



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 27  
XA95/18

Lord Menzies

OPINION OF THE COURT

delivered by LORD MENZIES

in the Application for Leave to Appeal

by

JOHN GORDON INNES

Applicant

against

SCOTTISH LEGAL COMPLAINTS COMMISSION

Respondent

**Appellant: Party**

**Respondent: Watt, (sol adv); Brodies LLP**

9 April 2019

[1] This is an application to this court under section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007, for leave to appeal against a decision of the Scottish Legal Complaints Commission dated 25 September 2018.

[2] That decision determined that the two issues of complaint raised by the applicant, Mr Innes, against Ms Joanne Gillies of Pinsent Masons LLP on a complaint form received by the SLCC on 12 February 2018 were each time barred in terms of Rule 7 of the Rules of the

Scottish Legal Complaints Commission 2016 (amended December 2016) and that none of the three factors listed in Rule 7(4) applied.

[3] By reason of section 4(1) of the 2007 Act, the SLCC was therefore required not to take any further action in relation to the complaint. Apart from such investigation as was necessary for the Commission to perform its sifting function with regard to time bar, there has therefore been no investigation into the substance of the applicant's complaints.

[4] These complaints comprised two issues which are set out in full at paragraph 1.3 of the decision. These are stated in the decision to have been agreed with the applicant and there is no suggestion that they were not so agreed. Both issues related to the conduct of Ms Gillies and/or Pinsent Masons in a litigation raised by the applicant against an individual, Mr X, in respect of a written guarantee to repurchase shares and repayment of a bank loan in which litigation Ms Gillies and/or Pinsent Masons acted on behalf of the defender (ie the applicant's opponent).

[5] The first issue was stated in the following terms:

"Ms Gillies and/or Pinsent Masons LLP acted in a conflict of interest as they acted against me, an established client of the firm, and argued against a contract which was created by them dated November 2008."

[6] The second issue was stated to be that Ms Gillies and/or Pinsent Masons LLP inaccurately provided false statements of fact during the court action in eleven specified respects. Each of these individual respects, which are set out in the decision, relates to denials made in the course of the defences lodged as part of the written pleadings in the court action. The applicant was unsuccessful in that action, the action being dismissed after debate on the relevancy of the applicant's pleadings. He sought leave to appeal to the Court of Session but leave was refused on 11 November 2015.

[7] The Commission considered each of these issues separately but its reasoning in respect of each was essentially the same. It reached the preliminary view that the alleged occurrence of professional misconduct occurred prior to 11 November 2015 as this was the date on which the applicant's application for leave to appeal was refused and that the applicant would have known about or should reasonably have been aware of each issue before November 2015 as Ms Gillies and the firm were representing the defender prior to this date. The Commission sought comments on its preliminary view. Unsurprisingly the firm agreed with it and the applicant disagreed with it. In his letter responding to the Commission's preliminary view dated 24 July 2018, he argued that Ms Gillies' involvement continued after November 2015. In particular he stated that she "acted to obstruct" an appeal to the Supreme Court on 4 February 2016 and she instituted bankruptcy proceedings against the applicant in order to recover an award of judicial expenses, which proceedings were ongoing in September or October 2017.

[8] The SLCC considered the applicant's and the firm's responses and concluded that the applicant would have been aware of both issues of complaint prior to November 2015. The relevant date for the consideration of a conduct complaint was the date on which the conduct complained of occurred. It went on to consider whether there were any exceptional reasons why the complaint was not made sooner but the applicant provided no information in this regard in relation to either issue and the Commission itself could not identify any exceptional reasons.

[9] The Commission went on to consider whether there were any exceptional circumstances relating to the nature of either or both issues of complaint and concluded that there were none. Finally, It considered whether it would be in the public interest to proceed with considering either or both issues of complaint, despite their being made outwith time

limits. Despite the applicant's submissions to the contrary, the Commission concluded that both issues of complaint related specifically to this transaction and there was no indication of a wider impact on members of the public. There was no other information available which represented circumstances which indicated it would be in the public interest to proceed.

[10] The applicant may only proceed with an appeal to this court against a decision of the Commission with the leave of this court in terms of section 21 of the 2007 Act and may do so only on any ground set out in sub-section (4) of that section. The test to be applied in an application for leave to appeal is whether the appeal has a real (or realistic) prospect of success or whether there is some other compelling reason why it should be heard - *Williams v SLCC* 2010 CSIH 73, *Mathews v SLCC* 2015 CSIH 68. It is for the applicant to satisfy the court that this test is met - *B v SLCC* 2016 CSIH 48. The question which must be answered in favour of the applicant if he is to succeed was put as follows in a recent decision of this court (*X LLP v SLCC* 2017 CSIH 73):

“Is it arguable, or is there a reasonable prospect of persuading a court, that the Commission went so wrong that its error must be categorised as an error of law or that it exercised its discretion irrationally?”

