Neutral citation [2025] CAT 61

Case No: 1672/5/7/24

IN THE COMPETITION APPEAL TRIBUNAL

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

14 October 2025

Before:

The Honourable Lord Richardson
Peter Anderson
Charles Bankes

(Sitting as a Tribunal in Scotland)

BETWEEN:

PATRICK HENRY MCAULEY

Pursuer

- v -

FACULTY OF ADVOCATES

Defender

Heard at the Court of Session on 14 August 2025

JUDGMENT (STRIKE OUT) (INTERIM MEASURES)

APPEARANCES

Patrick Henry McAuley on behalf of himself

Lord Keen of Elie KC and Rachel Breen (Instructed by Balfour and Manson LLP) on behalf of the Faculty of Advocates

A. INTRODUCTION

1. On 28 August 2024, the pursuer commenced proceedings under s 47A of the Competition Act 1998. The defender in these proceedings is now the Faculty of Advocates. The pursuer is a Scottish solicitor registration number 45504 but with a restriction on his practising certificate.

2. As we set out in further detail below, in his Claim Form, the pursuer describes two ongoing cases pending in which he was self-representing, but in respect of which he required advocacy services.

3. In the present proceedings, the pursuer contends that the refusal by the defender to provide certain advocacy services directly to him is an abuse contrary to section 18 of the Competition Act 1998; and/or the direction by the defender prohibiting advocates in Scotland from accepting instructions directly from him is contrary to section 2 of the Competition Act 1998.

4. This is the Tribunal's judgment on:

   (a) an application by the defender to strike out the claims in their entirety (the "Strike Out Application"). The Strike Out Application is made on two bases, which are, at a high level, that the claim should be struck out:

      (i) by operation of Schedule 3 of the Competition Act 1998; and/or

      (ii) because there is otherwise no reasonable basis for the claim;

   (b) an application by the pursuer for interim measures, by which he seeks a declarator requiring the defender to negotiate with him with a view to providing "no win no fee" advocacy services or *amicus curiae* services (the "Interim Measures Application").

5. By order made on 4 February 2025, the Tribunal directed pursuant to Rule 18 of the Competition Appeal Tribunal Rules 2015 that the proceedings are to be treated for all purposes as proceedings in Scotland.

6. This judgment summarises the pursuer's claim, the defence and the procedural history of these proceedings. It then moves on to consider each of the applications in turn.

7. At the outset, we wish to record that the pursuer has represented himself in these proceedings, including by appearing at the hearing the subject of this judgment. In this regard, the Tribunal has borne in mind the governing principles set out in rule 4 of the Tribunal Rules and adjusted its procedures accordingly. In order to deal with proceedings justly, the Tribunal has employed active case management techniques to seek to place the parties on an equal footing and, insofar as possible, to ensure that they each understand one another's positions. This has included declining to determine the Strike Out Application at a hearing on 29 April 2025 and deferring determination until both parties had had the opportunity set out their cases more fully in writing. The Tribunal has also endeavoured to make sure that the pursuer understood the various legal and factual propositions that were raised in hearings, and that he has had an adequate opportunity both to put his case and to respond to each point raised.

8. As such, the pursuer has also been afforded some degree of latitude throughout the proceedings. While this has possibly protracted proceedings to some extent, we consider that it has allowed the Tribunal to consider, and the defender to respond to, the substantive case raised by the pursuer. As explained in more detail below, we should also note that the defender, having regard to the fact that the pursuer was self-representing, has not taken certain pleading and procedural points that it might otherwise done.

B. SUMMARY OF PROCEEDINGS AND APPLICATIONS TO DATE

(i) *Summary of the Claim*

9. On 28 August 2024, the pursuer commenced these proceedings under section 47A of the Competition Act 1998 against the Faculty of Advocates Services Limited. The Claim Form sets out a very high level summary of the alleged conduct and alleged infringements. It annexes a chain of fourteen emails between the pursuer and the Dean of the Faculty.

10. As noted below, the pursuer was subsequently allowed permission both to amend the name of the defender and to add the Faculty of Advocates as a further defender to the proceedings.

11. The pursuer seeks:

(a) a declaration that the alleged infringements summarised at paragraph 3 above are well-founded;

(b) an order that the defender must offer the services of an advocate "for pending proceedings (i) in the Inner House of Scotland [sic] against the Law Society of Scotland, & (ii) the UK Supreme Court in the case of McAuley v Ethigen.";

(c) an order for the costs and expenses of bringing these proceedings; and

(d) an order for damages.

(ii) *The Defence*

12. The defender, the Faculty of Advocates, is an unincorporated association of which all advocates in Scotland are members. The defender regulates the training, professional practice, conduct and discipline of advocates in Scotland. Certain of the defender's functions, including the admission of advocates, the criteria for making such admissions and the development of professional rules are set out in the Legal Services (Scotland) Act 2010. These functions and the operation of the Legal Services (Scotland) Act 2010 are discussed further below.

