SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 23
XA79/24

Lord Justice Clerk
Lord Malcolm
Lady Wise

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

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

by

LEVY & McRAE SOLICITORS LLP

Appellant

against

THE SCOTTISH LEGAL COMPLAINTS COMMISSION

Respondent

Appellant: Dean of Faculty (Dunlop KC), Brown; Livingstone Brown Limited, Glasgow
Respondent: C O'Neill KC (Sol Adv); Burness Paull LLP

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12 August 2025

Introduction

[1] This is an appeal under section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007 by Levy & McRae, Solicitors. One of its partners, David McKie, is the subject of a third-party complaint to the Scottish Legal Complaints Commission. The complainer is Guardian News and Media Ltd, the publisher of the Guardian newspaper. The complaint concerns Mr McKie's conduct in response to its proposed reporting of its investigation into

the appellants' then client Baroness Michelle Mone. The appellants challenge the Commission's decision, intimated by email on 15 October 2024, to refer 12 of 15 complaints to the Law Society of Scotland for investigation.

[2] The 2007 Act governs how complaints against legal practitioners are examined. On receipt of a complaint, the Commission performs a sifting function. It must determine under s 4 whether the complaint is timeously made or premature. If it is out of time the Commission should not take any further action on it. If it is premature the Commission need not take any further action on it. Otherwise, it must determine if the complaint is a conduct or service complaint and whether the complaint is frivolous, vexatious or totally without merit (s 2(4)(a)). In this case all of the complaints were conduct complaints and the Commission's obligation was to refer them for investigation and determination by LSS unless they were premature, time-barred or frivolous, vexatious or totally without merit.

[3] The appellants retain a file, said to include documents and correspondence relevant to the complaint. A solicitor's file belongs to its associated client, and not to the solicitor. For such a file to be disclosed to the Commission, the client must waive legal professional privilege: *SLCC* v *Murray* [2022] CSIH 46, 2023 SC 10. The effect of privilege is that Mr McKie cannot divulge what his client told him when seeking advice and what advice he gave her. Baroness Mone has not expressly waived it. Accordingly, the appellants' principal contention is that it was manifestly unfair for the complaint to be considered appropriate for investigation since material relevant to the complaint will be unavailable. Such insurmountable unfairness dictated a finding that the complaint was, in all its aspects, totally without merit.

Background

[4] The appellants provide a media law and reputation management service in Glasgow. Their former client is a well-known businessperson and Life Peer. Between December 2021 and March 2022, she instructed the appellants concerning significant media interest in her possible connection to the company PPE Medpro who contracted with the UK Government to supply personal protective equipment during the COVID-19 pandemic. Mr McKie was the partner responsible for Baroness Mone's business with the firm.

[5] The conduct complained of arose from Mr McKie's communications in response to pre-publication requests made by Mr David Conn, a Guardian journalist, for comment on his client's alleged interest in, or involvement with, the company and her alleged role in improperly exploiting her political connections to facilitate its receipt of a substantial government contract. Between December 2021 and March 2022, Mr McKie sent a number of emails to Mr Conn. In essence, Mr McKie asserted that his client had no connection to the company or the contract, that any suggestion to the contrary was defamatory and any attempt to claim otherwise in print would result in court action.

[6] By December 2021, journalists at the Guardian had recovered material which, in their view, supported their claims that Baroness Mone was involved in securing a government contract for PPE Medpro. In a letter dated 16 December 2021, Mr McKie wrote to the Guardian:

> "The inference which you clearly wish to create is that our client has used her position to lobby the government to award lucrative contracts to companies 'connected' to her and then spent the proceeds on an expensive yacht and townhouse. That is not only wholly untrue, but if repeated, is highly actionable as it is grossly defamatory of our client."

[7] On 5 January 2022, Mr Conn wrote to Mr McKie to explain that they had received further information supporting their understanding that Baroness Mone appeared to have

been involved in the business and activities of PPE Medpro. He specified that he and his colleagues had seen WhatsApp messages Baroness Mone sent in June 2020 shortly before the Department of Health and Social Care awarded a second contract, worth £122 million, to PPE Medpro. In these messages Baroness Mone appeared to be discussing details about gowns and the process for supplying them including details of the Government's purchase order system.

[8] On 17 March 2022, Mr Conn wrote to Mr McKie explaining that he had new information from emails released by the Cabinet Office appearing to show that Baronesss Mone was involved in the business of PPE Medpro. They showed that Mr McKie represented her in relation to PPE Medpro's contract to supply surgical gowns. Mr Conn specified further emails he had seen disclosing that she had lobbied the Government, contacting Michael Gove MP, Minister to the Cabinet Office, to offer to supply PPE on 7 May 2020, and then Lord Agnew, also a Cabinet Office Minister, copying in Mr Gove, using personal email addresses. She wrote that she had managed to source PPE masks from Hong Kong. These various messages were said by Mr Conn to show that Baroness Mone's public denials were untrue.

[9] In a PPE Medpro promotional video published on 10 December 2023, Baroness Mone stated, according to the content of a letter of 18 December 2023 from Mr David Pegg, a Guardian journalist, to Mr McKie:

> "I made an error in what I said to the press. I regret not saying to the press straight away: 'Yes I am involved, and the government knew I was involved, and the emergency team, Cabinet team, knew I was involved, the government [Department of Health and Social Care] knew that I was involved, the NHS, all of them knew I was involved. The legal team advised myself and my husband not to comment and not to say that of my involvement in PPE Medpro."

