

**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

**DAVID EWAN McNEISH, formerly of Optima
Legal (now Alston Law) and now of DWF LLP,
No. 2 Lochrin Square, 96 Fountainbridge,
Edinburgh**

Respondent

1. On 26 April 2022, David Ewan McNeish, formerly of Optima Legal (now Alston Law) and now of DWF LLP, No. 2 Lochrin Square, 96 Fountainbridge, Edinburgh, (hereinafter referred to as “the Respondent”), was found guilty of professional misconduct.
2. There was a Secondary Complainer in the Complaint, Dr A, on her own behalf and on behalf of her child (hereinafter referred to as “the Secondary Complainer”).
3. Prior to the hearing of 26 April 2022, the Secondary Complainer had lodged with the Tribunal and intimated to the Respondent a written statement of claim for compensation together with some supporting documents. There being insufficient time to deal with this at that hearing, the Tribunal fixed a hearing of the claim for compensation for 31 May 2022, this hearing to be held in-person.
4. Notices of this hearing were duly served upon both the Respondent and Secondary Complainer.
5. The Secondary Complainer emailed the Tribunal Office requesting an extension of time to lodge documentary productions due to illness. In terms of Rule 56, the Chair allowed the

Secondary Complainer an extended time for lodging her Productions to the close of business on 23 May 2022.

6. On 23 May 2022, the Secondary Complainer lodged her Productions – documents 1 to 7. On 24 May 2022, the Secondary Complainer lodged her documents 8 and 9. On 29 May 2022, the Secondary Complainer lodged her documents 10 to 14 together with a statement addressed to the Tribunal.
7. At the compensation hearing on 31 May 2022, the Secondary Complainer was present and represented herself. The Respondent was present and represented by Ian Ferguson, Solicitor, Glasgow. The Tribunal invited submissions in relation to the late Productions. Mr Ferguson objected to the lodging of the written statement addressed to the Tribunal and to document 8. He confirmed he had no objection to the lodging of the other documents. The Tribunal heard submissions from both parties. Documents 9 to 14 were allowed to be received late as there was no objection. Document 8 and the written statement were allowed to be received subject to competency and relevancy. The Tribunal proceeded to hear evidence from the Secondary Complainer and submissions from both parties.
8. The Tribunal found the following facts established:-
 - 8.1 Dr A was the Secondary Complainer in the Complaint against David Ewan McNeish, formerly of Optima Legal (now Alston Law) and now of DWF LLP, No. 2 Lochrin Square, 96 Fountainbridge, Edinburgh. The Respondent was found guilty of professional misconduct in the following terms:-

singly, in that:-

 - (a) In the period between 07 January 2015 and 03 February 2015 or any part of that period he failed to act in the best interests of Dr A by liaising directly with her in particular relation to the following:
 - i. he failed to take her initial instructions for the purchase of the property or liaise with her directly in any way in relation to the purchase;
 - ii. he failed to take her further instructions or liaise with her directly in any way in relation to the change of position from the property being purchased in joint names to the sole name of Mr A;

- iii. he failed to give her full and proper advice and explanations directly of the consequences of the signing of the Standard Security given the title to the property was being taken in the sole name of Mr A;
- iv. he failed to advise her directly of the consequences of the transfer of funds from a joint account in light of the title being taken solely by Mr A;
- v. he failed to fully advise her directly of the consequences of mortgage payments being made when the title was taken in the sole name of CR.

and

(b) In the period between 07 January 2015 and 03 February 2015 or any part of that period he failed to ensure that he had the authority of Dr A for his actings in the conveyancing transaction in particular in relation to the following:

