



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 12  
XA36/22

Lord Justice Clerk  
Lord Tyre  
Lady Wise

OPINION OF THE COURT

delivered by LORD TYRE

in the Appeal

by

FEDERICO GARCIA LÓPEZ DE LA TORRE

Appellant

against

SCOTTISH LEGAL COMPLAINTS COMMISSION

Respondent

**Appellant: Party**

**Respondent: Irvine; Anderson Strathern**

23 February 2023

**Introduction**

[1] In July 2021 the appellant submitted a complaint to the respondent against his former solicitor, Mr Hamish Lindsay. Mr Lindsay was a partner in the firm of Lindsay & Kirk (“L&K”) until that firm ceased to trade on 31 October 2018, and was thereafter a

consultant with Grant Smith Law Practice Limited (“GSL”) until his retirement in 2019. The complaint was assigned to one of the respondent’s case investigators, who took the view that it required to be treated as two separate complaints against Mr Lindsay and L&K (Complaint A) and Mr Lindsay and GSL (Complaint B) respectively. The case investigator proceeded to consider whether the complaints were eligible for investigation.

[2] On 3 February 2022 the respondent issued two decisions addressing the eligibility of Complaints A and B respectively. In relation to Complaint A, the respondent accepted one issue for investigation as a conduct complaint but rejected three further issues, one because it was time barred and the others because they were totally without merit. In relation to Complaint B, the respondent accepted two issues for investigation as conduct complaints but rejected six further issues as being totally without merit. The appellant now appeals, with permission, to the court under section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007 against both eligibility decisions. By agreement of parties the appeal has been considered by the court on the papers without the need for an oral hearing.

[3] In its answers, lodged in advance of the hearing on permission to appeal, the respondent conceded that the appeal had a reasonable prospect of success in establishing that it had acted irrationally in exercise of its discretion in relation to Complaint A (in two specific respects) and Complaint B (in one specific respect). In its written note of argument, the respondent accepts that the irrationality ground is made out in those respects and invites the court to quash both eligibility decisions and remit the appellant’s complaints for consideration of new by a different case investigator. The appellant, however, seeks a determination by the court of all of his grounds of appeal.

**The statutory grounds of appeal**

[4] Section 21(1) of the 2007 Act provides that certain specified persons may, with the leave of the court, appeal against “any decision of the Commission under the preceding sections of this Part as respects a complaint” on any ground set out in section 21(4). Those grounds are:

- (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.

**Background circumstances**

[5] In about 2017-18, Mr Lindsay acted on the appellant's behalf in claims related to damage to property due to water ingress. According to a narrative annexed to the grounds of appeal, the appellant received a payment in March 2018 from his insurers who then instructed another firm of solicitors, DAC Beachcroft, to seek relief from Aberdeen City Council. That firm offered its services to the appellant in pursuit of a claim for negligence against Aberdeen City Council. On 19 March 2018, having sought and obtained advice from Mr Lindsay, the appellant authorised DAC Beachcroft to act on his behalf but subject to a condition that he would have the final say as to whether any sum offered by way of compensation was adequate. He had further communications with Mr Lindsay in July and October 2018.

[6] On 31 October 2018 L&K ceased to trade and on the following day Mr Lindsay was appointed as a consultant to GSL. The appellant was unaware that L&K had ceased to trade until 18 April 2019 when he received a letter from Mr Lindsay advising that his old firm had merged with GSL and intimating his own forthcoming retirement. During the intervening period the appellant had understood that Mr Lindsay was continuing to pursue his water damage claim.

### **The appellant's complaints to the respondent**

[7] The appellant's initial complaint to the respondent included an issue in the following terms:

"Mr Lindsay terminated relationship unilaterally without providing explanation or rendering invoice."

The case investigator contacted Mr Lindsay to obtain his observations. She then informed the appellant that because there were two firms involved there had to be two separate complaints. The complaint already lodged was thereafter treated as a complaint against Mr Lindsay and L&K, and the appellant was invited to submit another claim form containing his complaint against Mr Lindsay and GSL, which he did on 5 September 2021.

[8] In the course of email correspondence with the appellant, the case investigator made a number of amendments to the wording of the summary of his complaints. Her explanation for this, in an email dated 20 October 2021, was that

"...we consider some of the changes you've requested to the summary have the potential to make your complaint less clear. It's important that the summary is accurate and complete. However, it is also important that what you're complaining about can be properly understood by all of the parties involved... For this reason, the SLCC has the final say on what is included in the summary of complaint..."

