



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 23

P429/19

OPINION OF LORD BRAILSFORD

In the Petition of

FRANCIS CANNON

Petitioner

for

Judicial Review

Respondent

Petitioner: G MacColl QC, McKinlay; Thorntons Law LLP

Respondents: Moynihan QC; Anderson Strathern LLP

28 February 2020

[1] The petitioner is a practising solicitor. He has been on the roll of solicitors in Scotland since August 1968. He is a member of a legal firm having a place of business in Glasgow. The compering respondent in the present petition is the Scottish Legal Complaints Commission (“SLCC”) statutory body established under the Legal Profession and Legal Aid (Scotland) Act 2007 (the “2007 Act”). In the present petition the petitioner seeks judicial review of certain acts of the respondent relating to a purported complaint made by and to the respondent against the petitioner in his capacity as a solicitor. The act giving rise to the present petition was a letter dated 24 April 2019. The petition was presented to the court on 13 May 2019. Permission to proceed was granted by interlocutor

of the Lord Ordinary dated 4 July 2019. The substantive hearing in the petition was held on 26 September 2019.

Factual background

[2] There was no dispute as to the relevant factual background. This was averred in paragraph 3 of the petition and, in all essential respects, admitted in the corresponding answer.

[3] By letter dated 24 April 2019 the respondent intimated to the petitioner that it had decided ex proprio motu to make a complaint in its own name in relation to the petitioner's involvement with a series of transactions in 2008/9¹. The heading of the letter was in the following terms "Complaint by Mr Neil Stevenson on behalf of the Scottish Legal Complaints Commission (in his capacity as Chief Executive)". The first paragraph of the letter was in the following terms: "The matters referred to in this complaint have been brought to the SLCC's attention by Police Scotland. The SLCC has taken the decision to ex proprio motu raise this complaint in its own name." The letter also purported to waive a statutory requirement of the 2007 Act, namely section 4(4) thereof which provides, inter alia, that a complaint is made prematurely where the complainer has not previously communicated the substance of it to the practitioner. The letter further concluded that the complaint was not time barred, on the basis that the SLCC had been "excusably unaware" of the matters which formed the subject matter of the complaint until December 2018².

¹ The letter of 24 April 2009 is produced and is no 6/1(1) of process.

² Section 4(3) of the 2007 Act and rule 7 of the Rules of the Scottish Legal Complaints Commission 2016.

Legal framework

[4] The SLCC is a statutory body created under and in terms of the 2007 Act.³ Section 2 of the 2007 Act makes provision for the receipt of complaints and preliminary steps that the SLCC must take on such receipt. Section 2(1) provides, inter alia;

“(1) This section applies where the Commission receives a complaint by or on behalf of any of the persons mentioned in subsection (2)—

(a) suggesting—

(i) professional misconduct or unsatisfactory professional conduct by a practitioner other than a firm of solicitors or an incorporated practice;

...

(a complaint suggesting any such matter being referred to in this Part as a ‘conduct complaint’);

...

(1A) The Commission must,

...

(a) determine whether the complaint constitutes—

(i) a conduct complaint,

...”

[5] Section 2(2) of the 2007 Act defines “persons” for the purposes of section 2(1). The subsection provides, inter alia,

“(2) The persons are—

(a) as respects a conduct complaint, any person;

...”

³ 2007 Act section 1(1).

[6] For the purposes of section 2 of the 2007 Act subsection 4 defines “preliminary steps” as follows;

“(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).”

[7] Section 4 makes provision for time limits in relation with which complaints should be dealt with. As already noted section 4(4) renders a complaint premature where the complainer has not previously communicated the substance of it to the practitioner. Section 6 makes provisions for determination of conduct complaints. Section 21 makes provision for appeal against decisions of the SLCC in respect of complaints in certain categories.

