EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 18
XA106/19

Lord Menzies
Lord Malcolm
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the appeal under section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007

by

B

Appellant

against

A decision of the Scottish Legal Complaints Commission dated 15 July 2019 and communicated to the appellant on 26 July 2019

Appellant: J A Brown; Blackadders LLP
Respondent: C O'Neill QC (Solicitor Advocate); Brodies LLP

2 March 2021

Introduction

[1] In early 2012 the Law Society of Scotland ("the Law Society") appointed a judicial factor to a firm of solicitors in Wick, the Highland Law Practice ("HLP"). At that time TS was a client of HLP and HLP acted for her in a litigation. The judicial factor immediately wound up the business of HLP. She sought to make arrangements with other solicitors to take over responsibility for client files, papers and funds which had been held by HLP in

order to minimise prejudice to the clients. The appellant carried on practice as a solicitor and he was willing to take HLP's chamber business. He did not provide litigation services and he was not registered for legal aid. He indicated to the judicial factor that he could not take on the HLP litigation work (some of which was legally aided). However, the judicial factor encountered difficulty in finding a solicitor locally who was prepared to take the litigation work. At the judicial factor's suggestion it was arranged that the appellant would employ M, one of the solicitors who had worked for HLP, to do the litigation work. M was registered to do legal aid work. On about 5 March 2012 all files and papers from HLP were transferred to the appellant and M commenced employment with him. The files were transferred by the judicial factor in the exercise of her powers and without client mandates, on the basis that the appellant's firm would thereafter notify the clients, which it did. Unfortunately, the arrangement with M did not work satisfactorily. About 5 months later she left the appellant's employment without giving any notice. Her practising certificate was suspended. Prior to leaving she took no steps towards arranging a transfer of litigation business to another firm. Without M, the appellant was not in a position to provide litigation or legal aid services. He identified a firm of solicitors, ML, which provided litigation services and which had practitioners who were registered for legal aid. He arranged for them to take over the litigation files with immediate effect, on the understanding that they would write to each client advising that M had left the appellant's firm; that the appellant's firm could no longer provide litigation services or legal aid; that ML had the files and were prepared to act, but that it was for the client to select a solicitor; and that if the client preferred to instruct a different solicitor their file would be passed to that solicitor.

[2] On 7 October 2018 TS complained to the Scottish Legal Complaints Commission ("the Commission") about the appellant. For present purposes it is only necessary to refer to one aspect of the complaint ("issue 3"), *viz* that her file had been transferred by the appellant to ML without a mandate from her to do that. In terms of an eligibility decision intimated to the appellant on 26 July 2019 the Commission found that TS's file had been transferred to ML in about August 2012 and that TS was aware of the transfer very shortly after it took place. In terms of rule 7 of the Rules of the Scottish Legal Complaints Commission 2016 (as amended in December 2016) ("the 2016 Rules"), where the relevant misconduct occurred before 1 April 2017 the complaint required to be made within 12 months of the client becoming aware of the misconduct unless there were exceptional circumstances (rule 7(4)). The Commission determined that issue 3 was a conduct complaint, and that it ought to be admitted for investigation even though it was made more than 5 years after the misconduct because the circumstances were exceptional.

[3] The appellant applied to the court for leave to appeal against that determination. The application for leave was served upon the Commission, the Law Society, and TS. No answers were lodged. The court granted leave to appeal. The appellant then lodged an appeal, serving it on the same parties. Once again, no answers were lodged.