13. The defender is separate from Faculty Services Limited ("FSL"). FSL is a services company wholly controlled by the defender. We understand that FSL employs staff on behalf of the defender. Importantly, whereas all advocates practising in Scotland are members of and are regulated by the defender, not all advocates are subscribers to FSL.

14. In terms of the defence dated 24 January 2025, the defender contends that:

(a) there is no breach of the Chapter II Prohibition because there is no relevant "conduct" within the meaning of section 18 of the Competition Act 1998. This is because the defender contends that the inability of an advocate to accept instructions arises as a matter of law. In this case, the inability was said to arise from rules of professional conduct contained in the Guide to Professional Conduct of Advocates (7th Edition) for which the Lord President of the Court of Session is ultimately responsible; and

(b) there is no breach of the Chapter I Prohibition because the pursuer has failed to identify an "agreement" within the meaning of section 2 of the Competition Act 1998. The defender contends that the relevant rules preventing the pursuer from directly instructing an advocate were not such an agreement.

15. The defender's pleaded defence is reflected, and expanded upon, in the Strike Out Application.

(iii) *Procedural history*

Objections to the composition of the Tribunal

16. On 4 February 2025 the parties were informed of the constitution of the panel in this case, and that the forum of these proceedings would be Scotland. The pursuer objected to the appointment of all three members of the panel. By ruling of the Acting President of the Tribunal [2025] CAT 18, Mr Ian Forrester KC was removed from the panel. Mr Forrester was subsequently replaced by Mr Charles Bankes, while Lord Richardson and Mr Peter Anderson remained on the panel.

The Case Management Conference

17. A Case Management Conference ("CMC") was held on 29 April 2025. As noted above, the Claim Form had initially named a company called Faculty of Advocates Services Limited as the defender. No such company exists. It became apparent that this was a typographical error on the part of the pursuer and he had intended to convene FSL as the defender. However, following consideration of evidence filed by the Faculty of

Advocates, the pursuer was given permission both to amend the designation of the defender to FSL and to add the Faculty of Advocates as a defender. This was not opposed. At the CMC, Lord Keen of Elie KC, appearing on behalf of the defender also confirmed both to the Tribunal and the pursuer that, to the extent that it could be proved, the Faculty of Advocates would meet the pursuer's claim.

18. Ahead of the CMC, the defender had applied for the claim to be struck out in its entirety. In the event, strike out was granted only in respect of the claim against FSL, leaving the Faculty of Advocates as the sole defender to the claim. The Tribunal declined to determine the application to strike out the claim in its entirety at the CMC, and, instead, set down a timetable for written submissions on the Strike Out Application, leading to a hearing subsequently listed on 14 August 2025.

19. That timetable also provided the pursuer with an opportunity to set out the basis for an application for interim measures. This application had been first referred to in the pursuer's skeleton argument prepared in advance of the CMC. The defender was also allowed time to consider and make submissions in response to that application.

The parties' submissions

20. In accordance with the timetable, the Tribunal received written submissions in respect of both applications in advance of the hearing on 14 August 2025. Thereafter, at the hearing we heard oral submissions.

21. At this stage, we should note the significant differences in detail provided in the Claim Form when compared to the pursuer's submissions made both in writing in preparation for, and orally at the hearing on 14 August 2025. As noted above, the Claim Form is a relatively brief document, providing a high level description of the alleged conduct and infringement, along with a few pages of emails said to evidence the pursuer's position. On the other hand, in preparation for the hearing, the pursuer provided substantial further submissions. This included a number of entirely new legal submissions in his bundle of authorities just days before the hearing took place. Not only is this unsatisfactory from a procedural perspective, but it has led to confusion about the ambit of the pursuer's case and the elements to which the defender must respond.

22. An important example is that it became apparent only towards the end of oral submissions that the pursuer would have been content only to receive legal advice (as distinct from representation in court) from an advocate when he first communicated with the defender. Such advice might have included receiving preliminary advice on the prospects of his claim and possible costs arrangements (such as whether "a no win, no fee" agreement could be made). This represented, at the very least, an important development in, if not an outright change of, the pursuer's position. As set out above, the Claim Form and its attached emails refer specifically to a request by the pursuer for 'representation' (Claim Form, paragraph (c)(3)) and seek an order requiring the defender to offer the pursuer the services of an advocate for two particular pending proceedings (Claim Form, paragraph (e)(ii)). Despite being given the opportunity to consider his position, the pursuer made no application to amend his case.

23. It was clear to the Tribunal that the defender had proceeded on the basis of the pursuer's Claim Form and, in particular, on the understanding that the pursuer was seeking representation in ongoing court proceedings. This was focussed when the Tribunal put what appeared to be the pursuer's developed position to Lord Keen KC towards the end of the hearing:

> " MR ANDERSON: Lord Keen, just one point quickly. Suppose Mr McAuley tomorrow was to send a communication to a member of the Faculty, asking only for advice about his prospects of success in any matter, would that member of Faculty still be -- would that member of Faculty be at liberty to reply?
>
> LORD KEEN: Absolutely. I see no difficulty with that whatsoever. But that is not this case."

