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**IN THE COMPETITION**  
**APPEAL**  
**TRIBUNAL**

Case No. : 1672/5/7/24

Court of Session Supreme Courts,  
11 Parliament Square,  
Edinburgh,  
EH1 1RQ

Thursday 14<sup>th</sup> August 2025

Before:

The Honourable Lord Richardson  
Peter Anderson  
Charles Bankes

(Sitting as a Tribunal in Scotland)

BETWEEN:

Patrick Henry McAuley

**Claimant**

v

Faculty of Advocates

**Defendant**

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**A P P E A R A N C E S**

Patrick Henry McAuley On Behalf of Himself

Richard Keen KC On behalf The Faculty of Advocates Services LTD (Instructed by Balfour and  
Manson LLP)

Thursday, 14 August 2025

(10.30 am)

THE CHAIRMAN: Good morning. Good morning, Mr McAuley, good morning, Lord Keen.

Now, the matter cause before us this morning in order to deal with two applications. The first is the strike-out application made on behalf of the defender, and then we have your application for interim measures, Mr McAuley.

MR MCAULEY: Yes.

THE CHAIRMAN: So there were two preliminary matters I wanted to deal with before we start.

The first one was you mention in your -- a number of your written submissions, Mr McAuley, that you continue not to enjoy good health, and I just wanted to check that you are in a position to present arguments to us this morning.

MR MCAULEY: Yes. I think so. I have tried to improve that, like I have joined a football team and things like that in the meantime. So I am just trying to -- I do not want to sink into the abyss. That is what --

THE CHAIRMAN: I am pleased to hear that.

Just in terms of auditability, I wonder if the microphone is turned on. I think you might need to use the other one.

1 MR MCAULEY: Testing.

2 THE CHAIRMAN: Yes, that sounds ... It might be a bit  
3 better.

4 MR MCAULEY: Yes, I think so.

5 THE CHAIRMAN: Thank you. That is good to hear. As I said  
6 to you on the last occasion, if at any point you feel  
7 that you would like to have a break, then please just  
8 ask and we will deal with that as and when that arises.

9 The second matter was on your application for  
10 interim measures, as I understand it, you submitted  
11 a slightly amended version which you had marked up with  
12 some red crosses, and would I be correct in  
13 understanding that you would seek the Tribunal's leave  
14 to amend your application?

15 MR MCAULEY: Yes.

16 THE CHAIRMAN: Yes, you would.

17 Lord Keen, is that amendment opposed?

18 LORD KEEN: No, it is not.

19 THE CHAIRMAN: Thank you. That is very helpful.

20 Now, in terms of the structure of the applications,  
21 what the Tribunal would propose is that we will hear  
22 from Lord Keen on the strike-out first of all, and then,  
23 Mr McAuley, we will hear from you both in your response  
24 to the strike-out, and the arguments you wish to make in  
25 support of your application for interim measures, and

1           then we will hear from Lord Keen in response to that.

2           So that is how we would propose to divide matters up  
3           between you, unless either counsel or you, Mr McAuley,  
4           have a different view as to how we should deal with  
5           matters. Are you content to deal with it in that way?

6       MR MCAULEY: Yes.

7       THE CHAIRMAN: Lord Keen?

8           Application for strike-out by LORD KEEN

9       LORD KEEN: Thank you, my Lord. Thank you, members of the  
10          Tribunal, and good morning.

11          The defender invites the Tribunal to strike out the  
12          entirety of the first claim on the basis that there are  
13          no reasonable grounds for making the claim, and that  
14          application is made pursuant to rule 41, paragraph 1,  
15          subparagraph (b), of the Tribunal Rules, which can be  
16          found at page 61 of the defender's bundle of  
17          authorities. I do not think it is necessary at this  
18          stage to go to it.

19       THE CHAIRMAN: Yes.

20       LORD KEEN: But it may be that in due course we can address  
21          it.

22          Before dealing with the substance of the  
23          application, I would propose, first of all, to adopt the  
24          written note that has been submitted in support of the  
25          application in its entirety.

1 THE CHAIRMAN: Yes.

2 LORD KEEN: And then to touch upon a number of background  
3 facts which do not appear, to us, to be in dispute --

4 THE CHAIRMAN: Yes.

5 LORD KEEN: -- between its parties.

6 The pursuer, Mr McAuley, is a Scottish solicitor.

7 THE CHAIRMAN: Yes.

8 LORD KEEN: As such, he is subject to the regulation of the  
9 Law Society of Scotland, the relevant regulator pursuant  
10 to the Solicitors (Scotland) Act 1980.

11 THE CHAIRMAN: Yes.

12 LORD KEEN: In order to conduct practice as a solicitor in  
13 Scotland, the pursuer requires to adhere to the  
14 requirements of his regulator. The Law Society of  
15 Scotland requires that someone in the position of the  
16 pursuer should apply for and be granted a practice  
17 certificate.

18 THE CHAIRMAN: Yes.

19 LORD KEEN: An application that has to be made annually.

20 That practice certificate is sometimes referred to as  
21 a D1 application, being a reference to the relevant  
22 section of the Law Society of Scotland's guidance.

23 THE CHAIRMAN: Yes.

24 LORD KEEN: The pursuer has applied for and been granted  
25 a certificate to practise as a solicitor. However --

1 THE CHAIRMAN: I think it has been lodged in process.

2 LORD KEEN: It has indeed, my Lord. The point is that that  
3 certificate is subject to a qualification imposed by the  
4 Law Society of Scotland, sometimes referred to as a D2  
5 management qualification, but essentially he is subject  
6 to a supervision requirement if he is to practise as  
7 a solicitor in Scotland.

8 THE CHAIRMAN: Yes.

9 LORD KEEN: And therefore must come under the supervision of  
10 a solicitor in Scotland with an unqualified practice  
11 certificate.

12 THE CHAIRMAN: Yes.

13 LORD KEEN: Mr McAuley challenged the imposition of the D2  
14 management or supervision requirement in proceedings  
15 before the Court of Session. He also commenced  
16 proceedings against the SLCC, but I will put those to  
17 one side for a moment.

18 THE CHAIRMAN: Yes.

19 LORD KEEN: His challenge to the imposition of the  
20 qualification to his practicing certificate to the  
21 supervision requirement was rejected.

22 THE CHAIRMAN: And that is the -- is that the decision of  
23 Lord Doherty; is that right?

24 LORD KEEN: Yes. I understand that the pursuer has now  
25 applied to the Supreme Court for leave to appeal that

1 decision, and that is where matters stand, as

2 I understand it, and Mr McAuley agrees with that.

3 THE CHAIRMAN: Is that correct?

4 MR MCAULEY: Yes.

5 THE CHAIRMAN: Thank you.

6 LORD KEEN: In respect of those appellate proceedings,

7 Mr McAuley has sought to instruct a member or members of  
8 the Faculty of Advocates to appear on his behalf. The  
9 Faculty of Advocates has intimated that he is not in  
10 a position to give such direct instructions to a member  
11 of the Faculty of Advocates as he is not a solicitor  
12 entitled to conduct proceedings before the courts.

13 THE CHAIRMAN: Yes.

14 LORD KEEN: He not being the subject to a supervision as  
15 required by his regulator.

16 THE CHAIRMAN: Yes.

17 LORD KEEN: In reliance thereon, reference has been made to  
18 the guidance for the professional conduct of advocates  
19 which can be found in the bundle, if your Lordships have  
20 that.

21 THE CHAIRMAN: Yes. It is in the defender's bundle.

22 LORD KEEN: C3 of the bundle, thank you.

23 THE CHAIRMAN: Yes.

24 LORD KEEN: And if we can turn, first of all, to  
25 paragraph 8.2.

1 THE CHAIRMAN: Yes.

2 LORD KEEN: Heading, "From whom may an advocate accept  
3 instructions". An advocate must not accept instructions  
4 directly from a client except as provided for in rule  
5 8.3.

6 THE CHAIRMAN: Yes.

7 LORD KEEN: And here Mr McAuley is the client.

8 If we turn --

9 THE CHAIRMAN: Just pausing there, Lord Keen, and it is  
10 maybe -- I make this point, I do not want you to address  
11 it right now, Mr McAuley, but just so you know when it  
12 comes to you speaking I would be grateful for you to  
13 explain this.

14 I think we have discerned from the papers that  
15 initially the request for representation from Mr McAuley  
16 seemed to address two matters. One is the one you have  
17 touched upon already, but there was also the --  
18 a question, I think, before, an employment law question  
19 with Mr McAuley's former employee -- employers. So  
20 there were two matters then which are touched on in  
21 email correspondence.

22 Subsequently, Mr McAuley, I think in -- I think in  
23 a note that he appended to his list of authorities,  
24 referred to four matters. So the Tribunal was not  
25 entirely clear at the moment as to how many litigations

1           there are on foot, Mr McAuley's, or involving  
2           Mr McAuley, and in respect of which the question of  
3           representation might arise.

4           So I am raising that, Mr McAuley, now, so that  
5           you -- when it comes for you to respond to Lord Keen, it  
6           will be -- the Tribunal will be helpful -- would be  
7           grateful if you would explain where we are with those  
8           various other litigations.

9       MR MCAULEY:   Yes.

10      THE CHAIRMAN:  Thank you.

11      LORD KEEN:    I am obliged, my Lord.  Reference has been made  
12                    by the pursuer to two appeal proceedings.

13      THE CHAIRMAN:  Yes.

14      LORD KEEN:    We are only aware of one, which involves the  
15                    application for leave to the UK Supreme Court in respect  
16                    of the decision made in the case brought by Mr McAuley  
17                    against the Law Society of Scotland.

18      THE CHAIRMAN:  Yes, thank you.

19      LORD KEEN:    So if the pursuer wishes to elucidate on that,  
20                    then clearly I will respond in due course.  But that is  
21                    the extent of my knowledge and it is in that context  
22                    that I address the Tribunal.

23      THE CHAIRMAN:  Yes, that is helpful.

24      LORD KEEN:    Now, if we go to 8.3.

25      THE CHAIRMAN:  Yes.

1 LORD KEEN: And in particular 8.3.3:

2 "Where the right to conduct litigation before  
3 a court or tribunal is restricted by law, direct access  
4 instructions to appear in that court or tribunal must  
5 only be accepted from a person entitled to conduct  
6 litigation before that court or tribunal."

7 THE CHAIRMAN: Yes.

8 LORD KEEN: And, of course, it is in respect of that  
9 provision that the pursuer takes issue for the purposes  
10 of competition law, and I will come on to deal with that  
11 in a moment.

12 THE CHAIRMAN: Yes.

13 LORD KEEN: But the genesis of the provisions in the Guide  
14 can be found in section 120 of the Legal Services  
15 (Scotland) Act 2010, which is found in A2 of the bundle.  
16 But more immediately, in terms of the Act of Sederunt  
17 (Regulation of Advocates) 2011, which can be found in A3  
18 of the bundle.

19 THE CHAIRMAN: Yes.

20 LORD KEEN: And which can be found at page 21.

21 THE CHAIRMAN: Yes. So section 120 of the 2010 Act is the  
22 provision --

23 LORD KEEN: Is the statutory basis for the promulgation of  
24 the Act of Sederunt by the Lord President --

25 THE CHAIRMAN: Number 312 of 2011.

1 LORD KEEN: Yes. And if we look at Act of Sederunt, it  
2 provides that the professional practice, conduct and  
3 discipline of advocates are to be regulated by rules  
4 made by the Faculty of Advocates.

5 So that is the statutory genesis, if you like, for  
6 what is referred to in the Guide at rule 8.2 and 8.3.

7 THE CHAIRMAN: Yes.

8 LORD KEEN: Now, the pursuer's claim comprises two limbs.

9 The first is that the defender acted in breach of  
10 section 18 of the Competition Act 1998 by abusing  
11 a dominant position --

12 THE CHAIRMAN: Yes.

13 LORD KEEN: -- in refusing to permit the pursuer to instruct  
14 counsel directly, notwithstanding that he holds only  
15 a restricted practicing certificate from his regulator,  
16 the Law Society of Scotland.

17 THE CHAIRMAN: Yes.

18 LORD KEEN: The second limb is that this conduct also  
19 amounts to a cartel for the purposes of section 2 of the  
20 Competition Act.

21 THE CHAIRMAN: Yes.

22 LORD KEEN: There are no reasonable grounds for advancing  
23 the first element of the pursuer's claim. Even on the  
24 hypothesis that the defender is in a dominant market  
25 position with regard to the provision of advocacy

1 services in Scotland, the pursuer has failed to identify  
2 any abuse of such a position.

3 THE CHAIRMAN: So just to be clear about that, are you  
4 referring -- when you say the pursuer has failed to  
5 identify any abuse, clearly matters have developed  
6 during the course of these proceedings. So we have had  
7 the claim form. That was then amended, and  
8 subsequently, in the course of written argument,  
9 Mr McAuley has set out in his response to the defender's  
10 strike-out application a series of grounds of alleged  
11 abuse by the Faculty. So what the Tribunal would be  
12 keen to understand is when you say that the pursuer and  
13 Mr McAuley has failed to identify any grounds of abuse,  
14 are you saying that, as it were, as a matter of  
15 pleading, that in the claim form the abuse has not been  
16 identified, or are you seeking to address wholesale all  
17 those grounds of abuse that are set out in the argument?

18 LORD KEEN: Insofar as the matter has been pleaded, the case  
19 pleaded is unfounded, and patently unfounded, because it  
20 proceeds upon a misapprehension.

21 THE CHAIRMAN: I see. So that is a slightly different  
22 point. To be clear, the point I am seeking to  
23 understand, it seemed to the Tribunal, having looked at  
24 the defender's strike-out application, that there were,  
25 as it were, two discrete points, or the points might be

1 summarised under two headings.

2 The first one is an argument which I think you are  
3 going to come on to make about the application of the  
4 exception in schedule 3 to the --

5 LORD KEEN: That is a later point, my Lord, which I am  
6 clearly going to come on to.

7 THE CHAIRMAN: Come on to that. But the other one, which is  
8 the way it is framed in the application, is essentially  
9 a pleading point in that you say the pursuer has not  
10 pled a relevant basis to engage the -- either section 2  
11 or section 18.

12 In relation to that pleading point, the issue that  
13 the Tribunal wants to be clear about is: is that -- is  
14 your argument based on the pleading, ie, to be  
15 absolutely clear, excluding what additional grounds and  
16 arguments Mr McAuley has advanced in his responsive  
17 note, his responsive submission?

18 LORD KEEN: No, I am going to address both.

19 THE CHAIRMAN: I see.

20 LORD KEEN: But they come together quite neatly.

21 THE CHAIRMAN: Very well. Well, carry on.

22 LORD KEEN: On that first part, because I will come on to  
23 the schedule 3 issue as a secondary. Although it is  
24 a very important point --

25 THE CHAIRMAN: Yes.

1 LORD KEEN: -- I want to deal with the abuse point first.

2 As your Lordship observes, the pursuer, even in the  
3 absence of pleading, makes a number or a series of  
4 complaints. But the forms of abuse posited by the  
5 pursuer appear to proceed upon the erroneous hypothesis  
6 that the defender obtained financial gain as a result of  
7 pursuer's inability to instruct counsel directly.

8 That appears to stem from a misunderstanding on the  
9 part of the pursuer that awards of expenses pronounced  
10 against the pursuer, in cases where the other party was  
11 represented by counsel, amount to awards of expenses in  
12 favour of the defender, and this contention is  
13 fundamentally flawed.

14 Instructing agents are responsible for the payment  
15 of counsel's fees as an outlay, and the awards of  
16 expenses referred to by the pursuer were made in favour  
17 of the Law Society of Scotland, and in a second case,  
18 the Scottish Legal Complaints Commission respectively,  
19 and the defendant has not obtained financial benefit  
20 from either award.

21 Further examples of abuse posited by the pursuer,  
22 who, as your Lordship has noted, in response to the  
23 defender's application to strike out, adopts what might  
24 be termed an omnibus approach to abuse, proceed on the  
25 false premise that the pursuer is a competitor of the

1 defender.

2 So, for example, at page 14 of his response to the  
3 defender's strike-out application, the pursuer refers to  
4 Professor Whish's definition of exclusionary abuse as  
5 behaviour that:

6 "... forecloses competitors in an anticompetitive  
7 way from entering the market or prevents existing  
8 competitors from growing within it. The foreclosure  
9 might occur upstream or downstream."

10 THE CHAIRMAN: Can you just give me that reference again?

11 LORD KEEN: Yes. It is at page 14 of the pursuer's response  
12 to the strike-out application, and it is quoted as  
13 follows:

14 "The definition of exclusionary abuse as behaviour  
15 that 'forecloses competitors in an anticompetitive way  
16 from entering the market or prevents existing  
17 competitors from growing within it. The foreclosure  
18 might occur upstream or downstream'."

19 What the pursuer goes on to state is this:

20 "Given that Faculty has completely excluded the  
21 solicitor, this falls within the spirit of exclusionary  
22 abuse."

23 THE CHAIRMAN: Yes.

24 LORD KEEN: But any form of abuse predicated on the  
25 assumption that the pursuer, who does not hold extended

1           rights of audience, is a competitor of the defender,  
2           must necessarily fail.

3       THE CHAIRMAN:   Yes.   Just -- so going back -- sorry to come  
4           back to the point I put to you before, Lord Keen, but  
5           I am keen to fully understand -- clearly understand the  
6           defender's position.  You are not taking a point, then,  
7           that these matters, the one we are just looking at,  
8           exclusionary abuse, has not been pled in the statement  
9           of case?  You are not saying, as a matter of pleading,  
10          well, Mr McAuley has not put this in the statement of  
11          case, and so therefore the Tribunal ought to require  
12          Mr McAuley, for example, to amend this in order for --  
13          for the defender to respond to it, and so on and so  
14          forth; you are saying we will deal with this all, and we  
15          maintain our strike-out position that notwithstanding.  
16          Is that your position?

17       LORD KEEN:   I notice the lack of pleading.

18       THE CHAIRMAN:   Yes.

19       LORD KEEN:   But when we look behind the lack of pleading to  
20           the response the pursuer has made to the strike-out  
21           application, we find what is apparently the substance of  
22           his complaint about abuse.

23       THE CHAIRMAN:   Yes.

24       LORD KEEN:   And I invite the Tribunal to look at the  
25           substance of that complaint, and to note that it is

1           unsustainable. So that there would be no requirement in  
2           that context to invite the pursuer to amend.

3       THE CHAIRMAN: Because the other -- looking at it from  
4           having considered the papers in advance, it had occurred  
5           to the Tribunal that, taking your second point that you  
6           are going to come on to first, that if you are right  
7           about that --

8       LORD KEEN: This does not arise. And you may think that  
9           I have done it in the wrong order, but I thought it was  
10          important to look at the substance of the complaint and  
11          then to come on to consider the second point.

12      THE CHAIRMAN: Yes, I understand why you have done that.

13      LORD KEEN: But I fully recognise that if the Tribunal is  
14          with me on the schedule 3 point, that essentially is an  
15          end of the matter.

16      THE CHAIRMAN: Yes.

17      LORD KEEN: And indeed, as we will see, is an end of the  
18          second part of the complaint under Chapter I as well.

19      THE CHAIRMAN: But turning that on its head then, if we were  
20          not with you on the schedule 3 point, then you say,  
21          well, we should go on and consider the substance, as you  
22          put it, of Mr McAuley's complaints --

23      LORD KEEN: Then I do not hold on to a pleading point.

24      THE CHAIRMAN: You do not hold on to a pleading point. Very  
25          well, that is very helpful.

1 LORD KEEN: So, my Lord, can I move on to that further  
2 point, which is that in addition to the pursuer's  
3 failure, whether in pleading or in response to the  
4 strike-out application, to identify bases on which the  
5 Tribunal could reasonably conclude, even following  
6 proof, that there is any abuse of a dominant position on  
7 the part of the defender, the Tribunal is able in any  
8 event to conclude, without hearing evidence, that the  
9 Chapter II prohibition does not apply in the present  
10 circumstances.

