EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 45
XA101/17

Lady Paton
Lord Menzies
Lord Glennie

OPINION OF THE COURT

delivered by LADY PATON

in the appeal by

STANLEY F MAZUR

Appellant

against

THE SCOTTISH LEGAL COMPLAINTS COMMISSION (SLCC)

Respondent

Appellant: Party
Respondent: Barne QC; Anderson Strathern LLP

5 July 2018

Complaint against a solicitor

[1] In November 2005 the appellant, acting on the advice of a solicitor AB, allowed himself to be sequestrated. In November 2008 he was automatically discharged, although the sequestration was not finalised until early 2010. The appellant's position is that, as a result of being sequestrated, he suffered considerable financial loss and also damage to his reputation and credit. He has since been involved in several related litigations and complaint procedures.

[2] On 20 September 2016, the appellant lodged a complaint against a different solicitor CD with the Scottish Legal Complaints Commission (SLCC). The complaint, as agreed between the SLCC and the appellant and set out in paragraph 1.2 of the SLCC's determination dated 19 May 2017, was as follows:

> "Mr [CD] lied in his evidence during a proof at Perth Sheriff Court on 20 and 21 June 2016 in that he stated to the court that [the appellant] did not instruct him in relation to [the appellant's] sequestration in January 2009."

In a letter dated 20 February 2017, referred to in paragraph 2.3 of the determination, the appellant stated that he had instructed CD in January 2009 "in order to prevent … the sequestration". In his application for leave to appeal to this court, the appellant further stated (under heading 2.11) that "for eight months of [CD] acting on my behalf, he could have stopped the sequestration during that time, but failed to do so". The appellant's position is that CD lied about this matter during a solicitors' debt recovery action in which CD's then firm sought to recover outstanding fees owed by the appellant. CD had lied in that he had denied carrying out work concerning the appellant's sequestration from January 2009 onwards.

[3] As required by section 2(4) of the Legal Profession and Legal Aid (Scotland) Act 2007, the SLCC had to consider whether the complaint was "frivolous, vexatious or totally without merit". In its determination dated 19 May 2017, the SLCC set out the history of the case and the facts found proved, and continued:

> "2.14 This means that [CD] would be obliged under Rule B1.2 and Rule B1.13.1 to ensure that he did not mislead or perjure the court. The SLCC note that the case was heard before a Sheriff as an independent arbiter, hearing all the facts and evidence and thereafter making a decision. The SLCC note that Sheriff Tait heard evidence from both parties to the action as well as considering physical evidence provided by both parties. Sheriff Tait preferred the evidence given by [CD]. Furthermore, the Appeal Sheriff came to the conclusion that there had been no error by Sheriff Tait.

2.15 The SLCC is not an alternative to court action, nor is it within its functions to overturn a court decision or to decide on the truthfulness or otherwise of evidence given. The SLCC is also aware that perjury is a criminal offence and falls under the jurisdiction of Police Scotland. The SLCC has given consideration to the history of this complaint and also to the previous complaints made by Mr Mazur against [CD] and is of the view that the current complaint has been made as a result of the ongoing conflict between Mr Mazur and [CD] relating to outstanding fees and expenses awarded by the court. The SLCC can, in determining the eligibility of a complaint, classify issues as frivolous, vexatious or totally without merit in terms of section 2 of the 2007 Act. In particular, complaints which show characteristics of vexatiousness are noted to have been made with the intention to cause trouble or annoyance for the practitioner as well as being made in bad faith or for an ulterior motive. The SLCC believes that the intention of Mr Mazur in raising this complaint stems from this conflict and is motivated by vexatiousness.

2.16 Accordingly, the SLCC has determined that issue 1 of the complaint is vexatious and accordingly not eligible for investigation.

Determination under section 2(4)

The SLCC has determined that:

Issue 1 is vexatious and accordingly, not eligible for investigation."

[4] The appellant appeals against that determination.

The appellant's application for leave to appeal

[5] The appellant lodged a detailed 5-page document (Form 40.2) seeking leave to appeal. On 29 November 2017, leave was granted by Lord Malcolm, with an accompanying note focusing the issues arising. That note was in the following terms:

> "This note relates to Mr Stanley Mazur's application for leave to appeal to the Court of Session against a decision of the Scottish Legal Complaints Commission (the Commission) to reject his complaint about his former solicitor, which was to the effect that he lied under oath to the sheriff at Perth, on the ground that it is vexatious in terms of section 2(4)(a) of the 2007 Act. But for that, the complaint would have been passed to the Law Society of Scotland for investigation and determination. As per the definition in The Shorter Oxford Dictionary, a "vexatious" complaint has two elements, namely (i) it is brought without sufficient grounds, and (ii) it is motivated purely by a desire to cause trouble or annoyance to the person named in the complaint.

