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**IN THE COMPETITION**

Case Nos. 1249/5/7/16

**APPEAL TRIBUNAL**

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

9 November 2016

Before:

**THE HONOURABLE JUSTICE ROTH**  
(The President)  
**WILLIAM ALLAN**  
**PROFESSOR STEPHEN WILKS**

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

**SOCRATES TRAINING LIMITED**

Claimant

- and -

**THE LAW SOCIETY OF ENGLAND AND WALES**

Defendant

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**DAY 2**

## **APPEARANCES**

Mr. Philip Woolfe (instructed by Socrates Training Limited) appeared on behalf of the Claimant.

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

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1 (9.00 am)

2 THE PRESIDENT: Mr. Smithers, good morning for us, good afternoon for you. As you know  
3 this is the hearing in London of the Competition Appeal Tribunal. Just to explain who is  
4 here, I am Mr. Justice Roth and I am Chairman of this Tribunal. On my left, your right, is  
5 Professor Wilks, a member of the Tribunal, and on the other side is Mr. Allan, the third  
6 member of the Tribunal, and the three of us are the judges in the case, so that is Professor  
7 Wilks and Mr. Allan. Mr. Allan is a solicitor and was a partner in Linklaters before.

8 Thank you very much for staying up late and it seems it will be later still so that we can --

9 A. Thank you for facilitating this.

10 THE PRESIDENT: -- hear your evidence. If at any time the technical process of either picture or  
11 sound does not work, please say so at once so we can take steps to rectify.

12 A. I certainly will, yes. Thank you.

13 THE PRESIDENT: Has Mr. Smithers been sworn? No is the answer. I think you have a Bible or  
14 -- are you taking an oath or affirming? Yes. Could you administer the oath.

15 A. I am happy to take an oath. MR. JONATHAN SMITHERS (sworn)

16 THE PRESIDENT: Please sit down, Mr. Smithers.

17 A. Thank you.

18 THE PRESIDENT: I think there is a slight delay in the voiceover.

19 Now the two counsel, Mr. Smithers, in the case are Ms. Smith QC appearing for The Law  
20 Society and Mr. Woolfe QC appearing for the claimant Socrates.

21 Ms. Smith will now ask a few questions.

22 MS. SMITH: Thank you.

23 Examination-in-chief by MS. SMITH

24 MS. SMITH: Mr. Smithers, do you have open in front of you bundle D?

25 A. Bundle D. Yes, I have.

26 Q. Could I ask you to turn to the document at tab 2 in that bundle. I think you probably have it  
27 open already.

28 A. Yes, I have it, thank you.

29 Q. Is this a statement from you dated 22 July 2016?

30 A. Yes, it is.

31 Q. Could you confirm your full name please.

32 A. Jonathan Robert Saville Smithers.

33 Q. And your professional address?

1 A. My current professional address is 19 Torrens Street, Braddon, Australian Capital Territory  
2 in Australia.

3 Q. And at the time you made this statement?

4 A. My firm, as it says in the statement, CooperBurnett, 14-16 Mount Ephraim Road, Tunbridge  
5 Wells in Kent.

6 Q. Thank you. Can you turn to not quite the end, but page 26 of that tab. Is that your  
7 signature?

8 A. Yes.

9 Q. And can you confirm what is in that statement is true to the best of your knowledge and  
10 belief?

11 THE PRESIDENT: Just before you answer that --

12 A. Yes, it is.

13 THE PRESIDENT: -- Mr. Smithers, can you go back to the first page of your statement please.  
14 This statement was of course made in July. You say in paragraph 2:  
15 "I am a practising solicitor and senior partner at CooperBurnett in Tunbridge Wells."  
16 Is that the position today?

17 A. Slightly different, sir. I am still a consultant to that firm. I remain as a practising solicitor  
18 of England and Wales, I have a current practising certificate, but I have since, from 5  
19 September, taken up a position as Chief Executive of the Law Council of Australia, based in  
20 Australian Capital Territory in Canberra.

21 THE PRESIDENT: So you are now a consultant at CooperBurnett, but no longer the senior  
22 partner, is that right?

23 A. That is correct, yes.

24 THE PRESIDENT: Yes, thank you.

25 MS. SMITH: Is there anything else that you want to correct or update in that statement?

26 A. No, not particularly. I have noted at point 2 my firm has been accredited since 1986, in fact  
27 they have just received their -- an application for the seventh year of accreditation for the  
28 Conveyancing Quality Scheme.

