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IN THE COMPETITION

Case No. : 1672/5/7/24

APPEAL
TRIBUNAL

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

Tuesday 29th April 2025

Before:

The Honourable Lord Richardson
Peter Anderson
Charles Bankes

(Sitting as a Tribunal in Scotland)

BETWEEN:

Patrick Henry McAuley

Claimant

v

Faculty of Advocates Services LTD

Defendant

A P P E A R A N C E S

Patrick Henry McAuley On Behalf of Himself

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

Tuesday, 29 April 2025

Case management conference

(10.57 am)

LORD RICHARDSON: Good morning, Mr McAuley.

MR MCAULEY: Morning, Judge Richardson. Good morning,
Judge Bankes. Good morning, Judge Anderson.

LORD RICHARDSON: I thought it might be helpful to begin by
just making clear that so far as the Tribunal are
concerned, this case management hearing is principally
concerned with procedural matters, but nonetheless there
are a number of motions before us that, if it is
appropriate, we will deal with as well.

Before I go any further, Mr McAuley, I understand from
reading the papers that you are currently signed off your
work; is that correct?

MR MCAULEY: Yes.

LORD RICHARDSON: Yes. So I just wanted to -- if, for
whatever reason, during the course of the hearing you
require a short break, please tell us and we will do our
best to accommodate that. Do you understand?

MR MCAULEY: Yes. I should be fine.

LORD RICHARDSON: Right. The second thing I noticed,
Mr McAuley, from my consideration of the documents was
certainly at one point, you had had a difficulty in
gaining sight of the documents lodged by the defender

1 and I just wanted to confirm that you had had sight of
2 the documents, in particular the skeleton argument and
3 the proposed agenda, that had been lodged by the
4 defendant; is that right?

5 MR MCAULEY: Yes.

6 LORD RICHARDSON: Yes, thank you.

7 Now, given that the principal purpose of this hearing is
8 procedural, so far as the Tribunal was concerned, we are not
9 particularly attracted by either side seeking to rehearse the
10 substantive merits of their positions. Having considered the
11 agendas lodged by both parties, and we are grateful to both
12 sides for lodging those, the first issue that we would like
13 to be addressed is the question of amendment, Mr McAuley.

14 MR MCAULEY: Yes.

15 LORD RICHARDSON: Now, I understand, Mr McAuley, that you
16 seek to amend the identity of the party that you are
17 pursuing these proceedings against from the Faculty of
18 Advocate Services Ltd. I understand that. Am

19 I correct --

20 MR MCAULEY: Yes.

21 LORD RICHARDSON: -- that you still wish to amend?

22 MR MCAULEY: Yes.

23 LORD RICHARDSON: So then the question is which party do you
24 want to amend that to, if you understand my question.

25 MR MCAULEY: Yes.

1 LORD RICHARDSON: Because you will have seen from the
2 defences that have been lodged on behalf of Faculty of
3 Advocate Services Ltd -- albeit I think those defences
4 make clear that they have been lodged essentially on
5 behalf of two parties: on the one hand, Faculty
6 Services Ltd and, separately, the Faculty of Advocates.
7 So those are two separate entities. Do you understand
8 that, Mr McAuley?

9 MR MCAULEY: Yes.

10 LORD RICHARDSON: Lord Keen, can I just confirm: am I right
11 in my understanding that the defences that are lodged
12 and indeed your instruction before us today is on behalf
13 of both of those entities? Is that right?

14 LORD KEEN: My Lord, I am instructed on both -- on behalf of
15 both Faculty Services Ltd and the Faculty of Advocates,
16 as anticipated by the written response to the claim
17 intimated on 25 January of 2025. We have refused to
18 consent to the amendment to the claim which was sought
19 by Mr McAuley --

20 LORD RICHARDSON: Yes.

21 LORD KEEN: -- for very particular reasons, given the party
22 he wanted to name. That is all I will say.

23 LORD RICHARDSON: I understand that and I will come back to
24 you, if I may, Lord Keen, but what I wanted to be clear
25 about to begin with from Mr McAuley is to understand

1 which of those two entities you wish to pursue.

2 Can I just check, Mr McAuley, is your microphone turned
3 on?

4 MR MCAULEY: Yes.

5 LORD RICHARDSON: That does not seem to be making any
6 difference. Perhaps the ...

7 MR MCAULEY: Yes. Well, it may be helpful to start by
8 saying the reason that I did it to Faculty of Advocate
9 Services Ltd was I was filling out the forms, so I had
10 my computer screen up, so half of it was the
11 Companies House information and half was the document
12 that I was typing.

13 LORD RICHARDSON: Yes, yes.

14 MR MCAULEY: So basically, I got -- I basically put the name
15 of the address into the name of the company.

16 LORD RICHARDSON: Yes.

17 MR MCAULEY: But it was Faculty Services Ltd which
18 I intended to.

19 LORD RICHARDSON: Yes.

20 MR MCAULEY: The reason that I intended to do that is
21 because their classification of industry -- their
22 classification of industry at Companies House is
23 barrister services.

24 LORD RICHARDSON: Yes, I have seen that and the Tribunal
25 understand that. The point I want to be very clear

1 about is you will have seen from the documents that are
2 lodged by on behalf of both Faculty Services Ltd and the
3 Faculty of Advocates that so far as they are concerned,
4 there is -- Faculty Services Ltd is a services company
5 and the regulatory body, so the body that is responsible
6 for the rules which, as I understand it, you are seeking
7 to challenge, is the Faculty of Advocates. That is what
8 they say.

9 Now, I understand you may take a different view or you
10 may not, but what I want to understand first of all, just to
11 confirm, is that you are clear that these are two separate
12 and different bodies. Do you understand that?

13 MR MCAULEY: I did read that carefully and look it up. So
14 there is a Faculty of Advocates registered as a charity
15 with the Scottish Charities Commission --

16 LORD RICHARDSON: Yes.

17 MR MCAULEY: -- but as a point of law, they are required to
18 say what their purposes are and it does not say -- it
19 lists six purposes and none of them are barrister
20 services.

