

**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, formerly at 26 Drumsheugh
Gardens, Edinburgh and now at Atria One, 144
Morrison Street, Edinburgh**

Complainers

against

**JOHN GERARD O'DONNELL, Flat 1/2, 322
Kelvindale Road, Glasgow**

Respondent

1. On 15 February 2017 John Gerard O'Donnell, Flat 1/2, 322 Kelvindale Road, Glasgow (hereinafter referred to as "the Respondent") was found guilty of professional misconduct in respect of six Complaints. In respect of one of those Complaints, Tribunal reference DT/16/08, the Tribunal found the Respondent's actions had been contrary to the principle that a solicitor should be a person of honesty and integrity.
2. There was a Secondary Complainer in the Complaint, namely Mrs EE (hereinafter referred to as "the Secondary Complainer").
3. On 15 February 2017, the Tribunal allowed the Secondary Complainer twenty-eight days from the expiry of the appeal period to lodge a written note of claim at the office for the Tribunal. At the Secondary Complainer's request, the Tribunal extended this period. A written statement of claim dated 1 June 2017 was lodged on 6 June 2017. On 22 June 2017, the Tribunal issued an Interlocutor allowing the statement of claim for the Secondary Complainer to be received and appointing the Respondent to lodge Answers if so advised within fourteen days with fourteen days thereafter for both the Secondary Complainer and the Respondent to adjust. The Tribunal assigned 7 September 2017 as a hearing.
4. On 7 September 2017, the Secondary Complainer was present and represented by her son. The Respondent was neither present nor represented. There was no appearance on behalf of the Law Society. Having considered the Tribunal Clerk's evidence regarding the

attempts at service of the Interlocutor of 22 June 2017 intimating the date of the hearing on the Respondent, the Tribunal decided that it was fair to proceed in the Respondent's absence.

5. The Secondary Complainer, her son and her daughter-in-law gave evidence. Submissions were made on behalf of the Secondary Complainer.

6. The Tribunal found the following facts established:-

6.1 Mrs EE was the Secondary Complainer in the Complaint with Tribunal reference DT/16/08 against John Gerard O'Donnell. The Tribunal found the Respondent guilty of professional misconduct. The Respondent asked the Secondary Complainer to sign a blank sheet of paper and told her he would complete it later. The Respondent created an affidavit which was purportedly sworn by Mrs EE on 9 September 2011 and purportedly notarised by the Respondent's partner. The affidavit sought to persuade that heritable property was not a matrimonial home and was therefore not matrimonial property. The existence of the affidavit came to light during divorce proceedings involving Mrs EE and her former husband. During separate interdict proceedings taken by the Law Society of Scotland against the Respondent, it was established that the affidavit in question had been executed by the Respondent using the signature of his partner. The partner had not been present when Mrs EE had signed the blank sheet of paper. During the hearing on the professional misconduct Complaint, the Tribunal determined that the Respondent's actions were contrary to the principle that a solicitor should be a person of honesty and integrity.

6.2 The Secondary Complainer lodged a written statement of claim seeking £5,000 compensation for non-quantifiable loss for her inconvenience and distress resulting from the professional misconduct.

6.3 The Secondary Complainer was inconvenienced and distressed as a result of the Respondent's professional misconduct. She was anxious and depressed. She feared that her word would not be believed against that of a solicitor and that the contents of the affidavit would be presumed to be true. She was concerned that this would have a significant financial impact upon her upon divorce and might have further legal ramifications. When she attempted to explain the situation to

a different firm of solicitors, they chose not to represent her and she did not think they believed her. This caused her further distress and anxiety.

6.4 The Secondary Complainer was directly affected by the misconduct of the Respondent resulting in her experiencing inconvenience and distress.