29 Q. Thank you, Mr. Smithers. Mr. Woolfe will have some questions for you.

30 A. Thank you. Cross-examination by MR. WOOLFE

31 MR. WOOLFE: Good morning, Mr. Smithers. I am not sure if you can see me on the screen or  
32 not.

33 A. I can.

1 Q. I hope the weather in Australia is better than it is here.  
2 If I could ask you to begin by turning to paragraph 13 of your statement, which is on page 3.  
3 A. Yes.  
4 Q. You say:  
5 "The standardisation of the approach to a conveyancing transaction, combined with  
6 consistently high standards of education and training is and has always been at the  
7 core of the CQS."  
8 And you refer to the CQS creating a minimum consistent standard. I just want to  
9 understand, the evidence that you are giving there is that education and training have always  
10 been at the core of the CQS?  
11 A. Yes, they have, from the early stages of the concept and the discussions that were had in  
12 many various meetings leading to the launch of the scheme.  
13 Q. Then at paragraph 15 you say:  
14 "Having considered the views of lenders and insurers, I believe that it is essential to  
15 the ongoing viability of the CQS that all CQS members have carried out the same  
16 training courses, delivered in the same way, in order to maintain the credibility and  
17 confidence in the minimum standard that CQS creates."  
18 At paragraph 16 you go on to say you liaised with the lenders. Now, this is what I want to  
19 turn now to explore with you by reference to the documents. Just to help you in terms of  
20 doing that, if you could have to hand to begin with volume D1, in which begin the exhibits  
21 to your statement, and if you could also have volume E2 easily to hand, which is a volume  
22 of additional documents. Just to explain that to you, E2 includes documents disclosed from  
23 The Law Society, so documents emanating from The Law Society, and essentially --  
24 A. I have those.  
25 Q. More or less we are going to run through D1 and E2 for a while, then you can put D1 away  
26 and we will move to D2 and E2, but E2 will stay out for most of the time of that and I am  
27 going to take you through more or less chronologically.  
28 Your account in your statement begins at paragraph 22 and onwards where you refer to the  
29 financial crisis and you refer to two factors in particular: falling standards on one hand and  
30 issues with the mortgage lender panels.  
31 What you seem to be doing is painting a picture that this is what lay behind the inception of  
32 the CQS. Was that your intent?  
33 A. Yes.

1 Q. You refer to a report of the Property Ombudsman at paragraph 24 and that should be at tab  
2 3 of bundle D1. Can you turn that up please, to tab 3.

3 I think we may have a freeze.

4 THE PRESIDENT: Mr. Smithers, can you hear us? I am being told it is at the Australian end  
5 that the problem is. Are we in it contact with anyone in Australia?

6 SOLICITOR: Yes.

7 THE PRESIDENT: Can we ask them to rectify it and investigate.

8 My experience with these things is you sometimes get recurrent and irritating problems in  
9 the first hour and then they get resolved and it then sorts itself out, but I am afraid it may  
10 happen again.

11 (Pause).

12 While that is happening can I just mention, I think because we have had an early start we  
13 need to take two breaks in the course of the morning. We will have one about 10.15ish, and  
14 one about -- at a convenient time -- 11.30, 11.45.

15 The other thing can I mention, Mr. Woolfe, while we have this interval, a couple of the  
16 figures in Mr. Williams' report -- by "figures" I mean illustrations -- are quite difficult to  
17 read in our copies.

18 MR. WOOLFE: You would like a different copy?

19 THE PRESIDENT: Well, it is really figures 3 and 6. If it is possible to get a larger version, a full  
20 page version of his figure 3 and figure 6, it may be my eyesight.

21 MR. WOOLFE: They may not be the right figures but if you turn to the very end of the tab they  
22 are enlarged, or at least two things are enlarged. I am not sure if that is everything you ...

23 THE PRESIDENT: Not in my copy, I do not think. No.

24 MR. WOOLFE: In which case we will get them for you.

25 THE PRESIDENT: No, I have not got those pages. I do not know if my colleagues do, but if we  
26 could just get --

27 MR. WOOLFE: We will sort that out.

28 (Pause).

29 THE PRESIDENT: Can you hear us?

30 A. I have sound but no vision. I have no vision, but I certainly have sound, I can hear you.

31 THE PRESIDENT: We are in the same --

32 A. My colleague is speaking to the IT technician.

1 MR. WOOLFE: Shall we press ahead for the moment with sound. I think that is probably  
2 sufficient.

3 THE PRESIDENT: I think we will press on for the moment. It is not ideal but --

4 A. Yes.

5 MR. WOOLFE: I simply wanted to observe that this is the Property Ombudsman report for 2010,  
6 do you have that at tab 3 of bundle D1?

7 A. Yes, I have.

8 Q. I just want to suggest to you that this appears to be a report that is written at the end of  
9 2010. Do you agree with that?

10 A. Yes.

11 Q. That means I do not need to go into that. So that was not something that you considered at  
12 the time that the CQS was first being considered in early 2010, was it, that document?

13 A. The CQS had been discussed in many forms for some years, the raising of standards had  
14 been a concern for the Society for a great many years, so a wide range of opinions was  
15 sought from a wide range of people. The Property Ombudsman, I think I am right in  
16 saying, was a relatively new concept dealing with estate agents, not primarily focused on  
17 any activities relating to solicitors.

