Neutral citation: [2017] CAT 10

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1249/5/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

26 May 2017

Before:

THE HON. MR JUSTICE ROTH
(President)
WILLIAM ALLAN
PROFESSOR STEPHEN WILKS

Sitting as a Tribunal in England and Wales

B E T W E E N:

SOCRATES TRAINING LIMITED

Claimant

- v -

THE LAW SOCIETY OF ENGLAND AND WALES

Defendant

Heard at the Rolls Building on 8 – 11 November 2016

JUDGMENT

APPEARANCES

Mr Philip Woolfe (instructed by Mr Bernard George) appeared on behalf of the Claimant.

Ms Kassie Smith QC and Ms Imogen Proud (instructed by Norton Rose Fulbright LLP) appeared on behalf of the Defendant.

INTRODUCTION

1. The Conveyancing Quality Scheme ("CQS") is a scheme operated by the defendant ("the Law Society") which provides a form of accreditation for firms of solicitors engaged in residential conveyancing. For several years, the CQS has incorporated an element of mandatory training, including training in mortgage fraud and anti-money laundering ("AML"). The claimant ("Socrates") is a provider of training courses, including training in AML for lawyers. Socrates contends that the requirement under the terms of the CQS that members of the scheme must obtain these training courses exclusively from the Law Society is an abuse of a dominant position contrary to the Chapter II prohibition under the Competition Act 1998 ("CA"). Further or in the alternative, Socrates claims that this requirement in the terms whereby solicitors become members of the CQS constitutes an anti-competitive agreement contrary to the Chapter I prohibition in the CA.

2. The claim was filed on 4 April 2016. By order of 16 May 2016, the Tribunal directed that the issue of liability should be determined separately and in advance of any question of the quantum of Socrates' damages in the event that it succeeds in its claim. Further, and pursuant to the same order, this is the first case before the Tribunal to proceed to trial under the fast-track procedure under rule 58 of the Tribunal Rules. As a result, there has been no general disclosure but the two parties gave very limited, specific disclosure as directed by the Tribunal and otherwise appended the documents on which they sought to rely to the statements from their witnesses. The proceedings have also been subject to cost-capping pursuant to rule 58(2)(b).

THE PARTIES

3. The Law Society is the professional body for solicitors in England and Wales, operating under a Royal Charter granted in 1845. It states on the home page of its website that:

> "We represent and support our members, promoting the highest professional standards and the rule of law."

4. In addition to its representative functions, the Law Society operates

commercially in various ways. It has developed and operates a number of voluntary accreditation schemes for which participating firms of solicitors pay an annual subscription fee. The Law Society's other commercial activities include the provision of online training courses and publishing.

5. The regulatory functions previously carried out by the Law Society were transferred to the Solicitors Regulatory Authority ("SRA") as a consequence of the Legal Services Act 2007.

6. Socrates is a provider of online training. It was established in 2003, primarily to provide training to law firms, and its annual turnover is now about £750,000. It was set up by Mr Bernard George, who is himself a solicitor and was for 12 years the director of training and development at a City of London law firm. Mr George is the managing director of Socrates and its driving force, and it has four other employees. For the first three years of Socrates trading, its only product was a course in AML for law firms. From 2007 it has offered a distinct AML course for accountancy firms. It now offers 14 different courses, including a distinct AML course for international law firms (i.e. commercial law firms with an international client base), most of them targeted at solicitors' firms, which account for almost 80% of its clients. The individual courses may comprise several modules.

7. As of 13 July 2016, 441 firms subscribe to Socrates' general course in AML for law firms, which is its best-selling product. Mr George estimated that this AML for law firms course and the AML for international law firms course (which has 35 subscribers) together account for about half of its turnover. In this judgment, reference to Socrates' AML course will be to the general AML for law firms course, save where otherwise expressed.

THE TRIAL

8. With the assistance of Counsel for both sides, the trial was completed in four days. Each side adduced two factual witnesses and called one economist, whose expert evidence as previously directed by the Tribunal was confined to the questions of market definition and dominance. The parties also submitted various analyses based on data of CQS members and subscribers to Socrates'

AML course, all directed to the question of the effect on Socrates of the mandatory training in the CQS. For Socrates, these analyses were prepared by Mr George himself, with some outside assistance on the handling of databases. For the Law Society, they were prepared by its economic expert who gave evidence explaining them.

9. Socrates' factual witnesses were Mr George himself and Mr Ian Hamilton. Mr George was cross-examined in some detail. He is understandably proud of what he has achieved in building up Socrates and clearly has a strong sense of grievance at what he regards as the unfair practice of the Law Society with whom small firms have to compete in the offer of training courses to solicitors. We found that the strength of his feelings did not get in the way of his giving honest evidence. He also tried in good faith to present the various analyses of subscriber data although he was evidently struggling accurately to analyse the disparate data in a consistent and meaningful way.

10. Mr Hamilton is a conveyancing partner in a general practice firm in Stevenage. His firm's largest areas of practice are residential conveyancing, wills and probate. The firm became CQS accredited in July 2013 and has been re-accredited every year since. It was a subscriber to Socrates AML training programme for some years up to 2012, when it let its subscription lapse, and renewed its subscription in January 2015. Mr Hamilton's evidence in his witness statement concerned the effect of the obligation to take training from the Law Society on his firm's demand for training from Socrates. Mr Hamilton is in the process of retiring from practice and he said that he had felt somewhat concerned about giving evidence against the Law Society and that he might not have done so if he were not retiring. His evidence was unchallenged and he therefore did not attend trial.

11. The Law Society's factual witnesses were Mr Jonathan Smithers and Mr Graham Murphy. Mr Smithers was President of the Law Society for the year ended July 2016 and had previously served on a large number of its committees, including the Project Board that was originally responsible for developing what became the CQS, and thereafter the CQS Technical Panel responsible for its continuing development. Mr Smithers had also been the senior partner of

CooperBurnett, a firm of solicitors in Tunbridge Wells that has a large residential conveyancing practice, and he continues to be a consultant to that firm. He was therefore able to give evidence both regarding the development of the CQS by the Law Society and as a solicitor with experience of residential conveyancing practice. However, not long before this trial, he had moved to Australia to take up the position of chief executive officer of the Law Council of Australia. He accordingly gave his evidence by video-link and, despite starting to hear his evidence at 9 a.m., because of the time difference his evidence concluded at what for him in Australia was well past midnight. Despite that, he remained resilient throughout and the Tribunal is grateful to him for being available so late. As would be expected, his evidence was frank and honest, although inevitably it was difficult for him after all this time to remember what had happened at the many different council and committee meetings at the Law Society which had considered the development of the CQS. He was therefore reliant on the contemporary reports and minutes, to which we also will refer and several of which concerned meetings which Mr Smithers himself had not attended.

12. Mr Murphy joined the staff of the Law Society in January 2014 as a product manager. He is currently responsible for the management of the CQS, along with another of the Law Society accreditation schemes (the Wills and Inheritance Quality Scheme). He gave helpful evidence, based on the documents and what he had been told, about the various changes in the content of the training required under the CQS since its inception. His evidence was more direct as regards the consideration and implementation of the very recent fundamental changes in the CQS, although in part he was reporting on meetings with lenders and other stakeholders that he had not himself attended. He was an entirely honest witness, but his concern to defend the Law Society's position led him to speculate on the reaction of third parties in a manner that went beyond actual evidence.

13. The two economic experts were (for Socrates) Mr Sam Williams, of the consultancy Economic Insight, and (for the Law Society) Dr Adrian Majumdar, of the consultancy RBB Economics. Their written reports were commendably clear and their joint statement of issues on which they agreed and on which they

disagreed was very helpful. Their oral evidence was heard concurrently, in a so-called 'hot tub', and their constructive and very sensible approach in response to the Tribunal's questions made this a valuable and efficient exercise. As mentioned above, Dr Majumdar also produced some factual analyses of the data on subscribers, on which he was cross-examined separately by Mr Woolfe on behalf of Socrates.

THE CQS

14. Membership of the CQS is open to practices regulated by the SRA. The overall nature and requirements of the CQS emerge from the Scheme Rules, of which the current version is from March 2014, and a presentation summarising the Scheme given by the Law Society to mortgage lenders and others between May 2015 and January 2016. The structure of the CQS has changed since its inception, as we explain more fully below, and the current framework of the Scheme involves four pillars:

    (a) *Probity*. To remove or reduce the risk of fraudulent staff or bogus practices, the initial application for accreditation requires the law firm to supply a range of data to enable identity and status checks to be carried out on the practice, including details of the amount and nature of residential conveyancing work carried out, financial information on the practice, details of PII (professional indemnity insurance) cover and claims history, evidence of risk management procedures, and the names of all relevant members of the firm.

    (b) *Practice Quality Standards*. This is based around two documents: the Conveyancing Protocol, which introduces consistent residential conveyancing processes; and the Core Practice Management Standards, which seek to ensure efficient management, embracing financial management and risk management. This head also embraces the requirement that all relevant staff undertake the prescribed mandatory training within six months of the practice being accredited.

    (c) *Client Service*. The practice must adhere to the Client Service Charter, which is a brief document setting out what clients should

receive in terms of service quality, and it must have in place an effective client care and complaints procedure.

(d) *Scheme Quality Assurance*. The firm must have monitoring and enforcement processes in place. Each firm must appoint a Senior Responsible Officer ("SRO") who is a senior manager in the practice (or the sole practitioner) responsible for ensuring adherence by all conveyancing staff with the various Scheme requirements and is accountable to the Law Society on the firm's behalf. The SRO must inform the Law Society of any changes in staff or practice, or material events affecting the firm such as revocation of PII cover or regulatory investigation.

15. Apart from facilitating access to the panels of mortgage lenders, as we explain in more detail below, a solicitors' firm gains the following practical advantages from being accredited under the Scheme:

(a) benefit from the Law Society's marketing activities;

(b) use of related Law Society promotional materials;

(c) a display of the firm's accreditation on the Law Society's *Find a Solicitor* website; and

(d) the right to use the CQS logo.

It was hoped that the Scheme would also help to keep down premiums for PII cover for accredited firms, but it is unclear to what extent that has yet materialised.

Accreditation and Re-accreditation

16. To apply for accreditation, a practice has to complete an application form and supply a significant amount of detailed information concerning the probity criterion as summarised above, and the Law Society conducts DBS checks on the SRO, the head of conveyancing and all relevant senior managers. The information is then assessed by the CQS Technical Team.

17. Accreditation is for a period of one year, and a practice then has to apply for re-accreditation each year thereafter. On initial application, the practice has to pay both an application fee and a membership fee, which are linked to the size of the practice. Currently, the fees (excl. VAT) vary from £397 in total for a sole practitioner to £2209 for a firm with 50 or more partners. On application for re-accreditation, a further fee is payable (varying similarly from £238 to £1190). These fees are wholly distinct from the fees for the training courses, which are charged on a per individual basis, as described below.

18. We should add that we have no doubt that the concept of a dedicated accreditation scheme is of potential benefit to residential conveyancing solicitors and those who deal with the firms so accredited, whether as lenders, providers of PII cover, other solicitors or the public; and further that, as illustrated below, the CQS was developed with the dedicated effort of various people involved with the Law Society.

THE FACTUAL BACKGROUND

The Money Laundering Regulations

19. The Money Laundering Regulations 2007 (the "ML Regulations") introduced by reg. 21 an obligation on any "relevant person" to provide that all his relevant employees are "regularly given training in how to recognise and deal with transactions and other activities which may be related to money laundering or terrorist financing."

20. "Relevant person" is defined by reg. 3(1) to comprise (subject to certain exclusions):

> "the following persons acting in the course of business carried on by them in the United Kingdom …—
>
> (a) credit institutions;
> (b) financial institutions;
> (c) auditors, insolvency practitioners, external accountants and tax advisers;
> (d) independent legal professionals;
> (e) trust or company service providers;
> (f) estate agents;
> (g) high value dealers;

(h) casinos."

21. Most of these categories are in turn specifically defined (e.g., "financial institution" includes insurance companies and investment advisors). For present purposes, it is sufficient to set out the definition of "independent legal professionals" in reg. 3(9):

> "Independent legal professional" means a firm or sole practitioner who by way of business provides legal or notarial services to other persons, when participating in financial or real property transactions concerning—
>
> (a) the buying and selling of real property or business entities;
> (b) the managing of client money, securities or other assets;
> (c) the opening or management of bank, savings or securities accounts;
> (d) the organisation of contributions necessary for the creation, operation or management of companies; or
> (e) the creation, operation or management of trusts, companies or similar structures,
>
> and, for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction."

22. The ML Regulations apply to the whole of the United Kingdom and came into force on 15 December 2007.

23. The result of this statutory training obligation was to generate a significant demand for AML training. That included, of course, training for solicitors engaged in the fields of work encompassed by the definition in reg. 3(9). Some major institutions arranged for the provision of training in–house, while others used outside training providers. As mentioned above, Socrates had already been providing AML training courses for solicitors since 2004. Although most of its business is directed at solicitors' firms, it was no doubt as a result of the ML Regulations that in 2007 Socrates added a second product, AML for Accountancy Firms, and subsequently it introduced a distinct training product, AML for Estate Agents.

24. The Law Society's advice to solicitors is that the requirement for "regular" AML training in the ML Regulations means at least every two years. Some law firms choose to give their relevant employees such training annually.

The Introduction and Evolution of the CQS

25. Because of the importance of the economic and factual context, which changed over the relevant period, it is necessary to refer to the evolution and development of the CQS in some detail, with particular reference to the incorporation of the relevant training requirements. The account is complicated because of the large number of committees and boards within the Law Society which were involved or consulted.