Petitioner’s submissions

[8] The primary submission on behalf of the petitioner was that the SLCC was not entitled to make a complaint to itself. Consequently the complaint intimated to the petition by letter dated 24 April 2019⁴ of process, which was in terms a complaint initiated by the SLCC, is invalid and of no effect. The SLCC was, quite simply, not entitled to determine the complaint or to appoint it to any further determination process. The reasoning behind the

⁴ 6/1(1)

submission was that the commission is a statutory body created under and in terms of the Act of 2007. Its powers are therefore both provided and circumscribed under and in terms of that Act. In terms neither the Act, nor rules made thereunder empower the SLCC to make any complaint to itself. By purporting to do that the respondents have acted ultra vires. It follows that the complaint is invalid and of no effect.

[9] Senior counsel for the petitioner developed the argument by noting that the respondents found upon the terms of section 2(2)(a), that the words therein “any person”, are sufficiently wide to permit it to make a conduct complaint to itself. This argument was characterised by senior counsel as “plainly misconceived”. In support of that contention senior counsel observed that the phrase “any person” in section 2(2)(a) contrasts with the prescribed list of persons who can bring a services complaint under section 2(2)(b). It was said that no natural or reasonable interpretation would extend the phrase to include the commission itself in section 2(2)(a). Moreover the phrase as used in section 2(2)(a) was said to refer back to section 2(1)(a) which expressly provides that the section applies where the SLCC “receives” a complaint “by or on behalf of any of the persons mentioned in subsection (2) ...” The use of the word “receives” was said to carry the necessary implication that the complaint came from outwith the SLCC.

[10] Beyond this senior counsel submitted that the 2007 Act fell to be interpreted in light of well-established common law principles of natural justice and, further, in conformity with principles of Article 6 ECHR. It was submitted that the respondents’ wholly literal interpretation of “any person” in section 2(2)(a) “fundamentally conflicts” with principles of natural justice and Article 6 ECHR.

[11] In relation to common law principles of natural justice it was said that in making a complaint to itself and purporting to determine that it had jurisdiction to adjudicate upon

that complaint the respondent had acted contrary to the rules of natural justice at common law. No party should act as a judge in its own interest. Any party so doing would plainly be apparently biased in its determination. Reliance was placed in relation to the standards to which quasi-judicial bodies, in which category the SLCC fell, must adhere to the dicta of the Lord President (Clyde) in *Barrs v British Wool Marketing Board*⁵ in the following terms:

“Although quasi-judicial bodies such as this Tribunal are not Courts of law in the full sense, it has always been the law of Scotland that they must conform to certain standards of fair play, and their failure to do so entitles a Court of law to reduce their decisions. Were this not so, such Tribunals would soon fall into public disrepute, and confidence in them would evaporate. Fair and equal opportunity afforded to all interests before the Tribunal is the fundamental basis upon which the Tribunal must operate, and, in the absence of such fair play to all, it is right and proper that a Court of law should reduce the Tribunal's decision.

...

It is important to observe the width of this principle. It is not a question of whether the Tribunal has arrived at a fair result; for in most cases that would involve an examination into the merits of the case, upon which the Tribunal is final. The question is whether the Tribunal has dealt fairly and equally with the parties before it in arriving at that result. The test is not ‘Has an unjust result been reached?’ but ‘Was there an opportunity afforded for injustice to be done?’. If there was such an opportunity, the decision cannot stand.”

[12] It was submitted that there would plainly be an opportunity for injustice to be done if the SLCC was entitled to make complaints to itself. It was further submitted that having regard to the circumstances of the present petition it can be seen from the content of the complaint letter of 24 April 2019⁶ that the SLCC has already purported to make determinations in its own interest, and without providing the petitioner with an opportunity to respond or comment, for example by waiving the requirement for the complaint to have been raised with the solicitor who was the subject of the complaint and that person being

⁵ 1957 SC72 at p82.

⁶ 6/1(1) of process.

given a reasonable opportunity to deal with the complaint and, further, in determining that the purported complaint was not time barred. It was pointed out that were the complaint allowed to proceed further determinations would require to be made by the SLCC.

