeed the very existence of the service raises awareness of the type of situation which arose at Happy Valley.

38. There is, nevertheless, no way of guaranteeing that a builder will not stray over the area on which he is entitled to build. Where this happens, in the normal case the title can be rectified by negotiation with the owner of the land on which the encroachment has taken place. Most landowners will approach this reasonably. In this case my distinct impression is that they were not reasonable. Despite Mr Anderson's assurances that Crannog were prepared to settle for £300,000 - or less – in June 2005, I am satisfied, on the basis of Mr Reid's contemporaneous report, that negotiations did not proceed further because of an exorbitant demand. I am fortified in that view by Mr Anderson's reference to "the insurers meeting their obligations". This appears to assume that RSA have some clear liability to reimburse the Happy Valley proprietors for such claims as Crannog pressed against them. It reflects a fundamental misunderstanding of the insurers' position. There is no "negligence" for them to "avoid" as Mr Anderson puts it. The insurers' advice is that there is no professional liability on the part of the solicitors whose interests they cover.

39. In a sense the difficulties facing the Happy Valley proprietors have been compounded by the division of opinion as to legal liability of solicitors. This arises because of the fact that they have advice that the solicitors who acted in the original purchase were negligent, whereas the professional indemnity insurers have contrary advice. It is not for me, in the context of this Report, to express any view as to which of these opinions is, or is likely to be proved to be, correct. Such a conflict of expert opinion is not by any means unusual and arises in the medical, and other fields of professional practice, as much as is does in the law. But it is not desirable to have the potential for such conflict in an area as commonplace as house purchase, particularly in the case of the purchase of a new house from a builder. Aside from the existence of conflicting opinions in the present case, my discussions lead me to the tentative conclusion that it is not entirely clear what a house purchaser should be entitled to expect by way of legal duty on the part of his solicitor. I have heard that solicitors acting for lenders have imposed upon them, not infrequently, a duty to comply with "best conveyancing practice" in securing a fully enforceable security. There are mixed opinions as to whether this term imposes a higher duty than that to be expected of "an ordinarily competent solicitor" (the **Hunter v Hanley** test), and that in itself adds to the potential uncertainty. I have not had the opportunity to explore this matter in depth and in any event I regard it as outwith my area of expertise, but I have the impression that more needs to be done to clarify and define what the ordinary house purchaser should expect of his solicitor in relation to confirming that the boundary of lands being acquired matches that owned by the seller. Such clarification would at least make the determination of fault more straightforward should that question arise.

40. This whole situation, including the doubt over whether or not the purchasing solicitors were at fault, has led to the Happy Valley proprietors being left in a highly invidious position. Whilst they have had the benefit of representation in the Court of Sessions actions directed against them, the outcome of those actions does not resolve the question of title which remains at the root of the

problem. Quite separately from those actions they have, over the years, incurred very significant legal expenses with no immediate prospect of recovery of any of these. This has occurred in the context of what ought to have been a straightforward house purchase transaction. It is, I regret, not within the province of this Report to offer a solution.

In summary

41. These two cases arise for very different reasons. They are not indicative of a systemic problem in conveyancing practice. However, both have resulted in processes which have been protracted; expensive and highly stressful for consumers of a routine legal service; and neither displays immediate prospect of resolution. They are very damaging to the image of the legal profession.

42. The Aberdeen case, appears to have arisen because of an act of dishonesty on the part of a solicitor. The act in question – the creation and recording of a false disposition – is in itself a highly unusual one and in consequence the case must be regarded as exceptional. It is not possible to exclude, by legislation or otherwise, exceptional acts of dishonesty. It is possible that the situation could have been resolved earlier if the Guarantee Fund provisions permitted greater flexibility (although that is by no means a certainty). In consequence my recommendation arising from the Aberdeen case is that manner of operation of the Guarantee Fund should be examined with a view to providing more discretionary powers to those charged with its operation..

43. The Happy Valley case is in some respects more complex. It has arisen because of a mistake on the part of original housebuilder resulting in the purchasers being granted a defective title. This type of error is less likely to occur because of the change in conveyancing practice outlined in paragraph 37. Where it does occur one might anticipate that the problem would be rectified through negotiations. In this case it has not been rectified, as far as I can tell, because those who acquired the land onto which the new houses encroached have

entertained a mistaken expectation of recovering money from an insurance company. That somewhat unusual state of affairs makes this case, hopefully, unique.

44. I do, however, suggest that thought needs to be given to clarifying the legal duty of a solicitor acting for a purchaser in similar transactions with a view to avoiding the conflict of opinion which has arisen here.

Lundie
Angus
20 January 2015