

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION

Case No. : 1672/5/7/24

APPEAL
TRIBUNAL

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

Tuesday 27th January 2026

Before:

The Honourable Lord Richardson
Peter Anderson
Charles Bankes

(Sitting as a Tribunal in Scotland)

BETWEEN:

Patrick Henry McAuley

Pursuer

v

Faculty of Advocates

Defendant

A P P E A R A N C E S

Patrick Henry McAuley On Behalf of Himself

Rachel Breen On behalf The Faculty of Advocates (Instructed by Balfour+Manson LLP)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Tuesday, 27 January 2026.

(10.05 am)

LORD RICHARDSON: Now, good morning. Good morning, Ms Breen. Good morning, Mr McAuley.

We are here to deal, I think, with three applications. The first one is yours, Mr McAuley, for permission to appeal. The second one I think in terms of time, in terms of the time which was made, is the application for expenses and the third one is the Rule 114 application.

What I would propose to do is to deal with the application for permission to appeal and then the Rule 114 application first and then once we have heard argument on those, to also then move on to hear argument on the application for expenses.

Would that cause any inconvenience to you Mr McAuley, if we deal with them in that order?

MR MCAULEY: It might be better to do with the clerical one first.

LORD RICHARDSON: Very well. You want to deal with the 114 one first. I can see the logic of that. But we'll deal with those two

1 first. Then we'll deal with the expenses
2 thereafter.

3 Thank you. Can I just check, Mr McAuley,
4 microphone is on. Yes, it is, I can see the
5 light.

6 MR MCAULEY: Thank you.

7 LORD RICHARDSON: Sit that one down. That
8 one is just to make sure we can hear you. The
9 other one directly in front of you is for the
10 transcribers, but I am sure if either of the
11 transcribers or I can't or we are struggling to
12 hear you, we'll let you know.

13 MR MCAULEY: Okay.

14 LORD RICHARDSON: Then, Mr McAuley, can
15 I invite you to address us first of all on your
16 Rule 114 application.

17 MR MCAULEY: I think before doing that, it
18 is just as well to run through the pertinent
19 points of the original form and the pertinent
20 points of the judgment.

21 LORD RICHARDSON: Very well.

22 MR MCAULEY: The form as you can see in
23 paragraph 3, it says:

24 "The applicant contacted the
25 Faculty of Advocates ..."

1 LORD RICHARDSON: This is your claim?

2 MR MCAULEY: Yes, the original form, yes.

3 And it says --

4 LORD RICHARDSON: It's in our bundle in
5 tab 16. Hang on a second. Yes.

6 MR MCAULEY: So it does say:

7 "The applicant contacted the
8 Faculty of Advocates for representation in
9 these two cases, which, being a solicitor, he
10 thought was within Faculty rules, which state
11 an advocate can only be instructed by a
12 'Scottish solicitor or other person authorised
13 to conduct litigation' ... "

14 So just to clarify --

15 LORD RICHARDSON: I see you are reading
16 from paragraph 3 of the facts narrative, yes.

17 MR MCAULEY: Just to clarify there,
18 they have not used the word "represent" which
19 has a different meaning from "representation"
20 according to the dictionary.

21 LORD RICHARDSON: You made that point in
22 your ground in your application for permission
23 to appeal.

24 MR MCAULEY: That is what I was saying.
25 I think it is handy just to run over it.

1 LORD RICHARDSON: I am just checking that
2 this is a point that I have read, because we
3 have read all the documents you have provided
4 us.

5 MR MCAULEY: Then in the next section of
6 this form where it says "The relief sought in
7 the proceedings" --

8 LORD RICHARDSON: Yes.

9 MR MCAULEY: -- at point two it says:
10 "An offer that the Faculty of Advocates
11 must offer the services of an advocate for
12 pending proceedings in the Inner House of
13 Scotland against the Law Society of Scotland
14 into the UK Supreme Court in the case of
15 McAuley v Ethigen."

16 LORD RICHARDSON: Yes.

17 MR MCAULEY: Just to clarify there, I have
18 not said "in court advocacy services", I have
19 just "advocacy services", which, as Lord Keen
20 stated the previous time, encompasses both
21 counsel's opinion and in court services.

22 LORD RICHARDSON: Yes.

23 MR MCAULEY: I think those are the two key
24 points from the form just to have clear in all
25 our minds.

1 LORD RICHARDSON: Yes.

2 MR MCAULEY: Yes. I don't know if it's
3 better now to go to the judgment or to go to
4 the dictionary, because obviously these are as
5 that is basically facts that I am pleading
6 there, so for facts to be able to determine
7 what the words mean is to look at them up in
8 the dictionary. So it might be better to go to
9 the dictionary first.

10 So if you look up "representation" in the
11 dictionary, it says:

12 "The act of presenting somebody something
13 in a particular way ..."

14 And then there is a wee kind of apostrophe
15 and it says --

16 LORD RICHARDSON: Can I just be sure
17 where -- sorry to interrupt you, Mr McAuley.
18 Can I just be clear where you are reading --
19 taking this from?

20 MR MCAULEY: It should be in the
21 documents. It's the Oxford Learner's
22 dictionary. It should be judicial knowledge in
23 any event.

24 LORD RICHARDSON: Obviously the different
25 dictionary definitions do differ from

1 dictionary to dictionary, but you are reading
2 from one in particular, so I am keen just to
3 make sure I have that before me.

4 MR MCAULEY: I don't -- in terms of this
5 word, I do not think they do, but I guess that
6 is something to consider later. It seems to be
7 page 11 of --

8 LORD RICHARDSON: Do you know which of
9 your applications it is?

10 MR MCAULEY: I am not entirely sure, no.
11 It is page 11 in one of them anyway I know
12 that.

13 LORD RICHARDSON: Just a moment I will see
14 if I can find it.

15 MR BANKES: It is appendix two of the
16 second application.

17 LORD RICHARDSON: I think it's possibly in
18 your reply.

19 MR BANKES: Reply for leave or page 4.

20 LORD RICHARDSON: It's document 6 in the
21 bundle. It's appendix two, the "Oxford
22 Dictionary defining representation". That is
23 what you are reading? Yes, I have that.

24 MR MCAULEY: So, yeah. So basically that,
25 as Lord Keen admitted, "representation" does

1 encompass basically all the duties of an
2 advocate there, because something that shows os
3 describes something would be a counsel's
4 opinion because it's a thing. When you get it,
5 you get the document. That is a thing. It's
6 something.

7 LORD RICHARDSON: Yes. Would you accept,
8 Mr McAuley, the meaning of words has to be
9 taken from the context of the documents in
10 which they are found?

11 MR MCAULEY: I think the meaning of words
12 has to come from the dictionary or else it
13 is -- I mean it's nonsense if we are not using
14 the dictionary to describe words in the
15 pleadings and the facts.

16 LORD RICHARDSON: Yes, of course the
17 dictionary definition is clearly important, but
18 is that -- would you accept that that is
19 influenced by the context or do you think we
20 should simply ignore the context?

21 MR MCAULEY: At the end of the day,
22 Lord Keen is an active advocate and he admitted
23 that "representation" means counsel's opinion
24 and in court advocacy. He also expanded it
25 further to state that it would encompass also

1 duties regarding fees etc.

2 LORD RICHARDSON: Yes.

3 MR MCAULEY: He thinks in practice it
4 actually means more than the dictionary.

5 LORD RICHARDSON: I am assuming that --
6 sorry, Mr McAuley. I am assuming you have seen
7 a copy of the transcript of the hearing.

8 MR MCAULEY: Yes, and I've read the
9 judgment as well which records the key aspects
10 of that.

11 LORD RICHARDSON: Of course. But in terms
12 of the transcript, are there any -- when you
13 talk about Lord Keen, you made reference to
14 Lord Keen admitting various things. Are there
15 any particular passages of the transcript you
16 want to take us to?

17 MR MCAULEY: We'll come to that in a
18 minute.

19 LORD RICHARDSON: Very well.

20 MR MCAULEY: Then the other thing is, if
21 you look at page 3 -- sorry definition 3 of the
22 Oxford Learner's Dictionary, it then says:

23 "Representations, especially in British
24 English, formal."

25 It says:

1 "Formal statements made to somebody in
2 authority, especially in order to make your
3 opinions known or to protest."

4 LORD RICHARDSON: Yes.

5 MR MCAULEY: So this is obviously a formal
6 document. So that -- the number one dictionary
7 refers to it, to the meaning of that word
8 broadly in society, but number 3 is in the
9 specific context of formal documents.

10 LORD RICHARDSON: Yes.

11 MR MCAULEY: You can see in formal
12 documents it means an opinion.

13 LORD RICHARDSON: But if they are not
14 making representations on behalf of someone is
15 that, but in any event we have the definition.

16 MR MCAULEY: It is splitting hairs a wee
17 bit there.

18 It is pretty clear that "representation"
19 means opinion. That is the most -- as I say I
20 am repeating myself. This is a formal
21 document, so of all the definitions, as you
22 were talking about context, that is the one
23 that would most aptly apply to the context,
24 according to the dictionary.

25 Then -- I have also -- you mentioned there

1 the other dictionaries may differ. I also
2 looked up Cambridge as well which is the same.
3 Do you want me to go through that? That is not
4 in the papers.

5 LORD RICHARDSON: No, we can check that
6 reference if we need to.

7 MR MCAULEY: Okay. Basically I will run
8 through it quickly anyway. It says:

9 "A person or organisation that speaks,
10 acts or is present officially for someone
11 else."

12 So basically you could say that "speaks"
13 refers to the definition that you have used in
14 your judgment, but "acts" means different from
15 speak. If you then look up the meaning of
16 "act", it says:

17 "To do something for a particular purpose
18 or to solve a problem."

19 That is what "act" means. So if you are
20 acting for someone, it means you are doing
21 something, which means there has to be a
22 physical thing to show for it. So again, it's
23 pretty clear.

24 There also even the third dictionary here,
25 the pocket dictionary, but we will come to

1 that.

2 LORD RICHARDSON: Yes.

3 MR MCAULEY: Then that goes on to say in
4 law, the Cambridge dictionary:

5 "A law: a formal decision made by a
6 Parliament or other group of people who make
7 laws for their country".

8 So again, I think it's pretty established
9 what the word means. It's very clear it would
10 encompass counsel's opinion.

11 LORD RICHARDSON: Yes.

12 MR MCAULEY: Okay. So just if we could --
13 I think that is the key points we have covered
14 just as background.

15 So if we could move on to the judgment,
16 please, and take you to paragraph 22.

17 LORD RICHARDSON: Yes.

18 MR MCAULEY: It says:

19 "An important example is it became
20 apparent only towards the end of oral
21 submissions that the pursuer would have been
22 content only to receive legal advice as
23 distinct from representation in court."

24 Well, as I've explained to you,
25 "representation" means an opinion or something

1 that describes something. So that is plainly
2 wrong what you have written there. It goes on
3 to say:

4 "...from an advocate when he first
5 communicated with the defender. Such advice
6 might have included receiving preliminary
7 advice on the prospects of his claim and
8 possible costs arrangements. This represented,
9 at the very least, an important development in
10 if not an outright change of the pursuer's
11 position."

12 I mean you can see that is wrong as well,
13 I have not changed my position.

14 "Representation" is written in the form and it
15 obviously means something that describes or
16 shows something or a solution to a problem,
17 something that is a solution. So it's not a
18 development. It's within what I said. It
19 is -- to call it "an outright change" is just
20 nonsense.

21 "As set out above, the claim form and its
22 attached emails referred specifically to a
23 request by the pursuer for representation."

24 So I mean you have put that in
25 inverted commas and you're defining the meaning

1 of this word, but I mean you have not used the
2 dictionary definition to say what you are
3 meaning, the meaning you are using.

4 So I mean how can we move forward if you
5 are just defining words that are important off
6 the top of your head?

7 "and seek an order requiring the defender
8 to offer the pursuer the services of an
9 advocate for two particular pending
10 proceedings. Despite being given the
11 opportunity to consider his position, the
12 pursuer made no application to amend his case."

13 So I mean, again, it seems why would
14 I have to amend my case if I have written
15 "representation" in the form and it's pretty
16 clear that from the dictionary that
17 representation means -- encompasses within it
18 something that describes or shows something or
19 a solution to a problem. So it is -- it
20 doesn't require an amendment. It just requires
21 me to explain what part of the meaning of
22 representation I am actually using. So that
23 was obviously why I didn't understand that.
24 And in any event, you didn't specifically point
25 this out to me, which I will come on to later.

1 Then at paragraph 23 this is a point that
2 I have said before about -- well, this is where
3 Mr Anderson and Lord Keen -- it says:

4 "Mr Anderson: Lord Keen, just one point
5 quickly. Suppose Mr McAuley tomorrow was to
6 send a communication to a member of Faculty
7 asking only for advice about his prospects of
8 success in any matter, would that member of
9 Faculty be at liberty to reply?"

10 And Lord Keen said:

11 "Absolutely, I see no difficulty with that
12 whatsoever but that is not this case."

13 LORD RICHARDSON: Yes.

14 MR MCAULEY: So it seems pretty clear now
15 that they are changing their position, the
16 Faculty, because I went to Faculty initially
17 they said: No, no counsel's opinion. That was
18 certainly Mr Dunlop and Mr Graham's position
19 so --

20 LORD RICHARDSON: Just so I am clear about
21 that submission, Mr McAuley, are you saying
22 they said no opinion based on the email
23 exchanges that are attached to your claim form.

24 MR MCAULEY: Yeah, I couldn't get anything
25 from them. I was not entitled to instruct an

1 advocate in any way, shape or form.

2 LORD RICHARDSON: Yes.

3 MR MCAULEY: And indeed they made a formal
4 complaint to the Scottish Legal Commission
5 about it.

6 LORD RICHARDSON: Yes.

7 MR MCAULEY: It says:

8 "For avoidance of doubt, we have
9 approached the determination of the
10 strike-out Application on the basis of the
11 pursuer's position as set out in claim form,
12 namely that he is seeking formal representation
13 in the ongoing proceedings to which you
14 referred."

