



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 46
P58/22

Lady Dorrian
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in Petition of

THE SCOTTISH LEGAL COMPLAINTS COMMISSION

Petitioner

against

DONALD RODERICK MURRAY and JAMES ANTHONY McCUSKER

Respondents

and

THE FACULTY OF ADVOCATES and LAW SOCIETY OF SCOTLAND

Interveners

Petitioners: C O'Neill KC; Harper McLeod
Respondents: Whyte; TC Young
Interveners: Dean of Faculty; Balfour & Manson

11 October 2022

The issue

[1] The question which arises in this petition is whether the petitioner is entitled, under section 17 of, and schedule 2 to, the Legal Profession and Legal Aid (Scotland) Act 2007, to

apply for the production and delivery of documents which would otherwise be covered by legal professional privilege (“LPP”).

The legislation

[2] The Act of 2007 provides as follows:

“17 Power to examine documents and demand explanations in connection with conduct or services complaints

(1) Where the Commission is satisfied that it is necessary for it to do so for the purposes of section 2, 4, 8, 9, 10, 15 or 16, it may give notice in writing in accordance with subsection (2) to the practitioner, the practitioner's firm or, as the case may be, the employing practitioner.

(2) Notice under subsection (1) may require—

(a) the production or delivery to any person appointed by the Commission, at a time and place specified in the notice, of all documents mentioned in subsection (3) which are in the possession or control of the practitioner, the firm or, as the case may be, the employing practitioner and which relate to the matters to which the complaint relates (whether or not they relate also to other matters);

...

(3) The documents are—

(a) all books, accounts, deeds, securities, papers and other documents in the possession or control of the practitioner, the firm or, as the case may be, the employing practitioner;

(b) all books, accounts, deeds, securities, papers and other documents relating to any trust of which the practitioner is the sole trustee or a co-trustee only with one or more of the practitioner's partners or employees or, as the case may be, where the practitioner is an incorporated practice of which the practice or one of its employees is a sole trustee or it is a co-trustee only with one or more of its employees.

37 Obtaining of information from relevant professional organisations

(1) The Commission may require any relevant professional organisation to—

(a) provide it with such information, being information which is within the knowledge of the organisation, as the Commission considers relevant for any of the purposes of section 23, 24 or 36;

(b) to produce to it such documents, being documents which are within the possession or control of the organisation, as the Commission considers relevant for any of those purposes.

(2) The information required to be provided or the documents required to be produced under subsection (1) may include information or, as the case may be, documents obtained by the relevant professional organisation from a practitioner while investigating a conduct complaint against the practitioner remitted to it under section 6(2)(a) or 15(5)(a) 1 ; and the organisation must comply with such a requirement.

(3) Where any information required by the Commission under subsection (1) is not within the knowledge of the relevant professional organisation, or any documents required to be produced under that subsection are not within the possession or control of the organisation, the Commission may require the practitioner concerned —

(a) to provide it with that information in so far as it is within the knowledge of the practitioner;

(b) to produce to it those documents if they are within the practitioner's possession or control.

(4) Schedule 2 makes further provision about the powers of the Commission under this section.

43 Restriction upon disclosure of information: Commission

(1) Except as permitted by subsection (3), no information mentioned in subsection (2) may be disclosed.

(2) The information is information —

(a) contained in a conduct complaint, services complaint or handling complaint;

(b) which is given to or obtained by the Commission or any person acting on its behalf in the course of, or for the purposes of —

(i) any consideration of such a complaint;

(ii) an investigation (including any report of such an investigation) into a services complaint or a handling complaint.

(3) Such information may be disclosed —

(a) for the purpose of enabling or assisting the Commission to exercise any of its functions;

(b) where the disclosure is required by or by virtue of any provision made by or under this Act or by any other enactment or other rule of law.

(4) Any person who, in contravention of subsection (1), knowingly discloses any information obtained when employed by, or acting on behalf of,

the Commission is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.