24. For the avoidance of doubt, we have approached determination of the Strike Out Application on the basis of the pursuer's position as set out in the Claim Form, namely that he was seeking formal representation in the ongoing proceedings to which he referred.

C. FACTS

25. For the purposes of dealing with the two applications, our understanding of the underlying factual position, insofar as uncontentious, is as follows.

26. The pursuer is a Scottish solicitor. He first qualified as a solicitor in April 2015. In order to practise as a Scottish solicitor, the pursuer is required to comply with requirements set down by the Law Society of Scotland, appointed by the Solicitors (Scotland) Act 1980 to regulate the practice of solicitors in Scotland. One such requirement is that he apply for, and be granted, a Practicing Certificate by the Law Society of Scotland before he is legally able to practice.

27. On 6 August 2024, the pursuer was re-enrolled on the Register of Solicitors in Scotland. A period of 6 years and 9 months had elapsed between the expiry of his previous Practising Certificate on 31 October 2017 and his application for a Practising Certificate on 31 July 2024[1]. On 23 August 2024, the pursuer was issued with a Practicing Certificate for the 2023-2024 year. The pursuer's Practicing Certificate recorded the following restriction, referred to as a D2 Management Condition:

> "The holder of this certificate cannot practice as a manager in a practice unit (as those terms are defined in the Society's Practice Rules) for a period of 12 months with effect from 23 August 2024."

On 1 November 2024, the pursuer was issued with a practicing certificate for the 2024-2025 year, which is still in effect and also bears the D2 Management Condition.

28. The practical result of the D2 Management Condition is that the pursuer may practise as a solicitor in Scotland only under the supervision of a solicitor in Scotland with an unqualified Practice Certificate. We understand that the pursuer accepts that this is the effect of the D2 Management Condition, even though he does not accept that it should have been imposed.

[1] See Opinion of the Extra Division, Inner House, Court of Session delivered by Lord Doherty in *Patrick Henry McAuley v The Council of the Law Society of Scotland* [2025] CSIH 7 at [4]

29. The pursuer challenged the imposition of the D2 Management Condition in proceedings before the Court of Session. By the opinion of the Court, delivered by Lord Doherty in *Patrick Henry McAuley v The Council of the Law Society of Scotland* [2025] CSIH 7, the pursuer's challenge was refused. We understand that the pursuer has applied to the Supreme Court for leave to appeal the Court of Session's decision. We refer to this litigation as the "Practising Certificate Proceedings".

30. The pursuer has separate proceedings on foot against Ethigen, his former employer. The pursuer's claims were either dismissed or struck out by the decision of Employment Judge P O'Donnell in *Mr P McAuley v Ethigen Ltd*, Case No: 4105806/2022 (Employment Tribunal, 28 August 2023). The Tribunal understands from the pursuer's submissions at the hearing that he has been granted a full hearing in the Employment Appeal Tribunal. We refer to this litigation as the "Ethigen Proceedings".

31. The Tribunal understands that the pursuer has other litigation on foot, including against the Scottish Legal Complaints Commission. However, the Claim Form refers to, and seeks an order in respect of only the Practicing Certificate Proceedings and the Ethigen Proceedings.

32. The pursuer represented himself in both the Practicing Certificate Proceedings and Ethigen Proceedings. As we understand matters, at no point did the pursuer attempt to instruct a solicitor on his behalf. We consider this important to note because such a solicitor could then have instructed an advocate to represent the pursuer in those proceedings.

33. Sometime in August 2024 the pursuer emailed Mr Heaney, an advocate known to him, requesting assistance. The pursuer's email to Mr Heaney was not referred to in the Claim Form and has not been produced in these Proceedings. As we understand it, the pursuer received no response from Mr Heaney.

34. The Claim Form annexes a series of subsequent emails, all dated 19 August 2025, which are the subject of these Proceedings. So far as relevant for present purposes, the emails disclose as follows:

(a) The pursuer initially emailed Ms Westwater, the clerk of Mr Heaney's stable of advocates, copying Mr Dunlop, the Dean of the Faculty. The pursuer stated that he had contacted one of Mrs Westwater's advocates regarding representation but that the advocate had not contacted him back. The pursuer sought an explanation for why he had not received a response from the advocate.

(b) All further correspondence took place between the Dean of Faculty and the pursuer.

(c) The Dean enquired whether the pursuer was a solicitor qualified to practice in Scotland and explained that if he was not, there may be difficulties in him issuing instructions to an advocate depending on the nature of the work involved.

(d) The pursuer initially suggested that he was a solicitor with a certificate to practice in Scotland. The Dean confirmed that, if this was the case, the pursuer would be permitted to instruct an advocate. The Dean also sought further details of the pursuer's enrolment.