11 THE CHAIRMAN: Yes.

12 LORD KEEN: That, as my Lord has anticipated, is set out in  
13 paragraphs 2 to 11 of the defender's application where  
14 reference is made to paragraph 5, subparagraph 2 of  
15 schedule 3 to the 1998 Act which can be found at page 12  
16 of the defender's bundle of authorities.

17 THE CHAIRMAN: Yes.

18 LORD KEEN: And that provides, of course, that the  
19 Chapter II prohibition does not apply to conduct to the  
20 extent to which it is engaged in to comply with a legal  
21 requirement.

22 The defender's conduct --

23 THE CHAIRMAN: Sorry, can you just give me the reference in  
24 the bundle again?

25 LORD KEEN: Page 12, my Lord, in the bundle.

1 THE CHAIRMAN: Page 12. Thank you.

2 Yes.

3 Yes, I have that, thank you.

4 LORD KEEN: You have that, my Lord.

5 It is set out also at paragraphs 7 to 11 of the  
6 defender's application for strike-out.

7 THE CHAIRMAN: Yes.

8 LORD KEEN: The defender's conduct in refusing to permit the  
9 pursuer to instruct counsel directly flows from a legal  
10 requirement. There is, of course, a longstanding rule  
11 in Scotland that only Scottish solicitors are authorised  
12 to conduct litigation in Scotland where they hold  
13 a practicing certificate, and that means a solicitor  
14 with a restricted practicing certificate can only  
15 conduct litigation when acting under the appropriate  
16 supervision required by that restricted practicing  
17 certificate.

18 THE CHAIRMAN: Yes.

19 LORD KEEN: Now, the pursuer in response refers to the case  
20 of *Robson v The Council of the Law Society of Scotland*  
21 in what appears to be an attempt to dispute the  
22 existence of any such rule.

23 THE CHAIRMAN: Yes.

24 LORD KEEN: And although that authority is not produced, an  
25 extract of that decision is produced by the pursuer on

1           page 49 of his response to the defender's application.

2       THE CHAIRMAN:   Yes.

3       LORD KEEN:   And your Lordship will see there that

4           paragraph 21 of that decision has been highlighted by

5           the pursuer.

6       THE CHAIRMAN:   Yes.

7       LORD KEEN:   The provision there simply demonstrates the very

8           application of the rule to which I have just made

9           reference.

10           Mr Robson had identified counsel who was willing to

11           act if duly instructed, but could not identify

12           solicitors who would accept instructions.

13       THE CHAIRMAN:   Yes.

14       LORD KEEN:   And this makes plain that Mr Robson could not

15           instruct counsel himself, otherwise presumably he would

16           have done so.

17       THE CHAIRMAN:   Yes.

18       LORD KEEN:   So rather than supporting the pursuer's

19           position, the dicta in the case of *Robson* --

20       THE CHAIRMAN:   Calling it dicta, I think, is -- it is

21           a passing -- it is almost a narration, as I understand

22           it, Lord MacFadyen is explaining in the context of the

23           court's ultimate refusal to discharge the hearing.

24           But I understand, you are responding --

25       LORD KEEN:   I am responding to the pursuer's reliance upon

1           that dicta, my Lord. I am not seeking to elevate it  
2           beyond that.

3       THE CHAIRMAN: No, I see that.

4       LORD KEEN: He has simply, by going to that dicta,  
5           underlined the position in law, rather than contradicted  
6           it.

7       THE CHAIRMAN: But just to be clear also, insofar as you are  
8           relying on paragraph 5.1 and 2 of schedule 3,  
9           a criterion that you required to satisfy is that the  
10          Faculty's actions were made in order to comply with  
11          a legal requirement. "Legal requirement", as we know,  
12          is defined in subparagraph 3 of paragraph 5. And that  
13          requires, as it were, black letter law in the form of  
14          some enactment.

15                So that then, if I understand your argument, is why  
16          you took the time to take us through the provenance, as  
17          it were, the genesis I think was the word you used, of  
18          the Faculty Guide, Guide to Professional Conduct,  
19          because, if I anticipate your argument, you say the  
20          Guide to Professional Conduct is the legal requirement;  
21          is that right?

22       LORD KEEN: Exactly so, my Lord.

23       THE CHAIRMAN: So it is that that you rely on, rather than  
24          a broader, well-understood common law position. You  
25          rely on the black letter provisions, as it were, of the

1           Guide to Professional Conduct; is that right?

2       LORD KEEN: We come down, as it were, in a waterfall.

3           Section 120 of the Act makes provision for the  
4           Lord President to promulgate the Act of Sederunt of  
5           2011, which in turn returns that the Faculty will  
6           proceed to produce the rules, the Guide, to conduct.

7       THE CHAIRMAN: Yes.

8       LORD KEEN: So the black letter of paragraphs 8.2 and 8.3  
9           has its genesis in section 120 of the Act, and clause 4  
10          of the Act of Sederunt. So that is the case that I am  
11          making at this point, my Lord.

12           There are other issues that could arise with regard  
13          to the common law position in regard to appearances  
14          before the Supreme Court of Scotland and elsewhere, but  
15          I am not going there for these purposes.

16       THE CHAIRMAN: For the purposes of today's hearing, and the  
17          strike-out application and test you require to meet, you  
18          are saying that on this, the application of these  
19          provisions, essentially Mr McAuley cannot succeed, given  
20          the requirements of 8.2 and 8.3; is that correct?

21       LORD KEEN: That is precisely it, my Lord.

22       THE CHAIRMAN: Just in that regard, a point that the  
23          Tribunal was keen to just tease out, because there was  
24          a degree of uncertainty about it in the parties'  
25          submissions was: am I correct to understand that the

1 Faculty accepts that a Scottish solicitor falls within  
2 the terms of appendix D to the Guide to Professional  
3 Conduct, because I assume that must be right, and indeed  
4 I assume you must be right because it follows from the  
5 logic of your argument, we would not get to 8.3.2 unless  
6 a Scottish solicitor was at least capable of falling  
7 within the terms of appendix D; is that correct?

8 LORD KEEN: Yes. And my Lord touches upon appendix D.

9 THE CHAIRMAN: Yes.

10 LORD KEEN: The pursuer does take the matter further by  
11 suggesting that he is acting within a legislative  
12 capacity for the purpose of paragraph 1, subparagraph  
13 (h) of the schedule to appendix D.

14 THE CHAIRMAN: Yes.

15 LORD KEEN: And that is at page 187.

16 THE CHAIRMAN: I saw Mr McAuley's argument in that regard.

17 I did wonder whether it was necessary for him to make  
18 that argument in the sense that, as I understand it, the  
19 Law Society of Scotland is a designated professional  
20 body under the Financial Services and Markets Act, and  
21 therefore reading paragraph 3 of appendix D, where it  
22 says:

23 "The following may instruct on their own behalf, and  
24 their members may instruct on their own behalf or on  
25 behalf of their clients."

1           That is 3(d), designated professional bodies under  
2           the Financial Services and Markets Act.

3           Now, insofar as the Law Society is such a body --

4   LORD KEEN:   Its members are also entitled to --

5   THE CHAIRMAN:   So in a sense, Mr McAuley's interesting  
6           arguments about 1(h) do not need to arise, because it is  
7           not on a matter of dispute between you as to whether the  
8           Law Society falls within appendix D. But you say that  
9           Mr McAuley's ability to act as a member of the  
10          Law Society is constrained by the regulations of the  
11          Law Society and the requirement under -- on his  
12          practicing certificate that he act under the supervision  
13          of another solicitor, that is it in a nutshell?

14   LORD KEEN:   Precisely.

15   THE CHAIRMAN:   That is helpful.

16   LORD KEEN:   I was going to say that his reference to  
17          paragraph 1(h) was clearly erroneous, because he is not  
18          a body acting in a law-making capacity, but it is  
19          neither here nor there at the end of the day. The issue  
20          does not really arise, in my submission.

21   THE CHAIRMAN:   No, that is helpful.

22   LORD KEEN:   But it follows from the submissions I make that  
23          there are, and can be, no reasonable grounds for making  
24          the claim that the defender acted in breach of the  
25          Chapter II prohibition.

1 THE CHAIRMAN: Yes.

2 LORD KEEN: And so that aspect of the pursuer's case should  
3 be struck out.

4 THE CHAIRMAN: Yes.

5 MR BANKES: Just so I understand, you make that point solely  
6 on the basis that Mr McAuley is not a competitor of  
7 either the Faculty or any member of the Faculty. That,  
8 you say, is sufficient to dismiss in its entirety the  
9 Chapter II claim?

10 LORD KEEN: It is not solely on that ground. There is the  
11 provision under reference to schedule 3.

12 MR BANKES: Of course, putting that aside. But to the  
13 extent that you fail on that point --

14 LORD KEEN: With regard to abuse, he is not a competitor.

15 MR BANKES: Okay. And you say that is sufficient to dismiss  
16 the Chapter II claim?

17 LORD KEEN: Yes, if you are not with me on schedule 3.

18 MR BANKES: Yes.

19 LORD KEEN: And as I acknowledged, it may be it would have  
20 been simpler to address schedule 3 and then the  
21 substance, but it appeared to me that we ought to look  
22 at the substance of the claim that is made and consider  
23 that, but we then go on to the prohibition and the issue  
24 in schedule 3.

25 MR BANKES: Yes. Thank you.

1 LORD KEEN: We then have the pursuer's second case, which is  
2 the allegation of a breach of Chapter I prohibition.

3 Now, again, I am going to deal with it in the same  
4 order as I did with the Chapter II case.

5 Mr McAuley suggests that communications between the  
6 Dean of Faculty, Mr Graham, and other members of the  
7 Faculty might be a breach of section 2 of the 1992 Act.

8 Now, either those individuals are said to have  
9 breached section 2 by acting on their own behalf as sole  
10 traders, in which case I have to notice that none of  
11 them are defenders to the present proceedings, and no  
12 claim is advanced against the current defender, or those  
13 individuals are to be presumed to be acting as  
14 representatives of the Faculty of Advocates, which  
15 appears more logical, in which case the pursuer has  
16 failed to identify the involvement of any other party  
17 for the purposes of a Chapter I prohibition.

18 THE CHAIRMAN: I have to say, the Tribunal was struggling  
19 slightly to wrestle with this argument, in part because  
20 we did not have a copy of the memorandum. I do not know  
21 if even -- is the memorandum -- is that a matter of  
22 dispute, that there was a memorandum or not, or can you  
23 help me with that? I appreciate that is maybe something  
24 Mr McAuley may be able to help me with more, but what is  
25 the defender's position in that regard?

1 LORD KEEN: I am just informed we have not seen it, my Lord.

2 THE CHAIRMAN: I see. So it would seem, in relation to this

3 part of Mr McAuley's case, wrestling with the substance

4 of this, that until the memorandum, its terms,

5 recipients, and so on and so forth, had been ventilated

6 by Mr McAuley, it is quite difficult to get to the

7 substance of his complaint.

8 LORD KEEN: Well, I wonder if that is the case, my Lord,

9 because who has been identified, other than the Faculty

10 of Advocates, for the purposes of this apparent cartel?

11 THE CHAIRMAN: Yes.

12 LORD KEEN: But that is the short point I make about this

13 aspect of the case.

14 I then come on to point out that in any event, with

15 respect to the Chapter II prohibition and the Chapter I

16 prohibition, any agreement which involves a requirement

17 to comply with the Guide is dealt with or covered again

18 by paragraph 5, schedule 3, of the 1998 Act.

19 THE CHAIRMAN: Yes.

20 LORD KEEN: So in effect that provision deals with both

21 aspects of the pursuer's claim in and of itself, without

22 going further into the substance of them.

23 THE CHAIRMAN: Yes.

24 LORD KEEN: But I have sought to point out why, in my

25 submission, there is in any event no substance to the

1           claims being advanced by the pursuer, whether by way of  
2           pleading or by way of his responses to the application  
3           to strike out.

4   THE CHAIRMAN: That is very helpful.

5   LORD KEEN: In other words, this is not intended to be  
6           a purely technical argument founded upon schedule 3 to  
7           the Act.

8   THE CHAIRMAN: I understand.

9   LORD KEEN: Now, my Lord, that was really all I was going to  
10          say about the strike-out application.

11   THE CHAIRMAN: Subject then to any questions that either  
12          Mr Bankes or Mr Anderson have, I think what I would be  
13          minded to do is to begin to hear from Mr McAuley, and  
14          then to give you an opportunity to reply to Mr McAuley,  
15          and also to address the question of the interim measures  
16          application thereafter.

17   LORD KEEN: I am content to do that. I will have very  
18          little to say about the interim measures application,  
19          but I am quite content to address that in response to  
20          Mr McAuley.

21   THE CHAIRMAN: Let us do that then. Thank you, Lord Keen.

22          Mr McAuley, it is now, I think, about 11.10. What  
23          I would be minded to do, because we need to give the  
24          transcribers a break, is to stop in about half an hour,  
25          but if you wanted to begin your submissions. I tell you

1           that just so you can pace yourself, as it were, as to --  
2           that we will stop at a convenient point in your  
3           submissions in about half an hour.

4                       Submissions by MR McAULEY

5       MR MCAULEY:   Yes, cool, yes.

6           Yes.   So just -- I think the best way for me to  
7           address both the strike-out and the interim measures is  
8           to go through the authorities that I have submitted to  
9           the CAT.

10       THE CHAIRMAN:   Okay.   I do not want to in any way constrain  
11       how you want to present your arguments, it is a matter  
12       entirely for you.   But just so that you know, we have --  
13       the Tribunal has had the opportunity to consider  
14       everything you have submitted in writing thus far.   So  
15       for the avoidance of unnecessary repetition, you can  
16       take that as read.   But if there are further and  
17       additional points you wanted to, or particular emphasis  
18       you wanted to place on things, by all means do do that.

19       MR MCAULEY:   I think it is easier to do that, because it is  
20       then natural for me to reply to the strike-out.

21           So, yes, my intention is just to go through that and  
22           explain it with oral submissions, because that is quite  
23           detailed, but my intention will be to use oral  
24           submissions to simplify it.   Because basically I want  
25           all of you to at least understand my arguments, so that

1           if you are not going to accept them, you at least fully  
2           understand them, and you can say: I know exactly what  
3           you are saying, I do not accept it for whatever reason.

4   THE CHAIRMAN:   That is helpful.

5   MR MCAULEY:   Lord Keen did touch on the factual matrix of  
6           the case, but I think it was a wee bit opaque, the way  
7           that he explained it.

8           I think there are four material facts which have  
9           happened in this case. It was -- firstly, it was  
10          August 2024 when I applied for the practicing  
11          certificate with the Law Society, and they placed  
12          a restriction on my practicing certificate. So after  
13          a couple of days of reading that, I decided: I think  
14          this restriction is unlawful.

15   THE CHAIRMAN:   Yes.

16   MR MCAULEY:   So I then contacted Mr Heaney, who I have known  
17           for years, our families both come from the same sort of  
18           area down in Dumbarton, Helensburgh, so I have always  
19           kind of known him, and I shadowed him for a bit, years  
20           ago when I was at Uni.

21          So I emailed Mr Heaney to say -- to basically  
22          contact him about helping me in the case, and before  
23          I know it, who is popping into my email inbox but  
24          Roddy Dunlop and Tony Graham, saying -- basically  
25          threatening Mr Heaney that he is not allowed to interact

1           with me at all in relation to that appeal.

2       THE CHAIRMAN:   Just so I understand how this fits in,  
3           Mr McAuley, we have in the bundle some emails that  
4           I think were submitted in advance of the last hearing --  
5           let me find those -- which start off with an email,  
6           I think, from yourself to ... They start off with an  
7           email from yourself to Ms Westwater and Mr Dunlop on  
8           19 August of 2024.

9       MR MCAULEY:    Mm-hm.

10      THE CHAIRMAN:   And that says:

11                "I contacted one of your advocates regarding ..."  
12                I do not know if you have this to read.   This is  
13                in ...

14      MR MCAULEY:    Yes.

15      THE CHAIRMAN:   I am sure you will be familiar with the terms  
16                of it.   But in any event, that email is to Ms Westwater,  
17                Mrs Westwater, and says:

18                "I contacted one of your advocates regarding  
19                representation.   The advocate has not contacted me back  
20                to even acknowledge the email."

21                And I think you copied in Mr Dunlop.   And certainly  
22                my impression, but correct me if I am wrong, my  
23                impression was that was the starting point of your  
24                correspondence with Mr Dunlop; is that right?

25      MR MCAULEY:    Yes, you are probably right there.   That is

1           what I was saying there. It then transpired that it was  
2           clear that Mr Heaney was under the impression that he  
3           was not allowed to reply, or else he could be -- he  
4           could have the nightmare of facing disciplinary  
5           proceedings which costs you £60,000 to defend.

6       THE CHAIRMAN: I see.

7       MR MCAULEY: So I then basically -- the emails then went on  
8           with Mr Dunlop. Obviously I was not happy about that,  
9           because I was thinking to myself, uh-oh, I am going to  
10          have to self-represent here. And basically, it  
11          transpired that Mr Dunlop had said he had let all the  
12          other clerks know that nobody -- because I thought that  
13          that is just Mr Heaney's interpretation; other people  
14          might take a different interpretation, that they are  
15          allowed to -- they might just see all solicitors as a  
16          friend, and, no, it was all clerks and all the people  
17          were under the strict instruction that nobody was  
18          allowed to contact me.

19                I was -- and then to make that even clearer to them  
20                all, Mr Dunlop and Mr Graham then complained about me to  
21                the Scottish Legal Complaints Commission to state that  
22                me even trying to contact Mr Heaney at all was  
23                misconduct.

24                So I think it could not have been clearer if I sent  
25                out the message, if nothing else, to the whole Faculty,

1           that anyone interacts with me then it is misconduct.

2       THE CHAIRMAN: And just to -- so you understand what we have  
3       and what we do not have, and what we can decide and what  
4       we are not deciding, the content of your -- of the  
5       complaint made by the Faculty, or Mr Dunlop and  
6       Mr Graham, to the Scottish Legal Complaints Commission,  
7       is not something that is before us. And I say that both  
8       in the sense that we do not physically have the  
9       documents, and that is not an encouragement for either  
10      side to submit them to us.

11           It seems, I think, to us, that that is not something  
12      that is -- I see how it forms the background,  
13      potentially, but in terms of the detail of it, and the  
14      rights and wrongs of that particular thing,  
15      and I appreciate, having read your submissions, that you  
16      feel strongly about that, and I do not want to say  
17      anything about that one way or the other, because we  
18      have to focus on what we need to decide. Do you follow  
19      me?

20      MR MCAULEY: Yes. So basically, that is the first material  
21      fact, just for you to be aware of that series of emails  
22      in August, that that took place, and that is what  
23      basically gave rise to this.

24           So then the effect of that was -- this is the second  
25      material fact -- I had then to self-represent in two

1           hearings in the House.

2       THE CHAIRMAN: And again, just so that I am clear about  
3           that, because I think it is potentially quite an  
4           important point, when you say you had to self-represent,  
5           there was another choice for you, which was to instruct  
6           another solicitor to instruct counsel; is that right?

