No. 8321/2001

IN THE MATTER OF ALLEN PHILLIP ELLIOTT, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS' ACT 1974

Mr. A G Ground (in the chair)
Mr. A H B Holmes
Mr. G Fisher

Date of Hearing: 3rd and 4th December 2001

FINDINGS

of the Solicitors' Disciplinary Tribunal
Constituted under the Solicitors' Act 1974

An application was duly made on behalf of the Office for the Supervision of Solicitors ("the OSS") by Jonathan Richard Goodwin solicitor and partner in the firm of JST Mackintosh of Colonial Chambers, Temple Street, Liverpool on the 1st March 2001 that Allen Phillip Elliott might be required to answer the allegations contained in the statement which accompanied the application and that such order might be made as the Tribunal should think right.

On the 5th November 2001 the applicant made a supplemental statement containing a further allegation.

The allegations below are those set out in the original and supplementary statements.

Initially the allegations had been made against the respondent and three other respondents. The allegations had been withdrawn against the three other respondents. The Tribunal has amended the wording of the allegations so that they now relate to Mr Elliott as the sole respondent, for instance where previously an allegation referred to "they or themselves" the Tribunal has amended it to refer to "he or himself".

The allegations were that the respondent had been guilty of conduct unbefitting a solicitor and had breached the rules specified below in each of the following particulars namely:-

(i) that contrary to Rule 1 of the Solicitors Practice Rules 1990 and Principle 15.04 in the Guide to Professional Conduct of Solicitors (1996 and 1999 Edition) he acted and/or continued to act as a solicitor when conflicts of interest existed and/or arose between clients and himself;

(ii) that contrary to Rule 10 of the Solicitors Practice Rules 1990 the respondent failed to account to his clients for any commission of more than £20 received and/or failed to disclose to his clients the amount of any commission received or the basis or calculation of commission retaining the same without consent;

(iii) that he failed to disclose material information to Mortgagee clients (lay investor clients);

(iv) that he made representations in advertisements which were misleading and/or inaccurate;

(v) that contrary to Rule 4(4) of the Solicitors Investment Business Rules 1995, the respondent conducted discrete investment business when the firm was not authorised to do so;

(vi) that contrary to Rule 20 of the Solicitors Investment Business Rules 1995 the respondent allowed discrete investment business to be conducted when no person within the firm held "qualified person" status and/or failed to provide direct supervision by a "qualified person";

(vii) that contrary to Rule 22(1) of the Solicitors Investment Business Rules 1995 the respondent made personal recommendations and/or effected transactions for clients without assessing the suitability of such recommendations and/or transactions for each client;

(viii) that contrary to Rule 22(2) of the Solicitors Investment Business Rules 1995 the respondent made personal recommendations to clients without having taken reasonable steps to enable the client to understand the nature of the risks involved;

(ix) that contrary to Rule 3 of the Solicitors Practice Rules 1990 and Section 2(3) of the Solicitors Introduction & Referral Code 1990, the respondent rewarded introducers by the payment of commission and/or otherwise;

(x) that the conduct of the respondent overall was such that it gave rise to breaches of Rule 1 of the Solicitors Practice Rules 1990 in that his independence and/or integrity was compromised or likely to be compromised and/or the duty to act in the clients' best interests was compromised or likely to be compromised and/or the good repute of the solicitor or of the solicitors' profession was compromised or likely to be compromised;

(xi) that the respondent caused correspondence to be sent to investor clients which was misleading and inaccurate;

(xii) that the respondent improperly purported to witness the signature of an individual in circumstances where the signatory had not signed in his presence;

(xiii) that contrary to Rule 13 of the Solicitors Practice Rules 1990, the respondent operated a regional office that was not properly supervised and/or failed to comply with the minimum standards set out in Rule 13;

(xiv) that the respondent provided information that was inaccurate and/or misleading to the Solicitors Indemnity Fund Ltd for the year from 6th April 1998 on the Gross Fee Certificate;

(xv) that contrary to Rule 5 of the Solicitors Practice Rules 1990 and the Solicitors Separate Business Code, the respondent carried on a separate business, namely Elliotts Mortgage Administration Ltd;

(xvi) that the respondent provided a misleading representation to The Law Society on his application for admission as a solicitor of the Supreme Court of England and Wales.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London ECM 7NS on the 3rd and 4th December when the OSS was represented by Mr Tim Dutton of Queen's Counsel instructed by Messrs JST Mackintosh of Colonial Chambers, Temple Street, Liverpool. At the opening of the hearing the respondent made an application for an adjournment. The respondent represented himself at such application. Upon the refusal of the adjournment application by the Tribunal, Mr Elliott withdrew from the proceedings and was not therefore in attendance and was not represented at the substantive hearing.

Mr Elliott's application for an adjournment

1. The Tribunal noted that Mr Elliott's solicitors, Irwin Mitchell of Sheffield, had addressed a letter to the Tribunal dated 23rd November 2001 setting out grounds for which an adjournment was sought. The Tribunal also had before it Mr Elliott's letter addressed to the Tribunal dated the 1st December 2001 and a copy of the correspondence which had passed between Mr Elliott and Messrs JST Mackintosh during November 2001. Mr Elliott made his application for an adjournment in person.

The Submissions of Mr Elliott

2. Mr Elliott had been unable to fund representation because Russell Cooke Trust Company had obtained a freezing order in respect of his assets alleging a breach of trust against Mr Elliott. There had been discussions between Russell Cooke, Potter & Chapman, solicitors, who had intervened into the respondent's practice on behalf of The Law Society, to establish a basis upon which funds could be provided to the respondent. At best such funds could be made available to enable the respondent to make an application to the High Court for permission to spend money on his representation in the disciplinary proceedings.

3. The OSS was represented by leading Counsel and Mr Elliott was not represented at all. The lack of equality of arms was seriously prejudicial to Mr Elliott.

4. The respondent had instructed a firm of solicitors to represent him over a period of time. That firm had not been able to continue with his representation, and in

particular had not been able to instruct Counsel, in the absence of funds. It had somewhat late in the day notified the respondent that it had come to the conclusion that it did not have the relevant expertise to pursue the respondent's application for the release of funds and the respondent had had to instruct new solicitors.

5. The respondent had instructed new solicitors, Messrs Irwin Mitchell, only a short time before the date when the substantive matter was listed for hearing.

6. In its letter addressed to the Tribunal Messrs Irwin Mitchell had confirmed that it would endeavour to make an application to the court for permission for the respondent to spend money on his representation as quickly as possible. The firm pointed out that it had been only recently instructed and it would be necessary for it to familiarise itself with the case. It considered it unlikely that there would be an effective hearing of the application for the release of funds before the end of January 2002. Further when funding had become available before the disciplinary proceedings Messrs Irwin Mitchell would require a reasonable period of time in which to get to grips with the substantive issues and to arrange for the respondent's representation at the disciplinary hearing. Messrs Irwin Mitchell made a provisional estimate that it would require at least one month from the point at which funds became available.

7. The respondent pointed out that there had been a preliminary hearing before the Tribunal on the 13th November 2001. At that hearing the respondent had assured the Tribunal that the OSS was fully aware of its duty to give full disclosure and that it would do so within seven days of the interim hearing.

8. The respondent had sought a copy of a report prepared by Mr Robinson, an Investigating Officer of the OSS, following his inspection of the respondent's firm in September 1998.

9. On the 26th November 2001 the respondent had been sent by those representing the OSS eighteen pages of handwritten notes made by Mr Robinson. That document had been delivered nearly one week after the seven day period referred to above and the notes were meaningless without a proper transcription. On the 28th November the respondent had requested a transcription of Mr Robinson's notes.

10. It was the respondent's case that the relevant documents pertaining to Mr Robinson's investigation formed an integral part of his case but on 29th November 2001 Messrs JST Mackintosh in response to the respondent's request for a transcription advised that they were not prepared to cooperate and said that:-

> "Mr Robinson's evidence does not form part of The Law Society's case."

11. The respondent told the Tribunal that he was unable properly to prepare his defence without full and intelligible disclosure of the internal memoranda and contents of Mr Robinson's notes. He was seriously prejudiced by his inability to instruct solicitors experienced in proceedings before the Disciplinary Tribunal and was further prejudiced by the fact that the applicant was represented by Leading Counsel and he had no representation at all.