SCHEDULE 2 FURTHER POWERS OF COMMISSION UNDER SECTION 17 OR 37

1 Where the Commission—

(a) gives notice under subsection (1) of section 17 to any person having possession or control of any documents mentioned in subsection (3) of that section;

...

and the person refuses or fails to produce or deliver any of the documents or the information within the time specified in the notice or requirement or to cause them to be so produced or delivered, the Commission may apply to the court for an order requiring the person to produce or deliver the documents or information or to cause them or it to be produced or delivered to the person appointed at the place fixed by the Commission within such time as the court may order.

SCHEDULE 3 RULES AS TO COMMISSION'S PRACTICE AND PROCEDURE

1 The rules as to the Commission's practice and procedure made under section 32(1) must include provision—

(a) regulating the making to the Commission of complaints under Part 1, including—

(i) when a complaint is to be regarded as made for the purposes of the Part; (ii) the eligibility of persons to make such complaints on behalf of other persons (whether living or not);

(b) requiring the Commission not to—

(i) investigate a services complaint by virtue of section 9;

(ii) remit a conduct complaint to a relevant professional body under [section 6(2)(a) or 15(5)(a)] 1 ;

(iii) investigate a handling complaint by virtue of section 23,

unless the complainer has, for the purposes of Parts 1 and 2 of this Act, waived any right of confidentiality in relation to the matters to which the complaint relates;”

The background

[3] The matter arises in the context of a services complaint relating to work undertaken by the respondents during divorce proceedings. It is a third party complaint, the complainer being the party against whom the respondents had acted. It is accepted that

there was a professional obligation of confidentiality between the respondents and their then client, the husband.

[4] The petitioner served notice under section 17(1) requiring production or delivery of the business file in relation to the complaint (which was in four parts), and copy fee notes and receipts, within 14 days. The file was not produced. The husband in the proceedings has since instructed another firm, and the majority of the papers held by the respondents have been released to that firm under mandate. It is accepted however that the respondents do retain some papers which might be relevant. The respondents indicated to the petitioner that the former client was maintaining confidentiality in the matter and that they could not release the material in their possession. The former client has himself notified the petitioner to this effect, in writing. The respondents have been advised by the Law Society of Scotland not to release the material. They maintain that they are prevented from doing so by LPP.

[5] The petitioner, having reviewed the file of the complainer's solicitors, considered that it had enough information to investigate complaints 1-3. However, it maintains that the file is required to address complaint 4. The file would not be made available to the complainer who would receive only a limited amount of information from it. The petitioner explained that under its Policy and Procedure Manual, the Case Investigator who is preparing the Investigation Report must consider if there are any confidential matters which the complainer should not see, including matters confidential to a practitioner's own client. If there are such matters of confidentiality then either a redacted copy of the Investigation Report or a summary letter should be issued to the complainer.

[6] Complaint 4 as taken from the Summary of Issues of Complaint prepared by the petitioner is that the first respondent "failed to act with competence and diligence by not providing in a timely manner all necessary vouching which has been requested of them by

my solicitor since September 2018, despite numerous e mails being sent chasing this information”.

[7] Both the Faculty of Advocates and the Law Society of Scotland have been given permission to appear as interveners. They maintain that LPP is not lost by the making of a third party complaint, nor elided by any provision of the 2007 Act.

Issues

[8] The parties helpfully lodged a document setting out both areas of agreement and areas of disagreement to the following effect:

Issues of Agreement

1. The parties are agreed that:
 - a. LPP is a fundamental right that can only be disregarded or overridden in certain limited circumstances.
 - b. LPP may only be disregarded if it has been waived, if there is a recognised exception in play or if it is overridden by statute.
 - c. There has been no waiver in this case.
 - d. The only potential exception that the petitioner could seek to rely on in this situation is what is sometimes termed the non-infringement exception arising when information is sought by a regulatory body.
 - e. If there is no such exception, in the present circumstances LPP may only be disregarded if it has been overridden by statute.
 - f. Statutes may override LPP either expressly/explicitly or by necessary implication.
 - g. There has been no express override in this case and the question is therefore whether the relevant legislation overrides LPP by necessary implication.