7       MR MCAULEY: If you read the *Robson* case carefully --

8       THE CHAIRMAN: Just before we come back to the *Robson* case;  
9           that is right, is it not?

10      MR MCAULEY: I do not have £30,000 upfront to pay  
11           a solicitor, plus also another £30,000 to guarantee the  
12           other side if I lose, which basically -- and I did not  
13           qualify for Legal Aid at that time.

14           So basically I had -- the only practical choice  
15           I had was to self-represent.

16      THE CHAIRMAN: Yes, I understand that.

17      MR MCAULEY: So I did, I self-represented in two hearings.  
18           That was the first one in January before the three-panel  
19           bench, and then another case before Lord Armstrong.

20      THE CHAIRMAN: And so the January hearing, was that the one  
21           in relation to your practicing certificate?

22      MR MCAULEY: Yes, that was the first restriction. The  
23           second one was obviously after I did that to Mr Dunlop,  
24           and Mr Graham after that, a series of emails. The SLCC  
25           did disciplinary proceedings against me with a view to

1           restricting me even further, so I appealed against that  
2           as well.

3           Yes, so that was basically then. So it was August.  
4           Then it was January/February with those two hearings.  
5           And I was left with no choice, no practical choice but  
6           to self-represent.

7       THE CHAIRMAN: Yes.

8       MR MCAULEY: So the third material fact, I think, is the  
9           fact that I have suffered mental health/stress, to quote  
10          the exact terms from the GP, and I had to get prescribed  
11          with propranolol. Because the anger and the emotion  
12          that you feel with these things, it is extreme, and you  
13          are having to email the courts, rather than email your  
14          solicitor, email your advocate with these emotional  
15          emails, so he can then put it through the refinery  
16          process and make -- polish up your arguments and make  
17          them sound good.

18          So I had to -- and I also noticed Mr Robson stated  
19          that he had self-represented. He had mental health  
20          problems as well. So I do not think it is having a thin  
21          skull, I think it is your whole life, your whole  
22          studies, everything is at stake, and you are having to  
23          stand up. It is hellish.

24       THE CHAIRMAN: Just thinking about Mr Robson's case, you  
25          heard what Lord Keen said in that regard. And what

1 Lord Keen said was that actually, in Mr Robson's case,  
2 the observation of Lord MacFadyen in that case is that he  
3 is narrating what happened, and what happened was there  
4 was some discussion between Mr Robson and an advocate,  
5 and Mr Robson was asking the court to discharge the  
6 hearing that was otherwise going to take place, because  
7 Mr Robson was saying, well, I have spoken to this  
8 counsel and he might represent me, or she might  
9 represent me, but I need to get a solicitor.

10 MR MCAULEY: Yes.

11 THE CHAIRMAN: So there was not -- it was not directly  
12 analogous to your situation.

13 MR MCAULEY: I do come to that later, but to address it now  
14 since you have raised it. See, if Mr Heaney -- if I had  
15 been able -- if Mr Dunlop had left me alone and said,  
16 "That is fine, you can correspond with Mr Heaney and  
17 anyone else", so that I could have said, "Listen, is  
18 anyone willing to represent me on no win, no fee?" Like  
19 Mr Robson was. But I could not even interact with him  
20 to say --

21 THE CHAIRMAN: You would --

22 MR MCAULEY: Because sometimes -- sometimes junior counsel  
23 that are new counsel, they think, I would like to get  
24 a case under my belt, I do not have a big client base,  
25 etc. Or there might be someone who is a specialist in

1           that area that reads it and goes, ah, I know that is  
2           wrong, I know exactly where to find the law, I can do  
3           this easily and well. So that is obviously what you are  
4           hoping for. Because if you do not -- if you get a no  
5           win, no fee advocate, it helps you get a no win, no fee  
6           solicitor.

7       THE CHAIRMAN: I see. So just to scroll back slightly,  
8           because that last point was the one I wanted to just  
9           understand. So you say that the issue here was that you  
10          were not able to engage in discussions with advocates.  
11          Had you been able to do so, you might then have obtained  
12          a solicitor who would have instructed counsel?

13       MR MCAULEY: I think so.

14       THE CHAIRMAN: There was another matter in that regard. Did  
15          you approach the Free Legal Services Unit at the Faculty  
16          of Advocates?

17       MR MCAULEY: As we will come to later, you have to be a lay  
18          person to do that.

19       THE CHAIRMAN: You have to be ...

20       MR MCAULEY: You have to be a lay person to qualify for  
21          that, which I will come to later. I am a Scottish  
22          solicitor and I am a practitioner as a point of law, so  
23          why should I go into a charity and speak to students. I  
24          have passed exams that they have not. I think it is  
25          outrageous to suggest that.

1 THE CHAIRMAN: Well, whether it is outrageous or not, just  
2 as a matter of fact, you did not take that course?

3 MR MCAULEY: I did not entertain that. I am not lowering  
4 myself to do that.

5 THE CHAIRMAN: It is useful just for us to understand.

6 MR MCAULEY: The other thing with Mr Robson, I do not think  
7 Mr Robson got a fair trial either. When I read that,  
8 and he wanted to instruct counsel, and he was suffering  
9 from mental health problems, and he was expected to  
10 self-represent. I think that is nonsense. I think that  
11 is a disgrace to Scots law, that that is written in a  
12 judgment, that he was doing all that, and no arrangement  
13 could be worked out.

14 It maybe was not put to Lord MacFadyen, but it was  
15 good of Lord MacFadyen to acknowledge that, that  
16 Mr Robson was experiencing mental health problems as  
17 a result of all of that, and it was what he was wanting,  
18 to get involved. It was not that he was  
19 thinking: I know better than everyone and I want to  
20 self-represent.

21 So those are the first three facts.

22 The fourth fact as well is that this does raise the  
23 unfortunate situation that this -- Scotland and England  
24 are different in this matter. In England, you are  
25 allowed to -- I have done it, I have friends that are

1           barristers -- you are allowed to email them and say "Do  
2           you know anyone that might be interested in this", a  
3           sort of negotiation process, to sort of break the ice  
4           and get things moving, get people at the Bar talking  
5           about cases.

6       THE CHAIRMAN:   Yes.

7       MR MCAULEY:   So it is unfortunate.  This is a difficult  
8           situation; Scotland and England are different.  What  
9           I was doing factually and Mr Dunlop stopped me from  
10          doing, if I had crossed the border into Carlisle, and it  
11          was in England, I can do that no problem.  So that is  
12          a difficult fact.

13                 So I think those are the four material facts.  So  
14          that is the factual matrix of the case which I hope you  
15          now all have immersed yourselves in.

16       MR BANKES:   Could I just ask you one further question.  The  
17           genesis was an employment dispute; is that now finished  
18           one way or the other?  That is no longer --

19       MR MCAULEY:   The Employment Appeal Tribunal within *McAuley v*  
20           *Ethigen*, Lord Fairley got back yesterday to say that is  
21           going to a full hearing.  I have self-represented in  
22           that as well, in the rule 3.10 hearing.  So that is  
23           going to a full hearing, so that --

24       THE CHAIRMAN:   So it is going to an appeal hearing --

25       MR MCAULEY:   That is -- I guess that is something that would

1           be helpful to have an advocate for.

2       THE CHAIRMAN: Sorry, I just misheard you, Mr McAuley. What  
3           is the present status of the employment dispute?

4       MR MCAULEY: The *McAuley v Ethigen* one? A full hearing in  
5           the Employment Appeal Tribunal before Lord Fairley.

6       THE CHAIRMAN: Has a date been fixed for that?

7       MR MCAULEY: Yes.

8       THE CHAIRMAN: When is that?

9       MR MCAULEY: That was my first -- I read the email on my  
10           phone. I have fallen into this trap before. You read  
11           the email on your phone and then get back and sit at  
12           your computer and go -- read it a bit different. When  
13           I read it on my phone, it looked like it was -- the  
14           order was made for a full hearing. I am 99% sure of  
15           that.

16       THE CHAIRMAN: So has a date been fixed for that?

17       MR MCAULEY: I do not think so. I did not see one when  
18           I first skimmed it.

19       THE CHAIRMAN: That is helpful, thank you.

20       MR MCAULEY: I think the respondent has been asked to  
21           provide a reply.

22       THE CHAIRMAN: I see, thank you.

23       MR MCAULEY: Yes. So those were the four facts.

24           So after that situation, I then raised an action in  
25           the Competition Appeals Tribunal to say this system of

1           the Faculty of Advocates, forcing solicitors to  
2           self-represent, is a breach of the Competition Act.  
3           I thought the fact that I get no access to Mr Heaney at  
4           all, I thought it was an abuse of a dominant position,  
5           and I thought Mr Graham and Mr Dunlop complaining and  
6           emailing people to stop me getting any representation,  
7           I thought that was a cartel.

8       THE CHAIRMAN:   That was ...?

9       MR MCAULEY:   I thought that was a cartel when they sent out  
10           that email to stop anyone from being able to -- I do not  
11           think they should have done that.  I think they should  
12           have left that to the free choice of any advocate to  
13           take their own interpretation of the code, to say --  
14           because, I mean, there is an interpretation that all  
15           solicitors and all advocates are friends, and it does  
16           state specifically in the code that friends are allowed  
17           to speak to advocates who are allowed to give free advice to  
18           friends, you know.

19           So that -- and just in terms of the whole  
20           collegiality of the whole legal sector in Scotland, and  
21           that is what I understood the position was previously,  
22           before Mr Dunlop was the Dean.

23           Yes, so that was it.  So I thought Mr Dunlop and  
24           Mr Graham sending out that email breached section 2.  
25           And I also thought them refusing me any -- interfering

1 with Mr Heaney and saying no, Mr -- and stopping me  
2 getting any access to Mr Heaney at all, I thought was  
3 a breach of section 18.

4 THE CHAIRMAN: Just reference to the memo again, am I right  
5 to understand that the reference -- so you have never  
6 seen this memo; is that right?

7 MR MCAULEY: No, I understood from the emails though that --  
8 I was told that all of the clerks and all of the  
9 secretaries have all been informed, no one is going to  
10 reply to you.

11 THE CHAIRMAN: So essentially you are using the memo as  
12 a shorthand to mean the communication by the Dean of  
13 Faculty to the advocates' clerks. I think that is  
14 right, is it not?

15 MR MCAULEY: Yes.

16 THE CHAIRMAN: To say that they ought not to engage in  
17 correspondence with you.

18 MR MCAULEY: Yes. It was -- I think Mr Graham as well  
19 mentioned as well, basically they had read *McAuley v*  
20 *Ethigen*, which was a very misleading judgment and is  
21 going to a full appeal.

22 So I think it was basically they were saying as  
23 well -- worried about the manner in which I spoke to  
24 people and things like that. But, I mean --

25 THE CHAIRMAN: So in relation --

1 MR MCAULEY: A lot of the things I said were taken wildly  
2 out of context.

3 THE CHAIRMAN: So in relation -- sorry to interrupt you, but  
4 I am just keen -- you obviously are fully seized with  
5 all the details of this, and you will appreciate we are  
6 trying to follow your argument.

7 MR MCAULEY: Yes.

8 THE CHAIRMAN: So far as Mr Graham is concerned, we have,  
9 I think, an affidavit that has been lodged on his behalf  
10 by the defender, and I am not aware that that email  
11 refers to any communication on his behalf. That  
12 affidavit seems largely to be restricted to the issue we  
13 dealt with at the previous hearing, which was the status  
14 of Faculty Services Ltd.

15 MR MCAULEY: Yes.

16 THE CHAIRMAN: So is there something else from Mr Graham  
17 that we do not have?

18 MR MCAULEY: I think you possibly could -- Mr Graham -- it  
19 was my understanding from the emails that it was clear  
20 that no clerks and secretaries were going to reply,  
21 which I thought must have come from Mr Graham and  
22 Mr Dunlop.

23 THE CHAIRMAN: And it is your understanding that that was  
24 something that came not merely from the Dean of Faculty,  
25 and we have correspondence between yourself and the Dean

1           of Faculty, but also you think Mr Graham was involved in  
2           that as well, but you cannot immediately put your finger  
3           on where the basis of that understanding comes from.

4       MR MCAULEY: I think the clerks -- the clerks -- I do not --  
5           Mr Graham -- this is where the legal personality issue  
6           comes into it. I think it is -- Mr Graham is the  
7           chairman of Faculty Services Ltd.

8       THE CHAIRMAN: Yes.

9       MR MCAULEY: And that is who employs the clerks and the  
10          secretaries.

11       THE CHAIRMAN: Yes.

12       MR MCAULEY: Whereas Mr Dunlop is in charge of -- he is the  
13          Dean of the Faculty of Advocates, which I understand is  
14          the charity wing of it, which is to do with if people  
15          apply to the Bar, they go through that education process  
16          in the deviling and in charge of the library.

17       THE CHAIRMAN: Sorry to interrupt you again. I think, as we  
18          discussed last time, I think the Faculty is actually the  
19          regulator -- the Faculty of Advocates is the regulator  
20          rather than the charity wing. But we do not necessarily  
21          need to retread that territory, I think.

22       MR MCAULEY: What they do is check the exams and things like  
23          that, which a regulator typically would not do. So  
24          I think it is -- and they are in charge -- there is the  
25          charity wing that runs the -- that runs the library.

1 THE CHAIRMAN: I do not want to interrupt you at all,  
2 Mr McAuley, but I am just conscious of the time.

3 MR MCAULEY: Okay.

4 THE CHAIRMAN: And we have, I imagine, some way to go in  
5 your arguments. So rather than --

6 MR MCAULEY: Yes. Well, that might be a convenient place to  
7 stop if we have done the factual matrix and we have done  
8 the procedure.

9 THE CHAIRMAN: Very well. So if we stop now for 10 minutes  
10 or 15 minutes or so, and then we will sit until  
11 lunchtime. If we were to allow you until lunchtime,  
12 obviously, how much additional time do you think, would  
13 you anticipate you would need after that?

14 MR MCAULEY: Probably roughly about the same time as  
15 Lord Keen. I would estimate --

16 THE CHAIRMAN: Lord Keen spoke for about 40 minutes or so.  
17 So you would think you would be finished by lunchtime on  
18 that basis?

19 MR MCAULEY: Yes.

20 THE CHAIRMAN: That is very helpful. Of course, it is  
21 always very difficult to estimate exactly how long it is  
22 going to take, and we may have questions for you that  
23 will delay matters. But that is helpful, thank you very  
24 much.

25 We will rise now and sit again in 15 minutes.

1 (11.33 am)

2 (A short break)

3 (11.46 am)

4 MR MCAULEY: So just -- I was just thinking there, just to  
5 clarify one fact about the relation to the position in  
6 England and Wales so that you are --

7 THE CHAIRMAN: Sorry, I do not know if we can move ... You  
8 are quite softly spoken, Mr McAuley. Can we swap the  
9 two microphones round, perhaps?

10 MR MCAULEY: There we go.

11 THE CHAIRMAN: Thank you, Mr McAuley.

12 MR MCAULEY: Yes. So the system in England and Wales is to  
13 stop you from basically just going through a list of  
14 advocates. They have people, they are stable leaders,  
15 like Tony Jones, who phone you and say "Listen, leave it  
16 with me. I will speak to people, I will go up to the  
17 Bar, and I will ask around and I will see if anyone can  
18 do this", and you will send them a copy of the document  
19 and they basically think -- have a read at it and they  
20 discuss it and things like that.

21 Also -- there is also my friend that I was at Uni  
22 with, Michael Deacon, who is a barrister, and he says  
23 pretty much more or less every time that works, because  
24 they can usually always find somebody new at the Bar  
25 that will -- even if -- the system is they try and see

1           if a specialist can do it and, if not, there is usually  
2           someone new, a student newly qualified, that is up for  
3           it.

4       THE CHAIRMAN:   Yes.

5       MR MCAULEY:   Yes, so that is the four facts there.

6       THE CHAIRMAN:   Yes.

7       MR MCAULEY:   Okay.

8           So that takes us through the first seven pages of  
9           the authorities.

10      THE CHAIRMAN:   Yes.

11      MR MCAULEY:   Any questions on that?

12      THE CHAIRMAN:   Not from me, no.

13      MR MCAULEY:   Okay.

14      THE CHAIRMAN:   Thank you.

15      MR MCAULEY:   Yes. So that then takes us on to the statutory  
16           framework on page 8 to page 22, now that we know those  
17           facts.

18      THE CHAIRMAN:   Yes.

19      MR MCAULEY:   So page 8 is just section 2 of the Competition  
20           Act 1998 which we have covered that, that people, two  
21           people cannot come together to stop a person obtaining  
22           business unless there is a lawful reason for them to do  
23           so.

24      THE CHAIRMAN:   Yes.

25      MR MCAULEY:   Section 18 is that all dominant organisations

1 must provide reasonable access to everyone in the  
2 marketplace.

3 THE CHAIRMAN: Yes.

4 MR MCAULEY: Page 10 is then section 3 of the Human Rights  
5 Act, which states if there ever is laws which are  
6 ambiguous, which I would submit at best the Faculty  
7 Guide is, it obligates the court to take into  
8 consideration human rights arguments to see and use that  
9 and to take an interpretation of them, which would  
10 comply with the Convention rights in schedule 1 of the  
11 Human Rights Act.

12 Page 11 is then section 6 of the Solicitors  
13 (Scotland) Act, which affirms that my technical status  
14 as solicitor has been admitted by the Lord President as  
15 a solicitor. I am not a client. I am not a lay person.  
16 I am a solicitor, that is my title.

17 THE CHAIRMAN: Just to be clear, I think a solicitor -- the  
18 fact one is a solicitor does not mean one cannot also be  
19 a client, because if a solicitor has a -- let us suppose  
20 a solicitor was knocked down by a car, and decided to  
21 bring a personal injury action against the driver of the  
22 car, then the solicitor would at one and the same time  
23 be a solicitor but also be a client; is that right?

24 MR MCAULEY: I guess it is the thing. If you look at  
25 judgments involving the General Medical Council and

1           things like that, and they refer to doctors, they refer  
2           to them as doctor, the name.

3       THE CHAIRMAN: I think we might be talking at cross purposes  
4           and I am sure the fault is mine.

5           There is the question as to what your professional  
6           status is or what one's professional status is.

7       MR MCAULEY: Yes.

8       THE CHAIRMAN: And then how one should be addressed as  
9           a matter of courtesy, for example. And then there is  
10          a separate question, which is when we are looking at the  
11          Guide for Professional Conduct for advocates, it is  
12          considering your status, or one's status, in that  
13          regard. I think the important point that we would be --  
14          and I am sure you will come to address this, is that  
15          when one looks at 8.2 of the Guide, 8.2 says ... so  
16          I have the exact wording before me, it says:

17                 "An advocate must not accept instructions directly  
18                 from a client."

19                 As we would understand that, what that means  
20                 is: must not accept instructions for someone to act in  
21                 a case for that person, rather than --

22       MR MCAULEY: It is a point I am going to get onto in the  
23           statutory interpretation exercise, which I think  
24           solicitors are not getting in these -- at the top of  
25           these judgments, they are not getting their professional

1 status reflected properly.

2 THE CHAIRMAN: I see.

3 MR MCAULEY: At the top of them, but I will get on to that.

4 Okay. So section 46 is then the point that -- that  
5 is on page 12. Section 46 says that any solicitor who  
6 is on the Roll of Solicitors as a practitioner, and they  
7 are subject to the regulation of the Scottish Legal  
8 Complaints Commission and the Law Society of Scotland,  
9 so even if you do not have any practicing certificate  
10 and you are on the Roll, you can potentially have to  
11 make yourself -- you are still subject to the regulation  
12 there.