18 Q. But this particular report that you mention in your statement, that was not something that  
19 figured in your reasoning process in early 2010?

20 A. Well, there were a lot of things that figured in our reasoning process. The extent to which it  
21 was considered, or taken on as necessary, I cannot directly recall, but there were a very  
22 large -- a large amount of market evidence was considered at the time. The reasons our  
23 members were giving us frequently were plain for all to see: the dropping of standards, as I  
24 say, the pressure from lenders, The Council of Mortgage Lenders who were directly  
25 involved in the work of solicitors, as opposed to the Property Ombudsman who, as I say, is  
26 primarily directed at estate agents and perhaps would have taken less weight.

27 THE PRESIDENT: Can I just -- this is Peter Roth -- I understood your paragraph 24 of your  
28 statement where you exhibit this document -- if you have paragraph 24, Mr. Smithers -- as  
29 saying that you've got evidence, or The Law Society have received evidence that there is an  
30 increasing number of complaints and claims --

31 A. Yes.

32 THE PRESIDENT: -- and that is what influenced the process of coming up with a the CQS and  
33 the Property Ombudsman's report is simply corroborating that, because he also received a

1 record number of referrals, but you are not relying on it saying "We had this document and  
2 it was the Property Ombudsman's report which influenced the launch of the CQS", because  
3 I think you say later the CQS was in fact launched in October of 2010 and it is not clear this  
4 report had even been published by then. Is that right? Have I understood your paragraph 24  
5 correctly?

6 A. Yes, broadly. There are also complaints data compiled by the Legal Ombudsman which  
7 were more influential and certainly we received, and you may have seen from my statement  
8 there are a number of points at which I am speaking on market perception. We were  
9 frequently told that the number of complaints was increasing, there was market  
10 dissatisfaction. We did not necessarily need to prove that by reference to evidence. It was  
11 well-known and certainly the perception amongst lenders and others, that complaints had  
12 increased quite dramatically over a period of years following the crash. This was not the  
13 only piece of evidence that was referred to.

14 THE PRESIDENT: No, but this actual report you would not have had when you launched the  
15 scheme, so the point being made is the report itself could not have influenced you because it  
16 had not been published.

17 A. No, that is correct.

18 MR. WOOLFE: And just moving on then to paragraph 28, you refer -- under the heading of  
19 "Mortgage lender panel" --

20 A. Forgive me, sorry, it is quite hard without being able to see. I think I may have  
21 misunderstood. We would not have had this report at the time, but the report is evidence of  
22 the contention that complaints had increased. This report was published after that time and  
23 shows that the contention about the number of complaints was correct. That is the point I  
24 am trying to make.

25 THE PRESIDENT: Yes, that is exactly how I understood it. Thank you.

26 A. Sorry, forgive me. Thank you.

27 MR. WOOLFE: At paragraph 28, Mr. Smithers, you refer to several materials in relation to  
28 mortgage fraud, two of which you give the dates of them. You give The Law Society  
29 Gazette of 20 May 2010 and a Guardian article you refer to of 30 August 2009, slightly  
30 earlier. You also refer to an FSA report. I will not take you to that now but that FSA report  
31 is from June 2011, is that right? Do you recall? I can take you to it if you want.

32 A. Forgive me, I do not have that in front of me.

1 Q. It is in the text tab of the exhibits actually, you can see it from the front, if you turn to tab 4.  
2 You see June 2011. Just to be clear I am not asking you to give an account now of what  
3 your reasons were for wanting to -- I am just asking you to confirm the obvious, that this  
4 document did not figure in your reasoning process.

5 A. No, but similarly it is evidence that that was indeed the case. As I say, a lot of this was  
6 about perception from lenders and others about what was taking place within the profession  
7 and the conveyancing industry if I can use that phrase.

8 Q. Within that tab can you turn to page 23 of that report. It is page 227 of the bundle.

9 A. Yes, I have it.

10 Q. The first sentence on that page refers to:

11 "Cases of collusion between criminals and rogue professionals such as solicitors,  
12 conveyancers and mortgage brokers and valuers to commit organised mortgage fraud  
13 led to losses for a number of lenders."

14 This is within section 3.4 and underneath that over a series of pages you have 3.4.1,  
15 solicitors, 3.4.2 brokers and so forth, and valuers come after that.

16 I just want to suggest to you that what this FSA report was concerned with was deliberate  
17 fraud by rogue professionals?

18 A. There was a confusion within the report and again there was a lot of discussion about this at  
19 the time. The 1 billion figure you see referred to in paragraph 28 of the report refers to a  
20 global figure without, in my view, direct reference to evidence and referred to all fraud that  
21 was being committed through solicitors. The amount of fraud actually being created or --  
22 by solicitors themselves, as opposed to the clients who may be committing that, was the  
23 subject of much discussion and I think the two were wrongly conflated.

