

**THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
(PROCEDURE RULES 2008)**

DECISION

in hearing on Compensation in Complaint

by

**THE COUNCIL OF THE LAW SOCIETY of
SCOTLAND, Atria One, 144 Morrison Street,
Edinburgh**

Complainers

against

**STEPHEN ANDREW HARPER, c/o 37
Seaforth Avenue, Wick, Caithness**

Respondent

1. On 22 June 2023, Stephen Andrew Harper, c/o 37 Seaforth Avenue, Wick, Caithness (“the Respondent”), was found guilty of professional misconduct.
2. There was a Secondary Complainer in the Complaint, Gavin Mason, Cobbarn Farmhouse, Groombridge Lane, Eridge Green, Tunbridge Wells, on behalf of the AJ Stuart Trust (hereinafter referred to as “the Secondary Complainer”).
3. Following the finding of professional misconduct on 22 June 2023, the Tribunal allowed the Secondary Complainer 28 days from the intimation of the findings of misconduct to lodge a claim for compensation. A written claim for compensation was lodged. No Answers were lodged by the Respondent. In accordance with its rules, the Tribunal set down a virtual compensation hearing for 22 September 2023. Notices were duly served upon the Respondent and Secondary Complainer.
4. At the virtual compensation hearing on 22 September 2023, the Secondary Complainer was present and represented himself. The Respondent was neither present nor represented. The Secondary Complainer confirmed to the Tribunal that he had lodged the complaint and claim for compensation on behalf of the AJ Stuart Trust. In answer to a question from the Tribunal, the Secondary Complainer stated that he believed that the Trust had been wound up. The Tribunal, *ex proprio motu*, adjourned the hearing to a date to be afterwards fixed to allow the Secondary Complainer to confirm the status of the Trust.

5. A virtual compensation hearing was set down for 10 November 2023 and notices thereof were duly served upon the Secondary Complainer and Respondent.
6. At the virtual compensation hearing on 10 November 2023, the Secondary Complainer was present and represented himself. The Respondent was neither present nor represented. The Tribunal determined that it was fair and appropriate to proceed in the absence of the Respondent. The Tribunal proceeded to hear submissions from the Secondary Complainer.
7. The Tribunal found the following facts established:-
 - 7.1 Gavin Mason, on behalf of the AJ Stuart Trust, was the Secondary Complainer in the Complaint against Stephen Andrew Harper, c/o 37 Seaforth Avenue, Wick, Caithness. On 22 June 2023, the Tribunal found the Respondent guilty of professional misconduct in respect that he:-
 - a) Failed to act diligently in that he failed to finalise the tax compliance work for the Trust following the death of the life tenant;
 - b) Failed to act diligently or in the best interests of the Trustees in that he delayed unconscionably and failed to complete the winding up of the Trust;
 - c) Failed to act diligently or communicate effectively with his client in that the Respondent did not inform the Secondary Complainer that he had ceased to practise despite having been engaged in an ongoing matter; and
 - d) Accepted instructions to deal with matters which were beyond his professional competence.
 - 7.2 The Secondary Complainer lodged a written statement of claim with the Tribunal claiming the maximum award permitted by Statute, namely £5,000, in relation to quantifiable and non-quantifiable loss.
8. The Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 10 November 2023. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Stephen Andrew Harper, c/o 37 Seaforth Avenue, Wick, Caithness and having previously

determined that the Respondent was guilty of professional misconduct; Having considered whether it was appropriate to award compensation to the Secondary Complainer; Make no award of compensation; Make no finding of expenses due to or by either party; and Direct that publicity will be given to this decision.

(signed)

Beverley Atkinson

Vice Chair

9. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent and the Secondary Complainer by recorded delivery service on *5 December 2023*.