The Submissions of the OSS

12. The statement made pursuant to Rule 4 of the Solicitors Disciplinary Proceedings Rules 1994 and the supplementary statement both of which had been served upon the respondent and were before the Tribunal set out in detail the allegations and cross referred the allegations to the particular paragraphs dealing with the evidence in support of such allegations. The papers upon which the applicant was to rely had been disclosed at an early date. The supplemental statement dealt with the making by the respondent of a misleading statement and had no connection with matters revealed by any investigation carried out by the OSS.

13.. The respondent's assets had been made subject to a freezing injunction in order to protect trust assets. On 6th March 2001 Mr Justice Laddie had refused to set aside that injunction. This provided a strong argument that the respondent had trust assets in his possession.

14. The substantive hearing had been fixed to suit the convenience not only of the applicant but in particular of the respondent. The case had been listed for a hearing of ten days. The respondent was served with the Rule 4 Statement in March 2001 and he had had at least eight months in which to prepare his case and seek any release of funds from the High Court. It had been open to the respondent to go to The Law Society's Intervention Agents, Russell Cooke, Potter & Chapman, at any time as they were holding the relevant files.

15. Mr Elliott could not be said to have been disadvantaged. He had had plenty of time to prepare himself for the hearing. All of the matters before the Tribunal were within the personal knowledge of the respondent. The respondent lived in London. The Tribunal would note that the respondent had submitted a "response to outline note of The Law Society" in effect a Skeleton Argument which was a detailed and complex document. The Tribunal would also note that the respondent had been vigorous in trying to defend his position before the High Court. He clearly was entirely capable of conducting his own defence and could not be said to be prejudiced in not being represented.

16. The Tribunal was reminded that the respondent had appeared before the Tribunal on the 13th November 2001 when the respondent had given no indication that he felt unable to represent himself. The Tribunal was invited to consider the Court of Appeal's judgment made in connection with Mr Pine's appeal. In the case of the respondent he was medically fit to attend. He was intelligent and able to grasp complex matters. In reality there was no-one better fitted to deal with the issues. It was further a fact that the Tribunal itself was an expert Tribunal. The Tribunal would ensure that the matters before them would be dealt with fairly.

17. The reality was that the respondent had no serious prospect of obtaining a release of funds subject to the freezing injunction by the High Court. There had been on his part eight months delay in seeking funds and he had brought this matter up at the eleventh hour before the substantive hearing.

18. The OSS was ready to proceed. Three witnesses were in attendance to give evidence before the Tribunal.

19. The notes of Mr Robinson had been provided to the respondent. No formal report of Mr Robinson's investigation had been written. On the 13th November the OSS had indicated to the respondent that any notes would be disclosed and they had been. The main complaint by the respondent appeared to be that he had to grapple with hand-written notes. That was true, of course, but the applicant did not rely on Mr Robinson's notes.

The Decision of the Tribunal

20. The Tribunal refused the respondent's application for an adjournment.

21. The respondent was present before the Tribunal. He had been granted the opportunity of appearing before an independent Tribunal to explain and defend himself. The Tribunal did not consider that the respondent's appearing in person without legal representation denied him the chance of a fair trial or denied him any of his rights under Article 6 of the European Convention on Human Rights.

22. With regard to the evidential material requested by the respondent from the OSS, the respondent asked for full disclosure of the September 1998 investigation made by Mr Robinson. The Tribunal noted that Mr Robinson's notes relating to that investigation had been made available to the respondent. Those representing the OSS had indicated to the Tribunal that Mr Robinson was present and would be called as an oral witness if required. The respondent would therefore during the course of the substantive trial have the opportunity of questioning Mr Robinson. That was a safeguard for Mr Elliott, even though the OSS had indicated that it placed no reliance on any matters with which Mr Robinson would be able to deal.

23. The Tribunal also noted that the respondent had made a previous application to the Tribunal on the 13th November 2001. He had sought further information from The Law Society and the division of the Tribunal presiding in November 2001 had ruled that it was not appropriate to order The Law Society to provide further and better particulars of its case. The statement made pursuant to Rule 4 of the Solicitors Disciplinary Proceedings Rules 1994 was comprehensive. Those representing the OSS had indicated that they would prepare the respondent with a formal written opening and that had been done.

24. The respondent had been served with the disciplinary proceedings in March 2001. The date for the substantive hearing commencing on the 3rd December 2001 had been set on the 18th June. The respondent had had ample time to prepare himself for the substantive hearing. The Tribunal had before it the respondent's response to the outline note of The Law Society. He had full personal knowledge of the matters alleged against him, indeed it might be said that he was an expert on such matters and was well able to deal with the allegations.

25. It was for those reasons that the Tribunal rejected the respondent's application and confirmed that it would forthwith proceed to the substantive hearing. The 3rd December, the day upon which the respondent's application was heard, was the first of ten days set aside for the substantive hearing of the matter and those days had been set aside for many months. The Tribunal trusted that the respondent would remain to exercise his rights and the opportunity to explain matters and assist the Tribunal, his own professional disciplinary body.

Mr Elliott's retirement from the proceedings

26. Upon learning that he had been unsuccessful in his application for an adjournment, the respondent told the Tribunal that he had been advised in such circumstances to withdraw from the proceedings. He did not consider that justice had been done. The respondent then withdrew.

The Substantive Hearing

27. The evidence before the Tribunal included the oral evidence of David James Middleton and of John Charles Gould.

28. At the conclusion of the hearing the Tribunal ordered that the respondent Allen Phillip Elliott of Chiswick, W4 formerly of London, W6 solicitor be struck off the Roll of Solicitors and they further ordered him to pay the costs of and incidental to the application and enquiry to be subject to a detailed assessment if not agreed between the parties, such costs to include the costs of the Monitoring and Compliance Officer of The Law Society.

29. The Tribunal confirmed at the end of the hearing that the matter had been one of considerable complexity and it was entirely appropriate that Leading Counsel should have been instructed to represent the applicant.

The facts are set out in paragraphs 30 to 81 hereunder: -

30. The respondent was born in 1949. He qualified as a solicitor in Queensland, Australia. He came to England in 1995 and was admitted to the Solicitors' Roll in that year. Mr Elliott commenced in practice as a sole practitioner on 1st July 1996. He practised under the style of Elliotts Solicitors Plc ("Elliotts") from offices at Lloyd's Bank Chambers, 312 Chiswick High Road, London, W4 1NP. Elliotts was incorporated on 20th August 1999 and with effect from 26th August 1999 was recognised by The Law Society as a "recognised body" in accordance with the Solicitors Incorporated Practice Rules 1998. On the 15th March 2000 The Law Society resolved to intervene into the practice of Elliotts on the grounds of reasonable suspicion of dishonesty.

31. Following an inspection of the respondent's firm carried out by the Monitoring & Investigation Unit ("MIU") of The Law Society, a copy of whose report dated 15th December 2000 was before the Tribunal, it had come to light that the respondent had run certain investment schemes which were the subject of concern. The respondent had been interviewed by Mr Fletcher, an MIU Officer, and Mr Middleton, a Senior Officer at the OSS, on 9th March 2000. A transcript of that interview was also before the Tribunal.

32. Elliotts operated what they referred to in marketing literature as "The First Mortgage Debenture Monthly Income Plan." As at 31st January 2000, investing clients had invested £14.8 million in the scheme. Copies of marketing literature were produced to the Tribunal. The Tribunal noted that in one brochure it was said that the investment return compared to bank interest was:-

> ".... a better performing yet secure alternative form of investment where you can with as little as £10,000 receive a return on your investment far better than any High Street Bank or Building Society."

33. Interest rates payable to investing clients were around 11% or 12%. The investing clients provided funds to Elliotts to be lent out to a commercial borrower the funds being secured by a first charge on real property owned by the borrower. The borrower was always a limited company. The advertising literature indicated that other security would be taken including a charge over the borrower's assets, personal guarantees from directors and the assignment of life policies. It was unusual for clients' funds to constitute the entire loan to a borrower. It was more common for the funds of several lending clients to be pooled so that in effect several lending clients contributed to a single commercial loan. In most cases Elliotts or the respondent himself were described in the charge documents as the lender's " trustee." On completion of the transaction the respondent or Elliotts made a declaration of trust in favour of the lending clients.