The introduction of the CQS

26. The origins of what became the CQS are apparent from a report prepared for a meeting of the Legal Affairs and Policy Board of the Law Society on 13 January 2010 by Paul Marsh. Mr Marsh was the immediate past president of the Law Society and also the chair of the Solicitors Indemnity Fund. The Report proposed the introduction of a "Residential Conveyancing Membership Scheme." The covering paper for the Board summarised the report as follows:

> "10. The Membership Scheme Report provides a picture of the current state of the conveyancing market and identifies the challenges that face conveyancing solicitors including:
>
> - the growing role of Licensed Conveyancers
> - the likelihood of new entrants using the vehicle of alternative business structures (ABS)
> - disquiet amongst lenders and insurers relating to concerns that range from very poor quality of work to dishonesty
> - the impact that the minority of poor performers can have on the reputation of the majority and regulatory costs
>
> 11. The current proposition is to tackle these challenges through a Membership Scheme which will provide a framework for the conveyancing process. The introduction of this framework will provide a more transparent and structured process that will:
>
> - help members to improve efficiency, and market their services more effectively
> - reassure the insurers market and lenders that a process exists which will better demonstrate the differences between worst performing and dishonest firms and the majority of the profession
> - enable clients to understand more clearly the conveyancing process and the role of the solicitor and make better informed choices"

27. Mr Marsh made an oral presentation to the Board, emphasising the importance of the Law Society taking action to protect solicitors' interests, and the Board approved the proposal to set up a specific Project Board to take the proposal forward.

28. At around the same time, in early 2010, mortgage lenders came under pressure from their then regulator, the Financial Services Authority ("FSA"), as the pre-2008 lending boom had been marked by a rise in mortgage fraud and related financial crime which increasingly came to light and persisted after the financial crisis of 2008-09. On 3 February 2010, the Council of Mortgage Lenders ("CML") wrote to the chief executive of the Law Society on the subject of solicitor involvement in mortgage fraud, copying the letter to the chief executive of the SRA. It is worth quoting a significant part of that letter:

> "As you are aware, the CML and our members are extremely concerned about the growth of complicit solicitor involvement in mortgage fraud. We have agreed to meet to discuss this unwelcome trend, and invited both the Law Society and Solicitors' Regulatory Authority to speak at our legal issues conference next week, so you can feedback to our members direct the seriousness with which you view the issue, and the actions which you propose to take.
>
> In advance of our planned meeting I am writing to both of you (and copied to the FSA for information) to set out the action we believe is urgently necessary to tackle the problem….
>
> This scale of loss (actual and potential) demonstrates the urgent need for regulatory and supervisory action by your organisations, supported by the CML, to control this unacceptable risk to the lending industry in the short, medium and long term.
>
> The lenders are keen to collaborate with the Law Society and the Solicitors Regulatory Authority to address this business risk. However, they are also subject to pressures from regulators and others, to do more to prevent financial crime and to take timely action to reduce these risks.
>
> Given the scale of exposure which has been identified, and the real regulatory risks to lenders if they do not take firm action, we expect affected lenders to review their future relationship with the profession. Any business model based on an 'open panel' of conveyancing firms will come under pressure, and may become unsustainable as lenders across the industry will continue to seek to reduce the risks they face from solicitor involvement in mortgage fraud. The knock on implications for the structure of the conveyancing profession are clear.

> The degree of control that lenders exercise over their panels is, and will be, heavily influenced by the responses of the legal professions' regulators, and the future of arrangements for the provision of professional indemnity insurance coverage. If these instil confidence for the future, it may not be necessary to restructure current operations to the same extent.
>
> …
>
> We believe the following will be necessary to achieve this outcome:
>
> - Enhanced perimeter controls (specifically around the qualified lawyers' transfer tests).
> - Allowing clients to have access to details of the practising history of firms' partners and solicitors.
> - Better systems and controls requirements for individual firms.
> - A more intrusive supervisory process that is targeted at higher risk firms.
> - A disciplinary regime that provides sufficient powers to provide a credible deterrence.
> - A regulator that is willing to engage with lenders constructively, deliver measurable change and that is sufficiently resourced and empowered to supervise this market and to maintain progress with initiatives that it commits to.
> - A review of the current rules surrounding the lenders' rights to access files.
> - An indemnity insurance structure that is 'fit for purpose' and that meets lenders' reasonable needs (see annex d for further detail of members' concerns)."

29. Mortgage lenders play, as explained by Mr Smithers, "a critical role in the legal conveyancing market." It is important for a conveyancing solicitor to be on the panels of as many mortgage lenders as possible since if a firm is not on the panel it cannot act for that lender in a conveyancing transaction. Although the solicitor could still act for the borrower alone, that may not be financially attractive as the borrower would also have to pay separately for legal representation for the lender. Therefore, it is most common for the same firm to be instructed by both the borrower and the lender. The risk for solicitors from any move by lenders to reduce the size of lenders' panels was clear.

30. As well as growing pressure from mortgage lenders, there was also evidence that the number of complaints relating to, and negligence claims against, conveyancing solicitors had increased. Professional indemnity insurers were indicating that premiums would have to rise to deal with claims relating to fraud

and poor practice.

31. The letter from the CML was followed up at a meeting held a month later, on 4 March 2010, between representatives of the Law Society and the SRA with representatives of the CML and three of the main lenders (Lloyds, Santander and Nationwide). The SRA and the Law Society outlined their respective responses to the lenders' concerns. The SRA explained its plans for enhanced entry controls and vetting, while the Law Society representatives spoke about accreditation. To quote from the minutes of that meeting:

> "The Law Society outlined its work to develop an accreditation scheme that would increase requirements overtime [sic] in the initial period. The Law Society intends to launch the scheme by the end of the year and will consult with the CML on the detail shortly."

32. At a meeting on 24 March 2010 of the Law Society's Council, the large governing body with a broad representation of members, the chief executive reported on the concerns of the CML and lenders about tackling mortgage fraud, and the risk that lenders might significantly reduce their conveyancing panels if effective action was not taken, including by the SRA. At the Council meeting on 28 April 2010, it was reported that Nationwide had removed 300 solicitors' firms from its conveyancing panel. The Council noted that part of the response of the Law Society to lenders' concerns about mortgage fraud was the development of "an accreditation process to establish firms' probity", and that the Society would work with the SRA in an effort to persuade lenders to collaborate on the respective initiatives they proposed instead of acting to reduce conveyancing panels.

33. The developing status of the project was the subject of regular reports to the Law Society's Membership Board.[1] For the meeting of 14 May 2010, the written report included the following explanation:

> "TLS proposes to launch a suite of services designed to enhance the reputation of solicitors in [the conveyancing] market, enable them to maintain their market share, and increase their profitability. Through the provision of services and engagement with members, TLS also

[1] The role of the Membership Board was described as to set and oversee the implementation of policy relating to services for members, such that any major changes relating to products offered by the Law Society required Membership Board approval.

> seeks to set accepted procedure for how law firms process their work – and create consumer facing standards in an area that has been taken by referral companies, HIP providers, and corporate estate agencies.
>
> A membership/accreditation scheme that established a quality standard for conveyancing practices, for example, could provide a platform for achieving all of the above objectives and be interlinked with the existing Property Section and/or Lexcel.[2]"

The report noted that a business case for the project was being prepared, which would include incorporating feedback from lenders and insurers, with a view to delivering the project by October 2010.

34. For the Membership Board meeting on 24 June 2010, an update report recorded the outcome of a meeting with the CML who "responded well to the proposals and agreed to engage with us in Working Groups to help provide input as the scheme is developed further." It noted that future meetings were planned accordingly with the CML and with other "lender stakeholders" and "relevant insurers". The report included a project plan, showing a 3-year development of the scheme: in year 1 there would be a "low barrier to entry to gain high initial volume of participants"; in year 2, the standards would be raised with enhanced services launched; in year 3, "[h]igh levels of standard" would be required for 'premium' participation and all member services would be rolled out. The minutes of the meeting recorded:

> "The Conveyancing Quality Scheme was a form of accreditation which aimed to develop ways to design and revise protocols in the conveyancing process, and improve quality in residential conveyancing to the satisfaction of CML. Firms of all sizes would be involved in the scheme but it was primarily a way for small firms to remain in the conveyancing market.
>
> The scheme would launch in October to tie in with the Property Section Conference. A commercial model was being developed to facilitate discounts for members of both the Society and the Property Section…"

35. Between those two meetings, the Council of the Society met on 8-9 June 2010, and in his report to the Council the chief executive of the Law Society noted as regards the scheme that meetings were being set up with the CML and some of the main lenders:

[2] For Lexcel, see para 170 below.

> "The meetings will be an opportunity for lenders to comment on the Membership Scheme proposals that are relevant to them and to indicate to the Law Society the type of characteristics they would be looking for in a scheme."

36. Matters resumed after the summer break. On 14 September 2010, at a meeting of the Law Society's Legal Affairs and Policy Board, a paper was presented concerning "Lenders' Panels". The main focus of the paper and discussion at the meeting was the steps taken by some of the main lenders to reduce the size of their panels. It was reported that in particular firms with a low volume of transactions were being removed by Santander and Lloyds Banking Group. In describing the Law Society's response to these developments, which were particularly worrying for smaller firms of solicitors, the paper referred to the representations being made to lenders and, specifically as regards mortgage fraud, to the Society's discussion with the SRA in the effort to improve its regulation and stated:

> "The promotion of due diligence and vigilance against fraud and negligence throughout the profession has also been an important part of this process and Practice Notes on mortgage fraud and anti-money laundering advising members on best practice have been produced."

37. Reference to development of the CQS came under the heading "Support and Informing the Profession". There it was stated that:

> "Work also continues on the development of a residential conveyancing membership scheme and its soft launch in October 2010. The aim is for the scheme to be implemented in early 2011. The scheme focuses not just on accreditation but on improving standards throughout the conveyancing process and assisting members in tackling fraudulent intervention within their firms. Updated protocols are being developed as part of the scheme."

38. A further account of the CQS was given to the meeting of the Membership Board of the Law Society held two days later, on 16 September 2010. That was the first Membership Board meeting which Mr Smithers attended. Since this appears to be the fullest recorded description of the project as it had developed (at least as set out in the various documents provided for this trial), it is worth quoting from the account in the minutes:

> "The Conveyancing Quality Scheme would provide a recognised quality standard for residential conveyancing practices which would be

interlinked with the existing Property Section. It was essential that the Society provided leadership to assist law firms in maintaining a leading role in conveyancing. The Society proposed to launch a suite of services designed to enhance the reputation of solicitors in the market to enable them to maintain their market share and increase [responsibility].[3]

There would be a protocol at the centre of the scheme which would require all members to adhere to. Each firm would have a Senior Responsibility Officer. The integrity of the firm and the individual would be checked. The Officer would monitor and enforce the Society's conveyancing protocol.

There had been a lot of progress over the summer months on the evaluation of information which members had provided. The Society was awaiting the evaluation results. Over the coming months, the governance process and complaints procedure would be looked at. Maureen was hopeful that registration would begin at the end of 2010.

[The President] indicated that the scheme was available to solicitors only and for firms of solicitors regulated by the SRA. A licensed conveyancer or notary in a law firm was also an acceptable member. A pricing structure and entry price to encourage members to join at the inception was being looked at. The design scheme would be developed over the next three years to develop the brand and a logo easily recognisable to the customers.

A paper would be submitted to the November Council meeting in more detail. It was anticipated that total costs of the project would amount to £3m. Payback was based on a [trading] assumption of 31 months. There was significant investment in this but the benefits to the profession were significant. It was not expected that the Society would make a profit on this project.

…

There would be standard documentation and members of the scheme would be required to use the protocol. It would be a national standard and the Society would need to link the protocol and the suite of documentation together."

39. It is worth noting that at the same meeting, Ms Katie Whatmore, a staff member who was head of events at the Law Society, spoke about the "commercial potential for accreditation schemes." However, that was said in the context of the Society's existing accreditation schemes. Ms Whatmore developed this theme further in a paper dated 4 October 2010, which she presented at the next meeting of the Membership Board on 19 October. The paper noted that the Law

[3] Sic. This may be a typographical error for "profitability": cp the paper quoted at para 42 below.

Society was running a number of accreditation schemes with little or no supporting offer of training, leaving what were potentially significant commercial opportunities to commercial training providers. The paper recommended that for the future, individuals in a scheme should be required to demonstrate that they had completed a certain amount of training that links with the requirements of their scheme, and that the Law Society should launch accreditation-linked training which could provide the Society with significant potential income. The commercial model set out in the paper was approved by the Membership Board, which agreed to start with a pilot training scheme in Children and Family Law.

40. This discussion was separate from the Membership Board's consideration of the new CQS, which was the subject of a distinct paper presented for information to the same meeting. It was noted that the business case for the CQS would be presented to the Management Board the following day. The paper for the 19 October Membership Board meeting presents a full description of the Law Society's view of the CQS at the point of its launch. It therefore merits extensive quotation:

> "The Conveyancing Quality Scheme will provide a recognised quality standard for residential conveyancing practices. Achievement of membership will establish a level of credibility for member firms with stakeholders (regulators, lenders, insurers and consumers) based upon:
>
> - The Integrity of the Senior Responsible Officer and other key conveyancing staff
> - The firm's adherence to good practice management standards
> - Adherence to prudent and efficient conveyancing procedures through the scheme protocol
>
> This scheme will create a trusted community which will deter fraud. Year on year we will drive up standards
>
> **Progress status**
>
> With the revised Transaction protocol at the heart of the scheme to deliver consistent standards, the CQS is based on four key principles:
>
> 1. Probity – application for membership focuses on identity and status checks for individual conveyancers and firms to create a trusted conveyancing community

2. Practice quality standards – consistent processes and standards are central
3. Client/stakeholder service – a new client charter aims to ensure quality of service delivery
4. Quality assurance – monitoring and enforcement will be robust and members may be subject to spot checks and audits

…

Training

The application and accreditation process will include mandatory training for the Senior Responsible Officer (SRO), who must be nominated by the applicant firm to be responsible for application to the scheme, and post accreditation for ensuring all other key conveyancing staff comply with the scheme requirements. Courses are currently being developed for both the SRO and all key staff.

…

The benefits of membership

Membership will provide credibility with stakeholders including regulators, lenders, insurers and clients, many of whom have been involved in developing the scheme. It is to be a prerequisite for acceptance onto lender panels.