(e) The pursuer then provided his roll number and explained that he was challenging the imposition of a supervision restriction in the Practicing Certificate Proceedings. In his email of 3.20pm on 19 August 2024 the pursuer wrote:

> "There are two matters in which I require representation by Counsel. (1) An employment dispute with a jurisdiction hearing coming up in the UKSC […] and (2) an Inner House hearing where despite being a Solicitor, I have only been given a "Law Society" practising certificate with a 1 year supervision restriction …"

(f) The Dean then explained to the pursuer that the rules under which advocates operate state that instructions may only be accepted from Scottish solicitors or other persons authorised to conduct litigation in Scotland. The Dean further explained that the pursuer would only be authorised to conduct litigation in Scotland if employed under the supervision of another solicitor because of the restriction on his practicing certificate. The Dean also clarified that advocates

could also be instructed by any solicitor with an unrestricted practicing certificate acting on the pursuer's behalf.

(g) The pursuer maintained that he was entitled to instruct an advocate because he is a Scottish solicitor, notwithstanding the restriction on his practicing certificate.

(h) While there were, thereafter, further emails exchanged, it appears to us that those emails merely repeated positions summarised in subparagraphs (f) and (g) above.

35. Finally, in recording the facts upon which we have proceeded, it is necessary also to note one further issue.

36. In the Claim Form, the pursuer refers to an instruction issued by the Dean of Faculty that "*the secretary in no stable of Advocates was to accept instructions from* [the pursuer]" (paragraph (c)(4)). By the hearing, this had developed into an allegation that a memorandum had been sent by the defender to all advocates disseminating this instruction. No such memorandum has been produced in these proceedings. At the hearing, both the pursuer and Lord Keen for the defender confirmed that they had never seen such a memorandum. In response to questioning by the Tribunal, the pursuer suggested that he had understood from emails that he had reviewed that "*all of the clerks and all of the secretaries have all been informed, no one is going to reply to you.*"

D. THE STRIKE OUT APPLICATION

(i) *Introduction*

37. The defender advanced two bases upon which it was contended that there were no reasonable grounds for the pursuer's claims in terms of rule 41(1)(b) of the Tribunal Rules:

(i) The defender argued that the conduct complained of by the pursuer was not capable of amounting to a breach of either section 18 or 2 of the Competition Act 1998 because, in terms of paragraphs 5(1) and (2) of

Schedule 3 of the Competition Act 1998, such conduct arose as a result of compliance with a legal requirement.

(ii) The defender argued that there was otherwise no reasonable basis for the claim.

(ii) *The law*

38. In respect of the first argument, Paragraph 5 of Schedule 3 of the Competition Act 1998 provides, for present purposes, as follows:

> "(1) The Chapter I prohibition does not apply to an agreement to the extent to which it is made in order to comply with a legal requirement.
>
> (2) The Chapter 2 prohibition does not apply to conduct to the extent to which it is engaged in in order to comply with a legal requirement.
>
> (3) In this paragraph "legal requirement" means a requirement
>
> a. Imposed under any enactment in force in the United Kingdom.
>
> …"

39. The "legal requirement" relied upon by the defender is contained in provisions of the Guide to the Professional Conduct of Advocates, Seventh Edition, (the "Guide"). The Guide is promulgated by the Lord President of the Court of Session pursuant to sections 120 and 121 of the Legal Services (Scotland) Act 2010. Those sections provide:

> "120 **Regulation of the Faculty**
>
> (1) The Court of Session is responsible—
>
> (a) for—
>
> (i) admitting persons to (and removing persons from) the office of advocate,
>
> (ii) prescribing the criteria and procedure for admission to (and removal from) the office of advocate,
>
> (b) for regulating the professional practice, conduct and discipline of advocates.

(2) The Court's responsibilities within subsection (1)(a)(ii) and (b) are exercisable on its behalf, in accordance with such provision as it may make for the purpose, by—

(a) the Lord President, or

(b) the Faculty of Advocates.

121 **Professional rules**

(1) Subsections (2) and (3) apply to any rule which—

(a) prescribes the criteria or procedure for admission to (or removal from) the office of advocate, or

(b) regulates in respect of any matter the professional practice, conduct or discipline of advocates.

(2) If the rule is made by the Faculty, the rule—

(a) is of no effect unless it has been approved by the Lord President (and may not be revoked unless its revocation has been approved by the Lord President),

(b) must be published by the Faculty.

(3) In any other case, the rule—

(a) is of no effect unless the Faculty has been consulted on it (and may not be revoked unless the Faculty has been consulted on its revocation),

(b) requires—

(i) where made by the Lord President, to be published,

(ii) where made by the Court of Session, to be contained in an Act of Sederunt.

(4) Neither this section nor section 122 affects the validity of any rule—

(a) that was in force immediately prior to the commencement of this section, and

(b) which regulates in respect of any matter the professional practice, conduct or discipline of advocates.

(5) Nothing in Part 2 affects the operation of any rule which regulates in respect of any matter the professional practice, conduct or discipline of advocates (in particular, as it may relate to their involvement in or with licensed legal services providers).”