- i. to confirm directly with her, her instructions to act in the purchase of the property with title being taken in joint names;
- ii. to ensure that he obtained Dr A's direct instructions and authority that the significant deposit could be taken from the joint account held in her name and that of Mr A when title was to be taken in both names;
- iii. to ensure that he obtained Dr A's direct instructions and authority at the time of instruction to change title into the sole name of Mr A;
- iv. to ensure that he obtained Dr A's direct instructions and authority to proceed with a mortgage in the sole name of Mr A;
- v. to ensure he obtained Dr A's instructions and authority to use funds from the joint account for the purchase of the property in the sole name of Mr A;

and *in cumulo* that:-

(c) In the period between 07 January 2015 and 03 February 2015 or any period thereof he failed to communicate effectively with Dr A whilst she was a client of the firm. In particular he:

- i. did not meet with her; send or receive e-mails directly to or from her;

receive AML documents directly from her; speak to her or meet her either face to face or in zoom meetings to take her instructions or to communicate generally directly with her to allow her to make informed decisions;

- ii. did not take instructions directly from Dr A that he could communicate solely with Mr A by email throughout the transaction;
- iii. failed to directly advise Dr A of the significant development, namely that the title in the property was to be taken in the sole name of Mr A rather than in the joint names of Mr A and Dr A, to allow her to make informed decisions;
- iv. failed to ensure that Dr A had received any of the communications that he sent solely to Mr A;
- v. he failed to directly advise her and explain the implications and consequences of signing the Standard Security for the limited purpose it was actually signed and so he failed to permit an informed decision to be made by Dr A regarding the signing of that document.

8.2 The Secondary Complainer lodged a compensation claim form in the sum of £54,890. This was made up of quantifiable loss made up of: “Loss of Proprietary Rights - £20,000”, “Marital Breakdown - £10,000”, “Family Breakdown - £10,000”, and “Reduced Child Maintenance - £9,890.46”; and non-quantifiable loss in relation to distress and inconvenience of £5,000.

8.3 The Secondary Complainer was directly affected by the Respondent’s misconduct noted above. As a result of the aforesaid misconduct, the Secondary Complainer suffered inconvenience and distress.

9. The Tribunal, having heard further submissions from the parties in respect of expenses and publicity, pronounced an Interlocutor in the following terms:-

Edinburgh, 31 May 2022. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against David Ewan McNeish, formerly of Optima Legal (now Alston Law) and now of DWF LLP, No. 2 Lochrin Square, 96 Fountainbridge, Edinburgh and having previously determined that the Respondent was guilty of professional misconduct, Find that the Secondary Complainer, Dr A, has been directly affected by the Respondent's misconduct and consider that it is appropriate to award compensation to the said Secondary Complainer; Ordain the Respondent in terms

of Section 53(2)(bb) of the Solicitors (Scotland) Act 1980 to pay to the Secondary Complainer, Dr A, the sum of £1,250 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 £250; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Catherine Hart

Vice Chair

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

IN THE NAME OF THE TRIBUNAL



A handwritten signature in blue ink, appearing to be 'Catherine Hart', written over the redacted area.

Catherine Hart
Vice Chair

NOTE

The Tribunal had hoped to be able to deal with the Secondary Complainer's claim for compensation at the hearing of the Complaint on 26 April 2022 but unfortunately time did not allow. Accordingly, the Tribunal fixed a separate date for the hearing of the claim for compensation on 31 May 2022. Unfortunately, due to ill-health, the Chair who sat at the hearing was not available for the compensation hearing on 31 May 2022. Both parties confirmed they had no objection to a different person sitting as Chair.

The usual notice of hearing was served upon both parties, confirming that any Productions they wished to rely upon required to be lodged with the Tribunal no later than 14 days prior to the hearing. The Respondent confirmed that he wished the Inventory of Productions lodged on his behalf for the original hearing to be available at the compensation hearing, although he expected only to refer to items 6 (Minute of Agreement) and 12 (Title sheet). The Secondary Complainer emailed the Tribunal Office requesting further time to lodge Productions due to ill-health. The Tribunal allowed the Secondary Complainer until the close of business on 23 May 2022 to lodge her Productions. Between 23 May and 29 May 2022, the Secondary Complainer lodged documents 1 to 14 and a written statement addressed to the Tribunal, as noted above.