This unique conveyancing quality kitemark will:

- Increase consumer awareness of the importance of using a qualified conveyancer
- Develop high standards of professionalism and competence
- Help practices to improve marketing and business development opportunities
- Reassure clients, lenders and insurers that your practice is financially sound and well managed
- Reduce your practice's operational risk and improve its quality and efficiency
- Help to reduce negligence claims and minimise PII rates and difficult of obtaining cover"

41. On 20 October 2010, the same day that the CQS was formally launched at the Society's Property Section conference, the Management Board of the Law Society was asked to approve funding for the CQS (the launch was based on short-term emergency funding). The detailed paper and business case presented to the Management Board had not been disclosed prior to the hearing before the Tribunal, and came to light only after Professor Wilks pressed the Law Society at the hearing to look for further documents. Apparently, the minutes of the

Management Board were not reviewed in the course of preparation of the Law Society's defence and the existence of this business case had not been identified (although it was expressly referred to in several of the disclosed documents). Since it was produced only after the hearing had concluded, Mr Smithers obviously could not be questioned about this document and, in any event, he was not a member of the Management Board which considered it.

42. The paper about the CQS to the Management Board meeting on 20 October was written by the same individuals as the paper to the Membership Board meeting on 19 October. The "management summary" in the former paper presents an overview summarising the CQS as follows:

> "TLS proposes to launch a new conveyancing quality scheme designed to enhance the reputation of solicitors in the conveyancing market with an aim to enable them to maintain their market share, and increase their profitability. At the centre of this scheme will be adherence to a new protocol which is currently being developed by TLS in consultation with the industry. Initially concentrating on solicitor to solicitor aspects of the transaction for scheme launch it is proposed that this will be expanded as the scheme progresses.
>
> It is planned that future iterations of the scheme will provide linked resources and services..."

43. The background and objectives of the CQS are succinctly set out, and as these complement what is said in the other paper, they also merit full quotation:

> "The property market and solicitors' involvement in the sale and purchase of residential properties is at a critical stage of development. There has been a significant drop in the volume of residential conveyancing transactions which is having an impact on firms of all sizes but particularly small firms. In addition, a number of factors including perceptions of poor service, new entrants into the market and overcapacity threaten the solicitors' share of the conveyancing market.
>
> It is essential that The Law Society provides leadership to assist law firms in maintaining a leading role in conveyancing. TLS proposes to launch a suite of services designed to enhance the reputation of solicitors in this market to enable them to maintain their market share and increase their profitability.
>
> The Law Society are proposing to introduce a membership/quality scheme which provides a recognised quality standard for conveyancing practices. In the longer term this scheme could provide linked resources and services, to include an e-conveyancing portal.

> The centre of the scheme will be the protocol to which all members will be required to demonstrate adherence. Reassurance to the extended market will be provided by introducing the requirement for identity checks of firms and individuals to decrease the risk of fraud. Adherence to protocols and financial probity will be regularly monitored and confirmed annually upon re-registration.
>
> TLS aim to offer a training package which will support the adoption of the protocols provided as a mandatory element to the application process in order to ensure consistency in understanding and use of the process and aid restoration of confidence in the wider market.
>
> In brief the objectives of the introduction of this scheme are to:
>
> - Provide assurance as to the financial probity of conveyancing firms and those working in them
> - Introduce consistent quality standards throughout the conveyancing process
> - Provide assurance to key stakeholders, lenders, insurers and clients that member firms meet the required standards
> - Improve standards through annual monitoring and enforcement
> - Increase client recognition of quality standards for conveyancing
> - Facilitate and support firms in the transition towards e-conveyancing
>
> It is recognised that there is a significant amount of work to be done in order to establish this scheme in the given timeframe. A great deal of work has already been carried out and consultation with the profession and the wider market has taken place.
>
> In the time of increased competition this scheme will offer great benefits to our members but also to lenders and customers of the conveyancing market."

44. The paper attached detailed financial projections, based on estimated take-up by eligible firms, and project and implementation plans. The income projections cover membership fees and substantial training revenue, which combined would "offset a significant percentage of initial set up costs." In discussion of this proposal at the Management Board, the President of the Law Society referred to the interest in joining the new scheme among delegates at the property conference, and is recorded in the minutes as saying:

> "The Law Society hoped to generate revenue from selling services to scheme members, such as education and training, more than from the cost of membership."

45. In his witness statement describing the development of the CQS, Mr Smithers

said that "mandatory training was always at the heart of the scheme." Mr Woolfe cross-examined Mr Smithers on the various contemporary documents, pointing out that only at an advanced stage in the process of evolution of the scheme is any reference made to training, which Mr Woolfe suggested came as a late 'add-on'. Mr Smithers had not attended the earlier meetings of the various Boards and so could not really give direct evidence as to how the scheme was there discussed, but he was a member of the Project Board engaged in developing the scheme. Nonetheless, we accept that it was envisaged early on that an element of training would be part of the CQS, and indeed when the proposal was finally presented for budgetary approval it is clear that training income was seen as an important part of the financial model. However, we have quoted extensively from the contemporary documents and we think it is an exaggeration to say that the training was "always at the heart" of the CQS. By the time of launch in late October 2010, when presentations were made to the various committees and Boards of the Law Society, it seems clear that the heart of the CQS was the new Conveyancing Protocol. That emerges also from the slide presentation by the President of the Law Society at the launch of the Scheme at the Property Conference, which makes no reference to training at all. The Conveyancing Protocol was specifically approved by the Membership Board at its meeting on 19 October 2010, where it was described as providing "a structure and good practice for the conveyancing process." It was not designed to prescribe the advice which solicitors should give but "offered a framework which established clarity and consistency."

46. The new Conveyancing Protocol was issued in April 2011, shortly after the launch of the CQS, and took a substantially different form from the previous versions (it had last been revised in 2004). It is a substantial document and provides a step-by-step guide for a conveyancing transaction (comprising 70 steps), appending the various Law Society forms that can be used in transactions. The aim, as explained in the Guide to the Protocol (also an appendix), is "to set out arrangements for the conduct of business between buyers and sellers and their respective solicitors on the basis of a set of agreed principles." And the Preface to the Protocol explains:

> "The focus is not only on the solicitor-to-solicitor contact but also

> encompasses the relationship with others in the process, such as estate agents, surveyors and mortgage brokers. In particular, the Protocol aims to make the standards expected of solicitors dealing with: lenders, buyers and sellers transparent to all."

47. The training which was envisaged at the outset was specifically for the SRO. As Mr Smithers accepted, at that stage plans for further training modules or requirements had not been developed. And while it was anticipated that there would be further training requirements for key staff, we consider that these were similarly linked to observance of the Conveyancing Protocol and good practice standards, not AML or mortgage fraud. That is confirmed by the project report on the Scheme for December 2010, prepared by the staff involved in implementation of the CQS. Additional and specific training on AML or mortgage fraud was not then seen as part of the CQS. That is significant, since conveyancing solicitors were already subject to an independent obligation to have AML training by reason of the ML Regulations.

48. Further, while an important incentive for development of the CQS was pressure from the CML and some major lenders, with whom the Law Society held discussions as the plans progressed, they evidently had not asked for training in AML as part of the CQS. The CQS was aimed also at insurers providing PII and, indeed, the public. We think that Mr Smithers expressed its overall aim succinctly when he spoke in his evidence about building a "trusted community" of those engaged in conveying practice.

The introduction of mortgage fraud training

49. As mentioned above, the CQS was formally launched on 20 October 2010. Thereafter the Law Society engaged in efforts to promote the Scheme to conveyancing solicitors. At the Council meeting on 15-16 February 2011, the chief executive reported that the number of solicitors joining the Scheme had been lower than anticipated (the chair of the Membership Board reported that 182 applications had been received as at 28 January). Moreover, it is clear that through 2011 there was growing concern about initiatives by lenders to reduce the size of their panels. At the meeting of the Membership Board on 14 April 2011, it was reported that Coventry Building Society, Nationwide, Leeds Building Society and Alliance & Leicester/Santander were all removing firms

from their panels. The Board noted that "[t]he CQS had not got a significant enough number of firms in it yet to be able to fight against the panels. If there were 1000 accredited firms, it could be easier to get them to fight this." A report to that meeting by the Society's operations director summarised the extensive marketing efforts being made to promote the CQS. As regards CQS training, he reported that:

> "The assessment for the role of the SRO and the new conveyancing protocol and the core practice management standards are now currently online and accessible for firms to complete."

50. However, although the number of firms applying for CQS accreditation slowly increased, major lenders continued to take steps to reduce (or "rationalise") their panels. On 18 January 2012, the Conveyancing and Land Law Committee of the Law Society recorded that HSBC had decided to create a smaller panel, apparently of only 43 firms, which had led the Society to write in protest to the CML; and that Nationwide was planning to write to 1000 firms which had not carried out a transaction in the past year informing them that they would be removed from panel membership if they were not a CQS member. At the same time, it was reported that the CQS had gained more than 1000 members who had passed the various checks required for accreditation.

51. As from September 2011, the governance arrangements of the CQS had changed. The Project Board of the CQS was renamed the CQS Technical Panel, while commercial management of the CQS rested with the Membership Board. By the start of 2012, the Technical Panel had begun to design the second year of the CQS accreditation modules, with a view to their introduction in March 2012. A member's second year would commence 12 months after it was accredited, and any training requirements had to be completed within six months of re-accreditation. The Panel decided to include a module on mortgage fraud in the Year 2 training along with a further module on the Conveyancing Protocol, the fifth edition of the Standard Conditions of Sale and the Law Society's Code for Completion by Post.

52. Mr Smithers said that this was decided because of the importance that lenders placed on mortgage fraud training and the role that their concern about mortgage

fraud played in the reduction of lender panels. Some approaches were evidently made to lenders since key points of concern supplied by lenders were passed on to the person writing the course. Indeed, someone from one of the lenders agreed to write a scenario (derived from the case of *Lloyds TSB Bank v Markandan & Uddin* [2010] EWHC 2517 (Ch)) for inclusion in the training module. But although the content of the new mortgage fraud training module therefore had the benefit of input from some lenders, we do not consider that introduction of this module can be described as a requirement or even request of the lenders. There was no formal record of the decision by the Technical Panel to introduce mortgage fraud training into the CQS, but the decision was conveyed to the Membership Board in a report dated 15 February 2012. The situation was very frankly explained by Mr Smithers in his oral evidence:

> "… we were doing this in the dark. Lenders had not been particularly clear about what they would require to endorse the scheme so we had to try and estimate what was going to be necessary. If you had a scheme which after two years they could turn around and say "Well, we do not like it very much" we really would have wasted our time, so we were trying to anticipate what lenders would require and have discussions with them, but no lenders would actually give you certainty in advance. So … this was developing very fast. This meeting took place in February 2012 and we have already got to this point, by late 2011 … but as the Boards do not meet very often we did not have the luxury of waiting all the time for approval which could then take some months in a governance process. But it was certainly considered at Technical Panel level amongst those of us who set up the scheme that this was our best attempt, if you like, to gain the trust of the lenders and the lending community, also insurers, also clients, also complaints bodies, regulators and so on. So it was multi-faceted."

The addition of AML training

53. In about May 2012, HSBC announced that firms in the CQS could be admitted to its conveyancing panels, a decision which took effect in August. This stimulated a significant rise in applications from conveyancing solicitors to join the CQS. At the same time, the Law Society was engaged in discussions with lenders as to what developments they wished to see in the CQS. It seems that various suggestions were made by different lenders, including as regards verification of information that firms supplied, visits to member firms, etc. Staff training on mortgage fraud was one of a range of suggestions put forward in

discussion with HSBC. Through 2012, the Law Society continued to engage with lenders on the issue of their management of their panels, seeking to persuade the lenders to keep their panels as open as possible. In June, it was noted that lenders had agreed to work together in identifying industry-wide solutions to panel management and collection of the necessary data. The Law Society submitted a tender for that purpose, proposing to use CQS data, but the tender was unsuccessful.

54. By late 2012, the CQS Technical Panel was working on designing the training modules for year 3 (i.e. 2013). In a report dated 2 January 2013 to the Membership Board, it was announced that the Law Society was developing a new accreditation scheme for wills and probate/private client solicitors, to be called the Wills Quality Scheme ("WQS") [4], closely modelled on the processes and format of the CQS. The WQS as described in that report would have many similarities with the CQS, including a WQS Protocol to drive up standards and "Core Practice Management Standards ("CPMS")", but the report states that the new scheme would involve "mandatory and optional training through the CPD Centre on the Protocol and CPMS." As regards the CQS, the same report stated that as at the end of 2012 over 2000 firms were accredited; that announced and unannounced monitoring visits on CQS firms had commenced; and that the Year 3 training for the CQS was in the process of being designed and would cover AML.

55. As with the introduction of mortgage fraud training, there is no minute or record of the decision to introduce AML training or of discussion that preceded it. In his witness statement, Mr Smithers said:

> "We determined that conveyancing firms would benefit from an AML module that was specifically tailored to conveyancing practices. At this time, the SRA was consistently making statements that firms were failing to do proper AML checks."

In his oral evidence, Mr Smithers added that this was an obvious step to take, based on ongoing discussion in the market as to what the threats were:

> "… there was no need to have an enormous debate about it. It was

[4] It was subsequently named the Wills and Inheritance Quality Scheme.

clearly something which needed to be done..."

He further explained that there were a large number of people in firms carrying out conveyancing who were not solicitors but para-legals. It was important for training to reach those individuals who fell outside the requirements of the ML Regulations.

56. When it was put to Mr Smithers that there were alternative means to ensure that staff received adequate AML training without mandating that this training was obtained from the Law Society, such as imposing a requirement for specific training but with the option of taking it elsewhere, he responded:

> "There are lots of different things that the Law Society could have done, but there was always the consideration about cost and efficiency and wholeness of the scheme to keep the confidence of lenders and insurers and the public and various other stakeholders that I mentioned. We did not know what reaction there would be. The Law Society and its members, particularly solicitors, had been vilified in some parts for poor practice and we were trying to, if I can use this euphemism, climb the hill, to ensure that we got back on an even path and with the outpour from the crash in 2008 which was working its way by this time into some serious claims through the indemnity fund and from lenders – in fact they often arose three or four years later – and then the risk of money laundering claims which had become much more prevalent by then, this was very much a hot topic and seen as a very good way of delivering to scheme members and their employees."

57. At the meeting of the Council on 6 February 2013, the chief executive stated that the "CQS was important and was an appropriate way of spending money as it would allow firms to stand out as quality providers." This was particularly important for high street practitioners who were finding it increasingly hard to compete with high volume alternative business structures offering conveyancing. The minutes of that meeting also record the chair of the Membership Board as responding to a member's comment by saying:

> "The CQS had a dual purpose: to ensure the Society's dominant position within the residential conveyancing market and to generate revenue for the Law Society"

In his evidence, Mr Smithers said that this did not reflect discussions at the Law Society at the time. He explained:

> "The Law Society remained keen to maximise the number of firms that

> signed up to the CQS – and as such increase the associated revenue – but this was primarily to increase standards in the residential conveyancing market and to assist conveyancers in obtaining access to lenders' panels rather than to make profit from the scheme."