40. Paragraph 4 of the Act of Sederunt (Regulation of Advocates) 2011 (2011 No. 312) provides:

> **"Professional practice, conduct and discipline**
>
> 4. The professional practice, conduct and discipline of advocates are to be regulated by rules made by the Faculty of Advocates."

41. The Guide has been approved by the Lord President. Paragraph 8 of the Guide, so far as it is relevant to this case, provides:

> "8.2 **From whom may an Advocate accept instructions?**
>
> 8.2.1 An Advocate must not accept instructions directly from a client, except as provided for in Rule 8.3.
>
> 8.2.2 An Advocate must not, accept instructions to act from, or on behalf of, any person or body from which he receives any remuneration other than the professional fees or retainers paid to him as Advocate. Thus, he must not act for, or accept instructions from, a company of which he is a director, or any person or body by which he is employed, or a firm of which he is a partner, and from which he derives director's fees, a salary, or a share of the profits either in name or in reality.
>
> 8.2.3 Where a Dean's Ruling is in force regulating the acceptance of instructions from a particular solicitor or firm of solicitors, an Advocate may only accept instructions from that solicitor or firm on the conditions laid down by the Dean's Ruling.
>
> 8.2.4 While there is no rule which prevents an Advocate giving free legal advice at a Legal Advice Centre or similar institution, he should remember the limitations on his power to act explained in paragraph 1.2.3 above.
>
> 8.2.5 While there is no rule which prevents an Advocate giving legal advice to a relative or friend, he should remember that it is not always possible to advise a relative or friend with the degree of objectivity which the case requires.
>
> 8.3 **From whom may direct access instructions be received and in relation to what matters?**

8.3.1 An Advocate may accept instructions directly from a client under this rule. Such instructions are called "direct access instructions".

8.3.2 Direct access instructions may be accepted from the persons defined in the Schedule to Appendix D. The Dean may amend the Schedule.

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

42. Appendix D of the Guide, in so far as it is relevant to this case, provides:

"APPENDIX D

DIRECT ACCESS INSTRUCTIONS

1. An Advocate may accept direct access instructions from persons named in the Schedule hereto.

2. Any Advocate accepting direct access instructions does so subject to the terms of paragraphs 8.2 and 8.3 of the Guide to Professional Conduct of Advocates and the Standard Terms of Instruction as they may be updated by the Faculty from time to time.

Schedule

1. The following may instruct on their own behalf:

…

h) Any person or body acting under law in a governmental, judicial or legislative capacity;

…

3. The following may instruct on their own behalf, and their members may instruct on their own behalf or on behalf their clients:

…

d) Designated Professional Bodies under the Financial Services and Markets Act 2000."

(iii) *The defender's first argument*

43. In order to fall within the exception provided for in paragraph 5 of Schedule 3 of the Competition Act 1998 it is necessary for the defender, first, to identify a legal requirement imposed under any enactment in force in the United Kingdom.

44. The Guide is published by the defender pursuant to the obligations of the Court of Session imposed by section 120(2)(b) of the Legal Services (Scotland) Act 2010 and the authority delegated to the defender by the Court of Session by paragraph 4 of the Act of Sederunt 2011. On this basis, we are satisfied that the provisions of the Guide fall within the definition of "legal requirement" in paragraph 5(3) of Schedule 3 of the Competition Act 1998. In this regard, we also note that the pursuer did not seek to argue otherwise.

45. The next step in the defender's first argument is that the defender was required to refuse to permit the pursuer directly to instruct advocates to represent him in the Practicing Certificate Proceedings and the Ethigen Proceedings in order to comply with the provisions of the Guide.

46. The starting point for considering the requirements of the Guide is to recognise that, in seeking to instruct an advocate for the two sets of pending proceedings referred to in the Claim Form, the pursuer was acting on his own behalf. In other words, the pursuer was seeking to instruct directly as a client. In his oral submissions the pursuer argued that, by virtue of his status as an enrolled solicitor, he was, in some way, not the client for the purposes of the Guide. We reject this argument. Given that the pursuer was himself a party to each of the proceedings and, indeed, represented himself, we consider that no alternative characterisation of the pursuer's role is tenable. We do not consider that the pursuer's professional status as a solicitor alters the fact that in respect of each of the proceedings for which he was seeking to instruct an advocate, he was the client.

47. In these circumstances, rule 8.2.1 of the Guide is clear. It prohibits an advocate from accepting instructions directly from a client "except as provided for in Rule 8.3". Rule 8.3 sets out the rules regulating so-called "direct access" instructions to advocates. Accordingly, it is necessary to turn to consider those rules.

48. Rule 8.3 sets out two criteria which must be fulfilled by a client seeking to instruct an advocate directly: first, the client must fall within one of the categories set out in the Schedule to Appendix D to the Guide (Rule 8.3.2); and, second, where the instructions relate to appearance in a court or tribunal and the right to conduct litigation before that

court or tribunal is restricted by law, instructions must only be accepted from a person entitled to conduct litigation before that court or tribunal (Rule 8.3.3).

