FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 5
XA68/20

OPINION OF LORD PENTLAND

in the application for leave to appeal

by

JOHN SWINDELLS

Applicant

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

against

a decision of the Scottish Legal Complaints Commission issued on 29 September 2020

Applicant: Party
Respondent: Welsh; Anderson Strathern

26 January 2021

Introduction

[1] The applicant seeks leave to appeal, under section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007 ("the 2007 Act"), against a determination decision ("the decision") issued by the respondent, the Scottish Legal Complaints Commission, on 29 September 2020.

Factual background

[2] In April 2019 the applicant made a complaint ("the complaint") to the respondent against a firm of solicitors ("the firm") alleging that the firm had failed competently to wind up his deceased father's estate. The applicant submitted nine grounds of complaint. The respondent accepted three of the grounds of complaint (Issues 1-3) for investigation as services complaints; the others were rejected as being totally without merit.

[3] In March 2020, the respondent issued an investigation report recommending that Issues 1 and 3 should be upheld and that Issue 2 should not be upheld. Issue 1 concerned the firm's failure to obtain the deceased's death certificate timeously. Issue 3 related to the firm's failure to notify three companies of the deceased's death. Issue 2 involved an allegation that the firm failed to communicate effectively with the applicant about the fact that they had not received the death certificate. The investigation report concluded that the firm had carried out the executry work to an acceptable standard, with the exception of the matters covered by Issues 1 and 3; accordingly, no reduction of the firm's fees was proposed. The applicant had not established any actual loss, but compensation for inconvenience and distress arising from Issues 1 and 3 was recommended in the sum of £500. The firm accepted the recommendations, but the applicant did not. On 18 March 2020 he sent an email to the respondent in response to the investigation report. The email was expressed in highly abusive and offensive terms. It alleged that the respondent had not taken any of his comments on board, that it was unjustified for the firm's fees not to be reduced, and that the respondent had not investigated anything.

[4] On 19 March 2020 the respondent advised the applicant that in view of the offensive language he had directed at a member of their staff in his email he should in future contact them by letter.

[5] On 7 April 2020, the respondent advised the applicant that it had decided to suspend the complaint pending the outcome of the eligibility process in respect of another complaint submitted by him. The respondent explained that if there were eligible service issues arising from the other complaint, the complaints could then be dealt with together. This was considered to be the most pragmatic and sensible way to deal with both complaints. Accordingly, the first complaint was suspended and would not, for the time being, progress to the respondent's Determination Committee. The applicant would be contacted once the eligibility process in relation to the other complaint had been completed.

[6] On 23 June 2020, the respondent emailed the applicant to advise that the complaint had been "unsuspended" following the conclusion of the linked complaint. The email continued as follows:

> "As I advised in my letter of 31 March 2020, I would give you the opportunity to provide any further comments on (the) complaint, which would be put to the Determination Committee. Please provide me with any comments by Monday 29 June 2020. As you have been advised, you must not email the SLCC and please provide your response by letter – our office is receiving mail.
>
> I look forward to receiving any further comments you wish to make. There is no requirement to send any comments which have already been made.
>
> The SLCC will be in touch within the next 12 weeks with our Decision."

[7] The applicant did not submit any further comments. By letter dated 29 September 2020 the respondent wrote to the applicant to advise him that the service complained about in the complaint had been considered by three independent commissioners, forming a Determination Committee. A final determination had been made. The letter explained that the Determination Committee members had reviewed the recommendations of the investigating committee and had had access to all correspondence and evidence in relation to the case. Their decision was that the complaint against the firm should be upheld in part.

In particular, the members decided that Issues 1 and 3 should be upheld and that Issue 2 was not upheld. The letter went on to set out the reasons why the Determination Committee had reached this decision. The letter explained that the Determination Committee agreed with the recommendation that no award of compensation for actual loss allegedly incurred by the applicant should be made in view of his failure to provide evidence and vouching of the alleged losses. The Determination Committee noted that the firm had had its fees assessed by the Auditor of Court. The Determination Committee agreed with the recommendations that the work had been carried out to an acceptable standard and that a reduction of fees was not applicable.