15 LORD RICHARDSON: Yes.

16 MR MCAULEY: So I mean I think it's clear
17 when you read the definition of
18 "representation" it includes counsel's opinion.
19 This is then repeated again at paragraph 56 in
20 the judgment, but it says:

21 "For the avoidance of doubt, our
22 conclusion in respect of the pursuer's claim
23 relates to the claim as it was pled in advance
24 before us. We should not be taken as in anyway
25 having concluded that the Guide prevents

1 advocates from communicating with or even
2 providing solicitors advice to solicitors, like
3 the pursuer, whose practising certificate is
4 restricted. That was not the pursuer's pled
5 case and is not the case with which we have
6 dealt, as we have noted above at paragraphs 22
7 and 23 during the course of oral submissions,
8 that the pursuer's position had changed or at
9 the very least significantly developed in this
10 respect. By the time of the hearing it
11 appeared that the pursuer would have been
12 content to instruct an advocate on this basis
13 not involving representative and appearance."

14 I mean see even there you assume
15 representation and appearance. You seem to be
16 acknowledging the fact that "representation"
17 and "appearance" mean different things.

18 LORD RICHARDSON: Yes.

19 MR MCAULEY: "As that position is not the
20 subject of any developed argument before us, we
21 certainly reserve judgment on it."

22 As I did explain at paragraph 22,
23 Lord Keen has already admitted, after Mr Bankes
24 asked him, that they would be content to give
25 advice to restricted solicitors.

1 LORD RICHARDSON: Yes, have you sought --
2 have you -- following the hearing and following
3 that clarification or whatever statement by
4 Lord Keen, have you sought an opinion from
5 faculty?

6 MR MCAULEY: Well, the way it worked out
7 actually was, Mr Dunlop told me my restriction
8 had expired so I am now an unrestricted
9 solicitor.

10 LORD RICHARDSON: Yes.

11 MR MCAULEY: But I did try to contact
12 advocates to operate no win, no fee, but
13 I couldn't get any luck with that.

14 LORD RICHARDSON: So the issue became a
15 funding one; is that right?

16 MR MCAULEY: Yeah, so I wasn't going to
17 get in the taxi without a no-win-no-fee
18 arrangement in place. That is where it says at
19 56:

20 "We certainly note that Lord Keen appeared
21 to see no difficulty with what was proposed."
22 That was what we have established that it seems
23 Faculty have acted or there has been a mix up
24 or difference of practice within Faculty that
25 Mr Dunlop and Mr Graham think a restricted

1 solicitor is entitled to not instruct an
2 advocate in anyway.

3 LORD RICHARDSON: I think would one
4 interpretation be that they understood you to
5 be asking for representation in court at the
6 beginning and that is the basis upon which they
7 proceeded? I think that -- Ms Breen will
8 clarify if my understanding is wrong, but my
9 understanding is that the Faculty and The Dean
10 of Faculty understood you to be asking for
11 representation in court at the outset.

12 MR MCAULEY: I mean you would really need
13 affidavits in respect of that, but all I can
14 say is I did say in the form "representation".

15 LORD RICHARDSON: Yes.

16 MR MCAULEY: He denied that. They made no
17 offer to settle. So it's pretty clear
18 they have denied that with the form.

19 LORD RICHARDSON: It is certainly clear
20 that they denied your request. The question
21 I suppose is what they understood you to be
22 requesting. It would also be fair to observe,
23 wouldn't it, that quite rapidly the
24 correspondence seemed to move away from that
25 issue and moved into other matters?

1 MR MCAULEY: I mean I asked Lord Armstrong
2 as well in that hearing when I had to
3 self-represent. At that time, I could have
4 afforded to buy a counsel's opinion and
5 basically I said to Lord Armstrong: Listen,
6 I would like to get a counsel's opinion here to
7 present that to the court so that -- because
8 I mean obviously it would have been handy if
9 I had that counsel's opinion from Lord Keen at
10 that time of the hearing to say he is saying
11 that people do that fine and it's no bother,
12 you know. Because I mean if you have a
13 counsel's opinion saying other people do that,
14 how could that be deemed to be serious and
15 reprehensible for misconduct? And Lord
16 Armstrong said I wasn't allowed one. I had to
17 stand up myself and defend it as best I could.

18 So it's very -- they are just trying to
19 rewrite history basically if they say that.
20 It's clear that I was entitled to zero. Okay.
21 So, yes, so at page 63, paragraph 63 --

22 LORD RICHARDSON: Paragraph, yes.

23 MR MCAULEY: It says:

24 "In these circumstances, as we have
25 concluded that the pursuer has no reasonable

1 grounds for making this claim either in terms
2 of Section 18 or Section 2 of the
3 Competition Act, we will grant the defender's
4 application and strike out the pursuer's claim
5 in terms of Rule 41 of the Tribunal Rules.
6 There would be no reasonable basis for it."

7 So I mean that was obviously wrong when
8 you realise that "representation" means a
9 counsel's opinion and Lord Keen has already
10 admitted that a restricted solicitor's entitled
11 to one. So I mean, if anything, once you know
12 what "representation" means, this should be a
13 summary judgment getting issued the pursuer.
14 It's pretty clear that is what the law is here.

15 LORD RICHARDSON: Yes.

16 MR MCAULEY: It then goes on:

17 "The defender's second argument. [This is
18 at paragraph 64]. On the basis of our
19 conclusion above in respect of the defender's
20 first argument, it is not necessary for us to
21 determine the second argument advanced by him.
22 In any event, the current state of the
23 pursuer's pleaded case is unsatisfactory as
24 explained in paragraphs 9, 10 and 11 above.
25 The pursuer's claim form continued essentially

1 only a summary of the facts relied on, together
2 with the bare allegation that the defender had
3 acted in breach of Sections 2 and 18 of the
4 Competition Act 1998.

5 "In subsequent submissions and, in
6 particular, his reply submissions to the
7 strike-out Application, together with the
8 additional submissions contained in his bundle
9 of authorities, the pursuer has sought to
10 develop the case significantly and has made
11 substantial additional arguments, not all of
12 which appear to be completely consistent with
13 the initial claim form."

14 So I mean again it's obviously getting
15 repetitive now, but just that -- I mean that is
16 wrong again. It's consistent with the claim
17 form when you know what "representation" means
18 by the dictionary definition.

19 LORD RICHARDSON: I hesitate to interrupt
20 you, Mr McAuley. I wonder if this is dealing
21 with a slightly different issue. What this is
22 dealing with was the fact that in preparation
23 for the hearing that we had in August, you
24 lodged very lengthy legal submissions setting
25 out, you may remember, specific articulations

1 of the way in which you said the Faculty had
2 breached the terms of the Competition Act and
3 you set that out in some detail. I think the
4 point we are picking up here is that the detail
5 of that and the particularisation of your case
6 there had not been set out in the original
7 claim form.

8 MR MCAULEY: I guess that is true.

9 LORD RICHARDSON: Just so I can finish.
10 So we are moving on, we are not dealing with
11 here with the same point that you are talking
12 about the representation issue.

13 MR MCAULEY: Yeah. Okay, well, I guess
14 that is true. It's difficult. All the
15 difference of categories of Section 18 are very
16 nuanced, like regulatory pricing bundle and all
17 these different things. There is loads of
18 different ways you can argue that so I didn't
19 argue that in the claim form.

20 LORD RICHARDSON: No, sorry.

21 MR MCAULEY: I guess that is fair enough
22 then.

23 LORD RICHARDSON: I think the point we
24 were making in this part of the judgment is
25 essentially that had we been -- if we had been

1 dealing with that part of your argument, we
2 would have wanted to clarify what your case was
3 and also to give the defender an opportunity to
4 respond in detail to that, but because of the
5 decision that we did make we didn't go down
6 that road, but we just wanted to indicate what
7 our position would have been.

8 MR MCAULEY: I guess that would be the
9 difference between when you make a summary
10 judgment or whether you do a full one, because
11 if you were doing a full one, you might want to
12 say this is exactly what part of Section 18 the
13 Faculty doing this is in breach of.

14 LORD RICHARDSON: I suppose it's the
15 difference --

16 MR MCAULEY: In fact Lord Keen has
17 admitted it. It might just be better just
18 to -- we do not necessarily need to go into the
19 detail of what precisely --

20 LORD RICHARDSON: Obviously, the only
21 thing we are dealing with at the moment, the
22 only thing -- we do not have the power to
23 revisit our judgment other than in terms of
24 Rule 114. What you need to persuade us of now
25 is that and I understand your arguments are

1 directed towards this for us to give you
2 permission to take your case to the Inner House
3 of the Court of Session to appeal.

4 MR MCAULEY: That would be if the clerical
5 issue is not upheld.

6 LORD RICHARDSON: That's right.

7 MR MCAULEY: Right. The next paragraph,
8 this is the bit I alluded to earlier. At 66 it
9 says:

10 "For it's part, the defender pled its
11 defence in advance to strike-out application in
12 writing on the basis of the pursuer's pled
13 position. However, during the course of the
14 hearing, Lord Keen on behalf of the defender
15 sought to address the full extent of the
16 pursuer's case as it was set out through
17 various submissions launched on his behalf in
18 advance of the hearing. Notably, Lord Keen,
19 while recognising the discrepancy between those
20 submissions and the pursuer's pled position,
21 did not insist on any inadequacy in the
22 pursuer's pleading. Rather, the defender's
23 position was that the tribunal should address
24 the substance of the pursuer's case."

25 LORD RICHARDSON: Yes.

1 MR MCAULEY: So that basically, I think,
2 covers what we touched upon earlier that not
3 only does representation, include a counsel's
4 opinion, comply with the dictionary definition,
5 Lord Keen is also saying he is an active
6 serving advocate and he is prepared to accept
7 that --

8 LORD RICHARDSON: I think that we may be
9 dealing with slightly at cross-purposes, again
10 Mr McAuley, because I think what we are dealing
11 with here in the judgment is not the
12 representation point. What we are dealing with
13 here is again the discrepancy, if there be one,
14 between what you set out in your legal
15 submissions particularising all the parts of
16 Section 18 and what was said in your claim
17 form. That is what this part of the judgment
18 is dealing with. It's dealing with the second
19 argument, so not the strike-out argument, but
20 the second argument.

21 MR MCAULEY: I am not so sure about that,
22 but -- I mean perhaps it is -- I think the fact
23 that you say:

24 "No, it is the pursuer's pled position was
25 that ..."

1 LORD RICHARDSON: Yes. I don't know if
2 you remember the discussion I had with
3 Lord Keen during the hearing in August, but one
4 of the points I asked him about was, was he
5 seeking to challenge your case on the basis
6 that your claim original form didn't say
7 anything about the particularisation of, as you
8 put it, the predatory pricing of the bundling,
9 for example. He didn't say anything about that
10 and what I was asking Lord Keen was: well, are
11 you making an issue of this as a matter of
12 pleading and he said no. So that is what
13 paragraph 66 is recording. So I think it's on
14 a slightly different point from your main
15 argument, as I would understand.

16 MR MCAULEY: Okay. I guess in the next --
17 in the next two you basically be on to say the
18 Faculty would have then had the right to
19 potentially decide if they were wanting to
20 argue like what would it come under? Would it
21 be --

22 LORD RICHARDSON: Just a minute,
23 Mr McAuley. (Pause). I am very sorry to
24 interrupt. Apparently, Mr McAuley, the
25 transcribers have a technical problem. They

1 deal with the rule 114 application first, is
2 that right?

3 MR MCAULEY: Yeah. So basically the rule
4 114 application is -- without going into all
5 the detailed procedural law, I think it is a
6 clerical mistake and I've brought -- You
7 mentioned how dictionary definitions can be
8 complicated, etc and multifaceted.

9 LORD RICHARDSON: Yes.

10 MR MCAULEY: But I mean if you even just
11 have a pocket dictionary the Colin Gems English
12 Dictionary, "The world's best selling pocket
13 dictionary", if you look up "representation" in
14 this --

15 LORD RICHARDSON: Yes.

16 MR MCAULEY: -- it says:

17 "Person chosen to act for or represent a
18 group."

19 So if you then look up "Act" --

20 LORD RICHARDSON: Yes.

21 MR MCAULEY: Sorry. It says: "Thing
22 done."

23 LORD RICHARDSON: Sorry. Say again.

24 MR MCAULEY: It says "Thing done".

25 LORD RICHARDSON: "Thing done", yes.

1 MR MCAULEY: So I mean a thing is clearly
2 a document or some other moveable piece of
3 property which a counsel's opinion would be.

4 LORD RICHARDSON: Yes.

5 MR MCAULEY: I mean I think it is
6 basically a clerical error that that
7 representation falls under when you look up
8 just a simple dictionary, a simple pocket
9 dictionary, and the definition of
10 "representation" is that.

11 LORD RICHARDSON: Yes.

12 MR MCAULEY: So the -- I don't know if --
13 how you want to do this. Will I just do all?
14 Do you want to give the defendant a chance to
15 reply to some of that before they move on to
16 the leave to appeal and the expenses
17 applications?

18 LORD RICHARDSON: What I thought -- what
19 I had intended to do, Mr McAuley, was to let
20 you deal with this and then the permission to
21 appeal and then I will hear from Ms Breen and
22 Ms Breen will deal with the expenses -- sorry,
23 the costs matter and then we will come back to
24 hear from you to reply to that.

25 MR MCAULEY: Okay. That is fine. That

1 was basically I was just saying just using that
2 dictionary to explain how I think that is just
3 a simple clerical error anyone can make, rather
4 than -- I mean you can't be expected to know
5 the meaning of every word in the dictionary.

6 LORD RICHARDSON: Yes.

7 MR MCAULEY: I just thought that so that
8 was it really. Just keeping that one short as
9 a simple matter, a clerical mistake.

10 LORD RICHARDSON: Yes.

11 MR MCAULEY: So just to move on to the
12 115, rule 115 application --

13 LORD RICHARDSON: Yes.

14 MR MCAULEY: -- which is the permission to
15 appeal.

16 LORD RICHARDSON: Just sorry, to interrupt
17 you, Mr McAuley. In your first document you
18 refer to "Rule 107 permission to appeal". I
19 don't know if you have that document.