21 LORD RICHARDSON: Right. So --

22 MR MCAULEY: I think under the rules, I might be able to add
23 another party. I mean, if it was going to come to that,
24 I would like to have Faculty Services Ltd there because
25 I have seen them in the court provide barrister

1 services. It says barristers at Companies House, and
2 I perhaps could add Faculty of Advocates as well and
3 just make it two parties and then we could address that
4 point.

5 LORD RICHARDSON: So if I understand correctly, what you are
6 now seeking to do, and this would be a change slightly
7 from -- well, not slightly; it would be a change from
8 what you have said thus far, but in writing. But what
9 you are proposing now is you would like to amend to
10 introduce both Faculty Services Ltd and the Faculty of
11 Advocates; is that correct?

12 MR MCAULEY: Well, yes, I mean, if the respondents agree
13 that if -- on that plea in law for the -- they organise
14 it that no party is liable for expenses, I would be
15 happy to do that and we could just -- if -- I mean, if
16 the parties --

17 LORD RICHARDSON: Well, that -- you are -- sorry, sorry.

18 MR MCAULEY: If the panel found that as a justiciable issue
19 that it might be of Faculty of Advocates and Faculty --
20 I mean, the reason I do not want to put that in is
21 because under section 9 of the Companies Act, it says
22 you must declare who the lawful purpose is, and I think
23 it is under -- under section, I think it is, 836, it is
24 a crime to -- if you do not say the purpose lawfully.

25 LORD RICHARDSON: Yes.

1 MR MCAULEY: So that is why I just do not understand what
2 they are saying. I have not seen the other
3 organisation -- another organisation called the Faculty
4 of Advocates that has the purpose of saying, "We provide
5 barrister services". So I do not understand their
6 arguments, but if the panel want to make it, I will make
7 the --

8 LORD RICHARDSON: It is not what we want --

9 MR MCAULEY: That is fine. I will then -- I will make the
10 application and we could add another party or add
11 Faculty Services Ltd --

12 LORD RICHARDSON: So -- well, first of all, obviously,
13 Mr McAuley, we have to -- you will appreciate that we
14 have to take this in stages. So the first thing that
15 I want to do is to understand -- what the Tribunal wants
16 to do is to understand what you are asking us and then
17 of course I will require to find out what the position
18 of Lord Keen is in relation to that matter and then the
19 Tribunal will have to make a decision.

20 But just to be clear, you are seeking now to amend
21 Faculty of Advocate Services Ltd to both Faculty Services Ltd
22 and the Faculty of Advocates; is that correct?

23 MR MCAULEY: Yes, yes.

24 LORD RICHARDSON: Thank you very much. Well, I will hear
25 from Lord Keen now. Thank you.

1 Lord Keen, so you have heard now what Mr McAuley's
2 amended position is. What is the position of those that you
3 represent?

4 LORD KEEN: My Lord, insofar, but only insofar as Mr McAuley
5 seeks to introduce the Faculty of Advocates as the
6 subject of this claim --

7 LORD RICHARDSON: Yes.

8 LORD KEEN: -- we would not oppose that --

9 LORD RICHARDSON: Yes.

10 LORD KEEN: -- albeit we are not expressly consenting.

11 LORD RICHARDSON: No, I understand.

12 LORD KEEN: Under rule 32, it is for the Tribunal to give
13 permission for such amendment and in that context, and
14 having regard to rule 32(2)(b), I would not take any
15 issue with the suggestion that Mr McAuley made a genuine
16 mistake --

17 LORD RICHARDSON: Yes.

18 LORD KEEN: -- with regard to the identification of
19 a limited company.

20 LORD RICHARDSON: Yes.

21 LORD KEEN: Nevertheless, I would object to an amendment
22 that also brought in Faculty Services Ltd --

23 LORD RICHARDSON: Yes.

24 LORD KEEN: -- for the reasons that we have sought to set
25 out. That is just a service company. That position is

1 supported by the two affidavits that have been lodged.

2 LORD RICHARDSON: Yes.

3 LORD KEEN: Pursuant to section 120 of the Legal Services
4 Act 2010, it is quite clear that the party responsible
5 for regulating the Faculty of Advocates and the
6 profession of advocates and their professional practise
7 is the Court of Session, which may in turn exercise that
8 either by way of the Lord President or by way of the
9 Faculty of Advocates itself.

10 LORD RICHARDSON: Yes, and you are referring now, I think,
11 to the copy of -- well, to the Legal Services (Scotland)
12 Act 2010, a copy of which helpfully you handed up.

13 LORD KEEN: Indeed.

14 LORD RICHARDSON: May I take it that Mr McAuley has also
15 been --

16 LORD KEEN: He was provided with that this morning, my Lord.

17 LORD RICHARDSON: Thank you.

18 LORD KEEN: It was just to make clear that if the amendment
19 is to introduce the Faculty of Advocates, so be it.

20 LORD RICHARDSON: Yes. No, that is very helpful. Well, let
21 me just clarify what Mr McAuley's position.

22 Now, Mr McAuley, you have heard what Lord Keen said.

23 MR MCAULEY: Yes --

24 LORD RICHARDSON: Just a moment. Let me make my point first
25 of all, if I may.

1 Lord Keen is saying that the Faculty of Advocates would
2 not oppose an amendment to introduce the Faculty of Advocates
3 and they say that the Faculty of Advocates is the body which
4 is responsible for regulating advocates and advocacy services
5 in terms of the 2010 Act.

6 Now, the issue really for you becomes quite a sharp one,
7 which is whether you would insist -- and it is a matter
8 entirely for you; the Tribunal cannot advise you -- on that
9 part of your amendment which seeks to introduce Faculty
10 Services Ltd as a defender, because at the moment, they are
11 not a defender --

12 MR MCAULEY: Yes.

13 LORD RICHARDSON: -- because of the issue with the name. We
14 understand how that has come about, but the question is:
15 are you insisting on introducing them or not?

16 MR MCAULEY: Yes. Well, I think it is -- Lord Keen referred
17 to the section 32.

18 LORD RICHARDSON: Yes.

19 MR MCAULEY: I think he referred to section 32(2) in the
20 genuine error, but that one only applies if it is
21 time-barred, which it is not time-barred because it is
22 the --

23 LORD RICHARDSON: Well, sorry to --

24 MR MCAULEY: Under schedule 8A of the Competition Act, the
25 prescription period is five years and the limitation

1 period is six years.