13 THE CHAIRMAN: This is the regulation of the Scottish Legal  
14 Complaints Commission; is that right?

15 MR MCAULEY: Yes. The 2007 Act clarified that, because  
16 I think there was previously some dubiety over that,  
17 over whether it was just principal solicitors who could  
18 be -- who could have actions raised against them, but  
19 that confirmed it was all solicitors at all times in  
20 their life; anything you do, you are subject to the  
21 regulation.

22 Then page 13, section 2 of the Legal Profession and  
23 Legal Aid (Scotland) Act, that just refers to  
24 section 46, I think, and confirms what I have just said  
25 there.

1 THE CHAIRMAN: Yes.

2 MR MCAULEY: Okay. So pages 14 to 20 and parts of the  
3 Faculty Guide explaining the various professionals who  
4 can instruct -- who can have access to counsel. I do  
5 not think they have the taxi service, but they have  
6 access. So it does not specify -- it just says "any  
7 member", as far as I can see. It does not specify.  
8 Basically, if you are an architect with a restricted  
9 practicing certificate, as long as you are a member, you  
10 fall within the terms of that.

11 THE CHAIRMAN: Which bit are you reading at the moment?

12 MR MCAULEY: I do not really want to dwell too long on them,  
13 because Lord Carloway does clarify it in the case.  
14 Because Lord Carloway went through the Faculty of  
15 Advocates website, which we will come to, and he  
16 interpreted that, of who is allowed to instruct an  
17 advocate.

18 THE CHAIRMAN: Just so I understand your argument, so you  
19 are not dwelling on the detail of 8.2 and 8.3, because  
20 you say that we should take guidance from the  
21 authorities; is that right?

22 MR MCAULEY: I am not really arguing this point. This is  
23 the kind of way that, having now filled in the Supreme  
24 Court forms, this is the way they want you to do it.  
25 They basically tell you: go through the facts, tell us

1           what happened, tell us all the provisions which you  
2           think are relevant. And then once you have done that,  
3           you then make your pleas and your arguments and just put  
4           them all together.

5       THE CHAIRMAN: You present your arguments as you see best.

6       MR MCAULEY: Okay. So that is just irrelevant.

7           Page 21 is then section 16 of the Solicitors  
8           (Scotland) Act, which basically says any solicitor who  
9           the Law Society impose a restriction in their practicing  
10          certificate has -- by that subcommittee, has the right  
11          to appeal to the Inner House of the Court of Session.  
12          So that is a statutory right you have there if you are  
13          restricted in any way.

14       THE CHAIRMAN: Yes.

15       MR MCAULEY: Page 22 is then section 21 of the Legal

16          Profession and Legal Aid (Scotland) Act 2007, which says  
17          that if the Scottish Legal Complaints Commission seek to  
18          begin the process of trying to impose a restriction in  
19          your practicing certificate, or bring sanctions against  
20          you, you have the right to appeal that to the Inner  
21          House of the Court of Session. So they are both  
22          statutory appeals, because it is very serious matters if  
23          you are getting restricted, as *Robson* referred to as  
24          well.

25       THE CHAIRMAN: Just again -- during the break we were

1           wanting to be clear -- am I right in understanding that  
2           so far as the SLCC matter is concerned, is that also --  
3           has that gone before the Inner House yet, or is that --

4       MR MCAULEY: Yes, that was an ex tempore judgment of

5           Lord Armstrong, which -- this is something I do not  
6           have --

7       THE CHAIRMAN: I do not want to be -- I just wanted to ...

8       MR MCAULEY: He was a former director of Faculty services --

9       THE CHAIRMAN: Sorry, just -- I do not want to divert you  
10           from your course, but just in terms of where that has  
11           reached procedurally.

12       MR MCAULEY: Procedurally where that is, that is an issue in  
13           the case. Basically, Lord Armstrong sat alone and  
14           refused leave, so I appealed that to the UK Supreme  
15           Court as well. But the registrar at the UK  
16           Supreme Court says because Lord Armstrong refused leave,  
17           it does not fall within the jurisdiction of the 1988  
18           Act. What is the name of that Act? The Court of  
19           Session Act 1988.

20           So I requested a review of that, to say that the UK  
21           Supreme Court has jurisdiction under section 7, because  
22           I do not think I got a fair trial there from  
23           Lord Armstrong. So that is going to be going to one of  
24           the UK -- the Supreme Court justices to say: is it just  
25           the 1988 Act that gives jurisdiction to the Supreme

1 Court over the Court of Session, or does section 7 give  
2 the Supreme Court jurisdiction over the Court of Session  
3 as well? So I do not know the answer to that yet.

4 THE CHAIRMAN: That is helpful. So that is also pending  
5 before the UK Supreme Court?

6 MR MCAULEY: Yes -- well, it might not. It just goes to  
7 a justice, and if they say no, we definitely do not, you  
8 do not get a leave to appeal again. So that is where  
9 that is at the moment, still waiting for that to come  
10 back.

11 Okay, so just to get to pages 23 to 25.

12 THE CHAIRMAN: Yes.

13 MR MCAULEY: That is the case law that we have already  
14 considered so far in the case.

15 THE CHAIRMAN: Yes.

16 MR MCAULEY: The first one is the *Petrodel* case of  
17 Lord Sumption, which says that when provisions are invoked the  
18 modern day statutory interpretation is you interpret the letter,  
19 you consider the purpose, and you consider the social  
20 context.

21 THE CHAIRMAN: Yes.

22 MR MCAULEY: So the second case is also, which I consider  
23 the key case in this, at page 23. That is the *Kirkwood*  
24 case, which is in point for who is -- or, as I see it,  
25 in point for who is allowed to instruct the Faculty of

1           Advocates. Lord Carloway states that the letter of the  
2           law is that, expressly, Scottish solicitor is allowed to  
3           construct counsel, and he also states the purpose is so  
4           that they are subject to the regulation in Scotland of  
5           the Law Society in the Scottish courts.

6           So that is the letter in the purpose there.

7       THE CHAIRMAN: So the letter of the law, you are using that  
8           phrase to talk about the last sentence of paragraph 14;  
9           is that right?

10       MR MCAULEY: Yes. And then the third case on pages 24 and  
11           25 is the *Robson* case.

12       THE CHAIRMAN: Yes.

13       MR MCAULEY: Which --

14       MR ANDERSON: I am sorry to interrupt, but just for a  
15           moment, Mr McAuley, a very quick question. Looking at  
16           Lord Carloway's formulation in the passage that you  
17           read, the final sentence says:

18                "In proceedings before the Scottish courts, an  
19           advocate may only be instructed by a Scottish solicitor  
20           or other person authorised to conduct litigation in  
21           Scotland."

22           Is it your position that you hold yourself to be  
23           a Scottish solicitor falling within that definition and  
24           description?

25       MR MCAULEY: Yes. I think Lord Keen sees me as falling

1           within the second part, "other person", but I just see  
2           myself as "Scottish solicitor".

3       MR ANDERSON: I think Lord Keen may not have said that, but  
4           we can no doubt pick that up. But at the minute, my  
5           simple question to you is that, as far as you are  
6           concerned, you consider yourself to be a Scottish  
7           solicitor, notwithstanding the fact that your practicing  
8           certificate has a limitation on it?

9       MR MCAULEY: Yes.

10      MR ANDERSON: And subject to these proceedings, as far as  
11           I know, you are not practising as a solicitor?

12      MR MCAULEY: Yes. That is pretty much all correct, yes.

13      MR ANDERSON: Thank you very much.

14      MR MCAULEY: So the third case, then, on pages 24 and 25, is  
15           *Robson*, which we have discussed, which there are  
16           a number of points in that case. I can appreciate  
17           Lord Keen might say, oh, that does not support my case,  
18           and I guess in some ways it does not. But I think in  
19           some ways it does, in the sense that *Robson* was at least  
20           entitled to email solicitors -- email advocates and find  
21           one willing to act, which could then facilitate him  
22           getting a solicitor on board as well, which we have  
23           already covered.

24           I think it is also important that *Robson* clarifies  
25           the amount of money. That cost him £30,000 just to pay

1 his own fees, which, as I said, it would then be £30,000  
2 to cover the other side as well. And that was also,  
3 when the Law Society decides they are coming for you,  
4 they do not just come for you once, they come for you  
5 multiple times. They are determined to get you, no  
6 matter what. So that was *Robson* facing a £120,000 bill  
7 if he wanted to try to defend himself from those  
8 quangos.

9 So -- and I think also *Robson* as well made reference  
10 to the fact that he suffered mental health, just because  
11 of the sheer length of the process, the stakes, and  
12 having to basically do your best to try and go on the  
13 internet to find arguments without any access to the  
14 Faculty of Advocates library. So it is an extremely  
15 stressful process which often, I think inevitably,  
16 causes anyone mental health problems.

17 THE CHAIRMAN: Yes.

18 MR MCAULEY: So I think those were the three key cases that  
19 I referred to in the strike-out application.

20 THE CHAIRMAN: Yes.

21 MR MCAULEY: So just now to get on to them. At page 26,  
22 I then start the statutory interpretation exercise of  
23 them. So I think Lord Carloway expressly states the  
24 letter of the law is that it is a Scottish solicitor is  
25 entitled to access Faculty. He does not say a Scottish

1           solicitor, an unrestricted practicing certificate  
2           solicitor. The letter of the law is just "Scottish  
3           solicitor".

4       THE CHAIRMAN: He does not mention the practicing  
5           certificate point at all, does he?

6       MR MCAULEY: No. So that is what I think, by the letter,  
7           that supports the case.

8       THE CHAIRMAN: Yes.

9       MR MCAULEY: Then he also says the purpose is so that they  
10           are subject to regulation in Scotland, which is where  
11           section 46 -- that is at paragraph 28, Lord Carloway  
12           says that.

13      THE CHAIRMAN: Because he is talking in the context of  
14           English solicitors, is not he, in that case?

15      MR MCAULEY: Yes. So if section 46 had said: a solicitor  
16           who is on the Roll but does not have a practicing  
17           certificate or is not entitled to practice, is not  
18           subject to regulation, that would suit the Faculty's  
19           point, but --

20      THE CHAIRMAN: It is just, I suppose -- sorry to interrupt  
21           you. Do finish your point.

22      MR MCAULEY: That is basically my point, that even if you  
23           have a restricted practicing certificate, you are still  
24           subject to regulation. So Lord Carloway says that is  
25           the purpose of the law, if he is allowed to instruct

1           counsel. So that if you are inappropriate in the way  
2           that you instruct counsel, they have someone that they  
3           can complain to, they are not left in the lurch with  
4           nobody to complain about you to. So you are regulated,  
5           you are known.

6       THE CHAIRMAN: It might be suggested that in *Kirkwood*, what  
7           the court is considering there is the difference,  
8           distinction between is more of a jurisdictional question  
9           as between English solicitors and Scottish solicitors,  
10          and therefore the point about paragraph 28 is that  
11          English solicitors, whilst of course subject to  
12          regulation in England, are not subject to regulation in  
13          Scotland, and in focusing on the question of expenses  
14          and litigation in Scotland, the court was keen to  
15          ensure, and says that the purpose of the rules are to  
16          ensure, that solicitors are subject to regulation in  
17          Scotland.

18               And it might be said that that is a different  
19               situation from the one that we have, which is  
20               a situation, a distinction, between, on the one hand,  
21               a solicitor who has a full practicing certificate and  
22               a solicitor who is subject to a restriction.

23       MR MCAULEY: Yes. Well, I can take your point there that it  
24           might not -- you might argue it is not completely  
25           deductive reasoning which binds you, it is only

1           inductive reasoning. So I could see how you could --  
2           because it is -- like, for example, the Wednesbury case,  
3           about so unreasonable that no reasonable person could do  
4           it, that was obiter dicta, and that was used in other  
5           cases. So you might be within your rights to argue  
6           that, look, it is not completely deductive reasoning.  
7           I am using that as obiter.

8           So I guess that is an argument for saying that,  
9           against a strike-out application, that it is not  
10          actually technically binding, it is more inductive  
11          reasoning. It is persuasive rather than binding upon  
12          the court. If that was the interpretation you took,  
13          then I guess, fine, in relation to that.

14       THE CHAIRMAN: Yes.

15       MR MCAULEY: Yes. As I say, in relation to the -- yes,  
16          so --

17       THE CHAIRMAN: Just a moment, Mr McAuley. I do not know  
18          what is causing that creaking noise ...

19          Thank you.

20          Carry on.

21       MR MCAULEY: Yes. So that was the -- so yes, then, so  
22          obviously *Robson*, I think, has established that as the  
23          social context, that you are expected to contact  
24          advocates and try and get one on board even if you do not have  
25          that £60,000, you are expected to be enterprising and

1           industrious and try to get an advocate on board with no  
2           win, no fee.

3           So -- and then obviously, as well, in England, it is  
4           completely entrenched, that norm. They do expect you to  
5           try and get an advocate on board, or a barrister, sorry,  
6           to not think you know better than everyone, to work with  
7           them and try and get a team together for your appeal.

8           So I just think that those three parts of statutory  
9           interpretation, the letter, the purpose and the norms,  
10          are all complied with. I mean, if Faculty strike-out --  
11          if -- so in relation to Faculty strike-out, if that had  
12          said "unrestricted practicing certificate", well, that  
13          is the letter of the law. But it does not say that.  
14          Faculty are wanting to rewrite the law for it to say  
15          that.

16          If section 46 did not include me, you could say,  
17          well, that does comply with the purpose. You are not  
18          subject to regulation because you are only on the Roll,  
19          you are not regulated. But it does not say that.

20          And I also think, as well, in terms of the social  
21          context, the public expect to see and advocate they do not expect  
22          to see me standing here arguing, they expect to see an  
23          advocate here.

24          So I just think in terms of the social context, I do  
25          not think the Faculty's position is normal; I think Faculty's

1 position is weird. If

2 they want people to stand up and self-represent in

3 a prestigious court like this, I do not think that is

4 the social context, so ...

5 THE CHAIRMAN: I am not sure that I understand that to be

6 Faculty's position, but --

7 MR MCAULEY: Well, if you do not have £60,000.

8 THE CHAIRMAN: But then that becomes -- that is a different

9 question. I see why you relate them, and I quite see

10 the practical choice that you have made. But if we are

11 looking at the rule specifically, that is a different

12 question.

13 The other point I wanted to put to you was, if

14 I understand your complaint, if we go back to the thrust

15 of your complaint, the thrust of your complaint is that

16 you want representation in these cases. That is it, is

17 it not?

18 MR MCAULEY: Yes.

19 Yes. So, I mean, I do not think just because you do

20 not have £60,000 that you should just have to accept

21 whatever the Scottish Legal Complaints Commission and

22 the Law Society of Scotland say, if you read it and go

23 that is a load of rubbish, just because you do not have

24 £60,000, you could not get an advocate. I do not think

25 that is right.

1           So I guess that is my reply to -- just sort of  
2           the -- that is just my reply to the strike-out  
3           application of Lord Keen. And I note Lord Keen did not  
4           refer to any competition case law in his application,  
5           which I think also means it is difficult. He referred  
6           to, I think, downstream and upstream and waterfalls,  
7           saying that made -- and competitors, which -- I just did  
8           not understand his point at all there.

9       THE CHAIRMAN: Just one other point --

10      MR MCAULEY: Which made it bound to fail.

11      THE CHAIRMAN: We will come back to that. But just before  
12           we leave, we talked before about the practical choice  
13           you felt you were compelled to make to self-represent.  
14           Am I right to understand, did you approach any  
15           solicitors or not at all?

16      MR MCAULEY: Let me think. Did I? I do not think --  
17           I might have. I cannot remember. I would need to check  
18           that. You see, it is only two weeks that you have if  
19           you are going to do it.

20      THE CHAIRMAN: Yes.

21      MR MCAULEY: So it is within two weeks, it is really not  
22           a lot of time if you really need to --

23      THE CHAIRMAN: Is that to challenge the practicing  
24           certificate?

25      MR MCAULEY: Yes, I mean, if you are wanting to look up case

1 law. Because you cannot just write down your form  
2 and -- you cannot just write your form and then -- you  
3 have to look up the laws first, and then, once you know  
4 the law, you then write your facts in. It is a kind  
5 of -- what would be the word for that? Kind of mutually  
6 exclusive process of writing facts and looking up the  
7 law. You cannot write the facts without knowing the  
8 law. So when you have only got two weeks, and you think  
9 you really need to get on with it, explaining stuff. So  
10 you need two weeks basically to think your form through  
11 and polish it up. Then when you send it to the Court of  
12 Session, the staff do not let you lodge it  
13 automatically. They say, oh, you need to fix this, you  
14 need fix that. And before you know it, time is ticking  
15 down.

16 I cannot remember. I might have. I thought it  
17 would have been hard to do that, because you needed an  
18 advocate, and I did not have £30,000. So it is like if  
19 I had had a no win, no fee advocate on board, I would  
20 have --

21 THE CHAIRMAN: I understand that. I just wanted, as  
22 a matter of fact -- but I interrupted you, because you  
23 were telling us about Lord Keen's, the part of  
24 Lord Keen's argument which is focused on -- which  
25 focused on -- I think he focused on your case on abuse,

1 first of all, in terms of section 18. I think that is  
2 where you are coming to now.

3 MR MCAULEY: That is where I am coming to now.

4 THE CHAIRMAN: Do carry on with that.

5 MR MCAULEY: Yes. Also, sorry, before we get on to that, as  
6 well, it is just pages 31 and 32 of the Human Rights  
7 compliance under section 3.

8 So I think, at best, Faculty Guide is ambiguous,  
9 when you say a member of this, or restricted by law,  
10 legislative capacity. You cannot find these phrases in  
11 a legal dictionary. There is no universal agreed  
12 definition of what they mean.

13 So I think when you have legislation like that, or  
14 secondary legislation, or rules, whatever you want to  
15 call it, when you have rules that are more ambiguous  
16 like that, that is when section 3 is enforced. If it is  
17 legislation which is completely clear and completely  
18 written in plain language, section 3 does not really  
19 come into play. But section 3, I think, does come into  
20 play when you have a guide like that which is with kind  
21 of ambiguous wording.

22 THE CHAIRMAN: And how -- sorry.

23 MR MCAULEY: That is my point.

24 THE CHAIRMAN: So section 3 of the Human Rights Act, the  
25 interpretative obligation, what are the human rights

1 interests that you say come to bear on -- that we should  
2 apply to the construction, the proper construction --

3 MR MCAULEY: I think there are three. I think there is  
4 Article 3 -- Article 3, Article 6 and -- Article 3,  
5 Article 6, Protocol 1, Article 2, I think, and the final  
6 one is Article 14.

7 So the first one is, in terms of Article 3, I think  
8 it is -- you should make this interpretation, because it  
9 is inevitable that people -- that solicitors get mental  
10 health problems trying to defend this themselves.

11 I have had them, Mr Robson had them. There is another  
12 case which I should have referred to you that went to  
13 the solicitors, Malone. Malone self-represented and he  
14 got mental health problems as well.

15 Basically, everybody that does try to defend these  
16 themselves ends up with mental health problems.

17 THE CHAIRMAN: Yes.

18 MR MCAULEY: Basically, if you do not have the £60,000 that  
19 I mentioned.

20 So I think that is where Article 3 comes into play,  
21 is take an interpretation which allows people the mental  
22 health -- the support that they need so that it does not  
23 come to that.

24 The other thing as well is Article 6 for two  
25 reasons. I do not think there is equality of arms here

1 with people that are up against people that have done  
2 the two-year devilling process and, as Lord Carloway  
3 stated, that makes you closer to being a judicial office  
4 holder. So I do not think that is equality of arms  
5 there.