[8] Finally, the Determination Committee formed the view that the inadequate professional service which had been identified had been minor and would have caused the applicant minor upset and inconvenience. The delay in obtaining the death certificate would have had no impact on the administration of the estate. The Determination Committee did not agree with the recommendation in the investigation report as to the amount of compensation. The Determination Committee directed that the firm should pay the applicant £150 by way of compensation for the inconvenience and distress caused.

Legal framework

[9] Section 21(4) of the 2007 Act provides that a complainer may, with the leave of the court, appeal against any decision of the SLCC on the following grounds:

> "(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."

The application for leave to appeal

[10] The application for leave to appeal fails to engage with section 21(4). Instead it sets out, tendentiously and at length, a whole host of complaints about and attacks on the respondent, the firm, and the legal profession. Essentially, it seeks to open up before the Inner House the respondent's investigation and factual findings. A major theme of the application is the applicant's dissatisfaction with the amount of compensation he has been awarded.

[11] Despite the many shortcomings in the application, I have, in fairness to the applicant who appeared on his own behalf, attempted to analyse the application to see whether anything in it might (on a benevolent construction) fall within the grounds of appeal permitted by section 21(4).

Ground of Appeal 1

[12] The applicant avers that the respondent acted irrationally and with malice in suspending investigation of the complaint pending the outcome of the other complaint. He submits that suspension of the complaint caused unreasonable delay and frustration to him. This ground might fall within section 21(4)(c) as being an irrational exercise of discretion.

Ground of Appeal 2

[13] The applicant submits that the respondent did not provide him with an opportunity to submit representations to the Determination Committee. This ground of complaint might fall within the scope of section 21(4)(b) in respect that there had been a procedural

impropriety, although that leaves the question as to whether there had been such an impropriety in the conduct of a hearing.

Grounds of Appeal 3 to 13

[14] These grounds raise many issues bearing on: (i) certain aspects of the respondent's handling and investigation of the complaint; (ii) alleged misinterpretation of the evidence relating to Issue 2; (iii) the decision that the applicant had sustained no actual loss; and (iv) the assessment of compensation for loss and inconvenience. The only statutory ground that might conceivably be relevant to these grounds is that found in section 21(4)(d), but the application makes no attempt to identify in what way the respondent's decision was not supported by the facts found to be established.

Grounds of Appeal 14 and 15

[15] The applicant submits that the respondent's decision not to award a reduction in fees because they had been set by the Auditor of Court was irrational. Potentially, therefore, these grounds might fall within the ambit of section 21(4)(c).

Analysis and Decision

[16] The Inner House, in the recent decision of *Innes* v *SLCC* [2019] CSIH 27, confirmed the test to be applied in an application for leave to appeal such as this. The test 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 is as follows (*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?"

Applying this test to the circumstances of the present case, I have reached the following conclusions.

Ground of appeal 1

[17] The applicant complains of a delay in the assessment of his complaint and contends that in deciding to suspend consideration of the complaint the respondent acted irrationally and with malice. As I have explained, the complaint was suspended on 7 April 2020 and the suspension was lifted on 23 June 2020; a period of about 11 weeks.

[18] In my opinion, the reasons given by the respondent for deciding to suspend the complaint cannot arguably be said to have been irrational or to have been motivated by malice. The duration of the suspension was not unreasonable. This ground of appeal falls far short of being an arguable challenge based on irrationality or malice.

Ground of appeal 2

[19] As I have already stated, potentially this ground of appeal could be said to concern an alleged procedural impropriety. It does not, however, relate to the type of procedural impropriety contemplated by section 21(4)(b) of the 2007 Act. This is because the impropriety alleged by the applicant arises from an administrative decision of a procedural nature made by the respondent rather than from a decision made at a hearing. The statutory provision refers specifically to a procedural impropriety in the conduct of any hearing by the respondent on the complaint.

[20] In *Oliphant* v *SLCC* 2014 CSIH 94, Lady Clark of Calton, in giving the opinion of an Extra Division of the Inner House, said the following at paragraph [26]:

> "… the statutory ground of appeal in the 2007 Act, section 21(4)(b) appears to be limited to a procedural impropriety in the conduct of any hearing. *Prima facie,* the task of the SLCC at the preliminary sifting stage cannot be categorised as a 'hearing' as envisaged in the legislation."