2 LORD RICHARDSON: I think you may have --

3 MR MCAULEY: So --

4 LORD RICHARDSON: Sorry to interrupt you, Mr McAuley. I am
5 very sorry to interrupt you, but I just wonder if you
6 have misunderstood what Lord Keen -- because he is not
7 opposing --

8 MR MCAULEY: Yes. Basically, my position is that under
9 section 32(1), I would seek to amend the Faculty of
10 Advocate Services Ltd to Faculty Services Ltd.

11 LORD RICHARDSON: So you are still insisting on that?

12 MR MCAULEY: Yes. Then under section 30 -- regulation 28,
13 "Additional Parties", I would make the application to
14 add Faculty of Advocates, which is --

15 LORD RICHARDSON: Very well. That is helpful. That is
16 clear. So if I understand, you are still insisting on
17 Faculty Services Ltd being a party; is that correct?

18 MR MCAULEY: Yes.

19 LORD RICHARDSON: Yes, and you also wish to add Faculty of
20 Advocates.

21 Now, Lord Keen, if I understand correctly, you do not
22 oppose Faculty of Advocates being introduced, but you would
23 oppose -- or you would seek to insist on your strikeout
24 motion in relation to Faculty Services Ltd; is that correct?

25 LORD KEEN: Exactly so, my Lord.

1 LORD RICHARDSON: Very well. (Pause)

2 Very well. So what the Tribunal will do is that we will
3 allow the amendment to introduce Faculty Services Ltd and we
4 will allow the Faculty of Advocates itself to be added as
5 a defender to the proceedings. But on that basis, I think
6 the next matter that the Tribunal wishes to consider is
7 Lord Keen's strikeout motion in relation to Faculty
8 Services Ltd.

9 Now, Mr McAuley, you have seen the basis of that set out
10 in the skeleton argument and in the defences. Are you in
11 a position to deal with that today?

12 MR MCAULEY: My Lord, yes. The reason I do defend that is
13 because of the cases submitted with the Glasgow
14 City Council one --

15 LORD RICHARDSON: Well, we will come on to it. We will take
16 it in stages.

17 MR MCAULEY: -- which will be perfect for me.

18 LORD RICHARDSON: We will take it in stages, Mr McAuley, and
19 I will give you a chance to make your submissions in
20 just a moment, but I just want to be clear that that is
21 the road that we are going down, if you see what I mean.
22 All right?

23 MR MCAULEY: Yes.

24 LORD RICHARDSON: Now, Lord Keen, am I correct to understand
25 that in light of the Tribunal's ruling on the question

1 of amendment and the introduction of the new party, you
2 do insist on your motion in relation to Faculty
3 Services Ltd; is that correct?

4 LORD KEEN: My Lord, I would insist on it in respect of both
5 parties --

6 LORD RICHARDSON: I understand that.

7 LORD KEEN: -- just to be clear.

8 LORD RICHARDSON: I understand that and we will come back to
9 the second part of that, but the point that the
10 Tribunal -- the agenda that the Tribunal wishes to
11 follow is to deal first of all with the question of
12 Faculty Services Ltd, which raises a discrete point.

13 LORD KEEN: I am content to deal with it in that order,
14 my Lord.

15 LORD RICHARDSON: Just so you understand, Mr McAuley, what
16 I am going to do then and the Tribunal is going to do is
17 we will hear from Lord Keen on the strikeout motion
18 insofar as it relates to Faculty Services Ltd and then
19 we will give you an opportunity to respond at that
20 point. Do you understand?

21 MR MCAULEY: Yes.

22 LORD RICHARDSON: Yes, thank you.

23 Lord Keen.

24 LORD KEEN: My Lord, in a sense, it is quite difficult to
25 separate out the grounds for the strikeout motion as

1 against FSL, Faculty Services Ltd, and the Faculty of
2 Advocates, but I will say something quite shortly about
3 Faculty Services Ltd --

4 LORD RICHARDSON: Yes.

5 LORD KEEN: -- which is that the original registration of
6 the company was, of course, dictated by the list of
7 companies allowed in terms of the register and it seems
8 that back in 1971, the heading taken was "barrister
9 services".

10 LORD RICHARDSON: Yes.

11 LORD KEEN: Essentially, as set out in the affidavits that
12 have been produced, FSL is a service company of the
13 Faculty of Advocates which has no role in the
14 professional practise, conduct or regulation of those
15 who hold the office of advocate.

16 LORD RICHARDSON: Yes, and your authority for that is?

17 LORD KEEN: Section 120 and section 121 of the 2010 Act,
18 my Lord --

19 LORD RICHARDSON: Yes.

20 LORD KEEN: -- where there is no reference whatsoever to
21 Faculty Services Ltd.

22 I am aware that Mr McAuley has alluded to the fact that
23 at least in one instance where an amicus had been appointed,
24 he appeared in the Law Report as an advocate with the name
25 Faculty Services Ltd following.

1 First of all, this claim is not about the appointment or
2 otherwise of an amicus.

3 LORD RICHARDSON: Yes.

4 LORD KEEN: That, in my view, is an end of the matter.

5 LORD RICHARDSON: Yes.

6 LORD KEEN: But I would add this. My understanding is that
7 where an amicus is to be appointed, the matter is
8 presented to the Dean of the Faculty of Advocates.

9 LORD RICHARDSON: Yes.

10 LORD KEEN: He will then refer the matter to the clerks of
11 Faculty Services Ltd.

12 LORD RICHARDSON: Yes.

13 LORD KEEN: Where an amicus is appointed, there is, of
14 course, no instructing agent --

15 LORD RICHARDSON: Yes.

16 LORD KEEN: -- but because the arrangement has been made by
17 the clerks, it is listed as Faculty Services Ltd.

18 LORD RICHARDSON: Yes.

19 LORD KEEN: I do not see how myself that raises an issue
20 with which we are concerned pursuant to section 2 or
21 section 18 of the Competition Act, which is the basis of
22 the two claims that have now been directed at Faculty
23 Services Ltd and the Faculty of Advocates.

