

**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

**AIDAN VINCENT GALLAGHER, Aidan
Gallagher & Company, Solicitors, 4 Argyle
Street, Greenock**

Respondent

1. On 14 June 2018, Aidan Vincent Gallagher, Aidan Gallagher & Company, Solicitors, 4 Argyle Street, Greenock (hereinafter referred to as “the Respondent”) was found guilty of professional misconduct.
2. There was a Secondary Complainer in the Complaint, Mr A.
3. On 14 June 2018, the Tribunal allowed the Secondary Complainer 28 days from the intimation of the Findings to lodge a written claim for compensation with the Tribunal Office.
4. On 15 August 2018, 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 14 days, with 14 days thereafter for the Secondary Complainer and the Respondent to adjust. The Tribunal assigned 19 September 2018 as a hearing. Answers were received.

5. At the hearing on 19 September 2018, the Secondary Complainer was present and represented himself. The Respondent was not present but was represented by Jonathan Brown, Advocate.
6. The Tribunal carefully considered the Secondary Complainer's compensation claim form and attached documents, the Respondent's Answers, and submissions made by both parties.
7. The Tribunal found the following facts established:-
 - 7.1 Mr A was the Secondary Complainer in the Complaint against Aidan Vincent Gallagher, Aidan Gallagher & Company, Solicitors, 4 Argyle Street, Greenock. On 14 June 2018, the Tribunal found the Respondent guilty of professional misconduct in respect of his breaches of Rules B1.2, B1.4 and B1.5 of the Law Society of Scotland Practice Rules 2011 in respect that he had allowed his integrity to be called into question, he had not acted in the best interests of his client, and had accepted improper instructions.
 - 7.2 Mr A lodged a written statement of claim seeking £5,000 for inconvenience and distress and for the loss of property.
 - 7.3 The Respondent had a duty to act with integrity. He had a duty to act in the best interests of his client. He had a duty not to accept improper instructions. He failed in these duties by accepting and delivering a note given to him by a client in custody which was designed to intimidate witnesses and constituted an attempt to pervert the course of justice. The Secondary Complainer was convicted of an attempt to pervert the course of justice. He received a sentence of imprisonment. The Secondary Complainer's sentence was a direct effect of the Respondent's professional misconduct and also a direct effect of his own criminal wrongdoing.
8. The Tribunal pronounced an Interlocutor in the following terms:-

Glasgow, 19 September 2018. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Aidan Vincent Gallagher, Aidan Gallagher & Company, Solicitors, 4 Argyle Street, Greenock 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, Mr A; 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 and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Eric Lumsden
Vice Chairman

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 OCTOBER 2018*.

IN THE NAME OF THE TRIBUNAL



Eric Lumsden
Vice Chairman

NOTE

At the hearing on 19 September 2018, the Tribunal had before it the Secondary Complainer's claim for compensation with attached documents, the Respondent's Answers, and the professional misconduct findings against the Respondent dated 14 June 2018.

SUBMISSIONS FOR THE SECONDARY COMPLAINER

The Secondary Complainer described the circumstances which gave rise to the professional misconduct. He explained that he had received a seventeen month sentence for attempting to pervert the course of justice. This sentence was to run consecutively to another sentence and had resulted in him receiving a total term of imprisonment which exceeded four years. He referred to the compensation claim form he had provided to the Tribunal Office. The claim form detailed the loss of the Respondent's private rented accommodation which he said occurred as a result of his imprisonment. His home was cleared of his possessions including furniture, appliances, clothing and a television. He was billed for his home to be cleared. When in prison, the Secondary Complainer has missed out on spending time with his relatives, some of whom have been seriously ill. The Secondary Complainer feels angry and distressed.

SUBMISSIONS FOR THE RESPONDENT

Mr Brown referred to the findings of the previous Tribunal which found the Respondent guilty of professional misconduct. He noted that the plea had been tendered on a specific basis and that had been accepted by the Fiscal. Mr Brown suggested that the Tribunal should consider if there was any loss, from where that loss flowed, and then whether the Respondent was liable for that loss.