> Given the terms of its determination, it is clear that the Commission was unimpressed by the supporting information provided by Mr Mazur, and, at the hearing on the application, the submissions for the Commission concentrated on an alleged lack of substance in the complaint. However there was no finding or determination by the Commission that the complaint is without merit. The sole ground of rejection was that it is vexatious.
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> The finding of vexatiousness was made on the basis of the factors set out at paragraph 2.15 of the determination. With regard to the first, it is not explained why the complaint ought to be pursued in the courts. With regard to another factor relied upon, plainly the Commission cannot overturn a decision of the court, but, on the face of it, it is not being asked to do so. As to others, it is not clear why a complaint cannot involve alleged perjury, nor why the potential jurisdiction of the police is a bar. In any event it might be asked: in what respect do any of the matters mentioned at the outset of paragraph 2.15 point to vexatiousness on the part of Mr Mazur?
>
> In paragraph 2.15 reference is then made to the history of the complaint; to other complaints made by Mr Mazur; and to an ongoing conflict between him and [CD]. (It can be noted that an earlier complaint was upheld.) Again it is not explained why any of this points to a finding of vexatiousness in the sense of a groundless complaint pursued because of a dishonourable ulterior motive.
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> In the view of the court, it is at least arguable that, without further specification or explanation, the factors relied upon by the Commission do not support a determination of vexatiousness. The court puts it no higher than that, and it makes no prediction as to the likely outcome when the merits of the appeal come to be decided. That said, it is considered that the chances of success for the applicant in overturning the finding of vexatiousness are sufficient to warrant the grant of leave to appeal to the Court of Session in respect of the grounds specified by Mr Mazur in his application."

[6] The appellant's grounds of appeal in effect adopted or reflected the issues identified by Lord Malcolm, and were in the following terms:

> "1. With regard to the first, it is not explained why the complaint ought to be pursued in the courts.
>
> 2. In the view of the court it is at least arguable that without further specification or explanation, the factors relied upon by the SLCC do not support a determination of vexatiousness.
>
> Question of law for the opinion of the court.
> To determine whether or not it is frivolous and vexatious or totally without merit."

[7] At a further procedural hearing before Lord Glennie on 20 April 2018, the appellant

and counsel for the SLCC confirmed that the two issues outlined by Lord Malcolm, reflected in the grounds of appeal, were the matters to be considered by the appeal court.

[8] At the appeal hearing before us on 8 May 2018, the appellant stated that his appeal was in terms of section 21(4)(d) of the 2007 Act, namely "the Commission's decision [is] not supported by the facts found to be established by the Commission".

The appellant's submissions in the appeal

[9] In oral submissions, the appellant made further allegations about CD directed at showing further inaccuracies or untruths. However we shall focus upon the specific complaint as agreed between the SLCC and the appellant, and the issues outlined by Lord Malcolm as reflected in the grounds of appeal.

[10] The appellant submitted that certain correspondence, particularly a copy letter dated 26 January 2009, demonstrated that CD had been instructed by the appellant shortly after New Year 2009 (ie January 2009, not March 2009) to "stop" or "undo" his sequestration. As the appellant put it in paragraph 4.2 of his application for leave to appeal:

> "[CD] was believed by Sheriff Tait when he swore that he was not under instruction to halt my sequestration. Indeed there is no record of work charged for from January 2009 in his fee notes. This is a fabrication. The appellant is producing documents clearly showing [CD] at work. It suited [CD] to make the appellant bankrupt and allow fellow solicitors to benefit from the appellant's sequestration, then falsify his fee notes."

The appellant explained that in January 2009 he had also instructed CD to raise a professional negligence claim against AB.

[11] Before us, the appellant referred to certain documents contained in his appendix, and submitted that they demonstrated that CD had been instructed in January 2009 (not March 2009) to carry out work for the appellant in relation to his sequestration. A letter of claim,

admittedly relating to the professional negligence claim against AB, was dated 26 January 2009, showing that CD had been instructed in January 2009. Also there were several letters and emails addressed to the trustee in bankruptcy (or his assistants) and responses from them, showing that work in the sequestration was being carried out. However the fee-note or "agent-and-client account" which was the subject of the action in Perth Sheriff Court began with a consultation on 5 March 2009, with no mention of the January instruction. Nor were there any entries connected with sequestration work. The fee-note had been falsified, fabricated, doctored and redrawn in order to conceal the date of the initial instruction in January, and to exclude work done in connection with the sequestration. When giving evidence about the fee-note in Perth Sheriff Court, CD had lied in that he had denied carrying out professional services for the appellant in sequestration matters from January 2009 onwards.