24 I am, however, entirely prepared to address those claims
25 insofar as they are directed against the relevant statutory

1 bodies responsible for matters of regulation/professional
2 practise in respect of those who hold the office of advocate.

3 LORD RICHARDSON: Yes. Well, thank you. Is there anything
4 else you wanted to --

5 LORD KEEN: Nothing more, my Lord.

6 Do the members of the Tribunal have any questions? No.
7 Thank you.

8 MR ANDERSON: Perhaps just one, Lord Keen, if I may. Can
9 you help the Tribunal and perhaps even Mr McAuley to
10 understand: is it essential for someone who is
11 practising as an advocate to subscribe to and use the
12 services of Faculty Services Ltd or can they operate
13 independently of Faculty Services Ltd?

14 LORD KEEN: A number of members of the Faculty of Advocates
15 contract out of the service company obligation and
16 therefore have clerks who are not employed by Faculty
17 Services Ltd, and that has been the position for more
18 than ten years. So there are members of Faculty. There
19 are individuals who hold the office of advocate, with
20 all the rights and privileges that go with it, who are
21 not linked in any sense whatsoever with Faculty
22 Services Ltd, but are subject to the regulation
23 provisions made by the Court of Session, as delegated to
24 the Lord President of the Court of Session or to the
25 Faculty of Advocates.

1 MR ANDERSON: Thank you.

2 LORD RICHARDSON: Thank you. Now, thank you, Lord Keen.

3 Now, Mr McAuley.

4 MR MCAULEY: Does Lord Keen know how many are not members of

5 the organisation? It is just for competition law, the

6 exact percentage does matter.

7 LORD RICHARDSON: Well, I am not sure it necessarily --

8 I think the first question you would need to address is

9 what you say is the relevance of Faculty Services Ltd to

10 your claim.

11 MR MCAULEY: Yes. Well, Faculty Services Ltd, as alluded to

12 earlier, Lord Keen stated that the company was

13 registered in 1971 and that was the industry

14 classification back then, but every year now you have to

15 do a confirmation statement under section 853 of the

16 Companies Act. 853BA it is.

17 LORD RICHARDSON: Just so I understand it, would I be right

18 in understanding that your entire argument depends on

19 the registration at Companies House; is that right?

20 MR MCAULEY: Yes. Well, as I say, that is why I did it to

21 that company, because you can see the names of the

22 directors and all advocates.

23 LORD RICHARDSON: Yes.

24 MR MCAULEY: The vast majority of advocates in Scotland are

25 members of that company.

1 LORD RICHARDSON: Yes.

2 MR MCAULEY: As I say, if that was -- I mean, the types of
3 services that Lord Keen is talking about that company
4 providing, in any company, you do not just have to list
5 one purpose. You can list several. So all of these
6 other purposes that he is referring to, none of them are
7 listed there, so --

8 LORD RICHARDSON: But if I can just pin you down somewhat
9 just so I understand your position, your complaint
10 before this Tribunal is as to the way in which the
11 provision of services by an advocate are regulated; is
12 that correct? Because you say that you should be
13 treated as a solicitor and that you should have had
14 access as a solicitor to advocacy services; is that
15 right --

16 MR MCAULEY: Yes.

17 LORD RICHARDSON: -- in a nutshell?

18 MR MCAULEY: Yes, yes.

19 LORD RICHARDSON: I appreciate there is more to it than
20 that, but in a nutshell, that is it.

21 MR MCAULEY: Yes.

22 LORD RICHARDSON: Now, if that is correct, the point that
23 Lord Keen is making is to say that Faculty Services Ltd
24 is not responsible in any way for making the rules or
25 enforcing the rules --

1 MR MCAULEY: Yes.

2 LORD RICHARDSON: -- which you are complaining about. Do
3 you understand that? Do you understand the argument?

4 MR MCAULEY: Well, I do understand the argument.

5 LORD RICHARDSON: Yes.

6 MR MCAULEY: It is just, as I say, I can see here the
7 Faculty of Advocates is a charity with a number.

8 LORD RICHARDSON: Yes.

9 MR MCAULEY: It has trustees. As I say, I mean, it is not
10 necessarily a complaint about conduct I am making. It
11 is more just I need someone that is familiar that has
12 done the devilling and have the skills, because it does
13 remind me a bit of being almost -- an advocate, it is
14 a bit like a teacher. Like it is -- you could have
15 completed a degree in maths or whatever. You still need
16 to do teacher training --

17 LORD RICHARDSON: Yes.

18 MR MCAULEY: -- so that you know how to educate the pupils.
19 It is --

20 LORD RICHARDSON: I do not want to stop you, Mr McAuley.
21 I wonder if we are getting a little bit far from the
22 point. The issue here is that section 120 of the Legal
23 Services (Scotland) Act is quite clear, is it not? It
24 says that the responsibilities of regulation are -- of
25 advocates are provided by the court and by the Faculty

1 of Advocates, and there is no reference to Faculty
2 Services Ltd there, is there?

3 MR MCAULEY: Yes, although the point I am trying to make is
4 if -- I mean, I have a copy of the Charities Commission
5 here if you want it.

6 LORD RICHARDSON: I wonder if there is a further confusion
7 here, Mr McAuley, and correct me if I am wrong. Are you
8 aware that the Faculty of Advocates itself is a legal
9 entity --

10 MR MCAULEY: Yes. Well --

11 LORD RICHARDSON: -- and has been a legal entity for
12 hundreds of years?

13 MR MCAULEY: Yes. Well, that is what I am saying.

14 LORD RICHARDSON: It is not the charitable status.

15 MR MCAULEY: What is its legal penalty then? Is it
16 a statutory body? Is --

17 LORD RICHARDSON: No. It is a unique legal personality. It
18 has a legal -- its legal status is created -- its
19 corporate legal personality arises from prescription.
20 It is unique in Scots law.

