

**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

**MICHAEL GERARD KILKERR, of Michael G
Kilkerr, 1 Bridge Street, Stranraer**

Respondent

1. On 6 December 2022, Michael Kilkerr, of Michael G Kilkerr, 1 Bridge Street, Stranraer (hereinafter referred to as “the Respondent”) was found guilty of professional misconduct.
2. There was a Secondary Complainer, James Alan Craig, 31 Park Road, Dunragit, Stranraer (hereinafter referred to as “the Secondary Complainer”).
3. On 6 December 2022, 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 claim for compensation was received.
4. The Tribunal set the matter down for a virtual compensation hearing on 20 March 2023 at 2pm. The hearing was intimated to the Respondent by letter of 27 February 2023. The Respondent was informed that he had 14 days from the date of the letter to lodge Answers to the claim. No Answers were lodged. The Respondent’s representative indicated by email that neither he nor the Respondent intended to appear at the compensation hearing.
5. At the virtual compensation hearing on 20 March 2023, the Secondary Complainer was present and represented himself. The Respondent was not present or represented. The Secondary Complainer and his wife gave evidence.

6. The Tribunal found the following facts established:-

- 6.1 James Craig was the Secondary Complainer in the Complaint against Michael Kilkerr, of Michael G Kilkerr, 1 Bridge Street, Stranraer. The Respondent was found guilty of professional misconduct in that he (a) failed to communicate effectively in breach of Rule B1.9.1 by failing to explain in writing to the Secondary Complainer the full extent of the loss of rights in Dunragit which were a consequence of relinquishing the liferent and signing the disposition transferring title of his one half share of Dunragit to LK and (b) acted in a conflict of interest situation in breach of Rules B1.7 and B2.1.4 when he acted for both the Secondary Complainer and LK.
- 6.2 The Secondary Complainer lodged two written statements of claim with the Tribunal. The Secondary Complainer sought £4,424 for loss, inconvenience, and distress.
- 6.3 The Secondary Complainer was directly affected by the Respondent's failure to communicate effectively and by the Respondent acting in a conflict of interest situation. He suffered inconvenience and distress as a result.

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

By Video Conference, 20 March 2023. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Michael Gerard Kilkerr, of Michael G Kilkerr, 1 Bridge Street, Stranraer ("the Respondent") 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 the Secondary Complainer, James Alan Craig, 31 Park Road, Dunragit, Stranraer, the sum of £1,000 by way of compensation in respect of loss 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; 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, the Secondary Complainer and Karen Craig but need not identify any other person.

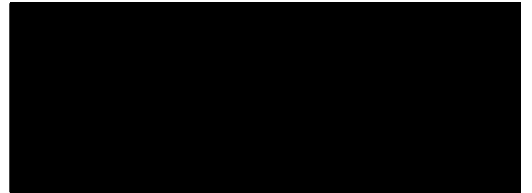
(signed)

Benjamin 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 16 MAY 2023.

IN THE NAME OF THE TRIBUNAL



Benjamin Kemp
Vice Chair

NOTE

At the compensation hearing on 20 March 2023, the Tribunal had before it the written findings of 6 December 2023 and two compensation claim forms.

The Secondary Complainer explained that he recently consulted a medical consultant who had produced a report. The Secondary Complainer had not intimated that report to the Respondent. The Chair asked if the Secondary Complainer wished to put the report before the Tribunal. The Secondary Complainer said that he did not but he would “lay it out” to the Tribunal.

The Secondary Complainer had submitted two compensation claim forms. He explained that when he submitted the second claim form, he had thought that he was going to be subject to the Scottish Legal Aid Board’s clawback rules. However, it had been recently confirmed that this would not be the case. Therefore, he was claiming only £2424 for financial loss, as was set out in his first compensation claim form. He was also claiming £2,000 for inconvenience and distress. He said that he wished he had also claimed for the fees he paid to the Respondent. However, he had not included these on either of his claim forms.

EVIDENCE FOR THE SECONDARY COMPLAINER**Witness One: James Craig (the Secondary Complainer)**

The Secondary Complainer gave evidence on oath. He said his claim for £2424 was not deniable. He had provided the Scottish Legal Aid Board’s letter to the Tribunal outlining the contribution he had to make.