[10] In an interview broadcast by the BBC on 17 December 2023, Baroness Mone again disclosed that she was connected to PPE Medpro. She stated:

> "We should have told the press straight up, straight away, nothing to hide… I was just protecting my family" and added that it was not a crime to lie to journalists. When the interviewer asked why she had repeatedly lied to journalists, including through her lawyers, she said, "It's something that we regret doing, and we listened to our lawyers."

The complaints and the Commission's decision

[11] The publisher submitted a number of complaints suggesting that Mr McKie may have breached LSS Conduct Rules in three broad categories:

(i) that he acted inappropriately by advancing statements about Baroness Mone that he knew, or ought to have known, were false;
(ii) that he acted inappropriately by suggesting that the reporting of facts uncovered by the Guardian was defamatory of Baroness Mone and of her legal advisors; and
(iii) that he acted inappropriately by sending unduly aggressive emails to a journalist at the Guardian.

[12] The Commission wrote to Mr McKie on 8 July 2024 alerting him to 15 complaints made by the publishers, advising that they would consider any information he chose to provide. In a letter of 29 July 2024, Livingstone Brown Solicitors replied on his behalf. They stated that a solicitor could never be faulted for presenting a factual position on behalf of a client where he had a proper basis to do so and was acting on instructions. They articulated a broad proposition that because of legal professional privilege Mr McKie was unable to answer the allegations. It prevented him from disclosing the file or otherwise divulging what was said between him and his client. In these circumstances, the complaints should be considered as being totally without merit on account of insuperable unfairness. They made particular representations only about heads of complaint 14 and 15.

[13] In determining the complaints, the Commission identified particular rules in the LSS Standards of Conduct (Conduct Rules) as germane; B1.2, B1.4.1, B1.4.3 and B1.10.

> "B1.2: Trust and personal integrity
>
> 1.2 You must be trustworthy and act honestly at all times so that your personal integrity is beyond question. In particular, you must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful.
>
> B1.4: The interests of the client
>
> 1.4.1 You must act in the best interests of your clients subject to preserving your independence and complying with the law, these rules and the principles of good professional conduct.
>
> …
>
> 1.4.3 You must at all times do, and be seen to do, your best for your client and must be fearless in defending your client's interests, regardless of the consequences to yourself (including, if necessary, incurring the displeasure of the bench). But you must also remember that your client's best interests require you to give honest advice however unwelcome that advice may be to the client and that your duty to your client is only one of several duties which you must strive to reconcile.
>
> B1.10: Competence, diligence and appropriate skills
>
> 1.10 You must only act in those matters where you are competent to do so. You must only accept instructions where the matter can be carried out adequately and completely within a reasonable time. You must exercise the level of skill appropriate to the matter."

[14] The Commission set out a 35 page analysis detailing each complaint, whether it was time barred (none was), if it would be investigated, the potentially applicable Conduct Rule/s, the publisher's position, Mr McKie's position so far as articulated or known and the reasons for their decision on it.

[15] The first complaint is illustrative:

> "Issue 1: Mr McKie may have acted inappropriately when he wrote to The Guardian on 22 February 2022 stating his client had no involvement or association with Company B, had never had any role or function in Company B, and had never had any role or function in the process by which contracts were awarded to Company B. This occurred in circumstances where: (a) the denials appeared to contradict factual information, including information provided by The Guardian at the relevant times; and (b) the client was lying to the media by saying she had no involvement with

> Company B, as later admitted by her. This was inappropriate if Mr McKie knew, or reasonably ought to have known (having sufficiently interrogated the factual circumstances, including information provided by The Guardian), that these statements were untrue."

[16] The Commission stated why the complaint was not time-barred and that it applied Conduct Rules B1.2, B1.4.1 and B1.4.3. They summarised what Guardian journalists understood about the scale and cost of contracts between the Government and PPE Medpro and the extent of profits made by the Baroness Mone's partner, and later her husband, Mr Douglas Barrowman and profits directed to a trust benefitting other relatives. The client denied allegations put to her by journalists who continued to engage in pre-publication correspondence with individuals and companies linked to PPE Medpro, mostly through solicitors. The purpose of such correspondence is fairness to the person concerned and to increase journalistic accuracy by ascertaining any response to allegations before publication. Journalists understood that the appellants acted for Baroness Mone from December 2021. They put salient facts to her through Mr McKie who denied them on her behalf.

[17] On 22 February 2022, Mr McKie wrote to Mr Conn to say that he had been put on notice on numerous occasions of his client's position that she had no involvement in the business. She was not associated with the company in anyway, never had been and never had any role in the process by which contracts were awarded to it, knew nothing of any "high priority lane" and did not know of the company being placed in it. Accordingly, she could not answer these questions. In response to further correspondence, Mr McKie again denied on 18 March 2022 that she had been involved in the company. The Guardian established that the client had contacted certain ministers to offer to supply PPE and that PPE Medpro was referred to the VIP lane and was awarded contracts. They also established that she had lobbied another minister to try to secure Covid testing contracts for the

company. In 2023, a new representative acknowledged that Baroness Mone had been involved in PPE Medpro, Mr Barrowman was an investor in the company and he had chaired and led the company's operation to supply PPE. Baroness Mone had acted as an intermediary/liaison between the company and the Cabinet Office/DHSC.