7. The Tribunal heard submissions from both parties with regard to expenses for the hearing on compensation. Thereafter, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 7 September 2017. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against John Gerard O'Donnell, Flat 1/2, 322 Kelvindale Road, Glasgow and having previously determined that the Respondent was guilty of professional misconduct, Find that the Secondary Complainer has been directly affected by the Respondent's misconduct and considered that it was appropriate to award compensation to the Secondary Complainer: Ordain the Respondent in terms of Section 53(2)(bb) of the Solicitors (Scotland) Act 1980 to pay to Mrs EE £4,500 by way of compensation in respect of inconvenience and distress resulting from the misconduct within 28 days of the date on which this Interlocutor becomes final with interest at the rate of 8% per annum from the due date until paid; Find the Respondent liable in the expenses of the Secondary Complainer to the extent of £100 and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but should not name the Secondary Complainer or otherwise identify her and that publicity should be deferred pending the outcome of associated proceedings or confirmation that there will be none.

(signed)

Nicholas Whyte

Chairman

8. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 2 OCTOBER 2017.

IN THE NAME OF THE TRIBUNAL



Nicholas Whyte

Chairman

NOTE

Prior to the hearing on 7 September 2017 the Secondary Complainer lodged with the Tribunal a completed compensation claim form. No Answers were lodged on behalf of the Respondent.

At the hearing on 7 September 2017, the Respondent was neither present nor represented. The Tribunal's Clerk gave evidence on oath that the professional misconduct hearing had taken place on 15 February 2017. On that date, the Secondary Complainer was allowed 28 days following the expiry of the appeal period to lodge a claim for compensation. The Tribunal's decision in the professional misconduct matter was successfully served upon the Respondent on 22 April 2017 by Sheriff Officers at the address in the Findings by posting it through the letterbox having confirmed residence with the neighbours.

On 6 June 2017, a compensation claim dated 1 June 2017 was lodged with the Tribunal Office. On 22 June 2017, an Interlocutor setting out the compensation hearing date and timetable for Answers and adjustments was sent out to the parties. The Respondent's copy was sent out for service by Sheriff Officer. The date of the hearing was put on the Tribunal's public website diary. On 10 June 2017, the Sheriff Officers returned the Respondent's notice because neighbours had been unable to confirm residence at the Respondent's last known address. They were unable to trace him. On 11 June 2017, the Tribunal Clerk telephoned the solicitor who dealt with the plea and Joint Minute in relation to the professional misconduct matter on the Respondent's behalf. The Clerk asked whether the solicitor could provide another address or whether she would be willing to accept service on the Respondent's behalf. The solicitor telephoned the Tribunal Clerk later that day to say that she had no instructions to accept service on behalf of the Respondent. The Tribunal Office sent the Interlocutor by email, recorded delivery letter and ordinary post to the Respondent's last known address. An email delivery receipt was generated. The recorded delivery letter was returned to the Tribunal Office. On 4 September 2017, a letter was sent to the Respondent's solicitor by email and Legal Post informing her of the date of the compensation hearing and indicating that the Tribunal might proceed in the Respondent's absence if he was not present or represented at the hearing. The letter invited her to provide written submissions if appropriate. No response to this letter was received by the Tribunal Office.

The Tribunal adjourned to consider whether in the circumstances it was fair to proceed in the Respondent's absence and concluded that it was. The Respondent was aware from the terms of the decision of 15 February 2017 that a compensation hearing might be held. This was not a new matter but followed on from the professional misconduct Complaint. There was an obligation on the Respondent to keep the Tribunal Office informed of any change of address while the matter remained outstanding.

It was reasonable to assume that the ordinary post letter had been posted through the letterbox at the Respondent's last known address. Despite the prospect of a compensation case, the Respondent had not updated the Tribunal Office with any change of address. The Tribunal had previously corresponded with the Respondent by email and the email with the hearing date had been successfully delivered. The Respondent's agent was aware of the date of the compensation hearing and the Tribunal presumed that she was still acting for him in the absence of any information from her to the contrary.