24 The necessity to cut out the fraud committed by solicitors is clearly an imperative and a  
25 regulatory imperative. The necessity to deal with fraud that is committed through solicitors  
26 but with their unwitting involvement is quite different and that is one of the ways that  
27 education came into it because poor practice can lead to fraud being committed through  
28 solicitors, possibly facilitated by them, unknowingly.

29 Q. I understand, Mr. Smithers, that the system I think can now be reset in order to get the  
30 picture back.

31 MS. SMITH: We have been -- sorry, apologies to interrupt Mr. Woolfe, it is just I have had an  
32 email through saying that if we try to restart at each end we may regain the visual link if we  
33 want to do that now.

1 MR. WOOLFE: That would be -- it is easier to see when somebody wants to start talking.

2 THE PRESIDENT: Do you want to try that?

3 MR. WOOLFE: I would prefer that if it is ...

4 THE PRESIDENT: Shall we rise for five minutes while that is sorted out, or will it be quick?

5 MR. WOOLFE: If it is quick I see no need to rise, but ...

6 (Pause).

7 We do not seem to have a picture. It may be that we simply continue for the moment.

8 A. I can see you.

9 Q. We can see you, wonderful.

10 Can I ask you to turn to tab 10 in bundle D1 please.

11 A. Yes.

12 Q. That, as you can see from the front of it, is a paper written by Paul Marsh, council member.

13 I understand he was a former member of The Law Society himself, is that correct?

14 A. He was. I think at that time he may have been the immediate past President, but yes he had

15 been.

16 Q. You can see it is written in December 2009 and you refer to this at paragraph 36 and

17 following of your statement.

18 A. Yes.

19 Q. I know you say that there are -- and we can see in the documents there are antecedents to

20 the CQS, but this in your statement is more or less where the story begins chronologically.

21 (Pause).

22 THE PRESIDENT: We will have to dial in again I think.

23 MS. SMITH: Would it be sensible to rise for five minutes to try to sort out some --

24 THE PRESIDENT: I think so because we need to find out whether the problem is -- I am told it

25 is at the Australian end --

26 MS. SMITH: I think it is the bridging software.

27 THE PRESIDENT: -- and there is nothing anyone here can do; that is what I am being told.

28 MS. SMITH: We can speak --

29 THE PRESIDENT: If there is someone there, because if it goes every ten minutes -- as I say, I

30 have had exactly this experience before. In the middle of a very aggressive cross-

31 examination of a Swiss banker accused of fraud, so you can imagine the concerns in that

32 case. At least this is a different kind of case.

33 Yes, we will rise for five minutes.

1 (9.35 am) (A short break)

2 (10.05 am)

3 MR. WOOLFE: For the Court's benefit I understand that the link has now been switched to a  
4 higher bandwidth link, which may be more stable.

5 Mr. Smithers, I was taking you to tab 10 of bundle D1 and that is a paper by Mr. Paul  
6 Marsh, which you refer to at paragraphs 36 and onwards of your statement. I will just  
7 briefly deal with the way you characterise it in your statement. You begin by saying that  
8 Mr. Marsh expressed concerns about the quality of conveyancing solicitors, that is in  
9 paragraph 37, the lack of a framework. You go on at paragraph 38 to refer to --

10 THE PRESIDENT: Sorry to interrupt, Mr. Woolfe.

11 I think just before we were interrupted Mr. Woolfe was just putting to you that this paper  
12 was really, as you present it in your witness statement, the start of the process that led to the  
13 CQS and I am not sure we ever got your answer to that because I think we were then cut  
14 off. Is that a fair -- that does appear to be the way -- you set out the background, but then  
15 the actual internal process of producing it, you suggest that it was this report from Mr.  
16 Marsh that sort of got it going; is that fair?

17 A. Yes, I think that is a correct characterisation. In order to facilitate The Law Society process  
18 a paper would be written suggesting matters (inaudible) which would then go through forms  
19 of committees and worked up and that led into what became the CQS. It had been  
20 discussed for some time before that but I think this was the first time the arguments had  
21 been put together in one paper.

22 THE PRESIDENT: Thank you.

23 MR. WOOLFE: Just to lead on from that actually, what we say about the process, just to assist  
24 the Tribunal in understanding the documents as we come to them, it is referred to here as a  
25 membership scheme for residential conveyancing solicitors. I think at some point it is dealt  
26 with under the rubric later of the Home Buying Review and then later gets called the  
27 Conveyancing Quality Scheme. Is that your recollection, as it goes through this process?

28 A. Yes, it is. My recollection is that The Home Buying Review came out of this report. The  
29 Law Society wanted to set out the propositions and carried out a review with a number of  
30 people in the market, of which I was one although very early in my Law Society career,  
31 talked about our experience of the (inaudible) basically to work up the idea into a form  
32 where it may be approved by the Society.

1 Q. Thank you, Mr. Smithers. Can I just ask as well, partly because of the link, but also just  
2 keep your answers as short as they can be while giving your full evidence, as it were,  
3 because we have quite a lot to get through in the time.

