SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 71
XA16/15

Lord Justice Clerk
Lady Clark of Calton
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

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

by

ANDERSON STRATHERN LLP and ANOTHER

Appellants;

against

A DECISION OF THE SCOTTISH LEGAL COMPLAINTS COMMISSION DATED 30 JANUARY 2015

Act: Dunlop QC; Anderson Strathern LLP
Alt: Ross; Brodies LLP
Interested Party: McConnell; Maclay Murray & Spens

31 August 2016

[1] This appeal against decisions made by the Scottish Legal Complaints Commission (the Commission) raises an important issue as to how it should classify complaints. In *Bartos* v *Scottish Legal Complaints Commission* 2015 SC 690, at its own instance the court raised a question as to the proper approach to certain provisions in the Legal Profession and Legal Aid (Scotland) Act 2007 (the Act). The court made certain comments which were "provisional" in nature. They had no bearing upon the outcome of that appeal. The court stated that it considered it proper to raise the matter to allow reflection on the part of the Commission and the professional bodies. The court continued "If appropriate, and if so advised, it can be raised as a live issue for determination in a future case." This appeal by Anderson Strathern LLP and the particular solicitor concerned against certain decisions of the Commission dated 30 January 2015 has now raised the same question as a live issue and the court therefore requires to reach a concluded view. The point is a matter of general principle concerning the proper construction of the legislation. It is convenient to discuss it

with reference to the relatively short and straightforward circumstances in the case of *Bartos*. The context of the present appeal will be mentioned in due course; however the correct outcome will be determined in large measure by our decision on the question of principle, which can be described as follows.

[2] In *Bartos*, an advocate acted for a party whose Court of Session action was dismissed after a legal debate. The detailed circumstances are set out in the court's opinion. For present purposes it is sufficient to note that subsequently the Commission received a complaint as follows:

> "Mr Bartos falsely stated during the hearing on 7 October 2010 that it was my wish that the case be dismissed, despite having no instructions to do so."

It is obvious that the complaint raised a conduct issue. However, in a preliminary ruling the Commission held that it also raised a question of inadequate professional services and proceeded to classify it as a "hybrid complaint". The result of this classification, which is not an uncommon practice on the part of the Commission, was that both the professional body and the Commission independently investigated exactly the same allegation, one with a view to determining whether it constituted either professional misconduct or unsatisfactory professional conduct, and the other whether it amounted to inadequate professional services.

[3] While it was clear that the complaint raised a conduct issue, in a general sense one can also understand that if an advocate invites a court to dismiss an action raised by the party instructing him on the basis of purported instructions which do not exist, then the individual concerned receives an inadequate professional service. The same could be said of many, though not all, instances of alleged professional misconduct or unsatisfactory professional conduct. The question is whether, in terms of the relevant legislation, the Commission can classify a single issue complaint of the kind made in *Bartos* as "hybrid", in the sense of amounting to both a conduct complaint and a services complaint; or whether the Commission, after appropriate consultation with the relevant professional body, must reach a decision to categorise it as one or the other, but not both.

[4] The full circumstances of the lengthy history of what happened in respect of the complaint against Mr Bartos are fully described in the report of the court's decision in that case. They provide a good example of what can happen when a single issue complaint is treated as hybrid and separately sent to both the professional body and to the Commission for discrete determinations. However, whether this course is open to the Commission is not a matter to be determined primarily by the consequences, but by a proper construction of the relevant statutory provisions in the Act. It is therefore necessary to consider those provisions in some detail. Recently, for wholly different reasons, some of the provisions were revised and rearranged, but at present the key question will be discussed under reference to the legislation as originally enacted. It was not suggested that the recent alterations provide any indication of an alteration in parliamentary intention regarding the classification of complaints.