Allegations (i), (ii), (iii) (iv) and (xi)

34. In relation to most loans the borrower paid a higher rate of interest than Elliotts paid to the investing clients. Elliotts kept the difference, describing the "turn" as "administration charges." Clients were not informed of those amounts.

35. The scheme operated primarily for the benefit of Elliotts and Mr R, an associate. The scheme did not operate in the best interests of Elliotts' lender clients. Companies closely connected with Mr R were borrowers. Mr R or his companies were introducers.

36. If an interest payment was late, the rate payable by the borrower was substantially increased sometimes doubling or trebling. In their most recent brochure Elliotts stated that Elliotts Mortgage Administration Ltd ("EMA") would "at our discretion" continue to pay the monthly interest to the client but that EMA "would then be entitled to receive the penalty interest."

37. Elliotts did not inform their lending clients that substantial facility fees were paid from the loan funds before the net amount was released to the borrower. Most of the facility fees were paid to close connections of Elliotts, in particular companies connected with Mr R.

38. Facility or "processing fees" were paid to the respondent personally to Elliotts and to a company and officially owned by the respondent's wife. The clients were not informed of that.

39. Lending clients invested on the basis that the loan made would not exceed 66.66% of the value of a property. The Tribunal had before it the documents relating to a number of loans from which it was clear that that had not been so. In one case an undeveloped piece of land was valued as if the development had been completed.

40. Elliotts represented to lending clients that stringent credit checks were made against borrowers. Loans were made to borrowers with poor credit records, companies that

had not filed annual accounts or which had been incorporated for an insufficient period of time to have gained a credit record.

41. Loans had been used to pay off other loans or interest due on other loans.

42. Interest payments due from borrowers to clients had been paid first into the account of EMA rather than into Elliotts' client account.

43. Defaults, such as the late payment of interest by borrowers, had not been disclosed to lender clients.

44. The marketing information about the investment scheme and correspondence direct with lending clients had been misleading.

45. The respondent and his wife were directors and shareholders of EMA. The company was not a recognised body and was therefore a separate business. Of the three promotional brochures before the Tribunal, the third stated that "Your loan is fully administered from start to finish by Elliotts Mortgage Administration Limited." There was reference to EMA paying interest "in the unlikely event of default." The latter statement was immediately below the following section:

> "Indemnity Insurance
>
> We have Professional Indemnity Insurance for up to £2,000,000 on each valid claim and Directors Liability Insurance for £1,000,000. (Both subject to the payment of the appropriate excess)."

46. An advertisement placed by Elliotts referred to "All loans fully insured."

47. An example of Elliotts' Terms of Business included "interest payments of the borrowers are paid to Elliotts Mortgage Administration Limited (a subsidiary of Elliotts Solicitors Plc) whose responsibility it is to administer and monitor all interest payments and will, in its absolute discretion, pay the interest payment due if not paid by the borrower."

48. Elliotts did not inform clients that, as customers of EMA, they did not enjoy the statutory protection attaching to clients of a solicitor or recognised body.

49. The attention of the Tribunal was drawn also to three brochures. In the first under the heading "The Role of the Law Firm" it was said:-

> "Solicitors of course are very often the first professionals to be consulted on both the raising of finance for property and on general investment matters, but historically, only a very small number have arranged mortgages or mortgage investment plans. Even those that do so usually restrict the service to favoured clients only: most have regarded this service as secondary to their core legal function. At Elliotts Solicitors however the financial benefit for our clients and the opportunity to offer a comprehensive financial and legal service is now so compelling that we resolved to offer this new service to the sophisticated investor as a packaged and managed product – the SMD Monthly Income Plan."

50. Under the heading "How The Plan Works" the following appeared:-

"1. Investment

The FMD monthly income plan offered by Elliotts Solicitors is simple to understand and simple to operate.

Investors first register with Elliotts Solicitors indicating the level of their investment and the preferred term over the minimum of three months.

The minimum investment is £10,000.

Money is initially placed in Elliotts Solicitors Clients Trust Account to be used as a mortgage by a second party after a number of stringent checks detailed below, are satisfied.

Loans are made to registered companies only. The borrowing company issues a debenture to the lender that is secured against the company's assets and registered at Companies House. The loan is then further secured against the borrowers' property as a first charge in the investors' name as first mortgagee in the charges register of the title deed. This document is endorsed by HM Land Registry and a copy is despatched to Elliotts Solicitors. A certified copy is then sent to the investor.

In the unlikely event of a default, foreclosure on the property securing the loan can be made immediately without the need for court action as the lender always hold a debenture over the company's assets.

All preliminary work is normally completed within seven working days during which time interest is paid to the client at current bank rate. Thereafter, interest is paid at the full agreed rate.

Payments are made on the first working day of each month either into the investors bank account or directly by cheque if preferred.

There is a monthly management fee of an eighth of one percent. This is deducted from each monthly payment.

2. Borrowing

The Plan is designed for short-term loans in the business lending market - the maximum period being three months. These loans are notoriously difficult to arrange quickly through the institutions and are often prohibitively expensive. The FMD however can be approved and finalised within seven days without compromising security in any way.

Borrowers are introduced to Elliotts Solicitors from many sources including high street and merchant banks, accountants, mortgage brokers, independent financial advisers and other law firms. Elliotts never act for the borrower, only the lender to avoid any conflict of interest.

> Before any mortgage is agreed, a number of additional conditions must be met. This preliminary work is undertaken by Elliotts Solicitors and charged to the borrower by way of a legal fee, arrangement fee or both."

51. When dealing with the returns of investment that brochure stated:-

> "Last year nearly £2 billion was invested in solicitor managed funds, an increase of 25% over the previous year, as more law firms capitalised on their privileged market position."

52. Under the heading "Credit Control" it was said:-

> "No loan application is approved unless stringent credit worthiness is established. All directors or guarantors are checked through the credit reference agency Experian (formerly CCN)."

53. The brochure went on to say:-

> "Elliotts Solicitors are regulated in the conduct of investment business by The Law Society. Funds for every loan transaction pass through the firm's clients' trust account and are audited in accordance with The Law Society regulations."

54. In the second brochure before the Tribunal the respondent gave a personal message:-

> "If mortgage investment sounds new to you, don't worry its not new to me. For the past 20 years I have personally been serving mortgage investment clientele from all over the world."

55. It went on to described Elliotts Solicitors Plc as a "multi national legal practice" and said:-

> "Access to mortgage business requires good contacts, high levels of administrative skill and a comprehensive knowledge of the law – precisely the profile of the experienced legal firm. We are a London based multi-national legal firm specialising exclusively in private mortgage finance."

56. It went on to say:-

> "Preliminary work is undertaken by us prior to any loan approval and all costs of establishing a mortgage are always passed on to the borrower by way of a legal fee, arrangement fee and/or administration fee."

57. It went on to say under the heading "No Transaction Costs":-

> "The borrower pays his own costs and also the lender's costs which include all legal fees associated with the mortgage deed, valuation fees, administration fees, establishment fees, insurance costs and disbursements."

58. Under the heading "Default Interest" the brochure stated:-

> "In the unlikely event of default by the borrower on the loan every mortgage document contains a penalty interest clause of at least 2% per month. If a default occurs at our discretion we will arrange to continue to pay the monthly interest to you by Elliotts Mortgage Administration Limited who would then be entitled to receive the penalty interest. It went on to say the plan is designed for short and medium term loans in the business lending market. Borrowers introduced from many sources including merchant banks, independent financial advisors, mortgage brokers, accountants and other law firms. We never act for the borrower only the lender thus avoiding any conflict of interest."

59. Lending clients were not informed that the respondent also acted for borrowers nor of the connection with Mr R and associated companies, nor that the respondent allowed borrowers on one loan to use monies advanced to them to pay off capital and interest due to other lenders on separate loans made to different borrowers.

60. The Tribunal had before it details of one matter involving an hotel. On 24th May 1999 £10,000 was received by way of further advance in relation to the hotel and was utilised to reduce the capital debt of P Ltd.

61. A letter dated 12th June 1999 to D Ltd suggested that there be a further reduction of the capital debt of P Ltd by a further £7,000.

62. On 14th June 1999 £7,000 was received by way of further advance to reduce the capital debt of P Ltd.

A further capital reduction of £9,000 occurred on 16th June 1999.

