

**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 JAMES RANKIN HODGE, Wallace
Hodge and Company Limited, 6 Killoch Place,
Ayr**

Respondent

1. On 10 January 2020, John James Rankin Hodge, Wallace Hodge and Company Limited, 6 Killoch Place, Ayr (hereinafter referred to as “the Respondent”) was found guilty of professional misconduct.
2. There was a Secondary Complainer, Ms A.
3. On 10 January 2020, the Tribunal continued consideration of the Secondary Complainer’s claim for compensation to a hearing to be fixed.
4. The Secondary Complainer had previously submitted a written claim for compensation. A copy of the aforesaid claim was intimated to the Respondent together with notice of the compensation hearing set down for 16 March 2020.
5. On 11 March 2020, the Tribunal Office received further documents from the Secondary Complainer which she intended to rely on at the compensation hearing. Copies of these documents were forwarded to the Respondent by the Tribunal Clerk on 11 March 2020. The Respondent contacted the Tribunal Office on 12 March 2020 by email acknowledging receipt of the further documents and requesting that the hearing on 16 March 2020 be postponed as a result of their late lodging. In terms of Rule 56(1) of the Tribunal Rules 2008, the Chair dealing with this case considered and refused the motion to postpone.

6. At the compensation hearing on 16 March 2020, the Secondary Complainer was present and represented herself. The Respondent was not present but was represented by Norman Fraser, Solicitor, Ayr. The Tribunal having heard submissions from both parties with regard to the late lodging of the additional documentation, granted the Secondary Complainer's motion to allow them to be received late. The Secondary Complainer proceeded to give evidence and both parties made submissions.

7. The Tribunal found the following facts established:-

7.1 Ms A was the Secondary Complainer in the Complaint against John James Rankin Hodge, Wallace Hodge and Company limited, 6 Killoch Place, Ayr. The Respondent was found guilty of professional misconduct in respect that (a) he failed to write to the Secondary Complainer to advise her that legal consequences may arise from her signing the discharge and that she should seek independent legal advice prior to signing the document, (b) he failed to act with integrity in that he advised the Secondary Complainer that the other executors and residuary beneficiaries had agreed to pay her a one eighth share of the proceeds of sale of the house, but then made payment of the said sums conditional upon the Secondary Complainer taking no further action in respect of the circumstances surrounding her discharge of the standard security, (c) he failed to act with integrity in respect that he made payment of the sums due to the Secondary Complainer conditional upon her withdrawing the complaint which she had made to the SLCC regarding the Respondent thus delaying or hindering the advancement of the executry, and (d) he placed himself in a conflict of interest situation.

7.2 Ms A lodged a written statement of claim with the Tribunal Office claiming compensation of £5,000 to include distress, inconvenience and legal expenses of £2,184.

7.3 Ms A was directly affected by the Respondent's misconduct when he (a) failed to act with integrity in that he advised the Secondary Complainer that the other executors and residuary beneficiaries had agreed to pay her a one eighth share of the proceeds of sale of the house, but then made payment of the said sums conditional upon the Secondary Complainer taking no further action in respect of the circumstances surrounding her discharge of the standard security; (b) failed to

act with integrity in respect that he made payment of the sums due to the Secondary Complainer conditional upon her withdrawing the complaint which she had made to the SLCC regarding the Respondent thus delaying or hindering the advancement of the executry; and (c) placed himself in a conflict of interest situation by his actings in respect of the foregoing. As a result of the foregoing misconduct, the Secondary Complainer incurred legal expenses and suffered inconvenience and distress.

8. The Tribunal having heard further from the parties in respect of expenses and publicity, pronounced an Interlocutor in the following terms:-

Edinburgh 16 March 2020. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against John James Rankin Hodge, Wallace Hodge and Company Limited, 6 Killoch Place, Ayr and having previously determined that the Respondent was guilty of professional misconduct, Find that the Secondary Complainer, Ms A, 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, Ms A, the sum of £2,500 by way of compensation in respect of loss, 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 £42.80 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 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.

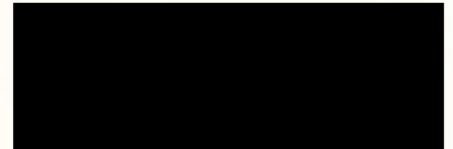
(signed)

Beverley Atkinson

Vice Chair

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 11 JUNE 2020.

IN THE NAME OF THE TRIBUNAL



Beverley Atkinson
Vice Chair

NOTE

Prior to the compensation hearing on 16 March 2020, the Secondary Complainer, Ms A, had lodged a written statement of claim for compensation. On 11 March 2020, the Tribunal Office received further documentation from the Secondary Complainer which was intimated to the Respondent.

At the commencement of the hearing, the Tribunal confirmed that Ms A wished the additional documentation to be allowed to be received late. Mr Fraser confirmed that he objected to the late lodging of these Productions. He explained that he had not had a chance to give the Productions full consideration and that he required medical people to look at it. The Secondary Complainer explained that she had recently changed doctors' surgery and that her current GP was not familiar with her history. She had had to make an appointment to go in and see the doctor and was only able to do that approximately one and a half weeks' or so ago. Having looked at her records, the GP had asked her to return to collect copies of any relevant documentation. She believed the appointment had been on a Tuesday and she had had to return on the following Friday to collect the paperwork. The paperwork was posted straight away to the Tribunal Office.

