

**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

**SIMON KENNEDY DUNCAN, Solicitor, Flat
G/L, 603 Clarkston Road, Glasgow**

Respondent

1. On 2 June 2023, Simon Kennedy Duncan, Solicitor, Flat G/L, 603 Clarkston Road, Glasgow (“the Respondent”), was found guilty of professional misconduct.
2. There was a Secondary Complainer in the Complaint, Larry Thomas Maguire, 2 Southview, Lammerlaws, Burntisland.
3. Following the finding of professional misconduct, the Tribunal allowed the Secondary Complainer 28 days from the intimation of the findings of misconduct to lodge a claim for compensation. The written findings were intimated to the Secondary Complainer.
4. The Tribunal set the matter down for a virtual compensation hearing on 15 November 2023. Notice was duly served upon the Respondent and Secondary Complainer.
5. At the virtual compensation hearing on 15 November 2023, the Secondary Complainer was present and assisted by his wife, Alexandra Maguire. The Respondent was present and represented by Johnston Clark, Solicitor, Dundee.
6. The Tribunal found the following facts established:-
 - 6.1 The claimant at this hearing was Larry Thomas Maguire, a Secondary Complainer in the Complaint against the Respondent, Simon Duncan.

6.2 On 2 June 2023, the Tribunal found the Respondent guilty of professional misconduct in respect that he

- (a) Failed to action a Mandate sent by letter by the Secondary Complainers' newly instructed solicitor on 13 November 2017;
- (b) Failed to respond to correspondence from the new solicitor, Digby Brown and specifically a letter of 17 January 2018 and a telephone call made to the firm on 12 February 2018;
- (c) Failed to respond to a letter of complaint from Digby Brown dated 28 March 2018; and
- (d) Failed to co-operate with the Complainers' investigation in respect of the complaint and failed to respond to any correspondence sent to him by the Complainers including formal Notices in terms of the Legal Profession and Legal Aid (Scotland) Act 2007 Section 48(1)(a) and the Solicitors (Scotland) Act 1980 Section 15(2)(i)(i).

6.3 The Secondary Complainer lodged a written statement of claim with the Tribunal claiming £5,000 for inconvenience and distress.

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

By Video Conference, 15 November 2023. The Tribunal, having considered the Complaint at the instance of the Council of the Law Society of Scotland against Simon Kennedy Duncan, Solicitor, Flat G/L, 603 Clarkston Road, Glasgow 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; Find that the Secondary Complainer has been directly affected by the Respondent's misconduct and considered that it is 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 the Secondary Complainer, Larry Thomas Maguire, 2 Southview, Lammerlaws, Burntisland, the sum of £2,000 by way of compensation in respect of inconvenience and distress resulting from the professional

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; 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 and the Secondary Complainer but need not identify any other person.

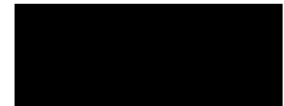
(signed)

Ben Kemp

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 Complainer by recorded delivery service on *5 December 2023*.

IN THE NAME OF THE TRIBUNAL



Ben Kemp
Vice Chair

NOTE

At the virtual compensation hearing on 15 November 2023, the Tribunal had before it the decision in the misconduct case against the Respondent; the Secondary Complainer's compensation claim form; a letter from the Secondary Complainer's wife Alexandra Maguire, and a copy of Mr Clark's email to the Secondary Complainer dated 14 November 2023 at 1333 hours. Following a discussion about the best way to proceed with the hearing, it was decided that Mrs Maguire would give evidence on oath and then she might make a submission on her husband's behalf. Mr Clark raised a concern about whether Mrs Maguire was to be set up as an expert witness but it was determined that she was going to give evidence as a witness to fact.

EVIDENCE FOR THE SECONDARY COMPLAINER**WITNESS ONE: ALEXANDRA MAGUIRE**

The witness explained that her husband, the Secondary Complainer, had a traumatic workplace accident in November 2016. He instructed the Respondent to represent him. It was 18 months before he realised that his repeated telephone calls and emails were going unanswered and it seemed unlikely that the Respondent was going to respond. The Secondary Complainer became depressed and angry. His self-esteem was at rock bottom. He had by this time already had 18 months of stress following a nasty accident. He wanted to withdraw the claim.