63. By letter dated 1st September 1999 Mr R on behalf of C Ltd wrote to the respondent enclosing copy invoice from BWI Marketing requesting that they discharge the same from the funds which were retained on the respondent's client account in respect of the mortgage over the hotel.

Lending clients, Mr and Mrs C

64. By letter dated 29th November 1999 Elliotts wrote to Mr and Mrs C and said:-

> "We advise that the borrower has requested an extension for repayment of their loan until 11th March 2000. Interest will be continued to be paid at 15% per annum until this time. All interest payments have been made promptly and we would recommend extending this facility. Please confirm (by signing and returning the enclosed copy letter) that you are agreeable to this extension."

65. Arrears had accrued since August 1999 and Elliotts had been pressing for payment.

Allegations (v), (vi), (vii) and (viii)

66. The scheme operated by the respondent and Elliotts was considered by the MIU to be a series of collective investment schemes within the meaning of the Financial Services Act 1986. The OSS sought the advice of Counsel who confirmed that view. Mr

Justice Laddie had indeed ruled on the 11th July 2001 that Elliotts had created a series of collective investment schemes. Neither the respondent nor Elliotts were authorised to carry on discrete investment business. A collective investment scheme was discrete investment business. Neither the respondent nor Elliotts held a "Category 2 Certificate" which would authorise the conduct of discrete investment business. Elliotts held only a Category 1 Certificate. The respondent had been of the view that the investment scheme did not constitute a collective investment scheme and that he did not therefore require authorisation. The respondent's view was bolstered by Counsel's Opinion and by confirmation obtained from the FSA that the pooling of clients funds to lend to one borrower did not necessarily amount to a collective investment scheme. He had not taken the matter further with the Financial Services Authority.

67. The respondent had not assessed the suitability of the investment recommended to the lending client as was required by Rule 22.1 of the Solicitors Investment Business Rules 1995 which required a solicitor authorised to conduct discrete investment business to check the suitability of the recommendation of an investment for the particular client concerned and did not take reasonable steps to enable the client to understand the nature of the risks involved.

Allegation (ix)

68. The respondent had paid introduction fees to introducers of lending investor clients. By way of example Churchill Personal Investments of Uavea in Spain introduced investors to the respondent. By memorandum dated 4th May 1999 they introduced Mr D and Ms B who were to invest £60,000. There was a handwritten note contained on the memorandum to the following effect:-

> "This should be processed at 2% for ourselves."

69. The Tribunal also had before it evidence of sharing of fees with Mr R, an introducer of business.

Allegation (x)

70. The applicant relied upon the respondent's behaviour overall in support of this allegation.

Allegation (xii)

71. By letter dated 24th May 1999 the respondent sent a Land Registry form to Mr and Mrs C asking them to sign and return it. On the face of the document it appeared that the respondent witnessed Mr and Mrs C's signatures. During the interview on the 9th March 2000 when shown the document the respondent confirmed that the signature of the witness was his and when asked:-

> "Is it the case that the document was returned and you endorsed your signature as a potential witness when it came back?"

the respondent replied "

"I would say that is what is looks like."

72. He had confirmed that he had no recollection of meeting Mr and Mrs C.

Allegation (xiii)

73. Elliotts operated a "regional office" from offices at Oakdene House, Dittons Road, Polegate, East Sussex, BN26 6JG. When interviewed on the 9th March 2000 the respondent had not been able to recall how long that office had operated but he indicated that a Mr C managed the office. He said the office was not meant to be open to the public. The Polegate office was however open to telephone calls. He confirmed that he did not attend the office on a regular basis. Mr C was not a solicitor or otherwise qualified under the provisions of Rule 13 of the Solicitors Practice Rules.

Allegation (xiv)

74. Elliotts return to the Solicitors Indemnity Fund Limited (SIF) for the year from 6th April 1998 showed gross fees of £79,675. The respondent had confirmed that he had not included the processing and administration fees but had included only the fees he earned with the legal work. The respondent had signed the Gross Fee Certificate containing the declaration that the information contained therein was "reasonably accurately stated." The failure to include all professional fees, remuneration, retained commission and income of any sort whatsoever rendered that declaration inaccurate and/or misleading.

Allegation (xv)

75 The first respondent and his wife were directors and shareholders in EMA. That was not a recognised body and constituted a separate business. The brochures before the Tribunal confirmed that the lending clients' loan was to be fully administered by EMA and that company would continue to pay monthly interest in the case of a default by a borrower. The advertising material of Elliotts also confirmed "We have professional indemnity insurance..." The respondent did not inform lending clients that as customers of EMA they did not benefit from the statutory protection attaching to clients of the solicitor or the recognised body. The way in which investing clients' funds were paid into the account of EMA was a breach of the Solicitors Accounts Rules. It was clear that that separate business had a name which was common to the name of the recognised body (and earlier of the respondent's firm). There was no evidence that clients of the separate business had been informed in writing of Elliotts' interest in the business and that as customers of the separate business they did not enjoy the statutory protections attaching to clients of a solicitor (or recognised body).

Allegation (xvi)

76. By letter dated the 6th July 1995 the respondent wrote to The Law Society in support of his application to be admitted as a Solicitor of the Supreme Court of England and Wales. He had completed an application form headed "Application form for qualified lawyers applying for a certificate of eligibility to sit the qualified lawyers transfer

test." The first respondent declared that the facts set out in support of that application were true, such declaration being made on the 28th September 1994.

77. Question 16 of the Application form read as follows:-

> "Have you at any time been found guilty of professional misconduct by a Disciplinary Tribunal or are any proceedings before a Disciplinary Tribunal still pending? If yes you should provide full particulars on a separate sheet."

The respondent answered "No" to that question.

78. The respondent had been the subject of disciplinary proceedings instigated by the Council of the Queensland Law Society, which was dealt with by the Statutory Committee on the 1st and 2nd June 1988. The Committee found allegations proven and found that the first respondent had been guilty of unprofessional conduct and directed that he be fined the sum of Aus $5,000. He was further ordered to pay to the Queensland Law Society 75% of its costs. A copy of the Queensland Committee Findings was before the Tribunal.

79. The respondent had completed a form, Application for Admission as a Solicitor of the Supreme Court. He signed and dated the form 5th July 1995. The form ended with a declaration:-

> "I also understand that I must bring to the Society's attention any other matter which questions my fitness to become a Solicitor."

80. The respondent did not disclose the earlier disciplinary proceedings brought against him by the Queensland Law Society and the finding of unprofessional conduct against him.

81. In 1991 the respondent entered into a scheme of arrangement with his creditors as the result of what appeared to be another investment scheme or schemes. Following the failure of the arrangement, the respondent was made bankrupt by the Federal Court of Australia. The unrecovered debts were approximately Aus $2,373,939, the creditors receiving approximately 0.140 cents in the dollar. The respondent was discharged from bankruptcy on 3rd June 1998.

The Submissions of the Applicant

82. In summary the respondent's investment scheme had been a house of cards, dependent if disaster was not to befall it, on Elliotts being able to roll over loans if borrowers defaulted and upon a rising property market. It was run by the respondent, a solicitor whose admission into the profession in England and Wales had been achieved by his own dishonesty. The scheme as run by the respondent had conflicts of interest at its core.

83. It was a series of Collective Investment Schemes, yet Elliott had no authorisation under the Financial Services Act 1986 nor under the Solicitors Investment Business Rules 1995 (SIBRs) to run any collective investment scheme.

84. The respondent profited from the scheme by taking fees from it for himself in breach of the Solicitors Practice Rules 1990, and in breach of the SIBRs, and without the informed consent of his lending clients (the investors).

85. The respondent shared commission payments with Mr R and he paid them into an Isle of Man bank account, no doubt hoping that they would not come to the attention of the authorities.

86. Fortunately, the timely investigation of, and intervention into, his practice by The Law Society may have prevented much more serious harm to the public and the profession.

87. New trustees had been appointed by the High Court in place of Elliotts and the scheme was being wound up. Some of the borrowing was by companies to whom loans should never have been contemplated, on apparently over-valued property, and where guarantors turned out to be men of straw. One such was Mr R. He had several County Court judgments against him and was in an Individual Voluntary Arrangement with his creditors. That did not deter the respondent who passed his own clients' money to Mr R's companies; he took worthless guarantees from Mr R; he shared commission payments with Mr R; he profited from the scheme and kept the truth from his clients.