The Tribunal considered whether to adjourn the matter. However, it was of the view that if it were to do so, the Tribunal Office could not take any additional steps to intimate the hearing on the Respondent. The Tribunal considered whether it was fair to the Respondent to proceed in his absence. It also considered the purpose an adjournment would achieve and the desirability of proceeding with the compensation hearing, both from the perspective of the Secondary Complainer, the Tribunal and the public interest. Having weighed all these matters, the Tribunal decided that it was fair to proceed in the Respondent's absence.

EVIDENCE FOR THE SECONDARY COMPLAINER

Witness: Secondary Complainer

The Secondary Complainer gave evidence on oath. She explained that she had attended the Respondent's office in September 2011 with her former husband and had been asked to sign many blank sheets of paper using her former surname. She did this because she felt she could trust her husband and the Respondent, who was a solicitor. She thought the Respondent was a decent, honourable man. In 2014, she separated from her husband and divorce proceedings began. Her husband sent her the affidavit in question. The affidavit suggested that a residential property was not matrimonial home. It also contained other inaccuracies.

The Secondary Complainer was very concerned that as a result of the affidavit she was not going to receive the financial settlement on divorce to which she was entitled. She was embarrassed to admit that she had signed blank sheets of paper for a solicitor. She was worried that she would not be believed when she said that she did not sign the affidavit. This fear was borne out when she consulted a solicitors' firm for advice and they declined to take her case because they considered the affidavit to be genuine.

The Secondary Complainer described a great deterioration in her mental health as a result of dealing with the false affidavit. She became extremely anxious and depressed. She lost weight and had trouble sleeping. She suffered nightmares and would wake up screaming. She was very distressed and paranoid at times. She became irritable and aggressive with her family. Although she had previously been a

sociable person, she became antisocial. She found it hard to leave her house. She went through a period when she would hide in her attic. She thought she might be suicidal. She was tearful. She was frightened that she might go to prison as a result of the false affidavit. She feared for her mental health. She believed that she was partly to blame by signing blank sheets of paper and felt humiliated. It was very difficult for her to confide in her family but she eventually did so. She sought professional help from her doctor and counselling services. She provided letters from those professionals in support of her claim. She was prescribed medication to assist with anxiety. She still attends the counselling services. The Secondary Complainer described the lasting effect the Respondent's misconduct had upon her. She no longer trusts people and her confidence is depleted.

In answer to questions from the Tribunal members, the Secondary Complainer acknowledged that she was in a very stressful situation as a result of the breakdown of her marriage and subsequent divorce proceedings. She indicated that with the support of her family, she was coping with the divorce. She expected to deal with difficulties throughout the separation. However, the false affidavit had its own significant effect upon her over and above the stress she was experiencing as a result of the separation and divorce.

Witness: Secondary Complainer's son

The Secondary Complainer's son gave evidence on oath. He explained that the Secondary Complainer's husband had hoped to sell their home behind the Secondary's Complainer's back. If a friend had not alerted them to the fact it was on the market it might have been sold and she may not have received any of the proceeds. The purpose of the affidavit was to allow him to sell the house and keep the money. He referred to the documents lodged on behalf of the Secondary Complainer and the Tribunal's findings of professional misconduct against the Respondent.

He described the changes which the professional misconduct had wrought in his mother and how difficult that had been for him to experience. He acknowledged that his mother's distress arose as a result of the breakdown of her relationship as well as the Respondent's misconduct. However, he attributed the greater share of her distress to the professional misconduct. The Secondary Complainer had found it hard to contemplate divorce but she had been coping despite the difficult circumstances until the affidavit issue arose. She had been relieved to get away from her former husband. During the period when the affidavit was being used against her, the Secondary Complainer was concerned that she would go to prison or be fined.

The Secondary Complainer's son noted that she is still anxious and agitated. At certain times she cannot trust people. She feels stupid and small despite the fact she was entitled to rely on a lawyer's obligation

to help his client. He said that he honestly believed had it not been for the counselling and her friends and family, the Secondary Complainer would not be alive today as she was so damaged by the Respondent's misconduct. She still struggles every day. She has lost her confidence and "bubbliness".