[4] The Commission intimated to the appellant that it did not propose to resist the appeal. The appellant lodged a joint minute (no 1) he had entered into with the Commission which agreed that the appeal should be allowed and that the Commission's determination in respect of issue 3 should be recalled, with the court substituting a finding that issue 3 was totally without merit and should not be remitted for investigation. However, subsequently the appellant lodged a second joint minute (no 2) between him and the Commission which sought (i) to withdraw joint minute no 1; (ii) allowance of the appeal, recall of the

Commission's determination that the circumstances of the complaint in relation to issue 3 were exceptional, and substitution of a finding that it had not been submitted timeously and should not be admitted for investigation. Joint minute no 2 also incorporated a *McAllister* minute (*McAllister* v *Secretary of State for Work and Pensions* 2003 SLT 1195) which explained (under reference *inter alia* to *Murnin* v *SLCC* 2013 SC 97) why it was that the circumstances could not be said to be exceptional in terms of rule 7(4). On the information now available to it the Commission considered that insofar as the appellant's conduct was to any extent a departure from the standards to be expected of competent and reputable solicitors, any such departure was limited by mitigating circumstances in view of the very difficult situation in which the appellant found himself when M left.

[5] On receipt of the motion to allow the appeal the court intimated to the appellant and to the Commission that it wished to be addressed on a number of matters, including whether the proposed disposal of the appeal should be intimated to the Law Society and TS. The appellant and the Commission lodged notes of argument and the appeal was put out for a hearing.

The relevant statutory provisions

[6] The Legal Profession and Legal Aid (Scotland) Act 2007 ("the 2007 Act") provides:

> "**2 Receipt of complaints: preliminary steps**
> (1) This section applies where the Commission receives a complaint by or on behalf of any of the persons mentioned in subsection (2)—
> (a) suggesting—
> (i) professional misconduct or unsatisfactory professional conduct by a practitioner other than a firm of solicitors or an incorporated practice;
> …
> (1A) The Commission must, subject to subsection (3) and sections 3 and 4 and any provision in rules made under section 32(1) as to eligibility for making complaints—
> (a) determine whether the complaint constitutes—

(i) a conduct complaint,

…

… and then

(b) take the preliminary steps mentioned in subsection (4).

…

(2) The persons are—

(a) as respects a conduct complaint, any person;

…

(4) The preliminary steps are—

(a) to determine whether or not the complaint is frivolous, vexatious or totally without merit;

(b) where the Commission determines that the complaint is any or all of these things, to—

(i) reject the complaint;

(ii) give notice in writing to the complainer and the practitioner that it has rejected the complaint as frivolous, vexatious or totally without merit (or two or all of these things).

…

4 Complaint not made timeously or made prematurely

(1) Where a complaint referred to in section 2(1) is not made timeously, the Commission is not to take the preliminary steps referred to in section 2(4) in relation to it, and is not to take any further action under any other provision of this Part (except this section), in relation to it.

…

(3) For the purposes of subsection (1) or section 9A(3)], a complaint is not made timeously where—

(a) rules made under section 32(1) fix time limits for the making of complaints;

(b) the complaint is made after the expiry of the time limit applicable to it;

(c) the Commission does not extend the time limit in accordance with the rules.

…

21 Appeal against Commission decisions

(1) Any person mentioned in subsection (2) may, with the leave of the court, appeal against any decision of the Commission under the preceding sections of this Part as respects a complaint on any ground set out in subsection (4).

(2) Those persons are—

(a) the complainer;

(b) the practitioner to whom the complaint relates;

(c) the practitioner's firm;

(d) the employing practitioner;

(e) the relevant professional organisation.

…

(4) The grounds referred to in subsection (1) are—

(a) that the Commission's decision was based on an error of law;

(b) that there has been a procedural impropriety in the conduct of any hearing by the Commission on the complaint;

(c) that the Commission has acted irrationally in the exercise of its discretion;

(d) that the Commission's decision was not supported by the facts found to be established by the Commission.

(5) The Commission is to be a party in any proceedings on an appeal under subsection (1).

(6) In this section and in section 22, *'decision'* includes any determination, direction or other decision and also includes the making of any report under section 10(2)(e).

…

22 Appeal: supplementary provision

(1) On any appeal under section 21(1), the court may make such order as it thinks fit (including an order substituting its own decision for the decision appealed against).

…

(4) A decision of the court under this section is final.

…

32 Duty of Commission to make rules as to practice and procedure

(1) The Commission must make rules as to its practice and procedure and, as soon as practicable after making or varying those rules, publish them and make them available to the public in a form which is readily accessible.