IN THE NAME OF THE TRIBUNAL



Beverley Atkinson

Vice Chair

NOTE

The Respondent was neither present nor represented at the virtual compensation hearing on 10 November 2023. Accordingly, the first step for the Tribunal was to determine whether it was appropriate to proceed in his absence. The Tribunal heard evidence from the Depute Clerk confirming service of the notice of hearing by Recorded Delivery post. Additionally, the Depute Clerk confirmed that an email had been sent to the Respondent with joining instructions for the virtual compensation hearing. The Tribunal determined that notice had been properly served upon the Respondent within the 2008 Tribunal Rules. The Tribunal noted that the Respondent was not present at the hearing on 22 June 2023 or the compensation hearing on 22 September 2023. The Tribunal considered all of the information before it and concluded that it was appropriate and fair to proceed with the hearing in the absence of the Respondent.

SUBMISSIONS FOR THE SECONDARY COMPLAINER

The Tribunal invited the Secondary Complainer to make submissions in relation to the status of the AJ Stuart Trust. The Secondary Complainer drew the Tribunal's attention to his email to the Tribunal of 8 November 2023, attaching an exchange of emails between him and Messrs Thomson Snell and Passmore LLP. He stated that it appeared that the Trust was probably wound up following the death of the liferentrix. He submitted that he considered that he was acting in relation to his duties as executor of his mother-in-law's estate, she having been the liferentrix in this matter.

In response to a question from the Tribunal, the Secondary Complainer confirmed that in fact he was not an executor of the liferentrix's estate. He explained that he was not clear as to how he should have made a claim, but he had been concerned about 18 missing dividend payments in relation to the Aviva shares.

The Secondary Complainer confirmed that his claim for compensation came under four heads.

The first was the drop in value of the Aviva shares from the date of death of the liferentrix until today. The Secondary Complainer confirmed that as far as he was aware the shares were still registered in his name. He had received the share certificate earlier in 2023 from the Law Society. He was unable to now lay his hands on the share certificate.

The second head of compensation related to the missing dividend payments. The Secondary Complainer believed that there had been 18 dividends paid but he was unable to provide any detail in relation to

these payments. He confirmed that he had not received any dividends since receiving the share certificate.

The third head of claim related to legal costs incurred in relation to resolving the AJ Stuart Trust. The Secondary Complainer confirmed that he had lodged one fee note in relation to legal costs. He confirmed that the fee note was addressed to the executors of the liferentrix. He confirmed that there were other fee notes but he was unable to say how they related to the AJ Stuart Trust matter and how much related to the administration of the liferentrix's estate.

The final head related to penalties imposed by HMRC in relation to late tax returns. The Secondary Complainer was unable to provide any detail of the HMRC penalties. He was unable to say if the Respondent had settled all of the penalties. He believed that there was unlikely to be any additional penalties and he had heard nothing further from HMRC.

The Secondary Complainer concluded that he had perhaps not proceeded with his claim for compensation in the right way, but emphasised that he was a lay member and invited the Tribunal to make allowances for that.

DECISION

The Respondent was found guilty of professional misconduct in respect that he failed to act diligently in that he failed to finalise the tax compliance work for the Trust following the death of the life tenant; failed to act diligently or in the best interests of the Trustees in that he delayed unconscionably and failed to complete the winding up of the Trust; failed to act diligently or communicate effectively with his client in that the Respondent did not inform the Secondary Complainer that he had ceased to practise despite having been engaged in an ongoing matter; and accepted instructions to deal with matters which were beyond his professional competence.

Following that finding of professional misconduct, the Secondary Complainer had lodged a written claim for compensation. The Secondary Complainer had confirmed to the Tribunal that the original complaint to the Scottish Legal Complaints Commission ("SLCC") and the claim for compensation were on behalf of the AJ Stuart Trust.

The powers of the Tribunal to award compensation are set out within Section 53(2)(bb) of the Solicitors (Scotland) Act 1980 which provides that:-

“Where the solicitor has been guilty of professional misconduct, and where the Tribunal consider that the Complainer has been directly affected by the misconduct, direct the solicitor to pay compensation of such amount, not exceeding £5,000, as the Tribunal may specify to the Complainer for loss, inconvenience or distress resulting from the misconduct.”