In his emails the appellant gave reasons for his disagreement with the case investigator's amendments. He also took issue with the idea of the respondent having the final say on what was included in the summary of complaint.

[9] One of the amendments with which the appellant disagreed was the deletion from the summary of Complaint A of what has come to be referred to as the "unilateral termination" issue, set out at paragraph [7] above. In an email dated 3 November 2021, the case investigator explained the deletion as follows:

"In circumstances where a firm has ceased to trade, neither the firm nor any of its solicitors is permitted to continue to act for clients. Accordingly, withdrawing from acting on behalf of clients cannot suggest professional misconduct, unsatisfactory professional conduct or inadequate professional service. For this reason, reference to Mr Lindsay withdrawing from acting on your behalf hasn't been included in the summary."

The respondent now accepts that the deletion of this issue was irrational, and that the reason given by the case investigator did not address the essence of the complaint which was about failure to explain the termination or issue an invoice. The deletion prevented the respondent from considering whether this complaint was eligible for acceptance for investigation.

[10] Another contentious amendment made by the case investigator was the re-wording of one of the issues in Complaint A in a manner which suggested that the appellant's file had been passed from L&K to GSL. The appellant's position was that he did not know whether it had been passed or not, and there was material in the respondent's possession which indicated that it had not. To this extent, the respondent accepts that its consideration of eligibility proceeded on what may have been a factually incorrect basis.

[11] By the end of the process of amendment, the summary of complaints in Complaint A stated as follows:

"1. Mr Hamish Lindsay, and/or Lindsay & Kirk, failed to communicate effectively with me when the firm ceased trading and my file was passed to Grant

Smith Law Practice Limited, as Mr Lindsay did not explain the situation clearly to me, including with regard to what would happen with my case.

2. Mr Hamish Lindsay, and/or Lindsay & Kirk, failed to communicate effectively with me by not clarifying unequivocally Mr Lindsay's role as my solicitor after the involvement of a third-party solicitor, when Mr Lindsay declined to accept payment for outstanding fees in a face to face meeting with me on 17 July 2018 and thereafter,

3. Mr Hamish Lindsay, and/or Lindsay & Kirk, failed to communicate effectively with me and to act in my best interests, by failing to inform me of discussions which took place on 4, 15, 16 and 23 October 2018, between Mr Lindsay and a third-party solicitor in relation to my case.

4. Mr Hamish Lindsay, and/or Lindsay & Kirk, failed to act in my best interests by obstructing the provision of the full file to a third-party solicitor on 15 and 23 October 2018."

[12] The summary of complaints in Complaint B stated as follows:

"1. Mr Hamish Lindsay, formerly of Grant Smith Law Practice Limited and/or Grant Smith Law Practice Limited failed to communicate effectively with me when he terminated our relationship unilaterally without providing explanation or rendering an invoice,

2. Mr Hamish Lindsay, formerly of Grant Smith Law Practice Limited and/or Grant Smith Law Practice Limited failed to communicate effectively with me by not informing me of the progress of the case and by not responding to my email sent on 22 April 2019.

3. Mr Hamish Lindsay, formerly of Grant Smith Law Practice Limited and/or Grant Smith Law Practice Limited failed to communicate effectively with me by not explaining clearly the situation in regard to my case, once the firm in which Mr Lindsay had previously worked for, dissolved and/or merged with Grant Smith Law Practice Limited.

4. Mr Hamish Lindsay, formerly of Grant Smith Law Practice Limited and/or Grant Smith Law Practice Limited failed to communicate effectively and to act in my best interests by not informing me of conversations between him and a third party solicitor regarding my case on 16 and 25 January 2019, on 12 and 15 February 2019, on 30 April 2019, on 16 and 17 May 2019 and on 16 and 26 September 2019.

5. Mr Hamish Lindsay, formerly of Grant Smith Law Practice Limited and/or Grant Smith Law Practice Limited failed to act in my best interests by obstructing the provision of the full file to a third party solicitor on 25 January 2019 and on 15 February 2019.

