



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 54
P58/22

Lord Justice Clerk
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT (No. 2)

delivered by LORD MALCOLM

in the Petition of

by

THE SCOTTISH LEGAL COMPLAINTS COMMISSION

Petitioners

against

(1) DONALD RODERICK MURRAY and (2) JAMES ANTHONY McCUSKER

Respondents

and

THE FACULTY OF ADVOCATES and LAW SOCIETY OF SCOTLAND

Interveners

Petitioners: CO'Neill KC, soladv; Harper Macleod LLP

Respondents: Whyte; TC Young LLP

Interveners: Dean of Faculty; Balfour & Manson LLP

9 December 2022

[1] In its opinion dated 11 October 2022, [2022] CSIH 46, the court held that section 17 of the Legal Profession and Legal Aid (Scotland) Act 2007 did not entitle the Scottish Legal

Complaints Commission to recover material subject to legal professional privilege. The case has been put out by order to resolve any further issues.

[2] The Commission has moved the court to ordain the respondent solicitors to produce and deliver the file originally sought under exception of such material as is subject to said privilege. The solicitors submit that the order should expressly be confined to such material as is relevant to the complaint under investigation.

[3] The interveners (The Faculty of Advocates and the Law Society of Scotland) made submissions aimed at the wider issue of whether a notice served under section 17 obliges the recipient to deliver material which is subject to a solicitor's general duty of confidentiality regarding the client's affairs. It was submitted that only a court order would have that effect. Furthermore a solicitor should not be required to produce material other than that relevant to the specific complaint.

[4] The full circumstances of the case are set out in the earlier opinion and need not be repeated. In recognition that matters of general importance for not only lawyers but also for regulators of other professions arise, the court now records its views.

[5] The court adheres to the terms of the earlier opinion at paras [27]-[28]. In particular, while privileged material has a special status, the residual duty of confidentiality can be overcome in the public interest. There is a public interest in complaints against practitioners being fully and properly investigated, hence the Commission has been given certain statutory powers in this regard. These include the power under section 17 to require practitioners to deliver documents in their possession which relate to the complaint. If the Commission is not satisfied with the response it can seek an order from the court (schedule 2 para 1).

[6] The Commission is invested with a discretion as to which documents it sets out in a section 17 notice, including as to which it considers relate to the complaint. Here the Commission has decided that it needs to see the file relating to the work carried out. The challenge to that decision was limited to the apparent obligation to give up legally privileged material, and the court has ruled thereon in favour of the solicitors. There was no suggestion that the notice was flawed in that it sought material which did not relate to the complaint. We are not persuaded that the court's order should be qualified as suggested by the solicitors. That would place the decision on relevance in the hands of those subject to the complaint. That would be an odd state of affairs.

[7] On the matter of general principle raised by the interveners, service of a section 17 notice relieves the practitioner of the general duty of confidentiality. This is in accordance with the words used in the legislation and with the regulatory regime as a whole. We are not persuaded that anything said elsewhere in the Act or at stage 3 of the bill justifies a different outcome. There is no need for a court order before such a duty is overridden. For the avoidance of doubt we repeat that legal professional privilege is in a special position.

[8] We shall make an order in the terms sought by the Commission. Before leaving the matter we wish to say that the court expects the Commission and practitioners to act in a co-operative manner when issues of this kind arise. For example, if a solicitor subject to a third party complaint considers that the Commission is seeking material unrelated to the complaint or is trespassing on legally privileged material, there should be a professional discussion of the issues with a view to identifying a satisfactory method of resolving the situation which balances the client's and the Commission's respective interests. Section 17 notices, and even more so court proceedings, should be exceptional.