[18] The Commission summarised the import of Baroness Mone's published comments of 10 and 17 December 2023, set out at paras [9] and [10] above, her admitted lies and her explanation about advice from lawyers.

[19] Mr McKie had responded (through Livingstone Brown) that since his former client had not waived privilege, he was not released from his duty of confidentiality and he was bound to defend that privilege unless waived. Accordingly, there was no information he could give to the Commission and LSS. His solicitors had written to the publisher in December 2023 confirming the constraints of privilege but adding:

> "He is clear that he has never advanced a factual position on behalf of a client without being (i) aware of the basis therefore and (ii) instructed to do so. Solicitors are bound by their professional rules to act with honesty and integrity; at all times, he has done so."

The Commission referred to this general denial in considering the various complaints and quoted it and other passages from Livingstone Brown's letter in considering complaint 1.

[20] The Commission noted contentions that suggestions by Guardian journalists were grossly defamatory of Mr McKie. He disputed that his emails amounted to threats and bullying. "He insists that he at all times acts appropriately and consistently with practice rules when robustly representing his clients' interests." The Commission noted both his various representations about the invariable justification for a solicitor presenting a factual position on behalf of a client when he had a proper basis and instructions and his complaint about manifest unfairness caused by privilege.

[21] The Commission found a basis in Baroness Mone's published interviews to conclude that she may have told her lawyers that she was involved with the company and the contract awarding process and an investigation was required, amongst other things, to establish if Mr McKie was amongst the lawyers to whom she provided this information. If he knew the true position and advised her to deny her involvement there would be questions about whether he had given advice in her best interests and in relation to his honesty.

[22] Mr Conn had shared information and evidence by email with Mr McKie in the months prior to 22 February 2022 that the journalist considered showed that the client was involved with the company. Issuing denials in these circumstances might be deceitful conduct and may amount to unsatisfactory professional conduct or professional misconduct.

[23] At page 14 of the complaint decision letter, the Commission addressed LPP and the related fairness point and provided a conclusion on the first complaint:

> "Mr McKie considers it is unfair to expect him to refute the allegation in this issue of complaint as he cannot provide the evidence to do so. Mr McKie's position is that his firm cannot and will not disclose communications exchanged between him and Mrs A as these are covered by LPP.
>
> The SLCC acknowledges LPP may apply to information relevant to the investigation of this complaint. However, it may be that there is relevant information which, whilst confidential, is not privileged. SLCC v Murray 2023 SC [10] … confirmed that such information can be provided by a solicitor to a regulator in appropriate circumstances. Mr McKie's position is that information he requires to defend himself against this complaint is privileged and, therefore, he cannot disclose it to the SLCC or Law Society of Scotland. However, the SLCC considers it is for an investigation to decide whether that is the case and the consequent implications for the fairness of the complaints process.
>
> The SLCC has also noted Mr McKie's position is that Mrs A has not waived privilege. However, it is unclear whether she has been specifically asked to do so. Additionally, SLCC v Murray 2023 SC referred to the circumstances in which privilege may be overcome. Such circumstances include "waiver, whether express or implied, by the person entitled to assert the privilege". The context applicable to this complaint is unusual in that Mrs A has stated publicly, on more than one occasion,

> what advice she received from her legal advisers. Accordingly, it may be considered this constituted an implied waiver of privilege, at least insofar as the advice specifically relevant to this issue of complaint is concerned. The SLCC considers it is appropriate for these points to be decided in the context of an investigation.
>
> The SLCC acknowledges it is possible it may be established that Mr McKie is unable to provide any more information in relation to this issue of complaint. However, even if that is the case, the SLCC considers evidence has been provided in support of this issue of complaint, as referred to above. It is for an investigation to weigh the evidence which has been provided, and the importance of any evidence which cannot be provided, in making a finding on whether unsatisfactory professional conduct or professional misconduct has been established.
>
> For the reasons set out above, the SLCC has decided Issue 1 is eligible to be investigated."

[24] Complaints 2-4 refer to Mr McKie's communications to the Guardian or its journalists on 16 December 2021, 22 February 2022 and 18 March 2022 accusing them of making defamatory allegations about the client, that any continued defamatory reporting would be an aggravation of already inaccurate and libellous material and they were already on notice about making earlier defamatory statements. These communications were inappropriate if Mr McKie knew, or reasonably ought to have known having sufficiently interrogated the factual circumstances including information provided by the Guardian, that he had no legitimate basis to assert that Guardian communications were defamatory. The Commission noted Mr McKie's general denial through his solicitors. Baroness Mone's published remarks were to the effect that she had told her lawyers; this could include Mr McKie and should be investigated.

[25] Complaint 5 was that Mr McKie may have acted inappropriately on 16 December 2021, 20 December 2021, 5 January 2022, 6 January 2022, 22 February 2022 and 18 March 2022 by suggesting that the content of emails sent by Guardian journalists could result in legal action if he knew or reasonably ought to have known (having sufficiently interrogated the

factual circumstances, including information provided by the Guardian), that there was no legitimate basis on which any such legal action could be raised.