21 MR MCAULEY: It is just hard for me to get my head around
22 that concept. Like, the way it looks to me looking at
23 arguments is the Faculty of Advocates is a charity,
24 which -- all of those things as regards to conduct, they
25 are all listed as being done by that charity; letting

1 people in. If people do not conform to their teaching,
2 they are disciplined, etc.

3 LORD RICHARDSON: Yes.

4 MR MCAULEY: Then it -- I mean, it seems hard for me to
5 understand the amount that advocates charge per hour
6 that that can be done through a charity, but --

7 LORD RICHARDSON: I do not think it is.

8 MR MCAULEY: I just cannot get my head around the legal
9 personality. I have -- when you are taught at uni, you
10 are taught someone is either a citizen, a partnership,
11 an LLP, a company. I just cannot see -- I do not follow
12 the point.

13 LORD RICHARDSON: No. Very well. Well --

14 MR MCAULEY: It is -- as I say, I mean, I have read that
15 here it says "admitting persons to ... prescribing the
16 criteria for the admission, regulating professional
17 practise, conduct and discipline". That is all to do
18 with if an advocate does not do the services well --

19 LORD RICHARDSON: Yes, yes.

20 MR MCAULEY: -- which is different when -- it is different
21 from actually providing the services. I mean, I can
22 understand that. I mean, that charity does that, so it
23 is -- or it says it is doing that and --

24 LORD RICHARDSON: Very well.

25 MR MCAULEY: The second point that he made -- that Lord Keen

1 made about an amicus, that would be fine; I mean, if it
2 was Welsh, for example, or one of the members that is
3 there.

4 LORD RICHARDSON: Yes.

5 MR MCAULEY: That is all I really want; someone that I can
6 explain the case to and they are familiar with the
7 procedure for standing up and educating the judges,
8 because I have done this before. It is very difficult
9 when you are actually on your feet to educate the
10 judges, because I have made points and they have just
11 not gone in and they have just gone -- so it is
12 extremely difficult, and that is what I am saying. I do
13 not think that is in the judge's interest or the
14 parties' because, as I say, it reminds me of, like, the
15 good teachers at school. They can actually get the
16 point to stick, whereas other people, it just does not.

17 It is not necessarily your knowledge, but the people that
18 are members of that company have done the devilling, so they
19 know how to explain it to you. They can read your body
20 language, if you are understanding it, etc.

21 LORD RICHARDSON: Yes.

22 MR MCAULEY: They did that for a year. So that is what
23 I was saying. Like, with regards to the amicus, the
24 amicus would be fine because that is just a skill set
25 and --

1 LORD RICHARDSON: Yes, I think you might -- I am sorry to
2 interrupt you again, Mr McAuley, but I wonder if you are
3 slightly misunderstanding what Lord Keen was talking
4 about. I think Lord Keen was talking about the
5 reference that you have made to a case which refers to
6 an advocate being as of Faculty Services Ltd and he is
7 saying that relates to the amicus procedure, which is
8 where the court appoints someone to come and argue
9 a point for the benefit of the court. So that is quite
10 a different situation from the one you are dealing with.

11 But what I am keen to understand is -- and we have
12 clearly read what you have said in your written documents.
13 What other points do you want to make in relation to the
14 Faculty Services Ltd issue beyond that which you have set out
15 in your written documents? Because that is what I am keen --
16 I think the Tribunal are keen to focus on at the moment.

17 MR MCAULEY: I mean, that is basically -- as you said there,
18 the court wanted to appoint someone when there was
19 nobody there.

20 LORD RICHARDSON: Yes.

21 MR MCAULEY: The court went to Faculty Services Ltd.

22 LORD RICHARDSON: Yes. Well, I think what Lord Keen said --

23 MR MCAULEY: So I am following the lead of the --

24 LORD RICHARDSON: No, I do not think that is quite right,
25 Mr McAuley. I think what Lord Keen said is that the

1 Faculty -- the court went to the Dean of Faculty, who is
2 head of the Faculty.

3 MR MCAULEY: Yes.

4 LORD RICHARDSON: Then, through that process, the Faculty
5 engaged with Faculty Services Ltd in order to facilitate
6 the services of an advocate for the court. So that is
7 a slightly different situation.

8 But what I am keen to understand for the moment is what
9 your argument is?

10 MR MCAULEY: Yes, that --

11 LORD RICHARDSON: So what else do you want --

12 MR MCAULEY: I guess what my argument does come down to if
13 you look at the remedy I am seeking at the end, all
14 I basically want is --

15 LORD RICHARDSON: Yes.

16 MR MCAULEY: I mean, I have quite -- I basically just want
17 someone that can -- that is skilled and skilled on their
18 feet, skilled in oral argument, skilled in teaching.

19 LORD RICHARDSON: Yes, as I have said already, Mr McAuley --

20 MR MCAULEY: If it means getting -- I mean, as long as I can
21 potentially get that. I mean, what I do not want to
22 happen is I let Faculty Services Ltd go and then,
23 I mean, there is even potentially appeals from here and
24 then a judge says, "Oh, you have sued the wrong
25 company".

1 LORD RICHARDSON: Yes, absolutely. I understand that.

2 MR MCAULEY: I think it would be safe -- I think it would be
3 safe just to have both --

4 LORD RICHARDSON: Yes.

5 MR MCAULEY: -- in case -- just basically, as I say, because
6 the documents do say "barrister".

7 LORD RICHARDSON: Yes.

8 MR MCAULEY: So, I mean, Lord Keen might be right on that
9 point with regards to its legal personality, etc.

10 LORD RICHARDSON: Yes.

11 MR MCAULEY: But I think it is safe for us just to keep both
12 in case there is any --

13 LORD RICHARDSON: Right. I understand that.

14 MR MCAULEY: Even if Judge Bankes or Judge Anderson or
15 yourself maybe sit down and think, "Oh, was that right?"
16 Because sometimes that does happen.

17 LORD RICHARDSON: Yes.

18 MR MCAULEY: You know, there is a point that you think is
19 right at the time and then later, you go, "Was it?"

20 LORD RICHARDSON: Yes, yes.

21 MR MCAULEY: You know, so I can see Lord Keen's arguments
22 are very good in the sense that -- that prescription one
23 and the unique personality, which I had not heard of.