Issues of Disagreement

2. The parties disagree as to whether there is a valid exception arising for what is termed non-infringement:
 - a. The petitioner acknowledges that such an exception was recognised in *R(Morgan Grenfell & Co Ltd) v Special Commissioner of Income Taxes* [2003] 1 AC 563 and if it is recognised as an exception in Scots law then it would be applicable here.
 - b. The respondents and the interveners deny that such an exception exists.
3. The parties disagree as to whether the relevant legislation overrides LPP by necessary implication:
 - a. The petitioner maintains that the scheme of the 2007 Act means an override to LPP must necessarily be implied into section 17 of and schedule 2 to the 2007 Act.
 - b. The respondents and the interveners deny that there is any necessary implication from the Act that section 17 overrides LPP.

Aids to construction

[9] Senior counsel for the petitioner accepted that where the court was required to consider the issue of whether a proviso required to be read into a statute as a matter of necessary implication assistance might be gained from reference to relevant Explanatory Notes and parliamentary debates as assisting to elucidate both the context and purpose of the legislation. The parties' contentions regarding the effect of considering the relevant material is recorded hereafter in the summary of their submissions. The following material is relevant:

Explanatory Notes

[10] The Explanatory Notes to the Act include the following, in relation to section 37:

“71. Section 37 empowers the Commission to obtain information or documents from the professional organisations, or from individual practitioners where such information is not within the knowledge of the relevant professional organisation, in order to allow the Commission to carry out its conduct complaints handling functions under sections 23 and 24 and its monitoring function under section 36 (including the function of carrying out audits). The information or documents may include information obtained from a practitioner in the course of the relevant professional body’s investigation of a conduct complaint. The professional organisation or the practitioner is required to comply with a requirement to provide such information or documents. However, in making a request for information, the Commission is not given the right to override the existing rules of legal privilege.”

Parliamentary debates

[11] Section 17 of the Act was initially presented as section 13 of the Bill. On 14 December 2006 at stage 3 of the Bill the Scottish Parliament considered motions for amendment which included number 39, in these terms:

“Any practitioner, practitioner’s firm, employing practitioner or complainer of whom a requirement is made by a notice under subsection (1) or, as the case may be, subsection (3A) must comply with that requirement, notwithstanding any duty of confidentiality owed to any person or any right of confidentiality.”

The motion was resisted by the Government, with the following statement being made by the relevant Minister:

“The effect of amendments 39, 40, 71 and 80 would be radically to change the carefully structured provisions of the bill in terms of which the commission and the professional bodies can obtain documents and evidence.

At present, the bill provides that such bodies can require production of documents and other evidence. If the person who is put under such a requirement resists on the grounds of confidentiality or legal privilege, it will be necessary for the commission or professional bodies to go to court to seek an order. A court will not grant an order that breaches legal privilege and, in the public interest, it will try where possible to preserve other obligations of confidentiality.

The amendments would mean that all persons who were served with a requirement to provide documents would be put under an immediate statutory duty to comply

with the requirement. That would result in a complete override of legal privilege and confidentiality. However, legal privilege is an automatic right that not even the courts can overrule without explicit authority.

At stage 2, we amended schedule 3 to the bill to require the commission to make provision in its rules to prevent investigation of a complaint unless the complainer has waived any relevant rights of confidentiality. Accordingly, the whole framework of legal privilege is protected and respected in the bill. Even the complainer's rights are preserved unless he expressly waives them.

The bill should enable the commission and professional bodies to obtain most of the documents that they need without making inroads into rights of confidentiality or legal professional privilege, which are considered by the Executive to be of fundamental importance. Both the commission and the professional bodies will need to go to court if persons do not hand over documents or evidence that is required from them. In such cases, the legal machinery in schedule 2, which is based on provisions in the Solicitors (Scotland) Act 1980, would apply. In other words, the bill preserves the status quo on legal privilege and it adopts a procedure for going to court that is well tried and which works.

The amendments would radically alter the status quo in the wrong direction and against the public interest. On that basis, and in the interest of protecting client confidentiality, I oppose all the amendments in the group."

The amendment was not withdrawn and the matter proceeded to a division, in which the proposed amendment was rejected by a substantial majority.