The complainer in this case is essentially the AJ Stuart Trust. Only loss, inconvenience or distress suffered by the Trust can form a basis for any claim for compensation.

The Tribunal was concerned to clarify the status of the Trust to confirm the Secondary Complainer’s authority to pursue this claim. Unfortunately, the information before the Tribunal was less than clear cut. On the one hand, the Secondary Complainer stated that he believed that the Trust had been wound up. On the other hand, he submitted that his role continued in order to pursue the lost dividends, although that may have been under the umbrella of the executry of his mother-in-law. The complaint here was made on behalf of the AJ Stuart Trust, not the executry referred to. The Secondary Complainer is not an executor of that estate. The Tribunal was unable to consider any claim for compensation on behalf of that executry or the beneficiaries thereof.

If the AJ Stuart Trust was no longer extant, then the Secondary Complainer’s entitlement to pursue the claim for compensation was in doubt. The information before the Tribunal was insufficient to determine with any degree of certainty what the true position was. In the circumstances, the Tribunal determined that the fairest approach was to consider the written claim for compensation. The standard of proof in this case is the balance of probabilities and the onus of proof rests with the Secondary Complainer.

The written claim for compensation is in two sections, quantifiable and non-quantifiable loss.

Under the heading of quantifiable loss, the Secondary Complainer made three claims for compensation. The first was the drop in value of the Aviva shares between July 2015 and July 2023. The Secondary Complainer confirmed that the share certificate was in his name as trustee and that the shares had not been sold by the Trust. On that basis, it could not be said that any loss had crystallised here. At the end of the day, it is possible that, when these shares are sold, the value may have increased. The Tribunal concluded that no award of compensation was appropriate in these circumstances.

The written claim for compensation makes reference to 17 missing dividend payments. In his submissions, the Secondary Complainer refers to 18 missing dividend payments. The Secondary Complainer was unable to give information as to the dates, amounts or recipients of these averred payments. The findings in fact in the misconduct hearing make reference to some dividend payments

being paid to the executors of the deceased trustee of the AJ Stuart Trust. It appeared that the share certificate had been put into the name of the trustee personally rather than in his capacity as a trustee. That, however, had taken place before the Respondent's involvement with the administration of this Trust. The solicitors for the executry of the deceased trustee had retained the dividend payments as payment towards their fees in relation to the transfer of the share certificate into the name of the Secondary Complainer. The Tribunal was unable, even on the balance of probabilities, to find that any dividends had been paid to the Respondent and not accounted for. It concluded that no loss caused by the misconduct had been established.

The third head under quantifiable loss related to legal costs. The only fee note that was produced to the Tribunal was addressed to the two executors of the liferentrix's estate. Accordingly, this was not a loss to the Trust and could not form the basis of a claim against the Respondent in this Complaint.

Under the head of non-quantifiable loss, the Secondary Complainer referred to the tax penalties imposed by HMRC. He was unable to say whether any tax penalties had been paid by the Trust itself rather than by the Respondent. The Tribunal was unable to make any findings in fact of a loss to the Trust and therefor no award of compensation was appropriate.

Although the Secondary Complainer did not refer to these in his submissions, the written claim for compensation makes reference to a claim for his own time and distress to complete the task "as executor" and for distress suffered by the beneficiaries. It should be noted that a trustee is not entitled to charge a fee for his work as trustee unless the Trust document permits that. The Trust document has not been produced to the Tribunal. The beneficiaries are not Secondary Complainers. Any relevant distress would require to have been suffered by the Trust itself. A Trust cannot be distressed.

The Tribunal invited further submissions from the Secondary Complainer with regard to the issues of expenses and publicity. The Secondary Complainer invited the Tribunal to exercise its discretion and not make an award of expenses against him. With regard to the issue of publicity, he confirmed that he was happy for the Tribunal to follow the approach adopted in the misconduct hearing. In all of the circumstances, the Tribunal considered that it was appropriate to make no award of expenses and directed that this decision should be given publicity.



Beverley Atkinson
Vice Chair