At the commencement of the compensation hearing on 31 May 2022, the Tribunal invited submissions from both parties with regard to the late Productions. Mr Ferguson confirmed that he objected only to the statement addressed to the Tribunal dated 28 May 2022 and document 8 (letter from Secondary Complainer addressed to the Professional Conduct Sub Committee (PCSC) and responding to the Reporter's report to the PCSC.) His grounds for objecting to the brief statement were that it was late and irrelevant. He submitted that the statement contained new facts which were not agreed. It contained what he described as a character assassination of Mr A and Mr A was not present to defend himself. He objected to document 8 on the basis that he submitted it was irrelevant. He submitted that document 8 was part of the proceedings before the PCSC and was not relevant to the proceedings before the Tribunal.

The Secondary Complainer apologised to the Tribunal for the late lodging of some documents and explained the issues of ill-health. She explained that she had lodged the letter which is Production 8 in response to Mr Ferguson's Production 14 which he had asked to be before the Tribunal. Production 14 was the report which she had commented upon in her letter, Production 8.

The Chair clarified that any loss, inconvenience or distress claimed for required to be caused as a result of the misconduct found to have been established by the Tribunal. In response to a question from the Tribunal, Mr Ferguson confirmed that he was not expecting to refer to his Production 14.

With regard to the statement addressed to the Tribunal, the Secondary Complainer explained that she had lodged this to assist with her submissions and to help give a full picture of the impact of the Respondent's conduct on her. In response to a question from the Tribunal, the Secondary Complainer conceded that the harassment that she described within this statement might not be considered relevant to her inconvenience and distress in a direct sense but she would invite the Tribunal to consider this as contextual.

Prior to adjourning to consider the issue of the late Productions, the Tribunal explained to the Secondary Complainer that she had choices with regard to how to proceed at this hearing. It was explained that she could either rely on the documentary productions and her submissions or she could, in addition, give evidence. If she decided to give evidence then Mr Ferguson would be entitled to cross-examine her. The Tribunal invited the Secondary Complainer to consider how she wished to proceed, whilst the Tribunal adjourned to consider the issues relating to Productions.

The Tribunal gave careful consideration to the submissions of both parties. With regard to the Secondary Complainer's Production 8, the objection seemed to be taken on the basis of relevancy alone rather than late lodging. This is a document that the Respondent would have seen previously. The Secondary Complainer explained that she had lodged this in response to the Respondent asking for his Inventory of Productions to be available to the Tribunal. The Tribunal concluded that the appropriate and fair decision was to allow the Secondary Complainer's Production 8 to be received late, subject to issues of relevancy. Should either party refer to the Respondent's Production 14 or the Secondary Complainer's Production 8, issues of relevancy could be taken at that time.

With regard to the written statement addressed to the Tribunal dated 28 May 2022, it appeared to the Tribunal that this document was of the nature of supplementary written submissions rather than a documentary production. This was intended to be read alongside the Secondary Complainer's oral submissions. It would be open to the Secondary Complainer to simply read this statement in the course of her oral submissions should she so choose. Mr Ferguson would be given a full opportunity to respond to these oral submissions at the appropriate point in the proceedings. In all of the circumstances, it appeared to the Tribunal that the fair and appropriate decision was to allow the written statement to be received and treated as a written submission.

The Secondary Complainer confirmed that she wished to proceed by way of giving evidence, in addition to relying on her documentary productions and making submissions.

EVIDENCE FOR THE SECONDARY COMPLAINER

The witness stated that from her perspective everything that had happened in her life was linked together. From the moment of the transaction in early 2015, until the moment when she saw the three letters, written by the Respondent, on 24 April 2022, from her point of view, a lot had happened as a consequence. As a result of these letters being concealed from her a chain of events had followed. She had been put in a disadvantaged position without knowing it since 2015. She drew the Tribunal's attention to her written statement. This listed a lot of things that had happened. Her name was removed from all of the household bills immediately after they moved into the house. This was against her will and despite the fact that she paid them all. As a result, she had encountered difficulties proving her address. Thereafter, other 'unreasonable treatments' had occurred.