The relevant statutory provisions

[5] By way of a brief preamble, the Act established a new body, independent of the professional organisations, and containing significant lay involvement, to handle complaints of inadequate professional services and oversee the investigation of conduct complaints by the

profession. That body, the Commission, would be a single gateway for all unresolved complaints against legal practitioners. The office of Scottish Legal Services Ombudsman was abolished. The professional bodies retained jurisdiction in respect of conduct issues and expulsion from the profession.

[6] As seen in section 2 of the Act, a distinction is drawn between two types of complaint. The first is one suggesting professional misconduct or unsatisfactory professional conduct, which is described as a "conduct complaint"; the second is a complaint which suggests that a client received inadequate professional services, described as a "services complaint". In terms of section 2(2), only a limited class of persons can bring a services complaint, whereas any person can raise a conduct complaint. Still in terms of section 2, subject to any provision in rules made under section 32 of the Act as to eligibility for making complaints, for example regarding time bar, the Commission requires to address whether a complaint is "frivolous, vexatious or totally without merit". A positive finding would result in rejection of the complaint.

[7] The Scottish Government's explanatory notes to the bill for the Act stated in paragraph 6:

> "Section 2 sets out the preliminary steps which the Commission must take on receipt of a complaint. The Commission may receive complaints about either the conduct of a legal practitioner which may involve either professional misconduct or the new concept of unsatisfactory professional conduct on the one hand or the adequacy of the professional services provided by a legal practitioner on the other (referred to, respectively, as 'conduct complaints' or 'service complaints'). On receipt of the complaints, the Commission's initial function is (a) to determine whether or not they are eligible and (b) to reject those which it determines to be frivolous, vexatious, totally without merit or otherwise ineligible in terms of the Commission's rules."

Paragraph 8 explained that complaints of inadequate professional services would only be accepted from those directly affected by the services which were the subject of the complaint, other than the limited class of persons outlined in section 2(2), which include the Lord Advocate, any judge and a relevant professional organisation. Before leaving section 2, it can be noted that conduct complaints have to relate to individual practitioners, whereas services complaints can be raised against, amongst others, a firm of solicitors.

[8] The annotator to the Act in Current Law Statutes was Michael Clancy, the then Director of Law Reform at the Law Society of Scotland. He was closely involved in the various discussions and procedures in the lead up to and the development of the legislation. He notes that the intention was to ensure that the jurisdictions of the Commission and the professional bodies were kept distinct. This had been the subject of a "great deal of debate" but the executive was "steadfast" in its adherence to the proposals in the consultation paper that the new body should deal only with service matters, and that conduct issues should be referred to the professional organisations, albeit under the scrutiny of the Commission.

[9] Section 3 of the Act introduces the notion that a complaint may consist of a number of "elements", one or more of which may be outside the jurisdiction of the Commission. However, for present purposes section 5 of the Act as originally enacted (now section 2) is the key provision. It is headed "Determining nature of complaint". Section 5(1) states:

"Where the Commission proceeds to determine under section 2(4) whether a complaint is frivolous, vexatious or totally without merit and determines that it is none of these things, it must determine whether the complaint constitutes –

(a) a conduct complaint;
(b) a services complaint;

including whether (and if so to what extent) the complaint constitutes separate complaints falling within more than one of these categories and if so which of the categories."

Thus if a complaint constitutes "separate complaints", some of which fall into the category of conduct complaint and some into the category of services complaint, the Commission must specify into which category the separate complaints fall. This suggests that a separate complaint cannot fall into both categories.

Section 5(2) provides:

"Where it appears to the Commission that the complaint may constitute both –

(a) a conduct complaint; and
(b) a separate services complaint,

it must consult, co-operate and liaise with the relevant professional organisation and have regard to any views expressed by the organisation on the matter before making a determination under subsection (1) as respects the complaint."

This subsection addresses the proper procedure when, on the face of it, a complaint may contain a conduct complaint and a separate services complaint. For present purposes it is of note that the subsection envisages a services complaint which is "separate" from the conduct complaint.