[26] Once again, the Commission took account of the effect of privilege and the potential unfairness of the complaints process. The Commission had corresponded with the LSS on the potential relevance in a Scottish conduct complaint of Guidance from the Solicitors Regulation Authority on Strategic Lawsuits Against Public Participation. The LSS considered it analogous to Scottish standards of conduct. SLAPP guidance includes: "you must not bring or threaten unmeritorious claims or engage in tactics that are intimidatory or otherwise oppressive" and "particular care is required where a publication ventilates a matter that is likely to engage the public interest." Having considered the material advanced, and taking account of all of the published information from Baroness Mone about what she had told her advisers, the Commission concluded that the conduct alleged was capable of amounting to unsatisfactory professional conduct or professional misconduct.

[27] Complaints 6-11 provided the following specification:

> Issue 6: Mr McKie may have acted inappropriately and/or failed to communicate effectively with others when, in an e-mail to The Guardian on 16 December 2021, he referred to The Guardian's journalist's "apparent motives, which appear to be entirely malevolent towards our client's interests"…
>
> Issue 7: Mr McKie may have acted inappropriately and/or failed to communicate effectively with others when, in an e-mail to The Guardian on 16 December 2021, he stated The Guardian's journalist appeared to have "a dominant improper agenda against our client and seek to damage her reputation unfairly and without factual or legal justification"...
>
> Issue 8: Mr McKie may have acted inappropriately and/or failed to communicate effectively with others when, in an e-mail to The Guardian on 16 December 2021, he stated The Guardian's journalist's queries were based on a "nefarious interpretation of material which you appear to have clumsily cobbled together from unreliable information"…
>
> Issue 9: Mr McKie may have acted inappropriately and/or failed to communicate effectively with others when, in an e-mail to The Guardian on 18 March 2022, he

> stated The Guardian's journalist had sought to create "a nefarious interpretation of our client's character"…
>
> Issue 10: Mr McKie may have acted inappropriately and/or failed to communicate effectively with others when, in an e-mail to The Guardian on 18 March 2022, he stated The Guardian's journalist had a "deliberate and vexatious interpretation" of evidence put to his client for comment…
>
> Issue 11: Mr McKie may have acted inappropriately and/or failed to communicate effectively with others when, in an e-mail to The Guardian on 18 March 2022, he stated The Guardian's journalist had "dominant improper motives against our client"…

Each concluded with the proposition:

> This was inappropriate as Mr McKie had no legitimate basis to make this allegation, which was overly aggressive and sought to intimidate The Guardian and/or its journalist.

[28] The Commission noted that the general points raised by Mr McKie on ground 1 would also apply to these grounds but he had made no specific comment on these complaints. In these communications, he was questioning the integrity of journalists in an aggressive manner. He had impugned their motivation, professionalism and interpretation of material. It was not apparent that he had a proper basis to make these comments and allegations and unclear why he had felt it necessary to go further than issuing a simple denial. This could amount to unsatisfactory professional conduct or professional misconduct.

[29] The final complaint to be accepted for investigation was:

> Issue 12: Mr McKie may have acted inappropriately when, in an e-mail to The Guardian on 18 March 2022, he referred to The Guardian's journalist's comment that previous statements made on behalf of his client had been untrue and stated, "not only is this simply untrue in itself, but is grossly defamatory of her advisers who wrote to you at the time and, by extension, of us subsequently". This was inappropriate if Mr McKie knew, or reasonably ought to have known (having sufficiently interrogated the factual circumstances, including information provided by the Guardian), that he had no legitimate basis on which to suggest this was defamatory of his client's advisers, including Mr McKie and/or Levy & McRae Solicitors LLP. This occurred in circumstances where: (a) the denials appeared to

contradict factual information, including information provided by The Guardian at the relevant times; and (b) the client was lying to the media by saying she had no involvement in Company B, as later admitted by her.

[30] Mr McKie made no specific response beyond the general points relevant to all complaints. The Commission noted that the general points raised by Mr McKie on ground 1 would also apply. Whilst it was similar to complaints 2-5, issue 12 concerned alleged defamation of Mr McKie, his firm and previous advisers. The Commission considered that, if established, his actions were capable of amounting to unsatisfactory professional conduct or professional misconduct. An investigation was required.

Grounds of appeal

[31] The appellant challenged the decision of the Commission on nine grounds. They can be summarised thus:

i. The Commission erred in law in remitting complaints for investigation when it did not and could not ascertain the facts sufficiently to perform its function because of privilege.
ii. The LSS cannot investigate what information and instructions the client provided to the solicitor. The complaint cannot succeed without her authority, or the court's, for disclosure of privileged material. In failing to resolve this issue and its implications, the complaints must be considered to be totally without merit.
iii. The Commission erred in holding that the solicitor's file "may" be privileged. The file, any instructions given and any advice tendered in response are, as a matter of law, privileged and they erred in thinking that these were matters to be investigated. The Commission ought to have resolved all questions on privilege by engaging with Mr McKie and applying to the court if necessary.
iv. The Commission erred in holding that (a) some of the material within the file may be confidential but not privileged and (b) that the complaint could be fairly resolved on that material.
v. The Commission acted unfairly by remitting a complaint where Mr McKie is unable to present a defence to the complaints whilst the instructions and advice exchanged are subject to LPP.
vi. Articles 8 and 6 of the European Convention on Human Rights are engaged by a professional disciplinary complaint. Procedural unfairness arising from an inability to present a defence to the complaints would breach Art. 6.