20 MR MCAULEY: I should do, yes.

21 LORD RICHARDSON: So you refer to Rule
22 107, but then you later lodged a
23 supplementary -- I think it was called
24 "Supplementary reasoning to the leave to appeal
25 application". That was you lodged it on

1 9 December. In that document you did make
2 reference to rule 115. I was -- the tribunal
3 was a bit struggling slightly with that,
4 because rule 115 of the CAT Rules doesn't
5 relate to permission to appeal.

6 MR MCAULEY: Right.

7 LORD RICHARDSON: I wondered if that was a
8 clerical error, as it were.

9 MR MCAULEY: Yes, that is a clerical
10 error. Apologies for that.

11 LORD RICHARDSON: So it's rule 107 we are
12 dealing with. That is helpful.

13 MR MCAULEY: Okay. So basically, yes, six
14 grounds for the leave to appeal.

15 LORD RICHARDSON: Yes.

16 MR MCAULEY: Why I think it's an error of
17 law to have made that definition of
18 "representation". The first one is on the
19 basis of rule 41 which states that the
20 Competition Appeal Tribunal was only allowed to
21 strike out if the parties had been given an
22 opportunity to be heard.

23 LORD RICHARDSON: Yes.

24 MR MCAULEY: I mean it's pretty clear from
25 what we have heard so far that I've -- that

1 you have referred to a need for a further
2 exchange of submissions, etc. So I've not had
3 the opportunity to be heard and if you have
4 said that there has to be a further exchange of
5 submissions. How have I had the opportunity to
6 be heard?

7 LORD RICHARDSON: Just to be clear, the
8 further exchange of submissions, so I make sure
9 I understand your argument, the further
10 exchange of submissions that I think you're
11 referring to are those that we deal with in the
12 judgment in relation to the second argument.
13 Is that right?

14 MR MCAULEY: It's just in relation to the
15 counsel's opinion, I have not had the
16 opportunity to be heard in that and it's part
17 of this case. So you can't strike it out
18 whilst and it's not as if it's time barred.
19 It's not as if you could say I lodged this at
20 such a such a date. So it mean even if you
21 were --

22 LORD RICHARDSON: Yes.

23 MR MCAULEY: -- to.

24 LORD RICHARDSON: Can I just clarify two
25 things, Mr McAuley? I understand your argument

1 that you say that on -- dealing with the
2 permission to appeal you say we made an error
3 as to our understanding of what your claim form
4 meant. So you said we made an error about
5 that and I can understand the logic of your
6 position where you say we made an error about
7 that and therefore because we misunderstood
8 what you were originally seeking from the
9 faculty and indeed what the basis of your case
10 in this tribunal was, therefore you have not
11 been given a fair hearing.

12 Is that your first argument?

13 MR MCAULEY: More or less. One of the
14 difficulties is when you basically put these
15 arguments in at the time, you haven't had time
16 to streamline and simplify all your thoughts so
17 you just want to get everything in case you --
18 so basically these problems are a wee bit more
19 convoluted in sort of multiple grounds. If
20 I had longer to consider it, I would probably
21 have simplified and just picked one ground, but
22 I am sure you are all aware of that.

23 LORD RICHARDSON: Yes.

24 MR MCAULEY: You are nervous and things
25 that you do not want to go, oh, I have not made

1 an argument that you then realise later on so
2 you just put everything in.

3 LORD RICHARDSON: What you are talking
4 about how you is your -- that your original
5 paper part which set out your grounds, the six
6 grounds.

7 MR MCAULEY: Yeah, so I mean the thing you
8 need remember is as well when you strike out
9 his Article 6 considerations of your right of
10 access to court, because I have not actually
11 had a hearing here. These are all just case
12 management hearings --

13 LORD RICHARDSON: Yes.

14 MR MCAULEY: -- on the strike out. Yeah,
15 that is the point, yes. And "strike out" is
16 described as a draconian sanction. So when
17 you have clearly acknowledged there is a need
18 for further discussion, it does seem like
19 striking out is an error of law in these
20 circumstances.

21 LORD RICHARDSON: Just to be clear on that
22 last point, when you are talking about the
23 further discussion, can I take you back to our
24 judgment just for a moment.

25 MR MCAULEY: Mm-hm. Yes.

1 LORD RICHARDSON: Are you referring to
2 what we say at paragraph 68 when you talk about
3 the further discussion? Is that the point you
4 were making, a further exchange of submissions?

5 MR MCAULEY: That is the thing there and
6 obviously Lord Keen admitting that wasn't the
7 pled case etc.

8 LORD RICHARDSON: And we have touched on
9 the already. That is helpful.

10 MR MCAULEY: Yeah, so the second ground is
11 just the rules 4 and rules 12 of the
12 Competition Appeal Tribunal Rules 2015, which
13 they do require this court to have a more
14 flexible approach to pleadings and pleadings
15 than the old traditional system.

16 LORD RICHARDSON: Yes.

17 MR MCAULEY: So, for example, Rule 4,
18 Rule 4(2)(d) gives the obligation to ensure
19 that it's dealt with expeditiously and fairly.

20 LORD RICHARDSON: Yes.

21 MR MCAULEY: Rule 4 subsection (4) says:

22 "The tribunal shall actively manage
23 cases."

24 And then, Rule 4(5) says:

25 "Active case management includes

1 encouraging the parties to cooperate with each
2 other in the conduct of the proceedings."

3 "b" is -- which Lord Keen did admit that
4 "representation" could encompass the right to a
5 counsel's opinion.

6 LORD RICHARDSON: Yes.

7 MR MCAULEY: So I think if Lord Keen has
8 admitted that, you have a duty to encourage the
9 parties to cooperate. So if we have both
10 agreed that is what "representation" means,
11 it's a breach of that section for you to say:
12 no, I will tell you the parties what
13 "representation" means. So I think that was an
14 error of law.

15 LORD RICHARDSON: Yes.

16 MR MCAULEY: Identification and
17 concentration of the main issues as early as
18 possible.

19 LORD RICHARDSON: Yes.

20 MR MCAULEY: So that means it's up to you
21 to identify with me what part of the
22 "representation" definition that I am referring
23 to. It's not up to you to say that is what
24 "representation" means because we say so, that
25 is what it means in the context. It's up to

1 you to act, be active and to ask me what part
2 of that that I am referring to.

3 LORD RICHARDSON: Yes.

4 MR MCAULEY: Then it says ... (d) then
5 says:

6 "Adopting fact-finding procedures that
7 are most effective and appropriate for the
8 case."

9 So that is what I am saying. It's up to
10 you to find the facts and ask me: what do you
11 mean by representation?

12 LORD RICHARDSON: Yes.

13 MR MCAULEY: So I mean I think all of them
14 together and then the next one goes on to say:

15 "Planning the structure of the main
16 hearing in advance with a view of avoiding
17 unnecessary oral evidence and argument."

18 Then the next ones:

19 "Ensuring that the main hearing is
20 conducted within defined time limits."

21 I mean I think all of that points towards
22 the fact that you're required to look into that
23 and work it out. And rather than say, oh, you
24 didn't plead that, which would mean I would
25 theoretically have to raise another case saying

1 "and by 'representation' I mean this includes a
2 counsel's opinion." I think it's clear that
3 the rules do not require me to do that.

4 LORD RICHARDSON: Yes.

5 MR MCAULEY: So and then Rule 12(3) (a)
6 says:

7 "In deciding whether to grant permission
8 under paragraph 1, this isn't whether ... "

9 Or sorry, Rule 12 is "Amendments to notice
10 of appeal".

11 LORD RICHARDSON: Yes.

12 MR MCAULEY: "In deciding whether to grant
13 permission under paragraph 1 the tribunal shall
14 take into account all the circumstances,
15 including whether the proposed amendment
16 involves a substantial change or addition to
17 the appellant's case."

18 I mean, as I've explained to you,
19 counsel's opinion is capable of falling within
20 the meaning of "representation".

21 LORD RICHARDSON: Yes.

22 MR MCAULEY: So that can't be considered
23 to be a substantial change when it's already
24 within the definition of the word in the
25 dictionary. So I think it's clear that this

1 isn't an amendment issue. So, again, I think
2 that it is pretty clear that this isn't an
3 amendment issue and you have deemed it to be an
4 amendment issue because it doesn't change the
5 pleading substantially.

6 LORD RICHARDSON: Yes.

7 MR MCAULEY: Then -- so that is the first
8 two basically based in the Competition Rules to
9 Procedure Rules 2015. I think they require you
10 to be more proactive than what you have been.

11 LORD RICHARDSON: Just before we leave
12 part, Rule 12, I think the point has been taken
13 by the Faculty, and I am not sure it's in
14 dispute, that Rule 12 actually deals with a
15 different kind of procedure, rather than the
16 procedure we are dealing with here, because it
17 is dealing with appeals against decisions as
18 opposed to what we are dealing with here, which
19 was that you -- the argument being you --
20 whether you needed to make an amendment to your
21 claim form, but I think, I am not sure, I think
22 your bigger point, which would be you didn't
23 need to make an amendment because you say what
24 you were seeking was encompassed in the words
25 that you had used in your claim.

1 MR MCAULEY: Yeah, I mean I think the
2 other thing about those points is it gives you
3 an active duty if you are proposing the
4 amendment to me to explicitly state: what do
5 you mean by "representation"?

6 LORD RICHARDSON: Yes.

7 MR MCAULEY: Rather than just vaguely ask
8 me: are you sure you do not want to amend your
9 claim form in anyway? Because I am just like:
10 what do you mean by that? And it was vague. I
11 mean how was I supposed to know what you meant
12 by that?

13 LORD RICHARDSON: Yes.

14 MR MCAULEY: So the next four grounds
15 are -- that is kind of the arguments based on
16 the -- just the Competition Rules, the Appeal
17 Tribunal Rules. The next four arguments are
18 more common law based.

19 LORD RICHARDSON: Yes.

20 MR MCAULEY: Which I think it is those
21 rules are sort of a codification of the common
22 law or building up on the common law, rather
23 than seeking to reduce rights within the common
24 law. So I think this is a breach of common law
25 as well.

1 LORD RICHARDSON: Yes.

2 MR MCAULEY: The first point is the
3 McGlone case, which is a House of Lords case of
4 communication between the court now, which
5 I referred to which basically because Lord Keen
6 didn't take the objection to that definition of
7 "representation", it means that the parties
8 have agreed it and the court simply has to
9 answer that.

10 LORD RICHARDSON: In McGlone they were
11 dealing with evidence having been led; is that
12 right? Does that make a difference do you
13 think?

14 MR MCAULEY: Well, that is what I was
15 saying. Lord Keen admitted and it is in the
16 transcript that "representation" does mean
17 counsel's opinion as well as in court, because
18 you can't have in court without a counsel's
19 opinion if -- I mean, the reality is if you are
20 wanting to litigate against someone, you
21 basically need a counsel's opinion if you want
22 to get insurance so the first -- unless your
23 prepared to self-insure and just meet the
24 costs, but how many people can really afford to
25 do that? Not many.

1 So it is -- or maybe a lot of firms can,
2 but in terms of ordinary high-street lawyers.
3 Well, my experience of litigation is that if
4 you get someone that walks into your firm, an
5 ordinary person with -- that thinks they have a
6 claim, if you get a counsel's opinion saying,
7 "Yeah, I think that has a reasonable prospect
8 of success", you can then buy after the event
9 insurance. I have gone off at a bit of a
10 tangent here. You can then buy after the event
11 insurance.

12 LORD RICHARDSON: Yes.

13 MR MCAULEY: Then that allows you to raise
14 the -- that allows you to raise the case in
15 court, and you are covered if you lose at any
16 point, but what then often happens is the
17 opposition then, or the defender, respondent
18 then lodges their defences, which can raise new
19 evidence and then sometimes you can get an
20 updated counsel's opinion which says "I do not
21 give that a reasonable prospect of success any
22 more", which then means your insurance is
23 invalid.

24 LORD RICHARDSON: I do not mean to take
25 you out of your order, Mr McAuley. The point

1 I was making was I think more -- the question w
2 was asking was more a formal one about --

3 MR MCAULEY: Yeah, so sorry.

4 LORD RICHARDSON: Just to finish.

5 MR MCAULEY: Basically that is what
6 Lord Keen was admitting that you can't say
7 "representation" only brings in court, because
8 the two --

9 LORD RICHARDSON: Sorry, just to finish.
10 You have made that point, Mr McAuley. The
11 question I was asking was a lightly different
12 one, which was: in McGlone, the failure to
13 object was object to evidence from a witness,
14 whereas in this case we obviously haven't heard
15 witnesses, we have just heard argument.

16 MR MCAULEY: Yeah.

17 LORD RICHARDSON: What I am asking you is
18 to what extent do you say, or how do you say
19 that the -- what was held in McGlone can apply
20 in a situation where there was --

21 MR MCAULEY: Basically I presented to
22 the court that that is my understanding of
23 "representation" that was so closely
24 intertwined with in court that you can't really
25 have one without the other and Lord Keen didn't

1 object to it.

2 LORD RICHARDSON: Although he did make
3 clear he didn't think that was what your case
4 was.

5 MR MCAULEY: I think he has contradicted
6 himself a bit here. I think that is a weakness
7 in his argument. Which is I mean the reality
8 is as well if you get a counsel's opinion and
9 it is unfavourable and you insist upon
10 continuing to represent you in court, they can
11 withdraw. They have to withdraw from acting.
12 That is certainly my understanding of it.

13 LORD RICHARDSON: Yes.

14 MR MCAULEY: So I think it is --
15 Lord Keen, as far as my understanding of it
16 was, he didn't object to that meaning of
17 "representation". So when the parties have
18 agreed that is what "representation" means, the
19 court can't intervene and take another
20 definition, Mr Anderson.

21 LORD RICHARDSON: Yes, do you have
22 anything to add?

23 MR ANDERSON: No.

24 LORD RICHARDSON: We understand that
25 argument I think, the McGlone argument.

1 MR MCAULEY: Yes. Then the other thing as
2 well argument four is under common law if there
3 is no prejudice costing allowed. So I mean
4 there is no prejudice caused, because I mean
5 the case isn't time barred and Lord Keen has
6 admitted that you are allowed or there is
7 certainly a school of thought that a restricted
8 solicitor is entitled to pay for a counsel's
9 opinion.