[10] The Current Law annotations to the section are in the following terms:

"This section relates to one of the thorny issues raised by the decision to reject the existing model of complaint handling, and that proposed by the Justice One Committee, (whereby conduct and service complaints which arise from the same behaviour of a lawyer are dealt with by the same body and procedure) in favour of dividing service and conduct complaints between an independent Commission and the professional bodies. The issue is how to deal with the significant group of conduct cases which also contain service elements. The section provides that the decision as to whether the complaint is a service one, a conduct one or a hybrid of service and conduct parts, is for the Commission. However, if the Commission considers that a complaint is a hybrid one, this section requires the Commission to consult, co-operate and liaise with the professional body and have regard to their views before determining if the complaint is a service, conduct or hybrid complaint."

It can be noted that the annotator uses the term "hybrid complaint", and though the matter is not addressed directly, in the context it is reasonable to assume that this refers to a complaint adjudged to raise separate elements falling into more than one category of complaint. It is clear that a matter categorised as a conduct complaint should be referred to the relevant professional body, and that

the Commission has no jurisdiction to resolve a conduct complaint. In these circumstances one can understand sections 5(1) and (2) as allowing a complaint to be sent down the two different tracks, one conduct and one services, if and when it can be subdivided into separate complaints or, to use the section 3 phraseology, separate elements, some of which relate to conduct, and some to services. In that event, the professional body is required to resolve the issues categorised by the Commission as conduct complaints, and only the remainder fall within the jurisdiction of the Commission.

[11] Pausing here, it is useful to remember the terms of the complaint in *Bartos*, which was treated by the Commission as a hybrid complaint. It consisted of one sentence: "Mr Bartos falsely stated during the hearing on 7 October 2010 that it was my wish that the case be dismissed, despite having no instructions to do so." That complaint cannot be analysed as having separate elements, or containing discrete complaints. The Commission explained that it was remitted to both the Faculty of Advocates and to itself for determination on the basis that it could be categorised as both a conduct and a services complaint: the former because it was a complaint of an advocate deliberately misleading the court, the latter because if an advocate is providing services of the quality expected of a competent advocate, he would not tell a judge that the party he acted for wanted his case dismissed, unless he knew that to be the case. The result was that both bodies investigated whether counsel had falsely stated to the court that the pursuer wished the case to be dismissed. In the event the Faculty rejected the complaint, while the Commission upheld it. So the outcome was that the Faculty held that counsel had not committed an act of misconduct, while, albeit in the context of a complaint categorised as a services complaint, the Commission found that Mr Bartos had misled the court in the manner alleged, which is clearly a matter of conduct, something which Parliament intended to be within the sole jurisdiction of the professional body.

[12] All of this highlights the issue of statutory construction now raised for determination. Is it enough for "hybridity" if a single complaint can be seen as a conduct complaint, and can also be treated as a services complaint? The contrary argument is that, unless one can identify separate strands or elements within the complaint, a decision must be made as to whether to classify it as a conduct or a services matter; and that decision must respect the prohibition on the Commission dealing with complaints as to professional misconduct or unsatisfactory professional conduct. On that approach, for a single issue complaint, such as that lodged against Mr Bartos, after due consultation the Commission must decide whether the complaint is to be treated as one of conduct or services.

[13] Section 6 is headed "Complaint determined to be conduct complaint". It provides as follows:

> "Where, or to the extent that, the Commission determines under section 5(1) that a complaint is a conduct complaint, it must –
>
> (a) remit the complaint to the relevant professional organisation to deal with (and give to the organisation any material which accompanies the conduct complaint); …"

The section also provides for written notice to the complainer and the practitioner of, amongst other things, the reasons for the determination. The annotator to Current Law Statutes states:

> "This section sets out the duties which the Commission must fulfil when it determines that the complaint is wholly or in part a conduct complaint" (emphasis added).

So the Commission can refer part of a complaint to a professional body, and the rest to itself. But can it refer a part of the complaint to both? In the case of a single issue complaint, such as in *Bartos*, can it refer all of the complaint to the professional body and also to itself?