vii. The Commission erred in law by indicating, implicitly, that it was for the appellant to approach his former client to seek a waiver of LPP when this was inappropriate. The Commission erred in considering that waiver may be possible when they had not taken steps to determine if the client would provide a waiver.

viii. The Commission erred in law by holding that B may have implicitly waived her right to LPP, particularly where it was not clear if the appellant was one of the lawyers of whom she had spoken publicly and privilege precludes him from responding to her allegations. There was no basis for concluding that the client's published remarks might constitute implied waiver.

ix. The Commission erred in law by holding that there might have been a duty on Mr McKie to take independent steps to investigate or verify the truth of the position he was instructed to advance.

The appellant did not insist on ground (vi).

Submissions

Appellant

[32] Privilege was a fundamental right which was not impliedly overridden by any provision of the 2007 Act: *SLCC* v *Murray, supra,* at para [42]. The privilege belonged to the client, not to the solicitor, and the solicitor was required to protect the client's interest to preserve privilege unless and until instructed by the client or authorised by the court to do otherwise: *SLCC* v *Murray* at para [34]. Whilst a solicitor owed a general obligation of confidentiality in respect of all communings with a client, LPP only attached to a narrower class of material: *SLCC* v *Murray* at para [27]. The touchstone of privilege was whether the communication was between solicitor and client and relating to advice: *Narden Services Ltd* v *Inverness Retail and Business Park Ltd* [2008] CSIH 14, 2008 SC 335 at para [11]; *Three Rivers District Council* v *Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 at page 656. The Commission had the power to require a solicitor to produce material subject to the ordinary obligations of confidentiality but not material subject to LPP: *SLCC* v *Murray (No.2)* [2022] CSIH 54, 2023 SLT 17 at para [7]. Privilege could be lost where

the material in question ceased to be confidential: *Scottish Lion Insurance Co Ltd* v *Goodrich Corporation* [2011] CSIH 18, 2011 SC 534 at para [46]. Equally, privilege could be impliedly waived where the party entitled to resist the disclosure of the material acted in a manner inconsistent with retention of that right: *Scottish Lion Insurance Co Ltd* v *Goodrich Corporation* at paras [46]-[47]; *University of Dundee* v *Chakraborty* [2023] CSIH 22, 2023 SC 297 at para [20].

[33] The Commission had abdicated its responsibility to make a positive determination as to whether the complaint was totally without merit. In order to carry out that determination, the Commission was required to make such investigation of the facts as was necessary to discharge its duty: *Law Society of Scotland* v *SLCC* [2010] CSIH 79, 2011 SC 94 at para [34].

[34] The Commission had erred in law by determining that LPP "may" apply to the file. Information imparted by a client to a solicitor for the purpose of obtaining advice together with advice tendered by a solicitor to a client was the irreducible core category of material to which LPP applied. It followed that the material in question was privileged. The client had made no express waiver of her right to LPP. The interests of the appellant and his former client were at odds, and it would be inappropriate for the appellant to request her express waiver of LPP. Equally, there had been no implied waiver of LPP. Her broadcast comments were insufficient to give rise to an implied waiver. Baroness Mone had instructed several firms of solicitors to represent her interests during the relevant period. She had not identified Mr McKie, or the appellants, during the broadcasts, nor had she identified the time at which she "followed the advice of her legal advisers." It could not be said with any certainty that she had publicly disclosed what advice she received from Mr McKie. In any event, it was for the Commission to present a petition to the court under paragraph 1 of Schedule 2 of the 2007 Act for an authoritative determination on the status of the material.

The Commission had failed to take such a step. On a proper analysis, the Commission was bound to conclude that the relevant material was privileged and could not be disclosed.

[35] It followed that there was no basis upon which the complaints directed at Mr McKie's actual knowledge of the client's dishonesty could be upheld. If the material pertinent to those complaints could not be disclosed, the only reasonable conclusion was that there was no material available to uphold the complaints. That necessarily led to the conclusion that those complaints were totally without merit and fell to be rejected as such. The Commission erred in determining otherwise.

[36] Those parts of the complaint contending that Mr McKie "ought to have known" of the client's dishonesty also fell to be rejected. Absent any material to the contrary, there was no suggestion that he did anything other than act on the instructions of his client on the information provided to him. He did not have any duty to carry out any independent check or checks as to whether the information received was true: *LSS* v *SLCC, supra* at para [27]. It followed that those parts of the complaints, too, were totally without merit.

[37] In any event, it was manifestly unfair to determine both eligibility and the complaint as a whole without access to the privileged material. It was possible that the privileged material was wholly exculpatory. The complaints could not be fairly defended. It would be quite impossible for the LSS to determine, fairly, the issue between the parties: *Prebble Television New Zealand Ltd* [1995] 1 AC 321 at page 338. It would be grossly unfair to let the complaint proceed in circumstances precluding the appellants from putting forward a defence: *Hamilton* v *Al Fayed* [2001] 1 AC 395 at page 404. Such a scenario could not arise in a client-led complaint. Client complainers must waive privilege for a complaint to be referred to the LSS: 2007 Act, Schedule 3 para 1; *Murray* v *SLCC, supra* at para [36]. It would

be absurd for there to be such a distinction between client-led complaints and third-party complaints. That anomaly could not have been what Parliament intended.