58. Through 2013 and into 2014, the issue of lenders' 'panel management' policies, and thus access to lender panels, remained significant. A report by the Society's Conveyancing and Land Law Committee to the Legal Affairs and Policy Board meeting of 19 November 2013 stated:

> "Apart from the issue of increasing amounts of work being diverted by estate agents and other national consumer facing brands to conveyancers chosen by them the issue of Lenders and Panels is probably the one that most impacts on solicitor conveyancers."

The restructuring of the CQS

59. During 2014-2015, the Law Society carried out a review of the CQS. This involved a series of roadshow forums around the country, a survey sent to all CQS members and meetings with the CML and some of the key lenders and at least one of the PI insurers. The proposed changes were then discussed in a series of follow-up roadshows and further meetings with lenders and the CML. The significant restructuring of the CQS was apparently approved by the Membership Board on 6 October 2015.

60. A major concern voiced by solicitors was the delay and complication of the accreditation process and various comments were also received on the Conveyancing Protocol. Neither aspect is material for present purposes. But there was also a desire to streamline the training, which was felt to be over-complex and burdensome. Already on 24 July 2014, the CQS Technical Panel decided to define the Years 1-3 courses as "core modules"; and that once an individual had completed the core modules he or she would then have to take two update courses each year. In 2015, the two update training courses were "Conveyancing Practice" and "Risk and Compliance". In the end, this approach was further simplified, and the restructured training comprised, along with the two updated courses, two core training courses: "Protocol in Practice", and "Financial Crime". The Financial Crime course in essence consolidated and

updated the previous mortgage fraud and AML courses, incorporating also a new section on cyber-crime.

61. As we understood it, the revision of the training requirements was accomplished in stages. The two update courses were introduced in late September 2015. The original Years 1-4 training courses were withdrawn at the end of February 2016 and the two new core courses were released in late April 2016. There is also an additional core course on the "Role of the SRO" which only that individual has to complete once.

62. The Law Society produced a guide for accredited firms and solicitors on *Changes to online training*, covering transitional arrangements. The guide summarised the position overall as follows:

> "We are changing our online CQS training so that conveyancers in practices awarded an initial 12 months accreditation and conveyancers who join accredited practices will no longer need to catch up by completing a growing number of existing training courses."

THE CQS TRAINING REQUIREMENTS

63. It may be helpful to summarise the development and changes in the training courses required under the CQS, all of which had to be purchased from the Law Society.

64. At the launch of the CQS at the end of 2010, the only training element concerned the Conveyancing Protocol. During 2011 (Year 1), two further courses[5] were added: Core Practice Management Standards; and the Role of the SRO. The cost was £60[6] for each course, for each member of staff taking the training.

65. In the second year (2012), the course on mortgage fraud was added, as discussed above, with another course on "Standard Practice and Procedure" which was concerned with the Conveyancing Protocol and covered also the Law Society's Standard Conditions of Sale (5th edition). The latter course appears to have

[5] In their witness statements, Mr Smithers and Mr Murphy describes them as "modules" but most of the contemporary documents (including the booking forms) refer to them as courses and we will use the latter expression.
[6] Plus VAT. All prices are quoted exclusive of VAT.

replaced the Core Practice Management Standards course that was operated the previous year. The cost of each course was £40 for each member of staff taking the training. The courses were also available for solicitors at non-CQS accredited firms at a cost of £60.[7]

66. In the third year (2013), the course on AML was added, as discussed above, with another mandatory course entitled "Developments in Law and Practice." The cost of these was £40 each, again for each member staff taking the training, and £60 for staff at non-CQS firms.

67. In the fourth year (2014), two further courses were introduced: "New Build Purchase" and "Leasehold." These were priced at the same level as the previous courses.

68. The position by 2014 was that at a practice applying for accreditation for the first time, within six months of notification that its application was successful, all relevant members of staff had to complete the original Conveyancing Protocol course, along with the two courses from Year 2, the two courses from Year 3 and the two courses from Year 4: i.e. seven courses in all at a total cost of £340 per member of staff.[8] However, if the practice was being re-accredited, then staff who had already done the requisite training had to complete only the two new mandatory courses. And staff joining the practice from elsewhere would have to complete all seven courses except for any which they had already taken at their previous firm.

69. In late 2015/early 2016, as discussed above, the training was restructured and, as we understood it, this was accomplished in stages. In late September 2015, two "Update Courses" were introduced on "Conveyancing Practice" and "Risk and Compliance": the latter included a small, self-contained AML element. On 29 February 2016, the original Years 1-4 training courses (with the exception of the course specifically for the SRO) were withdrawn and on 29 April 2016 two new core courses were released on "Protocol in Practice" and "Financial

[7] Mr Murphy in his witness statement said that the price was £60 for staff at CQS accredited firms but the course booking form which he exhibits suggests that is an error and that the prices were as stated above.
[8] However, the prices were subject to progressive volume discounts if more of the same course were ordered.

Crime".[9]

70. The two update courses were priced on the same basis as the previous courses: i.e. £40 per member of staff for firms in the CQS, and available to non-member firms at the higher price of £60.[10] The new core courses were each priced at £35 per individual for firms in the CQS, and £60 for non-CQS firms.[11]

71. As a result, after 1 March 2016, the training required of relevant individuals (other than the SRO) was and is:

    (a) at a firm newly becoming accredited under the CQS or at a firm which was already accredited if they had not previously completed the former Years 1-4 training courses, to complete once the two core courses, "Protocol in Practice" and "Financial Crime"; and

    (b) to complete each year the two annual update courses.

72. It is intended that the content of the annual update courses will be determined according to current developments in law and practice. Thus we were told that the updates that were due to be released at the end of 2016 will not focus on AML or mortgage fraud.

73. Training is carried out via the Law Society's CPD Portal, on which all relevant members of staff receiving training therefore have to register. Prior to August 2015, practices had to submit copies of the CPD records for all relevant persons who had completed training when applying for reaccreditation. The Technical Team can now use the CPD Portal to check whether the training has been carried out.

74. Each course comprises on-line training material and then at the end a set of multiple choice questions (generally, 15 questions). The Years 1-4 courses had a specified duration of one hour each. The new courses under the restructured scheme do not specify their duration but at least for the two new core courses

[9] We understand that between 1 March and 29 April 2016, firms in the CQS at which the relevant individuals had not completed the mandatory training courses were told to delay their orders for training until after 29 April when the new core courses would be released.
[10] These were the prices when the update courses were introduced. From a subsequent document it appears that the £40 charge may subsequently have been reduced to £35 but nothing turns on this.
[11] Subject as before to a cap for large firms of £999.

that would appear to be two hours each. The prescribed training has to be completed within 6 months of accreditation and on applying for reaccreditation the SRO has to confirm that all the necessary training was completed. If all relevant staff have not completed their training, the reaccreditation process is delayed accordingly.

75. We refer to the original courses on mortgage fraud and AML, and the subsequent courses on Financial Crime and the 2015 Update on Risk and Compliance, as "relevant courses" since it is the mandatory requirement to take those courses exclusively from the Law Society which is the subject of this challenge.

THE SUCCESS OF THE CQS

Lenders

76. From 2012 onwards, a number of financial lenders made CQS accreditation a pre-condition for panel membership. However, as we understood it, in most cases membership of the CQS was not a guarantee of panel membership: most lenders apply additional criteria, and in some cases indeed use an independent firm (such as Lender Exchange or Legal Management Services) to manage the panel membership process.

77. The approximate dates when CQS accreditation became a requirement is set out in the table below:

Lender	**CQS accreditation required for panel membership**
HSBC	August 2012
Clydesdale Bank	Announced on 27 March 2012
Santander	31 March 2013
Aldermore Mortgages	August 2014
Nationwide Building Society	Announced on 20 April 2015*
Yorkshire Building Society	1 October 2015
Metro Bank	2015
*It appears that Nationwide had previously announced that it would be mandating CQS accreditation for solicitors currently on its panel and then in April announced that it would be accepting new applications for its panel and that any applicant had to be a member of the CQS: Minutes of the Conveyancing and Land Law Committee of 21 April 2015.	

78. A number of smaller mortgage lenders not included in the table have also made

CQS accreditation a requirement for panel membership: Accord Mortgages, Barnsley Building Society, Monmouthshire Building Society, and Norwich & Peterborough Building Society (a subsidiary of Yorkshire Building Society). There remain some very significant lenders which have not mandated CQS accreditation as a condition for their panels, including Lloyds, Barclays, Halifax and the Royal Bank of Scotland. However, Mr Smithers acknowledged that even for a lender for whom accreditation is not such a pre-condition, it is something that may be taken into account in deciding whether to appoint a solicitor to its panel.

Solicitors

79. From a slow start, which as noted above caused some concern to the Law Society, the Scheme grew to attract over 3,000 members by mid-2016. This must be seen in the context of there being some 4,700 firms of solicitors in England and Wales active in residential conveyancing work.[12] The growth in membership of the CQS is set out in the table below, derived from Dr Majumdar's report:

Solicitors firms with CQS accreditation		
Year	*Number*	*Percentage of total**
2011	864	19%
2012	1787	39%
2013	2607	56%
2014	2730	59%
2015	2851	61%
2016	3014	65%
*Based on 4,671 firms estimated active in residential conveyancing in July 2015 and the assumption that this did not vary significantly over the period.		

REVENUE AND PROFITABILITY OF THE CQS

80. Pursuant to the Tribunal's orders of 18 May and 30 June 2016 requiring the Law Society to produce a schedule setting out the income and profit derived from the CQS in each year since 2011, and since 2013/14 the breakdown of that revenue as between accreditation fees and the sale of CQS training, the Law Society served a schedule setting out figures for income - broken down as between accreditation/reaccreditation fees and training income - and profit/loss from the

[12] The Law Society's Defence gives the figure as 4,671 firms as at July 2015.

CQS for each year since 2011. Those figures showed that the CQS had operated at a loss each year, declining to a loss of £451,918 in the year ended 31 October 2015, whereas the revenue derived from the scheme had significantly increased over that period. The training income, in particular, was shown as £1,554,056 in the year to 31 October 2015, more than double the equivalent income in the preceding year.

81. Under the schedule it was stated that the Law Society "is able to capture and record income received as it applies to a specific service", which therefore covered the CQS income attributed to accreditations and training. However, that was not possible for a significant part of either staff or non-staff costs, so that those costs were largely allocated on the assumed basis that for each business area involved, the same proportion of costs was attributable to the CQS as the proportion of income generated by the CQS.

82. In reliance on this schedule, the skeleton argument for the Law Society stated that: "[t]he CQS is … loss making overall, and is subsidised by practising certificate income."

83. However, not only is the method of cost allocation (whereby an increase in revenue automatically generates a corresponding increase in attributable cost) an unreliable basis for any fair assessment of the profitability of the scheme, but it became clear during the course of the trial, following questions from the Tribunal, that the figures presented for CQS training income in the years prior to 2015 were materially understated. It emerged that before 31 October 2014 the Law Society's system did not in fact record income due to CQS training, and on the final day of the hearing the Law Society presented revised figures which represented an upper bound of training income: those figures were between 70% and over 100% higher than the figures originally presented.

84. We are bound to record that it is disappointing, to say the least, that the Law Society produced a schedule of figures in purported compliance with the Tribunal's orders which was wholly unsatisfactory. The method used for allocation of costs is such that even with the revised figures showing an upper bound for training income (which on that method would require all the costs

figures to be recalculated), it is in our view impossible to reach any reliable view as to whether or not the CQS was loss-making, at least after 2012 when the training income significantly increased.

85. What can be deduced from the revised figures is that in the year ended 31 October 2014, the income from all CQS training was likely to have been close to £1 million; and that thereafter the training income (which is now accurately recorded) has been between about £1.4 and £1.5 million.[13] We noted above that financial projections for the CQS were presented to the Management Board of the Law Society on 20 October 2010, although that also came to light only in the course of the hearing. Copies of the 2010 Business Case for the CQS, supplied to the Tribunal subsequently, projected that even on a "worst case" scenario, the CQS was expected to become significantly profitable by 2012. However, those initial budgetary estimates, as the Law Society has pointed out, assumed that applications for CQS accreditation would be made on-line, which is not in fact what happened, so that the largest cost of running the CQS is the cost of processing applications. As regards the more recent situation, we were told by Ms Smith QC, on behalf of the Law Society, that no overall financial forecasts for the CQS have been made.

86. We note that by letter from its solicitors to the Tribunal written after the conclusion of the trial, the Law Society restated its case to assert that the CQS is loss-making on "a standalone basis." We doubt very much that even that conclusion can be drawn robustly given the method used for cost allocation, but in any event, the CQS of course is not a standalone business. We therefore cannot accept the submission that the CQS has had to be subsidised from the Law Society's practising certificate income. Overall, we conclude that it is impossible on the evidence before us to determine whether or to what degree, when considered in terms of avoidable costs, the CQS as a whole is profitable for the Law Society, but it seems clear that by 2014-15 the supply of the CQS training courses generated a substantial income stream and made a positive contribution to overheads.

[13] At trial, the Tribunal was given provisional figures for training and accreditation income in the year ended 31 October 2016, and subsequently we received the final, audited figures.

THE STATUTORY PROHIBITIONS

87. As stated at the outset, Socrates alleges infringement by the Law Society of the Chapter I and/or the Chapter II prohibitions under the CA. Its primary case concerns the Chapter II prohibition, which is set out in sect. 18 CA. The full text is reproduced in the Appendix. In essence, this involves five elements:

    (a) The defendant is an undertaking;

    (b) which occupies a dominant position in a market in the United Kingdom, or part of it;

    (c) and engages in conduct which amounts to an abuse of that dominant position;

    (d) which may affect trade within the United Kingdom;

    (e) and which is not objectively justified.