[11] There was a flavour in some of the applicant's written and oral submissions to the court of an argument based on irrationality, and Mr Innes indicated that he regarded the Commission's determination on whether it was in the public interest that his complaint should be investigated as irrational. In this regard it should be understood that for a decision of a public body such as the Commission to be irrational in law, the test is not simply that the applicant or indeed an interested member of the public regards it as irrational. Irrationality in this context has a more demanding and more objective meaning in law. As the court observed in *B v SLCC* at paragraph 9, the question is:

“Can it be said to have been a determination which no reasonable body properly instructed on the information available to them and applying the law correctly could have reached?”

[12] In considering the question of time limits and in particular when addressing the circumstances in which time limits may be extended, the Commission is exercising a gatekeeping or sifting function which has been entrusted to it by Parliament. It is important to keep in mind what this court has said in this regard in the past. Mr Innes drew the court’s attention to the Opinion of the Court delivered by Lord Carloway in *Murnin v SLCC* 2013 SC 97 at paragraph 30 and I have had regard to that, but it is important to bear in mind also what the court said at paragraph 31. This is, I consider, worth repeating here in full:

“The first respondents are a specialist body to whom Parliament has given the power, under the 2007 Act, to sift complaints against solicitors. Parliament has given them a specific power to make rules concerning their procedures and, in particular, to set time limits for the making of complaints and the circumstances in which these time limits may be extended (2007 Act, section 32(1), Schedule 3 para 2). The first respondents have introduced a general rule that they will not accept complaints which are older than a year unless they consider that there are circumstances which they consider to be exceptional. It is, in the first instance, for the first respondents to determine what circumstances fall into the category of ‘exceptional’, bearing in mind the definition of that term as an ordinary English adjective (see *R v Kelly* Lord Bingham CJ (page 208)). In order to have an appreciation of what is exceptional, it is necessary to know what is common or normal. As the specialist body seeing all the complaints, ranging from the frivolous to the most grave, the first respondents are in the best position to gauge when a complaint fits into the exceptional category such that, in the public interest, it should be considered even if not made in time. The first respondents must be accorded a degree of institutional respect by the court in taking decisions in this area of competence.”

[13] Having regard to the two issues of complaint set out in the decision letter and according the Commission the degree of institutional respect to which reference has been made, I cannot see that any of the four grounds referred to in section 21(4) can possibly apply in the present case.

[14] I am not persuaded that the applicant has a real (or realistic) prospect of success in persuading a court that the Commission’s determination in relation to its sifting function

regarding time limits was based on any error of law. The Commission addressed itself to the correct legal test and concluded that all the specific complaints made by the applicant related to conduct alleged to have occurred in the course of the court action brought by him against Mr X which concluded at the latest in November 2015. I can find no error of law in this conclusion.

[15] Mr Innes submitted that Ms Gillies and/or Pinsent Masons continued to act after November 2015 and in particular acted against him in the bankruptcy proceedings which post-dated that date. However, these were different proceedings concerned with a quite different remedy, namely the enforcement and recovery of an award of judicial expenses against Mr Innes. The actions of Ms Gillies and/or Pinsent Mason after November 2015 do not form part of the complaint about conduct.

[16] There is no suggestion of procedural impropriety by the Commission, nor can I find any from the papers before me. No part of the decision displays any irrationality in the exercise of the Commission's discretion - a discretion conferred on it as a specialist body by Parliament - and I can find no part of the Commission's decision which was not supported by the facts found to be established (to the extent that this ground is applicable to this application). The Commission found that the conduct complained of occurred before November 2015. The complaint to the Commission was received on 12 February 2018, well over two years after this date. Rule 7(1)(a) of the Commission's 2016 Rules provides that in such a situation a conduct complaint will not be accepted if, in the opinion of the Commission, it is made more than one year after the date of the professional misconduct or unsatisfactory professional conduct complained of. The Commission was entitled to reach the conclusion which it did on this point.

[17] The Commission then quite properly went on to consider whether it should accept the complaint notwithstanding that it was not made within the time limit, on the basis of any of the discretionary factors listed in Rule 7(4) of the 2016 Rules.

[18] The applicant did not identify any exceptional reasons why the complaint was not made sooner, either in his response to the Commission or before this court, and the Commission could find none. Similarly, the applicant provided no information about any exceptional circumstances relating to the nature of the complaint and the Commission could find none.

[19] Finally, the applicant suggested in his email of 24 July 2018 that the circumstances were such that he believed it would be in the public interest to review his complaint as Ms Gillies' "flagrant dishonesty and reckless disregard for the Law Society of Scotland's rules needs to be addressed and he believed that the firm needed to address their systems to ensure this does not occur again." The Commission disagreed and decided that both issues of complaint related specifically to this transaction and there was no indication of a wider impact on members of the public.

[20] I can find nothing in the exercise of the Commission's wide discretion on these three factors which could be described as perverse or irrational as I have already explained this term to mean. The Commission was entitled to reach the conclusions which it reached on each of them. It follows that I am not satisfied that this appeal has a real (or realistic) prospect of success nor can I find any other compelling reason why it should be heard.

[21] For these reasons, I refuse the present application.