49. Dealing with the first criterion, there is no dispute that the pursuer falls within the scope of the Schedule to Appendix D. This is because, as a solicitor, the pursuer is a member of the Law Society of Scotland which, in turn, is a designated professional body under the Financial Services and Markets Act 2000 (see paragraph 2(b) of The Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001 (SI 2001/1226)). Accordingly, as a member of the Law Society of Scotland, the pursuer is entitled to instruct advocates on his own behalf in terms of paragraph 3(d) of the Schedule to Appendix D to the Guide (see paragraph 42 above). We understood that this was accepted by the defender.

50. For completeness, we note that we do not accept the pursuer's argument that, by virtue of his status as a solicitor and officer of the Court he is, in some way, acting under law in either a judicial or legislative capacity and, as a result, fell within paragraph 1(h) of the Appendix to Schedule D (see paragraph 42 above). We do not consider that the fact that the pursuer is a solicitor has the result, in itself, of placing him within this category. A simple natural reading of paragraph 1(h) would suggest that someone acting in "judicial" capacity must have been appointed to an office and be carrying out duties which at the least involve judicial responsibilities. Equally, the plain meaning of someone acting in a "legislative capacity" is that he or she is in the position of framing and enacting or being involved in the enactment of legislation. The fact that someone is a solicitor does not, of itself, very obviously fall within either. Perhaps unsurprisingly, the pursuer was unable to provide any authority supporting his position.

51. Turning to the second criterion stipulated in Rule 8.3.3, it is first necessary to consider whether or not it is applicable to the pursuer's attempt to instruct an advocate upon which his claim is based. In other words, we are required to be satisfied both that the instructions related to appearance in a court or tribunal and that the right to conduct litigation before that court or tribunal was restricted by law. In short, we are so satisfied.

52. As we have set out above (see paragraphs 2, 11(b) and 22), in both his Claim Form and the email exchanges with the Dean of Faculty appended to it, it is, in our view, clear

beyond argument that the pursuer was seeking to instruct an advocate to appear on his behalf in the two sets of proceedings to which he referred. In short, we consider that the pursuer's repeated references to his requests for representation in respect of the ongoing proceedings allow for no alternative interpretation.

53. It is also clear that the right to conduct litigation before both of the courts in respect of which the pursuer sought to instruct appearance, the Inner House of the Court of Session and the UK Supreme Court, is restricted by law. In both cases, for present purposes, the right to conduct litigation is restricted to solicitors. In the former case, the position is governed by Rule 1.3(1) of the Rules of Court of Session 1994 (SI 1994/1443). In the latter case, the equivalent provision can be found in Rule 3(2) of the Supreme Court Rules 2024 (SI 2024/949).

54. Accordingly, the sharp issue becomes whether, in terms of Rule 8.3.3 of the Guide, the pursuer is a "person entitled to conduct litigation" before either the Court of Session or the UK Supreme Court. Any entitlement which the pursuer has to conduct litigation stems from his status as a solicitor. Accordingly, one is led back to the terms of pursuer's Practising Certificate and the restriction placed on it by his own regulatory body, the Law Society of Scotland. As noted above (at paragraphs 27 and 28), that restriction means that, unless he is practising under the supervision of a solicitor in Scotland with an unqualified Practice Certificate, he has no entitlement to conduct litigation as a solicitor. At the time of the pursuer's request for representation on 19 August 2024, he was not so supervised. That remains the position. It follows that, in terms of Rule 8.3.3 of the Guide, instructions for appearance in court, such as those tendered by the pursuer, must not be accepted by any advocate from the pursuer.

55. In light of the foregoing, we conclude that the defender's first argument is well founded. We consider that the conduct of the defender which forms the basis of the pursuer's claim - the refusal to accept instructions to represent the pursuer in in the Practicing Certificate Proceedings and the Ethigen Proceedings – was made in compliance with a legal requirement all in terms of paragraph 5 of Schedule 3 of the Competition Act 1998. It follows that the prohibitions contained in Chapters I and II of the Competition Act 1998 do not apply to that conduct.

56. For the avoidance of doubt, our conclusion in respect of the pursuer's claim relates to the claim as it was pled and advanced before us. We should not be taken as, in any way, having concluded that the Guide prevents advocates from communicating with or even providing advice to solicitors, like the pursuer, whose Practicing Certificate is restricted. That was not the pursuer's pled case and is not the case with which we have dealt. As we have noted above (at paragraph 22 and 23), during the course of oral submissions that the pursuer's position had changed or, at the very least, significantly developed in this respect. By the time of the hearing, it appeared that the pursuer would have been content to instruct an advocate on this basis not involving representation and appearance. As that position was not the subject of any developed argument before us, we simply reserve judgment on it. We simply note that Lord Keen appeared to see no difficulty with what was proposed.

57. We consider our reasoning set out above is sufficient to deal with the issues raised by the defender's first argument. However, it is necessary to record that the pursuer's submissions made both in writing and orally were extremely wide-ranging. We have carefully considered all of the pursuer's arguments but do not consider that any impact on our conclusion. In deference to the arguments that were presented, we make the following brief observations.