4 The way you deal with the Marsh report in your statement, at paragraph 37 you say that he  
5 expressed concern about the quality of conveyancing solicitors. You pick up the same point  
6 at paragraph 38 again, referring to very poor quality of work. At paragraph 39 you say:

7 "On this basis Paul Marsh recommended the membership scheme."

8 So you are drawing an explicit link there between the concerns about quality and the launch  
9 of the scheme, and at paragraph 40 you refer at the end of that paragraph to "raising the bar  
10 on an annual basis with education".

11 So the impression that the reader gets from your statement is that this is primarily a concern  
12 about quality and that education is an intrinsic part of that. Is that a fair reading of your  
13 statement?

14 A. It is a fair reading of my statement and indeed of my active participation in discussions at  
15 the time.

16 Q. Turning to the actual Marsh report itself, so after the title page you get the first full page and  
17 he sets out the background, the factors in the current market that he calls attention to, and  
18 under "The current market" it refers to the property market being at a critical stage. He says  
19 "There had been a significant drop in volume of residential conveyancing transactions"  
20 which is having an impact. He goes on to say that solicitors still deal with 96 per cent of the  
21 conveyancing market, but their market share has fallen. He also refers to the fact that the  
22 price of home buying and selling in England and Wales is the lowest in Europe.  
23 Presumably, just to check, by that I understand him to mean the price of conveyancing was  
24 the lowest in Europe?

25 A. Yes.

26 Q. It goes on to say:

27 "There is a good level of appreciation of the technical work provided by solicitors, but  
28 there is a widespread concern about the level of service by many firms."

29 So what I would suggest to you, Mr. Smithers, is that the concerns he is talking about here  
30 are about solicitors' profitability in terms of their market share and their profitability in  
31 terms of volume and prices, he is saying that actually their expertise is appreciated, so that  
32 is quite different from the impression one gets from your witness statement, is it not?

1 A. No, I disagree. They are all similarly parts of the same idea. Certainly for a membership  
2 organisation the profitability of firms is a concern if that directly led to a decrease of  
3 standards because of aggressive price competition.

4 Q. Mr. Marsh goes on to refer to concern about the growth of licensed conveyancers impacting  
5 on solicitors.

6 If you turn over the page, he makes reference -- I think this is the bit you call attention to, in  
7 the fourth paragraph on the page -- to the concerns raised by the CML and insurers ranging  
8 from very poor quality of work to dishonesty and the concern he expresses is that it  
9 significantly undermines the reputation of the majority, so his concern there is about the  
10 reputation rather than about quality per se.

11 MR. ALLAN: I am sorry, Mr. Woolfe, where are you?

12 MR. WOOLFE: Sir, it is page 280, in the fourth paragraph.

13 My question to you, Mr. Smithers, is that Mr. Marsh's concern, as expressed here, is about  
14 reputation, is it not?

15 A. Reputation of the profession, yes, of the whole profession.

16 Q. Then he goes on again at the bottom of the page to refer in bullet points to the same kind of  
17 concerns, so market share is declining, concerns about referral fees, panel management  
18 having pushed down the level of fees, new entrants to the market; overcapacity means  
19 intense competition, then there is perception of a high level of claims for negligent  
20 complaints and fraud, and again over the page, the last bullet point refers to a very  
21 competitive environment.

22 So again I suggest to you again that his concerns are in respect of the competitive situation  
23 in the market for solicitors and the effect it is having on their profitability.

24 A. That was part of a concern, but only a part of it. This was a paper written in order to  
25 describe many and various different threats to the market. Some of them of course were  
26 entirely dissipated by the time the scheme was launched, for example the Home Information  
27 Pack which was subsequently abolished by the Government between this paper and the  
28 launch of the scheme. So it was a wide range of suggestions he was making.

29 Q. But I suggest to you that the predominant concern, as we see it here, is about profitability  
30 and market position, it is not about quality?

31 A. No, I disagree. It is very much about quality because quality impacts on the advice which  
32 consumers are receiving, so where firms are profitable doing the work poorly, not only is

1 the reputation of the profession damaged but the service to clients in accordance with their  
2 professional obligations is diminished.

3 Q. Over the page on page 281 he goes on to say that "leaving everything to the market is not an  
4 acceptable option". This is at the top of page 281 under "The Law Society's response",  
5 middle of that paragraph.

6 A. Forgive me, if I may, where are you?

7 Q. It should be on page 281 and the first heading on that page is "The Law Society's response"  
8 and you have the first paragraph underneath that.

9 A. Yes, I have it, yes.

10 Q. "Indications from counsel and those members who have engaged suggests that leaving  
11 everything to the market is not an acceptable option."

12 They refer to delivering a scheme which:

13 "... assisted the Law Society to improve, update, rebrand and relaunch TransAction as  
14 the first element."