6 The other point is, as well, there is -- so the  
7 equality of arms under Article 6. There is also the  
8 presumption of innocence under Article 6. That should  
9 be that the restriction on my practicing certificate is  
10 assumed by you and by the Faculty and by everyone to  
11 have been unlawful until final determination. I think  
12 it is -- I think the disciplinary proceedings are  
13 similar to -- akin to the criminal proceedings. So  
14 I think that presumption of innocence until proven  
15 guilty applies, which means that when there was that  
16 minute from the Law Society imposing that restriction,  
17 I should have had all my rights, maybe not some of them,  
18 the most rights I could have had, maybe not -- obviously  
19 not the taxi service because you are not insured, but  
20 I think this should be a presumption that, wait  
21 a minute, this restriction here might be unlawful. So  
22 you should be entitled to counsel or access to the  
23 Faculty with a presumption that, listen, this might be  
24 wrong. We need to check this with your statutory right  
25 as well.

1 THE CHAIRMAN: I think Article 6, presumption of innocence  
2 in Article 6 is specifically in relation to criminal  
3 proceedings.

4 MR MCAULEY: I did -- this is a problem as well. I did find  
5 some case law in Chat GPT saying that principle, though  
6 in criminal law it passes over into disciplinary  
7 proceedings, but then when I asked Chat GPT to provide  
8 me the reference to it, it said that it was in a private  
9 database, which will bring me on to the question I get  
10 to later, that -- and then it basically says, if you  
11 press it sometimes, oh, that is the wording of the  
12 articles, it is a rephrasing of it, which -- it is one  
13 of the difficulties that I will get to later when I am  
14 arguing this if -- the advocates' library being an  
15 essential facility. That is not good, that you are  
16 having to go to Chat GPT, and you need LexisNexis and  
17 Westlaw and those books that you cannot get hold of.

18 Apologies, by the way, if there is any quotes  
19 I referred to that were not 100% checked. The ones I am  
20 referring to today, I can guarantee you are 100%. So  
21 apologies for that. I am just getting used to Chat GPT  
22 as well.

23 So basically, I think that does cross over. That  
24 principle of innocent until proven guilty should pass  
25 over to some degree to the civil wing as well. I admit

1 to some degree, I think it should.

2 Yes. And the other thing is as well there is the  
3 Protocol 1, Article 2, which is the right to education,  
4 which was the Sahin (ECHR) case that I referred to, that  
5 you are supposed to have your qualifications recognised  
6 by the state. I do not think -- if you take that  
7 interpretation that I am not allowed to instruct any  
8 access to counsel, I do not think it protects that,  
9 because how can a member of the -- any member of an  
10 architects institute get access to Faculty, but there is  
11 not any member of the Law Society of Scotland can?

12 Also, in Lord Carloway's dictum in paragraph 14 and  
13 28, he also says any member of the Law Society of  
14 Scotland -- Law Society of England and Wales. So why is  
15 it any member of the Law Society of England and Wales  
16 that can access the Faculty, but it is not any member of  
17 the Scottish Law Society? That does not make sense.

18 THE CHAIRMAN: I think in the case of England and Wales, or  
19 for that matter architects, they could not instruct  
20 counsel in the way you are seeking to, because they are  
21 not either a solicitor or have a right of audience  
22 before the court. So they can seek advice, but that is  
23 not what you are looking for. You are looking for  
24 representation.

25 MR MCAULEY: No, the first thing I was looking for was an

1           advocate's opinion, counsel's opinion.

2       THE CHAIRMAN:   Yes.

3       MR MCAULEY:   Which is different.

4       THE CHAIRMAN:   Well, again --

5       MR MCAULEY:   Instructing in relation to: can you answer

6           me: are you able to do this, no win no fee?

7       THE CHAIRMAN:   The difficulty we have, Mr McAuley, is we

8           have the correspondence that you have put before us, or

9           that has been put before us, and that refers

10          specifically to two matters in which you are seeking

11          representation.

12       MR MCAULEY:   Yes, but --

13       THE CHAIRMAN:   Is that not correct?

14       MR MCAULEY:   I was -- I was wanting to speak to him and

15          explain the position.   What I was wanting to do was

16          first of all to find out, can I get this no win, no fee?

17          Or do you have it, do you know anyone?   Which I think

18          advocates should be obliged to say, listen, Pat,

19          I cannot do that, I have got too much on, and it is --

20          it is not practical for me, I cannot squeeze it in.

21          Or --

22       THE CHAIRMAN:   It may be a matter that will require to be

23          teased out, but certainly the basis upon which we are

24          proceeding is that -- and I think this is the basis upon

25          which the Faculty is also proceeding, but no doubt

1 Lord Keen will correct me if I am wrong -- in your email  
2 dated 19 August 2024, you say:

3 "There are two matters in which I require  
4 representation by counsel ..."

5 One, an employment dispute, and then give some  
6 details about that.

7 And two, an Inner House hearing where:

8 "... despite being a solicitor, I have only been  
9 given a Law Society practicing certificate with  
10 a one-year supervision restriction."

11 Now, that is the basis upon which you engaged the  
12 discussion with the Dean of Faculty, which culminates in  
13 the Dean of Faculty saying, no, you may not instruct --

14 MR MCAULEY: Yes.

15 THE CHAIRMAN: -- representation.

16 MR MCAULEY: Representation does involve giving counsel's  
17 opinion, because counsel --

18 THE CHAIRMAN: It does. It can do.

19 MR MCAULEY: And it also involves them saying -- it also  
20 involves them saying, listen, this is -- does not have  
21 a chance of success. I cannot advise you. I cannot --  
22 representation does involve telling you sternly, listen,  
23 do not put that application in. I cannot advise you to  
24 do that. And if you do put that in, I am withdrawing  
25 from acting here because it is not going to win, you

1           know? So it is --

2       THE CHAIRMAN: I understand that.

3       MR MCAULEY: So that was what -- and basically just  
4           representation as well and the fact of -- I guess  
5           representation -- if I had been allowed to actually  
6           speak to them and clarify and get involved in emails,  
7           I would have clarified that, that I was not seeking  
8           for -- to run up a bill of £30,000. It was the no win,  
9           no fee that I was seeking. But I was wanting Bryan --  
10          because Bryan was not answering me. So it was -- I was  
11          wanting him to confirm, see if he was saying, Pat, do  
12          you have the money to cover this? And --

13       THE CHAIRMAN: I think the other thing that would be very  
14          helpful in the course of your submissions, and if  
15          necessary perhaps over lunch, would be for you to  
16          find -- to be able to point us to the email which -- or  
17          the communication that you have had from the Faculty  
18          which forbade you to communicate with advocates at all,  
19          because certainly the correspondence that we have seen,  
20          I think, engages on the question of whether you are  
21          entitled to have representation, but I rather wonder if  
22          two separate matters are being mixed up here, I do not  
23          mean mixed up in a confused sense, but just being put  
24          together.

25                The two are, on the one hand, your request for

1 representation, and the second being the Faculty's  
2 complaint to the Scottish Legal Complaints Commission,  
3 because I rather think these two matters are -- come  
4 together.

5 MR MCAULEY: I guess --

6 THE CHAIRMAN: Sorry, Mr McAuley just so -- I want you to  
7 pick up this point, because I want you to respond to it  
8 if you can, is to point us to the communication from the  
9 Faculty which forbids you to communicate at all with  
10 advocates. So if there is such an email or if there is  
11 such correspondence, we at the moment do not have that.

12 MR MCAULEY: Well, I think the -- it was the complaint going  
13 into the SLCC as well that forbade me, because if I had  
14 kept communicating, I would have got another complaint.

15 THE CHAIRMAN: I wonder, would I be -- again, I said earlier  
16 I did not want to get into this, and I do not  
17 particularly unless it is relevant, but would I be right  
18 to understand, and I appreciate you dispute the nature  
19 of that complaint, but would I be correct to understand  
20 that the basis of the complaint is what is alleged by  
21 the Faculty to be the tone of the -- of your  
22 communication; is that right?

23 MR MCAULEY: To be honest, it is one of the problems with  
24 the SLCC. They are not specific in what you have actually  
25 done wrong. It is big, long reports referring to

1 multiple provisions and such. I do not think it is  
2 necessarily the tone. I do not know, it is not clear.  
3 I thought they were saying it was, my understanding  
4 was -- because, I mean, I have sent similar emails like  
5 that to England and Wales, and they get back to you and  
6 you discuss this and they clarify this and that. And it  
7 is -- there is correspondence on it. Whereas with the  
8 Faculty of Advocates, it is militant that, oh, you must  
9 not email any further and be complaining to the Scottish  
10 Legal Complaints Commission.

11 THE CHAIRMAN: It is certainly helpful to have your  
12 understanding of the position, and no doubt we can look  
13 for what assistance we can find from the analysis of  
14 your -- of the complaint in the litigation that is  
15 followed on from that.

16 In any event --

17 MR MCAULEY: Okay. So the other thing as well is, as I was  
18 saying, is the Article 14 argument, that *Robson* was  
19 entitled to find out if counsel was willing to act, so ...  
20 And it does say in Lord Carloway's point as well, there  
21 is an overlap here that it is any member of the  
22 Law Society of England and Wales is entitled to access  
23 to Faculty.

24 THE CHAIRMAN: Yes.

25 MR MCAULEY: So I just do not understand why *Robson* and any

1           member of the English Faculty in England would be  
2           allowed to access the Faculty and I am not allowed. It  
3           just does not make sense to me.

4       THE CHAIRMAN: Yes. I understand your -- the thrust of your  
5           argument.

6       MR MCAULEY: Okay.

7           Okay. So just now to -- I do not think it is  
8           realistic to go through all the points of competition  
9           law that I referred to. So basically, in terms of --  
10          I just want to specify four grounds why I think this is  
11          abuse.

12       THE CHAIRMAN: Yes.

13       MR MCAULEY: Which is margin squeezing, price  
14          discrimination, refusal to access essential facility,  
15          and method.

16       THE CHAIRMAN: Can you just run through those again. So  
17          margin squeezing.

18       MR MCAULEY: Sorry, I got them mixed up. Number 1, method.

19       THE CHAIRMAN: Number 1 is method?

20       MR MCAULEY: Yes. Number 2 is margin squeezing.

21       THE CHAIRMAN: Yes.

22       MR MCAULEY: Number 3, price discrimination. And number 4,  
23          refusal to access essential facility.

24       THE CHAIRMAN: Yes.

25       MR MCAULEY: Okay. So if I can refer you to page 34 of the

1           authorities, that is where Whish states the general  
2           definition for abuse, and he describes it as:

3                 "An objective concept [being] through discourse to  
4           methods different from those which normal competition in  
5           products or services ..."

6                 If you can see that, that is at page 34.

7       THE CHAIRMAN:   Yes.   Yes, we have that.

8       MR MCAULEY:   So at page 40, if I can refer you to page 42 as  
9           well, the Judicial Appointments board case. That is a  
10          Scottish case, and again it is Lord Carloway. At  
11          paragraph 8 he describes devilling. He says devilling  
12          will:

13                 "... significantly enhance the entrant's legal  
14          skills ... Along with practice at the Bar, it will, as  
15          a generality, better equip a person who has been  
16          a solicitor for judicial office."

17                 At paragraph 31, he then goes on to say:

18                 "In order to improve his or her skills, that person  
19          decides to go to the Bar in order to be better prepared  
20          for a judicial career."

21                 And then he ends paragraph 31 by saying:

22                 "It would discourage solicitors from taking  
23          advantage of the devilling scheme, thus improving their  
24          skills to be a judicial office holder."

25       THE CHAIRMAN:   Yes.

1 MR MCAULEY: So I think it is pretty clear that Whish says  
2 the objective, the method must be objective, and you  
3 must be denied access to that -- that method. And  
4 Lord Carloway has said that that is an objective method  
5 which gives you an advantage. You are closer to the  
6 judges.

7 THE CHAIRMAN: I think -- I am not following this argument,  
8 Mr McAuley, because I think what Lord Carloway is  
9 talking about in that context is the benefits that going  
10 through a process of devilling and becoming an advocate  
11 has on a person from -- who then decides that he or she  
12 wishes to apply for judicial office.

13 MR MCAULEY: Yes.

14 THE CHAIRMAN: I am not clear how that relates to your  
15 situation where --

16 MR MCAULEY: -- (Overspeaking) --

17 THE CHAIRMAN: Could I finish my question, please, Mr  
18 McAuley.

19 MR MCAULEY: Sorry.

20 THE CHAIRMAN: Our dialogue is going to work a lot more  
21 easily if you just let me finish my question.

22 MR MCAULEY: Sorry.

23 THE CHAIRMAN: So what I am trying to understand is how the  
24 devilling process, which is not one that you are seeking  
25 to go through, if you did not wish to become an

1           advocate --

2       MR MCAULEY:   No.

3       THE CHAIRMAN:  -- why that has a relevance to the -- the  
4           argument you are making.

5       MR MCAULEY:   Yes.  Well, basically, my understanding with  
6           that case was the Judicial Appointments board were  
7           basically saying to people applying for judicial office,  
8           listen, that devilling process, that is just a two-year  
9           career gap for -- you do it and you have fun and you  
10          learn new skills, it is a bit like being a student.  And  
11          Lord Carloway said, no, that is absurdity, this enhances  
12          you.  You learn methods.  It is a two-year period where  
13          you learn methods and it enhances you and you are closer  
14          to the -- you have a closer knowledge to the judicial  
15          office.

16                So I do not understand why -- I think it is an abuse  
17          for one side in the case to have knowledge of all of  
18          that method, that they are closer to the bench, and the  
19          other side does not.

20       THE CHAIRMAN:  So --

21       MR MCAULEY:   And if Lord Carloway had said, no, they are  
22           right, it is a Mickey Mouse process, it does not enhance  
23           them, fine.  But we cannot have this, that under that  
24           section 18, you cannot have one side being enhanced and  
25           the other side not.  Both of us have to be enhanced.

1 THE CHAIRMAN: So it is an aspect of your equality of arms  
2 argument?

3 MR MCAULEY: No, the method argument was the *Hoffmann La*  
4 *Roche* case back in 1979 as well. This is where -- the  
5 core. It said:

6 "The concept of abuse is an objective concept  
7 relating to the behaviour of an undertaking in  
8 a dominant position which is such as to influence the  
9 structure of a market where, as a result of the very  
10 presence of the undertaking in question, the degree of  
11 competition is weakened, and which, through recourse to  
12 methods different from those which normal competition  
13 and products or services, or on the basis of the  
14 transactions of commercial operators, has the effect of  
15 hindering the maintenance of the degree of competition  
16 still existing in the market or the growth of that  
17 competition."

18 So I do not think, if Faculty are not giving me an  
19 advocate, how can they give the other side? I mean,  
20 that is an abuse for Faculty, to allow one side to  
21 get -- to have an advocate and the other side not to  
22 have, because one side has an enhanced method that is --

23 THE CHAIRMAN: So Hoffmann La Roche is talking about an  
24 undertaking, dominant undertaking, using methods in the  
25 market which are different from those which would apply

1           in circumstances of normal competition.

2       MR MCAULEY:   Yes.

3       THE CHAIRMAN:   And so if I understand your argument, you are  
4           saying that were there to be normal competition, how  
5           would that relate to method --

6       MR MCAULEY:   If it was normal competition, it would be one  
7           solicitor against another solicitor.  We both have the  
8           same level of education.

9       MR BANKES:   So you are equating the process of litigation  
10          with the process of competition in the market, I think  
11          is what you are saying.

12      MR MCAULEY:   What I am saying is if Faculty were telling  
13          me -- I mean, I emailed Faculty to say this appeal is  
14          happening, can I get some form of services here.  If  
15          they were telling me, no, you cannot, well, they should  
16          not be allowed to provide it to the other side.

17      MR BANKES:   I see.

18      THE CHAIRMAN:   That is helpful.  I understand your argument.

19      MR MCAULEY:   Section 18.

20          I mean, really, when the Law Society went to -- when  
21          the Law Society -- when the Law Society went to the  
22          Faculty of Advocates, they should have said, oh, that  
23          other side does not have an advocate.  So because of  
24          competition law, we are prevented from being able to  
25          give you an advocate.  I mean, that should have been one

1           solicitor against another, because they did not cannot  
2           the other side that method and not give it to me.

3       THE CHAIRMAN: No, I understand that.

4       MR MCAULEY: Okay. So the other -- to go on to the second  
5           one, this margin squeezing.

6           So it says at page 745:

7           "The focus of this section is whether (a) --"

8           Sorry, this is at page 46 of the authorities  
9           booklet.

10       THE CHAIRMAN: Yes.

11       MR MCAULEY: Whish at page 745:

12           "The focus of this section is whether A is guilty of  
13           manipulating the relationship of its upstream &  
14           downstream prices in order to eliminate its downstream  
15           competitor by a margin squeeze."

16       THE CHAIRMAN: Yes.

17       MR MCAULEY: So basically, by -- so then the other thing is  
18           as well, at page 41, there is the *Albion Water* case,  
19           where Lord Carlile -- what paragraph is that? It is  
20           paragraph 275 of his judgment, the conclusion. He says:

21           "... an abuse of a dominant position if it consists  
22           directly or indirectly imposing unfair selling  
23           prices ..."

24           And then at the end of the paragraph he says:

25           "It rests too on a number of other points,

1 particularly the source of Dwr Cymru's pricing power and  
2 the effect of the First Access Price on the competitive  
3 process and end-consumer."

4 So I think what Faculty are doing in refusing you  
5 any services at all is margin squeezing. Basically,  
6 what they are doing is, rather than them giving you --  
7 saying, listen, there is available to you a counsel's  
8 opinion for £500 or £1,000 or whatever it is,  
9 a preliminary counsel's opinion, what they are doing is  
10 we are saying, oh, we are not providing you with  
11 anything, and -- but they then provide the other side of  
12 it, and rather than you be able to get an opinion from  
13 them on the merits of the case for 500 quid, they then  
14 bill you £30,000 at the end to eliminate you.

15 THE CHAIRMAN: Yes, okay. So I think I am struggling with  
16 this part of your argument, Mr McAuley, I think, first  
17 of all because margin squeezing, as it is traditionally  
18 understood, means a dominant undertaking reducing its  
19 price to a point which makes it impossible for or very  
20 difficult for competitors to compete with the dominant  
21 undertaking. Without prejudice to any of your other  
22 arguments about abuse, I am just struggling how --

23 MR MCAULEY: I do not think that is. I think that is  
24 predatory pricing that you are referring to, when they  
25 reduce their price to put you out of business. That is

1 predatory pricing.

2 THE CHAIRMAN: Well, that is predatory pricing, you are  
3 right. But the issue I am struggling with in a sense is  
4 where there is any pricing involved in this --

5 MR MCAULEY: Well, I have submitted to you the £30,000 price  
6 I have had to pay for that.

7 THE CHAIRMAN: But that is not related to your  
8 representation. That is an award of expenses by the  
9 court.

10 MR MCAULEY: But it is the same organisation.

11 THE CHAIRMAN: But it is from a completely different cause.  
12 That came from the court deciding that you should be  
13 liable for the expenses of that litigation.

14 MR MCAULEY: It is the same organisation that has billed me.  
15 It is their name. It is "Faculty Services Ltd" that is  
16 on the bill.

17 THE CHAIRMAN: Well, the bill is not from Faculty Services.  
18 The bill is from the Law Society, is it not?

19 MR MCAULEY: No, its Faculty Services badge is on it. It is  
20 them that has done it.

21 THE CHAIRMAN: But they have not billed you for it, have  
22 they, Mr McAuley?

23 MR MCAULEY: Well, the bill is there. If you look at it, it  
24 is not all from -- there are Faculty Services Ltd bills  
25 there.