10 LORD RICHARDSON: Yes.

11 MR MCAULEY: So I mean there has hardly
12 been any prejudice caused or if there is,
13 I certainly can't understand it. This is also
14 the -- argument five is the one that we have
15 touched on.

16 LORD RICHARDSON: Yes.

17 MR MCAULEY: Which is that this is the
18 McPhilemy case, which is that the -- it is
19 basically just explaining this was a case that
20 stated the pleadings should be shorter and the
21 person that is doing them has the right to
22 explain what meaning of words that they are
23 referring to, which is to keep pleadings
24 shorter, because if you had to write the
25 meaning -- the dictionary meaning of every word

1 you were using, I mean the pleadings would be
2 gigantic and the costs would be extortionate.
3 So it's pretty clear, as I have written
4 "representation" it's up to me to clarify what
5 I mean by that and the court just has to accept
6 it. That is what our understanding was.

7 I mean could understand if you looked up
8 the word in the dictionary and it didn't comply
9 with that, but that is the system. For example
10 some -- it was Lord Woolf and he said:

11 "What is important is the pleadings should
12 make clear the general nature of the case of
13 the pleader."

14 He also says:

15 "The need for extensive pleadings,
16 including protected laws, should be reduced as
17 to the meaning that the words complained of are
18 capable of meaning."

19 So I mean it's pretty clear that
20 "representation" is capable of meaning that.
21 So I do not have to explicitly point out in my
22 pleadings. I just have to write the words and
23 then that is it, and basically the person
24 informs the court what particular definition
25 they are referring to.

1 Then just the final points looking at
2 Article 6.1 of the -- what case is that again?
3 The European Human Rights case the -- I am not
4 sure if it is there. Off the top of my head,
5 is it Smith and Grady? I think it was.

6 I will be able to find that, but basically
7 it is saying when you are a self-representing
8 party, the court has an additional obligation
9 to -- it's why it's never ideal for people to
10 self represent that the court has additional
11 obligations to assist them.

12 LORD RICHARDSON: Is it may be Steel and
13 Morris.

14 MR MCAULEY: Steel and Morris, it is. So
15 the fact that it wasn't clearly made out to me:
16 are you making an application for amendment of
17 "representation", I think it is not compliant
18 with Article 6, because I was self-representing
19 party. It wasn't like I had a team of
20 solicitors and a junior counsel who could say:
21 hold on like, give me a second until we can sit
22 and think about that more clearly.

23 LORD RICHARDSON: Yes.

24 MR MCAULEY: So and then the other point
25 is as well, as I said, with the Osman case,

1 which is that you are only allowed -- the court
2 is only allowed to strike out our case if it
3 has watertight reasoning.

4 LORD RICHARDSON: Where? Can we just
5 go --

6 MR MCAULEY: This was a supplementary
7 application I put in.

8 LORD RICHARDSON: Let me just find that.

9 MR MCAULEY: Which is obviously late which
10 isn't great.

11 LORD RICHARDSON: Because this was the
12 reference to Rule 115.

13 MR MCAULEY: Yes.

14 LORD RICHARDSON: You refer to Rule
15 115(3):

16 "Permission must be granted where the
17 appeal would have a real prospect of success or
18 there is some other compelling reason for the
19 appeal to be heard."

20 Now, I understand the real prospect of
21 success and compelling reason for the appeal to
22 be heard test is the correct one, but that is
23 not what Rule 115(3) says and indeed that is
24 not even part of Rule --

25 MR MCAULEY: It is just making the point

1 it's an error of law to strike this case out
2 when it doesn't have watertight reasoning.

3 LORD RICHARDSON: Yes.

4 MR MCAULEY: Because if you are striking
5 out cases without watertight reasoning, it just
6 gives a party blanket immunity. It's also as
7 well, as referred to Osman, that was the case
8 for the teacher was mad basically and got
9 obsessed with one of the pupils, a sixth-year
10 boy I think it was, and killed him and the
11 police were immune from -- the police were
12 immune from liability and negligence for that
13 and the court struck that out and they said
14 that it was a violation of access to court.

15 So I mean obviously -- obviously nobody
16 has died in this case but I mean I've still got
17 a £70,000 bill plus here that I am seeking in
18 money, you know. So it's a lot of money and it
19 is a very important case. So I mean to strike
20 it out when the damages are so large as that,
21 and it's more than that potentially with
22 interest. I don't know other ancillary
23 grounds. So it is -- I think it's -- it does
24 raise Article 6 issues here.

25 LORD RICHARDSON: Yes.

1 MR MCAULEY: So, yes, I think that is it
2 for the time being.

3 LORD RICHARDSON: So that deals with
4 permission to appeal and your Rule 114?

5 MR MCAULEY: Yes.

6 LORD RICHARDSON: Thank you, Mr McAuley.
7 Ms Breen.

8 MS BREEN: Good morning, My Lord, members
9 of the tribunal. I can deal relatively
10 briefing with the Rule 114 application first.

11 LORD RICHARDSON: Yes.

12 MS BREEN: Essentially, members of the
13 tribunal, the pursuer's application for
14 permission to appeal and the Rule 114
15 application advance the same contention, which
16 is that this tribunal fundamentally erred in
17 delineating the basis on which the pursuer's
18 case failed to be determined.

19 Now, putting aside the merit of that
20 complaint which I will come on to deal with in
21 a minute, it can't reasonably be said it's a
22 complaint that doesn't go to the substance of
23 the tribunal's decision. It's very much a
24 complaint of substance, not form and it doesn't
25 concern a clerical error or other irregularity

1 of the kind envisaged by Rule 114.

2 LORD RICHARDSON: Yes.

3 MS BREEN: So I simply invite the tribunal
4 to refuse the Rule 114 application and proceed
5 to consider the substance of the pursuer's
6 complaint in terms of his application for
7 permission to appeal.

8 LORD RICHARDSON: Yes.

9 MS BREEN: Moving on then to the question
10 of permission to appeal, in my submission the
11 pursuer's proposed appeal enjoys no real
12 prospect of success and there is no other
13 compelling reason why permission should be
14 granted.

15 LORD RICHARDSON: Yes.

16 MS BREEN: The application should
17 accordingly be refused.

18 At the outset, I adopt the answers that
19 were lodged on behalf of the defender. I don't
20 propose to rehearse those at length, unless the
21 tribunal would find that of any assistance, but
22 the defender's position can essentially be
23 summarised as follows. Just to be clear, when
24 I am talking about the permission to appeal
25 application, I am talking about the application

1 that was filed on 14 October.

2 LORD RICHARDSON: Just stay that again.
3 When you talk about the application?

4 MS BREEN: The application. As
5 I understand it there are four documents with
6 which we are concerned when talking about
7 permission to appeal application.

8 LORD RICHARDSON: Yes, I think we have --
9 I think there was originally a Rule 107
10 application, which was in the form of a letter,
11 and then there were -- there were attachments
12 to that. Then there was a reply to your
13 answers and then there was a supplementary
14 reasoning. So I think we have potentially
15 three substantive documents and then there Rule
16 114 as well; is that right?

17 MS BREEN: I think that is correct,
18 my Lord. Mr McAuley can correct me if that is
19 wrong. I understand one of those documents
20 might have been served twice on different
21 dates.

22 LORD RICHARDSON: It might have been
23 served twice on different on dates?

24 MS BREEN: But is in essence the same
25 document.

1 LORD RICHARDSON: Yes. Can I just check,
2 Ms Breen, is your microphone turned on?

3 MS BREEN: Perhaps it wasn't. A green
4 light now, yes.

5 Yes. So the crux of the defender's
6 position, members of the tribunal, is that
7 there is no real prospect of persuading the
8 Inner House that this tribunal erred in law by
9 determining the pursuer's case in accordance
10 with the claim form as pled.

11 LORD RICHARDSON: Yes.

12 MS BREEN: The tribunal has been to its
13 decision in some detail already, but if we
14 could perhaps just quickly revisit paragraph
15 22.

16 LORD RICHARDSON: Yes.

17 MS BREEN: The second half of that
18 paragraph refers to the fact that the pursuer's
19 claim was framed in reference to two
20 litigations that were then on foot:

21 "As set out above, the claim form its
22 attached emails refer specifically to a request
23 by the pursuer for representation (claim form
24 paragraph C(3)) and seek an order requiring the
25 defender to offer the pursuer the services of

1 an advocate for two particular pending
2 proceedings (claim form paragraph E(ii)).
3 Despite being given the opportunity to consider
4 his position, the pursuer made no application
5 to amend his case."

6 So the claim form referred to two ongoing
7 litigations and it also appended a number of
8 emails. Those emails are summarised by the
9 tribunal at paragraph 34 of its decision and of
10 particular relevance here is the email that is
11 quoted at subparagraph E on page 11 of the
12 tribunal's decision.

13 LORD RICHARDSON: Yes.

14 MS BREEN: This is, I understand,
15 correspondence between the pursuer and The Dean
16 of Faculty.

17 The pursuer then provided his Roll number
18 and explained that he was challenging the
19 imposition of a supervision restriction in the
20 practising certificate proceedings. In his
21 email of 3.20 pm on 19 August 2024, the pursuer
22 wrote:

23 "There are two matters in which I require
24 representation by counsel: an employment
25 dispute with a jurisdiction hearing coming up

1 in the UK Supreme Court and an Inner House
2 hearing where, despite being a solicitor,
3 I have only been given a Law Society practising
4 certificate with a one-year supervision
5 restriction."

6 That is the conduct complained of on the
7 part by the pursuer on the part of the defender
8 in the claim form.

9 LORD RICHARDSON: Yes.

10 MS BREEN: In my submission, the claim
11 form related to representation in two
12 litigations that were then on foot. That is
13 borne out when one moves on to considers the
14 emails appended to the claim form as between
15 the pursuer and The Dean of Faculty. That is
16 the basis on which the defender defended the
17 claim.

18 LORD RICHARDSON: Yes.

19 MS BREEN: The pursuer was given the
20 opportunity at the strike-out hearing to
21 consider his position. He did not seek to
22 amend the claim form and, in those
23 circumstances, there is no real prospect of
24 persuading the Inner House that this tribunal
25 erred in law.

1 LORD RICHARDSON: On that point, just
2 thinking about it hypothetically, had on the
3 assumption you are correct as to the
4 construction of the claim form, then if
5 Mr McAuley had sought to amend and had said by
6 way of clarification what he was seeking in his
7 original emails was simply advice, leaving to
8 one side the intentions of those who were
9 corresponding at that time, but is the tribunal
10 correct to understand that there is no dispute
11 about that? In other words, if Mr McAuley had
12 sought advice the rule which was founded upon,
13 that rule relates to representation in
14 litigation, not advice; is that right?

15 MS BREEN: Yes, that is correct.

16 For the avoidance of doubt, I am sure that
17 such a claim would other -- be defended on
18 other bases but not on the basis of that, the
19 application of that particular rule, which, as
20 your Lordship knows, relate only to appearance
21 work effectively.

22 That is all I propose to say in relation
23 to the application for permission to appeal
24 having adopted the answers, unless I can be of
25 any assistance to the tribunal.

1 LORD RICHARDSON: Yes. No, that is
2 helpful, thank you.

3 Does that -- do you want to now move on to
4 the question of --

5 MR MCAULEY: Can I reply to that please?
6 Could I reply to the --

7 LORD RICHARDSON: Yes, please do.

8 MR MCAULEY: Yes.

9 LORD RICHARDSON: Let me just check. That
10 is the conclusion of your submissions on that
11 point?

12 MS BREEN: On those two applications,
13 my Lord, yes.

14 LORD RICHARDSON: Please do, Mr McAuley.

15 MR MCAULEY: I notice Ms Breen talks about
16 it goes to substance, not form, but I mean
17 there is no definition of what "substance and
18 form" actually means.

19 LORD RICHARDSON: Yes.

20 MR MCAULEY: If you are saying that
21 looking up a dictionary to find out what the
22 word means is a matter of substance in a case,
23 I mean it is -- that is nonsense. I mean it is
24 surely a basic matter of form and construction
25 in the judgment that you're giving words their

1 dictionary definition.

2 LORD RICHARDSON: Yes.

3 MR MCAULEY: You know. I mean that is not
4 from when we are actually interpreting laws.

5 LORD RICHARDSON: I think the issue would
6 be, just as a matter of procedure, that insofar
7 as you are correct that we have erred in our
8 understanding, in our interpretation of your
9 document, in order for Rule 114 to apply, that
10 would have to have been a clerical error;
11 whereas I think the point that Ms Breen is
12 making is that when you read the judgment, it
13 is quite clear that we, as it were,
14 intentionally concluded that "representation"
15 meant what we thought it meant in the judgment.

16 MR MCAULEY: Yes.

17 LORD RICHARDSON: Therefore, it doesn't
18 take away from your second line of argument.
19 I think she is just saying it's not
20 unintentional, it's not a clerical error.

21 MR MCAULEY: I mean in the English
22 procedural rules I understand that they make
23 the point that sometimes clerical errors can
24 materially affect the outcome of a decision.

25 LORD RICHARDSON: Yes.

1 MR MCAULEY: Like, for example, if they
2 get mixed up with the names of the companies or
3 whatever in the document, that would be a
4 clerical error that would -- that would affect
5 the outcome. So that is what I am saying that
6 that point I think was pretty briefly made, but
7 it's -- that is a lot more complicated than
8 like where the line is drawn between what is
9 substance and what is form is. I think that is
10 more complex than what was being made out
11 there.

12 LORD RICHARDSON: Yes.

13 MR MCAULEY: The other point I would like
14 to reply to as well as the on-foot thing that
15 just because --

16 LORD RICHARDSON: The?

17 MR MCAULEY: The on foot.

18 LORD RICHARDSON: On foot, yes.

19 MR MCAULEY: The fact they were already
20 lodged. So, yeah, the fact that they were
21 already lodged on foot.

22 LORD RICHARDSON: Yes.

23 MR MCAULEY: You can, if given the
24 timescales that you have to put these appeals
25 in, it's often the case that when an appeal has

1 to be lodged urgently or a document lodged
2 urgently, you just put in the application
3 before you then get a counsel's opinion in.
4 Like usually if it is for time bar and things
5 like that you just submit the appeal so that
6 it's in and it's not time barred and you get a
7 counsel's opinion later. So the fact that
8 there were on foot is irrelevant, because even
9 though they were lodged, I could still have
10 obtained a counsel's opinion and then said:
11 whoops, sorry, guys, I am going to withdraw
12 this on the grounds of the counsel's opinion to
13 save myself the expenses or whatever. So
14 I mean that point is irrelevant.