15 Just to confirm that, I think it is clear from your evidence that "TransAction" was an  
16 existing conveyancing protocol The Law Society had and it was effectively revised to  
17 become the CQS protocol. Is that right?

18 A. No, not quite. TransAction was a protocol, but was not a compulsory scheme. So you will  
19 see in this paper like the potential new names for TransAction Plus, they wanted a safe and  
20 existing brand that was well-known in the market and to develop it (inaudible) the world  
21 was going to be very different.

22 Q. There are references to other bullet points, 2, 3, 4, and 5. There is no reference to training,  
23 is there?

24 A. Yes. Yes, in point 4 (inaudible) reduce the number of claims and complaints. That would  
25 absolutely be carried out by training.

26 Q. Well --

27 A. It was simply a mission statement, it does not speak about the delivery arrangements.

28 Q. Can I take you, Mr. Smithers, to the very last page in this tab. This is table 1. Perhaps just  
29 for the Tribunal's benefit if we go to page 282 first. Can you turn back to page 282. At the  
30 bottom of that page, "The new scheme":

31 "The proposal is therefore that TransAction should be relaunched in the spring of  
32 2010 and that it should be developed on the basis of a clearly thought out membership  
33 scheme strategy introduced incrementally each year to a point three years in time."

1 It refers to lower down:

2 "A level of entry requirements that is increased incrementally over the next three  
3 years."

4 So that was the idea: you had some requirements in year 1, more requirements in year 2,  
5 and higher requirements in year 3; that was the structure that Mr. Marsh was proposing?

6 A. Yes. That was suggested in 2009.

7 Q. 2009, sorry.

8 Can you turn to the last page in the tab. You have a table here which sets out the  
9 requirements and benefits for each year of the scheme. So under year 1 you can see a whole  
10 series of things: online application process, copy of current (inaudible). Agree to follow  
11 protocol is perhaps an important element of that, the protocol would become binding on  
12 members, but there is no reference to training in the first year, is there?

13 A. No, not in this table.

14 Q. And if you turn to year 2, in the central column, there is a reference to the firms providing a  
15 copy of a business plan, details of all quality standards applied, so they have to provide  
16 information to The Law Society, details of their staff, details of complaints, etc. Then the  
17 last but one item in that column refers to providing details of all conveyancing specific  
18 CPD lectures attended."

19 So that would be a better of the firms reporting to The Law Society what training they had  
20 undertaken, is that right?

21 A. Yes.

22 Q. But it is not part of the requirement in year 2 that solicitors should undertake specific  
23 mandatory training?

24 A. This was a paper developed in order to suggest the scheme be started. What actually was  
25 launched was quite different to this and in fact most of the requirements between 1, 2 and 3  
26 in this proposition paper are in fact a requirement of year 1 as the scheme was launched.

27 Q. But what I am suggesting to you, Mr. Smithers, is there is no -- focus on this, there is  
28 nothing in year 2 or in year 3 that would require people signing up to the scheme as Mr.  
29 Marsh was envisaging it to take mandatory training?

30 A. I understand the question you are asking and the implication is that this is the whole of the  
31 idea that the CQS was a --

32 THE PRESIDENT: Mr. Smithers, sorry. Can I just interrupt you. You will have a chance to  
33 speak about the later stages and of course The Law Society's counsel, very experienced

1 counsel, can ask you some supplementary questions in re-examination, but if I could ask  
2 you please just to focus on the question you are asked, which was quite specific, otherwise  
3 we will not finish your evidence in time and I think what was said is that as out forward by  
4 Mr. Marsh at the time, and this is only, we know, the start of the process, there is no  
5 requirement for mandatory training at least from The Law Society, was that right?

6 A. That was certainly not suggested in this paper.

7 THE PRESIDENT: But can I just clarify, in year 3 the requirements, the third one, "Commitment  
8 to accreditation by Lexcel or some other Law Society approved alternative"; was Lexcel a  
9 Law Society accredited training scheme? What was it?

10 A. Lexcel is a practice management standard quite similar to BS5750 or that nature of  
11 accreditation of a practice management standard. It is quite a different scheme to the CQS  
12 but it is a firm based accreditation rather than individual accreditation. It was one of the  
13 ideas that was discussed at the time of the scheme being brought into being.

14 THE PRESIDENT: Yes, so that is firm based and have I understood it, what is said is, as Mr.  
15 Marsh was putting it forward, year 3 a member would commit to either having accreditation  
16 under Lexcel, or an alternative which The Law Society approved; is that what he says?

17 A. That was his suggestion at the time, yes. That is what he suggested.

18 MR. WOOLFE: If I can take you back to page 283, Mr. Smithers, where Mr. Marsh continues his  
19 discussion of the requirements we have just looked at and he goes on to say that:

20 "Membership requirements are shown in table 1 ..."

21 We have seen:

22 " ... may need some refinement depending on the views of membership services and  
23 membership board and the practical implications."