Submissions for the petitioner

[12] The petitioner advanced submissions under two main headings: whether the making of the order would involve an infringement of LPP; and whether the statute could be said to provide a statutory waiver of LPP, by necessary implication. The first of these submissions was advanced with a degree of diffidence, senior counsel for the petitioner accepting the characterisation by the interveners of her pursuit of the point as being "faintly" argued.

No infringement

[13] The first of these submissions depended strongly on the interpretation placed by

Lord Hoffman in *Morgan Grenfell* in respect of the decision in *Parry-Jones v The Law Society* [1969] 1 CH 1, which concerned similar provisions of the Solicitors Act 1957. Reliance was placed on Lord Hoffman's comments at para 32, that:

“the true justification for the decision was not that Mr Parry-Jones's clients had no LPP, or that their LPP had been overridden by the Law Society's rules, but that the clients' LPP was not being infringed.”

Whilst the concept of a 'no infringement' exception to LPP, was rejected by the Court of Appeal in *Financial Reporting Council Ltd v Sports Direct International plc* [2020] 2 WLR 1256, that involved a “retrofit” of the sort deprecated by the court itself (at paragraph 40). In any event, the court in *FRC* endorsed *Parry-Jones* as good authority for the proposition that rule 11 of the relevant Solicitors' Accounts Rules conferred the power to compel privileged documents.

Necessary implication

[14] It was accepted that should the court reject the no infringement submission, there being no express waiver in the Act, the petitioner had to satisfy the court that a waiver arose by necessary implication; that is one which necessarily follows from the express provisions of the statute construed in their context and according to their purpose.

[15] The purpose of the provisions (Policy Memorandum, paras 4 and 5) was to provide a new regime for the handling of complaints against legal practitioners under which the petitioner was to act as a “gateway” to receive complaints that could not be resolved by practitioners themselves. The arrangements were intended to provide quicker outcomes for practitioners and complainers. In this regard debates in Parliament may be relevant to the over-arching purpose of the legislation. It was not submitted that any ambiguity arose for the purpose of *Pepper v Hart* 1993 AC 593. The statutory context for section 17 and schedule

2 includes the powers given to the petitioner to enable it to discharge a wide range of functions, including the determination of eligibility of complaints, investigation and determination of services complaints and decisions on remedy.

[16] The party seeking to establish a necessary implication is not required to demonstrate that the purpose of the legislation would otherwise be “wholly frustrated”. It would be enough to show that an important aspect of the legislation would be frustrated or stultified. That could be shown here. A right of complaint had been conferred on a wide range of persons and organisations going beyond the individual client of a solicitor. It was inevitable that in handling such complaints the petitioner may in individual cases require access to material subject to LPP. The powers of recovery conferred by the relevant provisions were designed to support the petitioner in discharging its full wide range of functions. To exclude material subject to LPP from the scope of the recovery provisions would leave the petitioner in a position in which its access to potentially relevant information was controlled by the willingness of the client to grant a waiver. It would also lead to a situation in which some complaints may be subject to less comprehensive examination than others simply by virtue of the identity of the complainer. Whilst the majority of complaints were made by the client of the solicitor complained against, third party complaints might at any one time make up between one third and almost one half of complaints.

[17] In addition exclusion of such material would create an additional administrative burden, since the petitioner, in the face of resistance by the client, would be in no position to adjudicate on whether LPP was justifiably asserted. It would thus be for the court to adjudicate in the context of a schedule 2 application. This was not consistent with the statutory purpose of achieving an effective complaints-handling system and would contribute to a frustration of the statutory purpose.

Submissions for the respondents

[18] Section 17 and paragraph 1 of schedule 2 to the Act do not extend to circumstances in which an obligation of confidentiality exists. The obligation of confidentiality arising out of a solicitor-client relationship is of foundational importance to that relationship, to the giving of informed, frank and helpful legal advice in the context of that relationship and to the administration of justice and legal affairs more generally. That confidentiality survives the termination of the solicitor-client relationship, and can only be discharged by waiver by the client to whom the privilege belongs. The solicitor cannot discharge the obligation.

Disclosure of material subject to that confidentiality can itself give rise to grounds of complaint against the solicitor unless they are able to point to a clear exemption or statutory limitation of confidentiality.