(2) Schedule 3 makes further provision as respects provision which—

(a) must be included;

(b) may in particular be included,

in the rules.

…

Schedule 3 RULES AS TO COMMISSION'S PRACTICE AND PROCEDURE

…

2 The rules as to the Commission's practice and procedure made under section 32(1) may in particular include provision—

(a) fixing time limits for the making of complaints against practitioners or relevant professional organisations or the stages of its investigation under Part 1;

(b) as to—

(i) extension of any time limit fixed by it under the rules;

(ii) the circumstances in which such extension may be made;

…"

[7] Rule 7 of the 2016 Rules provides:

"7. Time limits

(1) For a conduct complaint where the date of the professional misconduct or unsatisfactory professional conduct or conviction complained of was prior to 1 April 2017… and subject to the provisions contained in Rule 7(4), the following rules will apply:

(a) A conduct complaint will not be accepted if, in the opinion of the Commission, it is made more than 1 year after the date of the professional misconduct or unsatisfactory professional conduct or conviction complained of.

…

(3) In determining whether the period of 1 year mentioned in paragraph (1) or the period of 3 years mentioned in paragraph (2) has elapsed, there is to be disregarded any time during which the complainer was, in the opinion of the Commission, excusably unaware –
   (a) of the professional misconduct or unsatisfactory professional conduct or conviction in question ...

…

(4) Notwithstanding paragraphs (1), (2) and (3) above, the Commission may accept a complaint that has not been made within the time limits set out in these paragraphs if there are, in the opinion of the Commission:
   (a) exceptional reasons why the complaint was not made sooner;
   (b) exceptional circumstances relating to the nature of the complaint; or
   (c) the circumstances are such that the Commission considers it to be in the public interest to accept it."

Submissions for the appellant

[8] Mr Brown moved the court to allow the appeal. The suggested misconduct had been the transfer of TS's file to ML without having obtained a mandate from TS. It had occurred in about August 2012 and TS had been aware of the transfer very shortly thereafter. However the complaint had not been made until October 2018, more than 6 years later. It was very clearly time-barred in terms of rule 7 and there were not exceptional reasons why the complaint was not made sooner, or exceptional circumstances relating to the nature of the complaint, or circumstances in which it was in the public interest for the Commission to accept it though late. Reference was made to *R* v *Kelly* 2000 QB 198 and *Murnin* v *SLCC* 2013 SC 97. If in the whole circumstances transferring the file without first obtaining a mandate had been misconduct, there had been powerful mitigating circumstances given the very difficult situation in which the appellant had found himself when M had walked out.

[9] TS and the responsible professional body, the Law Society, had not lodged answers. Accordingly, neither had a locus to resist the appeal. There was no need to inform them of the Commission's decision not to resist the appeal. The Commission was acting responsibly.

As a result of the appeal the Commission had realised that it had been wrong to determine that there were circumstances which justified the complaint being accepted more than 5 years after the misconduct complained of. There were pragmatic reasons for not inviting a responsible professional body or a complainer to resist an agreed disposal. The practical benefit of a settlement would be diminished if third parties were permitted to intervene after an agreement was reached. It would introduce uncertainty and could result in unnecessary and disproportionate expense being incurred.

[10] Mr Brown recognised that a complainer might consider that there was no need to lodge answers to an appeal because he or she might expect the Commission to defend its decision. Moreover, if both the Commission and a complainer successfully opposed an appeal a complainer's participation might be seen as unnecessary, and the unsuccessful appellant might not be found liable to pay the complainer's expenses. Mr Brown acknowledged that the appellant was not asking the court merely to quash the Commission's decision. He was asking it to exercise the power in section 22(1) of the 2007 Act to substitute its own decision. He submitted that it would be very unfortunate if processing of the complaint had to begin again. It was not disputed that the court would be entitled to order intimation to TS before it decided whether it was prepared to substitute its own decision for the decision appealed against, but Mr Brown submitted that it ought not to do so.