15 LORD RICHARDSON: Yes.

16 MR MCAULEY: The other thing as well as to
17 say that by referring to "representation"
18 I was -- I meant only -- by "representation"
19 I meant both. I meant both appearance in court
20 and counsel's opinion. I mean I still
21 obviously your judgment is in court appearance
22 is not allowed, like a restricted solicitor
23 gets restricted advocacy services. Fair
24 enough, that is within your discretion, but my
25 initial position was that you should be able to

1 get both by representation and that was the
2 kind of point that -- so it is not just a case
3 that I have changed I am saying now: oh, no,
4 I just meant a counsel's opinion. It was both
5 that I was seeking.

6 LORD RICHARDSON: Yes. That is helpful
7 clarification, thank you.

8 Very well, Ms Breen, do you want to
9 address us now on your application for expenses
10 or costs?

11 MS BREEN: Yes, my Lord. The defender
12 moves for the costs of the proceedings and
13 relies on the general rules that expenses
14 follow success. The pursuer has been wholly
15 unsuccessful in his claim here.

16 LORD RICHARDSON: Yes.

17 MS BREEN: The defender was put to the
18 expense of defending what has been determined
19 to have been an unmeritorious claim.

20 LORD RICHARDSON: Yes.

21 MS BREEN: In my submission, there is
22 simply no reason to depart from the general
23 rule in these circumstances.

24 LORD RICHARDSON: Yes.

25 MS BREEN: In his opposition to the

1 defender's application, the pursuer raises
2 certain specific points that I will briefly
3 address.

4 LORD RICHARDSON: Yes.

5 MS BREEN: The first is in relation to a
6 costs cap.

7 LORD RICHARDSON: Yes.

8 MS BREEN: There is no costs cap in place
9 here. It's not in dispute that of course the
10 tribunal has jurisdiction to impose a cost cap,
11 none was sought or granted in this case.

12 LORD RICHARDSON: Yes.

13 MS BREEN: The pursuer also suggests that
14 this is an example of mixed success because the
15 tribunal has reserved judgment on certain
16 points.

17 LORD RICHARDSON: Yes.

18 MS BREEN: In my submission, that is
19 incorrect. This is not an example of a case
20 where there has been mixed success, the
21 defender has been wholly successful. The
22 tribunal has determined the entirety of the
23 pursuer's claim.

24 LORD RICHARDSON: Yes.

25 MS BREEN: And the other point that the

1 pursuer makes is that neither Lord Keen nor
2 I are Office Bearers of Faculty.

3 LORD RICHARDSON: Yes.

4 MS BREEN: In that regard, my Lord, my
5 submission is simply that has no bearing on the
6 defender's application for expenses, evidently
7 I am not seeking expenses personally. Expenses
8 are being sought on behalf of the Faculty of
9 Advocates. I am instructed by solicitors who
10 are in turn instructed by those with authority
11 to do so within the Faculty.

12 LORD RICHARDSON: I think the argument
13 Mr McAuley is making is it's akin to
14 self-representation because you are a member of
15 the Faculty of Advocates and you are appearing
16 on behalf of the Faculty of Advocates. I think
17 that is the point he is making. What would be
18 your response to that?

19 MS BREEN: Effectively the same point, my
20 Lord. I appear here as counsel instructed by
21 independent solicitors who are in turn
22 instructed by the Faculty as an organisation.

23 LORD RICHARDSON: Yes.

24 MS BREEN: The other point to note in
25 relation to expenses, my Lord, is that if the

1 tribunal is minded to grant the defender's
2 application for expenses, it has the choice
3 between assessing those expenses itself or
4 appointing the auditor for the Court of Session
5 to tax the expenses. In my submission, as was
6 recognised by this tribunal in Blue Planet, as
7 cited in the defender's application, it would
8 be more convenient for the auditor to tax the
9 expenses of this case having significant
10 experience in what expenses or costs are
11 reasonably incurred when litigating in
12 Scotland.

13 LORD RICHARDSON: Yes.

14 MS BREEN: That is all I intended to say
15 on the question of expenses.

16 LORD RICHARDSON: Thank you very much.
17 Mr McAuley.

18 MR MCAULEY: Yes. Yes, so there is six
19 reasons that I do not think that the -- that
20 expenses should be awarded here to the
21 respondent.

22 LORD RICHARDSON: Yes.

23 MR MCAULEY: The first point is that it
24 says I think in, is it Rule 41, that you have
25 only to award expenses if you think it

1 appropriate to do so.

2 LORD RICHARDSON: Yes.

3 MR MCAULEY: So there is no general rule
4 of expenses follow success. It's slightly
5 different from the Court of Session rules.

6 LORD RICHARDSON: I think it's Rule 104.

7 MR MCAULEY: 104 it says it is appropriate
8 to do so, which is a higher test than normal.
9 The one point I would make from the outset is
10 that Lord Keen has waived his right to
11 expenses, which I think I consider to be an
12 admission by him that it's not appropriate for
13 the expenses to be awarded in this case.

14 LORD RICHARDSON: I think -- just to
15 clarify, I think it's not -- I do not think
16 Lord Keen has an entitlement to expenses or
17 costs. I think what Lord Keen, as I understand
18 it, has done has waived his right to charge a
19 fee to The Faculty of Advocates so a slightly
20 different position. I appreciate the bottom
21 line impact of those two things may be -- you
22 may contend is similar.

23 MR MCAULEY: The exact nuances of it I am
24 not particularly sure in oral submissions.
25 It would be more -- I would need to look into

1 the details of that in writing, but I think the
2 fundamental point is clear that Lord Keen
3 doesn't think it appropriate for expenses to be
4 awarded in this case. That is his feeling in
5 the matter. His feeling is correct in terms of
6 the law. That is certainly how he feels. So
7 I think it's a big jump to go from senior
8 counsel, Lord Keen, thinking that, feeling that
9 to then you saying, no, it is appropriate.

10 The first argument I would make is that
11 this is a public interest case where it is not
12 appropriate to award expenses.

13 The Competition Commission -- I tell you
14 the person's name, if I can find it. Yes, Anna
15 Stellardi informed me that the Competition
16 Commission were keeping an eye on this case.

17 MR BANKES: Could you just clarify that?
18 The Competition Commission ceased to exist in
19 2000.

20 MR MCAULEY: Hold on. That is maybe the
21 wrong name, unless that is just a dodgy email I
22 have received.

23 MR BANKES: Competition and
24 Markets Authority?

25 MR MCAULEY: I am thinking, yeah --

1 Competition and Markets Authority said that
2 they do not monitor all cases, but this was a
3 case that they were monitoring.

4 LORD RICHARDSON: Would you be able to
5 give us a copy of that email? I do not think
6 it's in the bundle we have.

7 MR MCAULEY: I will do. It was
8 20 February 2025.

9 LORD RICHARDSON: Yes.

10 MR MCAULEY: I also have a phone number
11 here for her which is a direct line. It is --

12 LORD RICHARDSON: It's all right. If you
13 were able to --

14 MR MCAULEY: I will keep that private.

15 LORD RICHARDSON: I don't know if the
16 defender has seen a copy of the email.

17 MS BREEN: I don't understand so.

18 LORD RICHARDSON: I think it would be
19 helpful if a copy of just that email, nothing
20 else, could be provided.

21 MR MCAULEY: That is fine. I will provide
22 that. So the other thing is as well it is
23 public interest here, because I am not -- this
24 isn't just a case where of -- this isn't just a
25 case where money is at stake like personal

1 injury or commercial litigation or whatever.
2 This affects loads of solicitor in this
3 position that if you are a returning solicitor
4 to practise and you are getting a practising
5 certificate and you get a restriction on it,
6 you then can't get counsel's opinion on the --
7 you then can't get a counsel's opinion on
8 whether that is lawful or not.

9 LORD RICHARDSON: I am just struggling
10 with that a little bit, because if I understand
11 it there isn't a dispute that a solicitor with
12 a restricted practising certificate can get
13 advice.

14 MR MCAULEY: Well, I think if that has
15 been resolved then that that is a public
16 interest matter which has just been resolved
17 here. If you are saying that is the case,
18 well, that wasn't clear beforehand.

19 LORD RICHARDSON: Well --

20 MR MCAULEY: Because I certainly didn't
21 get it. I had to self represent without
22 counsel's opinion when I would have got one if
23 it was possible to at that time.

24 LORD RICHARDSON: But I wonder if the nub
25 of it, Mr McAuley, is the point you made just a

1 moment ago that you weren't just seeking
2 counsel's opinion, you were also seeking --

3 MR MCAULEY: Well --

4 LORD RICHARDSON: May I finish? You
5 weren't just seeking counsel's opinion, you
6 were seeking representation in the litigation
7 as a whole and looking back at the email
8 correspondence you had with The Dean of
9 Faculty, he comes back and says: no, because
10 you are seeking representation in the
11 litigation. So going to your point about is it
12 public interest --

13 MR MCAULEY: I think that's --

14 LORD RICHARDSON: May I finish? Is it
15 public interest or not? I am not sure -- it's
16 not certainly clear to me that it has ever been
17 in dispute that you can't get advice, simply
18 advice.

19 MR MCAULEY: Well, what I was primarily
20 seeking was counsel's opinion.

21 LORD RICHARDSON: I see.

22 MR MCAULEY: Because as I explained
23 before, it wasn't the taxi service that I was
24 seeking, it was -- it was primarily that I was
25 seeking the counsel's opinion, because if I had

1 not been able to get a counsel's opinion
2 supporting it, I mean obviously I wouldn't have
3 instructed an advocate to go into court that
4 didn't have a -- that didn't have a favourable
5 counsel's opinion. It's a waste of time. So
6 in a sense you could say I was on seeking a
7 counsel's opinion, because that was dependent
8 on the -- because if I had -- as I say, if
9 I had received that, I would then have sought
10 no-win-no-fee advocacy. I wouldn't have used
11 the taxi service.

12 So it is a slightly more nuanced fact of
13 that relates to how that -- I guess it is --
14 maybe it falls within your discretion to say
15 that it was just the counsel's opinion I was
16 seeking in that event, because even then they
17 would then have, I would imagine, have told me.
18 Mr Anderson can --

19 MR ANDERSON: Well, just for the sake of
20 clarity, please, Mr McAuley, I noted you, about
21 five minutes ago, as saying "by
22 'representation' I meant both appearance in
23 court and an opinion."

24 MR MCAULEY: Ah.

25 LORD RICHARDSON: Are you now saying you

1 didn't mean that?

2 MR MCAULEY: Well, it was primarily what
3 I was seeking was a counsel's opinion.

4 MR ANDERSON: By nevertheless by
5 "representation" --

6 MR MCAULEY: The thing is, well, yes and
7 no, because even if the advocate had said to
8 me: listen, I can't represent you in court
9 because you are a restricted solicitor, I might
10 have said to them: well, if your opinion is
11 favourable, do you want to fill in the form to
12 act as a lay person or an amicus?

13 MR ANDERSON: If we just focus on what you
14 said and what is your position today in front
15 of us, your earlier answer was:

16 "By 'representation' I meant both
17 appearing in court and an opinion."

18 Now, are you now saying to the tribunal
19 that you didn't really mean appearing in court
20 and all you really meant was the opinion?

21 MR MCAULEY: What I meant was primarily
22 counsel's opinion.

23 MR ANDERSON: That then would still mean
24 that in fact you were still in fact looking for
25 representation in court.

1 MR MCAULEY: Well, in some capacity. It
2 might not have been as an advocate. It might
3 have been as a lay person.

4 MR ANDERSON: Thank you.

5 MR MCAULEY: You didn't seem satisfied
6 with that, Mr Anderson. Could you explain why
7 you are not, please?

8 MR ANDERSON: No, I have your answer and
9 I understand it, Mr McAuley, and I am going to
10 note it. Thank you.

11 MR MCAULEY: What do you consider my
12 answer to be exactly?

13 MR ANDERSON: Well, Mr McAuley, you are
14 not here to interrogate the tribunal. I have
15 given you my response. Thank you.

16 LORD RICHARDSON: Mr McAuley --

17 MR MCAULEY: (inaudible) interrogation.

18 LORD RICHARDSON: I think we are slightly
19 moving away. Certainly where I understood
20 we were was you were discussing the public
21 interest argument in relation to costs. Am
22 I right in that regard that is where we got to
23 in your submissions?

24 MR MCAULEY: I think it's important to
25 clarify this point because the thing is, as

1 well, that if you have a favourable counsel's
2 opinion, it is still a lot easier to then get
3 potentially solicitors on-board.

4 LORD RICHARDSON: Just a moment,
5 Mr McAuley, I think there may be an issue with
6 the transcript.

7 Is there an issue with the transcript?

8 Yes. I'm sorry, Mr McAuley. You'll appreciate
9 part of the issue is that the staff are coming
10 to operate the systems in an environment they
11 are not used to and so we have these technical
12 difficulties. What we'll do is have a break
13 there, the mid-morning break, so we'll rise now
14 and sit again in 15 or so minutes, thank you
15 very much.

16 (11.40 am)

17 (A break)

18 (11.56 am)

19 MR MCAULEY: Sorry about that.

20 LORD RICHARDSON: I think it's still just,
21 good morning, Mr McAuley. So you were --
22 I think when we broke you were just -- you had
23 been making the submissions about the public
24 interest argument against the award of costs.

25 MR MCAULEY: Yes, I think it's important

1 at this juncture to clarify that when I did
2 contact The Faculty of Advocates, at that
3 juncture it was only counsel's opinion I was
4 seeking.