88. The burden is on the claimant to prove the first four elements. The fifth element does not appear on the face of sect. 18, but is well-recognised. If it is raised by the defendant, then it is for the defendant to show that its conduct was objectively justified. In that respect, the Law Society accepted that it bore the burden of proof.

89. In the present case, it is not in dispute that the Law Society is an undertaking for the purpose of competition law, or that the challenged conduct may affect trade within the United Kingdom. The critical issues were: (i) market definition and dominance; (ii) abuse; and (iii) objective justification.

90. The Chapter I prohibition is set out in sect. 2 CA, and is subject to exemption pursuant to sect. 9 CA. The full text of these two provisions is reproduced in the Appendix. For present purposes, the critical elements are:

    (a) An agreement between undertakings;

    (b) which may affect trade within the United Kingdom; and

    (c) has as its object or effect the prevention, restriction or distortion of

competition within the United Kingdom; and

(d) does not satisfy the four criteria for exemption in sect. 9(1) CA.

91. The burden is on the claimant to prove the first three elements and if exemption is raised as a defence then the burden of proving that rests on the defendant: sect. 9(2).

92. Here, it is accepted that the terms on which a law firm becomes a member of the CQS constitutes an agreement between undertakings; and although the second element was formally denied in the Law Society's Defence, it was accepted at the trial. The issues at trial accordingly concerned the third and fourth elements. Moreover, although Socrates' case was advanced on the basis of both the alternative limbs of the third element (i.e. both object and effect), in his closing submissions Mr Woolfe stated that in the light of the evidence, the allegation of an anti-competitive object was no longer pursued. The critical questions were therefore whether the agreements had an anti-competitive effect and if so, whether the agreements qualified for exemption.

93. The four cumulative criteria for exemption are that the restriction: (i) improves production or distribution of goods or services or promotes technical or economic progress; (ii) allows consumers a fair share of the resulting benefit; (iii) goes no further than is indispensable to achieve those objectives; and (iv) does not give the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question: sect. 9(1).

94. Sect. 60 CA sets out the consistency principle, whereby questions concerning the Chapter I and Chapter II prohibitions in relation to competition within the United Kingdom are to be dealt with in a manner consistent with the treatment of corresponding questions under EU law in relation to competition within the EU. In particular, the Tribunal must interpret and apply questions concerning the Chapter I and Chapter II prohibitions in the same manner as the EU Courts apply, respectively, Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"); and must "have regard" to any relevant decision or statement of the EU Commission.

THE ALLEGATIONS

95. The essence of Socrates' allegations was the requirement that training in mortgage fraud and AML as part of the CQS must be obtained from the Law Society. Mr Woolfe emphasised at the outset that Socrates was not challenging the requirement that relevant staff should take training on those issues as part of CQS membership. Furthermore, Socrates did not contend that the Law Society could not offer such training courses, provided that those being accredited under the CQS were given a choice whether to obtain the training from the Law Society or from an independent third party provider, such as Socrates.

96. On that basis, the mandatory requirement to obtain this training exclusively from the Law Society was alleged to constitute, in effect, the tying or bundling of the training with the grant of the accreditation, and therefore contrary to the Chapter II prohibition. Further or alternatively, even if the Law Society was not found to be dominant, the terms of membership of the CQS imposing this mandatory requirement were said to constitute an anti-competitive agreement contrary to the Chapter I prohibition.

97. As regards objective justification, Socrates argued that this mandatory requirement could not be regarded as inherent in or essential to the concept of the CQS. There were various alternative approaches which could achieve the necessary objective. In that regard, Socrates referred to an outcomes-based approach, which specified the training standards which solicitors were required to seek, which was said to be akin to the approach adopted by the SRA. Alternatively the Law Society could specify the policies and processes which the solicitors had to follow as regards training, corresponding to the model of the Law Society's Lexcel quality mark for practice management and client care. Mr Woolfe said a further alternative would be for the Law Society to accredit or audit third party firms providing training on an objective basis so that courses from accredited trainers would be accepted. Essentially for the same reason, the criterion of indispensability as one of the conditions for exemption from the Chapter I prohibition could not be satisfied.

98. In summary, the Law Society denied that it was dominant in the relevant market,

and disputed that the obligation at issue could be regarded as a tie or that it had any appreciable anti-competitive effect. In any event, the obligation was essential to ensure the quality of training which was integral to the CQS and to retaining the confidence of mortgage lenders, and was therefore objectively justified; it also met the criteria for exemption under sect. 9(1) CA.

ANALYSIS: INTRODUCTION

99. Before addressing the various issues under the Chapter I and Chapter II prohibitions, it is important to emphasise the temporal dimension. As our account of the evolution of the CQS has shown, it went through various stages of development. Not only may the position of a party on a market and the effects on that market of its conduct change over time, but in this case the arrangements which the CQS involved, particularly as regards training, themselves changed. In consequence, the legal analysis may produce different results for different periods.

100. In our view, it is here necessary to distinguish four relevant periods:

(1) from the launch of the CQS in October 2010 to the introduction of the mortgage fraud training course in 2012;

(2) from 2012 to the introduction of the AML training course in June 2013;

(3) from June 2013 to the introduction of the remodelled CQS training: either the end of February 2016 when the mortgage fraud and AML courses were withdrawn or the end of April 2016 when the new Financial Crime course was introduced; and

(4) from end February/end April 2016 to date.

101. Self-evidently, there is no question of an infringement of competition law in period (1). And the answers we reach on some issues for a particular period may mean that for that period the remaining issues are academic.

MARKET DEFINITION

102. The concept and role of market definition in competition law is conveniently explained in the European Commission's Notice on the definition of the relevant market (the "Market Definition Notice"). This states at paras 2-3:

> "2…The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article [101 TFEU].
>
> 3. It follows from point 2 that the concept of 'relevant market' is different from other definitions of market often used in other contexts. For instance, companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs."

103. The Commission explains the role of demand substitution, supply substitution and potential competition, and states at para 13 of the Notice:

> "Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers."

104. A well-recognised conceptual technique for market definition, as further explained at paras 15-18 of the Notice, is the so-called 'hypothetical monopolist' or 'SSNIP' test (referring to a 'small but significant non-transitory increase in price'). For demand substitution, this speculative exercise considers whether in response to a 5-10% increase in price by a hypothetical monopolist supplying the product in question, sufficient consumers would switch to an alternative product so as to render that price increase unprofitable. If so, the alternative product is part of the same relevant market, and the exercise is repeated until the set of products is such that a permanent price increase of this order is profitable. The same approach can be applied for supply substitution, asking whether in response to a SSNIP a supplier of another product would start supplying the

product in question: if so, that other product is considered part of the market.

105. This Tribunal reviewed the case-law on market definition in its first *Aberdeen Journals* judgment, *Aberdeen Journals Ltd v Director General of Fair Trading* [2002] CAT 4, and concluded, at [96]:

> "… the relevant product market is to be defined by reference to the facts in any given case, taking into account the whole economic context, which may include notably (i) the objective characteristics of the products; (ii) the degree of substitutability or interchangeability between the products, having regard to their relative prices and intended use; (iii) the competitive conditions; (iv) the structure of the supply and demand; and (v) the attitudes of consumers and users."

106. None of this is controversial, but we think it is important to emphasise that in competition law market definition is a means to an end and not an end in itself. Here, the end is determination whether at any period the Law Society had substantial market power amounting to dominance, and also to some extent determination of the competitive effect of the impugned practice.

107. It is necessary to consider both the product market and the geographic market. In the present case, it is clear, and was of course recognised by both experts, that there are:

(a) an upstream market, in which the Law Society supplies the CQS; and

(b) a downstream market, in which Socrates and others supply training courses.

(a) Upstream market

108. Mr Williams, the expert economist called by Socrates, considered that the upstream market is the supply of accreditation to law firms providing residential conveyancing in England and Wales.

109. Dr Majumdar, the expert for the Law Society, considered that the relevant upstream market was a two-sided platform serving two distinct customer groups. On the one side, the market involved the provision of quality assurance to mortgage lenders with regard to solicitors that offered residential conveyancing services; on the other side, it facilitated access to the panels of mortgage lenders

for solicitors offering such services.

110. The concept of a two-sided platform market was explained by the Tribunal in *Sainsbury's Supermarkets Ltd v MasterCard Inc.* [2016] CAT 11 at [70]-[71], quoting from the report of one of the economic experts in that case, Dr Gunnar Niels:

> "70. …The essence of a two-sided platform, as its name implies, is that "the platform brings together two types of user. In payment card schemes, these are the consumers who carry the card in their wallet (cardholders), and the retailers and other types of merchant who accept the card for payment (merchants). There are many other examples of two-sided platforms: TV channels, newspapers and websites bringing together viewers/readers and advertisers; PC operating systems bringing together users and developers/programmers; dating agencies bringing together men and women".
>
> 71. There is an essential relationship between the two types of user: "the more users there are on one side, the more attractive the platform is to the other side. The more consumers with a MasterCard in their wallet, the more attractive it is for retailers to accept MasterCard, and vice versa". A good example of a two-sided platform is the Metro newspaper, which is free of charge to readers (so as to maximise readership), thus making it attractive to the other group of users – advertisers – who will be prepared to pay more for advertising space the greater the size of the readership. There is a dynamic between the two groups of users (readers and advertisers), which causes one group (the advertisers) to pay more if the other group (the readers) is larger. That dynamic exists, even though there is no formal (legal) relationship between the readers and the advertisers."

111. We doubt that it is necessary, for the issues in this case, to determine whether the upstream market should properly be characterised as a two-sided platform. Even if that were the correct analysis, it is only the market power and anti-competitive effect as regards solicitors which is at issue. In addressing those questions, the focus is therefore on that side of a putative two-sided market, and the fact that there may be another side serving a distinct group of customers is relevant only if that provides a competitive constraint. For example, in *Aberdeen Journals*, concerning alleged predatory pricing for advertising space by a newspaper, the Director General of Fair Trading defined the relevant market for the purpose of the competition analysis as the supply of advertising space in local newspapers concentrated in the Aberdeen area, leaving aside the fact that competition between newspapers for advertising was clearly related to the competition

between them for readers; and that finding was upheld by the Tribunal: [2003] CAT 11, paras 22, 301. Here, Mr Williams accepted in evidence that the degree to which mortgage lenders may act as a competitive constraint is relevant on his definition of the market when addressing the question of dominance. And Dr Majumdar accepted that, on his market definition, the focus should be on whether the Law Society has power over the solicitor side, taking into account whether the lenders act as a constraint.

112. Nonetheless, we think that we should state our view that the product market definition put forward by Mr Williams is to be preferred. It is clear from Dr Majumdar's report that his opinion as to market definition is based not on specific economic expertise but on his assessment of the factual evidence regarding the design and development of the CQS. However, we consider on the basis of all the evidence that we read and heard that although access to lender panels was an important aspect of the CQS for solicitors, and perhaps the most important, it was and is clearly not the only significant aspect. The CQS served as a quality mark that was put forward, and perceived, as of value also as regards PII premiums and in marketing to the public, in particular in response to the challenge from other structures which started to offer conveyancing services: see paras 26 and 43 above. The 'trusted community' about which Mr Smithers spoke, and which the CQS was designed to foster, was not restricted to mortgage lenders. Examination of the development of the CQS, as set out above, shows that it was conceived in broader terms. Although increasing acceptance of the CQS by lenders undoubtedly made it increasingly attractive for solicitors, we therefore do not regard that alone as sufficient to justify a restricted market definition in terms of 'facilitating access to lenders', or to create such an interdependence of demand for this to be regarded as a two-sided platform.

113. As regards the geographical aspect of the upstream market, this is agreed to be England and Wales.

(b) Downstream market

114. Mr Williams regarded definition of the downstream market as of little relevance since there is no suggestion of dominance in that market. However, we think it

is important to have a basis on which to consider the degree of anti-competitive effect of the alleged tie: that is clearly necessary for the purpose of Chapter I and is arguably necessary also for the purpose of Chapter II, as we explain below. Accordingly, it is appropriate to define the downstream market.

115. Mr Williams expressed the view that there are separate product markets for each of mortgage fraud, AML and financial crime training for law firms, or alternatively a single market comprising all three. Because of his view as to relevance, he devoted little attention to developing this view, and he did not define the geographic market.

116. Dr Majumdar defined the market as the provision of AML training to firms and practices requiring such training under the ML Regulations, i.e. law firms, licensed conveyancers, accountants and estate agents. The geographic market in his view is the United Kingdom.

117. The critical consideration here as regards the downstream market is supply-side substitution: e.g., the ability of suppliers of AML training to accountants to offer training to law firms in the event of a SSNIP in the price charged for the supply of AML training to law firms. In his report, Dr Majumdar provided the costs of supplying a new training course, which information came from Mr Murphy of the Law Society. Covering design, commissioning of authorship and the review process, this amounts to around £10,000-£15,000 per course. This estimate was not challenged. Given the spend of customers on AML training, this means that a training firm established in supplying training to, e.g. accountants or estate agents, should profitably be able to develop a course also for law firms. Indeed, it is notable that Socrates itself supplies AML training courses for estate agents and for accountants as well as for law firms. There was no evidence as to the range of courses offered by Socrates' competitors but Socrates' example appears to confirm that the barriers to diversification by a firm which is active in one segment of this training market are not high.

118. As regards the downstream market, we therefore prefer Dr Majumdar's opinion, subject to the modification that we consider the market is the supply of training courses in AML, mortgage fraud and financial crime (and not just AML) to

firms that require AML training under the ML Regulations. Geographically, we think this market probably should be defined as covering the whole of the United Kingdom, since that is the scope of the ML Regulations. Mr George said that Socrates has a few clients in Scotland for its AML training course. However, it is unnecessary to reach a definitive view as to whether this market extends beyond England and Wales since that does not alter the competition analysis.

DOMINANCE

119. The classic definition of dominance, as articulated by the European Court of Justice ("ECJ") in its seminal judgment in Case 322/81 *Michelin v Commission* EU:C:1983:313 at [30] and repeated many times since is:

> "…a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers."

And in Case 85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36, at para 41, the ECJ described dominance in terms of an undertaking being:

> "in a position of strength which makes it an unavoidable trading partner and which, already because of this, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position."