58. First, the pursuer argued that, until he has exhausted all rights of appeal against the restriction on his Practising Certificate, he should be treated as a solicitor with an unrestricted certificate. No legal argument was submitted to support this assertion and we do not accept it. We note that there is no support for the pursuer's position in the wording of the provision regulating appeals from the Council of the Law Society – section 16 of the Solicitors (Scotland) Act 1980.

59. Secondly the pursuer argued that, to the extent that there is any ambiguity over the interpretation of the Guide, the Human Rights Act 1998 requires the Tribunal to interpret the Guide in a manner which takes proper account of his convention rights set out in Schedule 1 to the Act, including his rights under: Article 3 (the right not to be subjected to torture or to inhuman or degrading treatment or punishment); Article 6 (the right to a fair trial); Article 14 (prohibition against discrimination); and Article 2 of Protocol 1 (the right to education). However, the pursuer made no submissions as to

which provisions of the Guide were said to be ambiguous, or how such provisions ought properly to be interpreted. In our view, this argument is without foundation. We have detected no ambiguity in the provisions of the Guide which we have construed. Furthermore, it is far from clear to us how the various rights invoked by the pursuer either relate to his argument or would impact upon the proper interpretation of the provisions of the Guide.

60. Finally, the pursuer founded, in particular, on two cases: *Kirkwood v Thelem Assurances* [2023] CSIH 30 and *Robson v The Council of the Law Society of Scotland* 2008 SC 218 as supporting his position. We do not consider that either case assists him.

61. In respect of *Kirkwood,* as is summarised in the opinion of the court given by the Lord President (Lord Carloway), the case concerned a pursuer seeking to recover from the defenders the expenses which she had incurred in employing English solicitors (paragraphs 1 and 2). It was in that context that the Lord President went on to state:

> "[14] It is the court's understanding, although it is a matter for the Faculty of Advocates, that, although counsel may accept instructions from a solicitor who is a member of the Law Society of England and Wales on behalf of their client under the direct access rules ('Direct Access Instructions' (2020), sch, para 3(a)), they cannot do so in relation to the conduct of litigation in Scotland (ibid para 2.3; Guide to the Professional Conduct of Advocates, para 8.3.4(c), (f)). As the Faculty's website states in clear terms:
>
> 'In proceedings before the Scottish Courts, an Advocate may only be instructed by a Scottish solicitor or other person authorised to conduct litigation in Scotland.'"

As the case did not involve a solicitor, like the pursuer, with a restricted Practising Certificate, we do not consider that this passage can be read as expressing any view on that situation. In particular, we do not regard this paragraph as being supportive of the pursuer's position that solicitors with restricted Practising Certificates are entitled to conduct litigation in Scotland.

62. As to *Robson,* it concerned an appeal by a solicitor against a decision of the Scottish Solicitors' Discipline Tribunal. The factual background to the case is involved but, as we understood his argument, the pursuer relied on the fact that it appeared from the narrative provided in the case that Mr Robson had had discussions with an advocate with a view to that advocate representing him in his appeal. The advocate concerned

had been willing to accept instructions "if duly instructed". However, in the event, no solicitor had been willing to act on Mr Robson's behalf (see paragraph 21). We are unable to see how this case assists the pursuer. First, the pursuer does not identify or found upon any proposition of law from the case. Secondly, and in any event, the facts of the case do not support the pursuer's principal contention that a solicitor with a restricted Practising Certificate, acting on his own behalf, ought to be able to instruct advocates directly to appear for him. The facts are not analogous. Mr Robson, who had been struck off the Roll of Solicitors, did not seek to instruct an advocate directly.

63. In these circumstances, as we have concluded that the pursuer has no reasonable grounds for making his claim either in terms of section 18 or section 2 of the Competition Act 1998, we will grant the defender's application and strike out the pursuer's claim in terms of rule 41 of the Tribunal Rules, there being no reasonable basis for it.

(iv) *The defender's second argument*

64. On the basis of our conclusion above in respect of the defender's first argument, it is not necessary for us to determine the second argument advanced by it.

65. In any event, the current state of the pursuer's pleaded case is unsatisfactory. As explained in paragraphs 9, 10 and 11 above, the pursuer's Claim Form contained, essentially, only a summary of the facts relied together with a bare allegation that the defender had acted in breach of sections 2 and 18 of the Competition Act 1998. In subsequent submissions and, in particular, in his reply submissions to the Strike Out Application together with the additional submissions contained in his bundle of authorities, the pursuer has sought to develop his case significantly and has made substantial additional arguments, not all of which appear to be completely consistent with the initial Claim Form. Despite this development, the pursuer has made no applications to amend the Claim Form beyond those dealt with at the Case Management Conference (see paragraph 17 above).