Respondent

[38] The Commission made no error of law. The decision was an eligibility determination and involved no adjudication on the substance of the complaint. The function of the Commission was a sifting one. It was only required to obtain basic information as to the basis upon which the complaint was being made: *LSS* v *SLCC,* at para 35. The Commission could not intrude on the role and remit of the LSS in determining conduct complaints: *LSS* v *SLCC* at para 49; *AS* v *Scottish Legal Complaints Commission* [2020] CSIH 19, 2020 SC 443 at paras 30-32. It could not predict or assume what may occur during an LSS investigation.

[39] It was inherent in the scheme of the 2007 Act that the Commission was required to exercise its functions without access to privileged material: *SLCC* v *Murray, supra*. The unavailability of that material did not prevent the Commission from lawfully or properly assessing the eligibility of the complaints. It did not err in law by doing so. The Commission did not have to resolve the question of whether the material was privileged, nor was it required of the Commission to present a petition to the court for determination of the question. That would be directly contrary to the limited nature of the Commission's role at eligibility stage: *LSS* v *SLCC* at para 61. Equally, it was not for the Commission to judge the fairness, or unfairness, of an LSS investigation. It was not for the Commission to approach the client regarding waiver of her right to LPP. The Commission had not invited the appellant to make such an approach. The eligibility determination did not involve a

determination of Mr McKie's civil rights or obligations. It followed that Article 6 ECHR was not engaged. Complaints 6-11 could be resolved without access to privileged material.

Analysis and decision

[40] Section 2(1A) requires the Commission to determine whether a complaint constitutes a conduct complaint or a services complaint and then to take the steps in s 2(4)(a). It provides:

> "(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)."

Section 47 provides:

> "47 Conduct complaints: duty of relevant professional organisations to investigate etc.
> (1) Where a conduct complaint is remitted to a relevant professional organisation under section 6(2)(a) or 15(5)(a), the organisation must, subject to section 15(1) and (6), investigate it…"

The exceptions relate to situations where the professional organisation considers it reasonably likely that a complaint remitted to it may instead constitute a service complaint.

[41] The terms of the Act give effect to the Scottish Government's clear policy choice. The Commission must remit an eligible conduct complaint against a solicitor to the LSS and against an advocate to the Faculty of Advocates (ss 6 and 46), whilst dealing itself with service complaints (ss 7-9). Professional organisations must investigate remitted conduct complaints. It underlies the wording of s 2(4)(a). Lord Malcolm explained the significance

of the word "totally" in his opinion in *LSS* v *Scottish Legal Complaints Commission* [2010] CSIH 79, 2011 SC 94 at para 49 in the following way:

> "A flavour of the correct approach to the phrase 'totally without merit' can be gained from the link with 'frivolous' and 'vexatious' complaints. In my view, the test of 'totally without merit' is different from a test of 'without merit'. The latter would require consideration of the substance of the matter, allied to any necessary investigation. The statutory formula does not require this. It allows the sifting of complaints which, on their face, are obviously unworthy of any consideration or investigation by the professional body. It covers hopeless complaints where it is clear that further inquiries could make no difference. A conclusion that a complaint is unlikely to succeed would not meet the test for dismissal by the commission at the preliminary stage..."

We agree.

[42] Lord Malcolm had, at para 48, taken from Parliament's policy choice that the professional bodies would retain responsibility for the investigation and determination of conduct complaints that, in determining whether or not a complaint was frivolous, vexatious or wholly without merit, any inquiries carried out by the Commission should be no more than was needed to answer that question. Whilst Lords Reed and Kingarth disagreed with Lord Malcolm's view that the particular complaints in that case should not be considered to be totally without merit, there is no material difference between the members of the bench in that case on the question of investigation by the Commission. Lord Kingarth considered that the Commission would need to obtain at least basic information on the basis on which a complaint is made, and this would vary from case to case, but his examples demonstrate a very low level of investigation, amounting to little more than seeking to understand the basis of the complaint; Lord Kingarth at 34-37. Lord Reed expressed general agreement with Lord Kingarth and offered no disagreement with Lord Malcolm on the content of paras 48 and 49.