24 LORD RICHARDSON: Yes.

25 MR MCAULEY: So I think we should just keep both and if that

1 turns out to be correct, then so be it and, as I say,
2 hopefully the remedy will be at the end of it all, I can
3 get someone to stand on their feet and make the
4 arguments for me.

5 LORD RICHARDSON: Yes. Well, thank you. Thank you.

6 Are there any questions for Mr McAuley? No. Thank you.

7 Now, Lord Keen, perhaps you can help with this. I was
8 struggling slightly with the precise nature of the Faculty of
9 Advocates' legal personality, and that is a question that
10 Mr McAuley has raised and he has pointed to this charitable
11 registration and also Faculty Services. Can you help us with
12 what the precise basis of the Faculty's legal personality is?

13 LORD KEEN: My Lord, it is the subject of not inconsiderable
14 debate --

15 LORD RICHARDSON: Yes.

16 LORD KEEN: -- for at least the past 100 years, but in
17 a nutshell, my Lord, the Faculty of Advocates is
18 an unincorporated association.

19 LORD RICHARDSON: Does it have legal personality?

20 LORD KEEN: As an unincorporated association, it does have
21 legal personality.

22 Could I add one further point?

23 LORD RICHARDSON: Yes.

24 LORD KEEN: Insofar as I appear on behalf of the Faculty of
25 Advocates, we are prepared to accept and let it be

1 recorded that insofar as Mr McAuley has any claims
2 arising under section 2 or section 18 of the
3 Competition Act --

4 LORD RICHARDSON: Yes.

5 LORD KEEN: -- pertaining to the professional practise,
6 conduct or instruction of counsel in Scotland who have
7 been admitted to the office of advocate, that claim can
8 properly be laid at the door of the Faculty of
9 Advocates.

10 LORD RICHARDSON: Yes. That is very helpful. Thank you,
11 Lord Keen.

12 Mr McAuley, did you understand what Lord Keen just said?
13 So essentially, what he is saying is -- I think he is seeking
14 to set your mind at rest that insofar as, as you put it, it
15 might later transpire that for whatever reason, as yet
16 unknown, that Faculty Services was the correct body and the
17 Faculty of Advocates was not, the Faculty is accepting
18 responsibility essentially for any such claim insofar as it
19 arises under section 2 or section 18 of the Act.

20 Would you be content in those circumstances simply to
21 proceed against the Faculty? I mean, of course, the hearing
22 is being transcribed anyway, but we would note that.

23 MR MCAULEY: As long as -- yes, as long as I have that
24 guarantee --

25 LORD RICHARDSON: Yes.

1 MR MCAULEY: -- that it is not going to come back to bite
2 me, then I would be happy with that. Yes, that is fine.

3 LORD RICHARDSON: Yes, yes.

4 MR BANKES: Could I ask only two questions?

5 LORD RICHARDSON: Please.

6 MR BANKES: First, as one who is not familiar with the
7 Scottish legal system, could you explain to me the
8 relationship between the Faculty and its members and the
9 extent to which the members are liable for the liability
10 of the Faculty, or is it entirely separate from the
11 advocates who belong to the Faculty?

12 Secondly, does it have a balance sheet and assets so that
13 were Mr McAuley to succeed in his claim for damages, there
14 would be something from which he could be paid?

15 LORD KEEN: Answering both questions, my Lord, as
16 an unincorporated association, all members have
17 unlimited liability.

18 MR BANKES: But he does not need to include in the claim
19 form the members? The Faculty is separate from the
20 members.

21 LORD KEEN: Indeed.

22 Secondly, the Faculty does have a balance sheet and it
23 does actually maintain one of the copyright libraries of the
24 United Kingdom, albeit the non-legal texts have by trust been
25 handed over to the National Library of Scotland at its

1 foundation in 1925.

2 If you have an opportunity to go into Parliament Hall,
3 you will see at least one very striking sculpture of
4 Duncan Forbes of Culloden, which is one of the more
5 significant assets of the Faculty. But it has a more than
6 sufficient balance sheet to meet any liabilities that could
7 arise out of the present claim.

8 MR BANKES: More importantly, if necessary, Mr McAuley could
9 proceed against its members --

10 LORD KEEN: Absolutely.

11 MR BANKES: -- rather than force the nation of Scotland to
12 sell its treasures.

13 LORD KEEN: It is not the nation of Scotland to sell
14 treasures, my Lord; it would be the Faculty of
15 Advocates --

16 MR BANKES: To sell the nation's treasures.

17 LORD KEEN: Whether it is the nation's treasures --

18 MR BANKES: I just want to be very clear. I just want -- on
19 behalf of Mr McAuley's behalf, I want to clarify both of
20 those points.

21 LORD KEEN: Yes. There is no question about the ability of
22 the Faculty of Advocates and its members to meet any
23 claim arising out of this.

24 MR BANKES: You have given him the assurance that he can
25 proceed against the Faculty without also proceeding

1 separately against its members?

2 LORD KEEN: Yes, my Lord.

3 MR BANKES: Yes, okay.

4 MR MCAULEY: Would that make it a partnership under the
5 Partnership Act 1890?

6 LORD RICHARDSON: No. I think, if I may encourage you,
7 Mr McAuley, to -- I think Patterson v Bates has a useful
8 section setting out the -- and also Professor Walker's
9 book on the Scottish legal system has a useful section
10 on the unique status that the Faculty holds within the
11 Scottish legal system.

12 Very well. But just to be clear, in light of that, in
13 light of Mr -- the questions of the Tribunal clarifying the
14 position and in light of the position as set out by
15 Lord Keen, are you content, therefore, that we proceed in
16 these proceedings on the basis that it is yourself and the
17 Faculty of Advocates alone?

18 MR MCAULEY: Yes, on the basis of that, that is fine.

19 LORD RICHARDSON: Very well.

20 MR MCAULEY: I would also -- sorry to interject. I did also
21 make the application that I realise now it was on the
22 wrong basis. I think there can be interim -- interim
23 orders -- orders provided.