120. Mr Williams in his report noted that on his definition of the relevant upstream market, the Law Society had a 100% market share since there was no competing accreditation scheme to the CQS, and therefore should be regarded as dominant. In oral evidence, he qualified this on the basis that the conclusion of 100% market share would apply only once a lender had specified that CQS accreditation was a pre-requisite for admission to its panel, which made it an essential product for a group of solicitors. However, we regard that approach as misconceived in this case. We do not think it is appropriate to regard the Law Society as dominant either (if that is suggested) from the moment the CQS was launched, or when a single, small lender made CQS accreditation a requirement. The fact that an undertaking may hold 100% of a particular market is obviously relevant but does not automatically mean that it has significant market power.

As the ECJ stated in *Hoffmann-La Roche* at para 40:

> "A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned."

121. Therefore, it is necessary to consider the broader economic context and, in particular, the nature of the market. Here, the reality is that relatively few solicitors' firms initially signed up to the scheme and the Law Society was concerned over the early period at the slow take-up of this new offering and devoted considerable effort to promotion of the CQS. Accordingly, we do not see that the Law Society can be regarded, in any meaningful sense, as having market power throughout the time since the CQS was introduced.

122. In our judgment, the key questions for determination of dominance are:

    (a) when did the CQS become an essential or 'must-have' product for most conveyancing solicitors' firms; and

    (b) do mortgage lenders act to apply a competitive constraint so as to counter-act the market power the Law Society otherwise might have?

(a) 'Must-have' product

123. By 'must-have' product we do not mean that the product was so essential that no residential conveyancing solicitors' firm could operate outside the CQS: we use the term to describe the situation where for the majority of conveyancing solicitors there was little option but to seek CQS accreditation. Both experts considered that this should be considered by reference to the requirements of mortgage lenders for CQS accreditation as a condition for access to their panels.

124. Mr Williams suggested that this should be considered on the basis of the 'lost' revenue which a firm would forego if it was denied access to a panel, as compared to the costs of CQS membership. By looking at the average annual conveyancing revenues per law firm (£109,100 in 2015/16), he showed that the revenue foregone if only one major lender required CQS membership was likely very significantly to exceed the cost of CQS membership for an 'average' firm

comprising five partners. However, not only is that finding sensitive to the identity of the lender in question whereas the exposure of law firms to particular lenders is likely to vary but, as Dr Majumdar pointed out, there is a difference between a product being good value, so that it is rational to purchase it, and it being an essential product.

125. We consider that, as Dr Majumdar suggested, a better approach is to consider the share of overall mortgage lending accounted for by lenders who required CQS accreditation. It is when a substantial body of lenders made CQS accreditation a condition for panel membership that the CQS can fairly be regarded as an 'essential' product for conveyancing firms. Both expert reports provide data in that regard, which unsurprisingly are broadly similar. We apply as a cross-check the proportion of conveyancing solicitors' firms that were members of the CQS. Both these sets of figures of course changed over time. The figures set out below, derived from Dr Majumdar's report, are based on the dates when particular lenders specified CQS accreditation as a requirement for their panel: see the table at para 77 above.

Shares "covered by" CQS accreditation		
Year	**Lending***	**Solicitors firms****
2011	0%	19%
2012	13%	39%
2013	20%	56%
2014	23%	59%
2015	38%	61%
*share of UK lending assumed to be broadly representative of share of lending in England and Wales. Source: CML. **see table at para 79 above.		

126. These figures give only an approximation of the overall picture, since it seems that some small lenders who introduced a CQS requirement may not be included, as Mr Williams pointed out. However, from the solicitors' perspective, it is also relevant that a significant number of residential conveyancing transactions are for cash, for which being on a lender panel is obviously not relevant. We therefore accept the approach of both experts that these figures can be used as a reasonable basis to assess the importance for solicitors of the CQS. In our judgment, the most significant figure is that some

38% of mortgage lending was by lenders requiring CQS accreditation from their panel firms by the end of 2015, which was a percentage increase of some 65% over the share in the previous year (23%). As Mr Williams notes, the implications for firms once this share of transactions (by value) was not open to them is likely to be even greater since residential clients often wish to instruct the same firm to act on both the sale and purchase transactions when moving home.

127. The importance of the CQS for firms active in residential conveyancing is shown by the significant proportion of firms that were accredited by the end of 2013. It should be noted that there is no direct correspondence between the two columns in the table since the share of lending is by value whereas the proportion of firms is simply by number, irrespective of size. The fact that a sizeable minority of firms still did not have CQS accreditation at the end of 2015, although this effectively excluded them from close to 40% of financed conveyancing transactions, may therefore be explicable on the basis that some firms are engaged in much smaller amounts of conveyancing work (although still formally classified as 'active' in residential conveyancing) so that such conveyancing is not a core part of their commercial operation. This is obviously a matter of degree. We note that Mr Smithers stated, in answer to a question from the President, that for the vast majority of firms that do a significant amount of residential conveyancing "membership of panels is absolutely essential to keep a place in the market to undertake conveyancing."

128. Having regard to these figures, we consider that it cannot be said the Law Society was dominant vis-à-vis solicitors in period (2) referred to at para 100 above, i.e. 2012 – June 2013. For period (4), i.e. from end February/end April 2016 onwards, we note that Dr Majumdar in his report acknowledges that "[r]egarding 2015 and 2016…the situation is more finely balanced". In our judgment, that is an understatement: by the end of 2015 we consider that the balance had clearly tipped in favour of the Law Society having substantial market power, subject to the question of constraints from the lenders that we consider below.

129. For the intermediate period, i.e. June 2013 – end February/end April 2016, we

consider that the position changed over that time. We find that, on the balance of probabilities, the Law Society reached a dominant position by the end of April 2015, following the Nationwide announcement: see para 77 above. Nationwide accounted for about 12% of mortgage lending and so its mandating of the CQS raised the overall share set out in the table to 35%.[14]

(b) Competitive constraint

130. The question whether an undertaking is subject to countervailing power so as to preclude dominance is generally addressed in terms of the prices it can charge.

131. Here, the Law Society charges for accreditation and re-accreditation and then separately for the various training courses. Although there was a lot of evidence about the discussions with lenders and the CML around the development of the CQS, as summarised earlier in this judgment, there was nothing to suggest that any of the lenders was interested in the prices being charged by the Law Society for any aspect of the scheme. Indeed, Mr Smithers confirmed that the level of fees was never discussed with the lenders.

132. We recognise that as a representative body for the solicitors' profession the Law Society may not have any incentive to charge excessive prices for a product supplied to its members. But the question of incentive is distinct from the question of ability, and it is by no means impossible that the Law Society may at some point regard the CQS or the supply of training courses under it as a means to boost revenue and cross-subsidise some of its other activities for the benefit of its members generally: see the suggestions tabled at some of the various committee and board meetings referred to at paras 39 and 44 above. If the Law Society did seek, for any reason, to raise its prices for CQS training, we do not see that the lenders can be regarded as applying a competitive constraint that would prevent it from doing so.

133. Dr Majumdar also considered that the Law Society was not pricing the CQS at above competitive levels and that this was significant in indicating that it did not have market power. However, aside from the point that the *ability* to charge

[14] The further 3% shown for the end of 2015 was the result of the Yorkshire Building Society requiring CQS accreditation from October 2015.

above competitive levels does not mean that the power is being exercised, we consider that there is no evidence to support that conclusion. Dr Majumdar based his view on the schedule produced by the Law Society of income and expenditure for the CQS but, as we have noted above, it subsequently emerged that this was inaccurate and, indeed, unreliable.

134. Dominance does not require a power to behave in *all* respects independently of customers or competitors, and we consider that the Law Society's ability to set its charges under the CQS to an appreciable extent independently of the solicitor customers would ordinarily be sufficient to find that there were not such competitive constraints from the lenders as to preclude a finding of dominance. But in view of the Law Society's submissions in this respect, we address also the question of countervailing constraints as to quality, in case that should be necessary. The lenders were undoubtedly very willing to respond to approaches from the Law Society regarding the development of the CQS and engaged in sometimes full discussions regarding its contents. We accept that the lenders were interested not only in the probity aspect of the CQS (as Socrates argued) but also in the training element. However, as demonstrated by the various papers and discussions surrounding its development which we refer to above, the CQS was conceived and developed more broadly than simply to appeal to lenders: see. e.g, para 43 above. As Mr Woolfe pointed out, even as regards quality, the Law Society might feel it appropriate to include elements in the CQS in which lenders would have little interest: e.g. a requirement for a specified procedure for handling consumer complaints as part of the Client Service pillar of the Scheme: see para 14(c) above.

135. Altogether, the extent of the lenders' concern and constraint is very difficult to assess. Although the burden of proof of dominance rests on the claimant, if a defendant wishes to argue that it was subject to competitive constraints it bears an evidential burden of laying the foundation for this. Here, it was striking that the Law Society adduced no evidence from any of the various lenders (or the CML). This was despite the fact that at the CMC on 16 May 2016, the Law Society requested and was granted permission to file a witness statement from a third party "in order to explain the requirements made by mortgage lenders as regards the CQS." In the absence of direct evidence, we do not accept that the

lenders exercised such constraint as regards the quality of the CQS, whether generally or more specifically as regards the quality of the training, as to counteract the market power of the Law Society towards solicitors and rebut a finding of dominance.

136. Moreover, we consider that the issue of competitive constraint cannot be divorced completely from the alleged abuse, which concerns the obligation to obtain the relevant training only from the Law Society. While some lenders may have been interested in the nature or content of the training, we do not consider that they attached importance to the identity of the training provider. We return to this aspect under the heading of objective justification, but this reinforces our view that even if there may have been some constraint from the lenders as to the overall quality of the CQS, it was insufficient to counteract the market power which the Law Society otherwise exercised towards solicitors seeking CQS accreditation in any respect that is relevant to this case.

CONCLUSION ON DOMINANCE

137. Accordingly, we find that the Law Society was in a dominant position from the end of April 2015.

ABUSE

138. In *Michelin*, the ECJ stated at para 57, in terms that have often been repeated:

> "A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted completion on the [internal] market."

139. The meaning of abuse in EU competition law was defined by the ECJ in *Hoffmann-La Roche*, at para 91:

> "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the

> maintenance of the degree of competition still existing in the market or the growth of that competition."

140. Here, the abuse alleged is tying or bundling. These are overlapping concepts which are often used interchangeably.[15] As explained in Rose and Bailey, *Bellamy & Child, European Union Law of Competition* (7th ed, 2013), at para 10.123:

> "A typical example of tying is where the dominant firm is prepared to supply the product in respect of which it holds a dominant position ('the tying product') only if the customer also agrees to buy another product ('the tied product'). The dominant firm may not be dominant in the supply of the tied product, the mischief often being the attempt to extend its market strength into the market for the tied product, to the detriment not only of its customer but also of its competitors in the supply of the tied product."

141. Although sect. 18(2)(d) CA, mirroring Art. 102(d) TFEU, proscribes what amounts to tying in terms where "by their nature or according to commercial usage" there is no connection between the two products, the EU Courts have held that the abuse is not confined to that situation, since the list of abusive practices set out in that provision is not exhaustive. Hence in Case T-201/04 *Microsoft v Commission* EU:T:2007:289 *("Microsoft")*, the Court of First Instance (as it then was) ("CFI") held that even when the tying of two products is consistent with commercial usage or there is a natural link between the two products, it may still constitute an abuse: para 942.

142. In *Microsoft,* the CFI upheld the decision of the Commission that Microsoft had abused its dominant position on the market for client PC operating systems (i.e. for general purpose computers) by tying the Windows Media Player with the Windows client PC operating system. Microsoft offered equipment manufacturers its Windows operating system only with Media Player already installed; and in view of Microsoft's overwhelming share of the operating systems market, this practice was found to alter the balance of competition in the distinct market for streaming media players in favour of Microsoft to the detriment of other manufacturers of such streaming media players.

[15] Bundling can refer more strictly to the case where products are effectively offered only as a package, whereas for tying the dominant undertaking may supply the tied product (but not the tying product) on its own: see the Commission's *Guidance on its enforcement priorities in applying Art.* [102 TFEU] ("Commission *Guidance*"), para 48.

Two distinct products

143. A necessary element of the abuse is that the tying and tied products are distinct. In *Microsoft*, the appellant argued that its media player should not properly be regarded as a separate product but was an integral part of its Windows PC operating system. The CFI held that:

(a) The distinctness of products for the purpose of analysis under Art [102] has to be assessed by reference to customer demand: para 917;

(b) In the absence of separate demand for the allegedly tied product, there can be no question of separate products and no abusive tying: para 918;

(c) But the fact that there was no demand for the tying product without the tied product does not preclude a finding of tying since complementary products are not to be regarded as a single product and it is quite possible that customers would wish to obtain the two products together but from different sources: paras 919-922.

144. Rejecting Microsoft's argument, the CFI stated, at para 925:

> "… the Court finds that a series of factors based on the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and also Microsoft's commercial practice demonstrate the existence of separate consumer demand for streaming media players."

In that regard, the CFI noted that the Windows client PC operating system and Windows Media Player were clearly different products in terms of their functionalities; and that there were distributors who developed and supplied streaming media players on an autonomous basis, independently of client PC operating systems: paras 926-927.

145. In the present case, the Law Society submitted that training was an integral part of the CQS. As Ms Smith put it in her opening submissions: "[T]he CQS is made up of a combination of complementary, interlinked components of which training is just one." The relevant training courses were accordingly part of a single product and should not be regarded as distinct. However, we reject that

argument, by analogy with the CFI's reasoning in *Microsoft*. We accept that a requirement that solicitors should have received training to an appropriate standard may well be inherent in an accreditation scheme or the award of a 'quality mark'. But the supply of the training course itself is clearly different from the supply of accreditation and the two are functionally distinct. More significantly, it is not in dispute that there was a separate market for the supply of training courses. Socrates is of course itself devising and supplying such courses to law firms, and it was common ground that the downstream market in which Socrates operates is competitive: indeed Mr Williams in his report identified a number of other third party suppliers of AML training to law firms. Mr George said in his second witness statement that Socrates' AML for property lawyers course covers mortgage fraud and cybercrime, and that there was nothing in the courses supplied by the Law Society concerning these aspects that was not available independently from Socrates. Mr Ian Hamilton, the independent solicitor who gave evidence, said much the same. That evidence was not challenged.

