



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 10
P694/23

Lord Malcolm
Lord Pentland
Lady Wise

OPINION OF THE COURT

delivered by LORD MALCOLM

in the petition by

THE SCOTTISH LEGAL COMPLAINTS COMMISSION

Petitioner

against

JANE ELIZABETH ROBISON AND ANOTHER

Respondents

Petitioner; Black; Harper MacLeod LLP
First Respondent; Hamilton KC; Levy & McRae LLP

30 April 2024

Introduction

[1] The question requiring determination is whether an admitted failure by a solicitor to comply with an order of the court amounts to a contempt. It arises in the latest of a line of petitions by the Scottish Legal Complaints Commission (the Commission) designed to enlist the assistance of the court in compelling solicitors to co-operate with its investigations into complaints. The solicitor concerned is Jane Robison of Smail & Ewart Ltd, Biggar.

[2] These petitions are brought only when efforts by the Commission and then its solicitors have failed to provoke the production of information, typically the relevant file(s) and a response to the complaint. One might have thought that such proceedings would be virtually unheard of, but in recent times they have approached double figures.

[3] Even more surprising is that on occasion, as here, and notwithstanding the service of the petition, no answers are lodged, the material is not handed over, and at the request of the Commission the court grants a final order requiring the solicitor to provide it within a set period, typically 21 days.

[4] Extraordinary as it may seem, even then there have been instances, again as here, of the Commission informing the court that there has been a failure to comply with the terms of the order resulting in a hearing attended by the solicitor to address the question of contempt of court.

[5] It has always been a professional obligation to co-operate with the regulatory body. However, faced with increasing evidence of its members not complying with the Commission's legitimate requests, in 2022 the Law Society of Scotland introduced Practice Rule B1.17: "You must deal with the Commission in an open, timely and co-operative manner, so as to enable the Commission properly to exercise and fulfil its statutory functions."

[6] That such a specific rule was necessary is in itself a matter of concern. Unfortunately it is apparent that in respect of some members of the profession, including Ms Robison, it has not had the intended effect. Such failures delay the proper investigation of complaints and bring the profession at large into disrepute.

[7] It is however a unique feature of these proceedings that they occur against the background that in respect of an order granted in a previous petition, on 18 May 2023

Ms Robison was found to be in contempt for failings similar to those in the present case.

At the time the court expressed the view that there had been deliberate and serious misconduct by a solicitor who, as an officer of the court, was under a particular duty to obey the order. However given that, albeit belatedly, substantial compliance had occurred, and other matters indicated that Ms Robison had gained a fuller appreciation of her professional responsibilities, no penalty beyond the finding of contempt was imposed. As will become apparent the hope of a fuller appreciation has proved to be overly optimistic.

The background circumstances

[8] In November 2022 the Commission received a services complaint concerning John Armstrong, a now retired partner of Ms Robison, in respect of his administration of the executry estate of a person who died in 2012. In summary the concerns relate to undue delays, a lack of diligence, and poor communication. In March 2023 Ms Robison, as the client relations manager of the firm, was sent a summary of the complaint and invited to provide her comments ahead of an eligibility assessment. The following month she sent a response to the complaint to the Commission.

[9] In due course the Commission determined that all 15 issues raised in the complaint were eligible for investigation. The Commission offered the use of its free mediation service but the firm did not respond. By letter of 28 June the Commission wrote to Ms Robison explaining that the complaint would be investigated. It served a notice under section 17 of the Legal Profession and Legal Aid (Scotland) Act 2007 requiring production of the firm's business file by 19 July. In the absence of a response, on 25 July the Commission intimated that unless the material was provided within 7 days agents would be instructed to commence legal proceedings. On 4 August the Commission's solicitors made a further

demand for the files. This provoked a telephone call when Ms Robison advised that the material would be provided shortly.

[10] This not having been done the petition was lodged and served. The deadline for answers, namely 14 September, came and went. There was an attempt at compliance the previous day when some material was forwarded, however it concerned a separate trust, not the executry, and was dated from January 2018, several years after the firm's instruction in the matter which was the subject of complaint. There was an acknowledgment that there were files for earlier years relating to the complainers which could be provided if required. No explanation has been offered for the failure to send them along with or shortly after the trust documentation.

[11] On 16 November 2023, on the unopposed motion of the Commission and in respect that no answers had been lodged, the court ordered Ms Robison to provide the case file (or files) relating to the firm's work in relation to the administration of the deceased's estate within 21 days of service of the interlocutor. The firm was found liable in the expenses of the process.

[12] The interlocutor was served on 6 December, meaning compliance was required by 27 December. A large amount of material was provided to the Commission on 10 January 2024. The previous day the Commission lodged a motion which caused the court to fix a hearing for 27 February to consider whether there had been a contempt of court. On that date Ms Robison appeared unrepresented. She accepted the court's offer of an adjournment to allow her to seek and obtain legal advice. At the continued hearing she was represented by solicitors and senior counsel.

The account and explanation tendered by Ms Robinson

[13] At the outset counsel for Ms Robison acknowledged that the 21 day deadline was not met. Through counsel she unreservedly apologised for this failure. However the papers were uploaded on 10 January 2024, 14 days late. It was submitted that in the whole circumstances this delay did not involve a contempt of court; if it did, it was purged by the late compliance.