5 LORD RICHARDSON: I see.

6 MR MCAULEY: The actual representation
7 that I would have been seeking would have been
8 through another solicitor if I had received a
9 favourable counsel's opinion, which is what
10 I meant when I said I was seeking that is what
11 I meant and, for example, I would give you the
12 case in point of Robson. That was exactly what
13 he did and it was my intention to do exactly
14 what Robson did, which was to try and get the
15 advice first of all and then try and get access
16 to a solicitor.

17 LORD RICHARDSON: To be clear, you say we
18 should read your claim form and your email as
19 you were only looking for an advice.

20 MR MCAULEY: Yes, it was -- I have also
21 explained this as well that when you have a
22 counsel's opinion, it's much easier to then go
23 to a solicitor.

24 LORD RICHARDSON: You have explained that.

25 MR MCAULEY: And explain that you can do

1 that so that is what I was seeking and then it
2 would have been at that point I would have
3 said, if that still wasn't possible, I might
4 have tried to say: listen, do you still want to
5 see if we can maybe fill out the lead
6 representation form? Or I could have made the
7 application to the bench to say: listen, there
8 is a favourable counsel's opinion here, but
9 I can't get a solicitor on-board, is there
10 anyway that the court could appoint this
11 advocate as an amicus? So that was what -- or
12 as I say the worst case scenario they said:
13 listen, do you just want to do it as a lay
14 person?

15 So that is what I meant when I said I
16 would have tried all avenues if I had received
17 a favourable counsel's opinion to get that
18 advocate to be standing up and doing it.

19 LORD RICHARDSON: Thank you for that
20 clarification.

21 MR MCAULEY: It wasn't my intention to --
22 I mean obviously, as I explain at the moment,
23 I am an unrestricted solicitor. It was never
24 my intention to get in a cab -- get in an
25 advocate's cab or to instruct him: listen, you

1 must do that. So that was never my intention
2 to use the cab system, because I mean today
3 I could have emailed an advocate and said: I am
4 an unrestricted solicitor, you have to be at
5 this hearing at this time and I've not done it.
6 So that was never my intention to do that.

7 LORD RICHARDSON: Yes, I do not think
8 you could insist on them appearing, but in any
9 event.

10 MR MCAULEY: Well, I am unrestricted
11 solicitor so it is my understanding that you
12 can. Well, maybe the counsel's opinion first.
13 They would need to read it and --

14 LORD RICHARDSON: No, I think the cab rank
15 rule, as I understand it, only applies if you
16 tender the fee in advance so you would have to
17 be prepared to pay for the counsel and then
18 you could insist.

19 MR MCAULEY: Right. I am just saying that
20 that wasn't my intention to say and I have not
21 said it to anyone since.

22 LORD RICHARDSON: That is helpful for that
23 clarification. Where does that leave us in
24 terms of your submissions on expenses?

25 MR MCAULEY: Yes, so that is what I was

1 saying. It wasn't in my thinking to think: oh,
2 I will just get a counsel's opinion, then I'll
3 stand up and self-represent. It was in my mind
4 I thought, right, I will get the counsel's
5 opinion first and then I will do everything
6 I possibly can to try and to see if that can in
7 some way facilitate the thing.

8 LORD RICHARDSON: Yes.

9 MR MCAULEY: Mr Anderson, I must put in
10 the record that I am bit concerned by your body
11 language there and you just need to be --

12 LORD RICHARDSON: Mr McAuley --

13 MR MCAULEY: -- impartial.

14 LORD RICHARDSON: -- please if you --
15 you have made your observation. I think it
16 would assist us all if you could take us
17 through the remainder of your submissions.

18 MR MCAULEY: That was the point I made at
19 the start, Mr Anderson, when I questioned your
20 appointment on the bench. I understand you are
21 a partner at Clyde & Co; is that correct?

22 MR ANDERSON: I'm sorry.

23 MR MCAULEY: Are you still a practising
24 solicitor?

25 MR ANDERSON: Yes.

1 MR MCAULEY: So you use The Faculty of
2 Advocates?

3 LORD RICHARDSON: Mr McAuley, I hesitate
4 to interrupt. First of all, I would be
5 grateful if you would direct your questions to
6 me unless you are responding directly to
7 something.

8 MR MCAULEY: Well, I am just saying that
9 as concerning that Mr Anderson is a practising
10 solicitor in Scotland, he will be using The
11 Faculty of Advocates and then he was quite
12 flippant towards me there.

13 LORD RICHARDSON: Mr McAuley, if I may
14 finish? We have the applications that we have
15 before us and what I suggest we do is you
16 complete your submissions and we can conclude
17 those hearings. If you have other issues you
18 wish to raise, then I suggest you do those
19 appropriately at the appropriate stage, but
20 I think the best use of our time and your time
21 now is for you to conclude your submissions on
22 costs.

23 MR MCAULEY: That is just to conclude that
24 point. It was the counsel's opinion that I was
25 seeking and then I was going to then see what

1 the future would have held after that, as
2 I say, with the Robson case that I have
3 referred to.

4 LORD RICHARDSON: Yes.

5 MR MCAULEY: So yeah, I think it was in
6 the public interest for this case for that to
7 be clarified that a restricted solicitor was
8 entitled to a counsel's opinion --

9 LORD RICHARDSON: Yes.

10 MR MCAULEY: -- given the importance of it
11 that if the practising certificate or committee
12 of the Law Society interferes with your
13 practising certificate, you can get a counsel's
14 opinion and pay for it on to find out on the
15 lawfulness of it or if you do go to the
16 Scottish Solicitors Disciplinary Tribunal and
17 you get a restriction put on it, you are
18 entitled to a counsel's opinion in the
19 lawfulness of that.

20 So it is getting a counsel's opinion early
21 and right away and just getting that done does
22 facilitate justice so I think it was -- I think
23 that judgment that we have here has established
24 an important point of public importance that
25 that is still open to restricted solicitors.

1 It's not a matter of once you're restricted,
2 you are ostracised completely from Faculty.

3 You are restricted but you have a
4 restricted level of access and I think it is
5 especially important because as I have led the
6 bench the evidence, it's 90% prosecution rates
7 for men in this disciplinary tribunal. So
8 given the mismatch there in terms of men are a
9 minority within the solicitor profession and it
10 is 90% men are prosecuted in the SSDT --

11 LORD RICHARDSON: I saw that argument.
12 I am not sure how that relates to the
13 restricted -- the application of the rule in
14 relation to those with restricted certificates.
15 Are there more men who have restricted
16 practising certificates than women?

17 MR MCAULEY: No. Well, what I am saying
18 is it's like the -- if it is the case that
19 restricted practising -- well, I would imagine
20 so, yeah, because that is the -- that is
21 basically when you get the restrictions put on
22 when you go to the disciplinary tribunal.

23 LORD RICHARDSON: I see.

24 MR MCAULEY: That is the reason that you
25 go to it, unless you're a returning solicitor,

1 which we wouldn't know.

2 LORD RICHARDSON: Yes.

3 MR MCAULEY: But in terms of that is how
4 you get restrictions put on your practising
5 certificate is through that disciplinary
6 tribunal so it certainly does look like that.

7 LORD RICHARDSON: That wasn't the case in
8 your case though.

9 MR MCAULEY: No mine was through because
10 I was a returning solicitor you have to apply
11 to the practising certificate.

12 LORD RICHARDSON: Yes. I wonder how far
13 we can take that without actually having
14 evidence before us in relation to exactly how
15 the gender balance lies in relation to those
16 points, but we have noted -- I note the point
17 you make.

18 MR MCAULEY: I mean I think it is a public
19 interest case here that it was important for
20 all those people it was established: listen,
21 you are not alone there, you can get a
22 counsel's opinion. You are restricted but not
23 bastardised basically. I think that
24 anti-bastardisation message is one of public
25 importance.

1 LORD RICHARDSON: Yes, you have made that
2 point, yes.

3 MR MCAULEY: Okay. The other thing as
4 well is that -- the second argument is that
5 expenses are only supposed to follow success
6 and conclusiveness of the pleadings. It is the
7 exception to the general rule that expenses are
8 made before the matter has been fully
9 determined. I mean this matter hasn't been
10 fully determined, because it's my understanding
11 that the -- as I explained earlier, the CAT has
12 reserved judgment on whether solicitors,
13 restricted solicitors, are entitled to
14 counsel's opinion. It's not actually said that
15 they agree with Lord Keen that restricted
16 solicitors are entitled to counsel's opinion.

17 The CAT has reserved judgment on it. So
18 I think when the CAT has reserved judgment, it
19 you shouldn't be making and entering a lot of
20 expenses, because if that -- say I do reraise
21 that case, it is -- it suggests that the CAT is
22 biased in terms of the strength of that
23 argument if it awards expenses before the
24 matter is finished. So I think the CAT should
25 really be waiting until we find out the answer

1 to that and it conclusively answers whether
2 restricted solicitor are entitled to counsel's
3 opinion and that is when the award of expenses
4 should be made.

5 Professor Rodger, the competition law
6 professor, described these as "David versus
7 Goliath". Well, we do not know who has won,
8 because it is not finished. So how can you
9 just go and line Goliath's pocket full of cash
10 when we still don't know who has won.

11 I am thinking, yeah -- Competition and
12 Markets Authority said that they do not monitor
13 all cases, but this was a case that they were
14 monitoring.

15 LORD RICHARDSON: Would you be able to
16 give us a copy of that email? I do not think
17 it's in the bundle we have.

18 MR MCAULEY: I will do. It was
19 20 February 2025.

20 LORD RICHARDSON: Yes.

21 MR MCAULEY: I also have a phone number
22 here for her which is a direct line. It is --

23 LORD RICHARDSON: It's all right. If you
24 were able to --

25 MR MCAULEY: I will keep that private.

1 LORD RICHARDSON: I don't know if the
2 defender has seen a copy of the email.

3 MS BREEN: I don't understand so.

4 LORD RICHARDSON: I think it would be
5 helpful if a copy of just that email, nothing
6 else, could be provided.

7 MR MCAULEY: That is fine. I will provide
8 that. So the other thing is as well it is
9 public interest here, because I am not -- this
10 isn't just a case where of -- this isn't just a
11 case where money is at stake like personal
12 injury or commercial litigation or whatever.
13 This affects loads of solicitor in this
14 position that if you are a returning solicitor
15 to practise and you are getting a practising
16 certificate and you get a restriction on it,
17 you then can't get counsel's opinion on the --
18 you then can't get a counsel's opinion on
19 whether that is lawful or not.

20 LORD RICHARDSON: I am just struggling
21 with that a little bit, because if I understand
22 it there isn't a dispute that a solicitor with
23 a restricted practising certificate can get
24 advice.

25 MR MCAULEY: Well, I think if that has

1 been resolved then that that is a public
2 interest matter which has just been resolved
3 here. If you are saying that is the case,
4 well, that wasn't clear beforehand.

5 LORD RICHARDSON: Well --

6 MR MCAULEY: Because I certainly didn't
7 get it. I had to self represent without
8 counsel's opinion when I would have got one if
9 it was possible to at that time.

10 LORD RICHARDSON: But I wonder if the nub
11 of it, Mr McAuley, is the point you made just a
12 moment ago that you weren't just seeking
13 counsel's opinion, you were also seeking --

14 MR MCAULEY: Well --

15 LORD RICHARDSON: May I finish? You
16 weren't just seeking counsel's opinion, you
17 were seeking representation in the litigation
18 as a whole and looking back at the email
19 correspondence you had with The Dean of
20 Faculty, he comes back and says: no, because
21 you are seeking representation in the
22 litigation. So going to your point about is it
23 public interest --

24 MR MCAULEY: I think that's --

25 LORD RICHARDSON: May I finish? Is it

1 public interest or not? I am not sure -- it's
2 not certainly clear to me that it has ever been
3 in dispute that you can't get advice, simply
4 advice.

5 MR MCAULEY: Well, what I was primarily
6 seeking was counsel's opinion.

7 LORD RICHARDSON: I see.

8 MR MCAULEY: Because as I explained
9 before, it wasn't the taxi service that I was
10 seeking, it was -- it was primarily that I was
11 seeking the counsel's opinion, because if I had
12 not been able to get a counsel's opinion
13 supporting it, I mean obviously I wouldn't have
14 instructed an advocate to go into court that
15 didn't have a -- that didn't have a favourable
16 counsel's opinion. It's a waste of time. So
17 in a sense you could say I was on seeking a
18 counsel's opinion, because that was dependent
19 on the -- because if I had -- as I say, if
20 I had received that, I would then have sought
21 no-win-no-fee advocacy. I wouldn't have used
22 the taxi service.

23 So it is a slightly more nuanced fact of
24 that relates to how that -- I guess it is --
25 maybe it falls within your discretion to say

1 that it was just the counsel's opinion I was
2 seeking in that event, because even then they
3 would then have, I would imagine, have told me.
4 Mr Anderson can --

5 MR ANDERSON: Well, just for the sake of
6 clarity, please, Mr McAuley, I noted you, about
7 five minutes ago, as saying "by
8 'representation' I meant both appearance in
9 court and an opinion."

10 MR MCAULEY: Ah.

11 LORD RICHARDSON: Are you now saying you
12 didn't mean that?

13 MR MCAULEY: Well, it was primarily what
14 I was seeking was a counsel's opinion.

15 MR ANDERSON: By nevertheless by
16 "representation" --

17 MR MCAULEY: The thing is, well, yes and
18 no, because even if the advocate had said to
19 me: listen, I can't represent you in court
20 because you are a restricted solicitor, I might
21 have said to them: well, if your opinion is
22 favourable, do you want to fill in the form to
23 act as a lay person or an amicus?

24 MR ANDERSON: If we just focus on what you
25 said and what is your position today in front

1 of us, your earlier answer was:

2 "By 'representation' I meant both
3 appearing in court and an opinion."

4 Now, are you now saying to the tribunal
5 that you didn't really mean appearing in court
6 and all you really meant was the opinion?