146. Our conclusion is reinforced by the fact that as regards all the relevant training courses, the Law Society has set a separate price for supply to firms that are not members of the CQS and thus makes them available as a separate, self-standing product.

Foreclosure

147. Tying or bundling will only constitute an abuse if it may have an anti-competitive effect. In that regard, it is pertinent to note that the object of competition law is to prevent harm to the structure of the market, so that to find an infringement it is not necessary to establish direct harm to customers or consumers. As the ECJ stated in Cases C-501/06P etc. *GlaxoSmithKline v Commission,* EU:C:2009:610, at para 63, regarding what was then Art. 81 of the EC Treaty (now Art. 101 TFEU) but in terms that were expressly of wider application:

> "…like other competition rules laid down in the Treaty, art.81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such."

This was reflected in the reasoning of the CFI in *Microsoft*, at para 1089:

> "The Commission therefore had ground to state … that there was a reasonable likelihood that tying Windows and Windows Media Player would lead to a lessening of competition so that the maintenance of an effective competition structure would not be ensured in the foreseeable future. It must be made clear that the Commission did not state that the tying would lead to the elimination of all competition on the market for streaming media players. Microsoft's argument that, several years after the beginning of the abuse at issue, a number of third-party media players are still present on the market therefore does not invalidate the Commission's argument."

148. In *Streetmap.Eu Ltd v Google Inc.* [2016] EWHC 253 (Ch) ("*Streetmap*"), after reviewing the relevant authorities (including *Microsoft*), the High Court held at [88] that:

> "The impugned conduct must be reasonably likely to harm the competitive structure of the market".

In the present case, both sides agreed that this was the applicable test.

149. In *Streetmap*, the court went on to state at [90] that "[i]n determining that question, the court will take into account, as a very relevant consideration, evidence as to what the actual effect of the conduct has been." However, that observation must be seen in the context of the factual situation in that case. There, the practice complained of had commenced in mid-2007 and concerned searches conducted on the internet, something that occurs multiple times each day. The conduct had been carried out for some eight years prior to trial by a company assumed to be dominant, and if it were to have an anti-competitive or foreclosure effect, it was inconceivable that this would not have become evident. By contrast, in the present case the impugned requirement to purchase a relevant training course was first imposed only in mid-2013, at a time when the Law Society was not dominant, and further requirements were introduced only in subsequent years. Law firms typically decide on whether to purchase a training course for their solicitors at most once a year, and for some only biennially in accordance with the Law Society's advice regarding compliance with the ML Regulations: para 24 above.

150. This does not mean that it is inappropriate to consider the actual effect on an

independent provider like Socrates, but it is necessary to bear in mind that the degree to which conduct has actually had (or not had) an anti-competitive effect is only evidential. That is because demonstration of a potential effect is sufficient, as the passage from *Microsoft* quoted above makes clear. Accordingly, in Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83, where the alleged abuse concerned a margin squeeze that excluded competitors from the downstream market, the ECJ stated, at para 64:

> "… in order to establish whether such a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking."

Therefore, provided that the conduct is reasonably likely to have an effect, the fact that the effect has not yet been realised is no answer to an allegation of abuse.

151. A further question is whether to establish an abuse it is necessary to find that the likely effect was appreciable; or put another way, whether there is a *de minimis* threshold for the application of Chapter II. In *Streetmap*, it was held that where the effect in question was on a distinct market where Google was not dominant, a *de minimis* threshold should apply in circumstances where the conduct was pro-competitive on the market where Google was dominant: see at [98]. That accordingly raises two questions for the present case:

    (a) Is the obligation to purchase training courses from the Law Society as part of the CQS to be regarded as pro-competitive in the upstream market?

    (b) If not, does the holding in *Streetmap* apply more generally in a 'distinct' or 'related' market case, even where the conduct is not pro-competitive?

152. Ms Smith submitted that the mandatory requirement to purchase training from the Law Society was pro-competitive because it made the CQS a more attractive or valuable product. But even if that was not accepted, the answer to the second question was yes. Mr Woolfe argued that the answer to both questions was no.

However, if we find on the facts that the conduct did have an appreciable effect, then both these questions become academic.

153. However, as regards the first question, we should state our conclusion that while the introduction of the CQS as an accreditation scheme for conveyancing solicitors may certainly be regarded as pro-competitive, and that encompasses a requirement that solicitors in accredited firms should have received specified training in mortgage fraud, AML and related issues, we do not consider that the particular obligation here at issue, i.e. that such training must be obtained from the Law Society, is pro-competitive. Even if it might arguably have been so regarded in 2012, when the mortgage fraud course was introduced, because of the possible novelty of the course involved,[16] in our view it was certainly not pro-competitive after 2014. We return under the head of objective justification below to the alternative ways the specification for training might be satisfied.

Did the tie have an appreciable effect in the downstream market?

154. In our judgment, the meaning of an "appreciable" effect should be the same in the context of the Chapter II prohibition (or Art. 102 TFEU) as it has for the Chapter I prohibition (or Art. 101 TFEU), where the requirement to show an appreciable effect (actual or potential) is well-established. Accordingly, appreciable does not mean substantial: it means more than *de minimis* or insignificant.

155. For the approach to assessment of effect in this case, Mr Woolfe relied in particular on the ECJ judgment in Case C-1/12 *Ordem dos Téchnicos Oficiais de Contas v Autoridade da Concorrência* EU:C:2013:127 ("*OTOC"*). That concerned a Quality Control Regulation adopted by the Portuguese organisation of chartered accountants (OTOC), which was set up under statute. Under the regulation, chartered accountants were required to obtain professional training amounting to an average of 35 training credits per year over a period of two years. The training was divided into two types: "institutional training" and "professional training." Institutional training could only be obtained from

[16] Although we have some doubts regarding novelty since we note that Socrates introduced its module of "AML for property lawyers" in February 2011, about the same time as this was incorporated in the CQS. We have no evidence regarding Socrates' competitors.

OTOC, up to a maximum of 16 hours, whereas professional training could be obtained either from OTOC or from independent training providers approved by OTOC, in courses with a minimum duration of 16 hours. Accountants were awarded 1.5 credits per hour of training. Further, all chartered accountants were required to earn 12 institutional training credits per year.

156. Following a finding that the regulation breached Art. 101 TFEU, the Lisbon Court of Appeal referred a number of questions to the ECJ including the following:

> "In the light of European Union competition law (in the training market), may a professional association impose the requirement, for the practice of the profession, of particular training provided only by it?"

157. In addressing that question, the ECJ noted that in examining effects it is well-established that it is necessary to take into consideration the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected and the real conditions of the functioning and structure of the market (para 70); and further that it was necessary to take account of potential effects as well as actual effects (para 71). The Court then stated (at para 72):

> "Although it is for the referring court to examine whether the contested regulation has had or is likely to have harmful effects on competition in the internal market, it is for the Court to provide it for this purpose with the points of interpretation of European Union law which enable it to reach a decision."

158. In that regard, the Court noted that the effect of the regulation was artificially to segment the market for the compulsory training of chartered accountants. On a review of the specified subject-matter of the two categories of training, the Court considered that it appeared that the two categories of training "could be regarded, at least in part, as interchangeable": para 76. If the national court found that to be the case, then the distinction in the regulation between those two types (with a requirement to obtain one category only from OTOC), was not justified. The Court continued, at paras 78-79:

> "The division of the market of compulsory training for chartered accountants, as made in the contested regulation, leads, secondly, to the designation of bodies authorised to provide each of those two types of training. In that regard, it is apparent from art.5(2) of that regulation

> that institutional training can be provided only by the OTOC. Moreover, of the average of 35 credits per year which chartered accountants are required to earn during the previous two years pursuant to art.4(1)(e) of the Quality Control Regulation, 12 credits must compulsorily be obtained from institutional training, as follows from art.15(2) of the contested regulation.
>
> It follows that that regulation reserves for the OTOC a significant part of the market of compulsory training for chartered accountants."

159. Having regard to these factors, and in addition the effect of the specified minimum length for professional training courses (which could preclude independent providers wishing to offer short training programmes), the Court concluded:

> "Such a rule therefore appears likely to distort competition on the market of compulsory training for chartered accountants by affecting the normal play of supply and demand."

160. We think this demonstrates that the question of effect is not to be assessed simply on the basis of market share or complete foreclosure, but can result from a segmenting of the market and a distortion in the way competition operates affecting one segment.

161. In examining the issue of effect on the evidence, we make three preliminary observations. First, assessment of effect requires comparison with a notional counter-factual situation where the challenged practice or restriction did not exist. In this case, that does not mean a CQS with no requirement for the relevant training, but a CQS where the relevant training did not have to be obtained from the Law Society. Secondly, the issue concerns the effect on the downstream market not on Socrates alone. Thirdly, since we have found that the Law Society became dominant at the end of April 2015, it is unnecessary to assess the degree of effect before that date, although evidence from previous years can be relevant in shedding light on the actual and potential effect from 2015 onwards.

162. For the Law Society, it was emphasised that the effect of the training requirement on any individual firm was limited. Before the restructuring in late 2015/2016, the courses on mortgage fraud and AML had to be taken only once by the solicitors involved; and after those courses had been withdrawn on

29 February 2016, the new CQS core module on 'Financial Crime' would similarly be taken only once, and was not required of those solicitors who had previously taken the old mortgage fraud and AML courses. Moreover, the annual update courses would not necessarily include any mortgage fraud or AML element: although one of the two updates for 2015/16 did so, we were told that neither of the two update courses being prepared for the following year was relevant. By contrast, pursuant to the ML Regulations, every firm engaged in conveyancing would have to ensure that its solicitors engaged in this work received AML training "regularly", which the Law Society advised its members meant every two years.

163. We take that into account, but we further have regard to the following factors:

(a) The extent of the Law Society's dominance on the upstream market. There were no rival suppliers of such an accreditation scheme and no prospect of any entry into that market with a competing product. Once the scheme became, as we have found, a 'must-have' for a large number of solicitors, there was by definition no choice for them at all.

(b) The large number of conveyancing firms who were members of the CQS by this time and their share of the total. There were some 2750-2800 accredited firms by April 2015, amounting to an estimated 59-60% of the total number of firms active in residential conveyancing, and the number was steadily increasing: see the table at para 79. This sheer volume constituted a segment of demand in the downstream market that was significant, even though it is clear that the total size of that market (as to which we had no evidence) is much larger.

(c) In effect, the obligation for any firm in the CQS to purchase the relevant courses from the Law Society, whilst intermittent, continued without limitation. Although accreditation was on an annual basis and therefore had to be renewed each year, once the Scheme had become well-established it is obvious that a firm which decided it wanted accreditation would wish to continue being a member of the CQS. The Scheme was indeed operated on the basis of annual renewals.

(d) Of the only two conveyancing solicitors from whom we had direct evidence, one (Mr Ian Hamilton) considered that the AML training involved in the courses required under the CQS enabled his firm to comply with the statutory obligation under the ML Regulations and so reduced the need to purchase such training elsewhere. His firm had let its subscription with Socrates lapse in 2012 as it felt it was up-to-date with AML training at the time, and while it became a subscriber again in January 2015, he said the firm would certainly have been much more likely to have renewed earlier if it had not been obliged in the meantime to purchase equivalent training from the Law Society under the CQS rules. Mr Smithers, on the other hand, said that his firm did not consider that the CQS training fulfilled the requirement under the ML Regulations. Neither witness was challenged on this, nor was it suggested that Mr Hamilton's view was erratic. We consider that the evidence demonstrates that different firms would take different views, reflecting perhaps also the profile of the firm generally as the ML Regulations apply more widely than to conveyancing solicitors. But we think it shows that for local firms with a heavy conveyancing practice, there is a potentially significant effect on the demand for AML training from third parties. Although for any firm which has joined the CQS the effect for the future will fluctuate as between years (whether by reason of the difference between the requirements under the ML Regulations and under the CQS, or the degree to which new solicitors join the firm, or otherwise), we do not regard that as sufficient to reduce the potential effect to a level that is insignificant.

(e) Several of its customers had written to Socrates stating that they wished to cancel or were not renewing their subscriptions for training because they had become members of the CQS. Ms Smith sought to dismiss this evidence on the basis the solicitors were just using the CQS as a pretext or a negotiating tactic to get a discounted rate, but we see no reason to belittle the evidence in that way. The evidence was limited, but it provides some support for point (d) above.

(f) The revenue derived by the Law Society from the sale of training courses under the CQS is significant and increased substantially over the period 2013-2015. As corrected on the final day of the hearing (see para 83 above), this showed that training revenue had risen from somewhere between £340,000-£750,000 in the year ended 31 October 2013 to over £1.5 million in the year ended 31 October 2015.[17] Of course, not all of this relates to courses on mortgage fraud and AML, but an appreciable share of it will do. Those are significant sums in the context of competition in the market for training provision. The annual turnover of Socrates is about £750,000 and Mr George's unchallenged evidence was that it has been for some years the leading provider of AML and compliance training to general practice law firms.

(g) AML and mortgage fraud training for conveyancing solicitors is a distinct product, even though it is part of a much wider downstream market. These are on-line courses and there appear to be substantial economies of scale for the supplier of such a course: as one would expect, the figures quoted by Dr Majumdar show that the main cost is the preparation of the materials (both content and programming). The marginal cost of supplying each additional customer is minimal.

164. In the light of the above, once the CQS became a must-have product to which close to 60% of firms active in residential conveyancing subscribed, we are satisfied that by reserving at least a significant part of the demand from such firms for AML/mortgage fraud training from at least a significant number of those firms at any one time, potential competition from other suppliers of such training was actually or potentially impaired, and that this could discourage entry by other suppliers into this segment of the market. We take account of the fact that we have held that the downstream market is UK-wide and covers training for other professionals subject to the ML Regulations: para 118 above. Although inevitably a matter of fact and degree, in our judgment the effect we have found was nonetheless appreciable, i.e. more than *de minimis*, at least as

[17] The revenue declined slightly to £1.4 million in 2015-16, and we recognise that as the restructured training requirements take effect it may decline a little further, but that does not affect the point.

from the end of April 2015.