[14] Section 7 is an equivalent provision to section 6 covering the situation where, or to the extent that, the Commission determines that a complaint is a services complaint. Section 10(4) provides that if and when the Commission is upholding a services complaint, it can take into account, amongst other things, other compensation ordered (whether by determination, direction or otherwise) by a tribunal or other professional body to be paid to the complainer in relation to the subject matter of the complaint.

[15] Section 15(1) allows a professional body to remit a complaint back to the Commission if it considers it reasonably likely that the complaint, "or any element of it," constitutes a services complaint. Section 15(2) sets out an equivalent provision for the Commission if it considers it reasonably likely that a complaint before it, or any element of it, may instead constitute a conduct complaint. In such circumstances, after liaison with the professional body, the Commission can confirm the original decision, or change it. Where it decides that a complaint, or any element of it, which was originally classified as a services complaint, constitutes instead a conduct complaint, it must remit it to the relevant professional body. In the event of the opposite occurring, namely a conduct issue being reclassified as a services matter, the Commission then proceeds to determine the complaint in accordance with sections 8-12 of the Act.

[16] Section 38 makes provision for "efficient and effective working" of the procedures under the Act. For example, in relation to any investigation or report undertaken by the Commission, it must liaise with the relevant professional organisation with a view to minimising any unnecessary duplication in relation to any investigation or report undertaken by the relevant professional organisation, and equivalent provisions apply for the reverse situation. The annotator stated as follows:

> "The objective of this provision is to minimise any unnecessary duplication in relation to any investigation or report. However, this provision has to be read in conjunction with the overall thrust of the Act which is to encourage the swift resolution of service disputes. Accordingly, the Clementi Review argued strongly that the overlap between service and conduct complaints should not lead to the service elements of complaints being left in limbo for months on end while conduct elements are dealt with by the professional bodies. It follows that parallel investigation of service and conduct complaints is not ruled out by section 38".

[17] Section 46 contains the interpretation provisions for part 1 of the Act. "Unsatisfactory professional conduct" means, for example in respect of a solicitor,

> "professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor, but which does not amount to professional misconduct and which does not comprise merely inadequate professional services…".

"Inadequate professional services" means, as respects a practitioner who is, for example, a solicitor, "professional services which are in any respect not of the quality which could reasonably be expected of a competent solicitor", and includes any element of negligence in respect of or in connection with the services. Professional misconduct is not the subject of a statutory definition, however reference is often made to *Sharp* v *Council of the Law Society of Scotland* 1984 SC 129, and in particular to the remarks of Lord President Emslie that

> "there are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct".

The submissions of parties on the question of hybrid complaints

The appellants

[18] The appellants adopted the concerns of the court as expressed in *Bartos*. In particular, the statutory regime did not contemplate "double jeopardy" in the sense of a practitioner having to defend both a services complaint and a conduct complaint on the same factual narrative. The relevant statutory provisions envisage that, whilst a complaint can constitute a conduct complaint and a services complaint, this can only occur if the services complaint is separate from the conduct complaint. Where precisely the same issue is involved, the Commission must categorise it either as a conduct complaint or as a services complaint, otherwise the professional complained of is subject to two separate investigations by two separate bodies with the possibility of two separate decisions, sanctions and appeal procedures. It was submitted that the hybrid categorisation of complaints 2, 3 and 5 (being a reference to three of the complaints made in the present case, to be discussed in more detail below) is erroneous in law and should be quashed.

The Commission

[19] For the Commission it was submitted that there are circumstances in which it may be appropriate to classify the same factual issue as being potentially both a conduct matter and a services matter. Such dual categorisations are not unknown, for example, a teacher who assaults a pupil may be guilty of a criminal offence, liable to dismissal, and also likely to face disciplinary proceedings before the General Teaching Council. A driver in a fatal road traffic accident may be prosecuted, or may be questioned at a Fatal Accident Inquiry, and in either case may be the subject of a damages claim. All of these may involve different court processes and different standards of proof. It was submitted that the Act provides for a complaint being classified as both a services and a conduct complaint. This hybrid classification was previously used by the Law Society of Scotland. In *Bartos* the court recognised that "many conduct complaints could be viewed as raising inadequate professional services issues", and mentioned the example of an advocate acting when under a conflict of interest. The court also observed that

> "a complaint could be seen as having at least two separate strands or elements, which fell into two different camps. An example might be that of a solicitor who falsely represented that he was a specialist in a certain area (a conduct matter) and be criticised for the quality of his work (a services issue)".