7 MR MCAULEY: What I meant was primarily
8 counsel's opinion.

9 MR ANDERSON: That then would still mean
10 that in fact you were still in fact looking for
11 representation in court.

12 MR MCAULEY: Well, in some capacity. It
13 might not have been as an advocate. It might
14 have been as a lay person.

15 MR ANDERSON: Thank you.

16 MR MCAULEY: You didn't seem satisfied
17 with that, Mr Anderson. Could you explain why
18 you are not, please?

19 MR ANDERSON: No, I have your answer and
20 I understand it, Mr McAuley, and I am going to
21 note it. Thank you.

22 MR MCAULEY: What do you consider my
23 answer to be exactly?

24 MR ANDERSON: Well, Mr McAuley, you are
25 not here to interrogate the tribunal. I have

1 given you my response. Thank you.

2 LORD RICHARDSON: Mr McAuley --

3 MR MCAULEY: (inaudible) interrogation.

4 LORD RICHARDSON: I think we are slightly
5 moving away. Certainly where I understood
6 we were was you were discussing the public
7 interest argument in relation to costs. Am
8 I right in that regard that is where we got to
9 in your submissions?

10 MR MCAULEY: I think it's important to
11 clarify this point because the thing is, as
12 well, that if you have a favourable counsel's
13 opinion, it is still a lot easier to then get
14 potentially solicitors on-board.

15 LORD RICHARDSON: Just a moment,
16 Mr McAuley, I think there may be an issue with
17 the transcript.

18 Is there an issue with the transcript?
19 Yes. I'm sorry, Mr McAuley. You'll appreciate
20 part of the issue is that the staff are coming
21 to operate the systems in an environment they
22 are not used to and so we have these technical
23 difficulties. What we'll do is have a break
24 there, the mid-morning break, so we'll rise now
25 and sit again in 15 or so minutes, thank you

1 advice first of all and then try and get access
2 to a solicitor.

3 LORD RICHARDSON: To be clear, you say we
4 should read your claim form and your email as
5 you were only looking for an advice.

6 MR MCAULEY: Yes, it was -- I have also
7 explained this as well that when you have a
8 counsel's opinion, it's much easier to then go
9 to a solicitor.

10 LORD RICHARDSON: You have explained that.

11 MR MCAULEY: And explain that you can do
12 that so that is what I was seeking and then it
13 would have been at that point I would have
14 said, if that still wasn't possible, I might
15 have tried to say: listen, do you still want to
16 see if we can maybe fill out the lead
17 representation form? Or I could have made the
18 application to the bench to say: listen, there
19 is a favourable counsel's opinion here, but
20 I can't get a solicitor on-board, is there
21 anyway that the court could appoint this
22 advocate as an amicus? So that was what -- or
23 as I say the worst case scenario they said:
24 listen, do you just want to do it as a lay
25 person?

1 So that is what I meant when I said I
2 would have tried all avenues if I had received
3 a favourable counsel's opinion to get that
4 advocate to be standing up and doing it.

5 LORD RICHARDSON: Thank you for that
6 clarification.

7 MR MCAULEY: It wasn't my intention to --
8 I mean obviously, as I explain at the moment,
9 I am an unrestricted solicitor. It was never
10 my intention to get in a cab -- get in an
11 advocate's cab or to instruct him: listen, you
12 must do that. So that was never my intention
13 to use the cab system, because I mean today
14 I could have emailed an advocate and said: I am
15 an unrestricted solicitor, you have to be at
16 this hearing at this time and I've not done it.
17 So that was never my intention to do that.

18 LORD RICHARDSON: Yes, I do not think
19 you could insist on them appearing, but in any
20 event.

21 MR MCAULEY: Well, I am unrestricted
22 solicitor so it is my understanding that you
23 can. Well, maybe the counsel's opinion first.
24 They would need to read it and --

25 LORD RICHARDSON: No, I think the cab rank

1 rule, as I understand it, only applies if you
2 tender the fee in advance so you would have to
3 be prepared to pay for the counsel and then
4 you could insist.

5 MR MCAULEY: Right. I am just saying that
6 that wasn't my intention to say and I have not
7 said it to anyone since.

8 LORD RICHARDSON: That is helpful for that
9 clarification. Where does that leave us in
10 terms of your submissions on expenses?

11 MR MCAULEY: Yes, so that is what I was
12 saying. It wasn't in my thinking to think: oh,
13 I will just get a counsel's opinion, then I'll
14 stand up and self-represent. It was in my mind
15 I thought, right, I will get the counsel's
16 opinion first and then I will do everything
17 I possibly can to try and to see if that can in
18 some way facilitate the thing.

19 LORD RICHARDSON: Yes.

20 MR MCAULEY: Mr Anderson, I must put in
21 the record that I am bit concerned by your body
22 language there and you just need to be --

23 LORD RICHARDSON: Mr McAuley --

24 MR MCAULEY: -- impartial.

25 LORD RICHARDSON: -- please if you --

1 you have made your observation. I think it
2 would assist us all if you could take us
3 through the remainder of your submissions.

4 MR MCAULEY: That was the point I made at
5 the start, Mr Anderson, when I questioned your
6 appointment on the bench. I understand you are
7 a partner at Clyde & Co; is that correct?

8 MR ANDERSON: I'm sorry.

9 MR MCAULEY: Are you still a practising
10 solicitor?

11 MR ANDERSON: Yes.

12 MR MCAULEY: So you use The Faculty of
13 Advocates?

14 LORD RICHARDSON: Mr McAuley, I hesitate
15 to interrupt. First of all, I would be
16 grateful if you would direct your questions to
17 me unless you are responding directly to
18 something.

19 MR MCAULEY: Well, I am just saying that
20 as concerning that Mr Anderson is a practising
21 solicitor in Scotland, he will be using The
22 Faculty of Advocates and then he was quite
23 flippant towards me there.

24 LORD RICHARDSON: Mr McAuley, if I may
25 finish? We have the applications that we have

1 before us and what I suggest we do is you
2 complete your submissions and we can conclude
3 those hearings. If you have other issues you
4 wish to raise, then I suggest you do those
5 appropriately at the appropriate stage, but
6 I think the best use of our time and your time
7 now is for you to conclude your submissions on
8 costs.

9 MR MCAULEY: That is just to conclude that
10 point. It was the counsel's opinion that I was
11 seeking and then I was going to then see what
12 the future would have held after that, as
13 I say, with the Robson case that I have
14 referred to.

15 LORD RICHARDSON: Yes.

16 MR MCAULEY: So yeah, I think it was in
17 the public interest for this case for that to
18 be clarified that a restricted solicitor was
19 entitled to a counsel's opinion --

20 LORD RICHARDSON: Yes.

21 MR MCAULEY: -- given the importance of it
22 that if the practising certificate or committee
23 of the Law Society interferes with your
24 practising certificate, you can get a counsel's
25 opinion and pay for it on to find out on the

1 lawfulness of it or if you do go to the
2 Scottish Solicitors Disciplinary Tribunal and
3 you get a restriction put on it, you are
4 entitled to a counsel's opinion in the
5 lawfulness of that.

6 So it is getting a counsel's opinion early
7 and right away and just getting that done does
8 facilitate justice so I think it was -- I think
9 that judgment that we have here has established
10 an important point of public importance that
11 that is still open to restricted solicitors.
12 It's not a matter of once you're restricted,
13 you are ostracised completely from Faculty.

14 You are restricted but you have a
15 restricted level of access and I think it is
16 especially important because as I have led the
17 bench the evidence, it's 90% prosecution rates
18 for men in this disciplinary tribunal. So
19 given the mismatch there in terms of men are a
20 minority within the solicitor profession and it
21 is 90% men are prosecuted in the SSDT --

22 LORD RICHARDSON: I saw that argument.
23 I am not sure how that relates to the
24 restricted -- the application of the rule in
25 relation to those with restricted certificates.

1 Are there more men who have restricted
2 practising certificates than women?

3 MR MCAULEY: No. Well, what I am saying
4 is it's like the -- if it is the case that
5 restricted practising -- well, I would imagine
6 so, yeah, because that is the -- that is
7 basically when you get the restrictions put on
8 when you go to the disciplinary tribunal.

9 LORD RICHARDSON: I see.

10 MR MCAULEY: That is the reason that you
11 go to it, unless you're a returning solicitor,
12 which we wouldn't know.

13 LORD RICHARDSON: Yes.

14 MR MCAULEY: But in terms of that is how
15 you get restrictions put on your practising
16 certificate is through that disciplinary
17 tribunal so it certainly does look like that.

18 LORD RICHARDSON: That wasn't the case in
19 your case though.

20 MR MCAULEY: No mine was through because
21 I was a returning solicitor you have to apply
22 to the practising certificate.

23 LORD RICHARDSON: Yes. I wonder how far
24 we can take that without actually having
25 evidence before us in relation to exactly how

1 the gender balance lies in relation to those
2 points, but we have noted -- I note the point
3 you make.

4 MR MCAULEY: I mean I think it is a public
5 interest case here that it was important for
6 all those people it was established: listen,
7 you are not alone there, you can get a
8 counsel's opinion. You are restricted but not
9 bastardised basically. I think that
10 anti-bastardisation message is one of public
11 importance.

12 LORD RICHARDSON: Yes, you have made that
13 point, yes.

14 MR MCAULEY: Okay. The other thing as
15 well is that -- the second argument is that
16 expenses are only supposed to follow success
17 and conclusiveness of the pleadings. It is the
18 exception to the general rule that expenses are
19 made before the matter has been fully
20 determined. I mean this matter hasn't been
21 fully determined, because it's my understanding
22 that the -- as I explained earlier, the CAT has
23 reserved judgment on whether solicitors,
24 restricted solicitors, are entitled to
25 counsel's opinion. It's not actually said that

1 they agree with Lord Keen that restricted
2 solicitors are entitled to counsel's opinion.

3 The CAT has reserved judgment on it. So
4 I think when the CAT has reserved judgment, it
5 you shouldn't be making and entering a lot of
6 expenses, because if that -- say I do reraise
7 that case, it is -- it suggests that the CAT is
8 biased in terms of the strength of that
9 argument if it awards expenses before the
10 matter is finished. So I think the CAT should
11 really be waiting until we find out the answer
12 to that and it conclusively answers whether
13 restricted solicitor are entitled to counsel's
14 opinion and that is when the award of expenses
15 should be made.

16 Professor Rodger, the competition law
17 professor, described these as "David versus
18 Goliath". Well, we do not know who has won,
19 because it is not finished. So how can you
20 just go and line Goliath's pocket full of cash
21 when we still don't know who has won.

22 LORD RICHARDSON: I think the point that
23 is being made by the Faculty is that at the
24 moment we have decided that they won and
25 you say that we are wrong about that and that

1 is why you are seeking permission to appeal,
2 but there is no doubt as to the outcome of our
3 judgment. The reason you say -- you make the
4 point about the reserved judgment, I think
5 rightly or wrongly -- and you say of course
6 wrongly -- we say, well that argument wasn't
7 before us, so we make no ruling about it one
8 way or the other but I understand you argument.

9 MR MCAULEY: Okay. I do not think you can
10 say they have won. The game has not finished.
11 You may be think they are an elite.

12 LORD RICHARDSON: Sorry, Mr McAuley, I do
13 not know --

14 MR MCAULEY: Sorry, you can may be say
15 you think Faculty are an elite in this matter
16 but I mean it's not finished. So I mean you
17 can't say they have won. The final whistle
18 hasn't been blown yet in the game because there
19 are still issues to be resolved.

20 LORD RICHARDSON: Yes.

21 MR MCAULEY: So you can't pay them.
22 I mean, if you are playing the Champions League
23 of the Europa League you only get your money at
24 the end of the game if you have won.

25 LORD RICHARDSON: Yes.

1 MR MCAULEY: That is your -- or stopping
2 this game early because this is just so
3 dominant here. That is my position anyway.

4 LORD RICHARDSON: No, I understand it.

5 MR MCAULEY: The other thing is, is the
6 third point is that the competition --
7 the rules do state that the 2015 rules state
8 that competition law is complex and when there
9 is mixed success then that is to be reflected,
10 which I think there has been mixed success in
11 this which would be my third point.

12 The first part in respect of that is the
13 legal personality debate that we had which
14 I consider was one that I've won essentially in
15 clarifying that. Because if you look up
16 Faculty Services Limited at Companies House it
17 says, barristers at law for them, but it was
18 established in this case that they are not. If
19 you read the affidavits from Tony Graham and
20 Tony Lenehan they both state that
21 Faculty Services Limited isn't barristers at
22 law, that that is a services company. I have
23 the documentation here. I can submit that to
24 the CAT if necessary.

25 LORD RICHARDSON: I think we had that --

1 MR MCAULEY: Yes.

2 LORD RICHARDSON: -- before us when
3 we made --

4 MR MCAULEY: So I mean under company law
5 you are supposed to submit to the
6 Companies House the proper.

7 LORD RICHARDSON: Yes.

8 MR MCAULEY: So it has been established
9 that Faculty have sent wrong information to --
10 have sent wrong information to Companies House
11 in terms of the nature of the business.

12 LORD RICHARDSON: But if we view it
13 through the perspective of this litigation,
14 Mr McAuley, the reality is you originally sued
15 a company I think and there was a clerical
16 error with the name but when that was clarified
17 we refused, we dismissed your case. We struck
18 out your case in relation to the
19 Faculty Services Limited.

20 MR MCAULEY: Yes. As I say it was because
21 of the Faculty's error.

22 LORD RICHARDSON: Yes.

23 MR MCAULEY: So it is Faculty that made
24 the mistake there that the
25 Competition Appeal Tribunal want to correct

1 Faculty's mistake at Companies House.

2 LORD RICHARDSON: That is your argument.

3 Yes, no, so that is the first --

4 MR MCAULEY: The thing is, I mean there
5 has been another confirmation statement in
6 1 December 2015 and the Faculty have said again
7 that they are barristers at law.

8 LORD RICHARDSON: Yes.

9 MR MCAULEY: So I mean that is a trap
10 basically that Faculty Services Limited put at
11 Companies House that they are barristers at law
12 and then people sue Faculty Services Limited
13 rather than suing the Faculty of Advocates.
14 I mean that is -- that can't be allowed surely.

15 LORD RICHARDSON: Yes, I am not aware of
16 it being a common problem beyond your case,
17 Mr McAuley, but in any event I understand your
18 argument.