The Secondary Complainer transferred his claim to Digby Brown. They had to gather together all the evidence the Secondary Complainer had already sent to the Respondent. It was not easy to recover this information. Digby Brown repeatedly chased the Respondent but he blanked them too. Digby Brown had to involve the Law Society to resolve the situation. This all took its toll on the Secondary Complainer. The Secondary Complainer and his wife frequently argued about the case. She wanted him to persist. He did not want to repeatedly go over the circumstances of the accident. He was quite ill for a time and took anti-depressant medication. The witness said she and the Secondary Complainer had a good marriage. However, during this period, they quarrelled frequently. They felt useless. Even now, the hearing was very stressful for them.

Digby Brown spent time locating the Respondent. The witness said that they had to pay for Digby Brown to do that. She drew attention to the "sheer inconvenience" of having to continually telephone the Respondent. His secretary became embarrassed at having to deal with their calls. The Secondary Complainer was distressed and inconvenienced. They lost family time because they were arguing.

The witness explained that Digby Brown referred the Respondent to an EMDR consultant for assistance with his PTSD. The Secondary Complainer was vulnerable due to the accident and the Respondent's misconduct created an additional lot of stress which had a strong effect on the Secondary Complainer's health and his relationship with his wife. The witness felt very strongly about it and wanted to present the situation to the Tribunal on his behalf. The witness acknowledged that it was difficult to quantify feelings. The Secondary Complainer was upset and angry due to the lack of contact by the Respondent. She hoped the Tribunal recognised that they were speaking from their hearts although they were trying to also present the case fairly.

The witness noted that the Respondent had offered a sum to settle the matter. This had been done by email late afternoon on the day before the hearing. There seemed to be doubt about whether the Respondent's agent was in funds. He suggested a Tribunal interlocutor. The Secondary Complainer and his wife did not accept the offer as they were concerned that they the sum might not get paid. The email from the Respondent's solicitor was complicated and they had been nervous about accepting the offer.

The witness was not cross-examined. The Chair asked a question about financial loss. He noted that the claim form was restricted to inconvenience and distress but that Mrs Maguire had alluded in her evidence to paying the new solicitors fees to deal with the Respondent. The witness said that there were costs to them for Digby Brown to chase up the Respondent. They had to spend time doing that and it was reflected in their overall fee. The Chair asked for more information. The witness said that there was no breakdown of cost or invoice. Deductions were made from the overall award.

SUBMISSIONS FOR THE SECONDARY COMPLAINER

The Secondary Complainer said that his wife covered everything perfectly. He felt as if they were still jumping through the Respondent's hoops. It had been 8 years of stress. He wanted closure and that included financial closure.

SUBMISSIONS FOR THE RESPONDENT

Mr Clark said he was grateful to Mrs Maguire for telling the Tribunal about the offer which had been declined. He said the difference between the parties was not whether compensation was due, but rather, the amount of the award.

He said the correct approach for the Tribunal was to define the professional misconduct in terms of the Tribunal's interlocutor. This involved failing to implement a mandate, failing to respond to telephone

calls and correspondence, failing to respond to a letter of complaint, and failing to cooperate with the Law Society. He referred the Tribunal to its findings at paragraph 7.68. He said that anything which happened prior to 13 November 2017 was not relevant to the misconduct as it was only at this point that agency was terminated. Mr Clark said it was clear from the finding that the Law Society was involved. This was a “voluntary act” on the Secondary Complainer’s behalf. There was no additional stress beyond what was already happening. With reference to the mandate, Mr Clark said there was no finding of fact relevant to the content of the file.

Mr Clark turned to the letter submitted by Mrs Maguire and her evidence. He noted her heartfelt testimony. However, he said that there was no evidence of her qualifications. There was no vouching of the medical aspects of the claim, including PTSD, or that the Secondary Complainer’s health deteriorated because of the misconduct. He said there was no notice of the claim regarding financial loss. He referred the tribunal to Law Society-v-Laura Winton and said that the misconduct in that case was more serious and the award was £800.

Mr Clark said that if the Tribunal made an award of less than that which was offered in settlement it should consider awarding expenses against the Respondent. He had no motion to make regarding publicity.

In answer to questions from the Tribunal about the Winton case, Mr Clark noted that even allowing for a 16% inflationary increase, any award should be under £1,000. He referred the Tribunal to its published tariffs. He said the misconduct in the Winton case was more serious because there was a financial loss and the Secondary Complainer had to litigate to recover her money. It was not just “mere” inconvenience and distress.