It was suggested that such examples undermine the contention that it is not possible for a single act or omission to amount to both a services and a conduct offence.

[20] Counsel explained that, by a hybrid complaint, what is meant is that the complaint is both a conduct matter and a services matter. The submission was that section 5 allowed a complaint to be categorised as both. The Commission required to have regard to the interests of the consumer, not least given the much larger amount of compensation (£20,000 as opposed to £5,000) which could be ordered by the Commission. From the consumer's perspective, a services complaint offers greater relief and in that sense "is more important for the consumer". Thus it was all the more important to maintain the possibility of categorisation of a complaint as hybrid. Otherwise the consumer, who may feel "railroaded", is deprived of the opportunity to have the services aspect investigated. Counsel explained that there are complaints which raise only conduct matters; complaints which raise only services issues; and complaints which raise both. Emphasis was placed on the use of the term "merely" in the definition of unsatisfactory professional conduct in section 46. That, it was said, indicated a "not only but also" approach.

[21] The word "hybrid" may be somewhat inelegant but it provides a functional description of a legitimate process which has operated through liaison with the relevant professional organisations who have indicated no difficulty with the process. It is efficient, logical and avoids duplication of effort. One complaint might raise several issues, some of which are conduct related and some of which are services related. This is anticipated in section 5(2) of the Act. No question of double jeopardy arises. That rule guards against a second prosecution for the same offence. The relevant professional organisations and the Commission have separate responsibilities and separate investigative functions. Different standards and tests are applied, with different standards of proof. Hybrid complaints are investigated in sequence not in parallel, the respective order being addressed at the liaison stage.

The interested party

[22] On the hybrid question, the interested party, namely the complainer, adopted a neutral stance.

Discussion and decision on the hybrid issue

[23] At the outset it may be helpful to reflect on some of the background to part 1 of the Act. For various reasons it was decided that the professional bodies should no longer have sole control over the resolution of complaints against practitioners. The Commission was set up as an independent body with significant lay involvement to act as a single gateway for all unresolved complaints. The concept of inadequate professional services was introduced, at least in part, because of a concern that the professional bodies were too ready to reject complaints as matters concerning negligence, not misconduct, and so requiring to be determined through court proceedings. This, it was thought, deterred the pursuit and determination of such complaints. The Commission was given jurisdiction to adjudicate upon all complaints of inadequate professional services (which could include issues of negligence) and also limited powers to order compensation and other relief. There was a view, held strongly by some, that the Commission should be given responsibility for the handling and determination of all complaints, including those suggesting professional misconduct. However, the government of the day adhered to the approach ultimately set out in

the Act, namely that complaints suggesting misconduct should remain within the sole jurisdiction of the professional bodies, subject to the procedural oversight of the Commission.

[24] It was recognised that this would create demarcation issues. For example, there could be complaints which lay within a borderline or grey area, particularly given the relatively open-ended definitions of the two types of complaint. The Commission was given the responsibility, after consultation with the professional bodies, to decide as to how a complaint was to be classified and therefore which body should address it. For this purpose the Act expressly requires the focus to be on what it is that is suggested by the complaint. Does it suggest professional misconduct or unsatisfactory professional misconduct, or the lesser (hence the term "merely") concern of inadequate professional services? It was predicted that the decision to reject the notion of a single decision-making body addressing all complaints would create uncertainties. Nonetheless, it was decided that conduct matters should remain in the hands of the profession, something which was seen as being in the public interest – though many disagreed. Section 15 of the Act recognises that once a classification decision has been made, it might come to be regarded as erroneous, and hence a procedure is laid down for, in an appropriate case, setting the complaint on the appropriate track.

