

**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

**JOHN FLEMING HAMILTON, 7 Forfar Road,
Kirriemuir**

Respondent

1. On 27 March 2019, John Fleming Hamilton, 7 Forfar Road, Kirriemuir (hereinafter referred to as “the Respondent”) was found guilty of professional misconduct.
2. Ms A and Ms B were Secondary Complainers (hereinafter referred to as “the Secondary Complainers”).
3. On 27 March 2019, the Tribunal allowed the Secondary Complainers 28 days from the date of intimation of the Findings to lodge a written claim for compensation with the Tribunal Office. A written statement of claim was received.
4. On 14 June 2019 the Tribunal issued an interlocutor allowing the statement of claim for the Secondary Complainers to be received and appointing the Respondent to lodge Answers if so advised within 14 days, with 14 days thereafter for both the Secondary Complainers and the Respondent to adjust. The Tribunal assigned 9 September 2018 as a hearing.
5. At the compensation hearing on 9 September 2019, no parties were present or represented. All parties had intimated in advance to the Tribunal that they did not intend to attend the compensation hearing. Therefore, the Tribunal was content to proceed in the absence of the Respondent and the Secondary Complainers on the basis of the written material provided by parties.
6. The Tribunal found the following facts established:-

- 6.1 Ms A and Ms B were the Secondary Complainers in the Complaint against John Fleming Hamilton, 7 Forfar Road, Kirriemuir (the Respondent). On 27 March 2019 the Tribunal found the Respondent guilty of professional misconduct. He failed to advise Ms A and Ms B that the fee for an executry would be materially higher than the percentage fee and failed to advise them when the limit of the percentage fee was approached and separately when it was exceeded. He also failed to advise Ms A and Ms B that he was suspended and his client account frozen.
- 6.2 The Secondary Complainers lodged a joint written statement of claim seeking £5,000 compensation. They claimed compensation for the fees the Respondent had taken in excess of the percentage fee he had agreed to charge at the outset. They claimed for the fees paid to the solicitor they had to appoint on the Respondent's suspension. They also claimed compensation for inconvenience and distress arising as a direct result of the misconduct.

7. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 9 September 2019. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against John Fleming Hamilton, 7 Forfar Road, Kirriemuir and having previously determined that the Respondent was guilty of professional misconduct, Find that the Secondary Complainers have been directly affected by the Respondent's misconduct and considered that it is appropriate to award compensation to the Secondary Complainers: Ordain the Respondent in terms of Section 53(2)(bb) of the Solicitors (Scotland) Act 1980 to pay to Ms A and Ms B jointly the sum of £5,000 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; Finds no expenses due to or by any party; and Directs 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)

Alan McDonald

Vice Chair

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 and the Secondary Complainers by recorded delivery service on 23 OCTOBER 2019 .

IN THE NAME OF THE TRIBUNAL



[Handwritten marks]

Alan McDonald
Vice Chair

NOTE

At the compensation hearing on 9 September 2019, the Tribunal had before it the findings in the misconduct case, the compensation claim form lodged by the Secondary Complainers along with supporting documents, Answers lodged on behalf of the Respondent, two letters from the Respondent dated 10 July 2019 and 2 September 2019 and a letter from the Clerk to the Tribunal to the Respondent dated 5 July 2019. The supporting documents for the Secondary Complainers comprised of a fee note for work completed after the Respondent's involvement, the Law Accountant's certificate relating to that fee, and the schedule of division relating to the estate in question.

DECISION

The Tribunal considered whether to proceed in the absence of the Respondent and the Secondary Complainers. All parties had intimated in advance to the Tribunal that they had received notice of the compensation hearing but did not intend to attend. They provided papers for the Tribunal's consideration. Therefore, the Tribunal was content to proceed in the absence of the Respondent and the Secondary Complainers on the basis of the written material provided by parties.

The Tribunal considered the Respondent's assertion that the Tribunal could not act as an independent Tribunal in determining the compensation claim because the interlocutor allowing the statement of claim to be received was signed or authorised by the Chair of the Tribunal, Nicholas Whyte. The Respondent noted that the Chair was a solicitor who had provided advice to the Respondent on his suspension and negotiated with the Respondent regarding the acquisition of the Respondent's former firm. The Chair's firm also represented the Secondary Complainers following the Respondent's suspension. The Tribunal rejected the suggestion that it was not an impartial Tribunal in these circumstances. The interlocutor was part of a standard letter sent out by the Clerk under the authority of the Tribunal. This is done administratively, and the interlocutor could equally well have run in the name of one of the Vice Chairs. The interlocutor had not been signed or approved by the Chair. The Chair had indicated before the Complaint was lodged that he could have no involvement in any case against the Respondent due to the circumstances of his prior involvement with the Respondent. The Tribunal was satisfied that a fair minded and informed observer, having considered these facts, would not conclude that there was a real possibility that the Tribunal was biased.

The Respondent noted that the Secondary Complainers did not make a claim against the Respondent, his firm, his professional indemnity insurers or his Trustee in Sequestration. The Tribunal did not consider that this precluded the Secondary Complainers from making this claim to this Tribunal.

The Tribunal also took note of the Respondent's complaint regarding the time it had taken to bring this case to a resolution. The Tribunal could not consider any potential delay before the Complaint was lodged (Council of the Law Society of Scotland v Hall 2002 SLT 989) and did not consider that the proceedings before the Tribunal were delayed. The Complaint was dated 18 June 2018 and the case was originally set down for a procedural hearing on 10 September 2018 but was repeatedly adjourned on joint motion before it was finally heard on 27 March 2019.

The Tribunal considered the terms 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."

The Tribunal noted its power to award compensation was limited. It could direct a solicitor to pay compensation of such amount which did not exceed £5,000 for loss, inconvenience or distress. A direct effect was one which would not have happened but for the professional misconduct. The loss, inconvenience or distress must result from the misconduct. The standard of proof in connection with a claim for compensation is that of the balance of probabilities.

Ms A and Ms B were the executors of an estate. They instructed the Respondent to administer the estate. It was agreed that the Respondent's fee for the administration of the executry would be 3.75% of the value of the deceased's estate. On 9 September 2019, the Respondent was found guilty by this Tribunal of professional misconduct by failing to advise Ms A and Ms B that the fee for an executry would be materially higher than the percentage fee and failed to advise them when the limit of the percentage fee was approached and separately when it was exceeded. He also failed to advise Ms A and Ms B when he was suspended and his client account frozen.

It was appropriate to compensate the Secondary Complainers for the fees taken in excess of those agreed at the outset with the Respondent. These amounted to £2,477.03 excluding VAT. It was also appropriate to compensate them for the fees they had to pay to another firm to complete the administration of the estate. These amounted to £1,647.67 excluding VAT.

The Secondary Complainers also experienced inconvenience and distress as a result of the Respondent's misconduct. They had to take part in protracted correspondence with him regarding the fees. Appointing

other solicitors to deal with the matter caused them inconvenience. They had to spend many hours compiling their Complaint.

The financial loss including VAT amounted to a figure which was already close to the statutory maximum amount of compensation the Tribunal could award. The non-financial loss alone could have resulted in a substantial award of compensation. Therefore, the Tribunal was satisfied that statutory maximum award of compensation was appropriate in the circumstances.

Neither party made any motion in relation to expenses or publicity in their written documents. The Tribunal found no expenses due to or by any party. Publicity will be given to this decision should include the name of the Respondent but need not identify any other person as publication of third-party details would be likely to damage their interests.

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Alan McDonald
Vice Chair