66. For its part, the defender pled its defence and advanced the Strike Out Application, in writing, on the basis of the pursuer's pled position. However, during the course of the

hearing, Lord Keen, on behalf of the defender, sought to address the full extent of the pursuer's case as it was set out throughout the various submissions lodged on his behalf in advance of the hearing. Notably, Lord Keen, while recognising the discrepancy between those submissions and the pursuer's pled position, did not insist on any inadequacy in the pursuer's pleading. Rather the defender's position was that the Tribunal should address the substance of the pursuer's case.

67. Although the defender's desire to have the Tribunal determine the case on its merits at the hearing on 14 August 2025, rather than on a procedural or pleading argument, is undoubtedly commendable, we do not consider that such an approach would have represented the most expeditious and fair way of dealing with the pursuer's claim for a number of reasons. As a starting point, any remaining uncertainty as to the pursuer's case would have been very unhelpful when considering an application for strike out. Secondly, the Tribunal would not have had the benefit of seeing the defender's position in respect of this second argument made in support of the Strike Out Application set out in writing. Finally, the pursuer would also not have had a proper opportunity to consider and respond to those arguments.

68. Accordingly, if this case were to have proceeded further, we would have required the pursuer to restate his case in a single document before, if the strike out application was still insisted upon, a further exchange of submissions.

E. INTERIM MEASURES

(i) *Introduction*

69. In light of our decision in respect of the Strike Out Application, it is also unnecessary for us to consider the pursuer's application for interim measures in terms of Rule 24(1)(c) of the Tribunal Rules. However, in deference to the submissions we heard, our views are as follows.

70. Following a minor, and unopposed, amendment made on the morning of the hearing, the pursuer seeks an order in the following terms:

"'Interim Declarator' for Faculty of Advocates to negotiate with the Claimant with a view to providing 'No Win No Fee' (NWNF) Advocacy Services, or NWNF Amicus Curiae Services for his 4 Pending Upper Court Appeals."

(ii) *The law*

71. For present purposes, Rule 24 of the *Tribunal Rules* provides as follows:

"**24.— Power to make interim orders and to take interim measures**

(1) The Tribunal may make an order on an interim basis—

(a) suspending in whole or part the effect of any decision which is the subject matter of proceedings before it;

(b) in the case of an appeal under section 46 (appealable decisions) or 47 (third party appeals) of the 1998 Act, varying the conditions or obligations attached to an exemption;

(c) granting any remedy which the Tribunal would have the power to grant in its final decision."

(iii) *Analysis*

72. Having considered what is sought by the pursuer in light of the terms of Rule 24, leaving to one side any consideration of the merits, we have the gravest doubts that it would have been competent for the Tribunal to grant such an order.

73. The present proceedings were raised pursuant to section 47A of the Competition Act 1998. In terms of that section, the remedies which the Tribunal can grant in its final decision are (i) an award of damages (section 47A(3)(a)); (ii) a pecuniary award other than damages (section 47A(3)(b)); and (iii) decree of declarator (section 47A(3A)). In this regard, it is also notable that in Scottish proceedings, the Tribunal has no power to grant injunctions (see section 47(3)(c) of the 1998 Act and Rule 67(1) of the Tribunal Rules).

74. It does not appear to us that what is sought by the pursuer would be a remedy which the Tribunal would have power to grant in its final decision. Although labelled as a declarator, in truth, the pursuer seeks a positive order requiring the defender to take certain steps. In Scottish proceedings, where such an order is sought the appropriate

remedy would be one of specific implement (Cf: *Church Commissioners for England v Abbey National plc* 1994 SC 651 at 659I to 660D (per Lord President Hope)). As such, we are unpersuaded, particularly in the absence of any supportive authority, that it would have been competent for us to grant the order sought by the pursuer.

75. Finally, and in any event, we should note that, following the exchanges during the hearing that we have noted above (at paragraph 23) concerning the pursuer's ability to communicate with advocates, it is not clear to us to what extent the pursuer was insisting on his application for interim measures. We have in mind the following exchange which occurred at the end of the hearing on 14 August 2025:

> "MR BANKES: It is now clear that whatever was the case, it is now the case that you are free to contact an advocate, to ask that advocate whether they would be willing to give you advice. That is not in dispute in this court.
>
> MR MCAULEY: Okay.
>
> MR BANKES: My question is, in the light of that clarification, or development, however you wish to characterise it, what more do you need -- what more does your application for interim measures seek, or is that what you were looking for anyway?
>
> MR MCAULEY: Now that that has been admitted, I think that is basically what I was wanting, interim declaratory. That is the position.
>
> MR BANKES: That is helpful.
>
> MR MCAULEY: So I am happy with that.
>
> THE CHAIRMAN: That is helpful, thank you. That is a very useful clarification."

F. CONCLUSION

76. For the reasons we have set out above, we will grant the defender's application and strike out the pursuer's claim. We will reserve all questions of expenses meantime.

The Honourable Lord Richardson
Chair

Peter Anderson

Charles Bankes

Charles Dhanowa CBE, KC (Hon)
Registrar

Date: 14 October 2025