[21] I acknowledge that the decision challenged in *Oliphant* was one taken at the preliminary sifting stage. In my opinion, the same reasoning must apply to a procedural or administrative decision made by the respondent in the course of its consideration and investigation of a complaint. The decision to suspend consideration of the complaint was not made at a hearing. Accordingly, this ground of appeal does not fall within the ambit of section 21(4)(b).

[22] In any event, there is no arguable merit in this ground of appeal. By the respondent's email of 23 June 2020 the applicant was given the opportunity to make further representations to the Determination Committee. The applicant submits that he did not receive the email, but he accepts that it was sent to his email address; at the oral hearing on the single bills he said that it might have gone into his junk mail folder, thereby accepting that it had been delivered to him. There is no basis for concluding that the email was not delivered to the applicant.

Grounds of appeal 3 to 13

[23] Section 21(4)(d) does not permit any challenge to the facts found established by the respondent: the sole question is whether its decision was not supported by those facts (*Mazur* v *Scottish Legal Complaints Commission* [2018] CSIH 45). The applicant does not allege that any of the conclusions reached by the respondent were not supported by its factual findings. These grounds cannot, therefore, be grounds upon which the applicant is entitled to be granted leave to appeal in terms of section 21(4)(d).

[24] In any event, on examination none of the applicant's assertions in grounds 3 to 13 has any arguable merit. The applicant relies upon the respondent's alleged failure to take into account various issues when reaching its decision, and its failure to state explicitly within its report that it had considered certain matters. The report of the determination committee dated 29 September 2020 confirmed that it had taken into account all available material in reaching its decision:

> "The members reviewed the Recommendations, and have access to all correspondence and evidence in relation to the case. This includes any submissions made, by either party, on the investigation outcomes and Recommendations which have been previously shared with you…
>
> Members considered and discussed the firm's emailed responses dated 19 and 25 March (2 emails) 2020. Members also considered and discussed your emails dated 18 March and 9 April 2020."

There is no need for the respondent to refer to every item of evidence in its determination decision.

[25] Turning to the specific grounds raised in the application for leave to appeal, ground 3 seeks to challenge the respondent's initial assessment of one aspect of the complaint as being wholly without merit. It does not relate to the decision of the Determination Committee. This ground does not amount to a competent ground of appeal.

[26] Ground 4 relates to an aspect of Issue 1. This Issue has been upheld. It cannot be the subject of an appeal.

[27] Ground 5 relates to Issue 2; it invites the court to reconsider certain aspects of the evidence and to substitute different conclusions for those reached by the respondent. The court has no jurisdiction to conduct a general review of the evidence. There is no arguable merit in this ground of appeal.

[28] Grounds 6 to 13 concern the respondent's refusal of the claim for actual loss and its assessment of compensation for inconvenience and distress. These were factual decisions for the respondent to take on the basis of its assessment of the evidence. The court cannot review them in an appeal under section 21. There is no arguable merit in any of these grounds.

Grounds of appeal 14 and 15

[29] The report of the Determination Committee noted the following:

> "The Determination Committee noted that the firm had had its fees assessed by the Auditor of Court. The fees incurred were £2,866.50 excluding outlays and VAT per the Auditor of Court's assessment dated 1 October 2019, and £3,439.80 inclusive of VAT. The Determination Committee agreed with the Recommendations that the work had been carried out to an acceptable standard and that a reduction of fees is not applicable."

There is no arguable basis on which this decision can be characterised as irrational. The respondent properly considered the Auditor's report.

Conclusion

[30] None of the applicant's proposed grounds of appeal has any realistic prospect of success. Leave to appeal must accordingly be refused.

Anonymity

[31] At the hearing on the single bills the applicant asked that his name be redacted from the published version of this Opinion. He said that the respondent had sought in its Answers to assassinate his character and to embarrass him. This is unfounded. The Answers properly refer to the respondent's investigation and determination of the complaint and explain the procedure it followed.

[32] Open justice is a fundamental principle in our system of litigation. It should not be lightly departed from. Those who bring proceedings before the court should be identified unless there is a sound reason for not doing so (*MH* v *The Mental Health Tribunal for Scotland* [2019] CSIH 14). There is no reason why an exception to the general rule should be made here. I refuse the applicant's motion for anonymisation.

[33] I shall reserve all questions of expenses.