[13] Senior counsel for the petitioner concluded this aspect of his argument by observing that the respondent's position is that it only has the power to refer conduct complaints to itself under section 2(2)(a) of the 2007 Act. Its position appeared to be to seek to found upon its role in conduct complaints being restricted to what was described as a "gatekeeper" function in relation to sections 2, 3 and 4 of the Act and that this was, in some way not explained, justification of the competence of it referring complaints to itself. This, it was submitted, was a plain infringement of the rules of natural justice which equally apply to any role which the SLCC may have in something which could be described as a "gatekeeper" function.

[14] Senior counsel presented a relatively brief argument under Article 6 of the ECHR to the effect that that provision precluded a person acting as both complainer and judge. In that context reliance was placed on observations of Lord Justice General Rodger (as he then was) in *Hoekstra v HMA*(2)⁷.

Respondent's submissions

[15] Senior counsel for the respondent initially explained the background which gave rise to the present position, a matter which he characterised as a "practical issue". He said that there have been a small number of instances of possible professional misconduct coming to the attention of the SLCC that are worthy of investigation but are not the subject of any

⁷ 2000 SLT605 at p610.

complaint from a member of the public or independent person. The SLCC initially took the view that it could not itself be a complainer in such circumstances, but that carried the risk that such instances might, by default, have to pass without any action being taken.

Accordingly in 2013, in the course of considering a number of potential changes to the 2007 Act, the SLCC drew to the attention of the Scottish Government this possible gap and suggested that there may be a need to amend the Act. It would seem, on the basis of what I was informed by senior counsel, that following discussions with the Scottish Government, details of which were quite properly not disclosed to this court, the view was taken that such an amendment was not required and that the legislation was drafted sufficiently widely to permit the commission to be a complainer in its own right. It would seem, again on what I was told by senior counsel, that the commission has acted on that basis since 2014.⁸ In relation to the so characterised “practical issue” I was further provided with certain brief information in relation to the background giving rise to the complaint. Senior counsel did not suggest that this information was incomplete. He appeared to accept that it would be inappropriate in the context of the present petition to provide full details of such information. His purpose in drawing these matters to my attention was simply to draw my attention to what he characterised as “potentially very serious professional misconduct”, and, further, to inform me that Police Scotland had not been willing to be a “complainer” in relation to the present petitioner in the context of the matters to which he had briefly drawn my attention.

[16] In relation to the question of interpretation of the relevant provisions of the 2007 Act senior counsel drew my attention to the distinction between a conduct complaint and a

⁸ See Paterson and Ritchie *“Law Practice and Conduct for Solicitors”* (2nd edition) 16.04.03, footnote 21.

services complaint. He noted that only limited categories of person as specified in section 2(2)(b) of the 2007 Act can make a services complaint. By contrast a conduct complaint can be made by “any person”. It was submitted that the lack of limitation on the class of person who may make a conduct complaint reflects the importance of the legislative aim of maintaining the reputation of the legal profession and sustaining public confidence in the profession. It was then submitted that consistently with promoting that aim the term “any person” can and should be understood to have no limitation. My attention was also drawn to schedule 1(12)(a) of the Act of 2007 which provided that the SLCC has power to;

“Do anything which appears to it to be necessary or expedient for the purpose of, or in connection with, or appears to be conducive to, the exercise of the commission’s functions.”

[17] In relation to the petitioner’s arguments in relation to natural justice and the principle that a decision maker should not be the judge in its own cause it was observed that that objection is not absolute. It was said that the principle does not apply in circumstances of necessity, where the decision maker is the only person competent to take the decision.⁹ That departure from the generality of the principle that a decision maker should not be judge in his own cause was said to be applicable in the present case because the SLCC were the only persons competent to exercise the gatekeeping functions in relation to timeous complaints (section 4 of the 2007 Act), determining whether the complaint is a conduct complaint (section 2(1A) of the 2007 Act) and whether or not the complaint is frivolous, vexatious or totally without merit (section 2(4)(a)). Having regard to these considerations there was, it was submitted, no breach of natural justice in the present petition.

