Neutral citation [2025] CAT 18

Case No: 1672/5/7/24

IN THE COMPETITION APPEAL TRIBUNAL

11 March 2025

Before:

THE HONOURABLE MR JUSTICE ROTH
(Acting President)

BETWEEN:

PATRICK HENRY MCAULEY

Claimant

- v -

FACULTY OF ADVOCATES SERVICES LTD

Defendant

(the "Proceedings")

Determined on the papers

RULING (CONSTITUTION OF TRIBUNAL)

A. INTRODUCTION

1. On 28 August 2024, Mr McAuley commenced these proceedings under s. 47A of the Competition Act 1998 ("CA") naming as defendant, Faculty of Advocates Services Ltd.

2. In short summary, Mr McAuley contends that the refusal by the Faculty of Advocates ("the Faculty") to provide services to a Scottish solicitor who does not have an unrestricted practising certificate is an abuse of dominance contrary to s. 18 CA; and/or that the rule or practice of the Faculty that prohibits advocates in Scotland from accepting instructions from a Scottish solicitor who does not have an unrestricted practising certificate is contrary to s. 2 CA.

3. By a Defence dated 24 January 2025, it is stated that there is no such company known as Faculty of Advocates Services Ltd. However, there is a company called Faculty Services Ltd ("FSL") which is controlled by the Faculty and which provides services to members of the Faculty. It is not clear whether Mr McAuley intends to bring these proceedings against FSL or against the Faculty. For the purpose of this ruling, it is inappropriate to rely on the distinction between them and I will assume that he seeks relief against either or both.

4. By order made on 4 February 2025, with the consent of the Faculty and FSL and without objection from Mr McAuley, it was directed pursuant to rule 18 of the Competition Appeal Tribunal Rules 2015 that the proceedings are to be treated for all purposes as proceedings in Scotland. That means that any appeal from a decision the Tribunal may make in these proceedings goes to the Court of Session: s. 49(3) CA.

5. On the same day, the parties were informed by the Tribunal that the Tribunal panel constituted to hear the case comprised: Lord Richardson (chair), Mr Ian Forrester KC and Mr Peter Anderson. They were told that:

   (a) Lord Richardson is a member of the Faculty, having practised as an advocate before his appointment as a judge, but that he has no current involvement in the administration or policy setting of the Faculty;

(b) Mr Forrester is a member of the Faculty and a currently practising advocate. He is also a member of the Faculty's Complaints Committee, which is responsible for the determination and disposal of conduct complaints remitted to the Faculty by the Scottish Legal Complaints Commission in accordance with the Faculty's disciplinary rules; but he is not otherwise involved in the administration or policy setting of the Faculty; and

(c) Mr Anderson is a Scottish solicitor, and is not a member of the Faculty.

6. On 7 February 2025, Mr McAuley wrote to say that he objected to Lord Richardson being a member of the Tribunal hearing this case on the basis of his being a "former member of the Respondent". He stated:

> "The Faculty of Advocates is a group in Scottish society who swear blind loyalty to each other to allow each to gain the most success in society possible by any means possible. Lord Richardson would be sitting on the bench with an emotional connection to the Respondent & justice not being seen to be done."

7. On 9 February 2025, Mr McAuley wrote to object also to Mr Forrester and Mr Anderson sitting on the case, apologising that he had not raised that objection in his previous letter. As regards Mr Forrester, the objection is because he is a member "of the Respondent" and "heavily involved in their administration." As regards Mr Anderson, the objection is because he is a member of the Law Society of Scotland ("LSS") which is "a party related to the case" and that Mr McAuley has or had cases against the LSS, making Mr Anderson "emotionally involved too."

8. Mr McAuley says that in the "exceptional circumstances" of this case it should be heard by an all-English panel.

9. By letter from their solicitors of 19 February 2025, the Faculty and FSL rejected Mr McAuley's objections which it submitted were unfounded. Mr McAuley, who is acting in person, replied the same day responding to their letter, in which he indicated that his concern is about "subconscious bias" rather than conscious bias.

B. PRINCIPLES

10. The relevant test for determination of a challenge to the constitution of a court or tribunal is well-established. It was set out by the House of Lords in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, by Lord Hope of Craighead (with whom the other members of the Appellate Committee agreed) at [103]:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

As Lord Hope observed, that test brought the common law in line with the jurisprudence under Art. 6 of the European Convention on Human Rights.

11. As would be expected, the test applies equally to proceedings in Scotland as to proceedings in England and Wales: *Helow v Home Secretary* [2008] UKHL 62, [2008] 1 WLR 2416. In that case, Lord Hope of Craighead said this, at [2]-[3]:

> "The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
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> Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

C. DISCUSSION

12. It is necessary to consider the objections to each of the three panel members separately.

(a) Lord Richardson

13. As stated above, Lord Richardson is a member of the Faculty. As I understand it, he is not a "member" of FSL and he would no longer be receiving services from FSL.