88. Between 1996 and 1999 Elliotts advertised the investment scheme widely to potential investors. The respondent indicated that sophisticated investors were attracted to the scheme and were introduced to it by respectable introducers such as High Street and Merchant Banks. He said that the borrower was to borrow money on a short term basis at a high rate of interest. Security would be taken over real property as well as charges over the borrowers' assets, personal guarantees from directors and assignment of life policies. The loan would not exceed 66.6% of the value of the real property security. There were to be proper valuations of the real property. He acted in a way to avoid any conflict of interest. He said that £2 billion was invested in solicitor managed firms of this type which was untrue.

89. The scheme was a series of collective investment schemes within the meaning of the Financial Services Act 1986. Neither the respondent nor Elliotts Solicitors Plc were authorised to carry out discrete investment business which such scheme would be. Laddie J ruled on 11th July 2001 that Elliotts had created a series of collective investments schemes.

90. Mr Elliott acted in serious breach of duty as a fiduciary.

91. The amounts of money being provided to Elliotts for the purposes of this scheme became very large. For example as at 31st October 1999 322 investors had provided funds to Elliotts in the sum of £11,133,500. By 31st January 2000 this had increased to 439 investors providing funds of £14,800,325.22 – a rate of "investment" of approximately £1 million per month.

92. In late 1999 the MIU began its enquiry into the activities of the respondent and Elliotts Solicitors Plc. The Law Society resolved to intervene upon receipt of the MIU Report.

93. High Court proceedings followed in which Orders were made for the Trustees to be replaced, a judgment that the scheme created many investment schemes, and, on 6th March 2001 that the respondent and other defendants' assets should not be dissipated or dealt with in the light of the discovery that the respondent had been directing funds into an Isle of Man bank account. Within months of his discharge from bankruptcy in Australia the respondent had started the ambitious property investment scheme ("FMD") in the UK using his position as a solicitor on the Roll to attract monies in.

94. By the time that the intervention got underway, on 20th March 2000, Elliotts had lent out £15.34 million of their clients' money. Thus it would appear that clients' funds were being brought into the practice and utilised in the scheme even after a Law Society investigation had started.

95. Elliotts necessarily held the funds placed in the client accounts on trust for the clients in question pending investment in loans. Elliotts acted for the clients whose funds were aggregated to make any particular loan in the preparation, execution and registration of the relevant charge at least initially in Elliotts' own name and therefore held that charge in the rights of action arising out of the mortgage deed, and any guarantees, on trust for the investors whose funds had been used to make that loan and in practice acted for the lender clients in question in respect of the receipt of payments of interest and capital and, as and when such payments were received, held them on trust for the investors in question.

The Rules

96. Practice Rule 1 of the Solicitors Practice Rules 1990 provides:-

> "A solicitor shall not do anything in the course of practising as a solicitor, or permit another person to do anything on his or her behalf, which compromises or impairs or is likely to compromise or impair any of the following:-
>
> (a) the solicitor's independence or integrity;
>
> (b) a person's freedom to instruct a solicitor of his or her choice;
>
> (c) a solicitor's duty to act in the best interests of the clients;
>
> (d) the good reputation of the solicitor or of solicitors' profession;
>
> (e) the solicitor's proper standard of work;
>
> (f) the solicitor's duty to the Court."

97. Practice Rule 10 of the Rules provides that a solicitor must account to clients for any commission received of more than £20 unless, having disclosed to the client in writing the amount or basis of calculation of the commission, he had the client's agreement to retain it.

98. Principle 15.04 in the Guide to the Professional Conduct of Solicitors (1996 and 1999 editions) provides that a solicitor must not act where his own interest conflicts with the interest of a client. Note 4 to that principle provides;

"A solicitor must at all times disclose with complete frankness whenever the solicitor has or might obtain any personal interest or benefit in a transaction in which he or she is acting for the client..."

99. This principle (15.04) incorporates the common law duties of a fiduciary into the Guide to the Professional Conduct of Solicitors.

100. The one collective invaluable asset of the solicitors' profession is trust. A solicitor fiduciary acts dishonestly where he acts with conscious impropriety – see Royal Brunei Airlines v Tan 1995 AC 378 as applied by Jonathan Parker J in Penna v The Law Society 23rd June 1999. If a solicitor receives a commission payment in his capacity as a fiduciary, which he knows should be accounted for to his client and which he does not pay to the client, he is acting dishonestly. The dishonesty is of the utmost seriousness if he directs that such payments be made off shore beyond the eyes of authorities.

101. The whole investment scheme had conflict at its foundation. The essential conflicts were: (a) the respondent's closeness to and association with borrowers, (b) taking commission payments without consent, (c) committing clients to risky loans from which Elliotts stood to gain and (d) sharing in arrangement fees with Mr R and/or his companies.

102. the respondent failed to account to clients for any commission of more than £20 and/or failed to disclose to clients the amount of any commission received or the basis of the calculation of commission.

103. The respondent failed to disclose material information to his lending clients in particular where the same borrower companies appeared on a number of occasions in respect of different properties all of which were controlled by Mr R who was an associate of the respondent. The companies had no track records and were risky companies to lend to. The transactions were not at arm's length. Lending clients were not told that the respondent would be keeping default interest if it was charged. They were not told that the respondent was keeping 3% interest back for himself as an administration fee. Since the applicant's statement of 1st March had been provided to the Tribunal, the details of the sharing of fees with Mr R and/or his companies had been emerging. Elliotts' clients were not told anything about the fact that the respondent was sharing 10% of the amount of any loan with Mr R and/or his companies.

104. The Tribunal was invited to note the misleading representations made in advertisements and in promotional brochures.

105. Despite the respondents early assertions that he had not, he had contrary to Rule 4 (4) of the Solicitors Investment Business Rules 1995 conducted discrete investment business when not authorised to do so. This was confirmed by the judgment of Laddie J of July 2001.

106. It was established that the investment schemes were discrete investment business as they were collective investment schemes and no-one in Elliotts held the necessary "qualified person" status.

107. Contrary to Rule 22 of the Solicitors Investment Business Rules the respondent made personal recommendations and/or effected transactions for clients without assessing the suitability of such recommendations and/or transactions for each client.

108. Contrary to the Rule 22 (2) of the Solicitors Investment Business Rules 1995 the respondent made personal recommendations to clients without having taken reasonable steps to enable the client to understand the nature of the risks involved.

109. Contrary to Rule 3 of the Solicitors Practice Rules 1990 and Section 2(3) of the Solicitors Introduction Code 1990 the respondent rewarded introducers by the payment of commission.

110. The respondent compromised his independence and integrity contrary to Rule 1 of the Solicitors Practice Rules 1990 - this followed from each of the breaches separately identified.

111. There was evidence before the Tribunal that the respondent did cause misleading correspondence to be sent to clients.

112. The respondent purported to witness the signatures of Mr and Mrs C in circumstances where the signatory had not signed in his presence.

113. The respondent operated a regional office at Polegate, East Sussex (which was not properly supervised) contrary to Rule 13 of the Solicitors Practice Rules.

114. The respondent provided inaccurate or misleading information to SIF for the year 6th April 1998 on his Gross Fee Certificate as he did not include commissions and other sums he received from the investment scheme.

115. Elliotts Mortgage Administration Limited was a separate business carried on by the respondent contrary to Rule V of the Solicitors Practice Rules 1990.

116. The respondent did provide a misleading representation to The Law Society on his application for admission as a Solicitor of the Supreme Court of England and Wales.

117. The respondent provided no evidence to refute the allegations of impropriety made in the Rule 4 Statement, the MIU Report and Mr Gould's report. No evidence had been provided in the Tribunal proceedings by the respondent, save his response to the Outline Note of The Law Society shortly before the hearing.

118. The applicant had invited Mr Elliott to serve any evidence he had on numerous occasions. None had been provided.

119. The documents before the Tribunal disclosed serious, long lasting, misconduct. The Tribunal was invited to note in particular that:-

(i) the respondent was personally taking substantial processing fees when making loans of clients' money;

(ii) he was prepared to witness a document signed by clients he had not met;

(iii) he misled clients in correspondence by recommending that they extend a loan and stating that interest payments had been made promptly when in fact there had been arrears;

(iv) he misled other solicitors by stating that he had instructions when he did not;

(v) the respondent took 3% as his "expenses" without specifying this amount in the documents provided to his clients and without obtaining their informed consent;

(vi) the security provided by the loans was low;

(vii) Mr R was a close associate of the respondent with whom the respondent plainly was not dealing at arm's length;

(viii) the respondent shared commissions with Mr R and/or his companies.