[11] Mr Brown further submitted that while both the application for leave to appeal and the appeal had been served on all interested parties, in fact there had been no need to serve the appeal on the interested parties because it could be assumed from the fact that they did not oppose the application for leave that they did not oppose the appeal. The procedural judge had often proceeded on the basis that the appeal need not be served on such parties.

Decisions of the procedural judge in the exercise of the power in rule 41.27(1)(a)(i) should balance appropriate vigilance to see that parties with an interest are given the opportunity to be heard with concern for the efficient and economic conduct of the appeal.

Submissions for the Commission

[12] Ms O'Neill confirmed that the Commission agreed that the appeal should be allowed and that the disposal sought by the appellant should be granted. The appeal had caused the Commission to carefully re-examine its decision. It had provided the Commission with much fuller information than it had at the time of the decision. On the basis of that material and the authorities upon which the appellant relied the Commission now accepted that it could not defend the decision. None of the heads of rule 7(4) was satisfied. It followed that the complaint in relation to issue 3 was time-barred.

[13] The Commission did not consider that it was necessary for the Law Society or TS to be informed of the settlement. Neither of them had chosen to lodge answers to the appeal. The Law Society in particular would have been alive to the possibility that settlement was a possible outcome of an appeal. There were factors which served to protect interested parties. First, the Commission took a very serious view of its obligations. An appeal would not be conceded lightly. Second, the appellant had to satisfy the court that there were good grounds in law for the appeal being granted, notwithstanding the Commission's consent (*McAllister* v *Secretary of State for Work and Pensions, supra*). Third, the court was not obliged to exercise its section 22(1) power to substitute its own decision.

[14] The Commission did not consider that section 21(5) obliged it to lodge answers to either the application for leave to appeal or the appeal. Ms O'Neill submitted that section 21(5) merely imposed an obligation on an appellant to call the Commission as a

respondent. It would cause unnecessary expense if the Commission had to lodge answers to an application or an appeal which it did not propose to resist. In *McAllister* the court had envisaged that it would not always be necessary for the decision-maker to appear at the hearing of the motion to grant an appeal (paragraph 6). The Commission's understanding was that it should be called as a respondent to an application for leave to appeal and that there should also be service on any other interested parties. Where the decision appealed against related to a services complaint, generally the responsible professional organisation would not be an interested party. Ms O'Neill was also of the view that where interested parties had not resisted the application for leave it could be assumed that they did not propose to resist the appeal, and service of the appeal upon them ought not to be required. That avoided disproportionate and unnecessary expense being incurred.

[15] Following the hearing the Commission submitted a supplementary note of argument addressing the proper construction of section 21(5). The provision applied to "proceedings on an appeal" which did not include an application for leave to appeal. The note highlighted that in some cases the Commission decided not to oppose applications for leave to appeal because it took the view that leave would be granted. It repeated the submission that on a proper construction section 21(5) merely required an appellant to call the Commission as a respondent to an appeal and that it did not oblige the Commission to lodge answers. It suggested that reference to proceedings in the Scottish Parliament during the stage 3 debate of the Bill supported that construction.

Decision and reasons

[16] At the conclusion of the hearing the court adjourned for a short period to consider the submissions. When the court reconvened it advised the parties that the clerk of court

would write to TS and to the Law Society providing them with Joint Minute no 2 (incorporating the *McAllister* minute) and inviting any representations they might wish to make within a period of 14 days.

[17] The court took that course because it recognised that interested parties (but, in particular, a complainer) may have proceeded in the expectation that the Commission would defend its decision, and that there was therefore no need for them to become respondents. Where the Commission decides not to resist an appeal we think that fairness will generally require that such interested parties be informed of the Commission's position before the court disposes of the appeal. In our view that is *a fortiori* the case where, as here, an appellant asks the court to substitute its own decision in place of the Commission's decision. That is because there is no right of appeal from the court's decision - it is final (section 22(4)). Where, on the other hand, the court merely quashes the Commission's decision and the matter is remitted to the Commission to make a new decision, interested parties have a right to seek leave to appeal against the Commission's subsequent decision (section 21(1)).

