



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 73
XA61/17

Lord Glennie

NOTE OF REASONS

delivered by LORD GLENNIE

in the application for leave to appeal

by

X LLP AND OTHERS

Appellant

against

SCOTTISH LEGAL COMPLAINTS COMMISSION

Respondent

Appellant: Crawford QC ; DWF LLP
Respondent: M Ross QC; Harper Macleod LLP

19 October 2017

[1] In this case the applicants, a firm of solicitors and individuals within that firm, seek leave to appeal against the decision by the Scottish Legal Complaints Commission to admit a number of complaints to further investigation. The Commission rejected some complaints as being frivolous, vexatious and totally without merit, and allowed others to proceed not having found that they fell into that category. The application for leave to appeal does not cover all of the complaints which the Commission have allowed to proceed; but it was

explained by Ms Crawford on behalf of the applicants that those which are not now challenged raised different types of issues from those which are the subject of this proposed appeal.

[2] The exercise carried out by the Commission is a gatekeeping or sifting exercise. Having categorised the complaints into service complaints or conduct complaints (and in the present case they were categorised as service complaints), the Commission has to decide in respect of each complaint whether it is frivolous, vexatious or totally without merit; and if it decides the complaint is any or all of these things, it must reject the complaint and notify the relevant parties. That is a high test to be applied or, to put it another way, is a low threshold to be crossed. It is only if the complaint is frivolous, vexatious or totally without merit that the case will not be allowed to proceed; and that is a test which the Commission has purported to apply in its very lengthy decision in the present case.

[3] An appeal to this court lies on an error of law made by the Commission or if it can be said that the Commission has acted irrationally in the exercise of its discretion. Those, I think, are the only two heads relied upon and they are the only two heads relevant to a case where the Commission has not yet found any facts to be established. That is a high test for the substantive appeal. It is not dissimilar to that which applies in the context of judicial review. One has to show that the Commission did not simply get it wrong, but that it got it wrong because it approached the matter in the wrong way as a matter of law or got it so wrong that its decision can be categorised as irrational. So if a substantive appeal were to be allowed, that would be a high test which would have to be overcome.

[4] The question on leave to appeal is a different one. It is whether the appeal would have a realistic prospect of meeting that high test, or whether there is an arguable case. I do not, for my part, think there is much difference if anything between these different ways of

expressing it. If it is said that one is lower than the other, I am prepared to accept the lower test. But it is a low test. The important thing is to note is that it is a low test of arguability with respect to the ability to meet the high test which would be applied on the substantive appeal if leave to appeal were granted. In other words, the question is: is it arguable, or is there a realistic prospect of persuading a court, that the Commission went so wrong that its error must be categorised as an error of law or that it exercised its discretion irrationally.

[5] The Commission decision in the present case is very fully reasoned and runs to some 61 pages, or 60 if I ignore the Appendix. It is longer than might be thought necessary on a gatekeeping exercise but, if that is a fault, it could be said to be a fault in the right direction. The decision deals with each complaint individually and over a number of paragraphs, and considers whether the complaint is frivolous, vexatious or totally without merit or whether it should proceed. The Commission did not simply accept the case advanced by the complainers, Mr and Mrs S. On a number of issues it rejected their case and held it to be frivolous, vexatious or totally without merit.

[6] The proposed appeal before this court makes criticism of the Commission's reasoning on those complaints which are the subject matter of this application. It is said, putting it compendiously – and I do not mean to do an injustice to the detailed Note of Argument and submissions put forward on behalf of the applicants – that on some matters there was insufficient investigation by the Commission to enable it to ascertain whether there was any sound basis for the complaint. It is said too that on some matters the Commission did not identify with sufficient precision what the complaint was before deciding that it merited further investigation. And there is a criticism, which perhaps overlaps with that, of a lack of specification in some of the complaints, which was not

clarified or resolved by the Commission before holding that the complaint should be allowed to proceed.

[7] But the nature and extent of the investigation to be carried out by the Commission, and how they go about it, is pre-eminently a matter for the Commission itself. That is made clear in the decision of the Inner House in *The Law Society of Scotland v Scottish Legal Complaints Commission* 2011 SC 96 at paragraphs 34 and 35.

[8] Matters of specification, so it seems to me, can be dealt with at the second stage once the complaint is being investigated, and that will also be the time at which the more detailed investigation to be carried out will be carried out.

[9] In terms of the gatekeeping exercise, I see no basis for saying that the Commission has erred in law by failing to go further in its inquiries or its consideration of the matter; or that its decision on any of the individual issues can be categorised as irrational. I see no arguable case or realistic prospect of the court being persuaded of that on a substantive appeal.

[10] For those reasons, I refuse leave to appeal in this case.