FURTHER SUBMISSIONS FOR THE SECONDARY COMPLAINER

Mrs Maguire said it would be grossly unfair for the Secondary Complainer to be charged expenses in relation to this procedure. He was the innocent party. The Respondent was the guilty party. The offer of compensation was not accepted because they did not understand the legal jargon in the email. The final offer was not made until 3.30-4pm the day before the hearing. The Secondary Complainer was content that publicity would be given to the Tribunal’s decision.

DECISION

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’s power to award compensation is limited. It can only direct a solicitor to pay compensation up to a maximum award of £5,000 to a Secondary Complainer for loss, inconvenience or distress which resulted from the misconduct. A direct effect is one which would not have happened but for the professional misconduct. The standard of proof in connection with a claim for compensation is that of balance of probabilities. The onus of proof rests upon the Secondary Complainer. The Tribunal has a discretion to award compensation but is not obliged to do so.

The Tribunal carefully considered all the documents before it, the evidence of Mrs Maguire and the submissions made by parties. Although Mrs Maguire worked in the field of mental health, she gave evidence as a witness to fact, and not as an expert. In this context, the Tribunal found her evidence credible and compelling.

The Tribunal carefully considered what Mrs Maguire had said about financial loss but considered that there was insufficient evidence before it to make a determination on the balance of probabilities that the Secondary Complainer had suffered financial loss as a result of the Respondent’s misconduct. “Success fees” are commonly taken from personal injury awards. This may have been the commercial arrangement between the Secondary Complainer and his new solicitors and did not necessarily reflect a fee for work undertaken to relation to the Respondent’s misconduct. The Tribunal also noted that the Secondary Complainer would have incurred costs in pursuing the litigation anyway, whether that was done by the Respondent or his new solicitors. There was no evidence of what additional cost there had been due to Digby Brown taking over the case upon which the Tribunal could base an award of compensation for financial loss.

The Tribunal considered that the Secondary Complainer had suffered inconvenience and distress as a result of the Respondent’s misconduct. Failing to comply with a mandate can have extremely serious consequences for a client who is attempting to pursue a claim. Failure to obtemper a mandate timeously in these circumstances caused a great deal of inconvenience and distress to the Secondary Complainer. The Respondent also failed to respond to Digby Brown, a letter of complaint and Law Society letters

about their investigation. This caused the Secondary Complainer additional stress. Having to involve the Law Society was another inconvenience. This all had an effect on the Secondary Complainer's health and relationship with his wife. Making a complaint to the SLCC and following that through with the Law Society and the Tribunal is stressful. The Tribunal could see for itself the effect the misconduct and the consequent compensation hearing had on the Secondary Complainer. The Tribunal noted that the Secondary Complainer had experienced a traumatic event in the form of the workplace accident and that some of his struggles were attributable to that. However, it was also of the view that the Respondent's conduct added significantly to that already stressful situation.

The Tribunal considered Law Society-v-Laura Winton. The case is not binding on the Tribunal and the Tribunal was aware of the risk of relying too heavily on previous compensation decisions which all turn on their own facts and circumstances. It noted that the function of compensation was not to reflect the degree of seriousness of the misconduct but rather to restore the Secondary Complainer so far as possible to the position he would have been in but for the misconduct.

The Tribunal had regard to its compensation tariffs table which provides guidance on awards for inconvenience and distress. In its view, the circumstances fell into the lower end of the "serious" category. There was a serious effect over a long period of time affecting the Secondary Complainer's wellbeing over a significant period. There was significant inconvenience over a long period of time and on many occasions. The quality of the Secondary Complainer's life and his relationship with his wife was considerably and noticeably disrupted. The Secondary Complainer was caused significant distress and upset. The Respondent failed to take reasonable steps at the time to rectify matters. In all the circumstances the Tribunal decided that the appropriate award was £2,000.

The Tribunal found no expenses due to or by either party. Although the Respondent would normally bear the expenses as the unsuccessful party, the circumstances were such that the Tribunal decided to exercise its discretion in this case to make no award. There was no motion for expenses made by the Secondary Complainer. His expenses for a hearing by video conference would be minimal. The Respondent admitted that compensation would be payable and had made a significant offer to the Secondary Complainer which might have been accepted had it been made earlier in the process. The Tribunal directed that publicity would be given to the decision, naming the Respondent and the Secondary Complainer.



Ben Kemp
Vice Chair