[18] In our opinion where the Commission decides not to resist an appeal it is desirable that interested parties are informed of that decision as soon as possible. There are numerous ways in which this could be done. One possibility is that the Commission sets out its position in answers to the appeal, and that copy answers are provided to the interested parties. An interested party may then seek to lodge answers to the appeal, if so advised, accompanied by a motion for late receipt if the period for lodging answers has already expired. We say "if so advised" because it would be prudent for the interested party to obtain legal advice before embarking on such a course. The interested party would face the obvious (but not necessarily insurmountable) difficulty that the Commission accepted that it

could not defend its decision. Opposing the appeal would involve incurring court and legal fees, and potential liability for the expenses of other parties to the appeal if the opposition was unsuccessful.

[19] In the present case the interested parties were the complainer and the Law Society (because the complaint was a conduct complaint), but in an appeal by a complainer where a practitioner did not lodge answers (admittedly, a much less likely scenario) the same principles ought to apply *mutatis mutandis*.

[20] Both the Law Society and the complainer responded to the clerk of court's invitation. The Law Society did not wish to make any representations. TS made email representations which made clear her dissatisfaction with the appellant and ML. However, in our view the representations do not provide a good basis for concluding that rule 7(4) was satisfied. In those circumstances we saw no need to invite the appellant or the Commission to respond to them. We were satisfied on the basis of the *McAllister* minute and the submissions at the hearing that the Commission erred in law in determining that rule 7(4) was satisfied. Accordingly, we allowed the appeal and substituted a finding that the complaint in relation to issue 3 was time-barred and that the Commission should not take any further action in respect of it.

[21] We turn now to deal with the interpretation of section 21(5). In our opinion section 21(5) requires the Commission to become a party to appeal proceedings. That is the ordinary and natural meaning of the language of the provision. In our view it is also a sensible and reasonable construction when regard is had to the fact that the appeal is against the Commission's decision. The only contextual assistance which we derive from the stage 3 debate to which we were referred is that the promoters of the amendment which resulted in section 21(5) envisaged that the Commission would be the primary contradictor to an

appeal - a factor which we see as tending to support rather than undermine our construction. We also have in mind that lodging answers serves a useful purpose even where the Commission decides not to resist an appeal. By lodging answers it becomes a party. As a party it has a locus to enter into a joint minute and a *McAllister* minute. The answers also enable it to explain its position (cf the problems which arose in *Aberdeen Computer Services Ltd* v *Scottish Legal Complaints Commission* [2021] CSIH 2, where the Commission and the appellant were unable to agree the terms of a *McAllister* minute and where the Commission did not lodge answers until it became clear that there was an impasse).

[22] We agree with the Commission that section 21(5) does not require it to lodge answers to an application for leave to appeal. In our opinion an application for leave to appeal is not part of the "proceedings on an appeal under subsection (1)". Once again, we reach that view having regard to the ordinary and natural meaning of the language of the provision. We also consider that the legislature would have been aware that in some circumstances the proper course for the Commission would be not to resist an application for leave, but to set out its position in answers to the appeal. In our opinion that is a further factor which tends to support our construction.

[23] Finally, we consider the question of service on interested parties of (i) an application for leave to appeal; and (ii) an appeal. In our opinion an application for leave to appeal should be intimated to all parties with an interest. An appeal should also be intimated to all interested parties unless the appellant is in a position to satisfy the procedural judge that an interested party has unequivocally indicated that it does not require the appeal to be served upon it. In that regard it will not suffice merely to show that an interested party did not lodge answers to the application for leave. It does not necessarily follow from a party's

non-opposition to the application for leave that the party will not oppose the appeal. The relevant criteria for the grant of an application for leave and for the allowance of an appeal are different. An interested party might well conclude that he has no realistic prospect of successfully resisting leave but that he has a realistic prospect of resisting the appeal itself. Another, less common, possibility is that the proposed grounds of appeal appended to the application do not meet with resistance but the grounds of appeal included in the appeal are materially different.