She and her husband separated in August 2017. Since then she had been subject to false accusations made by her ex-husband to the police. Mr Ferguson objected to this line of evidence submitting that the false accusations were irrelevant to a claim for compensation against the Respondent. In response to a question from the Tribunal, the witness explained that she believed she was placed in a disadvantaged position as a result of the Respondent's conduct and if she had not been in this disadvantaged position she did not think that her ex-husband would have believed that he could get away with his subsequent behaviour. She considered that their divorce was a consequence.

The Secondary Complainer referred the Tribunal to her document 3, a copy of the financial agreement between her and her ex-husband. She drew the Tribunal's attention to the fact that she had required to pay her ex-husband in the region of £32,000.

Her husband had refused to pay child support following their separation and she had required to get the Child Maintenance Service involved. In 2018, Mr A had made a claim for what was referred to as "prior debt" of nearly £10,000. She explained this was said to be rent for the house which he said she owed him as she was living in the house owned by him. The Child Maintenance Services decided in his favour on 20 March 2019 and she drew the Tribunal's attention to her documents 1 and 2.

The Secondary Complainer referred to issues of the Coventry Building Society's policy with regard to gifted deposits. At this point, the Tribunal explained to the Secondary Complainer that there were no issues of misconduct within the Complaint or the eventual findings of the Tribunal related to any

suggestion that the Coventry Building Society had been misled. As a consequence any loss said to be caused by this issue could not be relevantly considered by the Tribunal.

The Secondary Complainer referred back to her written statement where other events were described which she accepted were not directly related to the Respondent but she considered to be contextual background for what happened after the event. She spoke of her ex-husband breaching her confidentiality and of harassment that she and her daughter had suffered which she believed her ex-husband to be behind and which was designed to force them out of the community.

She referred the Tribunal to her written claim for compensation. She confirmed that she had claims for quantifiable loss under the heads of proprietary rights, family breakdown, marital breakdown and child maintenance.

She explained that the psychological impact of the Respondent's conduct was set out at page 3 of her claim form. She felt that she had been seriously let down by the system as a result of which she had "been through hell".

The Tribunal asked the witness for some clarification with regard to the loss claimed in relation to child maintenance. The Tribunal asked the witness whether the figure of £9,890.46 was the loss in real terms in the calculation of the maintenance payments or whether the weekly payments had been reduced by a percentage as a result of the claimed rent. The witness explained that she could not speak for the Child Maintenance Service but she understood that the figure of £9,890.46 was her actual loss. She understood that the total payment due for maintenance was reduced by that figure. In response to a further question from the Tribunal, the Secondary Complainer explained that originally the mortgage and all of the household bills were paid out of a joint account into which both her and Mr A's salaries were paid. This she said was demonstrated in bank statements originally lodged by the Respondent. After the couple's separation in either late 2017 or early 2018, Mr A had moved the payment of the mortgage from the joint account despite her objection. Then he made a claim to the Child Maintenance Service that she owed him the amount of nearly £10,000. She had believed that as a result of the sum she paid him, following the financial agreement being reached between them, that no further sums were due.

The witness explained that she believed that someone lied to the Coventry Building Society in relation to this mortgage application and believed that her ex-husband was trying to wipe all trace of her living in the house as a result.

The dropping of her name from the title deeds and then the cancelling out of her name in household bills had made her feel as though she was cancelled at home.

In response to a question from the Tribunal, she confirmed that she had appealed against the Child Maintenance Services decision and that this appeal process was still pending.

CROSS-EXAMINATION OF THE SECONDARY COMPLAINER

Mr Ferguson drew the witness's attention to a letter from the Child Maintenance Service dated 20 March 2019, attached to her compensation claim form. He had read this to be the Child Maintenance Service's decision with regard to her appeal in relation to the "rent" claimed by her ex-husband. The witness clarified that this was the Child Maintenance Service's internal decision with regard to her appeal and that she had taken an appeal to the Tribunal in Glasgow. This appeal was still pending although the Child Maintenance Service's decision continued to apply in the meantime.