[43] In *AS* v *Scottish Legal Complaints Commission*, *supra*, in giving the opinion of an Extra Division, Lord Pentland drew together principles enunciated in previous decisions on s 2(4)(a):

> "[30] First, the Commission's function is to sift complaints, not to determine them. The professional body, the Faculty or the Law Society of Scotland, is best placed to evaluate whether an advocate or a solicitor has been guilty of professional misconduct (*McSparran McCormick* v *Scottish Legal Complaints Commission*, para 46).
>
> [31] Secondly, it follows from the first principle that it is only where referring a complaint to the professional body would be a waste of time because the complaint is totally without merit that the Commission should dismiss it as ineligible. The policy of the 2007 Act is that the questions of what amounts to professional misconduct or unsatisfactory professional conduct are matters to be determined by the professional body and not by the Commission (*McSparran McCormick* , para 58).
>
> [32] Thirdly, the test of 'totally without merit' contained in sec 6(1)(b) of the 2007 Act is a high one. It permits the Commission to sift out complaints which, on their face, are obviously unworthy of any consideration or investigation by the professional body; that means hopeless complaints in which it is clear that further investigation by the professional body could make no difference. In other words, the threshold that a complaint requires to cross before the Commission should refer it for investigation by the professional body is a very low one (*Law Society of Scotland* v *Scottish Legal Complaints Commission*, para 49).
>
> [33] Finally, in an appeal brought under sec 21 of the 2007 Act the court should not substitute its own view on eligibility for that of the Commission. An appeal based on irrationality can only succeed where the decision was one that no such body properly directing itself could reasonably have made (*Saville-Smith* v *Scottish Legal Complaints Commission*)."

[44] We would add a fifth principle related to the fourth. The SLCC is a specialist body empowered by the Scottish Parliament to sift complaints against solicitors and as such should be accorded a degree of institutional respect by the court when adjudicating in its area of competence; *Murnin* v *Scottish Legal Complaints Commission* [2012] CSIH 34, 2013 SC 97, Lord Carloway at para [31].

[45] We note that in *McSparran McCormick*, each member of the court considered that before holding a complaint to be totally without merit the Commission would need to

conclude that it was not open to the LSS to find that conduct amounted to professional misconduct or unsatisfactory professional conduct: Lady Dorrian at para 43, Lord Drummond Young at para 46. At para 58 Lord Malcolm used slightly different language to the same effect, adopted in Lord Pentland's second principle in *AS*.

[46] Bearing in mind the very low threshold presented by s 2(4), we reject the contention that the Commission erred in concluding that the complaints were totally without merit. Parties do not dispute that Mr McKie communicated to the Guardian on his then client's behalf, making factual assertions that were not true. His former client has publicly stated that she lied through her lawyers having listened to her lawyers. Accordingly, it may be possible to infer from her public statements, broadly, what she told her solicitors, including Mr McKie, and she has explicitly stated that she was advised by lawyers (plural) not to reveal it. Whilst she may have instructed more than one firm of solicitors, she undoubtedly instructed Mr McKie at the relevant time and he communicated as he did to the Guardian. If what she has publicly stated is true, then it may be open to the LSS to find that the appellant's actions breached one or more of the Conduct Rules. The Commission had sufficient material before it to conclude that the complaint was not totally without merit. Having reached that conclusion, it was not its function to investigate and establish all necessary facts; *LSS* v *SLCC*, Lord Kingarth at para 34.

[47] The appellants contend that absent an express waiver the only proper conclusion is that the complaints are totally without merit. We do not accept that submission. That said, of course we acknowledge the importance of legal professional privilege. The underlying principle was explained by Lord Taylor of Gosforth in *R* v *Derby Magistrates Court, Ex parte B* 1996 AC 487 at 507:

> "…a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

and, in more detail and with reference to Scottish sources by the Lord President (Carloway) in *Dundee University* v *Chakraborty* at para 16. Whilst the appellants identify the implications of privilege and submit that any investigation against Mr McKie will inevitably be unfair, we are unable to accept it was for the Commission to resolve that issue. It is true that it has power to seek recovery of documents (s 17) and power to apply to the court (schedule 2) but so does the LSS (s 48 and schedule 4). The latter must investigate a conduct complaint and the former must only determine the criteria in section 2(4) before rejecting the complaint or remitting it to the relevant professional organisation.

[48] Since no one has asked the client whether she will expressly waive privilege, her response to any such request is unknown. Should she do so, the appellant's concerns about fairness would be met. The Dean of Faculty asserted that an express waiver is unlikely; however, until the true position is ascertained the submission of *insurmountable* unfairness cannot be made out. Likewise it would be for the LSS to address whether, in the whole circumstances, there has already been an implied waiver of the client's privilege. As the Dean of Faculty correctly acknowledged, with reference to *Scottish Lion Insurance Co Ltd* v *Goodrich Corporation* at para 46 of the opinion of the court delivered by Lord Reed, privilege can be lost where material ceases to be confidential, one example being where it is published. His Lordship continued,

> "Waiver of privilege can be distinguished from loss of privilege…
> It will arise, as we have explained, in circumstances where it can be inferred that the person entitled to the benefit of the privilege has given up his right to resist the disclosure of the information in question, either generally or in a particular context.

> Such circumstances will exist where the person's conduct has been inconsistent with his retention of that right: inconsistent, that is to say, with the maintenance of the confidentiality which the privilege is intended to protect."

Waiver is determined on an objective analysis of the conduct of the person asserting privilege and not their subjective intention, Lord Reed at para 47, and the Lord President in *Dundee University* v *Charkraborty* at para 20. It is open to the LSS to exercise its power under s 48 and schedule 4 to seek to recover the solicitor's file. Should the LSS need to apply to the court, schedule 4 para 1, the question of implied waiver may arise for determination. Given its limited role the Commission was correct to determine that resolution of any implications of privilege is for the LSS. The investigating body can determine, in light of what is ultimately available to it, whether it would be unfair to proceed with some or all of the complaints made. It is the proper body to resolve a conduct complaint that the Commission, in exercise of its statutory function, has found is not totally without merit.