[25] At the heart of the issue raised by the *Bartos* case, and now by this appeal, is whether the legislation allows the Commission to investigate and determine an issue which it has categorised as a matter of professional conduct, and this on the basis that it would not have occurred had a proper service been provided. This is on the thinking that a competent practitioner will not be guilty of misconduct. The principled argument against the proposition is that it contradicts the legislative intention to leave the investigation and determination of conduct issues within the sole jurisdiction of the professional bodies. Once the Commission decides that a complaint suggests that the practitioner was guilty of either professional misconduct or unsatisfactory professional conduct, the expectation was that it would remit the complaint to the professional body and content itself with its supervisory role. However, in *Bartos*, the result was that the Faculty, after investigation, held that counsel did not mislead the court, while the Commission, after a separate investigation, reached the view that he had. The Commission's decision was described as a finding of inadequate professional services, but clearly it was also a finding of at least unsatisfactory professional conduct. It could not reasonably be seen as anything else, the Commission having already sent the allegation to the Faculty on the basis that it raised a matter concerning conduct. This exemplifies the problematic consequences when a complaint which raises one sharp issue of alleged fact is sent down both the conduct and services tracks.

[26] Turning to the terms of the Act, there is no mention of a "hybrid" complaint. There is, for understandable reasons, recognition that a complainer might lodge a complaint which consists of separate parts or elements, one or more of which raises conduct issues, and one or more of which raises services concerns. It is envisaged that such a complaint could be subdivided and dealt with according to the proper classification of its constituent parts. No doubt such a complaint might be called a hybrid complaint – but it differs materially from the complaint so categorised in *Bartos*. That complaint did not have separate elements, therefore it could only be categorised as hybrid on the basis that a suggestion of professional misconduct could also be seen as a suggestion that an inadequate professional service had been provided, in that if a service is adequate, the client's interests will not be damaged in the way alleged by the complainer.

[27] We have come to the view that the Act does not give the Commission power to proceed in this manner. To a large extent we have explained our thinking on this when commenting on the detailed statutory provisions. We would adopt the concerns expressed at paragraphs 2-8 of the decision in *Bartos*. Reference was made there to a hypothesised complaint of an advocate allegedly acting when under a conflict of interest. Such a complaint might be viewed as raising both conduct and services issues, but this does not allow the Commission to adjudicate on whether the advocate did or did not act under such a conflict; and though perhaps, depending on the specific terms of the complaint, theoretically possible, it would seem undesirable to have separate inquiries by different bodies into (a) whether there was a conflict of interest, and (b) the impact it had on the quality of the service provided, especially since the latter could be relevant to the proper sanction for any finding of misconduct. In short we are of the opinion that if a complaint, or a part of a complaint, suggests a failure in proper professional conduct, a view taken by the Commission that it could also be seen as raising a services issue does not justify the course taken in *Bartos*. Instead the Commission must decide whether to classify it as a conduct or a services complaint. The real mischief, which may need addressing, is the disparity between the compensation powers available to, on the one hand the professional organisations, and, on the other hand, to the Commission.

[28] While the matter has been resolved primarily by reference to the specific terms of the relevant statutory provisions, this outcome is consistent with the parliamentary intention to limit the Commission's decision-making jurisdiction to services complaints. It is also in line with rules made under part 1 of the Act, which again make no mention of hybrid complaints, and have different time bar tests for the two types of complaint. The rules appear to contemplate a single issue complaint being on a single track.

[29] As mentioned earlier, the statutory provisions have been modified, namely by the Scottish Legal Complaints Commission (Modification of Duties and Powers) Regulations SSI 2014/232, but not in any respect which trenches upon the considerations mentioned above (though the key section changes from section 5 to the new section 2). The critical wording remains, namely that a complaint can be sent down more than one route only when it can be treated as constituting both a conduct complaint (or complaints) and a <u>separate</u> services complaint (or complaints) – see the new subsections 2(2A) and (2B) (emphasis added).