1 MR ANDERSON: I think, Mr McAuley, if you do look at it, the  
2 bill comes from Faculty Services on behalf of a named  
3 member of the Faculty, and goes to the instructing  
4 solicitor. The instructing solicitor and the client  
5 then have the first obligation to pay that, and they in  
6 turn, because of the award of expenses against you, then  
7 say, "You are going to have to indemnify us. You are  
8 going to have to reimburse us". And counsel's fee was  
9 not 30,000. From memory, counsel's fee was about 10,000  
10 or so, and the balance was then solicitors' fees.

11 But fundamentally, it is not a charge by Faculty  
12 against you. It is a charge by a member of Faculty to  
13 their client, and their client then has to pay it, and  
14 they try and get it back from you if they can.

15 MR MCAULEY: I think it is --

16 MR ANDERSON: Do you recall that?

17 MR MCAULEY: Yes, but it might not be margin squeezing that  
18 it falls under then. I do not know. But I think it  
19 is -- that is what it -- this is where I think the  
20 upstream and downstream thing comes in. Even though  
21 they are not necessarily directly billing me, the bill  
22 still arrives at my door via one way or another.

23 THE CHAIRMAN: Just taking a step aside from the precise way  
24 that this -- your complaint interlocks with the  
25 competition law, just so that we understand what the

1           basis of your complaint is, the basis of your complaint  
2           is that you are seeking representation and you are not  
3           being given it; is that right?

4       MR MCAULEY:   Yes.   Broadly, representation in terms of the  
5           broad meaning, meaning advising me, can we do this no  
6           win no fee.

7       THE CHAIRMAN:   Yes.

8       MR MCAULEY:   If -- I will provide you with a counsel's  
9           opinion so that you can read it and you can get the  
10          merits of -- you can understand the merits of your case.  
11          And then if that is then positive, it then -- you are  
12          then moving towards saying, well, you do the no win no  
13          fee on the day.

14       THE CHAIRMAN:   But understanding representation in the way  
15          that you have, as you have explained it, that is your  
16          complaint, is it not?

17       MR MCAULEY:   That is my complaint, that I get no support  
18          whatsoever.   I mean, if I had even had a counsel's  
19          opinion that was fairly positive, I could have provided  
20          that to the bench and said, "Here is the Faculty of  
21          Advocates", and then I could have used that as the  
22          foundation of my arguments and it would have helped me  
23          no end and given me credibility, because, I mean, you  
24          are standing there on your own.   The complaint with the  
25          SLCC, there was about 10 people sitting for the other

1 side, and I was sitting there by myself with nothing.

2 So it is like if you even had a counsel's opinion,  
3 that greatly strengthens your case. You are not alone  
4 then, you know.

5 THE CHAIRMAN: Yes.

6 MR MCAULEY: So I take Judge Anderson's point about it may  
7 not be margin squeezing, but I do think it might be  
8 something if it was -- I might need to scratch my head  
9 and read the book again and say what aspect of it --  
10 what subsection does it fall under.

11 But I just think that is unfair, that you cannot get  
12 a counsel's opinion for £500 or £1,000 or whatever.  
13 Instead, you get a £10,000 bill by one means or another  
14 at the end. I think it would be fair competition, if  
15 you were a solicitor with a pending restriction that you  
16 are challenging, that you could at least get a counsel's  
17 opinion --

18 THE CHAIRMAN: Yes.

19 MR MCAULEY: -- which is a lot cheaper and at least you are  
20 then in control of your money and everything, rather  
21 than this. They do not tell you anything, do not get  
22 any advice, do not get any access, and then you lose and  
23 you are facing a gigantic bill.

24 THE CHAIRMAN: Yes.

25 MR MCAULEY: Yes. So the other thing as well is the price

1 discrimination argument which is on -- which I refer to  
2 at page 36.

3 So Whish -- on page 36 I quote Whish saying it is  
4 applying dissimilar conditions to equivalent  
5 transactions with other trading parties, thereby placing  
6 them at a competitive disadvantage.

7 So I think that invokes the -- that invokes the  
8 *Robson* case, which I think when I went to the Faculty,  
9 they should have told me, "Listen, you are entitled to  
10 try to do what *Robson* did and to try to discuss the case  
11 with an advocate and try to get an advocate on board to  
12 see if they can convince you". I think that is --  
13 I think Faculty broke the law by not telling me of that  
14 strategy there that *Robson* had used, because I only  
15 discovered that *Robson* case when Lord Doherty referred  
16 me to it. I did not know it.

17 THE CHAIRMAN: But Mr Robson -- you would have still needed  
18 a solicitor if --

19 MR MCAULEY: But I still think Faculty should -- with  
20 Tony Jones, he says, "Right, leave it with me and I will  
21 speak to people at the Bar and see if there is anyone  
22 that might do this no win no fee", because that is  
23 basically what happened -- and then would assist you  
24 because it would then be a lot easier if you could, say,  
25 go into a -- I mean, it is a brass neck for a solicitor

1           that has got an unrestricted practicing certificate to  
2           start shopping round the Faculty of Advocates and  
3           say: will any of you do this no win no fee?

4           That is looked down upon, I think. That is my  
5           understanding anyway. If you have got an unrestricted  
6           practicing certificate, a solicitor should be looking at  
7           the merits and then they just use the taxi service for  
8           an advocate.

9           So basically, if you are wanting a no win no fee  
10          advocate, you are expected to basically do the  
11          grovelling yourself as the party. That is my  
12          understanding anyway.

13       MR ANDERSON: Just on that point, Mr McAuley, and  
14          I appreciate that Lord Richardson has asked you to look  
15          at this, but I have cast my eye through the email  
16          traffic that you supplied with the complaint in the  
17          first place. Although I understand why you get to this  
18          point, I do not see anywhere that either the Dean of  
19          Faculty, or anyone else for that matter, says to you,  
20          you cannot discuss a no win no fee arrangement directly  
21          with counsel. What they do say very clearly is you can  
22          only instruct counsel in a litigation through  
23          a solicitor, through -- sorry, a solicitor who is  
24          qualified to conduct litigation.

25       MR MCAULEY: Right.

1 MR ANDERSON: But can you -- I appreciate probably you are  
2 going to look at that over lunchtime  
3 -- (overspeaking) --

4 MR MCAULEY: I think it might be -- the difficulty -- maybe  
5 it is then a mixup between the -- I was not meaning  
6 necessarily representation as in you are ordered to go  
7 and stand up in that court and do it. It was more  
8 representation in the fact of can I discuss that with  
9 someone.

10 THE CHAIRMAN: I am not sure that -- I suspect that might be  
11 a distinction without a difference in the sense that if  
12 you go and say to someone, "I have this ongoing case,  
13 can I discuss it with you", and you are seeking advice  
14 on that case, then that would count as representation,  
15 essentially, whether or not the representation took the  
16 form of the person standing up on your behalf or not.  
17 So that may be something that Lord Keen can help us with  
18 when he replies.

19 MR MCAULEY: I have spoken to, like as I said, my friend  
20 Michael Deacon that is a barrister, and basically, if  
21 they do it, they say, "Yes, send me a copy of the  
22 document and I will have a look at it", or sometimes  
23 they just say, "No, that is not one for me, I will need  
24 pass on that".

25 So it is -- that is what I was instructing. I was

1           just looking for discussion on it. So --

2       THE CHAIRMAN: Yes. The sharp case before us is you say  
3           that the refusal by the Faculty to provide you  
4           representation, contrary to what they say in terms of  
5           their guide 8.3, you say that is a breach of competition  
6           law. That is the point we have to decide, is it not?

7       MR MCAULEY: Mm-hm. Well, I do not think I specifically  
8           said -- I did not author anyone to -- when Bryan said  
9           that, I did not tell Bryan, "This is the date of the  
10          hearing". There was no hearing at that point. There  
11          was -- nothing was lodged. So --

12       THE CHAIRMAN: We are slightly --

13       MR MCAULEY: I have done it when I was -- I did my  
14          traineeship, I did representation for Legal Aid clients,  
15          and gave them advice that: listen, this claim is not  
16          going to win.

17       THE CHAIRMAN: So, Mr McAuley, I think this is -- the reason  
18          one has pleadings in cases is so that the facts are  
19          pinned down.

20                I will say this again because I think it is  
21          important you understand the basis upon which we are  
22          proceeding. We are proceeding on the basis of your  
23          email dated 19 August 2024 where you say "there are two  
24          matters in which I require representation by counsel",  
25          and you then set them out.

1           If there is other correspondence that you wish us to  
2           consider, or if there is something in the -- some  
3           further, as I have said to you already, refusal by  
4           Faculty to allow you to communicate in any way with  
5           advocates, please can you identify it over lunchtime.

6           Do you understand?

7   MR MCAULEY: Well, I mean, I think --

8   THE CHAIRMAN: Do you understand?

9   MR MCAULEY: Yes. So -- but.

10   THE CHAIRMAN: Thank you.

11   MR MCAULEY: But do you understand as well that they then  
12           complained about me?

13   THE CHAIRMAN: I do understand that. But what I am -- and  
14           so if you are relying on the body of the complaint, and  
15           you say that is what constitutes some refusal by the  
16           Faculty, then that is not something you have currently  
17           pled because we do not have the complaint.

18   MR MCAULEY: I do not follow your point. Can you rephrase  
19           that with different wording, please?

20   THE CHAIRMAN: Yes. So what I am keen to understand -- what  
21           I am explaining to you is at the moment you are focusing  
22           on -- in the pleadings, the email where you say "there  
23           are two matters for which I seek representation". Okay?  
24           Do you understand that? Do you understand that that is  
25           the basis upon which we are proceeding?

1 MR MCAULEY: What is it you are actually saying here? Are  
2 you disputing the facts or are you --

3 THE CHAIRMAN: No, I am seeking clarity as to what your  
4 position is.

5 MR MCAULEY: My position is that I sought representation  
6 from Faculty which involves at least giving you an  
7 opinion on what the prospects of success are, and  
8 explaining what their fees might be and allowing you to  
9 negotiate fees.

10 THE CHAIRMAN: So in seeking clarity as to what your  
11 position is, the Tribunal's starting point is your  
12 statement of case and your email dated 19 August.

13 MR MCAULEY: Mm-hm.

14 THE CHAIRMAN: Insofar as you are seeking to rely on  
15 something over and above that, I am asking you to  
16 provide that to us.

17 MR MCAULEY: I do not have it. I was not given notice of  
18 it. So I would to need to go through and read the  
19 emails again and really peruse them forensically. Over  
20 lunchtime is not good enough.

21 THE CHAIRMAN: Mr McAuley, we can leave it like this. You  
22 have had an ample opportunity to set out your case thus  
23 far.

24 MR MCAULEY: This is the first I have been asked about this.  
25 This is the first when you have actually got into the

1 facts and I do not think you are being clear about  
2 whether -- is this a legal argument? Is this -- so what  
3 is it you are factually saying I did?

4 THE CHAIRMAN: I am not --

5 MR MCAULEY: You are just saying -- you are saying  
6 I ordered representation?

7 THE CHAIRMAN: No.

8 MR MCAULEY: I ordered Mr Heaney to turn up for a hearing  
9 that was not even scheduled, I had not even registered  
10 an action, nothing? Come on, that is a fudge, sir. You  
11 are at it.

12 THE CHAIRMAN: Mr McAuley, I wonder if we should take -- if  
13 we should rise for lunch now.

14 MR MCAULEY: There is a fourth point about the essential  
15 facilities.

16 THE CHAIRMAN: I am just concerned, Mr McAuley, that you  
17 are -- and I understand -- I quite understand why, but  
18 I think we are slightly at cross-purposes, and I am  
19 concerned that you are given a proper opportunity to set  
20 out your position and that we understand your position.  
21 Do you understand that?

22 MR MCAULEY: Yes. I do not see how starting to  
23 cross-examine me on the facts and saying check it over  
24 lunchtime, that is not an ample opportunity.

25 THE CHAIRMAN: Well, all I am asking you to do is this. We

1           have your statement of case and we have emails and we  
2           have all the documents you have set out.

3       MR MCAULEY:   Mm-hm.

4       THE CHAIRMAN:   And we are keen to make sure that we are  
5           proceeding on the correct understanding of your  
6           position; yes?   Do you understand?

7       MR MCAULEY:   Yes.

8       THE CHAIRMAN:   And so in that regard what you rely on in  
9           your statement of case is your email where you say, "can  
10          I have representation in relation to these two matters".

11      MR MCAULEY:   Yes.

12      THE CHAIRMAN:   Now, you are explaining to us, and it is  
13          a matter of fact, as to what you meant by  
14          "representation", and you are giving that a broad  
15          construction.   But all I am seeking to do, nothing more  
16          than this, is just to give you an opportunity to make  
17          sure that what you have said so far in writing and in  
18          the emails you have submitted is correct, and there is  
19          nothing else that you want to rely on in that regard.  
20          That is all I am trying to do.

21      MR MCAULEY:   I do not know.   I mean, I will need to --

22          I will need to go through the emails again forensically  
23          and answer that point, because I mean, do -- I do refer  
24          to the case later on which is Justice Megarry in *John v*  
25          *Rees*:

1            "As everybody who has anything to do with the law  
2            well knows, the path of the law is strewn with examples  
3            of open and shut cases which, somehow, were not; of  
4            unanswerable charges which, in the event, were  
5            completely answered; of inexplicable conduct which was  
6            fully explained; of fixed and unalterable determinations  
7            that, by discussion, suffered a change."

8            So if you are wanting to cross-examine me on all  
9            those emails, which is exactly what you are doing,  
10           because you are wanting to let Roddy Dunlop and  
11           Tony Graham out the back door, the emergency exit, well,  
12           you are going to need to give me a chance,  
13           Lord Richardson.

14           I will go through that email forensically, and then  
15           let us do it. You can cross-examine me all you want.  
16           I will be ready. But you cannot just spring it on me  
17           and say, oh, do it over lunch. Come on. That is not  
18           fair. It is nonsense.

19           THE CHAIRMAN: Mr McAuley, what I am going to do is if you  
20           are seeking an opportunity to amend your position, then  
21           you can make that application. But otherwise, we will  
22           proceed on the basis of the documents that you have  
23           lodged and the statement of case --

24           MR MCAULEY: Well, I will need to -- you have started  
25           saying -- you have interrupted me when I am going

1           through my submissions and you are trying to take me  
2           back to the facts which I have already been through the  
3           factual matrix.

4       THE CHAIRMAN: Very well. If you are content with what you  
5           have said on the factual matrix, we will proceed on that  
6           basis.

7       MR MCAULEY: I will need to make an application for delay so  
8           that I can go through these emails and then we can do  
9           this again.

10      THE CHAIRMAN: Well, what we are going to do now,  
11           Mr McAuley, is we are going to rise and we will sit  
12           again at 2 o'clock. So we will rise slightly early for  
13           lunch so you can consider your position. If you wish to  
14           make any applications, you can do so at that stage.

15      MR MCAULEY: Okay. So can I just take down verbatim here  
16           what it actually is you are saying before we rise?

17      THE CHAIRMAN: Yes.

18      MR MCAULEY: So what is it your position is?

19      THE CHAIRMAN: What I am asking you, Mr McAuley, is the  
20           Tribunal is keen to understand whether you are content  
21           to proceed on the basis of the statement of facts set  
22           out in the statement of claim together with the  
23           documents you have already lodged.

24      MR MCAULEY: So what are the statement of facts?

25      THE CHAIRMAN: The statement of facts as in the facts that

1           you have set out in the statement of claim.

2       MR MCAULEY:   What are they?

3       THE CHAIRMAN:   Well, I think that is a matter that you  
4           presumably know.

5       MR MCAULEY:   It is you that has brought it up.   So please go  
6           ahead and say.

7       THE CHAIRMAN:   I am struggling to hear you now, Mr McAuley.

8       MR MCAULEY:   It is you who has brought it up, so please  
9           state what they are.

10      THE CHAIRMAN:   You can have regard to the statement of claim  
11           that you have lodged yourself.

12      MR MCAULEY:   I do not have it with me.   I have my  
13           authorities and I have my submissions because that is  
14           what I thought I was instructed to do today.   It is you  
15           that wants to undertake cross-examination on the facts.  
16           So tell me what it says, please.

17      THE CHAIRMAN:   Mr McAuley, I will ensure that you are  
18           provided a copy of your own statement of claim shortly,  
19           after we rise.

20      MR MCAULEY:   So you do not know.   You do not know what is  
21           written there.

22      THE CHAIRMAN:   I am not going to read out your own statement  
23           of claim --

24      MR MCAULEY:   You do not know.   You do not have it at your  
25           fingertips.

1 MR ANDERSON: I think you are being a bit unkind, to put it  
2 mildly, to Lord Richardson. We do have the statement of  
3 claim. It is going to take time to read it. It is  
4 unnecessary.

5 MR MCAULEY: I do not think it is, if you are saying it is  
6 a key point in the case.

7 MR ANDERSON: The simplest thing will be that you can be  
8 given a copy of it, and then you know what the facts  
9 are.

10 THE CHAIRMAN: That you yourself have put in the document.

11 MR MCAULEY: Yes, but you do not. You do not know.

12 THE CHAIRMAN: Mr McAuley, you are not helping your position  
13 here.

14 MR MCAULEY: It looks like you have already predetermined  
15 the position.

16 THE CHAIRMAN: That appearance would be false. So you are  
17 not assisting us and you are not assisting yourself, and  
18 what I am doing now is I am going to adjourn to enable  
19 you to collect your thoughts, consider the point I have  
20 raised, and we will pick up the matter at 2 o'clock. Do  
21 you understand?

22 MR MCAULEY: Yes, okay.

23 THE CHAIRMAN: Thank you.

24 (12.54 pm)

25 (The short adjournment)

1 (2.00 pm)

2 THE CHAIRMAN: Good afternoon, Mr McAuley. Just before we  
3 begin, because I appreciate you had been speaking for  
4 a long time by the time we rose and I was concerned  
5 that, quite understandably perhaps, you were concerned  
6 at the nature of what I was asking you, and so I thought  
7 it might be helpful for me just to explain what it is  
8 I am asking you because I would hope it is nothing --  
9 there is no sinister aspect to it. It is simply that  
10 the Tribunal is keen to be sure that we understand where  
11 you are coming from, essentially.

12 So I asked you to be provided with a copy of your  
13 amended claim form, and in your amended claim form you  
14 set out -- I think you have a copy of that, do you?

15 MR MCAULEY: Yes.

16 THE CHAIRMAN: You set out under 3(a), at the foot of the  
17 first page it says -- a statement as to whether the  
18 claim is in respect of an infringement decision and, if  
19 so, whether that decision has become final, and you say:

20 "Yes, this is final. Despite the applicant being  
21 a solicitor, he has been informed that he cannot  
22 instruct the services of an advocate from the Faculty of  
23 Advocates and has to self-represent in proceedings both  
24 in the UK Supreme Court and the Inner House of the Court  
25 of Session."

1           Then over the page you say, under the facts, because  
2           you were asking me before about the facts, and it was  
3           just the fact -- you have 1, you refer to yourself,  
4           obviously, and your registration number as a solicitor,  
5           and then you say:

6           "The applicant has two cases pending in which he is  
7           self-representing."

8           Then you go through the two cases we talked about,  
9           and 3:

10          "The applicant contacted the Faculty of Advocates  
11          for representation in these two cases which, being  
12          a solicitor, he thought was within the Faculty's rules,  
13          which state an advocate can only be instructed by  
14          a Scottish solicitor."

15          And it goes on in 4:

16          "The Faculty of Advocates has refused to provide the  
17          services."

18          And --

19       MR MCAULEY: Sorry, I was just at paragraph 2 there. Two  
20       cases pending, both of which require advocacy services  
21       provided with the specialist deviling skill set and  
22       greater appreciation of how judges expect cases to be  
23       pleaded.