[19] LPP is a fundamental human right protected by the common law and under Article 8 of the European Convention on Human Rights. Such limitations as exist are exceptional and apply only within tightly defined circumstances, or arise only out of an obvious statutory abrogation of the right of confidentiality. The Act contains no clear or direct limitation or abrogation of confidentiality, nor can it be said to do so by necessary implication.

[20] Where the effect would be the overriding of fundamental common law rights, the test of necessary implication is a demanding one (*B (A minor) v DPP* [2000] 2 AC 428 (HL) and *Morgan Grenfell* at para 45) which was not met in this case.

Submissions for the interveners

[22] The importance of LPP was recognised as foundational by both of the interveners: see the Guide to the Professional Conduct of Advocates at 2.3 and the Scottish Solicitors

Practice Rules at B1.6. Standing its importance, there were only three situations in which the privilege could be overcome:

- i. As recognised by Stephen J in *Reg v Cox and Railton* (1884) 14 QBD 153, LPP did not arise from a communication between a client and his lawyer for a criminal purpose (“the iniquity exception”).
- ii. It may be waived, but only the client, to whom the privilege of LPP belongs, could do so.
- iii. It may be overridden by statute, but only by way of express provision or necessary implication.

[23] The parties were agreed as to the correct approach to the question of necessary implication. However, it should be borne in mind that “in considering the intention of the legislation, it is not enough that it is intended for the public good or that it would be even more beneficial for the public if” a certain result were to obtain (*R (Black) v Secretary of State for Justice* [2018] AC 215, para 36).

[24] Reading the provisions in question as subject to LPP would not stultify or frustrate any part of the statutory purpose, since:

- (a) It would have no impact in the majority of complaints in which waiver will have operated.
- (b) It would have no impact where the iniquity exception applies.
- (c) It would only prevent disclosure of material where LPP was made out. Only communications between clients and their lawyers for the purpose of obtaining legal advice will attract LPP (*Three Rivers District Council v Governor and Company of the Bank of England* [2005] 1 AC 610). Much of a file will, even in a third party complaint, thus still be disclosable.
- (d) Communications for the purpose of obtaining legal advice are unlikely to be fertile ground for a third party complaint, so the issue is likely to arise only rarely.
- (e) It is in fact more likely that it would be the respondent to the complaint that would wish to rely on such material – for example, to show that (s)he was acting in accordance with client instructions. The maintenance of LPP thus cuts both ways.
- (f) It does not avail the petitioner to point to the public importance of professional regulation: LPP does not yield to the public interest: *R v Derby Magistrates Court ex parte B* [1996] AC 487.

The legislature may be taken to have been aware of *B v Auckland District Law Society* [2003] 2 AC 736 and the general principle of legality when promulgating the 2007 Act. Had Parliament intended to override LPP – especially where it would so obviously be in play in third party complaints – one might have expected Parliament to tackle this directly. That the Act proceeded on an assumption of LPP being excluded from its ambit could be seen from the Explanatory Notes to s 37.

[25] No administrative burden would arise. The Court in applications under schedule 2 would require only production of material not covered by LPP, and in cases of difficulty would appoint a commissioner to carry out an excerpting exercise. The statutory purpose would not be stultified.

[26] The approach of the petitioner would create inconsistency. The Scottish Solicitors Discipline Tribunal is very clearly bound by the normal rules of LPP. Rule 13 of the SSDT Rules 2008, made in exercise of statutory powers and with the concurrence of the Lord President of the Court of Session, provides for an order for production of documents. Rule 13(2) provides as follows: “The parties are not obliged by such an order to produce any document which they would be entitled to refuse to produce in proceedings in any court in Scotland.” If the petitioner’s arguments were correct, this provision would be nugatory.

Analysis and decision

[27] No issues arise at the present stage of these proceedings as to whether the communications or documents in question are indeed such as fall within the scope of LPP. The arguments proceed at a level of principle, and by assuming, for these purposes, that this is so. It is nevertheless worth distinguishing between the general duty of confidentiality which arises from the solicitor/client relationship, and communications which attract

privilege. As Lord Scott noted in *Three Rivers* (para 24) confidentiality in the general sense is a pre-requisite for the claim of privilege, but of itself it is insufficient to give rise to it.