[49] The third ground of appeal focuses on the passage at page 14 of the Commission's decision letter. The sentence complained of states that the "SLCC acknowledges LPP may apply to information relevant to the investigation of this complaint". The assertion is that the whole file is privileged thus this displays an error of law. However, this passage should not be read in isolation. That sentence is followed by reference to information that may be confidential but not privileged with reference to *SLCC* v *Murray*. At paras 38 and 39 of her opinion in that case, the LJC (Dorrian) identified that there may be papers within a solicitor's file that are not subject to LPP. We apprehend it is that to which the Commission was referring in the said sentence. The Commission went on to note the appellant's concerns about the implications of privilege before considering both express and implied waiver, and the client's public comments. There remained matters to be investigated. As we have already stated, the LSS has the investigative function. Viewing the sentence complained of

in context, we do not find that the Commission failed to understand that privilege applies to communications between a solicitor and a client relating to advice. It was considering possible exceptions, hence the use of the word "may". There was no error of law.

[50] As we have indicated above, if Baroness Mone does waive privilege, the unfairness anticipated by the appellant will not arise. Even if she does not, it will remain open to the LSS to consider whether it is impossible fairly to determine the complaint and what should follow. It may conclude that it would be unfair to reach a conclusion adverse to the appellant. Or it may conclude on the material before it that the client's public statements cannot be accepted in light of all of the information before it and such further information bearing on the credibility and reliability of the public comments as the appellant could advance without breaching privilege by directing the LSS's attention to contradictory statements. Even if the appellant remains unable to state what his client told him and what advice he gave, the LSS may prefer his account. He felt able to give its essence, set out at para [19] above, through his solicitors in a letter to the Guardian on 19 December 2023 in response to a pre-publication letter sent to the appellant the day before alerting him that they were considering naming him in an article as having lied on behalf of Baroness Mone and others.

[51] We note that in *McSparran McCormick*, Lady Dorrian found (at para 35) that the Commission had erred in law in concluding that there could be no complaint where a solicitor wrote a letter in accordance with his client's instructions when it comes to inferences of fact or law. A client's say so is insufficient to found imputations of dishonesty unless the solicitor can conclude that on a reasonable interpretation of the facts that it would be reasonable to draw an inference of dishonesty. Lord Drummond Young explained, at

para 47, that where a complaint is made about a solicitor's letter on behalf of a client, the seriousness of any allegations made must be considered:

> "… If the allegations amount to criminal conduct, or significant moral turpitude, the solicitor writing the letter should not merely take his client's contentions at face value, but should ensure that some evidence exists to support them. The reason for this is obvious: the graver the allegation that is made, the more care should be taken before making it…"

His Lordship distinguished this from the position in *LSS* v *SLCC*. He went on, at para 48, to make a similar point to that made by Lady Dorrian about the distinction between assertions of fact and inferences of law. He identified a need for critical scrutiny of facts before giving advice about the legal position, "especially if the inference involves criminal or seriously unethical conduct."

At para 56, Lord Malcolm explained,

> "While it is true that a solicitor can act only on the instructions of a client, there is no absolute obligation to do so whatever the circumstances. It is not difficult to think of cases where it would be wrong to do so. It is of the essence of being an independent professional person that duties are owed to interests beyond that of the client and the solicitor's own business…"

Before adding at para 60,

> "A solicitor is not under a general duty to report any and all allegations made by a client. There will be cases when it is necessary to ask: What is the proper professional course of action? Sometimes this may be to refrain from the worst inference, especially in respect of an allegation such as fraud, unless there is clear evidence in support of it. This is in line with the discussion in Paterson and Ritchie, *Law Practice and Conduct for Solicitors* (para 12.09)."

[52] In any event it seems likely that complaints 5-12 will be capable of resolution without recourse to privileged material. They focus on the content and tone of Mr McKie's emails to the Guardian. Mr McKie accused a journalist of apparent motives appearing to be entirely malevolent, pursuing an improper agenda against his client, seeking to damage her reputation unfairly without factual or legal justification. He accused him of reaching a

clumsily compiled nefarious interpretation and a vexatious interpretation. He accused him of having "dominant improper motives against our client." This came against a background of the Guardian having informed Mr McKie in December 2021 of some of their source material. The journalist told him of further source material in some detail in March 2022 and Mr McKie immediately responded on 18 March 2022 with the emailed letter founding complaints 9-12. In doing so he threatened legal action for defamation and may be considered to have been seeking to inhibit a journalist from publishing material for which there was at least some vouching.

[53] Stressing that it is entirely a matter for the LSS, a possible outcome of complaints 5-12 may be that the LSS may conclude that, in the circumstances of Mr McKie having been informed of the sources of information supporting the journalist's proposed articles, the proper course was to restrict his response to an assertion of the client's position. It would not be necessary to know exactly what passed between Mr McKie and his former client before reaching such a conclusion.

[54] Having considered all of the submissions alongside the Commission's clear, careful and coherent analysis, we are not persuaded on any or all of the grounds of appeal that the Commission erred in reaching the conclusions it did. The appeal is refused.