6. Mr Andrew Duthie and/or Grant Smith Law Practice Limited unduly delayed for over 6 months in responding to my emails of 6 December 2020 and 9 June 2021 requesting whether or not the firm had my will.

7. Mr Andrew Duthie and/or Grant Smith Law Practice Limited unduly delayed for over 8 months in responding to my queries of 6 December and 15 June 2021 as to whether or not the firm held any files regarding my unfinished case that Mr Hamish Lindsay, formerly of Grant Smith Law Practice acted on my behalf.

8. Mr Hamish Lindsay, formerly of Grant Smith Law Practice Limited and/or Mr Andrew Duthie of Grant Smith Law Practice Limited and/or Grant Smith Law Practice Limited failed to unambiguously confirm the consultant status of Mr Hamish Lindsay, formerly of the Grant Smith Law Practice Limited from the date he started work for the firm until his voluntary removal from the solicitors' roll in 2020."

### **The respondent's decision on eligibility**

[13] As regards Complaint A, the respondent decided:

Issue 1 was a conduct complaint. It was accepted for investigation.

Issue 2 was a services complaint. It was rejected as time barred.

Issue 3 was a services complaint. It was rejected as totally without merit.

Issue 4 was a conduct complaint. It was rejected as totally without merit.

[14] As regards Complaint B, the respondent decided:

All of the issues were conduct complaints.

Issues 4 and 7 were accepted for investigation.

Issues 1, 2, 3, 5, 6 and 8 were rejected as totally without merit.

[15] In Complaint B, the respondent's reason for rejecting Issues 1 and 3 (which were considered together) was that these issues were being investigated in the context of Complaint A, and it was of no benefit and an inappropriate use of resources also to investigate them in the context of Complaint B. The respondent now concedes that that

conclusion was irrational because Issue 1 had been deleted by the case investigator from Complaint A.

### **Orders sought by the appellant**

[16] In his note of argument the appellant seeks the following:

- (i) An order quashing the respondent's decisions dated 3 February 2022;
- (ii) Complaints A and B to be remitted to the Commission for consideration anew by a different case investigator;
- (iii) Payment of the expenses of this appeal and of the application for leave to appeal.

A fourth crave for an order for payment of compensation by the respondent is not now insisted upon.

[17] As already noted, the respondent has conceded that the decisions must be quashed and that the two complaints should be remitted to it for consideration afresh by a different case investigator. Having proposed settlement of the appeal on terms contained in a draft joint minute to which the appellant has declined to agree, the respondent does not concede liability for the expenses of the appeal.

[18] The appellant's submissions are set out at length in a note of argument and a supplementary note of argument lodged shortly before the date when the appeal was due to be heard. Having regard to the concessions made by the respondent, the opinion of the court on the merits of these submissions will make no difference either to the disposal of the appeal or to any subsequent consideration by the respondent of the appellant's complaints: these will be remitted to the respondent for reconsideration and all of the conclusions of the first case investigator will be disregarded. This has been explained to the appellant at



previous hearings but he has insisted on the appeal proceeding. We shall briefly express our views on his submissions which, except as conceded by the respondent, are without merit.

### **The appellant's grounds of appeal**

#### ***Error of law: section 21(4)(a)***

[19] The appellant submitted that in reaching its decision the respondent failed, in relation to the question of whether his file was transferred from L&K to GSL to have regard to material evidence and to take account of relevant matters; that the respondent provided inadequate reasons for amending the wording of his complaint, for moving the unilateral termination issue from Complaint A to Complaint B and for splitting the issues between Complaints A and B; that the respondent failed to treat the complaints alike; and that the foregoing procedures were unfair in that they were to the detriment of the appellant and the benefit of Mr Lindsay. We reject these submissions, none of which identifies any error of law. While it is the case that irrationality may in some circumstances be a species of error of law in relation to decision-making, the actions of the case investigator which are conceded to be irrational in the present case are not errors of law but rather errors in the exercise of the respondent's discretion in attempting to identify and summarise the nature of the appellant's complaints. As such they fall within section 21(4)(c) and not section 21(4)(a). In other respects the appellant's submission amounts to no more than disagreement with the respondent's finding that he was not a client of GSL.