Privilege does not attach to documents or communications because they are confidential but because they arise out of the giving or receiving of legal advice; or because they are communications *post litem motam*. At the heart of this case is a question of the protection to be given to privilege in the sense of legal advice privilege, and litigation privilege.

[28] In other words, there is a general duty of confidence which requires a solicitor to keep his client's affairs confidential, which duty may be overridden in the public interest. To discuss a client's affairs in breach even of this general duty of confidence would be a grave breach of the duty; to answer legitimate questions in the course of a litigation, or in response to a relevant inquiry from the regulator, in respect of non-privileged communications, would not be.

[29] As parties have agreed, where the communications are within the scope of privilege, that privilege may not be overcome, even in the public interest, save within strictly defined circumstances. These are waiver, whether express or implied, by the person entitled to assert the privilege; recognised exception, including where the material is being used to shield criminal or fraudulent activity; and where the privilege is overridden by statute.

[30] There has been no waiver in this case; and there is no express override in the statute. The two issues to address are thus whether the circumstances constitute a recognised exception (the "no infringement" argument) or whether an override arises by necessary implication from the terms of the 2007 Act.

Whether there is a no infringement exception

[31] The argument that there was no infringement arose from efforts to explain the

decision in *Parry-Jones*, and from *obiter* comments by Lord Hoffman in *Morgan Grenfell*. It seems to us to be a somewhat fruitless task to seek to elucidate the rationale of *Parry-Jones*. The distinction between general duties of confidence as opposed to LPP, as developed in a modern understanding of the issues, for example in the *Three Rivers* case and in *Morgan Grenfell* itself, as well as *B v Auckland* and *FRC*, may lie at the heart of it. When one compares the observations of Lord Denning at page 7 with those of Lord Diplock at page 10, it is not clear that they have in mind the same concept. In particular, Lord Diplock's comments at page 10 appear to be focussed on the general duty of confidentiality, and not legal advice privilege. In any event, we find the treatment of *Parry-Jones* in *FRC* to be compelling, particularly at para 40. We reject the suggestion that a "no infringement exception" applies to LPP.

Necessary Implication

[32] Turning to the issue of necessary implication, consideration of this matter cannot be divorced from the vital nature of LPP as a fundamental right to which the courts have long attached the greatest degree of importance. It is of such significance that it does not yield, even in a case of murder, to the public interest (*R v Derby Magistrates Court, ex parte B*). In *B v Auckland* the court noted the comments in *R v Ukjee* [1982] 1 NZLR 561 that:

"Whether the principle operates as a bar to the emergence of the truth and to the overall public detriment is not now a relevant legal consideration."

This, along with the principle of legality to which we will turn shortly, explains why the question of implication has to be assessed by a test of absolute necessity. An implication that LPP is overridden can only arise if it follows necessarily from the express terms of the statute construed according to its context and purpose. The implication must be demonstrably necessary for at least an important aspect of the legislation to achieve its

purpose. It is not enough that it might be convenient; sensible; or reasonable. (see *Morgan Grenfell*, per Lord Hobhouse, para 45). A necessary implication “connotes one which is compellingly clear” (*B (a minor) v DPP*, Lord Nicholls, p 464). Privilege may successfully be asserted unless the only available inference is that Parliament must have intended to set it aside.

[33] The principle of legality is thus important in this connection, since,

“...in the absence of express words or a truly necessary implication, Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text” (*B (a minor) v DPP*, Lord Steyn, p471)

[34] In *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, at p 131,

Lord Hoffmann stated:

“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”

Whilst it is true, as submitted by senior counsel for the petitioner, that even extremely weighty and fundamental issues may be the subject of necessary implication, the principle of legality means that one has to recognise that Parliament does not legislate in a vacuum but according to a framework of law which is understood; and that whilst statutory waiver by necessary implication is possible, the more fundamental the right the less likely it is that it would be left to implication. This is part of the context in which the issue of absolute necessity and the cogency of the argument must be very carefully assessed.