[12] The appellant further submitted that he had a valid complaint against CD, and that the SLCC had no basis for rejecting the complaint as vexatious. "Vexatious" was a particularly annoying term, when it was CD who was clearly in the wrong. The appellant stated that, in the present appeal to the Court of Session, he did not seek monetary compensation, but wished to clear his name, to have the "vexatious" tag quashed, and to be vindicated in his valid complaint against CD. Following upon the appeal hearing, the appellant provided the court with an email dated 11 May 2018 explaining why he had withdrawn his opposition to the adjudication of claims in the sequestration, and in particular attributing responsibility therefor to CD.

Submissions for the respondent in the appeal

[13] Senior counsel submitted that the determination should be read as a whole. To focus

solely on paragraph 2.15, as had been done at the stage of leave to appeal, was too narrow an approach. The SLCC's decision was based on certain facts, which counsel enumerated. On the basis of those facts, the SLCC was entitled to reach the conclusion it had. The copy of the letter dated 26 January provided to the SLCC had a manuscript alteration of the year "2009" to "2010". The fee-note which had been the basis of the action in Perth Sheriff Court related solely to services rendered in respect of the professional negligence claim, and the first entry in the fee-note was dated 5 March 2009. The pleadings and the fee-note did not cover any other matter (such as sequestration): hence the sheriff's ruling preventing any line of questioning going beyond the pleadings. The appellant was trying, inappropriately, to re-litigate an issue which had been decided upon by the courts, without any factual basis for doing so. A decision that the appellant's complaint was "totally without merit" had also been open to the SLCC. But in the absence of any evidence to support an allegation of perjury, the SLCC was entitled to find the complaint vexatious, being tantamount to an abuse of process. Applying an objective test, bad faith could be inferred from the surrounding facts and circumstances. In particular bad faith could be inferred from the spurious nature of the allegations; the lack of any practical result from the complaint; the re-raising of issues decided in earlier litigations; and the prior history between the parties. The word "believes" in the last sentence of paragraph 2.15 of the SLCC's determination should be read as a synonym for "infers".

The role of the appeal court in an appeal from a determination of the SLCC

[14] The grounds of appeal available from a determination of the SLCC are set out in section 21(4) of the 2007 Act as follows:

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

(b) that there has been a procedural impropriety in the conduct of any hearing by the Commission on the complaint;
(c) that the Commission has acted irrationally in the exercise of its discretion;
(d) that the Commission's decision was not supported by the facts found to be established by the Commission."

[15] In the present case, the appellant confirmed that his appeal was based on section 21(4)(d) – the decision was not supported by the facts found to be established by the SLCC.

Discussion and decision

[16] We deal first with the facts found to be established by the SLCC. They included the following (references being to paragraphs in the determination):

- The appellant was sequestrated on 28 November 2005 [2.2]. He was automatically discharged on 14 November 2008 [2.11].
- The appellant consulted CD on 5 March 2009 [2.4] "in relation to various matters, including the raising of a negligence case against another solicitor" [1.1]. This finding-in-fact echoed Sheriff Tait's finding-in-fact 5 that CD worked for the appellant from March 2009 to October 2012. It also matched the fee-note which was the basis of the sheriff court action.
- In the context of the professional negligence case, CD *inter alia* drafted and sent a claim letter to AB in January 2010 (not January 2009) [2.4, 2.6].
- In 2016, the appellant was the defender in a sheriff court action for non-payment of legal fees owed to CD, by then a consultant with another firm. The action (and the fee-note upon which the action was based) related solely to the services rendered by CD in respect of the professional negligence case, and not to any services which might have been rendered in respect of the appellant's

sequestration. A proof in the action took place in Perth Sheriff Court in June 2016 [1.1, 2.7].

- In the course of the proof, the appellant cross-examined CD, and sought to ask him *inter alia* about services rendered in respect of the sequestration. That line of questioning was objected to as irrelevant in the context of an action for payment of fees for the professional negligence case (tab 12 of the appellant's appendix, page 21 of the excerpt transcript of evidence). The sheriff sustained the objection, and ruled that the appellant could not pursue that line [2.7]. As the sheriff noted at page 6 of her judgment:

> "The Defender did seek to introduce in his cross-examination a line of defence that the Pursuers had failed to implement his instruction to seek recall of his sequestration. Any such line was objected to on the basis that it formed no part of the Defender's case as pled and there was no fair notice. I upheld the objection. The Defender had to be reminded on a number of occasions of the limits of his defence as pled and he ultimately represented that as not being allowed to refer to his sequestration. I made it clear to the Defender that he could refer to his sequestration but not to a failure by the Pursuers, for which there was no record, to seek recall of his sequestration."