#### ***Procedural impropriety in the conduct of a hearing: section 21(4)(b)***

[20] The appellant submitted that the respondent had failed to act in accordance with the rule against bias. The amendments made to the complaints by the case investigator demonstrated bias on her part in favour of Mr Lindsay and against the appellant. By

moving issues into Complaint B and then making a finding that the appellant was never a client of GSL, the respondent prevented Mr Lindsay from being held liable in respect of any complaint accepted for investigation, because he could not be accountable for any “alleged issues committed” while he was working for GSL. The case investigator had then delivered contradictory eligibility decisions, one based on the appellant’s file having been passed to GSL and the other based on it not having so passed. It was submitted, under reference to *Porter v Magill* [2002] 2 AC 357 that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the respondent was biased.

[21] Section 21(4)(b) is concerned only with procedural impropriety “in the conduct of any hearing”. The question whether administrative action by the respondent at a preliminary stage can be categorised as having been carried out in the conduct of a hearing has been considered on a number of occasions: see *Oliphant v Scottish Legal Complaints Commission* [2014] CSIH 94; *Lilburn v Scottish Legal Complaints Commission* [2020] CSIH 20; and *Swindells v Scottish Legal Complaints Commission* [2021] CSIH 5. In *Lilburn*, Lord Drummond Young observed (paragraph 24):

“I would be reluctant to give the word ‘hearing’ too literal a meaning in this context, because the principle *audi alteram parte* is an important part of the general law, and it is obvious that any party interested in a dispute must be given an adequate opportunity to present his or her case. Nevertheless, the word ‘hearing’ does indicate that representations from interested parties must be under consideration before paragraph (b) is engaged.”

The actions of the case investigator alleged by the appellant to demonstrate bias were carried out in the course of a dispute as to the wording of the summary of his complaints. One of the outcomes of the eligibility investigation was that the case investigator made a finding that the appellant had not been a client of GSL. In these circumstances it is arguable

that the respondent's actions took place in the conduct of a hearing. We do not, however, require to reach a concluded view on that matter because we are wholly unpersuaded that the circumstances founded upon by the appellant are indicative of actual bias on the part of the respondent or that they give rise to any reasonable apprehension of bias. It is a very serious matter to allege that a body whose statutory function is to investigate complaints against members of the legal profession is biased in favour of those members and against the people who make complaints. The fact that the case investigator in the present case took actions which are now conceded to have been irrational provides no foundation for such an allegation.

***Irrationality: section 21(4)(c)***

[22] The appellant's submissions in relation to irrationality largely reiterate the points conceded by the respondent. In addition, the appellant submitted that the respondent acted irrationally in splitting issues between Complaints A and B using the date when L&K ceased trading as the cut-off date. It is contended that this split failed to contemplate the possibility of a solicitor continuing to act in a personal capacity while working for a firm. We reject this submission. The opening of two files for complaints against two different firms was a reasonable course of action for the respondent to take and, as its decision on the eligibility of Complaint B demonstrates, this did not preclude opening investigations into the actings of GSL or of Mr Lindsay acting in a private capacity.

***Decision not supported by facts found: section 21(4)(d)***

[23] The appellant submitted that although the respondent's substantive investigation had not yet taken place, there had been a fact-finding exercise in the light of which the respondent had concluded that no client/solicitor relationship existed between the appellant and GSL. That being so, the respondent's "decisions" to alter the wording of Complaint A

so as to imply that the appellant's file was transferred to GSL, to move the "unilateral termination" issue to Complaint B, and to split the issues into two complaints were unsupported by the finding that the appellant was not a client of GSL.

[24] On behalf of the respondent it was submitted that the ground of appeal in section 21(4)(d) was not engaged in respect of these matters. We agree. The reference in section 21(4)(d) to "the Commission's decision" is properly to be read as a reference back to the words "any decision of the Commission under the preceding sections of this Part as respects a complaint" in section 21(1). Those words are apposite to include a decision by the Commission on the eligibility of a complaint as well as a substantive decision taken after carrying out an investigation, but they are not apt to cover procedural matters (such as those founded upon by the appellant) which do not constitute a decision of the Commission as respects a complaint. If such matters are to be challenged, then the challenge requires to be based on irrationality and presented under section 21(4)(c).

### **Disposal**

[25] For the foregoing reasons we shall quash the respondent's two decisions dated 3 February 2022 and remit the appellant's complaints to the respondent for determination of new by a different case investigator. Questions of expenses are reserved.