Mr Fraser confirmed that he saw the paperwork, which had been emailed to him by his office, on the Friday before the hearing. He considered that he required to obtain medical advice on whether any aspect of the Secondary Complainer's condition could be attributed to the conduct of the Respondent. He did not dispute that these were medical records for the Secondary Complainer but was not in a position to admit or deny any causal effect of the Respondent's conduct. He had not had an opportunity to consider the precise nature of the medical opinion he required. He submitted that this was a fairly complex medical history disclosing several difficulties that the Secondary Complainer apparently suffered. He considered that the causal connection between the misconduct and any of the issues disclosed within the paperwork was not simply a legal question but a medical one.

The Tribunal adjourned to consider the submissions. Whilst the additional paperwork was late, it appeared that the Secondary Complainer had forwarded them to the office as soon as she could. The paperwork contained information of a factual nature and did not appear to contain any medical opinion in relation to causation. The Tribunal considered that the appropriate test in relation to the Secondary Complainer's motion was one of fairness to both parties. The Respondent's agent would be in a position to cross-examine the Secondary Complainer in relation to the factual content of the records. Accordingly, the Tribunal concluded that the fair decision was to allow the documents to be received late.

The Respondent's agent had been unclear in relation to what further medical input would be required on the part of the Respondent and therefore it was not clear what benefit would be gained by adjourning the hearing.

On the recall of the case, parties were advised that the Tribunal had determined that the documentation could be received late. In response to a question from the Tribunal, Mr Fraser advised the Tribunal that he was not making a motion to adjourn as he took the view that such a motion was not competent given that the Tribunal had refused such a motion previously.

The Secondary Complainer confirmed her intention to give evidence.

EVIDENCE FOR THE SECONDARY COMPLAINER

Ms A gave evidence on oath. She stated that she was making a claim for compensation as she had suffered from anxiety and depression which she still had. She described in some detail her recent history of serious mental and physical ill-health.

She had found it hurtful when her brother and sister had told her during their visit to her home that they had known that she had a different father. She described other very distressing incidents with close relatives.

When she had attended at the Respondent's office to ask about the money her brother had told her she was to receive, the Respondent had been dismissive and said she was getting nothing. This exchange had clearly caused Ms A significant distress.

She described receiving several forms of counselling including bereavement counselling but what she really needed was to know who her father was.

She spoke of moving into a women's refuge. After some time there, she had been allocated her own flat. The flat was in a dirty condition, but her daughter and her friends helped her make it habitable. It had been a struggle to begin with but now she thought of it as her "palace". She was proud of what she had done. She had had no help from her family, who had pushed her aside.

Mr Fraser intimated to the Tribunal that he had no cross-examination for the witness.

In response to a question from the Tribunal regarding the sequence of medical admissions regarding self-harm, Ms A stated that she thought that this had started just after her brother and sister had come to her home to tell her what she was going to receive. She said, “then things started getting really mixed up”.

The Tribunal drew Ms A’s attention to an Ayr Hospital A & E discharge note dated 31 July 2017. She was unable to give any clarification as to the sequence of her hospital admissions.

Ms A was asked if she had been given any breakdown of the legal fees noted in the invoice lodged with her statement of claim. She believed that was all that she had received.

SUBMISSIONS FOR THE SECONDARY COMPLAINER

Ms A explained that she thought that if none of this had happened then perhaps her health would not have suffered so much. She clarified that “none of this” referred to “all of the carry on” with the Respondent and with her family coming to her home. She stated that the Respondent had treated her “like an outsider” when he had told her she was getting nothing from her father’s estate.

SUBMISSIONS FOR THE RESPONDENT

Mr Fraser invited the Tribunal to adjourn the hearing on compensation in order to give him the opportunity to take further instructions that might lead to a concession of the full amount of compensation competent. He explained that he would require to discuss this with the Respondent and confirmed that he had certain other things that he had to make enquiries about.

The Tribunal agreed to a short adjournment to allow Mr Fraser to make contact with the Respondent and take further instructions. Subsequently, Mr Fraser confirmed to the Tribunal that he had been unable to secure the necessary agreement to make such an offer and he proceeded with his submissions.

Mr Fraser submitted that for the Tribunal to order compensation, there had to be a loss caused by the conduct in question. He argued that the Secondary Complainer’s claim was based on a false premise that she was due money on her father’s estate when it was clear from the evidence that the Tribunal heard some months ago that this was not correct. He speculated that it was unlikely that the Secondary Complainer would have enjoyed any better an outcome if the Respondent had proceeded “by the book”.

The conversation the Respondent had with the Secondary Complainer in his office, referred to in her evidence, was one that the Respondent had to have. He required to tell the Secondary Complainer the truth as he understood it to be and that is exactly what he did.

