



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 58  
XA23/19

Lord Justice Clerk  
Lord Menzies  
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the appeal

by

CALUM MacGREGOR

Appellant

against

A decision of the Scottish Legal Complaints Commission dated 2 November 2018

**Appellant: Brown; Digby Brown**

**Respondent: MacLean (sol adv); Brodies LLP**

3 December 2019

[1] In January 2018 Mr Joseph Gillan complained to the Scottish Legal Complaints Commission (which is the respondent in this appeal) concerning services provided to him by the firm of Lloyd Green, and practitioners within that firm, in connection with a personal injury claim. Mr MacGregor was one of three solicitors said to have had an involvement. The Commission separated the complaint into four issues. Issues 1 and 4 concern Mr MacGregor. The first issue is:

“Mr MacGregor, and/or Lloyd Green, unduly delayed in progressing matters on my behalf between approximately May 2005 and December 2013. “

Issue 4 is in the following terms:

“Mr MacGregor, and/or Lloyd Green, failed to act in my best interests between August 2013 and December 2013, as Mr MacGregor did not provide me with prompt and transparent information regarding the expenses and outlays to be deducted from the settlement offer I received. Mr MacGregor originally advised me the relevant deduction would be approximately £11,000, but subsequently deducted £14,642.02 from the settlement amount.”

[2] The Commission categorised issues 1-3, which all relate to delay, as conduct complaints. Issue 4 was classified as a services complaint. The Commission proceeded to determine whether the complaints had been lodged timeously. In terms of the Rules of the Scottish Legal Complaints Commission 2016 (amended December 2016) the Commission can accept a complaint not made within the relevant time limit if, in the opinion of the Commission, there are, amongst other things, “exceptional circumstances relating to the nature of the complaint” (see Rule 7(4)(b)). Given that the matters complained of took place before January 2014, the complaints were lodged well outwith the one year time limit. However, the Commission decided that there were exceptional circumstances relating to the nature of the complaints which allowed all of them to be accepted as eligible for investigation by the Law Society of Scotland.

[3] Mr MacGregor’s grounds of appeal contend that the Commission misdirected itself in that it is “obvious” that the circumstances are not exceptional, thus the Commission erred in law. Reference is made to *Murnin v SLCC* 2013 SC 97, and in particular the need for material that is objectively capable of being seen as exceptional. Separately it is asserted that the Commission’s decision is not supported by the facts upon which it proceeds. The court is invited to substitute a decision that, so far as relating to Mr MacGregor, the complaints are rejected on the grounds of time-bar.

### **The Commission's decision**

[4] The Commission considered that issues 1-3 are intrinsically linked, and that it is unclear to what extent each of the named practitioners were involved in Mr Gillan's case. The timescales mentioned in issues 1-3 relate to the time at which each practitioner was employed by the firm during the period when it handled Mr Gillan's claim. It took approximately eight and a half years for the matter to be resolved. This was an exceptional period of delay in the context of the nature of the claim. There was *prima facie* evidence of undue delay on the part of the practitioners. Thereafter it was stated (paragraph 2.17 of the determination):

“Accordingly, the SLCC considers there are exceptional circumstances relating to the nature of issues 1-3 of this complaint and that these issues of complaint should not be time-barred, despite not having been made within the relevant time limit.”

[5] A similar decision was reached in relation to issue 4. The view was that the size of the increase in the sum deducted from the settlement figure related to the initial underestimate of the firm's fees and expenses. This was regarded as a significant matter. The increase was not communicated to Mr Gillan until after the firm had concluded the settlement on his behalf. All of this represented exceptional circumstances relating to the nature of the complaint.

### **The submissions**

[6] For Mr MacGregor it was explained that the claim related to a workplace accident in circumstances clearly indicative of fault on the part of the alleged employer. The insurers declined to indemnify and there appeared to be doubt as to whether Mr Gillan had been an employee. The employer did not have any known assets and had emigrated to Australia. The only available funding was through legal aid. Decree in absence was taken against the

defender, whose whereabouts had not been traced. Legal aid was sought to commence proceedings against the insurers under the Third Parties (Rights against Insurers) Act 1930. This was granted restricted to proceedings in the sheriff court. In due course the insurers made an offer of settlement. Counsel advised that it be accepted on the basis that the prospects in the action were poor. Mr Gillan was advised that the sums paid by the Legal Aid Board would be deducted. The expenses incurred in respect of the Court of Session proceedings had been assessed, but only an estimate could be given of the likely expenses in respect of the sheriff court proceedings.

[7] It was contended that the question of delay in the resolution of the claim could not be considered in the abstract. Everything depends upon the particular circumstances. There were two separate litigations. The Commission said that it was unable to identify the specific responsibility of each of the three named individuals. A conduct complaint is specific to a named practitioner. It follows that the Commission had no basis for concluding that the complaint against Mr MacGregor involved a charge of causing exceptional delay in the progress of the claim. In any event there was nothing exceptional about the complaint. It was a difficult and uncertain case which had funding issues. A concern that it was not pursued as expeditiously as it might have been is of a commonplace nature. The Commission should have given weight to the unreasonable delay in the lodging of the complaint. A time-bar decision is final in nature and requires a proper foundation. Reference was made to *The Law Society of Scotland v SLCC* 2011 SC 94, particularly paragraphs 33/36. The delay here was not obviously "off the scale". There had been no analysis of relative gravity.

