

**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. There was a Secondary Complainer, Ms G (hereinafter referred to as “the Secondary Complainer”).
3. On 27 March 2019, the Tribunal allowed the Secondary Complainer 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 Complainer to be received and appointing the Respondent to lodge Answers if so advised within 14 days, with 14 days thereafter for both the Secondary Complainer and the Respondent to adjust. The Tribunal assigned 9 September 2018 as a hearing.
5. At the compensation hearing on 9 September 2019, the Secondary Complainer was present and represented herself. The Respondent was not present or represented. The Respondent had intimated in advance that he did not intend to attend the compensation hearing. The Tribunal was content to proceed in his absence on the basis of the written material he provided.

6. The Tribunal found the following facts established:-

6.1 Ms G was the Secondary Complainer 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 act in his clients' best interests, failed to carry out instructions competently and within a reasonable period of time; and failed to communicate effectively with his clients and others.

6.2 The Secondary Complainer lodged a written statement of claim seeking £5,000 for financial loss, inconvenience and distress arising as a result of the Respondent's 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 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 Ms G the sum of £3,500 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 £20 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 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.

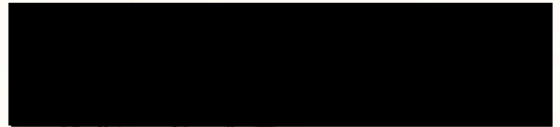
(signed)

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 Complainer by recorded delivery service on 23 OCTOBER 2019.

IN THE NAME OF THE TRIBUNAL



Alan McDonald
Vice Chair

NOTE

The Tribunal considered whether to proceed in the absence of the Respondent. He had intimated in advance to the Tribunal that he had received notice of the compensation hearing but did not intend to attend. He provided papers for the Tribunal's consideration. Therefore, the Tribunal was content to proceed in the absence of the Respondent on the basis of the written material he had provided.

At the compensation hearing on 9 September 2019, the Tribunal had before it the findings in the misconduct case, the compensation claim form from the Secondary Complainer 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 Complainer comprised of a letter dated 25 August 2019 with "Answers in Reply", an inventory of documents numbered 1 to 11, statements from two individuals, email correspondence between the Secondary Complainer and her brother (Mr H), and a letter from her brother's employer. The emails and the letter from Mr H's employer were submitted late. The Secondary Complainer advised that she had sent them to the Respondent, and he would have received them on the Saturday before the hearing. The Tribunal decided to reserve its position regarding these productions until it had heard evidence.

EVIDENCE OF MS G, THE SECONDARY COMPLAINER

Ms G gave evidence on oath. She provided her name, address and date of birth to the Tribunal. She said that she had suffered loss, inconvenience and distress as a result of the Respondent's misconduct.

The witness explained the background to her involvement with the Respondent and the nature of the legal work he had undertaken for her family. She said he had set family members against each other. He had not provided information when requested. She has not been able to recover the client files from the Respondent. Even her solicitor had become frustrated at the lack of assistance.

She noted that in his Answers, the Respondent asked why she had not made a claim earlier. She explained that before misconduct was established any complaint would only have been based on hearsay. The Respondent's attitude was to avoid her and refuse to engage regarding her concerns. She was unable to go to the Law Society because the Respondent was "stonewalling" her. However, eventually she received assistance from the Law Society and was able to make a complaint. The SLCC had not awarded her any compensation. She had not made any claim to the Trustee in sequestration but intended to follow this up.

The Secondary Complainer claimed that the Respondent's misconduct had caused her financial loss and referred to her compensation claim form. She claimed that due to the Respondent's misconduct, the title to her father's property was not transferred timeously into his children's names. When her mother moved into a nursing home, a charge order was placed over the property for payment of the home's fees. She believed that she has lost her family home as a result of the Respondent's misconduct.

The Secondary Complainer said that her physical health had suffered badly and attributed her symptoms to the Respondent's misconduct. In particular, she said that the Crohn's disease had flared up when she made the complaint to the Law Society. The Respondent was her mother's cousin and making the complaint had caused friction within the family. She also experienced anxiety and stress. She described being up at night "rifling through papers" and trying to find emails. She said that the stress had almost caused her to lose her job. She finds it hard to sleep.

The Secondary Complainer referred to a number of cases. These were not provided to the Tribunal.

EVIDENCE OF MR H

Mr H gave evidence on oath. He gave his age and current address to the Tribunal. Until recently, he had been working in Qatar. His own claim for compensation to the Tribunal had not been submitted in time but he wanted to give evidence in support of his sister's claim. Mr H said he felt aggrieved about the content of the Answers from the Respondent which had suggested that he did not want to make a complaint. He wanted to make it clear the reasons he had been unable to make a claim. The letter from the Tribunal was sent to the UK address he had provided. It was forwarded to him in Qatar but arrived when he was in Uganda. The internet service in Uganda was not sufficient to allow him to submit the claim electronically. Mr H clarified that he had not had any interaction with the Chair of the Tribunal or his firm, which was based in Forfar.

The witness said that the situation with the Respondent was ongoing since the 1990s. The Respondent's advice was very inconsistent. At one stage he said he could backdate a document to resolve a potential problem. The Respondent had advised that Mr H should not be the attorney for his mother due to the fact he was working in Africa. However, the Respondent would then use confidentiality as an excuse not to discuss matters with Mr H. The Respondent never followed-up with them after meetings. He delayed dealing with matters. He cancelled meetings at short notice. They have never had any meaningful response to requests for information. The Respondent has not assisted him or his sister in any way. They still do not have the files despite all their requests and mandates.