165. Both parties presented a series of analyses of data concerning the number of subscribers to the CQS and to Socrates over time, covering also such matters as rates of renewal, in an attempt to show that the CQS did, or did not, have an appreciable effect on Socrates' business. The analyses from Socrates were prepared by Mr George, and although we accept that he was making a conscientious effort in that regard, it became apparent on close scrutiny that these were not robust. For the Law Society, the analyses were prepared by Dr Majumdar, but we consider that those tables also had to be treated with considerable caution because they are at a high level of aggregation. For the few years considered, there is no close temporal alignment between different data attributed to the same year: a firm accredited to the CQS has from 6 months from the date of accreditation to obtain the necessary training, and the date of accreditation (and therefore any subsequent renewal) may be at any time in the year. And as regards Socrates, over a third of its law firm customers were on two or three year contracts (since those were at a discount) and so many firms would not face the question of renewal until one or two years after it became a member of the CQS. Despite the time devoted to this at trial by both sides, we do not find any of the analyses put forward to be sufficiently robust or dependable to be of assistance, and accordingly we have therefore not relied on any of those analyses.

Objective justification

166. As regards objective justification, it was for the Law Society to show either that the requirement that the relevant courses must be obtained exclusively from the Law Society was objectively necessary or that the anti-competitive effect is outweighed by efficiencies or advantages achieved as a result, and that this restriction was proportionate, i.e. that there was no less restrictive alternative of achieving the purpose allegedly pursued: see the Commission *Guidance* at paras 28-29. This was not in dispute.

167. The Law Society argued that if its own mandatory training was not included as part of the CQS, the scheme could not retain its value to lenders and members.

The skeleton argument for the Law Society, under the heading of objective justification, stated:

> "Lenders currently have input into the content of the Law Society's training, which they could not do if the Law Society lost control of the training element of the CQS. Not only would Lenders lose control over content, they could no longer be assured of its quality. Indeed, given that CQS members could be expected to select the cheapest training that allows them to retain CQS membership, there is likely to be pressure on the quality of the training such that the CQS could no longer achieve its aim of providing quality assurance to Lenders.
>
> The Law Society would no longer be able to guarantee that a uniform minimum standard had been reached by all certified firms. Lenders could lose confidence in the scheme, and this could lead to one or more withdrawing the CQS as a gateway to their panel."

168. We reject those submissions. On the evidence, the input from lenders regarding the content of the training was very limited. There was some discussion as to what might be covered, and a representative from one lender helped with drafting one example, but the courses were essentially prepared independently on behalf of the Law Society, and for most relevant courses commissioned from outside consultants in exactly the same way as an independent firm offering training might prepare its courses. As regards the inclusion of the courses on mortgage fraud and AML, we have summarised the evidence above. The explanation given by Mr Smithers is worth repeating: "… we were doing this in the dark. Lenders had not been particularly clear about what they would require to endorse the scheme so we had to try and estimate what was going to be necessary." As regards the 2015-2016 restructuring of the CQS, Mr Murphy gave evidence of various meetings with individual lenders and the CML. However, the notes of the meetings that were produced, with the exception of a meeting with Santander, did not support the assertion that the lenders were very interested in the content of the training. But in any event, we emphasise that the issue is not whether the CQS should require the relevant training, but whether it should require that this training had to be obtained from the Law Society. Accordingly, there would be no problem about the Law Society specifying the subjects on which training was required and the topics to be covered, or indeed publishing a syllabus, following such discussion with lenders as it considered appropriate.

169. Nor was there any evidence to suggest that law firms may seek lower quality training to save money. The charge for initial accreditation under the CQS might be regarded as significant, perhaps reflecting all the checks on the firm that are carried out, but the separate charge for the relevant training is relatively small: under the restructured scheme, there is a one-off charge per solicitor for the core financial crime module of £35 and then an annual charge per solicitor for the relevant update of £35 or £40 (with an overall cap on the annual training charged to a member firm of £999). It is trite to observe that a benefit of competition may be an improvement in quality, and if there were competing providers sufficient law firms may be expected to seek out the best quality training for their solicitors so as to maintain, or even enhance, standards. In any event, we consider that appropriate quality controls could be introduced, as we discuss below.

170. For Socrates, it was argued that the quality aspect of CQS membership could be achieved by either what was described as an 'outcomes-based approach' or by a requirement that firms should have in place appropriate policies and procedures for training as in the Law Society's Lexcel mark, or by some combination of the two. However, we do not think that either of those would be an acceptable alternative. As regards the 'outcomes-based' model, we understand that refers to the system the SRA introduced in place of the former requirement for solicitors to obtain CPD (continuing professional development) points, awarded by attendance at particular courses or conferences. It is essentially a form of self-regulation under which all solicitors must reflect on their practice and undertake regular learning and development so that their skills and knowledge remain up to date, and must make an annual declaration to the SRA that they have done this. We can understand that this would not have been regarded as adequate: there was already a statutory requirement for training in AML under the ML Regulations with which solicitors had to comply, and we think there was an evident advantage in the Law Society taking a more pro-active approach to the training required of a CQS member. As regards Lexcel, although that is also a quality mark awarded by the Law Society, it concerns practice management and client care generally and is designed to demonstrate that the firm has specified policies, plans and procedures in place to ensure that this standard is met.

Although that includes policies for staff training and development, it is at a high level of generality and does not specify the form or content of the training. It is not concerned with demonstrating that a standard of skill and knowledge has been achieved in any particular area of practice. We accept the Law Society's submission that the Lexcel model can be distinguished from the role of training under the CQS.

171. However, the third model suggested by Mr Woolfe was that the Law Society could authorise or accredit training providers, to ensure they were of the requisite standard. As part of this process, the Law Society could periodically monitor samples of the courses being offered. The Law Society sought to counter that suggestion by contending that this would be extremely costly and the expense would have to borne by the solicitor members. And further it was submitted that it would be administratively burdensome since an audit would have to be carried out whenever a course content changed, and the Law Society would also have to ensure that solicitors in the CQS were completing their training.

172. However, as regards costs, the Law Society had not made any attempt to estimate what the cost might be, which would of course then have to be compared to the cost involved in administering the relevant training, for which there was also no reliable information. And the charge for authorising or auditing third party firms offering training would presumably be made to those firms not to solicitor members. If the Law Society was continuing to offer such training itself, this would of course have to be done in a non-discriminatory and transparent manner, but we do not suppose that the Law Society as a responsible body is incapable of conducting matters that way. Third party firms might well seek to pass on the charge in their fees for training, but that may well not be a total pass-through, for example if they were able to sell further training programmes to the same customers. We note that the Law Society's submissions on cost relied also on its contention that the CQS was loss-making and subsidised by the Law Society, a contention which we have found to be unsubstantiated: see paras 84 and 86 above.

173. As regards auditing, we do not see that it would necessarily involve monitoring

the content of every course to verify that each course met the specifications. A sampling exercise or periodic checks could clearly be considered. And we do not see why the SRO at each accredited firm, who is already required to decide which solicitors at the firm require what training and report accordingly to the Law Society's CQS team, could not also submit confirmation that the requisite training had been completed by all relevant persons, which could be cross-checked against returns made by the independent trainers. That is hardly a complex exercise.

174. In short, the evidence on practical difficulties was scant and unpersuasive. That may reflect the fact, as Mr Smithers said in his evidence, that in the development of the training requirements in the CQS he could not recall any real discussion of the possibility of allowing third parties to provide the requisite training. As Mr Smithers frankly acknowledged (while seeking to stress the practical difficulties), this was something which "could be done." It seems clear, on all the evidence we saw and heard, that it was simply never considered. Although this may well have been justified when the CQS was being developed, and it was uncertain whether it would be a success, we consider that the position is different once the scheme had become established and when the Law Society assumed the "special responsibility" which falls on a dominant undertaking to ensure that its practices are not causing a distortion of competition.

175. As for the reaction of lenders, Mr Murphy said in response to a question from Ms Smith that if lenders were told that the relevant training under the CQS was to be supplied by third party trainers instead of by the Law Society "[t]hey would be extremely worried … that third parties would not be able to supply the quality, the depth, the knowledge and also the auditing process that we have in place." That evidence was entirely speculative: Mr Murphy did not suggest that he had discussed this with any lender. And in this regard, the lack of evidence from lenders in support of the Law Society's case is striking: see para 135 above. We do not suggest that the Tribunal should draw an adverse inference from the absence of such evidence, but we find that on the evidence which was before us the Law Society's contention as to lenders' losing confidence in the scheme is not made out.

176. Accordingly, we reject the Law Society's case on objective justification, i.e. that there was no reasonable alternative to the mandatory training by the Law Society itself. Although objective justification is essentially a question of fact, we note that our conclusion is consistent with the approach of the ECJ in the *OTOC* case, where the Court stated, at para 99:

> "… as regards the conditions for access to the market of compulsory training for chartered accountants, the objective of guaranteeing the quality of the services offered by them could be achieved by putting into place a monitoring system organised on the basis of clearly defined, transparent, non-discriminatory, reviewable criteria likely to ensure training bodies equal access to the market in question."

CONCLUSION ON ABUSE

177. Accordingly, we find that the Law Society came to hold a dominant position by the end of April 2015 and abused that position by thereafter obliging CQS member firms to obtain the training in mortgage fraud and AML required for CQS accreditation exclusively from the Law Society. The same conclusion applies to the equivalent requirement as regards training in Financial Crime when that was introduced in place of those two courses in April 2016. We are unclear as to whether the application of that obligation to the 2015 Risk and Compliance Update itself constituted an abuse. Other than to be told that this Update included a small, self-contained AML element, we were not addressed on the content or character of that course. We do not consider that inclusion of *any* element of AML/mortgage fraud training in a course amounts to an abuse: it must be a substantial element, such that it could form the body of a separate course. Since, as we understand it, the 2015 Updates were in use only that year, if it is necessary to resolve that matter we can do so on any further trial on damages.

CHAPTER I PROHIBITION

178. The case on the Chapter I prohibition was developed much more briefly by both sides. Mr Woolfe said that Socrates' case under this head was essentially the same as its case on the Chapter II prohibition save that (a) there was no requirement of dominance, and (b) by contrast with the position (in his submission) under Chapter II, there clearly was a *de minimis* threshold under

Chapter I so it was necessary to show an appreciable effect on competition. Ms Smith said that the Law Society relied on the same arguments as regards the lack of any appreciable anti-competitive effect, but if there was such an effect then it contended that the conditions for exemption under sect. 9 CA were satisfied on the same grounds that it relied on for its claim of objective justification under Chapter II.

Appreciable effect

179. The agreements potentially engaging the Chapter I prohibition are the agreements between each individual law firm and the Law Society when the firm becomes CQS accredited or re-accredited and thus subject to the mandatory training requirements. As observed above in addressing the Chapter II prohibition, the requisite effect may be actual or potential. Since we have found that there was an appreciable effect by the end of April 2015, the critical question here is whether the accumulation of those individual agreements was sufficiently significant for the effect to be appreciable any earlier.

180. The Commission's *Guidelines on the application of Article 81(3)* [now 101(3)] *of the Treaty* state, at para 25:

> "Negative effects on competition within the relevant market are likely to occur when the parties individually or jointly have or obtain some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power…."

181. We have found that the market power held by the Law Society once it became dominant, at the end of April 2015, was an important factor in concluding that the challenged obligation had an appreciable effect on competition. We recognise that some lesser degree of market power achieved some time earlier may perhaps have been sufficient for the obligation already to have had such an effect and thus engage the Chapter I prohibition. However, to justify a finding of infringement, that would have to be established not as a theoretical possibility but as a reasonable likelihood on the facts.

182. In the present case, we have found that there was a notable change in circumstances in April 2015 when Nationwide announced that CQS membership

was a condition for admission to its panel. That important development caused a percentage increase of 52% in the share of UK lending "covered" by CQS accreditation (from 23% to 35%): see paras 125 and 129 above. Seeking to identify and establish an earlier point at which the Law Society acquired sufficient market power for the obligation to have an appreciable effect would present obvious difficulties. Mr Woolfe understandably did not press any suggestion that there was an appreciable effect on competition before the Law Society was dominant. Rather, Socrates' case under the Chapter I prohibition simply relied on the submissions on market power urged as regards the Chapter II prohibition.

183. In those circumstances, while recognising that the potential effect on competition might have become appreciable earlier than the end of April 2015, we are not satisfied that this was the case.

Exemption

184. The conditions for exemption set out in sect. 9(1) CA and summarised at para 93 above are cumulative. Mr Woolfe submitted that the critical condition for present purposes was that in sect. 9(1)(b)(i): that the restriction is not indispensable to the attainment of the object pursued. Here, that object is the attainment and maintenance of a consistent standard of quality in training. For the reasons we have set out in rejecting the Law Society's case on objective justification, we find that the restriction of training provision to the Law Society was not indispensable.

185. Accordingly, the restriction does not qualify for exemption.

CONCLUSION ON CHAPTER I

186. We therefore find that the obligation to obtain the training required under the CQS in mortgage fraud, AML and, subsequently, Financial Crime, only from the Law Society breached the Chapter I prohibition as from the end of April 2015. As regards the obligation to take the 2015 Update course on Risk and Compliance, we reserve the position on the same basis as set out regarding the Chapter II prohibition: see para 177 above.

CONCLUSION

187. For the reasons set out above, we find that that Law Society has breached the Chapter I and Chapter II prohibitions from the end of April 2015.

188. We will invite submissions from Counsel for both parties as to what order and directions should be made in the light of this judgment.

The Hon. Mr Justice Roth William Allan Prof. Stephen Wilks

Charles Dhanowa OBE, QC (Hon)
Registrar Date: 26 May 2017

APPENDIX

Competition Act 1998

2 Agreements etc. preventing, restricting or distorting competition.

(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which—

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.

(4) Any agreement or decision which is prohibited by subsection (1) is void.

(5) A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

(6) Subsection (5) does not apply where the context otherwise requires.

(7) In this section "the United Kingdom" means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

(8) The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter I prohibition".

…

9 Exempt Agreements.

(1) An agreement is exempt from the Chapter I prohibition if it –

(a) contributes to—

(i) improving production or distribution, or

(ii) promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit; and

(b) does not—

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(2) In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertaking claiming the benefit of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied.

…

18 Abuse of dominant position.

(1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

(2) Conduct may, in particular, constitute such an abuse if it consists in—

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

(3) In this section—

"dominant position" means a dominant position within the United Kingdom; and

"the United Kingdom" means the United Kingdom or any part of it.

(4) The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter II prohibition".