Mr Ferguson asked the witness for clarification with regard to the payment of the mortgage and household bills and whether or not these were from a savings account or a joint account. The witness pointed to the Respondent's Production 7 and confirmed that these were paid from a joint account. The copies of the statements lodged by her show only her name because she was the one who applied for them so that they could be produced.

Having confirmed that no further evidence was to be led, the Tribunal adjourned to allow both parties a period of time to consider their submissions.

SUBMISSIONS FOR THE SECONDARY COMPLAINER

The Secondary Complainer wanted to emphasise to the Tribunal that she had nothing personally against the Respondent. However, she believed that a lot had happened as a result of him not communicating with her, acting in her best interests or obtaining her consent not to include her name in the title deeds. She considered that the most direct result was that she had lost all of her proprietary rights. She had no say in how the mortgage was to be repaid. She became a person in a family home where her voice had never counted. It was not just the position of her name being cancelled but she had been silenced. This had put her in a very difficult and disadvantaged position. Following that, her marriage and the family had broken down. Thereafter, there had been issues with the reduced child maintenance.

This whole process since 2015 had been a difficult journey for her. She considered it very unfortunate that the Respondent had not contacted her. If he had done so, then this might not have happened. She would not have been silenced at home and her name would not have been cancelled.

She felt they had been badly let down by the system. The Respondent was not just an individual, he represented the law. She stated that, because of the lack of contact from him, they had been forced into a position where there was no law, no justice.

She hoped that if anything could be learned from today it would be that a small action which may seem trivial, for instance not making a phone call, can in fact be extremely important. "What one represents is not just one person but a system."

The Respondent's actions had created a legal vacuum for her where she could find no justice. She had listed the things she considered had happened as a result.

She was grateful to have this opportunity. It was only through her contact with the Scottish Legal Complaints Commission (SLCC) and the Law Society that she had discovered the letters that had been sent to her. If she had not made contact with the SLCC this would have been hidden from her for her whole life and she would never have known what actually happened. She had not known letters were sent to her and had only gleaned this by reading between the lines of the reports that were sent to her last year. The process involving the SLCC, the Law Society and this Tribunal had let the truth be revealed.

SUBMISSIONS FOR THE RESPONDENT

Mr Ferguson accepted that the Secondary Complainer appeared to have been affected by her marriage and subsequent divorce from Mr A. He stated that she was clearly emotional and understandably so. However, he emphasised that the Tribunal was dealing only with the misconduct found to have been established and the consequences thereof.

Mr Ferguson submitted that the Secondary Complainer's claim for compensation lacked credibility and candour. He argued that the Secondary Complainer had suffered no loss and no evidence of such had been produced. He stated that the Secondary Complainer had not revealed the title position as it existed at the time she made her complaint and had been complaining of substantial losses including a loss of proprietary rights. He submitted that she had not revealed the existence of the Minute of Agreement until after he had been able to find out that it existed. He had called upon her to produce the Minute of Agreement in his Answers to the Complaint but she had not done so. He had not known one existed until

he had obtained the title sheet, his Production 12, which showed that the property had been transferred to her in implementation of an agreement. He had required to obtain an extract of the Minute of Agreement which he had subsequently lodged. The Secondary Complainer only lodged a copy of the Minute of Agreement just before this compensation hearing, without explanation, and this indicated that she had a copy of it all along.

The Tribunal drew Mr Ferguson's attention to the fact that he had not put any of this to the Secondary Complainer whilst she was giving evidence.

Mr Ferguson directed the Tribunal to the written compensation claim form for the Secondary Complainer. In that form the Secondary Complainer claimed a loss of proprietary rights valued at £20,000. Mr Ferguson submitted that this was demonstrably false as could be seen from the Minute of Agreement and title sheet which shows that the property had been transferred to the Secondary Complainer free of any standard security. In not disclosing these documents prior to the hearing, he argued that the Secondary Complainer had misled those dealing with the Complaint. The Minute of Agreement dealt with the financial settlement between the parties. Both parties had been represented and had the benefit of legal advice. The Secondary Complainer had paid over a sum of money. Her ex-husband had retained one property and she had retained the other. The property she retained was, according to Mr A's evidence at the misconduct hearing, £100,000 greater in value.