[8] As to issue 4, it was submitted that it is plain that there is nothing exceptional about the circumstances or nature of the complaint.

[9] On behalf of the Commission it was noted that the decision on issue 1 was merely a sifting decision on eligibility. The only investigation required was such as was necessary for that purpose. Reference was made to *Innes v SLCC* 2019 CSIH 27 at paragraph 3, and to *Law Society of Scotland* at paragraph 35. The Commission is entitled to institutional respect: *Murnin v SLCC* 2013 SC 97 paragraph 31. This was a discretionary decision. All material considerations required to be assessed, but thereafter the weight to be attached to each was a matter for the Commission. Limited representations had been made in relation to time-bar. The Commission is a specialist body and was entitled to take the view that there were exceptional circumstances relating to the nature of the complaint. As to issue 4, the discrepancy between the estimated and actual fee deduction was significant. Again the Commission was entitled to take the view which it did.

### **Decision**

[10] The Commission concluded that, on the face of it, the delay complained of in issue 1 was exceptional in the context of an accident at work claim. For the appeal to succeed, the court would require to identify at least one of the grounds of appeal set out in section 21(4) of the Legal Profession and Legal Aid (Scotland) Act 2007, namely, error of law; procedural impropriety; irrationality; or a decision unsupported by the facts. It is said that in the whole circumstances the only reasonable, rational, and supportable decision was that there were no exceptional circumstances relating to the nature of the complaint. The court was told that of the 62 complaints of delay lodged with the Commission over a five year period, only three involved a longer period than in the present case, and that this was influential in the decision. After investigation it may be that the time taken will be explained and justified, but in general one would expect an accident at work claim to be resolved in a much shorter

period. No doubt a different decision was open to the Commission, but the court is unable to describe the outcome as unreasonable, irrational, or unsupportable.

[11] Although not focussed in the grounds of appeal, it emerged that one of the applicant's main submissions was that in order to determine the time-bar issue, and given that issue 1 was categorised as a conduct complaint, the Commission required to assess Mr MacGregor's individual responsibility for the delay, or periods of it, and then decide whether there were exceptional circumstances relating to the complaint against him when seen in the context of such an assessment. So, for example, if it transpired that he contributed towards only a small part of the overall delay, it would be difficult to say that there were exceptional circumstances relating to the complaint made against him.

[12] Though at first this submission had a certain attraction, the court is satisfied that it is unfounded. In terms of the rule mentioned earlier, the Commission is entitled to accept a late complaint if there are "exceptional circumstances relating to the nature of the complaint." The focus is on the complaint, not its merits. Issue 1 states that between May 2005 and December 2013 Mr MacGregor unduly delayed in progressing the accident claim. It is known that he was a solicitor at the firm throughout that period and that he did have some involvement in the matter. The Commission's decision was that it would be exceptional for a claim concerning an accident at work to take eight and a half years to be resolved. In order to reach that decision it was not necessary for the Commission to investigate whether or not the applicant was responsible for all or most of the delay. This is all the more so when no representation as to the nature and extent of his individual contribution had been raised on his behalf by his solicitors when, on two occasions, they made written representations to the Commission. No doubt an individual assessment will

be necessary before the complaint itself can be determined, but that will be a matter for the professional body.

[13] The result is that the appeal in respect of the decision on issue 1 is refused. The court wishes to add that it has noted that there is little in the way of reasoning in the decision letter to explain to the reader why it was considered that the period of delay was considered to be exceptional. The Commission would be well advised to ensure that decisions are not simply announced, but also explained.

[14] A different view is taken in respect of issue 4. This was categorised as a services complaint, which is of a lower order of seriousness. There is no suggestion that the fees deducted were not due, nor that there was any bad faith or dishonesty involved in the estimate provided. The complaint is simply that it turned out to be inaccurate. (The decision letter appears to suggest that there was no accounting in respect of the deducted fees and expenses, but this is incorrect.) Mr Gillan was told that he had been provided with no more than an estimate. Whatever the merits of the complaint might be, in our view it is plain that there is nothing exceptional about it. The Commission reached a wholly unreasonable decision, and thus erred in law. The court will quash that part of the decision and substitute a finding that issue 4 is not eligible for investigation on the grounds of time-bar.

### **Postscript**

[15] At the hearing there was some discussion concerning observations of Lord Glennie (sitting alone) in *X LLP & Others v SLCC* [2017] CSIH 73 at paragraph 3 to the effect that, until an investigation has resulted in facts being established, the ground of appeal specified in section 21(4)(d) of the 2007 Act does not arise. Relying upon these observations, there

have been occasions when the Commission has asserted that this ground of appeal can never be founded on in respect of an appeal against an eligibility decision. At the hearing counsel for the Commission submitted that there was no such absolute rule. It may be correct to say that this ground of appeal is unlikely to arise in eligibility appeals, but each case will depend upon its own particular circumstances. The court agrees with that submission.