24 So this is, as you say, the proposal.

25 He goes on to say:

26 " ... discussion with lenders and insurers to establish what their key concerns are and  
27 whether they can be addressed by the scheme would also be helpful in making the  
28 scheme most are relevant and attractive to potential members."

29 My question to you, Mr. Smithers, is looking at this document what seems to be the case is  
30 that Mr. Marsh is starting from concerns about solicitors' market position, he is proposing a  
31 scheme to address that and he is saying "We should go and discuss this with lenders"; is  
32 that a fair reading of this document?

33 A. No, I do not believe it is.

- 1 Q. One of the things I suggest is not happening, The Law Society is not starting from a position  
2 of being driven by lenders' concerns and heading towards a focus on quality and raising  
3 quality by training. That is not what is going on in this report at all?
- 4 A. As I mentioned, this a report which led to the development of the scheme, so what we have  
5 actually ended up with is something quite different to this. The discussion with lenders and  
6 insurers was to ensure that lenders would decide that the scheme suited their purposes in  
7 dealing with their risk requirements.
- 8 Q. If I just go on to highlight the next paragraph:  
9 "It is clear that the setting of the level or the bars of the new scheme is critical. If it is  
10 set too low it will mean it will be difficult for it to be treated as a worthwhile badge, if  
11 it is set too high then many firms will shun it because it is too difficult to join."  
12 So it proposes a progressive raising of standards over time.  
13 That continued to be a concern in the design of the CQS, did it not?
- 14 A. The number of firms that would join was a concern because every conveyancing  
15 transaction has two sides, a buyer and a seller and so you need both sides to be using the  
16 same documents. If it was to be effective to satisfy lenders, there also needed to be a  
17 sufficient number in there which was then the backdrop of course of a very difficult market  
18 following the 2008 crash.
- 19 Q. So if your concern is to get everybody using the standard forms and the standard protocol  
20 and be bound into that, you want to make it easy to get into. Is that what you just said?
- 21 A. No, again, I would not interpret it in quite that manner. To use standard documentation will  
22 help everyone and importantly clients, not just buyers and sellers but also lenders, to  
23 simplify the process and help ameliorate risk.
- 24 Q. Yes, but in order to get solicitors into a scheme that does that you want to make the barriers  
25 to entry to the scheme quite low, is that right?
- 26 A. Well, what we did was made the entry to the scheme at the level that we thought any  
27 competent solicitors firms should be able to achieve and the evidence that that was  
28 successful was the number that joined very quickly.
- 29 Q. What I suggest to you, Mr. Smithers, is that the purpose of this scheme was to enable  
30 solicitors to maintain their market share and to maintain their profitability. Would you  
31 accept that?
- 32 A. That was one of the purposes of the scheme.

1 Q. And it was intended to make conveyancing work more advantageous for solicitors. Is that a  
2 fair reading?

3 A. That was one of the aims of the scheme, yes.

4 Q. You note at paragraph 42 of your statement that this paper was considered at the Legal  
5 Affairs and Policy Board meeting which I think the minutes are in the following tab. If I  
6 could just actually take you -- within tab 11 there should be three documents. Mine are  
7 separated by pink pieces of paper; is it the same in yours?

8 A. Yes.

9 Q. Perhaps if I could begin by taking you to the last one of those, so the last two pages in the  
10 tab, and you should have a paper -- it says at the bottom of the page "Authored by Sophie  
11 Brookes" and dated 29 December 2009.

12 A. Yes.

13 Q. If you go to -- I will say the LAPB, that is the Legal Affairs and Policy Board, it seems to  
14 be the abbreviation that is used. If you could actually look at the content of that, there is the  
15 current steps there being undertaken with respect to mortgage fraud. The proposal by Mr.  
16 Marsh does not form part of that report, does it?

17 A. No, this was a really separate point altogether. I referred earlier on to -- "allegations" is  
18 quite a strong word -- that had been made against the profession, the amount of fraud being  
19 spoken of and there had been a number of attempts by the Society to understand what that  
20 actually was, what the evidence was, and this paper I think was reporting on that specific  
21 point. It is not speaking as to what would be done about it, but the Legal Affairs and Policy  
22 Board is charged with looking at policy in very broad terms, so they would have asked for  
23 this paper to be brought forward.

24 Q. If I can ask you to turn back to the previous document within the same tab, page 298, do  
25 you have that document?

26 A. Yes.

27 Q. That should be a paper written by Mr. Tim Hill dated 12 January 2010. If you just flick  
28 through, do you recollect this document? Do you recall this document?

29 A. Yes.

30 Q. Now, what this appears to do is more or less be a covering paper which presented what I  
31 call the Marsh Report to the LAPB, is that broadly correct?

32 A. Yes, it is, yes.

1 Q. It summarises the Marsh Proposal and what I would like you to confirm is there is no  
2 reference to training in this document either is there?