The marriage and family breakdown had been caused by both Dr and Mr A and had not been caused by the Respondent.

There was no issue of "a gifted deposit". The evidence was clearly that the Secondary Complainer always intended the money she put towards the transaction to be a contribution and not a gift.

It was the Secondary Complainer's evidence that she chose not to open letters addressed to both her and her husband jointly. The Tribunal had found in fact that four letters were sent by the Respondent addressed jointly to Dr and Mr A. At the end of the day, it was reasonable for the Respondent to expect that both clients would have read the letters. The Tribunal had heard the Secondary Complainer's evidence that she chose not to open the letters. The reason she did not see the bills was because of her wilful and reckless choice not to open correspondence, especially when she started to suspect that Mr A was up to no good. The Secondary Complainer must have signed either a direct debit or a standing order for the bills to be paid in the way they were. She must have been aware that payments were going through the joint account. He could not explain why the Secondary Complainer was not asking her husband to

see the bills. All the tools were there for her to deal with the situation but she did not use them. None of this was anything to do with the Respondent.

With regard to the Secondary Complainer's claim for non-quantifiable loss, Mr Ferguson submitted that her claim was meaningless and illogical. She should have been aware that the original loan application in joint names had been turned down and that the transaction could only proceed by the loan being in the sole name of Mr A. The Secondary Complainer would never have got the property that she now lives in if the purchase had not been completed.

He stated that his conclusion was that the compensation claim was "completely fraud from beginning to end". He submitted that it had hidden incredibly important and pertinent facts and documents. The relevant information and documents had to be requested and when they were not supplied they had to be obtained by means of detective work on his part. He argued that this was not a claim pursued in good faith, with proper disclosure of information requested. Instead, he suggested that information was hidden and not disclosed so as not to show that the Secondary Complainer had incurred no loss. He invited the Tribunal to hold that no loss had been established.

RESPONSE BY THE SECONDARY COMPLAINER

The Secondary Complainer noted that Mr Ferguson had referred back to the issues of misconduct in his submissions. In relation to that, she submitted that there were a number of factual mistakes. For instance, she understood that the Respondent had sent three letters addressed to her and Mr A not four.

She submitted that she had provided a copy of the Minute of Agreement to the Fiscal well before the original hearing date of 26 April 2022. What occurred between the Fiscal and Mr Ferguson was outwith her knowledge.

In response to a question from the Tribunal, Mr Ferguson confirmed that the only request for a copy of the Minute of Agreement by him and addressed to the Secondary Complainer was in a call within the Respondent's Answers to the Complaint.

The Secondary Complainer noted that Mr Ferguson had referred to the gifted deposit. She emphasised that the Coventry Building Society policy with regard to gifted deposits was in force at the time of this transaction. Given that policy this mortgage should not have been granted. She noted from Production 14 for the Respondent that the Respondent was also the solicitor for the Coventry Building Society.

DECISION

The powers of the Tribunal to award compensation are set out within of 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.”

Any loss, inconvenience or distress must have resulted from the misconduct that was found to be established at the original hearing. The standard of proof to be applied by the Tribunal in reaching its decision is that of the balance of probabilities. The Tribunal has a discretion to award compensation but is not obliged to do so.

In this case, the Tribunal had the benefit of the written claim for compensation, the Secondary Complainer’s documents 1 to 14, the Secondary Complainer’s parole evidence, the submissions and written statement for the Secondary Complainer and the Productions and submissions for the Respondent.

With regard to the Secondary Complainer’s evidence, the Tribunal considered her to be a credible witness doing her best to explain her position in difficult circumstances.