24       THE CHAIRMAN: Yes, absolutely.

25       And furthermore, just at the back of that document,

1           there are a set of -- there is a document entitled  
2           "Annex", and then there are, I think, seven pages of  
3           emails. And those were the emails that I was referring  
4           you to earlier. Those are all within that body.

5       MR MCAULEY: Yes.

6       THE CHAIRMAN: And really the only thing I was -- I suppose  
7           it is rather a statement of the obvious, that unless and  
8           until you tell us otherwise, the Tribunal will proceed  
9           on the basis that that is -- that what is set out in  
10          your statement of case and the emails is the basis upon  
11          which you are advancing your claim in -- before this  
12          Tribunal. That is all I was seeking to clarify really.

13       MR MCAULEY: Yes. So it does say there I had contacted one  
14          of your advocates regarding representation. The  
15          advocate has not contacted me back to even acknowledge  
16          the email.

17       THE CHAIRMAN: Yes. Sorry, Mr McAuley, I do not know if  
18          they have turned off your microphone at lunchtime.

19       MR MCAULEY: Sorry, I should be speaking into it.

20          I contacted one of your advocates regarding  
21          representation. The advocate has not contacted me back  
22          to even acknowledge the email.

23       THE CHAIRMAN: Yes. Is that -- am I right to understand  
24          that was Mr Heaney?

25       MR MCAULEY: Yes, that is the point I was making. I was not

1 getting any interaction at all.

2 THE CHAIRMAN: No, I quite understand that. So that is all  
3 I was seeking to clarify. But I think all of this was  
4 to some extent a digression where you were trying to,  
5 I think, help the Tribunal answering a question we had  
6 raised, but I think we had got -- we were going through  
7 your four grounds of competition law, and I think we had  
8 dealt with the method, margin squeezing and price  
9 discrimination. I think the one that we had not got to  
10 yet was refusal to access of essential facilities.

11 MR MCAULEY: Yes. I think we were clarifying as well that  
12 with Mr Robson, he was actually getting responses from  
13 advocates and stuff like that. I was getting nothing.

14 THE CHAIRMAN: Yes. Yes.

15 MR MCAULEY: And that was my point, and that was when I then  
16 contacted Roddy Dunlop, and that was when Roddy Dunlop  
17 then said, no, that is absolutely correct. You should  
18 not even get an email back.

19 THE CHAIRMAN: Well, we have those emails. But that is  
20 helpful clarification. And on that basis, do you want  
21 to --

22 MR MCAULEY: Could I also clarify as well the date of that,  
23 August 19.

24 THE CHAIRMAN: Yes.

25 MR MCAULEY: Because at that stage I had not actually

1       started drafting the form, and I had not submitted it to  
2       the Inner House, the email address, because at that  
3       stage what I was basically wanting was to get an  
4       acknowledgment, and then at least get -- if Bryan had  
5       said back, "Listen, Pat, it is not possible, I am  
6       stacked with cases here, I am up to my ears in paperworkd",  
7       I would have said okay, fine, and moved on; or if he had  
8       said, "Send me a copy of the minute for the -- put the  
9       description on and I will have a quick look at it", and  
10      then if he had said that, he might have said, "Listen,  
11      Pat, no chance, you are barking up the wrong tree there,  
12      that is nonsense", I would just -- I would just accept  
13      that, and just get on with -- get on with your life.  
14      I think you are silly if you try and challenge that; or  
15      if he had said maybe, and he might have said, "I will  
16      give you an advocate's opinion" -- if he had maybe said,  
17      "I do not know, I can see why you have read that minute  
18      and thought I am not sure that is lawful. I can do an  
19      advocate's opinion for you for however much money, and  
20      I can go round the advocates' library and get the case  
21      law and stuff like that. This is how much it will  
22      cost".

23             But I was not getting any sort of response at all to  
24      even get involved in that.

25      THE CHAIRMAN:   Yes.

1 MR MCAULEY: So then I had -- without any counsel's opinion  
2 to advise me on the prospects of success, whether to  
3 just ignore it or just to give man-to-man advice that,  
4 "Listen, just forget that, just get your head down and  
5 just apply for jobs". He might have said that to me,  
6 "I am not -- I do not think even think it is worth you  
7 paying for a counsel's opinion for that", which  
8 sometimes they might say. Or he might just have said,  
9 "Listen, I am too busy to get involved with this", or,  
10 "It is a specialist area". All the different  
11 conversations that counsel have with solicitors.

12 So I was not even getting anywhere with that, which  
13 is when Roddy Dunlop got involved, and then I said  
14 right, and this is when I was that or not, because the  
15 deadline was the 22nd as well, which put me under major  
16 pressure.

17 So that was just to clarify those aspects of the  
18 facts.

19 THE CHAIRMAN: No, that is helpful.

20 MR MCAULEY: Yes. So the fourth ground was as well that  
21 obviously then the essential facilities doctrine, it  
22 is -- and obviously Whish at page 691 says:

23 "The idea is that there are some facilities that  
24 firms must have access to if they are to be able to  
25 compete in a downstream market."

1 THE CHAIRMAN: Where do we find this in your bundle?

2 MR MCAULEY: It is at page 35, the third paragraph from the  
3 bottom.

4 THE CHAIRMAN: Yes. I have that.

5 MR MCAULEY: "The expression 'essential facilities' will  
6 often be encountered in discussions of refusal to supply  
7 new customers: the idea is that there are some  
8 facilities that firms must have access to if they are to  
9 be able to compete in a downstream market."

10 THE CHAIRMAN: Yes.

11 MR MCAULEY: So -- yes, so it is not just -- you are not  
12 just instructing the advocate themselves. You are also  
13 instructing their access to that library, because that  
14 is a national library and it is a working library. You  
15 cannot get into that.

16 Like I mean, I have my train ticket here across,  
17 £42, plus it is a three-hour journey here and three-hour  
18 journey back by the time you are on and off trains. So  
19 I mean, the limited access that you get for just, oh,  
20 you can maybe request a book, we might let you come in  
21 and read a page of it. I mean, it is not good enough.  
22 You really need to be in there for the week, read stuff,  
23 go back, just the whole process of doing legal research  
24 in the library. And you also need access to the  
25 computers that they have with all the online stuff

1           nowadays.

2           So, I mean, if you do not have an advocate on board,  
3           you do not have access to that library. You do not have  
4           access to the electronic database. So you cannot get even  
5           really initial advice of, "Listen, that is nonsense", or  
6           "Maybe, let me look up the -- let me look up the law".

7           I mean -- and the other point as well that I want to  
8           emphasise in relation to that is it is not enough just  
9           to say all the statutes are online or you have tonnes of  
10          case law online. That is the point that Justice Megarry  
11          is making in *John v Rees* in 1970. I do not know if this  
12          authority is there. But that is basically what he says.  
13          Cases can turn on a tiny fact, on one word in an email,  
14          on one word in a judgment. It is extremely --

15       THE CHAIRMAN: Yes.

16       MR MCAULEY: It is the more on point the better, really.

17       THE CHAIRMAN: Yes.

18       MR MCAULEY: So that is what I am saying. It is not just  
19          about limited -- you cannot just have -- just say you  
20          have enough laws, because it is -- with law it is the  
21          more on point, the better. That is what you are doing  
22          when you are at university. The person that can hone in  
23          on a tiny factor.

24          So it is --

25       THE CHAIRMAN: And the essential facilities you are talking

1           about here are the access to the library and --

2       MR MCAULEY: I think that facility outside, I consider that  
3           an essential facility. I mean, when you look around  
4           just at the grandeur and everything, it looks on the  
5           surface like an essential facility that you would expect  
6           to look like.

7       THE CHAIRMAN: Yes.

8       MR MCAULEY: And when you go in and it is -- you have got  
9           clerks and all that, they can help you find books and  
10          everything. I think in the end -- and you have got  
11          computers. And even nowadays, with electronic  
12          resources, there are some cases that -- older ones that  
13          are not put on these electronic databases that you  
14          actually have to look up the book for. So -- and it can  
15          be older cases that can turn the case in your favour.  
16          Like you can read out one ratio from a case to the judge  
17          and the judge goes, ah. That is the bazinga moment,  
18          where that is that same point.

19                So you just -- you can -- what was it he said? You  
20          can compete but you cannot really properly compete.  
21          Definitely you have one hand tied behind your back when  
22          you do not have access to that.

23       THE CHAIRMAN: Yes.

24       MR MCAULEY: To that facility. So that is the fourth one.

25       THE CHAIRMAN: Yes.

1 MR MCAULEY: Yes. So, I mean, I know -- so my conclusion  
2 basically is that I think this is a case which *Furniss v*  
3 *Dawson* with Lord Scarman at 514, where he says whatever  
4 a statute --

5 THE CHAIRMAN: Sorry to interrupt you. Is that in your  
6 bundle as well?

7 MR MCAULEY: No, it is not. I should have referred to this.  
8 It is a well-known case.

9 THE CHAIRMAN: Can you just give us the name of it, please?

10 MR MCAULEY: It is *Furniss v Dawson* [1984] AC 474, and it is  
11 Lord Scarman at 514. This is one you will have heard of  
12 at university. He says:

13 "Whatever a statute may provide, it has to be  
14 interpreted and applied by the courts: and ultimately it  
15 will prove to be in this area of judge-made law that our  
16 elusive journey's end will be found."

17 I do not think this is -- albeit there is the David  
18 and Goliath stuff and that metaphor, the boxing  
19 metaphor -- I do not actually think this is a typical  
20 case where it is really like that. I think there is  
21 a black and white answer here. No matter who was  
22 standing here, it should not really matter, and it is  
23 impossible to defend, because I think this is the answer  
24 here, that it is just a black and white answer, that if  
25 you are involved in that process, you should be able to

1 email advocates, get some sort of answer, get some sort  
2 of counsel's opinion.

3 THE CHAIRMAN: Yes.

4 MR MCAULEY: So -- and as I say, I think Lord Carloway in  
5 *Kirkwood* and *JABS* has already interpreted it.  
6 I can take your point. It is not quite deductive, but  
7 I think it is -- those cases are strongly persuasive  
8 where he has said the advocacy thing is an enhanced  
9 method where you -- you learn your way round the  
10 library, you have exclusive access to it and everything,  
11 which improves your capability to be a judge. In  
12 *Kirkwood*, where he says a Scottish solicitor, there are  
13 none of these qualifications of restriction, and it also  
14 complies with the purpose.

15 So I think it is just a black and white answer that  
16 at that juncture, I did have it, and I just think that  
17 is the answer here.

18 THE CHAIRMAN: Yes.

19 MR MCAULEY: So basically, that is -- so in terms of  
20 section 18, I appreciate the point that Lord Keen said,  
21 well, if section 18 is not found in favour of, there is  
22 no point in considering section 2, because section 2  
23 rests -- if there was -- if it was not section 18, there  
24 is a lawful reason that those emails were sent to me  
25 that I was refused any access at all and was not even

1 emails acknowledged.

2 So basically, if -- if the dominant position, one  
3 does not come up, the other one is irrelevant. So that  
4 is my understanding anyway.

5 THE CHAIRMAN: So the section 2 -- your section 2 argument  
6 is subsidiary, essentially?

7 MR MCAULEY: Yes.

8 The other thing is as well, I think it is different  
9 tests, as I referred to. I think for section 2 you  
10 actually have to have distorted trade, whereas for  
11 section 18 it is just a risk of distortion to trade.

12 So as the case is still with the UK Supreme Court,  
13 you could say that trade has not been distorted yet  
14 because it is still under consideration. So --

15 THE CHAIRMAN: Yes, that is helpful.

16 MR MCAULEY: Just to make that point. So it is -- just as  
17 a sort of sense of pragmatism here.

18 So in terms of section 18, I think section 18.2(a),  
19 (b) and (c) have all been breached by that, the fact  
20 I was not getting any replies to emails from the Faculty  
21 of Advocates.

22 THE CHAIRMAN: Yes.

23 MR MCAULEY: So section 2(a) says:

24 "... directly or indirectly imposing unfair purchase  
25 or selling price or other unfair trading conditions".

1           So I think, directly or indirectly, I am getting  
2           unfair trading conditions imposed on me by having to  
3           self-represent.

4   THE CHAIRMAN: Are we -- sorry to -- just so I am following  
5           you, are we in a particular point in your --

6   MR MCAULEY: Yes, I have referred to this in the statutory  
7           framework.

8   THE CHAIRMAN: You did, and we went to it already. I just  
9           wondered if you came back to it.

10   MR MCAULEY: I am just going back to that because I think  
11           that is the key statutory provision.

12   THE CHAIRMAN: That is fine.

13   MR MCAULEY: So it is --

14   THE CHAIRMAN: Yes, I think you referred to it in the early  
15           part of --

16   MR MCAULEY: Also, sorry, the first part as well of that.  
17           It may affect trade. So it does not actually have to  
18           be -- basically, it may affect trade because if you do  
19           not have access to the full library and the full details  
20           and everything, you might end up with judgments which  
21           are wrong.

22   THE CHAIRMAN: Yes.

23   MR MCAULEY: So in a loser pays system, that means you might  
24           end up having to pay money that you should not have to,  
25           because if you had had the full access, you might have

1           won.

2       THE CHAIRMAN:   Yes.

3       MR MCAULEY:   And it also leads to the SLCC and Law Society  
4                   potentially getting -- potentially there being  
5                   solicitors that think: I do want to challenge that, but  
6                   I do not have £60,000 and I do not qualify for Legal  
7                   Aid. So it is going to lead to them being able to write  
8                   reports and do things which people would ideally  
9                   challenge, but they cannot because they do not have  
10                  \$60,000 and they are getting zero access to any counsel  
11                  at all.

12      THE CHAIRMAN:   Yes.

13      MR MCAULEY:   So I think that does -- so that is going to  
14                   lead to an authoritarian regulator that has far too much  
15                   power over solicitors and leads to everyone being scared  
16                   of them.

17                  And then with these judgments as well, they can  
18                   cross over and be used by the General Medical Council,  
19                   etc. So it is -- and applied to the whole of Scotland.  
20                   So we are potentially getting wrong authoritarian  
21                   judgments applied to solicitors all over Scotland.

22                  So I think self-representation is terrible. I mean,  
23                   you should have an advocate. You should be in the  
24                   library and have done your preparation for the case  
25                   properly. I just think it is nonsense that people

1           should self-represent and have not done a proper  
2           camp to get ready for litigation.

3           So that is why I think it does risk trade being  
4           affected.

5       THE CHAIRMAN:   Yes.

6       MR MCAULEY:   So in terms of 2(a), I do think it is an unfair  
7           trading condition that one side has the enhanced method  
8           of deviling, and they also have full access to that  
9           beautiful library through there and the other side does  
10          not. I think that is an unfair trading condition.

11       THE CHAIRMAN:   Yes.

12       MR MCAULEY:   (b):

13           "... limiting production, markets, or technical  
14           development to the prejudice of consumers ..."

15           I think they are limiting the production of stern  
16           words that an advocate can have with people, "Listen,  
17           I think it is nonsense and you need to back off from  
18           that", or counsels, when they go "Mm, let me go into the  
19           library and look that up". And that is stopping the  
20           proper development of the law in Scotland for solicitors  
21           actually being properly regulated. It is leading to an  
22           authoritarian system of solicitor discipline which just  
23           is not fair.

24       THE CHAIRMAN:   Yes.

25       MR MCAULEY:   And then I think (c), "applying dissimilar

1 conditions to equivalent transactions", as you can see  
2 from that email, the reason I got in touch with  
3 Roddy Dunlop was because I was getting nothing back at  
4 all. So, I mean, it is pretty clear that from that  
5 email I was getting zero back, and that is when I was --  
6 that is when I then contacted Roddy Dunlop. And it was  
7 at that stage to get preliminary advice on, "Listen, do  
8 you as an advocate think this might be worth running  
9 with here", and if there is an answer of maybe, I can --  
10 or if they have time, etc, all just the general  
11 logistical stuff that you go through at the start of  
12 that process, and then if they say, "I can see where you  
13 are coming from there", I could have got that.

14 So *Robson* was entitled to that. He was entitled to  
15 at least some access to negotiation basically what I have is  
16 nothing. It is not clear if *Robson* got a counsel's opinion or  
17 not, but he was certainly allowed to go in there and get access to  
18 speak to an advocate, get emails rolling, so that he could  
19 then try to get no win not fee. He was then in a stronger  
20 position for going into a solicitor that he had already done the  
21 groveling to try and convince an advocate to do them a turn and  
22 get on board.

23 THE CHAIRMAN: Yes.

24 MR MCAULEY: So my submission, basically, is that they  
25 are -- this is black and white a breach of

1 section 18.2(a), 2(b) and 2(c), and I do not think it is  
2 a grey area to do it. I do not think this is a matter  
3 of who is better at the art of law, Lord Keen or I.

4 I just think it is clear that this is the answer here.

5 THE CHAIRMAN: Yes.

6 MR MCAULEY: So, I mean, my conclusion is I think there is  
7 a lot of responsibility rests on your shoulders here  
8 about the future of the solicitor profession and how  
9 solicitors can stand up to the SLCC and the Law Society.  
10 At the moment it is authoritarian. Everyone is scared  
11 of them because they know if they get that report  
12 through, it is £60,000 if they want to defend it, or  
13 they just let it go and they just accept a restriction  
14 in their practicing certificate, or they just accept  
15 a restriction.

16 But if it was still the case that solicitors with  
17 a restriction could still get some access to Faculty,  
18 they were not just completely jettisoned from it unless  
19 they had £60,000, there would at least be fair fights  
20 there with some semblance of equality of arms.

21 At this moment in time if you have got a restriction  
22 and you are just like a leper, they cannot even reply to  
23 emails. That is nonsense.

24 I mean, also, as well, just to end with the  
25 metaphor, what is happening is you have seen it. I have

1 had to self-represent in two cases. That is like the  
2 Dark Knight with Batman, Bane, that he had forced  
3 Commissioner Gordon to self-represent, and he said I am  
4 not doing it.

5 So basically that is the practice. If you do not  
6 uphold this plea, Lord Keen is trying to obscure  
7 everything and find grey areas and whatnot. But if you  
8 uphold that, you are upholding a dystopian precedent  
9 that stops -- you are forcing solicitors, unless you  
10 have got £60,000 burning a hole in your pocket, having  
11 to self-represent. I mean, it is not fair.

12 THE CHAIRMAN: Yes.

13 MR MCAULEY: So, I mean, just to end on a point of  
14 pragmatism, I would accept section 18 be a dominant  
15 position, saying that in future solicitors that have the  
16 restriction in their practicing certificate can contact  
17 counsel, not just get their emails ignored, contact  
18 counsel, get representation in its early stages of  
19 either a stern word of "Now, listen, no, I would not  
20 touch that with a bargepole", or "I can -- even though  
21 you have got a restriction, I can still give you  
22 a counsel's opinion so that you can get formal advice on  
23 the prospects of success of that", for £1,500 or  
24 whatever, and then if you are into the Court of Session,  
25 and you do go ahead you are in a much stronger position.

1           So I think that is the right way forward for Scots  
2           law here to bring it into conformance with the law of  
3           England and Wales in respect of that, and have  
4           solicitors able to stand up to the Law Society and the  
5           SLCC, which they just cannot do currently. That is it.

6       THE CHAIRMAN: Thank you. That is very helpful.

7           I take it, by the fact you were going to sit down,  
8           that that would bring you to the end of your response to  
9           the strike-out.

10          The other thing -- and I do not know if -- we have  
11          obviously got your written submissions on this as well,  
12          but it was what else you wanted to say in relation to  
13          your application for interim measures.