24 LORD RICHARDSON: Yes, we will come back to that. I think
25 what I would be grateful for you to point to in that

1 regard is what the legal basis for that is because the
2 Tribunal -- but we will come back to that because before
3 we get there, I think, therefore -- let me just
4 confirm -- the Tribunal is content essentially to
5 proceed to grant the strikeout insofar as it applies
6 simply to Faculty Services Ltd in light of the position
7 as set out by Lord Keen. We will grant that.

8 That means we then move on, as the next issue that the
9 Tribunal was keen to understand how we will deal with is,
10 Lord Keen, your related strikeout motion in relation to the
11 remaining claim against the Faculty of Advocates. Now, in
12 that regard, the Tribunal's understanding of the position
13 was, and no criticism is intended in this regard, that you
14 had essentially set out the position in relation to the
15 amendment and then the position in relation to Faculty
16 Services Ltd and, to some extent, at a third alternative,
17 which is what the position was in relation to the case
18 against the Faculty of Advocates.

19 What the Tribunal was keen to understand and would be
20 minded -- the way the Tribunal would be minded to deal with
21 this is to require the Faculty to set out fully in writing
22 its position in relation to why the claim against the Faculty
23 ought to be struck out, because it seemed to the Tribunal you
24 had touched upon one or two arguments. In no way suggesting
25 those arguments are not fully sufficient, if you are correct,

1 to dispose of the action, but what the Tribunal is very keen
2 to avoid is a situation in which all of the arguments which
3 are going to deal with strikeout that you may have in
4 relation to the claim as it is presently framed are set out
5 in one submission by the Faculty to which Mr McAuley would
6 have an opportunity to respond and we would fix a hearing for
7 the disposal of that.

8 That was the provisional view the Tribunal reached,
9 having considered the papers. What is your position in that
10 regard?

11 LORD KEEN: Well, as your Lordship has noted, we put in
12 almost an addendum to our skeleton directed to the
13 possibility that the claim would be directed against the
14 Faculty of Advocates --

15 LORD RICHARDSON: Yes.

16 LORD KEEN: -- but was not originally directed against the
17 Faculty of Advocates and nor was it proposed that it
18 should be directed against them by way of an amendment
19 pursuant to rule 32.

20 LORD RICHARDSON: Yes.

21 LORD KEEN: So I accept that the explanation given there is
22 relatively brief.

23 LORD RICHARDSON: Yes.

24 LORD KEEN: I would venture that quite a short point can be
25 made in support of the strikeout application on behalf

1 of the Faculty of Advocates.

2 LORD RICHARDSON: Yes, okay.

3 LORD KEEN: But if the Tribunal is minded to have a fully
4 worked submission in writing --

5 LORD RICHARDSON: Yes.

6 LORD KEEN: -- from the Faculty with Mr McAuley being given
7 the opportunity to respond in writing, if that is what
8 he chooses to do --

9 LORD RICHARDSON: Yes.

10 LORD KEEN: -- then I am in your Lordship's hands, because
11 this is a procedural hearing.

12 I would merely observe that pursuant to rule 41, of
13 course, strikeout can be at any stage of the proceedings.

14 LORD RICHARDSON: Yes.

15 LORD KEEN: Pursuant to rule 4, there is a principle of
16 attempting to dispose of matters on a just and
17 proportionate basis. But, having said that, I recognise
18 that in terms of rule 4(1)(a), there is also an issue
19 about equality of footing. It does strike me that
20 perhaps, having regard to that, the course of action
21 proposed by the Tribunal will be more appropriate,
22 inasmuch as it would give Mr McAuley clear and ample
23 opportunity to respond to a case now made by the Faculty
24 of Advocates against whom he had not originally
25 anticipated directing his claim.

1 LORD RICHARDSON: Indeed. The other matter that occurred to
2 the Tribunal was that, and I think Mr McAuley has
3 touched upon in his skeleton and certainly in the
4 further clarification to his skeleton, that there are
5 issues potentially that go beyond the identity of the
6 defender and go into questions of remedy and, as it
7 were, into the way that the claim is currently framed.

8 Now, what the Tribunal is keen to have focused at this
9 stage, in written submissions, would be insofar as the
10 Faculty take issue with that, we think it would be of
11 assistance both to the Tribunal, and indeed to Mr McAuley not
12 least, to have those matters articulated, such that they can
13 be resolved one way or the other at this hearing that we are
14 discussing, rather than having a situation in which, as it
15 were, arguments are dealt with on a salami-slicing basis,
16 which would seem less satisfactory for a number of reasons.

17 So what the Tribunal is keen to do is to encourage the
18 Faculty to set out all of the arguments it wishes to insist
19 upon in support of its strikeout motion in one document, as
20 it were, thus to enable Mr McAuley to have an opportunity to
21 respond to those if he so wishes, and then for us to have
22 a hearing at which those matters can be ventilated.

23 LORD KEEN: It may be that it comes back to one
24 fundamental --

25 LORD RICHARDSON: It may be.

1 LORD KEEN: -- point, my Lord. But I hear what my Lord
2 says, and clearly this is a procedural hearing and I am
3 in the Tribunal's hands as to how they want to deal with
4 this matter. As I have previously observed, I am
5 conscious of the principle under rule 4 of ensuring that
6 there is equality, as it were, of footing of parties
7 before this Tribunal, and I would not want to be seen to
8 be taking some advantage, if I can put it in those
9 terms, by moving a motion today that Mr McAuley might
10 not feel he was fully prepared to respond to.

11 LORD RICHARDSON: Yes. No, thank you, Lord Keen.

12 Now, Mr McAuley, you have heard the discussion I have had
13 with Lord Keen, and what I was explaining there was that the
14 Tribunal's provisional view was that, in relation to the case
15 as we now have it, which is your case against the Faculty of
16 Advocates, that rather than try and deal with the arguments
17 that the Faculty want to make at this stage, partly because,
18 as Lord Keen has said, they were touched upon but they were
19 not fully fleshed out in the skeleton argument for various
20 reasons; what the Tribunal is minded to do is to allow
21 a certain period of time for the Faculty to set out its
22 position in writing and then to allow you an opportunity to
23 respond, and thereafter to -- well, we will fix the hearing
24 now, but thereafter there would be a hearing at which we
25 could deal with those matters. Are you content that we

1 proceed on that basis or do you have an alternative
2 suggestion?