[35] It is also important to bear in mind that the right to assert LPP is not the right of the solicitor, it is the right of the solicitor's client. The interest which is protected under LPP is not the interest of the solicitor, it is the interest of the client. It may very well be the case, as submitted by the learned Dean of Faculty, that it would often be favourable to the interests of the solicitor for the right to be waived, but it is not for him to make that call. It is for the client to decide, and if the client asserts the right the solicitor is powerless to resist. The refusal to submit the file in this case stems not from a choice or discretion of the solicitor, but from the client's decision to assert his privilege.

[36] Against this background we turn to ask whether there is a manifest legislative policy underpinning the Act such as to justify importing waiver of LPP into the statute by means of necessary implication? One may accept that the petitioner has been given relatively wide-ranging powers and responsibilities without being driven to the conclusion that a general waiver of LPP must be implied into the operation of the Act.

[37] In fact, having regard to the terms of the statute as a whole it appears that the opposite is the case. There is a significant and fundamental stumbling block in the way of the petitioner's argument, in the terms of para 1 of schedule 3 to the Act. The effect of this is that an individual who presents a complaint may only pursue that complaint if he waives **any right** of confidentiality on his own part (the emphasis is ours). That must include the right to assert LPP. The choice is left to the complainant: they may assert the privilege, although if they do so the complaint cannot progress. If the effect of the Act, in order to achieve its purpose, was that it carried a necessary implication that the right to assert LPP had to be understood to be waived by necessary implication, this provision would be entirely unnecessary. One can fully understand why schedule 1 requires that a complaint may only proceed if the complainer waives confidentiality, including the right to assert LPP.

It is nevertheless significant that this is achieved, not by stating that the making of a complaint carries with it the understanding, and necessary consequence, that LPP has, by virtue of the complaint, been waived; nor by leaving the matter silent and open to arguments about the possibility of implied waiver arising from the client having subjected the confidential relationship of solicitor/client to the scrutiny of the petitioner. Rather, even in respect of someone making a complaint against his own solicitor the statute has not left the matter to implication: the right to LPP is preserved by the statute. The choice is left to the individual, who will be in the best position to assess whether the benefit to him of maintaining his confidentiality, including the right to assert LPP, is of such importance that he would choose to assert it rather than lose it and allow the complaint to proceed. The argument for the petitioner is however that whilst such an individual may make this choice, a person whose solicitor is the subject of a third party complaint, who has no part in the process, and who seeks to maintain the confidential nature of the relationship, can have his right to assert LPP removed by inference. We cannot accept that argument. In the course of argument senior counsel submitted that to exclude material subject to LPP from the scope of the recovery provisions would leave the petitioner in a position in which access to potentially relevant information was controlled by the willingness of the client to grant a waiver: yet that is exactly the position which the petitioner is always in. Under the rules made in consequence of schedule 3, para 1, no complaint of any kind can be processed unless the client is willing to grant a waiver.

[38] The Explanatory Notes in respect of section 17 are silent on the issue of privilege. It is instructive to look at those addressing section 37 which relates to papers in the hands of third parties. In that context the statement is that “in making a request for information, the Commission is not given the right to override the existing rules of legal privilege.” When

taken with the terms of sch 1 para 3 this is a strong indication against waiver of LPP arising by necessary implication.

[39] The argument for the petitioner is that important aspects of their obligations under the statute would be thwarted were they unable to recover under section 17 documents in the hands of a solicitor where the client asserted LPP. It is not at all apparent why that should be so. The petitioner will often have at its disposal the file of the solicitor acting for the complainer. There is much information relevant to a complaint which may be available from that, including a considerable degree of correspondence from the solicitor complained of. That applies equally to litigation as to transactional complaints. In each case the petitioner will also be able to seek a response and explanation from the solicitor complained against. It is likely that there will be material which that solicitor may provide which is not covered by LPP and which may be relevant to the complaint. In litigation complaints, there may be court papers, or orders, which can be examined and which may help throw light on matters. In transactional cases there may be contractual or other documents available.