The Secondary Complainer explained that his case for reduction of the disposition was heard at Stranraer Sheriff Court. Legal aid was eventually granted. The Secondary Complainer was represented by Balfour and Manson. The action was undefended. The Secondary Complainer sought the return of his home. He said that in 2008, his former partner had given him an “IOU” for money to be paid when she sold her house. She never paid that money to him. The house had been conveyed to her in two stages. When the Secondary Complainer first went to court, he was only seeking return of the second half of the property. However, the judge returned the whole house to the Secondary Complainer. He is now the sole owner of his home. There is no liferent. The full amount the Secondary Complainer has to pay the Scottish Legal Aid Board is £2424. He has repaid about half that amount. The Scottish Legal Aid Board paid the rest of the fees.

The Secondary Complainer said he was already under extreme pressure regarding an extradition case, when he received a letter from the Respondent explaining that he was to be evicted from his home. At that time he believed he owned a half share of the house and his former partner owned the other half. He was very distressed. He knew that extradition might take several years. The proposed eviction was much more immediate. The Secondary Complainer was on his own at that time. He did not know what to do. It all became too much for him. His physical health was not good. Essential repairs were needed to the gable end of the house. Remedial damp work was required. He could not access grants to pay for the repairs because he was not the owner of the house.

The Secondary Complainer said that fees of around £1300 paid to the Respondent for the transfer of the second half of the house came from his own bank account. He did not know that he could have claimed compensation for this.

The Secondary Complainer explained that following the transfer of the second half of the house, he lived in it for another 4-5 years. He did not know that he did not own the house. When the second half of the house was transferred to his partner, the Secondary Complainer had been extremely ill and was not in a position to do anything. He lost half his body weight and was sleeping all day.

The Tribunal asked the Secondary Complainer questions about how the action for reduction of the disposition transferring the second half of the house resulted in the Secondary Complainer receiving the whole house. The Secondary Complainer said that his lawyers explained the circumstances relating to the first half to the court and he became the sole owner of the house. The Tribunal asked whether the application for legal aid had to be amended to deal with the transfer of the first half of the house. The Secondary Complainer said it was all achieved under one grant of legal aid. There was no additional cost in dealing with the first half. The case was undefended. It did not matter whether there were one or two parts. The Tribunal asked how this situation arose as the court could only grant what the Secondary Complainer had sought. The Secondary Complainer said he was not present. He may be wrong, but he thought that when the action was undefended, his lawyers sought return of both halves of the house.

The Tribunal asked questions about the fees the Secondary Complainer said he had paid to the Respondent. He said that his former partner was having difficulties dealing with her bank in the USA. She was receiving very little disability money. He was very ill. She had his bank card for bills, groceries and oil as he was unfit to deal with these things. He found a bill for £1200-£1300. He could not figure out what it was. He realised he had paid for the transfer of the house himself. The bill was in the style

of a receipt and was on a small handwritten slip of paper. He did not know that he could claim for that money when he submitted his compensation claims.

The Secondary Complainer explained that following the action for reduction the court awarded expenses against his former partner. She has not paid those.

The Secondary Complainer said that his former partner could not have afforded to pay for the essential repairs to his house. She would not have paid in any case because she was trying to get him out of the house. When the house was last valued, it was said to be worth £115,000-£140,000.

Witness Two: Karen Craig

The witness gave evidence on oath. She is a retired staff nurse. She said that when she met the Secondary Complainer in 2018, it was obvious the situation with the house was affecting his physical and mental health. It became worse as time went on. The Secondary Complainer had other problems too, but it was primarily the house that was bothering him. It was the roof over his head. It also had sentimental value. She could see it affecting him day-to-day. His mood and quality of life were going downhill. Thoughts about his home were constantly on his shoulders. He was not looking after himself. In 2018 he was trying to get his home back in his name. He always wanted to discuss his house. He was nearly put out of his home at one stage.

SUBMISSIONS FOR THE SECONDARY COMPLAINER

The Secondary Complainer noted that his wife was a staff nurse. She used to work with older people experiencing problems typical of that generation. She suggested several times that he ought to get treatment. He has subsequently consulted a medical professional. He has been told that he will need about 20 sessions before he will be back to normal. It is costing him a fortune, but he is not asking for the Tribunal to award compensation in relation to these costs.