Witness: Secondary Complainer's daughter-in-law

The Secondary Complainer's daughter-in-law gave evidence on oath. She explained how the Secondary Complainer became nervous, agitated and "stressed out" as a result of the Respondent's misconduct. She was on edge quite often. She said the Secondary Complainer's anxiety was started by the divorce but the affidavit was a significant factor. The stress was quite overwhelming for her. She noted that the Secondary Complainer was still using counselling services and was employing the techniques she had been taught to help her relax. She knew that the Secondary Complainer had consulted her doctor.

SUBMISSIONS FOR THE SECONDARY COMPLAINER

The Secondary Complainer explained that she was seeking the maximum amount of compensation. Her son drew attention to the fact that the Tribunal had already made a finding of professional misconduct against the Respondent. He highlighted that the Secondary Complainer's version of events had not changed since her first complaint to the Respondent, that she was truthful and she could be relied upon. He said that if the Respondent had not created the affidavit, his mother would be happy, carefree and relaxed in her home. Instead she was anxious, paranoid and agitated and that the Respondent was to blame.

DECISION

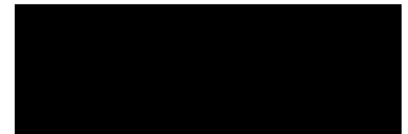
The Tribunal noted that the standard of proof in connection with a claim for compensation is that of the balance of probabilities. The Tribunal carefully reflected on the evidence from the Secondary Complainer and the submissions made on her behalf. It noted its previous finding of professional misconduct against the Respondent. It was satisfied that the Secondary Complainer had been affected by the Respondent's professional misconduct. The effect of the misconduct was evidenced by members of her family and the documentary medical evidence. The Tribunal found the Secondary Complainer to be credible and reliable. It was clear she had been seriously affected by the Respondent's misconduct. The Tribunal was impressed by the straightforward and candid way in which she gave evidence although it must have been difficult for her to give such detailed and personal information at the hearing.

The Tribunal considered to what extent the Secondary Complainer's inconvenience and distress flowed from the fraudulent affidavit and how much distress was attributable to the breakdown of her marriage

and the divorce proceedings. It recognised that the cause of her distress would have been due to both these factors. However, it accepted the evidence of the Secondary Complainer and her son that although she was understandably upset about the divorce, she had also felt relieved to separate from her husband. The affidavit issue was a significant cause of inconvenience and distress on its own, although it happened to occur when she was also in a vulnerable position following the separation.

The Tribunal considered that the consequences of the misconduct on the Secondary Complainer were serious. The Tribunal was convinced that the ramifications for the Secondary Complainer's mental health were significant. She described in detail the effects upon her which lasted for a long time, and to some extent she is still suffering. These have continued long after the divorce proceedings have concluded. The consequences had a serious effect over a long period of time affecting her wellbeing over a significant period. Her quality of life was considerably and noticeably disrupted. She required medical help. Her relationships with her family were affected. She suffered significant distress and upset. The Respondent did not take any steps to rectify matters. In these circumstances, the Tribunal thought it appropriate to make an award of compensation at the higher end of the scale of the compensatory powers available to it. The Tribunal considered that the appropriate amount of compensation was £4,500 to reflect the inconvenience and distress suffered by the Secondary Complainer as a direct result of the Respondent's professional misconduct.

Following submissions on publicity and expenses, the Tribunal was of the view that publicity should be given to the decision but that the Secondary Complainer and her family should not be identified as publicity would be likely to damage their interests due to the personal and medical information which is recorded within this decision. The Tribunal determined that the Respondent should be liable to the Secondary Complainer in expenses to the extent of £100 and the expenses of the Tribunal, including the expenses of the Clerk. Publicity will be deferred pending the outcome of any associated proceedings or confirmation that there will be none.



Nicholas Whyte
Chairman