120. The precise figure was not known but several hundred thousand pounds was diverted to the Isle of Man by the respondent. He should have made full disclosure to his clients about this 10%, full disclosure about any part he was going to have in it and he should have obtained the informed consent of his clients before paying the money to himself or any companies controlled by him. It was submitted that the respondent ought to have been full and frank about his involvement in these matters when The Law Society was enquiring into the scheme. In fact The Law Society obtained its information from Mr R in interview on 12th February 2001 and made an application to the Court for an asset freezing injunction following that approach. The respondent volunteered no information about the arrangement which he had with Mr R which produced such large rewards for the respondent.

121. In promotional material the respondent said that we had "over 20 years experience of secure property lending" and gave the impression that between 1976 and 1991 he "specialised in commercial conveyancing and mortgages." He did not say that between 1991 and 1995 the true position was that he was subject to a scheme of arrangement in Australia and that he was a bankrupt between 1995 and 1998.

122. The respondent had been making contact with his former clients and appeared to have been breaching confidentiality after the intervention. He had approached former lending clients by letters in terms castigating the actions of The Law Society. Some investors had expressed dismay at being denied a lucrative investment opportunity. It was accepted that a number of investors had regularly received the promised returns but the inevitable outcome would have been huge losses which would have been sustained to the capital of many investors. It was not possible to quantify losses at the time of the disciplinary hearing.

The Submissions of the Respondent (as set out in his written response to the outline note of The Law Society)

123. The respondent denied most of the allegations. However, if the allegations were proved or admitted there were mitigating circumstances surrounding the allegations that would show that the respondent's conduct had not such as to be unbefitting a solicitor.

124. He did not lie on his application to be admitted as a solicitor in England and Wales. He answered the questions honestly and truthfully. He had never been guilty of professional misconduct. In Queensland "unprofessional conduct" was totally different from "professional misconduct." The other question asked the respondent to bring to The Law Society's attention any other matter which questioned his fitness as a solicitor. Something that happened seven years prior did not stop the respondent from practising as a solicitor and the Certificate of Good Standing required by The Law Society issued at the time by the Queensland Law Society verified that. A copy of the Certificate of Good Standing was placed before the Tribunal.

125. The respondent did not put out misleading information. Not one former client he had spoken to had told him that they got the impression that Elliotts Mortgage Administration Limited was covered by professional indemnity insurance. In any event if someone did get that impression it certainly was not intended to do so.

126. The respondent agreed with the description on the investment scheme as having attracted many investors and large sums of money. He pointed out that:-

(a) Mr R's companies comprised about only 15% of the loans. The borrowers were not "usually companies associated with "Mr R. He did however introduce a lot of loans that were made to the other borrowers;

(b) he denied making misleading representations;

(c) the respondent's fees were disclosed in the brochure and acknowledged in writing by each client in the "Terms of Business." The arrangement fees were not passed on to clients because under the "Terms of Business" the client had already agreed he could keep them. The information that Mr R was receiving a fee of 10% did not require the cooperation of Mr R. The fact was quite clear from the files by the disbursement authority signed by the borrower. All files were made available to both Mr Fletcher and Mr Middleton of the OSS.

This fact was made clear to Mr Fletcher during his visits and was also obvious from the client account ledger cards given to Mr Fletcher in November 1999.

Having disclosed in writing the existence of fees other than legal fees to the client (albeit not the amount) the respondent assumed that how he was to receive those fees was his business. As a resident non-domiciled he had the benefit of certain tax advantages that did not apply to a domiciled taxpayer. In any event he was not aware of any law that prevented anyone having a bank account in the Isle of Man;

(d) if the scheme operated was so obviously in breach FSA 1986 and the SIBR's why did Mr Robinson and Ms Smith (or their superiors) not advise him of this in September 1998? Between September 1998 and March 2000 nothing changed in the methodology of the business – only the volume of money had got significantly larger. Nowhere in any marketing material did the respondent say the borrowers would be substantial or have a track record. Defaulting loans were not an uncommon experience in any loan book. In any event this eventuality was addressed in the marketing material. Not one loan was in a sum greater than 66.6% of market valuation. The valuation process was not an exact science. Valuers could get it wrong. That was why the respondent relied only on FRICS or ARICS valuers who had professional indemnity insurance. The valuers engaged by The Law Society through its

intervention agents had been proved to be incorrect as well. The Law Society had not disclosed this, however.

127. The FMD scheme was not a "house of cards." Some loans were "rolled over" but most of the loans were repaid in the normal course. The scheme was not dependant on the respondent being able to "roll over" loans. The Law Society had not disclosed the loans that were redeemed in the normal course. He had not been dishonest. There were no conflicts of interest at its core. Conflicts of interest at their core was where a solicitors' firm was appointed by The Law Society to take over a legal practice and that firm appointed its own trustee company to be trustee of client funds so the clients think the solicitors' firm is acting for them when in fact the solicitors' firm is acting only for The Law Society and its own Trust Company whose conduct had clearly been driven to suit The Law Society's objectives and not the objectives of the investor clients. That did amount to a conflict of interest at the core.

128. One firm could not act for The Law Society and ostensibly represent a group of people who could have claims against The Law Society.

129. Mr Robinson of The Law Society, an expert in the field, did not conclude in September 1998 that the FMD scheme was a series of collective investment schemes. If he did not think it was and the barrister the respondent briefed on the subject in 1998 did not think it was then the respondent could not have known. In fact, it took a landmark decision by Mr Justice Laddie to interpret the facts and interpret the uncharted territory of Section 75 of the Financial Services Act.

130. Up to the time of The Law Society's intervention no client had lost money or was likely to lose money. That situation would not continue as a result of the conduct of The Law Society and/or its agents. Their conduct had given cause for such grave concern that hundreds of complaints had been lodged with The Law Society, the intervention agents, the Legal Ombudsman and the Lord Chancellor's Office. The respondent had asked for copies of the complaints in their possession but all had refused to disclose the same.

131. In so far as Mr R was concerned the respondent conducted a credit check on him at the beginning of his business and found nothing of concern. The first he knew about the County Court judgments and the IVA was when Mr Middleton told him at one of the meetings in March 2000. The respondent had been taken aback by this information and when he confronted Mr R with it he said he had not bothered to tell the respondent because as far as he was concerned he would still be able to meet his obligations with him and nothing had changed. The respondent told him that he should have let the respondent be the judge of that and that the respondent felt very let down.

132. The respondent had never regarded the guarantee of Mr R as worthless, in fact quite the contrary. With hindsight the respondent had come to accept that he should have conducted a new credit check on Mr R every time there was a new loan. He did not do that.

133. The respondent confirmed that he profited from the scheme and he told the clients the truth that he would profit from the scheme. Some former clients had said they would have thought it suspicious if he had not said quite openly how he got paid from the

scheme. (The Tribunal was referred to the part of the documentation "Terms of Business" – How Do We Get Paid).

134. The existence of the margin in interest rates was disclosed in the brochure and Terms of Business but the amount was not.

135. Mr R was a mortgage broker so the statement about the sources of introductions of investors is 100% accurate.

136. The respondent never acted for a borrower. He was so concerned about the issue of conflict of interest that he insisted that every guarantor had independent legal advice separate from the solicitor acting for the borrower company even if he owned the company 100%. Prior to making the advance the respondent insisted on a certificate from the independent solicitor verifying certain matters. A copy was placed before the Tribunal.

137. The statement that nearly £2 billion was invested in solicitor managed funds by law firms was true. The statement did not say "through mortgage lending." It was meant to portray the message that solicitors generally were in the money management business.

138. The statement of the loan to valuation ratio was accurate. It only got risky when the intervention Agent/Trust Company took over.

139. Independent valuation firms carried out the valuations. It was absurd to suggest that the respondent would allow a loan to a valuer who valued the security himself.

140. The respondent denied any breach of duty. How seriously the respondent took this duty was exemplified by the care he took in pre-completion matters. He designed a checklist that was required to be completed by his staff prior to any new loan. This checklist was before the Tribunal.