These were his only submissions unless the Tribunal had any questions.

The Tribunal drew Mr Fraser's attention to the fee note lodged with the statement of claim. The narrative in the fee note referred to correspondence with the SLCC and the Law Society. Mr Fraser stated that it was his position that this was a choice that Ms A had made instead of accepting the offer.

The Tribunal asked Mr Fraser what his position was with regard to the delay in payment from the Executry to Ms A. He explained that this was a choice made Ms A who could have chosen to simply accept the original offer.

Mr Fraser was asked if he accepted that some of the legal fees incurred by Ms A naturally flowed from the Respondent's misconduct. He emphasised that it was his position that this was a legal expense and not a loss. The financial outcome that Ms A ultimately received was what was originally offered. It was his position that the legal fees were an expense and not a head of loss bearing in mind that Ms A had enjoyed a windfall as she had received money she was not entitled to. It was his position that she was substantially better off but could have been even better off if she had accepted the original offer.

In response to a question from the Tribunal, Mr Fraser argued that the evidence at the original hearing demonstrated that the Secondary Complainer had not lent money to the deceased which was why he referred to the payment as a "windfall" benefit.

The Tribunal asked Mr Fraser what his position was with regard to Ms A's claim for inconvenience and distress. He submitted that he could only speculate as to what caused Ms A's difficulties. He invited the Tribunal not to have him speculate.

Mr Fraser submitted that these proceedings were stressful for everyone. The offer made by the Respondent had been in everyone's interests and he had been right in doing that, despite the Tribunal's earlier findings. Everyone would have been in a better position if they had not had to go through with these proceedings and Ms A had accepted the original offer.

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 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.

The Tribunal had careful regard to the statement of claim, documents, parole evidence and submissions from both parties.

There were two heads of claim: (1) in relation to fees and (2) in relation to inconvenience and distress. The Tribunal considered them in that order.

The Tribunal did not accept Mr Fraser’s submission that no element of the legal expenses could be considered a loss. There was no evidence as to why the beneficiaries made the payment to Ms A or that the Respondent had any input to that decision. What was clear was that the Respondent had attached conditions to the offer of payment and cheque in payment which had caused Ms A to take legal advice. In the course of the substantive hearing, the Tribunal had seen correspondence between the Respondent and Ms A’s solicitor principally relating to the conditions imposed. The Respondent had created a conflict of interest which resulted in him delaying the completion of the executry. Ms A had a valid complaint against the Respondent. Her solicitor had engaged in correspondence with the SLCC and the Law Society in furtherance of this complaint. She incurred fees that she would not have done if the Respondent had not added these conditions which were the basis of the findings of misconduct. Having regard to the evidence before the Tribunal at the original hearing, as well as the content of the statement of claim, the Tribunal concluded that the appropriate award was one of a reasonable element of the fees charged which it concluded was £1,000.

With regard to the second head of claim, the Tribunal gave careful consideration to the content of the medical records lodged by Ms A but accepted the Respondent's submission that causation between the misconduct established and the medical issues disclosed within those notes had not been proved.

The Tribunal, however, was satisfied on a balance of probabilities that Ms A had suffered inconvenience and distress resulting from the Respondent's misconduct. It was not clear that the Respondent's conduct in failing to write to Ms A in the appropriate terms had had such a result. The misconduct in adding improper conditions to the offer of payment and to the cheque forwarded had however clearly caused a delay in payment being made. The statement of claim refers to a period of some 18 months. This misconduct was directed to an individual who was already suffering from bereavement and paternity issues, all of which was known to the Respondent. It was clear from Ms A's demeanour when giving evidence on both occasions that she had been caused distress. It is important to note that the Complaint before the Tribunal is at the instance of the Law Society and that Ms A was simply a witness in that. It is also clear that Ms A had a valid claim for compensation which she was entitled to pursue.

The Tribunal accepted that the Respondent was in no way responsible for the terms of the deceased's will and the effects that had on Ms A.

Support for the distress caused could be seen in the factual content of the hospital notes dated 31 July 2017, 10 September 2017 and 21 February 2018 which made reference to her legal complaint/legal issue. It is important to emphasise that the Tribunal had regard to this information simply as confirmation that Ms A was caused distress and anxiety and not that there was any causal link to the medical issues. The Tribunal concluded that the misconduct had had a serious effect over a period of time, had caused Ms A worry, concern, anxiety and upset and that the solicitor had failed to take reasonable steps to rectify the matters and that consequently the appropriate award of compensation was one of £1,500.

Both parties were invited to make submissions with regard to expenses and publicity. Ms A provided travel receipts to the Clerk. Mr Fraser confirmed he had no submission to make.

In the circumstances, the Tribunal concluded that the fair award was that expenses follow success and made an award of expenses in favour of Ms A for her travel expenses and found the Respondent liable for the expenses of the Tribunal.

Given the very personal and intrusive nature of the information contained in this decision, the Tribunal concluded that publicity should be given to the decision which should include the name of the Respondent but need not identify any other person.



Beverley Atkinson

Vice Chair