- Ultimately, when assessing the evidence, the sheriff made the following observations at page 15 of her judgment:

> "While this is not a case which has been determined on an assessment of the witnesses, I should note that I did not form the impression that either [CD] or [the appellant] sought to mislead the court. Both were credible. I found [CD] to be a straightforward historian. I found him to be reliable.
>
> My criticism of [the appellant's] evidence is that he held firmly to the belief that he had been wronged by [CD's] acceptance of the tender and was unable or unwilling to acknowledge that professional services had been provided which had value in the circumstances where he had been compensated separately for the pursuers' professional negligence. His dogmatic rejection of the pursuers' present claim seems to mirror to an extent his insistence in the original action that he would accept nothing less than the £40,000 craved. [The appellant's] approach may be considered to lack measure and to be somewhat unrealistic."

> The sheriff decided against the appellant and granted decree for the outstanding fees. That decision was upheld on appeal [2.14]. The SLCC observes that it does not have the power to change that outcome [2.15].

[17] On the basis of these facts, found to be established by the SLCC, the SLCC was, in our opinion, entitled to conclude that there was no basis for the complaint that:

> "[CD] lied in his evidence … in that he stated to the court that the appellant did not instruct him in relation to [the appellant's] sequestration in January 2009"

[18] Before this court, the appellant in effect sought to challenge some of the facts found by the SLCC. For example, he maintained that he had instructed CD in January 2009, not March 2009. He stated that the claim letter to AB was sent in January 2009, not January 2010. In relation to CD's evidence in Perth Sheriff Court, the appellant had obtained certain excerpts from the transcript of evidence, and referred to those excerpts, seeking to demonstrate the false denial complained of.

[19] Our opinion in relation to this challenge is as follows.

[20] First, we consider that section 21(4)(d) of the 2007 Act does not permit any challenge to the facts found established by the SLCC: the sole question is whether the Commission's decision "was not supported by the facts found to be established by the Commission." As already noted above, we consider that, on the basis of the facts found to be established by the SLCC, the SLCC was entitled to conclude that there was no basis for the appellant's complaint.

[21] Secondly, even if we were entitled to entertain a challenge to the facts found by the SLCC, the material placed before us, including Sheriff Tait's decision, the claim letter and fee-note in the professional negligence case, and excerpts from the transcript of evidence, satisfied us that the SLCC was entitled to find the facts it did. For example, we are unable to

accept the appellant's bare assertion that the fee-note was fabricated in order to support CD's lie that the appellant "did not instruct him in relation to [the appellant's] sequestration in January 2009". To establish such a serious allegation, we would require convincing evidence. No such evidence was produced. Similarly, we are not persuaded that CD's claim letter to AB was sent in January 2009: CD's evidence (which the sheriff found credible, reliable, and straightforward) together with the fee-note and the SLCC's copy of the letter dated 26 January which bore a manuscript alteration of the date (suggestive of a "start-of-the-year" error as to the correct year), entitled both the SLCC and this court to conclude that the letter was sent in January 2010. Moreover, in the context of the date when the letter was compiled and sent, senior counsel for the respondent referred us to a copy email dated 22 January 2010, lodged in the appeal process without objection and numbered 28 of process. The email bore to be from CD to the appellant, attaching a draft letter of claim addressed to AB and dated 22 January, to be discussed at a meeting with the appellant. In the email, CD apologised for the delay in producing the draft. The appellant's handwritten comment appears at the top of the email (and before us, the appellant accepted that the writing was his). The comment is "Tardy. Almost 1 year from instructing [CD]". That email with the handwritten comment supported the drafting and sending of the claim letter in January 2010, and not in January 2009. As for the excerpts from the transcript of evidence in the sheriff court, we have carefully examined these, but have found no lying assertion by CD such as is referred to by the appellant.

[22] In the result therefore we have not been persuaded that the SLCC erred in concluding that there was no merit in the appellant's complaint that:

> "[CD] lied in his evidence … in that he stated to the court that the appellant did not instruct him in relation to [the appellant's] sequestration in January 2009".

We therefore agree with senior counsel that the SLCC, on the facts found, would have been entitled to find that the complaint was "totally without merit" (section 2(4)(a) of the 2007 Act). However the SLCC determined that the complaint was "vexatious". The appellant challenges that decision.