3 MR MCAULEY: Yes, I noted Lord Keen mentioned in the
4 equality of arms thing and the issue, and under
5 regulation 24 there is -- the court has the power to
6 make interim orders, which if they are in the public
7 interest, if it is protecting the public interest. So
8 I mean, if Lord Keen consented as well, I would be happy
9 to have an advocate or an amicus curiae represent or
10 make the submissions in this case and I could sit as
11 the -- I mean, I will do them as well, it is not
12 a problem, but I do think it is in the public interest
13 for there to be an advocate or an amicus curiae as
14 an interim order, and then you can maybe decide at the
15 end of the judgment this was a one-off.

16 LORD RICHARDSON: Yes.

17 MR MCAULEY: Because it is very difficult when you are the
18 person that is doing it, because it is impossible not to
19 become emotional. So it is more like you can make your
20 emotional arguments almost to your advocate, which is
21 almost like crude oil and then they can refine them and
22 then they can put them in a way that is effective.

23 LORD RICHARDSON: Let us deal with this in stages,
24 Mr McAuley. The first one, the first question is how we
25 are going to deal with defender's position to strike out

1 your case. So we will deal with that first of all. As
2 I understood you, what you just told me, you are quite
3 content that we proceed on that basis, on the basis that
4 I have explained: in other words, we would allow the
5 defender a period of time, we would allow you a period
6 of time, and we would fix a hearing at which those
7 matters can be addressed. Are you content we proceed on
8 that basis?

9 MR MCAULEY: Yes, that is fine.

10 LORD RICHARDSON: We will come back to the question of any
11 motion you wish to make on interim orders. We will come
12 back to that.

13 Lord Keen, in terms of timing, how much time would you
14 require to prepare written submissions in this regard?

15 LORD KEEN: I would seek a period of four weeks, my Lord.

16 LORD RICHARDSON: Yes, very well. Thank you.

17 Now, Mr McAuley, how much time would you wish to have to
18 respond? So we are talking essentially at the end of May you
19 will have written submissions from the Faculty. How much
20 time would you wish to respond?

21 MR MCAULEY: Two weeks is fine.

22 LORD RICHARDSON: What I am going to do, Mr McAuley, is I am
23 going to allow you four weeks, I think, because I think
24 for various reasons we may be looking, in terms of when
25 we try and find a hearing, there will be time to fit

1 is most convenient for everyone, that is fine. Like in
2 terms of meetings, I know getting schedules to meet and
3 everything, that is not a problem if it is ...

4 LORD RICHARDSON: Just a moment. (Pause)

5 I think we can maybe move it to the 14th, if that might
6 be easier.

7 Lord Keen, would either you or, if you are not available,
8 would --

9 LORD KEEN: My Lord, if I am not available, counsel will be
10 available on that date.

11 LORD RICHARDSON: Thank you. Very well, so we will proceed
12 on that basis, then. The Faculty will be given
13 four weeks to set out the full basis upon which it
14 insists on its motion for strikeout of the claim against
15 it. Thereafter, Mr McAuley will be given four weeks to
16 respond, and we will fix a hearing for 15 August. The
17 order we issue -- the 14th.

18 LORD KEEN: I think we said 14 August.

19 LORD RICHARDSON: The order we issue will include provision
20 for the lodging of skeleton arguments and for the bundle
21 of authorities and documents insofar as they are relied
22 upon.

23 Now, Mr McAuley, the one matter that insofar as
24 the Tribunal understands remains is your motion for interim
25 orders.

1 MR MCAULEY: Yes.

2 LORD RICHARDSON: Now, the difficulty we have with that
3 motion is you only gave notice of it essentially in your
4 most recent document. What we are minded to do is to
5 give you, as it were, four weeks to set out the basis
6 upon which you would insist on interim orders and the
7 Faculty four weeks to respond thereafter. So we will
8 deal with that issue as well in the event that the
9 strikeout motion is unsuccessful. Are you content we
10 proceed on that basis?

11 MR MCAULEY: Yes, that is great.

12 LORD RICHARDSON: Excellent.

13 Lord Keen, are you content?

14 LORD KEEN: I am, my Lord. Just to clarify, what
15 I understand my Lord anticipates is a written statement
16 of case which will then be answered by Mr McAuley and
17 thereafter, in preparation for the hearing, a separate
18 skeleton; or is he envisaging that it should be the
19 skeleton which represents the case that is going to be
20 presented? I am content with either.

21 LORD RICHARDSON: Yes.

22 LORD KEEN: I think it would be more appropriate to deal
23 with it on the latter basis.

24 LORD RICHARDSON: I agree.

25 LORD KEEN: I just want to be clear.

1 LORD RICHARDSON: I agree. I think you are quite right to
2 seek that correction. I think what the Tribunal is
3 looking for is a fully set out argument.

4 LORD KEEN: Yes.

5 LORD RICHARDSON: So you are right. So whether in fact on
6 reflection whether we need further skeletons in advance
7 of the hearing, that may unnecessary.

8 MR BANKES: One document is fine.

9 LORD RICHARDSON: Yes, very well.

10 MR BANKES: And one document (inaudible).

11 LORD RICHARDSON: Do you understand as well, Mr McAuley?
12 Perfect.

13 MR MCAULEY: Yes.

14 LORD RICHARDSON: I am grateful to you, Mr McAuley, and also
15 to you, Lord Keen. Are there any other issues that we
16 can usefully deal with this afternoon, or does that
17 conclude the hearing? Mr McAuley, from your part?

18 MR MCAULEY: That is everything. Thank you.

19 LORD RICHARDSON: Thank you.

20 LORD KEEN: Only one matter, which is I would invite
21 the Tribunal to reserve all questions of expenses.

22 LORD RICHARDSON: Yes.

23 Mr McAuley, are you content we do that?

24 MR MCAULEY: Yes.

25 LORD RICHARDSON: We will reserve all questions of expenses.

1 Thank you very much. Thank you.

2 (12.03 pm)

3 (Hearing concluded)

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