The circumstances of the present appeal

[30] So far nothing has been said as to the circumstances which have given rise to the present appeal. Various complaints (8 in total) were made by Glencairn Whisky Company Limited (Glencairn), former clients of Anderson Strathern LLP (the appellants). The solicitors acted for Glencairn in proceedings raised on their behalf in the Court of Session. Following an initial eligibility assessment the Commission determined that issues 1, 2, 3, 5, 6 and 7 were totally without merit in terms of section 2 of the Act. (Issues 4 and 8 were remitted for investigation as services complaints.) The eligibility decision was appealed by Glencairn, and by interlocutor of the Inner House dated 4 March 2014 the complaint was remitted back to the Commission. The interlocutor did not interfere with the Commission's decision on issue 7, but made findings that issues 1, 2, 3, 5 and 6 were not totally without merit, frivolous or vexatious. In due course the Commission categorised them as services complaints. Once again Glencairn appealed, and by interlocutor of 25 September 2014, the Commission was again required to reconsider the classification of issues 1,

2, 3, 5 and 6. This was against the background that the Commission accepted the contention that it had not provided adequate reasons for its decisions. The court was not making a finding that the services categorisation was wrong.

[31] By letter dated 30 January 2015 (which is the decision now the subject of appeal) the Commission intimated that it had decided that issues 2, 3 and 5 would be accepted as hybrid complaints: that is to say, complaints that may be viewed as either services or conduct complaints, though later information from the Commission indicated that the decision was that they may be viewed as either services "and/or" conduct complaints. Issues 1, 4, 6 and 8 were deemed to be services complaints.

[32] The present appeal relates only to issues 2, 3 and 5, namely those determined to be hybrid complaints. Issue 2 was a complaint that the solicitor concerned

> "failed and/or delayed to procure a note from counsel in relation to the prospects for success in the actions despite such a note having been suggested by counsel and despite having been instructed to obtain such a note in December 2011 and again in January 2012."

Issue 3 was a complaint that the solicitor

> "failed and/or delayed in providing a copy of senior counsel's opinion dated 2 January 2012 (or otherwise effectively communicating the terms of the same)."

Issue 5 was a complaint that the solicitor

> "failed to implement her client's specific instructions relative to the erroneously uplifted funds of around £108,000 (which were consigned to the court as security for the expenses of Chivas Brothers Limited (the party on the other side of the litigation)) following settlement of the actions, namely to pay said sums to her clients and, instead, moved the court to order payment of said funds to be paid into the account of Anderson Strathern LLP, whilst erroneously representing to the court that said motion was made on behalf of, and with the instructions of, her clients."

[33] The submission on behalf of the appellants was that each issue raised a discrete point and thus the concerns expressed by the court in *Bartos* were equally applicable. Each complaint contained a single allegation. It was implicitly recognised by Mr Dunlop QC that one consequence of hybridity would be that a single allegation could be sent to the professional body for, in an extreme case, the expulsion of the practitioner from the professional body, and also sent to the Commission, so that the Commission could exercise its power to award greater compensation than that currently available to the professional body. However the submission was that this course of action is not competent. It was noted that, though a complaint may be treated as a conduct matter, the complainer retained the right to seek damages in court proceedings.

[34] Counsel recognised that if the court upheld his submission that a hybrid categorisation was unavailable to the Commission, the question would then arise as to the proper order for the court to make. In the particular circumstances, it was only the finding of hybridity which allowed the Commission to determine that issues 2 and 3 were not time-barred in respect of conduct issues, since it was accepted that, having regard to the relevant rules, if viewed solely as conduct matters,

the complaints contained in issues 2 and 3 had been raised too late. The same submission could not be made in respect of issue 5; however counsel submitted that, on any reasonable view, none of the three complaints could be viewed as raising matters of professional misconduct or unsatisfactory professional conduct.