14       MR MCAULEY: Well, in terms of the application for interim  
15       measures, I think that Lord Carloway has said clearly  
16       that solicitors are -- a Scottish solicitor is entitled  
17       to -- entitled to access to Faculty.

18          So I just think the letter of the law there is so  
19       clear that it should be an interim measure.

20       THE CHAIRMAN: So just in terms of -- you will have seen  
21       from the Faculty's response to what you said that what  
22       the Faculty have said in response is they question  
23       whether we, the Tribunal, have the power to do that,  
24       because what they say is, in terms of section 47(a),  
25       which is -- of the Competition Act 1998, which is the

1 provision which you rely on to bring your claim, they  
2 say, looking at rule 24 of the 2015 rules, that the  
3 powers that we have, they say, are restricted to either  
4 essentially awarding a sum of money or to making  
5 a declarator.

6 So they say the orders that you are seeking do not  
7 fall -- on an interim basis do not fall within that  
8 scope. What is your answer to that?

9 MR MCAULEY: Yes. Just interim declarator in the sense that  
10 Lord Carloway has stated that he went through the  
11 advocates' website. He was an advocate for many years.  
12 It just says "Scottish solicitor", and he also goes  
13 through the purpose.

14 So I think this is a case where it just should be --  
15 just apply that, what Lord Carloway has said there. No  
16 reference to restricted practicing certificate. So  
17 I should have been told by -- I should have been able to  
18 at least email Bryan Heaney and at least get some email  
19 correspondence going with -- of the type that I had  
20 said, especially at that early stage in the process  
21 before I had lodged any actions or anything.

22 And basically, then, if the Faculty of Advocates  
23 were just to accept that, we could just leave that as  
24 the judgment or -- and just have that going into the  
25 future, that solicitors with restrictions in their

1 practicing certificate -- that have just had  
2 restrictions imposed, they get that. They still get  
3 access to Faculty, to at least get counsel's opinions  
4 and get emails back, and get email correspondence at  
5 least rolling to try and get somewhere with defending  
6 their case.

7 And if the Faculty do not accept that, then we will  
8 come back and make all those arguments to do with all  
9 the competition law, all the specialist stuff, and the  
10 essential facilities and everything. That was what my  
11 interim one was. And it was -- if it went to a full  
12 hearing, it would be more to go through all the case law  
13 for all the different subsections of abuse.

14 THE CHAIRMAN: Yes.

15 MR MCAULEY: So that was -- that was why I put that in,  
16 because I do not think we need to go through all the  
17 specialist areas when it is so clear there, and we can  
18 just interpret. And it is -- surely that is the best  
19 for Scots law; anyone that cares about Scots law agrees  
20 that is the best way for it to go forward.

21 THE CHAIRMAN: Yes. Is there anything else you want to add  
22 on the interim measures point, or is that --

23 MR MCAULEY: That was just interim declaratory, just to  
24 apply in *Kirkwood*. And what was the other one? I think  
25 it was -- ah, just *Kirkwood* and Lord Sumption, just

1       saying on this letter in the purpose, solicitors, even  
2       that have just -- they need to use some sort of  
3       measures, and then give the Faculty a deadline for if  
4       they want to -- they do not accept that, and then we can  
5       come back and make all the arguments for essential  
6       facility and everything; and if they do, just accept it.  
7       That is just the position moving forward.

8             And then with that way as well, it also means as  
9       well then that there is not -- I do not know. I think  
10      that is for the best, and that was why I put it in, but  
11      I do not --

12      THE CHAIRMAN: That is helpful.

13             Let me just check if either Mr Bankes or Mr Anderson  
14      have any questions.

15             Thank you very much, Mr McAuley.

16             Lord Keen. So are there any points you wish to --  
17      first of all, if you could address, I suppose it is  
18      a matter for you, but it seems to me there are two  
19      possible topics that we would be grateful for your  
20      assistance on. One, is there anything you wish to say  
21      in relation to the application for interim measures, and  
22      the second is whether there are any brief points of  
23      reply you wish to take up from Mr McAuley's submissions  
24      in response to your strike-out application.

25             Reply submissions by LORD KEEN

1 LORD KEEN: Thank you, my Lord. The defender's opposition  
2 to the pursuer's application for interim orders has been  
3 set out in their written note, which I of course adopt  
4 for present purposes.

5 THE CHAIRMAN: Yes.

6 LORD KEEN: But it may be stated succinctly. The Tribunal,  
7 as your Lordship has already noted, may only pronounce  
8 interim orders granting any remedy which the Tribunal  
9 would have the power to grant in its final decision.  
10 That is reflected in rule 24.

11 THE CHAIRMAN: Yes.

12 LORD KEEN: Pursuant to section 47A of the 1998 Act, the  
13 remedies there are not such as to embrace the  
14 application made by the pursuer. It is as simple as  
15 that.

16 THE CHAIRMAN: Yes.

17 LORD KEEN: In any event, to compel the defender to permit  
18 the pursuer to instruct counsel directly would be to  
19 compel the defender to require an advocate to act in  
20 breach of the Guide to Professional Conduct. But that  
21 is very much a subsidiary point.

22 THE CHAIRMAN: Yes.

23 LORD KEEN: So I go to the competence of the application for  
24 interim measures.

25 I would then make some very short observations with

1           regard to the strike-out application.

2       THE CHAIRMAN:   Yes.

3       LORD KEEN:   First of all, I have to address the claim which  
4           has been made --

5       THE CHAIRMAN:   Yes.

6       LORD KEEN:   -- in terms of the claim form and the attendant  
7           documentation submitted in support of it.

8           The issue that was raised arose out of the pursuer  
9           seeking to instruct representation in the conduct of two  
10          appeals.

11      THE CHAIRMAN:   Yes.

12      LORD KEEN:   Incidental to such an instruction, of course, he  
13          might have wanted to engage with counsel's clerks over  
14          the matter of fees.  Incidental to such an instruction,  
15          he might have wanted to engage with counsel as to the  
16          prospect or otherwise of the relevant appeals.  But that  
17          was the route which the pursuer adopted.  He wanted to  
18          instruct counsel to act on his behalf in the conduct of  
19          two appeals.

20      THE CHAIRMAN:   Yes.

21      LORD KEEN:   And it was determined that he was not in  
22          a position to do so because it transpired, after  
23          enquiry, that his practicing certificate was qualified  
24          by the requirement that he should be subject to  
25          supervision, and enquiry disclosed that he was not.

1 THE CHAIRMAN: Yes.

2 LORD KEEN: The pursuer refers to a complaint to the SLCC.

3 I understand that it was in two parts, my Lord. First  
4 of all, that he had represented that he was in  
5 a position and qualified to instruct counsel to conduct  
6 these appeals, when, upon enquiry, it transpired that he  
7 had a practicing certificate that was subject to a  
8 supervision order that had not been obtempered.

9 THE CHAIRMAN: Yes.

10 LORD KEEN: And the second part of the complaint was  
11 directed to the tone and content of the communications  
12 he had had with advocates' clerks, the chairman of  
13 Faculty Services and the Dean of Faculty. And I do not  
14 go into the detail of that, but your Lordship has some  
15 of the email exchanges.

16 THE CHAIRMAN: Yes.

17 LORD KEEN: The second point I would like to mention  
18 concerns the case of *Kirkwood*, which has been repeatedly  
19 referred to by the pursuer.

20 THE CHAIRMAN: Yes.

21 LORD KEEN: I think one has to ensure that one understands  
22 the dicta in that case in the context in which they were  
23 delivered. That was a case in which the pursuer in  
24 an action had instructed English solicitors,  
25 Irwin Mitchell, to act, and they in turn had instructed

1           Scottish solicitors, and the issue that arose was the  
2           taxing out of the English solicitors' account of  
3           expenses.

4       THE CHAIRMAN:   Yes.

5       LORD KEEN:   It is in that context that Lord Carloway made  
6           his observations at paragraph 14:

7           "It is the court's understanding, although it is  
8           a matter for the Faculty of Advocates, that although  
9           counsel may accept instructions from a solicitor who is  
10          a member of the Law Society of England and Wales on  
11          behalf of their client under the direct access rules,  
12          they cannot do so in relation to the conduct of  
13          litigation in Scotland."

14          Reference is made to the Guide to the Professional  
15          Conduct of Advocates at paragraph 8.3.4(c) and (f).

16          If we can just turn to the guidance for a moment  
17          because -- and before we do so, can you note the  
18          quotation that follows:

19          "In proceedings before the Scottish courts, an  
20          advocate may only be instructed by a Scottish solicitor  
21          or other person authorised to conduct litigation in  
22          Scotland."

23          Lord Carloway appears to have taken that from the  
24          website, it is not from the guideline.

25       THE CHAIRMAN:   I was aware of that.

1 LORD KEEN: Well, perhaps I do not need to elaborate the  
2 point then. Because what we have in the guideline is  
3 perhaps a much clearer expression of the position,  
4 albeit I do not think there is any material distinction  
5 between that and what Lord Carloway has referenced here  
6 at all when it is read properly in context.

7 But I just want to underline that he was addressing  
8 a separate issue, and it was a separate provision of the  
9 guideline in paragraph 8.3, namely 8.3.4, which arose,  
10 because it was that provision that said that a Scottish  
11 advocate could not commence or proceed with proceedings  
12 on the instructions of a solicitor from England and  
13 Wales.

14 THE CHAIRMAN: Yes.

15 LORD KEEN: So the contrast between a Scottish solicitor and  
16 an English solicitor, not between a Scottish solicitor  
17 with a full practicing certificate, for example, and  
18 a Scottish solicitor with a qualified practicing  
19 certificate. That issue never arose, and therefore it  
20 was never addressed by the court.

21 The final point I would make, very shortly, is that  
22 the pursuer did have access to a member of Faculty for  
23 the conduct of those two appeals if he instructed  
24 a solicitor to act on his behalf. He was a client. He  
25 was perfectly entitled to go to a solicitor and to have

1           that solicitor instruct counsel to represent him in  
2           these two appeals. There was no inhibition there.

3           Now, he chose not to, and various explanations have  
4           been advanced. The fact is that that route was always  
5           open to him, as it was in the case of *Robson*.

6           While I note and understand the references to cost  
7           and impecuniosity, that is not the issue here. That is  
8           not the issue.

9           So unless I can assist further, my Lord, I would  
10          leave my submissions there.

11       MR ANDERSON: Lord Keen, just one point quickly. Suppose  
12          Mr McAuley tomorrow was to send a communication to  
13          a member of the Faculty, asking only for advice about  
14          his prospects of success in any matter, would that  
15          member of Faculty still be -- would that member of  
16          Faculty be at liberty to reply?

17       LORD KEEN: Absolutely. I see no difficulty with that  
18          whatsoever. But that is not this case.

19       MR ANDERSON: No, I absolutely understand your position.  
20          I just wanted to be quite clear that this was not  
21          a sweeping embargo on denying access to a member of  
22          Faculty for all purposes.

23       LORD KEEN: I would not even accept that it was an embargo  
24          of any kind. There was a route, but it was not adopted.

25       MR ANDERSON: I accept that in relation to litigation, but

1           just if you want an opinion as a member -- as someone in  
2           Mr McAuley's position, could you write for that opinion  
3           tomorrow? And your answer to that, I think, is yes.

4       LORD KEEN: One qualification. In respect of direct access,  
5           a member of the Faculty advocates is never obliged to  
6           accept a direct access instruction.

7       MR ANDERSON: But it would be for the individual member to  
8           choose whether to say, yes, I will do it, or no, I will  
9           not.

10      LORD KEEN: Yes.

11      MR ANDERSON: Thank you.

12      MR BANKES: Maybe just one question. Your submissions on  
13           the Chapter I case, although I think Mr McAuley has not  
14           emphasised that, it does of course apply to decisions by  
15           associations of undertakings, and I wondered whether you  
16           did not think that the Faculty is not perhaps an  
17           association of undertakings, each advocate being an  
18           undertaking for these purposes, and therefore caught  
19           within Chapter I, notwithstanding your arguments.

20      LORD KEEN: I would not accept that.

21      MR BANKES: No, no, but remember we are at strike-out here.

22      LORD KEEN: Indeed. But it does not appear to me that it is  
23           an association of undertakings which is being addressed  
24           in that context.

25      MR BANKES: Okay. Let us leave it there.

1 THE CHAIRMAN: Thank you, Lord Keen.

2 Mr McAuley, any points you want to make in brief  
3 response?

4 Reply submissions by MR MCAULEY

5 MR MCAULEY: The first point he said was none of the  
6 remedies count. There is interim declarator.

7 THE CHAIRMAN: Yes.

8 MR MCAULEY: So there are remedies that exist. Lord Keen  
9 said there was none.

10 The second point as well that Lord Keen said, he  
11 made out, oh, yes, it transpired on further  
12 investigation that this solicitor had a restriction on  
13 his practice certificate.

14 That is what I was actually appealing. That is what the  
15 appeal was about. That is what the nature of the appeal  
16 was about, because the restriction had been placed on  
17 it. It was not as if I had already been through that  
18 process with the restriction and that was finally  
19 determined, and then that restriction was on me. That  
20 was what the appeal was actually about. It was about  
21 that. So Lord Keen is factually wrong there. His facts  
22 are wrong.

23 THE CHAIRMAN: I understand your position.

24 MR MCAULEY: The third thing is as well about the tone of  
25 the emails. That is just desperation. Come on. And it

1 is already established in case law that if your tone  
2 is -- if your tone is flippant or whatever, it is fine.  
3 It is not a breach of duty.

4 THE CHAIRMAN: I am not sure --

5 MR MCAULEY: It is not good practice and you would never  
6 recommend it, but it is reflected in the case law,  
7 especially with freedom of expression. It is a  
8 passionate thing, and as long as there is a legitimate  
9 belief behind what you are saying.

10 Even in that first email there, it said:

11 "Do you not respond to emails from Roman Catholics  
12 ..."

13 I mean, *Robson* was entitled to emails back. I was  
14 just ignored. So that is what I am saying. That might  
15 look like a flippant tone, but when you see that in the  
16 full context, it is a case of how, when I put these  
17 emails in, are people too scared to even reply, albeit  
18 that the *Ethigen* case did not put me in a good light.  
19 That was the fourth point.

20 The fourth point as well was the Irwin Mitchell case  
21 and the Advocates Guide. It is not a breach of the  
22 Advocates Guide, there is nothing written in that  
23 Advocates Guide says that a solicitor with a restricted  
24 practicing certificate cannot have any access.  
25 Lord Keen is seeking to rewrite the Guide. It does not

1 say that anywhere.

2 The other thing is as well for Lord Keen to say it  
3 was open to me get a solicitor. I went to --  
4 Lord Clarke has already decided that. That is  
5 res judicata. When Lord Clarke allowed me to  
6 self-represent, he had to be satisfied that it was not  
7 possible for me to get solicitors. That is in the Court  
8 of Session rules.

9 THE CHAIRMAN: So I think -- are you referring to -- did

10 Lord Clarke grant you the ability to --

11 MR MCAULEY: Yes, because.

12 THE CHAIRMAN: -- sign proceedings?

13 MR MCAULEY: Yes, and in Scots law you do not have an  
14 automatic right to self-represent. You have to make  
15 submissions to the court and get the court to say, yes,  
16 it was not possible for you to get a solicitor and an advocate.

17 THE CHAIRMAN: Which set of proceedings was that?

18 MR MCAULEY: The rules of the Court of Session.

19 THE CHAIRMAN: But which --

20 MR MCAULEY: I think it is rule 4.

21 THE CHAIRMAN: Sorry, what I was asking you was in respect  
22 of which of your litigations did Lord Clarke --

23 MR MCAULEY: The one against the Law Society about the  
24 restriction in the practicing certificate.

25 THE CHAIRMAN: I see. So you applied --

1 MR MCAULEY: I had got prices before, and it was miles out  
2 of my price range, and basically I did not qualify for  
3 Legal Aid. So I had already been advised about that.  
4 So I had said that to him, and I said especially within  
5 14 days, I do not have time to go shopping around and  
6 emailing everyone and emailing back for them to explain  
7 and go through that whole process. And obviously when  
8 you do not have an advocate on board, it is not like  
9 they then have to then contact the Bar and say, listen,  
10 this guy cannot afford the 60,000. It just was not  
11 possible.

12 So Lord Clarke said that it was not possible. It  
13 was not practical for me to get a solicitor. I had no  
14 choice.

15 THE CHAIRMAN: Yes.

16 MR MCAULEY: The other thing is as well, I think in terms of  
17 this point that we did about representation, I do think  
18 if you look up the word "representation" in the  
19 dictionary, it is defined as "speak with authority on  
20 someone's behalf". So, I mean, it does not necessarily  
21 mean standing up in court, it can mean having a stern  
22 word that, listen, that has got no chance, or giving  
23 a counsel's opinion. That is what I consider to be  
24 representation as well, broadly speaking. And if I had  
25 been asked to clarify that, I would have done so.

1           And I think it is also clear from that email there,  
2           my main gripe was that I was getting nothing back. It  
3           was not necessarily that I was bothering advocates: you  
4           must do this for me. If I had got an email back to say,  
5           listen, it cannot happen, I would have said fine, you  
6           know. So that is another thing that I think has to be  
7           clear, about the facts here. I was not being bullheaded  
8           and ordering people about, I was just looking for some  
9           dialogue to get things moving forward.

10           So I think that was the only six points I wanted  
11           to ...

12       MR BANKES: Can I just ask you, in the light of Lord Keen's  
13           agreement that you are free to contact advocates as long  
14           as you are not seeking ... have you now got most of what  
15           you are looking for --

16       MR MCAULEY: The other thing as well, the reason that has  
17           happened is because I have raised this action.

18       MR BANKES: Sure, but you have got it now.

19       MR MCAULEY: In my opinion, that is what has happened here.  
20           They have now changed their position. It used to be the  
21           case that basically it was only nonrestricted practising  
22           certificates, or else it was like Mr Heaney, you do not  
23           even have to reply. So I think that is a new practise  
24           that they are doing now, and it is --

25       MR BANKES: I do not have a view on that, but my question is

1           that now that has been either clarified or changed,  
2           however you describe it, how much more were you looking  
3           for in your interim measure? Or does that address in  
4           full what you were looking for?

5       MR MCAULEY: Sorry, what do you mean by that?

6       MR BANKES: It is now clear that whatever was the case, it  
7           is now the case that you are free to contact an  
8           advocate, to ask that advocate whether they would be  
9           willing to give you advice. That is not in dispute in  
10          this court.

11      MR MCAULEY: Okay.

12      MR BANKES: My question is, in the light of that  
13          clarification, or development, however you wish to  
14          characterise it, what more do you need -- what more does  
15          your application for interim measures seek, or is that  
16          what you were looking for anyway?

17      MR MCAULEY: Now that that has been admitted, I think that  
18          is basically what I was wanting, interim declaratory.  
19          That is the position.

20      MR BANKES: That is helpful.

21      MR MCAULEY: So I am happy with that.

22      THE CHAIRMAN: That is helpful, thank you. That is a very  
23          useful clarification.

24      LORD KEEN: I have nothing to add, my Lord. I would only  
25          ask that if the Tribunal is to make avizandum, as it may

1           well intend, it should reserve all questions of  
2           expenses.

3       THE CHAIRMAN:   Yes.

4           I think, Mr McAuley, do you have any difficulty with  
5           that?

6       MR MCAULEY:   No.

7       THE CHAIRMAN:   Very well.

8           Well, we will reserve judgment, make avizandum at  
9           this point. I am grateful to both sides of the Bar for  
10          their helpful submissions both in writing and orally,  
11          but we will reserve judgment thereafter. Thank you very  
12          much.

13       (2.45 pm)

14                       (The hearing concluded)

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