⁹ *Wade and Forsyth on Administrative Law* (11th edition) pp395-397.

[18] In relation to the question of the potential for the appearance of bias it was submitted that the commission adopts different working practices where matters come to its attention as potentially meriting a complaint at its own instance. It would seem that whereas a complaint from a member of the public would be considered by the SLCC's complaints team a matter which comes to the attention of the SLCC potentially meriting a complaint is considered by the head of a separate team. Evidently, at the time the Police Scotland report in relation to the present petitioner was received that person was the Head of Strategic Insight. That person submits a report to the Chief Executive who will in turn make a complaint on behalf of the SLCC if he decides that it is merited. Thereafter the complaint is handled in the ordinary way by the complaints team. The practitioner complained of has a right to make observations in the usual way. It was submitted that that system as a whole was compatible with the common law principle of natural justice.

[19] With specific reference to the issue of arguments about time bar it was submitted that if the SLCC can make its own complaint a new time bar period could apply to that complaint. In the context of the present petition the events in question were said to have occurred in 2008 but the SLCC has, for time bar purposes, had regard to the later date when it became aware of the alleged misconduct on receipt of the police report. This situation was said not to be unique to the SLCC. It is a natural consequence of rule 7(3) of the Rules of the SLCC which requires that body to disregard any period during which "the complainer was, in the opinion of the commission, excusably unaware" of the professional misconduct. That rule gives rise to the possibility that a complaint by someone with immediate awareness due to personal involvement of the transaction in question may be time barred, while the later complaint by a third party with no involvement at the time and delayed awareness of the alleged misconduct may be timeous. The variability of the time bar is a product of rule 7(3)

being framed to promote the legislative aim. In relation to the complaint in the petition to the effect that the SLCC breached natural justice by taking the decision that the complaint is timeous without affording the petitioner the opportunity to make comment it was submitted that the SLCC has yet to consider whether to remit the complaint to the Law Society. In the event that the SLCC were to decide to do so the petitioner would have the right to seek leave to appeal under section 21. He could then raise any breach of natural justice in an appeal.

[20] In relation to Article 6 of the ECHR the respondent's submission was that the SLCC exercises only a gatekeeper function and does not itself reach a "determination of the petitioner's civil rights". In these circumstances Article 6 is not applicable to the decision of the SLCC.

Decision

[21] The SLCC is a body created by statute. As such its powers are derived from and circumscribed by the terms of the creating statute. In the present petition the decision challenged is a letter, in terms a complaint, in which the named complainer is the then Chief Executive of the SLCC but expressly raising the complaint on behalf of the SLCC. The empowering statute, the 2007 Act, determines the category of person who can make certain types of complaint. It is a matter of agreement between the petitioner and respondent that the complaint which is the subject matter to the decision challenged falls into the category of a conduct complaint. That type of complaint can, in terms of section 2(2)(a) be raised by "any person". Notwithstanding the apparent width of that provision the construction of those words requires to have regard to the remainder of the statutory provision. This, plainly, encompasses the remaining provisions of section 2 of the 2007 Act. Those provisions include in section 2(1) the provision that section 2 applies where "the commission

receives a complaint by or on behalf of any of the persons mentioned in subsection (2). In my opinion that language carries as a necessary implication that the complaint came from outwith the SLCC. The SLCC cannot, in my view, “receive” a complaint which is self-generated. A self-generated complaint would necessarily require the SLCC to take a determination on whether or not a complaint should be made. There is no provision in the 2007 Act for the SLCC to make such a determination.

[22] There is a further consideration in relation to the issue of the interpretation of the phrase “any person” in section 2(2)(a) of the 2007 Act. I consider there is force in the submission advanced by senior counsel for the petitioner to the effect that it requires to be considered and contrasted with the prescribed list of person who can bring a services complaint under section 2(2)(b). Again as a straightforward matter of language I do not consider that any natural or reasonable interpretation would include the SLCC itself.