19 MR MCAULEY: Okay. The second one is as
20 well that Faculty tried to tell us that it
21 wasn't -- it didn't fall within section 18
22 because it wasn't a monopoly because of the
23 solicitor advocates that we have since
24 established that -- we have since established
25 that Faculty is a dominant organisation subject

1 to section 18.

2 LORD RICHARDSON: I do not think we have
3 made any ruling about that, Mr McAuley. The
4 merits of the -- of your argument about the
5 Faculty being in dominant position --

6 MR MCAULEY: So that has still not been
7 determined whether --

8 LORD RICHARDSON: It's not an issue, no.

9 MR MCAULEY: Okay, and the third point was
10 the one about the, was it Mr Forrester his name
11 was?

12 LORD RICHARDSON: Yes.

13 MR MCAULEY: So the Faculty opposed that,
14 so that has been --

15 LORD RICHARDSON: Did the Faculty oppose
16 that?

17 MR MCAULEY: Yeah, they did. So that has
18 been established that people who are existing
19 members of a club are not allowed to set in
20 litigation involving the Club and I think that
21 is -- that is a point of public importance for
22 Scotland because I mean that is surely
23 nonsense.

24 LORD RICHARDSON: It doesn't need to be a
25 matter of public importance for you to be

1 successful in this part of your argument
2 because you would just say you were successful
3 in that part so they shouldn't be entitled to
4 their costs of that part of the claim.

5 MR MCAULEY: Well, I think it is just one
6 to establish the mixed success.

7 LORD RICHARDSON: Yes, exactly.

8 MR MCAULEY: So...

9 LORD RICHARDSON: Yes.

10 MR MCAULEY: So, yes, the fourth one is is
11 -- so that is the three points, sir, that
12 I think it was.

13 LORD RICHARDSON: Mixed success.

14 MR MCAULEY: Yes, and at least two, two
15 points there. The first one in the legal
16 personality point that we have established that
17 through those affidavits that the
18 Companies House position was wrong and the
19 other point there in the fact that Faculty
20 members can sit in cases involving Faculty. So
21 that is two points that I think have a degree
22 of success on.

23 LORD RICHARDSON: Yes.

24 MR MCAULEY: The fourth point is as well
25 that there was no schedule of costs estimate

1 sent.

2 LORD RICHARDSON: Yes.

3 MR MCAULEY: I think that is -- it's
4 implied by that that they thought this was a
5 public important case by -- a case of public
6 importance by not sending that schedule of
7 costs estimates.

8 LORD RICHARDSON: Where do you find --
9 where is the obligation on them to have?

10 MR MCAULEY: It's not an obligation, it's
11 for you to take into account. It's --

12 LORD RICHARDSON: Is this in rule 104?

13 MR MCAULEY: Yes. Yes, it's schedule 104,
14 subsection 4(B).

15 LORD RICHARDSON: Yes.

16 MR MCAULEY: "Any schedule of account or
17 estimated costs filed by the parties."

18 LORD RICHARDSON: Yes. So you say because
19 they haven't provided a schedule of costs
20 you're saying that because I think -- if
21 I understand the Faculty's position -- the
22 account of expenses that they prepared they say
23 was in place of a schedule of costs.

24 MR MCAULEY: Oh, no, it is estimated costs
25 has not been sent. 4(B) specifically says

1 estimated costs. I mean it is standard
2 practice in the Employment Tribunal that if a
3 solicitor is up against their self-representing
4 party that they have to send an estimate of
5 their costs or else they are not entitled to
6 them as a general rule. They can make an
7 exception against that but the general rule is
8 if you are up against a self-representing party
9 you have to let them know in advance and send
10 them the estimated costs.

11 LORD RICHARDSON: Yes. I am not aware of
12 that being the practice before this tribunal.

13 MR MCAULEY: Yes.

14 LORD RICHARDSON: But I take your --

15 MR MCAULEY: I think it means the same
16 thing and that is -- I think it's important to
17 establish that in the future that if any person
18 is self-representing against solicitors they do
19 need to send them the estimated costs at the
20 start to say, listen this is going to cost you
21 money if we are getting involved in this.

22 LORD RICHARDSON: Yes.

23 MR MCAULEY: Which I think is an important
24 safeguard for justice and prevents the chill
25 effect.

1 LORD RICHARDSON: Yes. So that is your
2 fourth argument I think, isn't it?

3 MR MCAULEY: Yeah. The fifth point is
4 unreasonable behaviour by Faculty. I think it
5 was unreasonable behaviour by Faculty for now
6 I told them in these, as part of the exchange
7 of emails over me not getting the counsel's
8 opinion that I thought this was a breach of
9 competition law and then they automatically
10 went running off to the Scottish Legal
11 Complaints Commission to make a complaint about
12 me. I think that is unreasonable behaviour.
13 I mean they should have let the -- they should
14 have let the Competition Appeal Tribunal deal
15 with it first and foremost.

16 LORD RICHARDSON: What is the state, are
17 those proceedings still live?

18 MR MCAULEY: Yeah. So I mean it's, I have
19 had to deal with two sets of things at the same
20 time --

21 LORD RICHARDSON: Yes.

22 MR MCAULEY: -- in respect of that and
23 it causes a lot of stress. So I mean I do not
24 think that is the precedent that the
25 Competition Appeal Tribunal should be setting

1 that someone threatens a party with taking them
2 to the Competition Appeal Tribunal and then
3 they automatically run off and make a complaint
4 about them.

5 LORD RICHARDSON: Yes.

6 MR MCAULEY: I mean and the other thing as
7 well is the unreasonable behaviour of Faculty
8 with putting at Companies House that they are
9 barristers at law when they are not. I mean
10 under the Companies Act that is a criminal
11 offence. Can refer you to the -- can refer you
12 to the --

13 LORD RICHARDSON: Yes, we have that. You
14 do not need to take us to that reference.

15 MR MCAULEY: Yes, the Companies Act in
16 that is pretty clear. So I mean I think if a
17 person's committing -- I mean and as I say
18 1 December 2025 again they have again submitted
19 their own confirmation statement despite
20 Tony Lenehan and Tony Graham who are directors.
21 I definitely know Tony Graham is saying, oh
22 they are not barristers. They have submitted
23 in other confirmation statements stating
24 they are.

25 LORD RICHARDSON: Yes.

1 MR MCAULEY: That is unreasonable
2 behaviour. I mean that is distressing for me
3 to think that they can do that and get away
4 with that you know.

5 LORD RICHARDSON: That is not --

6 MR MCAULEY: -- (overspeaking).

7 LORD RICHARDSON: -- before us.

8 I appreciate you are raising it as unreasonable
9 behaviour. I wonder if the nub of that dispute
10 turns on the way in which those descriptors of
11 services that you are required to provide in
12 the Companies House register are used and
13 you're construing it in one way and it would
14 appear the Faculty is construing it another
15 way; but as I said I understand your submission
16 and I do not think we can take it any further.

17 MR MCAULEY: I think it is -- I don't
18 think it is because I have got the rules here.
19 There are regulations and stuff.

20 LORD RICHARDSON: It's interesting if this
21 is a criminal, if this is criminal behaviour
22 and it has been going on for years that no-one
23 has done anything about it, isn't it?

24 I suggest you report it to the police if you
25 consider it's a criminal matter but that is not

1 a matter we can deal with.

2 MR MCAULEY: Well, I think it's in the
3 grounds of unreasonable behaviour.

4 LORD RICHARDSON: Absolutely. So we can
5 hear -- I can hear and understand your argument
6 and I do so.

7 MR MCAULEY: The final point, as I said,
8 was the self-representation --

9 LORD RICHARDSON: Yes.

10 MR MCAULEY: -- by Lord Keen and Ms Breen.
11 My position is basically that if Faculty are in
12 court they do have to appoint solicitor
13 advocates to represent them and that is who the
14 solicitors should have appointed if they wanted
15 to get paid.

16 LORD RICHARDSON: Yes.

17 MR MCAULEY: There is the case of if I can
18 find it here, yes, of Andrew Smith QC from
19 2019. That is an Inner House case.

20 LORD RICHARDSON: Is that in our...?

21 MR MCAULEY: No, it is not. It came to my
22 attention later. It is an Inner House case
23 number 19 of 20 -- from the year 20, is it?

24 LORD RICHARDSON: 20 and?

25 MR MCAULEY: 2020 and it is the case

1 number 19.

2 LORD RICHARDSON: Can you give me -- do
3 you have the neutral citation? So it's 2020?

4 MR MCAULEY: CSIH 19. If I could refer
5 you to paragraph 34 in that. It is
6 Lord Pentland that gave the leading judgment
7 there. He says:

8 "We consider that the commission is
9 entitled to regard this legitimate once
10 complaints concerning the nature of
11 the appellant's relationship with his clients
12 and whether he had acted in a manner that was
13 independent of them in line with his
14 professional responsibilities as an advocate."

15 [As Read]

16 So that is what I am saying. To be an
17 advocate -- to be acting as an advocate you
18 need to be independent. So I mean it's pretty
19 obvious from what Lord Keen and Ms Breen have
20 stated to the court that they are continuing
21 members of Faculty that they are not
22 independent. I mean, how is Ms Breen and
23 Lord Keen supposed to give independent advice
24 to Roddy Dunlop when he is the one that
25 regulates misconduct by them? So it is pretty

1 obvious to me, and the law is very well
2 settled, that whether it is self-representing
3 people in an organisation that represent the
4 organisation then they are not entitled to
5 expenses.

6 LORD RICHARDSON: Yes.

7 MR MCAULEY: So I mean Roddy Dunlop and
8 Tony Graham, and all the other Office Bearers,
9 could have theoretically represented them but
10 that wouldn't have been in their capacity as
11 advocates. That would have been as
12 Office Bearers in management.

13 LORD RICHARDSON: Yes.

14 MR MCAULEY: And that is what I think
15 so...

16 LORD RICHARDSON: No, I have that from
17 your argument too.

18 MR MCAULEY: I know there is the argument
19 that the solicitors say, well we are entitled
20 to get paid but if solicitors instruct the lay
21 people -- which is essentially what Ms Breen
22 and Lord Keen have been acting as here -- then
23 they are not entitled to get paid for that. So
24 that is my position in respect of that.

25 LORD RICHARDSON: Yes, thank you.

1 MR MCAULEY: That is all six points.

2 LORD RICHARDSON: That concludes your
3 arguments on --

4 MR MCAULEY: Yes.

5 LORD RICHARDSON: Just one point that
6 you have not touched on in your written
7 submissions but I just wanted to understand
8 what your argument was or your position was.
9 You'll be aware, I hope, that the tribunal can
10 do one of two things. If we are not persuaded
11 by your arguments in relation to expenses --
12 and we are persuaded by Ms Breen and we do
13 decide to award costs -- we can either remit
14 the matter to the auditor or we can deal with
15 it ourselves on a summary basis. Do you have a
16 view as to which of those courses we should
17 take? You may have no --

18 MR MCAULEY: No. Not off the top of my
19 head I don't, no.

20 LORD RICHARDSON: That is helpful,
21 thank you.

22 MR MCAULEY: I would -- as I said in the
23 application, I generally would prefer it to be
24 the CAT rather than the auditor because I do
25 not feel the auditor is independent of Faculty.

1 I mean it shares its offices with Faculty and
2 nobody wants to give a judgment against Faculty
3 really. They are all too scared to for fear of
4 repercussions. So I would prefer it to be the
5 CAT that dealt with it.

6 LORD RICHARDSON: I suppose the other
7 factors to bear in mind if we deal with it on a
8 summary basis that we would simply -- on the
9 basis that we reserve judgment today and go
10 away and think about the arguments we have
11 heard and come up with a written judgment -- we
12 would then make an order and there will be no
13 further submissions in relation to the costs.
14 If it goes to the auditor in the normal way
15 there would then be an opportunity for you to
16 go through it.

17 MR MCAULEY: I think it's better just for
18 the President Justice Ross to deal with it.

19 LORD RICHARDSON: It will be dealt with
20 us, by this tribunal.

21 MR MCAULEY: It says in the rules that it
22 can be the President who can determine it. So
23 I would make the request. I would want him to
24 deal with it.

25 LORD RICHARDSON: Yes.

1 MR MCAULEY: Because he can then decide if
2 expenses should be de minimis or if they should
3 be full expenses. So I would -- I think it's
4 better just to just keep everything because
5 obviously if I don't -- if I am not successful
6 here I will be appealing to the Inner House and
7 beyond. So I would rather that just everything
8 just stayed with the Competition
9 Appeal Tribunal rather than getting the
10 Court of Session involved on it.

11 LORD RICHARDSON: Yes, so that is helpful.
12 Thank you, I understand your position.

13 Ms Breen, just to clarify. I noticed
14 you nodding, but just at the relevant point,
15 I am correct to understand that the Faculty
16 opposed Mr McAuley's motion in relation to
17 the -- your application in relation to the
18 recusal of Mr Forrester, is that correct?

19 MS BREEN: That is correct, my Lord. If
20 I can just clarify, of course the defender's
21 position that there has been no mixed success
22 in the substantive determination of this
23 dispute --

24 LORD RICHARDSON: Yes.

25 MS BREEN: -- and so expenses should

1 follow success. I would have no difficulty if
2 the tribunal was minded to carve-out the, if
3 I can call it, constitution procedure related
4 to the appointment of Mr Forrester and
5 subsequently Mr Bankes from any award of
6 expenses.

7 LORD RICHARDSON: Yes. No, thank you.

8 MR MCAULEY: Could I just answer that
9 point, please? So that's Faculty are insisting
10 upon the expenses when they have admitted that
11 they give the wrong name to -- that they give
12 the wrong name to Companies House.

13 LORD RICHARDSON: Yes, that is their
14 position.

15 MR MCAULEY: (Overspeaking) unreasonable
16 behaviour.

17 LORD RICHARDSON: Yes, and I understand
18 your position in that regard.

19 MR BANKES: Nothing further.

20 MR ANDERSON: No, thank you.

21 LORD RICHARDSON: We are very grateful to
22 you, Mr McAuley and Ms Breen. Thank you for
23 your submissions both orally and in writing.
24 We'll reserve judgment. Thank you.

25 (12.28 pm)

(the hearing concluded)

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24

1

2