[23] "As a matter of ordinary language, the term "vexatious" is apt to characterise an action, claim, accusation, or complaint, which has been –

> "… instituted or taken without sufficient grounds, purely to cause trouble or annoyance to the defendant (Oxford English Dictionary)"

A similar definition can be found in Chambers Dictionary, being an action etc –

> "… brought on insufficient grounds, with the intention merely of annoying the defendant."

Those definitions include references to the motive of the person making the vexatious claim. However the term "vexatious" has a different meaning when used in certain specific legal contexts, of which this case is an example. In such cases, it is unnecessary to consider the motive of the person making the complaint. Authoritative guidance has been given by the courts as to the proper approach in law to be adopted by a decision-maker when assessing whether or not an action, claim, accusation or complaint is "vexatious". In *Bhamjee* v *Forsdick* [2004] 1 WLR 88, the Court of Appeal explained in paragraph [7]:

> "7 The courts have traditionally described the bringing of hopeless actions and applications as 'vexatious', although this adjective no longer appears in the Civil Procedure Rules: compare RSC Ord 18, r 19(r)(b) with CPR r 3.4(2). In *Attorney General v Barker* [2000] 1 FLR 759 Lord Bingham of Cornhill CJ, with whom Klevan J agreed, said, at p 764, para 19, that 'vexatious' was a familiar term in legal parlance. He added:
>
> > 'The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different

from the ordinary and proper use of the court process.'"

This approach has been accepted as applying in Scotland (*Lord Advocate* v *McNamara* 2009 SC 598, paragraph [31] *et seq*).

[24] In the light of that guidance, it is clear that the test of a vexatious claim is an objective one, which can be satisfied by an assessment of all the facts and circumstances (cf *Lord Advocate* v *McNamara* 2009 SC 598 at paragraph 31 *et seq*). It is not necessary to establish the subjective motive of the instigator of the claim, although in some cases, such motive may emerge from evidence about the circumstances. It is also clear that the question whether a complaint should be categorised as "vexatious" is one which might reasonably result in different views being taken by reasonable decision-makers. The only question for this court is whether no reasonable tribunal such as the SLCC could, on the information before it, reasonably have reached the conclusion it did.

[25] As noted earlier in this opinion:

- The complaint was unsupported by any evidence other than (i) a letter apparently dated 26 January 2009 but changed in manuscript to 2010, suggestive of a "start-of-the-year" typing error; (ii) the assertions of the appellant concerning an alleged lie on the part of CD and a falsified fee-note.
- The complaint sought to re-litigate matters which had been adjudicated upon by the sheriff court and the Sheriff Appeal Court, in particular the question of the credibility and reliability of CD, and the authenticity, accuracy, and enforceability of the fee-note which was the subject of that litigation. It was in this context that the SLCC pointed out in paragraph 2.15 of its determination that its powers and functions did not include overturning a court's decision, or

deciding on the truthfulness or otherwise of evidence previously given in court and adjudicated upon.

- The complaint did not outline a case which was stateable, either in fact or law.
- The complaint was made against a history of disagreements and confrontations between the appellant and CD, a factor which the SLCC was entitled to take into account when considering the whole circumstances.
- The complaint would involve CD in further adversarial procedure, taking up time and resources, and causing anxiety and upset.

[26] As explained by Lord Bingham in *Attorney General* v *Barker* [2000] 1 FLR 759:

> "The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

Thus it is neither necessary nor appropriate for a decision-maker such as the SLCC or the Court of Session to ascertain the actual motive underlying the proceedings brought. The relevant test is truly an objective one, without any subjective component.

[27] Applying that guidance to the present case, it cannot in our view be said that the SLCC was not entitled to conclude that the complaint was "vexatious". Whilst others might have categorised the complaint differently, (for example, as being "totally without merit") it does not follow that the SLCC was not entitled, on the material before it, including the matters noted in the bullet points in paragraph [25] above, reasonably to categorise the complaint as "vexatious". Viewed objectively, all the criteria desiderated by Lord Bingham were satisfied. In reaching its determination dated 19 May 2017, the SLCC did not indicate that the complaint "ought to be pursued in the courts". Rather the SLCC pointed out the

limitations of its own powers and functions (paragraph 2.15). The SLCC's reference to perjury and potential police involvement was intended, in our view, to emphasise the serious nature of perjury and the gravity of the complaint made. None of the observations of the SLCC in paragraphs 2.14 to 2.16 detracted from the SLCC's entitlement, on the basis of the material before it, to conclude that the complaint was vexatious.

[28] In the result we refuse the appeal. We continue any question of expenses.