In Mr Brown's submission, any loss the Secondary Complainer sustained stemmed from his incarceration. Mr Brown accepted that a prison sentence would be a reparable loss. However, the operative cause was the commission of the crime. The conviction was not challenged. The sentence is not solely related to the attempt to pervert the course of justice. Mr Brown submitted that the fact the solicitor did not intervene, did not cause the commission of the offence. He should not be liable for failing to act as a "good Samaritan". In particular, the loss of the property was not a direct result of the prison sentence.

Mr Brown accepted that the compensation powers of the Tribunal are broadly expressed so that the Tribunal can do justice in each individual case. However, he said that this particular case was not one in

which the Tribunal should exercise its discretion to award compensation. Mr Brown submitted that to allow the Secondary Complainer to profit from his crime would be contrary to general principle. If “black letter” civil law applied, there would be public policy arguments against compensating loss caused by one’s own criminal offence. The principle of *volenti non fit injuria* might also apply. He did not say that the Tribunal could not award compensation. It was a statutory jurisdiction and the Tribunal’s discretion was not otherwise fettered. Rather, he submitted that this was not an appropriate use of that discretion.

DECISION

The Tribunal considered the terms of Section 53(2)(bb) of the Solicitors (Scotland) Act 1980 which provides that the Tribunal may:-

“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 Tribunal has a discretion to award compensation and is not obliged to do so. On 14 June 2018, the Respondent was found guilty of professional misconduct. The Tribunal reflected upon the facts found by the Tribunal on 14 June 2018. Although the Secondary Complainer had described the circumstances of the misconduct differently, the Tribunal considered that it must proceed on the basis of the facts found by the previous Tribunal. The Respondent had breached his duties to his client by failing to act with integrity, failing to act in the Secondary Complainer’s best interests as he had also accepted improper instructions. The standard of proof to be applied in connection with a claim of compensation was that of balance of probabilities.

The Tribunal considered that a direct effect was one which would not have happened but for the professional misconduct. The Tribunal considered that the loss of the Secondary Complainer’s property was not a direct effect of the Respondent’s professional misconduct. It was too remote. The term of imprisonment was a direct effect of the Respondent’s professional misconduct. But for the Respondent’s actions, the Secondary Complainer’s wrongdoing would not have progressed as far as it did.

However, the Tribunal did not consider that it was appropriate to compensate the Secondary Complainer in circumstances where he was responsible for the criminal act by writing the note and asking his solicitor to deliver it. He committed the crime and as a result of this was literally the author of his own

misfortune. This is not to say that the Secondary Complainer was refused compensation because he was a prisoner or had committed a crime. The Tribunal could conceive of occasions where it would be appropriate to compensate criminals and prisoners for losses arising a direct effect of their solicitor's misconduct. Rather, the Tribunal had regard to the principle that one should not profit from one's own criminal actions as expressed in the maxims *Ex turpi causa non oritur actio* and *Commodum ex injuria sua nemo habere debet*. It also considered the guidance set out in the contract case, Patel-v-Mirza [2016] UKSC 42 and the factors to be taken into account in enforcing an agreement undertaken for an illegal purpose. It considered the overall fairness in the case and decided that justice was best done by making no award of compensation in the circumstances. The Secondary Complainer assumed a risk by asking a third party to deliver the note and should not be compensated for the effects of his own criminal wrongdoing. The Respondent's conduct allowed the crime to progress but the Secondary Complainer is ultimately responsible for it. It was impossible to separate the Secondary Complainer's actions and their effects from those of the Respondent.

The Tribunal invited submissions on publicity and expenses. The Secondary Complainer indicated that he was content he be named in the findings and that he be found liable in expenses. Mr Brown suggested that the Tribunal made the usual order with regard to publicity and that no expenses should be due to or by either party. The Tribunal made no finding of expenses due to or by either party. It directed that publicity will be given to the decision. However, other than those persons referred to in paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980, no other third party need be identified in the findings as publication of their personal data may be detrimental to their interests.



Eric Lumsden
Vice Chairman