[23] Beyond the foregoing considerations of linguistic interpretation I am further of the view that had parliament intended the commission to have power to complain to itself it would have stated so in express terms. Making a complaint is conceptually different from investigating and determining a complaint. Of necessity different considerations, factual, administrative and legal, are relevant and have to be considered in relation to the question of instigation of complaint than is the situation in regard to investigation and determination of a complaint. It seems to me tolerably clear that if parliament had intended the ambit of the SLCC’s statutory remit to include instigation of complaints specific provision for how it would discharge that function would have featured in the creating statute. The absence of such provision supports, in my view, the construction of the words “any person” to exclude the SLCC itself.

[24] The view I have just expressed would, of itself, be sufficient to answer the questions raised in this petition in favour of the petitioner. I should however refer to the other arguments advanced.

[25] In relation to the “practical issue” raised by counsel for the respondent I am not satisfied that it has any relevance in the context of the specific complaints made by the petitioner and the remedies sought. I accept what senior counsel for the respondent told me in relation to the practical difficulty that the SLCC encountered in 2013 when, at least initially, it considered that there might be a need to amend the 2007 Act in relation to the issue of whether or not it empowered that body to make complaints to itself. That matter is however, with no disrespect intended, of no consequence or relevance. The decision that the Act of 2007 was sufficiently wide in scope to enable the SLCC to make complaints against itself was, in my opinion as expressed herein, erroneous. I have no doubt that the decision was made in good faith and after consideration. It seems, and I accept, that it has been acted on since 2014. None of those considerations are relevant. The question of the authoritative interpretation of the provisions of the 2007 Act is, at the end of the day, a matter for the courts. It is not in my view a relevant consideration for this court when construing the provisions of that Act to have regard to how a statutory body has chosen to interpret the provision and how it has acted. It may be that consequent upon the decision of the court there will require to be a change in practice so far as the SLCC is concerned. Again, that is not a matter which can affect the court’s construction of the relevant statutory provisions.

[26] In relation to the issue of natural justice I consider that the decision taken by SLCC that it had power to raise complaints for its own determination and adjudication was contrary to the rules of natural justice at common law. I consider the dicta of the Lord

President (Clyde) in *Barrs* (supra) to be directly applicable to the circumstances of the present case.

[27] I take no issue with the views stated by the learned authors of *Wade and Forsyth on Administrative Law* to which my attention was drawn by senior counsel for the respondents. I do not however consider that the statement of the law relied upon has application in the circumstances of the present application. In the circumstances of the present petition the argument that the SLCC was the only person competent to exercise a gatekeeper function is entirely dependent on the construction of the words “any person” in section 2(2)(a) of the 2007 Act. It is only if, as was of course submitted on behalf of the respondents, that the phrase is given what I consider to be the unnatural construction contended for by the petitioners that the difficulties envisaged in the argument submitted arise.

[28] Similar considerations arise in relation to the other points raised by senior counsel for the petitioners in relation to the issue of natural justice. All these points only arise if the term “any person” in section 2(2)(a) of the 2007 Act are held to be inclusive of the SLCC itself. Put the other way the objections do not arise if the 2007 Act is deemed not to permit a commission to raise complaints before itself. In itself the arguments advanced could be taken, in my view, to be further support for the construction of the contentious words which I have upheld.

[29] The arguments advanced by both competing parties under Article 6 of the ECHR were relatively brief. I will deal with them equally briefly. It appears to me that the decision taken in the letter of 24 April 2019¹⁰ was indeed a determination or decision by the SLCC in

¹⁰ 6/1(1) of process.

effectively its own cause. In these circumstances I am satisfied that the provisions of the convention are engaged.

[30] Having regard to the foregoing I will sustain the petitioner's first and second pleas in law and reduce the SLCC's letter dated 24 April 2019.