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 considered that a direct effect was one which would not have happened but for the professional misconduct. The standard of proof in connection with a claim of compensation is that of balance of probabilities. The Tribunal has a discretion to award compensation and is not obliged to do so. However, the Tribunal’s power to award compensation was limited to £5,000.

The Tribunal gave careful consideration to the content of the compensation claims, the evidence of the Secondary Complainer and his wife, and the submissions made by the Secondary Complainer. It noted the misconduct which had been established on the last occasion. The Respondent had failed to communicate effectively with the Secondary Complainer and had acted in a conflict of interest situation.

The Tribunal considered what the Secondary Complainer would have done if the Respondent had communicated with him effectively and had not acted in a conflict of interest situation. Although he had previously transferred half the house to his partner, the Secondary Complainer said he would not have transferred the second half of the house to her. The Tribunal proceeded on that basis.

The Secondary Complainer had lodged the first page of a letter from the Scottish Legal Aid Board dated 30 June 2021 indicating that his contribution to fees was to be £2424. The portion of the letter provided to the Tribunal did not identify this contribution as relating to any particular action. However, the Tribunal accepted the Secondary Complainer’s evidence that this letter related to the action for reduction of the second disposition. The Tribunal was satisfied that the Secondary Complainer’s contribution to fees was £2424.

It was not clear to the Tribunal how the Secondary Complainer achieved reduction of both dispositions. According to his own evidence, the whole house was returned to the Secondary Complainer for payment of one contribution which related, at least initially, only to the reduction of the second disposition.

The function of an award of compensation would be to return the Secondary Complainer to the position he would have been in but for the misconduct. He had to bring the action for reduction of the second disposition because of the Respondent’s misconduct. He had to pay a contribution to the Scottish Legal

Aid Board to set the matter right. He still has to pay that contribution even although expenses were awarded against his former partner.

However, the legal position regarding the reduction of the dispositions was not clear to the Tribunal. Based on his own evidence, it appeared that the Secondary Complainer did not have to pay a separate fee or contribution for the reduction of the first disposition. He now owns a house worth £115,000-£140,000 for one legal aid contribution of £2424. It appeared to the Tribunal that if this was correct, there was no net financial loss to the Secondary Complainer. He has already been restored to a better position than he would have been in if only the second disposition had been reduced. It was his evidence that two legal claims were combined for one fee. He would in other words, on his own evidence, have required to pay this or a similar fee in order to reduce the first disposition in any event: the one not attributable to the misconduct of the Respondent. To award compensation in these circumstances would not be appropriate.

The Tribunal noted that the Secondary Complainer had indicated that he had wished he had claimed for the fees paid to the Respondent. This had not been included on his claim forms which had been intimated to the Respondent. It would therefore be inappropriate to consider this as part of his claim. Even if the Tribunal had been prepared to consider this issue, it noted that in the misconduct case, the Secondary Complainer's former partner had indicated that she had paid the legal fees in question. The Tribunal considered that it would have required more supporting evidence to prove on the balance of probabilities that the Secondary Complainer had paid those fees.

The Tribunal considered that the Secondary Complainer would have experienced inconvenience and distress as a result of the Respondent's misconduct. It was difficult to separate the distress caused by the extradition case from the distress caused by the Respondent's misconduct. However, it was clear that some of his distress related to the potential loss of his home. The potential financial, practical and emotional consequences would have been significant. The Secondary Complainer was inconvenienced by having to raise an action for reduction. He had to apply to the Scottish Legal Aid Board for assistance. He made a complaint to the Scottish Legal Complaints Commission. Overall, the Tribunal considered that the consequences of the misconduct were significant. There was a serious effect over a period of time but not a lasting one. It caused significant inconvenience on several occasions. It caused worry, concern, some anxiety and upset. The Respondent failed to take reasonable steps to rectify matters. In all those circumstances, the appropriate award was £1000 compensation to the Secondary Complainer.

The Secondary Complainer made no motion for expenses. The Tribunal made no finding of expenses due to or by any party. Publicity will be given to the decision. The Respondent, the Secondary Complainer and his wife who was a witness, will all be named in the decision but there was no requirement to name anyone else.



Benjamin Kemp
Vice Chair