141. It was right that the scheme attracted large sums from investors. Every penny of that money invested was fully accounted for and invested exactly as the respondent had told the clients.

142. The respondent had cooperated fully in the two decisions (one fund/many funds and the issue of collective investment) of Mr Justice Laddiee in that he filed witness statements and gave evidence under oath when clearly in view of what lay ahead of him he was advised not to. He believed his evidence was crucial to both cases in assisting Mr Justice Laddiee to reach an informed conclusion. Contrary to The Law Society's view that the respondent always preferred his interests over the clients the respondent had felt that it was necessary to give this evidence so that client's would get their money back quicker than they otherwise would have.

143. The respondent had adopted the stand:-

> "If what I had done in the past had contributed to the mess about collective investments then the least I could do is to tell the Judge everything I knew and what I did and why I did it no matter what the consequences to me."

144. There was no need for the injunction as it was obtained twelve months after the intervention when it was quite obvious that the respondent was not going anywhere and he had bought a house in his name in London since the second investigation started in November 1999 and he was clearly not going anywhere.

145. Twelve months after the intervention the respondent still had not been served with any disciplinary papers yet. By some strange coincidence, in the very same week he received those papers and an injunction preventing him from getting legal advice unless The Law Society (via its intervention agents) thought it was appropriate and, if so, how much.

146. The problems encountered by the respondent and the malice of The Law Society was highlighted by the fact that in the week before the disciplinary hearing, Russell Cooke Trust Company had said they would not allow any money to be spent on the respondent's defence at the Tribunal but would allow £5,000 (VAT inclusive) to challenge that decision in the High Court. How absurd that offer was demonstrated by the fact that Russell Cooke had filed papers in the breach of trust/injunction case to say that they had spent £38,000 up to June 2001 and that was after they had full knowledge of all the facts before they took the injunction. £5,000 would be insufficient to place the respondent on an equal footing in a case where the other party had already spent £38,000.

147. The respondent's IVA in Australia had nothing at all to do with any investment scheme or anything to do with his solicitor's practice. The respondent conducted about one hundred successful property deals and just one went bad in the middle of 1991. That had had a domino effect on the respondent's personal cash flow. So that his personal problems would not impact on the practice the respondent retired from the practice before entering an IVA.

148. The dredging up of his past on matters unrelated to the issues before the Tribunal was a reflection of the malice that permeated the approach of The Law Society throughout this matter.

149. The respondent agreed that he had placed £15.34 million by the date of the intervention. He believed that he was doing nothing wrong. At no time did either Mr Fletcher or Mr Middleton expressly or impliedly suggest that he should stop taking money. If they had said not to until the investigation was completed the respondent would have been only too happy to comply. He wished they had because a lot of loans were made in those five months between November 1999 and March 2000. It would have been even better if The Law Society had said to stop lending back in September 1998.

150. In any event the respondent did not understand why The Law Society did not stop him lending even in November 1999 and say that when each loan was redeemed the respondent was to give it back to the client. The evidence against the respondent would still have been there if he had committed breaches of any Practice Rules.

151. In the respondent's opinion there was another way to unravel what was going on rather that the mayhem that ensued since the intervention.

152. The respondent agreed that Elliotts had held clients' money on client account pending investment in loans and that Elliotts had acted for the clients whose loans had been aggregated to make a particular loan. The charge had been in the name of the respondent as trustee. He received payments of capital and interest on behalf of the lending clients.

153. The respondent was aware of the Rules relating to professional conduct.

154. The respondent had not acted dishonestly. Stupidity and naivety might be appropriate descriptions but never dishonestly. He truly believed that he was complying with the Rules. Somewhere somehow he believed that the wording of his terms of business complied with the Practice Rules. Having complied with the Rules about disclosure and after taking tax advice he treated the fees as his own and he believed at the time that what he was doing was ethical, lawful and allowable.

155. With regard to The Law Society's position that the investment scheme had "conflict at its foundation", the respondent said that the only two borrowers that he had any familiarity with were Mr R and Mr D. No-one else . The clients knew of the existence of the commission but not the amount. He never recommended a loan that he thought was risky. There were loans refused. The Law Society had not disclosed any of these loans.

156. The respondent invited the Tribunal to consider letters from some of his former clients which he believed reflected the attitude of the vast majority of clients. The respondent had wanted the opportunity to rectify this problem retrospectively which he understood was quite legal.

157. However, without proper advice as to the correct procedure and wording the respondent thought it was imprudent to try and rectify this problem on his own advice and possibly run the risk of compounding the problem.

158. The respondent denied that he had failed to disclose material information to his lending investor clients. Mr R was not an "associate" of his. He was a mortgage broker who was also a borrower. The brochure told clients about the default interest and if the respondent paid the interest to the client if the borrower defaulted then the respondent would take the default rate when and if he ever got paid. The arrangement suited the clients and the respondent thereby took the commercial risk.

159. The respondent had placed no misleading advertisements in the mind of the clients – only in the mind of The Law Society.

160. Whatever the respondent was doing in March 2000 was exactly what he was doing in September 1998 and he had been inspected by the regulatory body and allowed to continue. Rightly or wrongly he took that as authorisation to continue doing what he was doing. It took a landmark decision of Mr Justice Laddie to set the record straight.

161. The hypocrisy of The Law Society was again highlighted by the allegation that the respondent allowed discrete investment business to be conducted when no person in the firm of Elliotts held qualified person status. If The Law Society could grant an exemption to one of their favourites after the intervention why could not that have been granted to the respondent rather than causing the chaos that has ensued. Also,

given the size of the portfolio, why give the job of the intervention to a firm that had no experience in discrete investments? Surely an experienced intervention firm with an experienced discrete investment manager would have been more appropriate. The answer probably lay in a very simple observation of a former client, "Does The Law Society want justice or justification?"

162. The respondent denied the alleged breach of Rule 22(2) of the SIBR (making personal recommendations to clients without having taken reasonable steps to enable the client to understand the risks involved). He denied that he had recommended and/or effected transactions without assessing the suitability of the investment for the particular client. He denied that he had paid commission to introducers. He denied that he had been in breach of Rule 1 of the Solicitors Practice Rules.

163. With regard to the allegation that the respondent had purported to witness the signatures of Mr and Mrs C, the respondent said that the document had already been witnessed by another party.

164. The respondent denied the breach of Rule 13 of the Solicitors Practice Rules (regional office not properly supervised).

165. The respondent denied that he had provided inaccurate information about his gross fees to SIF.

166. The respondent agreed that Elliotts Mortgage Administration was a separate legal entity from Elliotts Solicitors Plc but it was an integral part of the whole business. Mr Fletcher of the OSS visited the respondent about a month after it commenced operation and he did not suggest that there was any breach of Rules. He only said that paying interest into the account of that company would not be appropriate so the respondent ceased immediately to do that. The respondent thought the role of the regulatory body was to guide and assist not to entrap a solicitor.

167. The respondent had not wanted to make any statements until he had the opportunity to take and consider legal advice. He was not aware that he had to file any response to the allegations until he was requested by the Tribunal on 13th November 2001 to file a reply to The Law Society's outline note. The respondent's silence was in no way an admission of anything.

169. The respondent denied any misconduct on his part.

170. With regard to the matters which The Law Society referred to as further "serious improprieties" the respondent had already explained his position with regard to payments made to him.

171. The respondent denied that the value of the property taken as security for the loans was low. What The Law Society had not brought to the attention of the Tribunal was that of 27 loans redeemed so far £9.9 million had been returned on loans where the principal sum was £9.1 million. This could not have been achieved if the security was low. If the respondent's approvals process was so questionable why was it that one example, a high street building society was prepared to lend even more than the sum approved by the respondent on the same security.

172. Mr R had not been "a close associate" of the respondent. The respondent agreed that he had shared commission with Mr R and had dealt with the matter earlier in his submissions.

173. The respondent agreed that he had claimed that he had "over 20 years experience of secure property lending." He denied any impropriety.

174. There was no rule against the respondent contacting his former clients. In fact they had felt consoled by the fact that he did not "vanish off the fact of the earth" after the intervention and they appreciated that he had helped where he could and they had someone to talk to when Russell Cooke ignored their letters and phone calls.