Mr H said that the Respondent's conduct had caused financial loss to the family. His sister's health had also deteriorated as a result of the misconduct. She suffers from epilepsy, anxiety and migraines. She takes various medications. Mr H felt he should have been present and more supportive but has his own family and lives abroad. His employment was terminated after he told his employers he had to come to Scotland to deal with this case. His sister's hours at work were reduced due to stress. She was inconvenienced. His sister had compiled all the papers to make the complaint. They still don't know what is going to happen regarding the title of the house. They don't have their father's client file. It feels ongoing all the time, like "groundhog day". He has nightmares and worries about what his father would have thought about the situation.

Mr H said he was happy that the SSDT had "exposed" the Respondent. The judgement helped with the family situation but some members of the family still do not speak to Ms G and Mr H. Mr H said that the case was on his mind every day. His father had worked very hard for his house and the benefit to his family had withered away. He felt very bad about that. Sometimes he will break down in tears.

SUBMISSIONS ON BEHALF OF THE SECONDARY COMPLAINER

The Secondary Complainer referred to the oral evidence and the documents she had submitted which she said supported her claim for £5,000 compensation.

DECISION

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 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 claimed that the Secondary Complainer's compensation claim was completely lacking in specification. He noted that it comprised a "general complaint" and contained numerous inaccuracies but did not detail these. He noted that it was curious that the Secondary Complainer had lodged a claim but her brother had not. The claim did not address why the Secondary Complainer had not made a claim against the Respondent and his firm at an earlier stage. The Tribunal did not consider that this precluded the Secondary Complainers from making this claim to this Tribunal. The claim was specific. It was clear that the Secondary Complainer was claiming for financial loss due to the failure to transfer title to the house and for inconvenience and distress allegedly arising from the Respondent's misconduct.

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 noted that it could only deal with the Secondary Complainer's claim for compensation. Mr H's request to lodge his claim late had been previously refused. His evidence was relevant only to his sister's claim. The Tribunal accepted the late documents lodged by the Secondary Complainer but ultimately decided that these had very little weight when considering the issue of compensation.

Section 53(2)(bb) of the Solicitors (Scotland) Act 1980 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.

On 27 March 2019, the Respondent was found guilty by this Tribunal of professional misconduct. He failed to act in his clients' best interests; he failed to carry out instructions competently and within a

reasonable period of time; and he failed to communicate effectively with his clients and others. The Respondent was instructed in relation to the executry of the Secondary Complainer's father. In May 2008, the Respondent received instructions from the Secondary Complainer and her brother to transfer the property to their mother in liferent and the Secondary Complainer and her brother in fee. The Respondent submitted a disposition to the Registers of Scotland but it was returned to him. Another disposition was prepared and registered in October 2010. The Secondary Complainer instructed her own solicitor in 2009-2010 in connection with concerns regarding the administration of the executry. The Respondent failed or delayed to implement the mandates sent by the solicitor on behalf of the Secondary Complainer. He also failed to pay the balance of the executry funds in respect of the Secondary Complainer's father's estate held in the client account and this was eventually dealt with by another firm.

The Tribunal was limited to considering the misconduct which had been established before the Tribunal on 27 March 2019 and did not take into account any information regarding any other potential misconduct. For example, Mr H referred to the Respondent offering to backdate a document, but this was not part of the misconduct found by the Tribunal. Therefore, the Tribunal had no regard to this evidence.

The Tribunal noted the lack of evidence to support the proposition that the Secondary Complainer had suffered financial loss. The Tribunal was not satisfied on the balance of probabilities on the available evidence, that the Secondary Complainer had "lost the family home" as a result of the Respondent's misconduct. Even if the Respondent had acted properly, the Local Authority could have challenged the transfer and the same result may have occurred. The claim for financial loss therefore was not made out. The Tribunal did not consider that the cases referred to by the Secondary Complainer were applicable in the circumstances.

There was no medical evidence offered in support of the Secondary Complainer's claim, although Mr H also spoke to the Secondary Complainer's difficulties. The Secondary Complainer had pre-existing health complaints but gave evidence that these had deteriorated as a result of the misconduct. The Tribunal considered that she had suffered as a result of the Respondent's actions to a serious extent and ought to be compensated for this. The misconduct had a serious effect over a long period of time, affecting the Secondary Complainer's well-being over a significant period. It caused significant inconvenience and distress over a long period. The Secondary Complainer's quality of life was noticeably disrupted, and she was caused significant distress and upset. The Respondent had failed to take reasonable steps to rectify matters. The appropriate award in the circumstances was £3,500. This

payment was to compensate the Secondary Complainer for the inconvenience and distress she had suffered as a direct effect of the Respondent's misconduct.

The Secondary Complainer indicated that she would prefer not to be identified in the findings due to the personal medical evidence that would be contained in them. The Tribunal decided 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 as publication of third-party details would be likely to damage their interests. The Secondary Complainer made a claim for parking expenses. The Tribunal found the Respondent liable in the expenses of the Secondary Complainer to the extent of £20 as well as the expenses of the Tribunal.



Alan McDonald
Vice Chair