14. Although Lord Richardson was previously a practising member of the Faculty and subject to its rules when he was a practising advocate, that ceased to be the case on his appointment as a judge in February 2021. Most judges of the Court of Session were previously advocates and therefore remain for that reason members of the Faculty. If that alone were sufficient to preclude them from hearing a case where the Faculty was a party, and as most such cases would be brought in the Scottish courts, it would be difficult for any case involving the Faculty to be heard. Moreover, I believe that all current judges of the Inner House are members of the Faculty and the Inner House hears the appeals from a decision of the Outer House. However, the Court of Session has heard and determined cases involving the Faculty without any suggestion that the judges were affected by actual or apparent bias: see e.g. the recent opinion of the Inner House in *Faculty of Advocates v The Judicial Appointments Board for Scotland* [2025] CSIH 5. See also *The Scottish Legal Complaints Commission v Murray and McClusker* [2022] CSIH 54, where the Faculty intervened in the proceedings, supporting the position of the respondents, but the Inner House in its opinion held in favour of the petitioner.

15. The context of the present case is important. As explained above, it is a challenge to a particular rule or practice which prevents advocates from accepting instructions from a solicitor who has a restricted practising certificate. That rule has no application to Lord Richardson, nor has he any involvement in the Faculty as regards the promotion or enforcement of that rule. Although Mr McAuley asserts that the members of the Faculty "swear blind loyalty to each other", no facts are relied on to support that assertion, which is strongly rebutted by the solicitors for the Faculty. To the contrary,

Lord Richardson has taken a judicial oath "to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will."

16. I recognise that the judicial oath alone is not a sufficient basis for displacing a perception of subconscious bias if there are strong factors pointing the other way. However, here, I consider that for the reasons set out above there are no such factors. A professional judge, by his or her experience, is accustomed to put aside any personal inclinations they may have when deciding cases: see per Lord Roger of Earlsferry in *Helow* at [23]. In my judgment, the fair-minded observer, informed of Lord Richardson's position and the nature of this case, would not have any concern that Lord Richardson might be biased, consciously or unconsciously, in deciding whether the impugned rule or practice of the Faculty was contrary to competition law.

(b) Mr Ian Forrester KC

17. Mr Forrester is in a rather different position. He is a practising member of the Faculty and therefore subject to the rule at issue. He also has a limited involvement in the administration of the Faculty through his membership of the Complaints Committee.

18. Although personally I have no doubt that Mr Forrester, as a very respected former judge of the EU General Court, would decide the issues in this case entirely objectively, I think, on balance, that the fair-minded observer would be concerned that in these circumstances there could be a risk of unconscious bias.

(c) Mr Peter Anderson

19. Mr Anderson is not now, nor has he ever been, a member of the Faculty. Although Mr McAuley has brought proceedings against the LSS, those proceedings are entirely distinct from the present case. They are not proceedings under competition law before the Tribunal and self-evidently do not relate to this rule or practice of the Faculty.

20. There are around 10,000 solicitors in practice in Scotland. It can reasonably be assumed that there is a variety of views among those solicitors about various aspects of legal practice in Scotland. I do not consider that simply because Mr Anderson is a solicitor

any fair-minded and informed observer would consider that he is emotionally involved in the case such that there is any real possibility that he would be affected by bias in deciding it.

D. CONCLUSION

21. For the reasons set out above, the objections raised by Mr McAuley to Lord Richardson and Mr Anderson are rejected, but Mr Forrester will be replaced as a member of the Tribunal panel hearing this case.

22. There are two further points. First, I consider that there is no basis for Mr McAuley's request for an "all-English tribunal". The objections he raises are to the connections of the particular individuals to the legal profession in Scotland. There can be no possible basis for objection to having Scottish members of the Tribunal who are not Scottish lawyers or judges. Indeed, I consider that for proceedings before the Tribunal which are proceedings in Scotland, there are strong grounds for at least the majority of the Tribunal panel hearing the case to be Scottish. It may be that Mr McAuley does not appreciate that there are Scottish "ordinary members" of the Tribunal who are not lawyers.

23. Secondly, I note that Mr McAuley says in his letter of 19 February 2025 that if he had a pro-bono Advocate appearing for him then he would have no objection to the appointed panel but that he has been forced to represent himself. However, it is open to Mr McAuley to instruct a solicitor who could engage an Advocate to represent him. The fact that he is challenging the rule which prevents him from instructing an Advocate himself is no reason for not instructing a solicitor who could in turn instruct an Advocate to advance that challenge and present the case on Mr McAuley's behalf.

The Hon Mr Justice Roth
Acting President of the Competition Appeal Tribunal

Charles Dhanowa CBE, KC (Hon) Date: 11 March 2025
Registrar