The Tribunal noted that Mr Ferguson, in his submissions, had used strong language. He suggested that the compensation claim was a complete “fraud from beginning to end” and had accused the Secondary Complainer of hiding important documents, namely the Minute of Agreement. The Tribunal was concerned to note that these comments were made by Mr Ferguson without him putting any of these accusations to the Secondary Complainer when she gave evidence. The foundation for these suggestions appeared to the Tribunal to be that the Secondary Complainer had not produced a copy of the Minute of Agreement to Mr Ferguson in answer to a call in the Respondent’s Answers to the Complaint. The Secondary Complainer was not a party to the original Complaint, nor was she legally represented. No issue was raised before the Tribunal either before or in the original hearing of any unanswered call, at which point the competency/appropriateness of a call for a third party to produce something could have been fully aired. The Tribunal detected no lack of candour or evasiveness on the part of the Secondary Complainer as she gave evidence. It is one thing to describe a claim for compensation made by an unrepresented Secondary Complainer as not well founded in law. It is quite a different matter to describe

it as fraudulent. In all the circumstances, the Tribunal rejected Mr Ferguson's submissions in this regard and found that there had not been any fraud or lack of candour on the part of the Secondary Complainer.

The Tribunal required to assess each head of claim made by the Secondary Complainer. It turned firstly to the claim in relation quantifiable loss. The first head of claim in this category related to "loss of proprietary rights - £20,000". The Tribunal had to assess, on a balance of probabilities, whether the Secondary Complainer had sustained a financial loss of £20,000 and whether that financial loss had been caused by the established misconduct. No information was placed before the Tribunal to explain how the Secondary Complainer had arrived at the figure of £20,000. Whilst the Secondary Complainer had given evidence explaining that she suffered, as she put it, "psychological consequences" of her name not being on the title, this did not assist in dealing with the question of actual financial loss. She had made reference, in passing, to having wished to repay the mortgage in a different way but there was no evidence of how that might have affected her financially. Both parties had entered into a Minute of Agreement apparently resolving the financial arrangements between them. Both parties were legally represented in the negotiations of the terms of this Minute of Agreement. A sum of money was paid by the Secondary Complainer to her ex-husband. No information was placed before the Tribunal to indicate how that figure was reached and whether or not it would have been a different figure if the title had been in joint names. The Tribunal does not know whether the property was treated as matrimonial property and whether all financial contributions and payments were taken into account or not when the Minute of Agreement was drawn up. Accordingly, the Tribunal was satisfied that it had not been established, on the balance of probabilities, that the Secondary Complainer had sustained any quantifiable financial loss under this head of claim.

The second and third heads of claim under quantifiable loss, namely "marital breakdown" and "family breakdown", the Tribunal considered ran together. No information had been placed before the Tribunal to demonstrate how the finances of the Secondary Complainer, or her daughter, had been affected by the divorce. It may be that these two heads might have been more appropriately included under the non-quantifiable loss category. However, even then, the Tribunal considered that it was too remote to suggest that the Respondent's conduct had caused the marital and family breakdown and these losses had not been established. The Tribunal noted that the Secondary Complainer had indicated in her evidence that the letters from the Respondent had been hidden from her. It should be noted that at the misconduct hearing the Tribunal found in fact that the Respondent had addressed four letters to both Mr A and Dr A. As to whether or not the contents of these letters were discussed with the Secondary Complainer by Mr A, at the misconduct hearing both witnesses gave polarised versions of events in their evidence and the Tribunal was unable to prefer one witness over the other. Additionally, the Tribunal at the misconduct hearing had concluded that the Respondent's conduct was "thoughtless" and not deliberate.