[14] Prior to service of the order, on 4 December Mr Armstrong attended at the office to assist with identification of the necessary material. He spent that day and the next identifying the papers relating to the executry. They consisted of a large and disordered collection of loose leaf papers in folders. These were organised and uploaded to the Commission on 6 December. When scanning them Ms Robison realised that there was missing documentation. This consisted of three files which had been deposited with a local offsite storage business.

[15] Thereafter Ms Robison, by now the sole solicitor in the firm, became involved in managing the practice and progressing existing work prior to Christmas. This included urgent matters for two clients who had each received a terminal diagnosis. She was also involved in meetings with the complainers relating to the outstanding issues in the executry. She anticipates that this work is nearing completion. The pressure was increased by the loss of staff post pandemic and the aftermath of a banking scam. Additionally Ms Robison was trying to cope with the strain of certain family issues, including health concerns relating to family members.

[16] By the time Ms Robison reverted to recovery of the three files she discovered that the business holding them had closed on 23 December and did not re-open till 9 January, a matter which has been confirmed by an email from a director. As a result she was unable

to access the files in order to meet the 27 December deadline. Surprisingly, she he did not inform the Commission or its agents of this problem. She recovered the documentation on 9 January and uploaded it to the Commission the following day.

The submissions for the parties

Ms Robison

[17] The failure to meet the 21 day deadline was not due to “a deliberate lack of respect for or defiance of the authority of the court” (*AB and CD v AT* 2015 SC 545 at paragraph 29).

It was a result of the unforeseen inability to access the files on the closure of the storage facility on 23 December. The identification of files held by the firm on 4 and 5 December and their transmission the next day demonstrated an understanding that the order had to be obeyed. Ms Robison did delay matters until it was too late to obtain the missing files before 27 December, but the reasons for this have been explained. She always intended to comply but was thwarted by matters beyond her control.

The Commission

[18] Counsel for the Commission indicated that it was neutral on the question of contempt. Its motivation was to obtain the material necessary for its investigations. Having had time to go through the voluminous material received on 10 January, and in the light of the subsequent provision of a report and an assurance that further correspondence could not be traced, it was satisfied that there had now been substantial compliance with the statutory notice of 28 June 2023 and the court’s order. In that notice, as replicated in the order, the Commission also sought a detailed response to the complaint; however it had now been confirmed that the firm did not wish to add anything to the response sent at the

pre-eligibility stage. Thus the only problematic issue concerns the late production of the outstanding files. In all probability active engagement by Ms Robison with the Commission would have prevented the involvement of the court, or at least the need to serve the final order. Even very belated engagement explaining her situation might well have avoided the court being asked to consider whether there had been a contempt.

Decision on contempt

[19] The documentation available to the court supports Ms Robinson's account and we are prepared to proceed on that basis. The overall picture is of casual indifference towards professional responsibilities owed to the regulatory body and the complainers, who despite everything have remained clients of the firm. The foolishness demonstrated by Ms Robinson's failure to take basic and obvious steps, if only in her own interests, causes concern for unsuspecting clients entrusting important matters to her stewardship. This is all the more remarkable given the previous finding of contempt. However any consequences of this broader picture are a matter for the Law Society of Scotland, which we assume will have this opinion drawn to its attention.

[20] The only substantive question for the court is whether Ms Robinson's conduct after receipt of the interlocutor requiring delivery of the files within 21 days amounts to a contempt of court. The court's inherent contempt jurisdiction is designed to uphold the due administration of justice. Thus, if proven to the criminal standard, disregard for the authority of the court is punishable. Absent an exculpatory explanation, such as a medical condition, a deliberate failure to obey an order of the court will be a contempt. Given that the court is proceeding on the circumstances explained by counsel for Ms Robinson, no issue

regarding proof of the facts arises. The only question is whether they demonstrate the necessary wilful non-compliance.

[21] Whatever other pressures she was under, Ms Robinson's decision to postpone completion of the exercise until the eleventh hour, and especially over the Christmas period, was cavalier and fraught with risk. Even without the context of a previous contempt finding, we would expect a solicitor served with an order of this kind to do all that was necessary to ensure that it was met without delay. Instead Ms Robinson gave priority to other matters and then discovered that she was unable to access the files because of a festive season closure at the storage facility where they had been deposited. However we are prepared to accept that she did intend to meet the deadline, and that the failure to do so was caused by the unanticipated shutdown and did not involve the necessary deliberate affront to the court's authority for a finding of contempt.

Expenses

[22] Counsel for the petitioner sought the expenses of the contempt proceedings on the agent and client, client paying scale; in other words on an indemnity basis. If no contempt order was made, counsel for Ms Robison moved for no expenses due to or by either party, failing which any award of expenses against her should be on the usual scale.

[23] It was suggested that it was premature for the Commission to apply for final orders when in September she had asked whether the earlier files were required. We disagree. No answers had been lodged and Ms Robison had been given every opportunity to do the right thing. The court was doing no more than enforcing an obligation resting upon her and giving her a generous latitude of time in which to do so.

[24] It was Ms Robison's unprofessional conduct which provoked the petition proceedings. It was her failure to meet the deadline in the court's order which caused the Commission to raise the question of contempt of court. She was responsible for all the consequential expense, including of two hearings. That ultimately we have not made a finding of contempt does not alter that state of affairs.

[25] We are almost as concerned about Ms Robison's overall behaviour since she was served with the statutory demand as we would have been had she been deliberately defiant of the final order. We shall mark our disapproval by granting the petitioner's motion and making an award of expenses against her on the agent and client, client paying scale.