[40] Whilst for these reasons we consider that it can be said as a matter of principle that it is not obvious why investigation of a third party services complaint requires disclosure of material covered by LPP, the matter may to some extent be illustrated by examining the nature of the complaints in the present case. The nub of complaint 4 is that the solicitor in question failed to act with competence and diligence, the specification of which is merely that he failed to provide "in a timely manner all necessary vouching". It is highly unlikely that proper investigation of this complaint requires disclosure of material which breaches the LPP rights of the solicitor's client. The court is not concerned with the other complaints accepted as eligible but they are of a similar nature, in that they relate to missed deadlines, failing to update their opposing solicitors in relation to meeting deadlines, failing to

acknowledge or respond to e mails or telephone calls, and failing to deliver commitments made to the opposing solicitors resulting in those solicitors having to “chase for information”.

[41] In the course of submissions senior counsel for the petitioner suggested that there were protections within the Act which were designed to limit disclosure of information coming into the possession of the petitioner, and that this supported the proposition that a waiver must arise by necessary implication. We do not accept this submission. In the first place, this section only arises for consideration when material is already in the hands of the petitioner so it does not help address the primary question in the case. In any event, the only true protection in the Act lies in section 43. However, the protection actually provided by the operation of section 43 is limited. It provides that information, including that which is given to the petitioner in the course of, or for the purposes of, any consideration of a complaint, may in fact be disclosed, but only

“(a) for the purposes of enabling or assisting the Commission to exercise any of its functions;

(b) where the disclosure is required by or by virtue of any provision made or under this Act or by any other enactment or other rule of law.”

This would not prevent disclosure of the material being made if it were deemed necessary for the purposes of preparing a report in an investigation; or for explaining to a complainer, who would be entitled to a reasoned decision, why a complaint has been rejected, or even upheld. The only basis upon which section 43 could be said to provide protection to the client’s interests would be if, contrary to the submissions for the petitioner, material within the scope of LPP were to be excluded from the scope of the Act. Senior counsel for the petitioner sought to rely on terms within the petitioner’s manual under which staff are enjoined to consider whether confidential and sensitive material should be redacted from

the decision report, especially in the case of third party complaints. Suffice it to say that the vagueness of these parts of the manual, which contain no more than guidance in any event, is unlikely to offer any comfort to an individual whose privilege is being assailed.

[42] Thus, without even examining any of the parliamentary material, we are satisfied that the petitioner's case must fail. In the course of the submissions we understood that it was not disputed that in the circumstances of this case we would be entitled to examine parliamentary material, at least in relation to divining the purpose of the Act. We note that the first condition for the operation of *Pepper v Hart* is that the legislation in question is ambiguous or obscure, or leads to an absurdity. In the strictest sense the legislation cannot be described as ambiguous. However the arguments upon which the case proceeds hinge on whether the statute must be read in such a way that a fundamental right should be taken as removed by implication. Yet, as Lord Browne-Wilkinson noted in *Pepper v Hart* (at p635) as part of his rationale for proposing that parliamentary materials should be available for consultation in limited circumstances,

“in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words? The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?”

The present is a case where the question was considered by Parliament, and by parity of reasoning with cases of ambiguity, obscurity or absurdity, it would be unreasonable for the court to close its eyes to this when faced with the arguments of the petitioner, even if only to apply a cross-check to the interpretation to which the court considers the words of the statute themselves give rise. The material available shows that the Scottish Parliament was alive to the issue. In the debate at stage 3 the Minister recognised the difference between

general confidentiality and LLP, and expressed concern that the proposed amendment would impinge on the issue of LPP. Consideration of the parliamentary material results in the conclusion reached by Lord Hoffman when conducting the same exercise in *Morgan Grenfell* (paras 34-35) “The Parliamentary material does not therefore assist in showing a clear intention to override a fundamental human right”.

[43] The result is that we are not satisfied that a statutory override must be read into the Act as a matter of necessary implication. The client is entitled to assert his privilege and the solicitors may not disclose to the petitioner any communications or documents within the scope of that privilege. Parties raised the possibility that it might be necessary for there to be further proceedings, including the appointment of a commissioner, to resolve any further issues. We will therefore put the case out By Order in case further discussion of these matters is required in light of this opinion.