The fourth and final head of quantifiable loss was “reduced child maintenance - £9,890.46”. This related to an adjustment to child maintenance assessed by the Child Maintenance Services. Mr A had made a claim to the Child Maintenance Service that he was paying the mortgage for the home for a period of time whilst his wife and child were living there and this was referred to in the paperwork from the Child Maintenance Service that the Secondary Complainer had produced as “prior debt”. It does not appear to be disputed by the Secondary Complainer that her husband did in fact pay the mortgage during this period of time. When asked by the Tribunal to clarify how that had affected the Child Maintenance Service’s precise calculations, the Secondary Complainer had conceded that she was unable to answer for the Child Maintenance Service. She went on to say that it was her understanding that the whole amount had been deducted from the award of child maintenance due to be paid. Unfortunately, it is not entirely clear from the paperwork from the Child Maintenance Service how their calculations were performed. Nor was it entirely clear that the Secondary Complainer was worse off financially than if the mortgage had been paid jointly or by her solely. Nor was there information before the Tribunal to confirm whether or not this payment of mortgage by Mr A had been taken into account when the parties negotiated their Minute of Agreement. It should be emphasised that both parties were separately legally represented at the time of the negotiation of the Minute of Agreement. The Respondent played no part in the negotiation of its term. Additionally, the Secondary Complainer had confirmed that she continued to have an appeal pending in relation to this decision by the Child Maintenance Service. In all of the circumstances, the Tribunal was satisfied that it had not been established that the Secondary Complainer had sustained a loss of £9,890.46.

In summary, the Tribunal held that it had not been established that the Secondary Complainer had sustained quantifiable financial loss as a result of the Respondent’s misconduct.

The Tribunal then went on to consider the question of non-quantifiable loss, which is described on the compensation form as inconvenience and distress. It was quite clear from the Secondary Complainer’s evidence that she had suffered distress as a result of a whole chain of events that occurred after the transaction in this case. That was supported by the witness’s obvious upset and distress whilst giving evidence. It was, however, also clear that this distress was caused by a number of issues and that the Respondent’s misconduct was only one. As noted above, the Tribunal did not accept that it had been established that the Respondent’s misconduct had caused the marital breakdown. The Tribunal did accept that it was established that the fact her name was not in the title deeds and that she was not a party to the mortgage had made her feel disadvantaged and that this was something that Mr A could have used to his advantage. Part of the findings made against the Respondent was that he had failed to take steps to confirm individually with the Secondary Complainer that she consented to the title going in her

husband's sole name and that she understood the consequences of that. On the basis of the Secondary Complainer's parole evidence, the Tribunal was satisfied on the balance of probabilities that the Secondary Complainer had been directly affected by the misconduct of the Respondent and that the misconduct had caused her distress. Additionally, the Tribunal was satisfied on the balance of probabilities that the Secondary Complainer had been inconvenienced. At the very least she had required to make a complaint to the SLCC, correspond with the SLCC and the Law Society and thereafter, no doubt, with the Fiscal. She had required to proceed with her written claim for compensation.

The Tribunal was satisfied that the Respondent's misconduct had caused the Secondary Complainer significant inconvenience, worry, concern, anxiety and upset. In all of the circumstances, the Tribunal considered that an appropriate award of compensation was one of £1,250.

It should be noted that the Tribunal considered that the issues of unreasonable treatment, false accusations, breach of confidentiality or "collective harassment" described within the Secondary Complainer's brief statement went beyond the scope of this hearing and that the Respondent's misconduct could not be held responsible for these issues. Reference was made before the Tribunal as to whether the mortgage had been legitimately obtained. There was no averment of misconduct within the Complaint directed to this issue. This was therefore not a relevant issue for any award of compensation.

The Tribunal invited submissions from both parties with regard to expenses and publicity. Mr Ferguson agreed that the normal principle was that expenses followed success. In answer to a question from the Tribunal, the Secondary Complainer confirmed that it had taken her approximately 7 hours to prepare the documents in support of her claim for compensation. She confirmed that she had not lost pay as a result of attending today's hearing but indicated that she might have to work extra hours to compensate for her time taken today. No party made any submissions in relation to publicity. Having regard to the whole circumstances, the Tribunal considered that the fair and appropriate award of expenses was one of £250 to the Secondary Complainer. At the original hearing a decision had been taken not to name the individuals involved given the nature of matters discussed and the involvement of a child. It seemed to the Tribunal only sensible and logical to take a similar approach to the publicity of the compensation hearing.



Catherine Hart
Vice Chair