[35] The background to all of this is that the relevant time-bar rule made under section 4 of the Act distinguishes between conduct issues and services issues to the general effect that a conduct complaint must be raised within one year of the conduct complained of, whereas a services complaint must be lodged within one year of the date when the practitioner stopped providing services to the complainer. If viewed solely as a conduct matter, both issues 2 and 3 were raised after the expiry of the one year limit, but timeously if viewed as services complaints. Having categorised them as hybrid complaints, the Commission felt able to treat the complaints as timeous in respect of both conduct and services. It was one of counsel's submissions that, in effect, the hybrid categorisation allowed the Commission to purport to waive the rules in relation to the timeous lodging of conduct complaints. Whatever else, given the rules on time-bar, and notwithstanding the hybrid categorisation, issues 2 and 3 should only proceed as services complaints. No time-bar issue arose in relation to complaint 5, but for the appellants it was submitted that, since the course adopted by the solicitor had been approved in advance by an official of the Law Society of Scotland, no conduct issue could properly arise. As to issues 2 and 3 it was submitted that they are classic services issues.

[36] In summarising his submissions Mr Dunlop QC stated (1) there is no such thing as a hybrid complaint; (2) issues 2 and 3 are time-barred regarding any conduct element; and (3) no conduct element can be attributed to issue 5.

[37] In her submissions on behalf of the Commission Ms Ross began with an observation that, given the long history of the case and the number of times it had been remitted for reconsideration, there might not be enough personnel in the Commission to allow the matter to be reviewed by a new panel. The court was urged to exercise its powers under sections 21 and 22 of the Act and resolve the classification of issues 2, 3 and 5. In so far as it might be thought that this interfered with the interlocutor of September 2014, it was explained that it proceeded on the basis of a joint minute of parties in the context of an appeal based upon a failure of the Commission to provide adequate reasons for its decisions; the proper classification of the complaints was not the key issue. Counsel accepted that if the Commission was in error on the question of hybridity, then it was also wrong in relation to time-bar so far as issues 2 and 3 are concerned.

[38] As to characterisation of the complaints raised in issues 2, 3 and 5, issues 2 and 3 were seen as potential breaches of both conduct and service standards. On the question of advice from the Law Society in respect of issue 5, the Commission could not be certain that the information before it was true and accurate. The Commission also had representations from the complainer. The court was urged to cut the Gordian knot and determine the proper classification of these complaints.

[39] Glencairn, as an interested party, was represented. Counsel explained that he had nothing to say on issues 2 and 3. Issue 5 plainly raised a matter of conduct. Hence the solicitor consulted the conduct department of the Law Society. In any event, nothing said by the Law Society sanctioned the alleged misleading of the court. Counsel expanded upon the interested party's

concerns raised in issue 5, however it is neither necessary nor appropriate to dwell upon them. It was suggested that the Law Society may not have been given full and proper information.

Decision on the appeal

[40] The categorisation of issues 2, 3 and 5 as hybrid complaints will be quashed. The court accepts the invitation to make an appropriate classification order at its own hand. There are compelling reasons to avoid a further remit to the Commission, especially when the court is well placed to determine the matter. The time-bar concerns do not apply to issue 5. It raises what, on any view, is a conduct matter. The Commission seems to have been tempted into a degree of deliberation upon the merits of the complaint. That will be a matter for the professional body. Issues 2 and 3 suggest no more than concerns as to the level of service provided to Glencairn. On that basis, no time-bar issues arise.

[41] The court will pronounce an order to the effect that issues 2 and 3 are services complaints, and that issue 5 is a conduct complaint. We do not consider that this conflicts with either of the earlier interlocutors of the court. Neither of them arose from contested proceedings, and neither involved a decision by the court on the proper classification of the complaints. In any event section 22 of the Act gives the court power to "make such order as it thinks fit", and this must be determined on the basis of the particular circumstances at the time when the order is being made.