175. The view of The Law Society was not shared by the respondent's former clients. That was evidenced by a sample of letters of support before the Tribunal. If the truth be known more damage had been done to the reputation of the solicitors' profession by the conduct of The Law Society and its agents since the intervention than any conduct of the respondent before the intervention.

176. In the submission of the respondent the position was best summed up by a former client who dared to ask "The Law Society appointed Russell Cooke to save us from Mr Elliott, but who will save us from Russell Cooke?"

177. In conclusion the respondent requested the Tribunal to bear in mind that he still had not had the benefit of obtaining good legal advice and he sought leave to amend his reply if he could "unshackle the purse strings at Russell Cooke."

The Findings of the Tribunal

The Tribunal did not find allegation (ix) to have been substantiated. There was no clear evidence before the Tribunal that the respondent had rewarded introducers by the payment of commission and/or otherwise.

The Tribunal found allegations (i), (ii), (iii), (iv), (v), (vi), (vii) and (viii) to have been substantiated and further found that the respondent had been guilty of dishonesty and conscious impropriety in his conduct. In making that finding the Tribunal applied the test in Royal Brunei Airlines v Tan and had no difficulty in concluding that the respondent did not act as an honest solicitor should. The Tribunal found allegations (xi) to (xvi) inclusive all to have been substantiated. The Tribunal found that the respondent had in providing a misleading representation to The Law Society when applying for admission as a solicitor of the Supreme Court of England and Wales, also been dishonest, applying the same test as before. There were a number of particularly serious aspects to this matter. The Tribunal concluded that the chief purpose of the respondent's investment scheme was to extract very large sums of money from unsuspecting investors for the benefit of himself and Mr R with whom he was closely associated. In acting for investor clients there was a clear direct conflict of interest between those clients and the respondent where his main purpose had been to reap significant and substantially undisclosed financial benefits from the transactions which he was handling apparently in the capacity of a solicitor. Rule 10 of the Solicitors Practice Rules 1990 makes it very clear that commissions of more than £20 received by a solicitor must be disclosed to the clients and may not be retained without consent. The respondent made large amounts of money both by way

of a "turn" on the difference between the interest charged to borrowers and the interest paid to the lending clients, an even greater turn when defaulting borrowers were compelled to pay interest at a punitive rate. In addition large arrangement fees as well as legal fees were deducted from the loan monies before they reached the hands of the borrowers. No disclosure was made to investor client that the respondent was a substantial beneficiary of arrangement fees collected into accounts in the Isle of Man. A solicitor has a clear and unequivocal duty as a solicitor not to make a secret profit at the expense of his client. That is a fundamental principle and was one to which the respondent paid no heed. Investing clients were induced to make investments by statements made in promotional material and advertisements which were misleading and blatantly inaccurate. The respondent used his status as a solicitor to give his scheme an aura of respectability and safety and endeavoured to give prospective investors the false impression that they would be protected by solicitors professional indemnity insurance and other statutory protections offered to the clients of solicitors. Despite a number of assurances in the promotional material, the respondent did not ensure that the secured lending was "low risk" and safe because of the rules governing the lending and the checks carried out. It was entirely clear that loans were made to companies with which Mr R was closely associated which did not have an acceptable credit rating. Guarantees offered by directors were worthless in the case of Mr R who had had County Court judgments against him and had entered into an IVA with his creditors. The property offered as security did not have the value purportedly attributed to it and where formal valuations had been made and had been placed before the Tribunal, a number of them clearly had a spurious basis, for instance undeveloped land had been valued on the basis that all building work had been completed. None of these matters were disclosed to lending clients. The Tribunal also had before it evidence that lending clients had not been notified when a borrower had defaulted and indeed had been led to believe that there had been no such default.

In conducting the scheme which he did the respondent had fallen foul of the Financial Services Act and the Solicitors Investment Business Rules 1995 made pursuant thereto. The scheme had been identified as a series of collective investment schemes within the meaning of the Financial Services Act 1986. This meant that the respondent was conducting discrete investment business when neither he or his firm was authorised to do so. The respondent had not taken the steps necessary with regard to assessing the suitability of making a recommendation to a client to enter into that type of transaction nor had he taken steps to enable the client to understand the nature of the risks involved.

The respondent had purported to witness the signature of an individual where a document had not been signed in his presence. Again any third party seeing from the face of a document that a solicitor had witnessed a signature was entitled to believe that the solicitor had done so having witnessed the party concerned write his own signature. Any act on the part of a solicitor which might throw doubt upon the fact that a solicitor witness could not be relied upon without exception, could not be tolerated.

The Tribunal had little before it to show how Elliotts "regional office" at Polegate in East Sussex was run. The respondent appeared to accept that telephone calls could be made to that office and it was therefore "open to the public" in accordance with Practice Rule 13. It further appeared that that office was managed by a Mr Collins about whom very little information had been given. From the papers before the

Tribunal there was no suggestion that Mr Collins was a solicitor or a legal executive qualified to supervise a solicitor's office. It was further clear that the respondent had carried on the separate business of Elliotts Mortgage Administration Limited without paying any attention or having any regard for the solicitors' separate business code.

The respondent demonstrated the clearest possible dishonesty when he did not make an accurate disclosure of his gross fees in his Gross Fee Certificate for the purposes of calculating the contribution to be made by him to the Solicitors Indemnity Fund for the year 6th April 1998. He disclosed such part of his income as he chose, the effect of which was to ensure that the contribution due from him was calculated at the lowest possible level and to conceal the fact that he was taking very large sums of money indeed out of the investment scheme. The Tribunal concluded that the respondent was a stranger to the truth when he did not make full disclosure of his disciplinary history and his bankruptcy in Australia when he made application to The Law Society of England and Wales for admission to the Roll. His failures in that respect simply did not demonstrate the qualities of probity, integrity and trustworthiness essential in a practising solicitor.

Whilst the Tribunal has some sympathy for the dismay of the lending clients of the respondent who had, prior to the intervention, received a handsome return upon their investment, the Tribunal hoped that those clients would come to recognise that their good fortune would have been at the expense of the misfortune of others. It was clear that all the time new funds were coming in the respondent was able to use those new funds to make payments of interest and make further loans to defaulters. The respondent himself was taking a substantial "rake off", as was his associate, Mr R and when the time came that new funds were insufficient to meet the need to pay off loans where there had been defaults and ever increasing claims for interest, then the whole scheme would collapse leaving a great many people with the potential for losing their money without the protection usually afforded to solicitors' clients and without the protection afforded by any financial regulator. The respondent's investment scheme had been described by Counsel for The Law Society as "a house of cards." The Tribunal recognise that the scheme was closely related to pyramid selling schemes where those at the apex of the pyramid were invariably happy with their lot but those at the base would in time find themselves in serious difficulties. It should not be overlooked that had the respondent but for the intervention, been permitted to continue with his nefarious activities then when the scheme collapsed, as it certainly would, and many investors lost large sums of money, the respondent would have salted away the very considerable sums he had raked off during the continuance of the scheme.

The respondent's behaviour compromised his independence and integrity and clearly had been guilty of the most serious failure in his duty to act in the clients' best interests. There was no doubt that the respondent had ill served the good reputation of the solicitors' profession.

In summary, the respondent had begun his career as a solicitor in this country following his provision of a misleading representation to The Law Society on his application for admission by not disclosing that he had been guilty of unprofessional conduct in Australia. He had been admitted here following such misleading representation, and also following his bankruptcy in Australia, he embarked on a scheme of obtaining significant funds from clients for the purpose of mortgage

lending to borrowers, which activity comprised virtually his whole practice. In operating the scheme the respondent acted in a systematically dishonest manner, involving conflict of interest of a most serious nature, secret profits and fees not disclosed to lender clients' aggregating some hundreds of thousands of pounds over a period of three years prior to the intervention. In addition he committed a number of other failures, including failure to disclose material information, misleading advertisements, acting contrary to the Solicitors Investment Business Rules and generally acting with conscious impropriety.

The Tribunal ordered that the respondent be struck off the Roll of Solicitors and further ordered that he do pay the costs of and incidental to the application and enquiry (to include the costs of the MIU Officer of The Law Society) such costs to be subject to a detailed assessment if not agreed between the parties.

DATED this 27th day of February 2002

on behalf of the Tribunal

A G Ground
Chairman