3 A. There is not, but there would not be.

4 Q. Then these are all considered at the LAPB meeting, so if you turn back to the start of that  
5 tab you have the minutes of the Legal Affairs and Policy Board on 13 January. If I can ask  
6 you to turn to page 289 and then you have minute 78 which deals with the mortgage fraud  
7 update, which is the paper that is at the back of the tab, the exhibit, and then there is a  
8 separate agenda item, the next one, "The Home Buying Review", and as I think you said  
9 earlier on, The Home Buying Review is what had been the Marsh Proposal and became the  
10 CQS later on, so that is what we should be looking at.

11 It seems that Mr. Marsh made a sort of presentation to the LAPB, and again:

12 "Paul Marsh spoke of the difficulties faced by conveyancing solicitors in the current  
13 market place with the widespread use of referral fees and competition from licensed  
14 conveyancing practitioners."

15 It refers to about 9,000 firms undertaking conveyancing work:

16 "To take no action would be a risk given the present gradual erosion of solicitors'  
17 share of the conveyancing market."

18 Then he describes the scheme and then not the next paragraph down but the one after he  
19 says:

20 "To try and simplify some of the areas of the conveyancing is difficult and Paul Marsh  
21 acknowledged that the scheme would not stop bulk conveyancing firms picking up  
22 business."

23 So it is concerned about bulk conveyancing firms:

24 "However, adoption of the scheme would demonstrate that The Law Society was  
25 seeking to protect solicitors' interests, making the conveyancing system better and  
26 more advantageous to them."

27 So I will suggest to you again that as presented to the LAPB this was being talked about as  
28 arising from the concern about solicitors' market position.

29 A. That was the concern that was expressed in this. That is not the only concern. Perhaps I  
30 could explain the fact that the paper came into the Legal Affairs and Policy Board because  
31 that board oversees the policy committee, the conveyancing passport, the money laundering  
32 passport and so on, which is why these are being reported through this board and they have  
33 oversight.

1 Q. As it is being presented it is about profitability and market share, market share as against  
2 licensed conveyancing practitioners, that is correct, is it not?

3 A. That is a conservative spread.

4 Q. Is not being presented as being about training, is it?

5 A. Well, it says -- I can pick up the sentence "making conveyancing systems better", that is  
6 very much focused on clients, so it is speaking about the gains, not about the methods of  
7 delivery.

8 Q. Then I think it is at this juncture in events that --

9 THE PRESIDENT: Well, if you are moving on, Mr. Woolfe, I think it is right, Mr. Smithers, can  
10 you look on page 290, which is where we were in the report by Mr. Marsh to the Board, of  
11 the third substantive paragraph:

12 "Membership of the scheme would need to be open not only to solicitors but to  
13 licensed conveyancers as well. A portal would ensure the owner would have the  
14 ability to lock out those conveyancers who appeared to be incompetent or dishonest."  
15 Can you just explain what that is referring to?

16 A. Yes, that was part of the idea which did not come to fruition at that time. Mr. Marsh had  
17 also been chair of what is called the e-connecting task force, electronic conveyancing had  
18 been (inaudible) including the Land Registry for some time and one of the initial  
19 suggestions was that the CQS be delivered through an electronic portal. In order for that to  
20 work everybody would have to be included and it turned out that this was not what  
21 happened because The Law Society is (inaudible) for solicitors, so that part effectively was  
22 bypassed because the facility did not exist to implement it.

23 THE PRESIDENT: Yes. Thank you.

24 MR. WOOLFE: Then if I can ask you, Mr. Smithers -- you can close that tab but keep the file  
25 with you. In paragraph 31 of your statement -- so it is referred to earlier in your statement,  
26 but I think it is the next point in time -- you say The Law Society received a letter from the  
27 CML, the Council of Mortgage Lenders, on 3 February 2010, so that is just after this LAPB  
28 meeting, and you say:

29 "In this letter the CML presented their concerns relating to solicitor involvement in  
30 mortgage fraud."

31 Can I ask you to turn to that letter. It is tab 8 of bundle D1.

32 A. I have it.

33 Q. The first sentence in that letter is:

1 "As you are aware, the CML and our members are extremely concerned about the  
2 growth of complicit solicitor involvement in mortgage fraud."

3 So this letter is expressing concern about complicit solicitor involvement, is it not?

4 A. Yes, it is.

5 Q. It is not expressing concerns about innocent solicitor involvement in fraud?

6 A. In terms of CML they are not in a position to judge what was complicit or not. Some  
7 lenders, I took the view at the time, would automatically think that any solicitor through  
8 whom a fraud had been committed was complicit, which simply was not the case.

9 Q. If I can ask you to look over the page, on page 271, having expressed some concerns about  
10 the panel, it refers to:

11 " ... changes in regulation that we believe are required."

12 And they are wide-ranging. Then just above the bullet points:

13 "We believe that the following will be necessary to achieve this outcome."

14 They refer to perimeter controls, allowing clients to have access to the details of practising  
15 history, better systems and controls requirements, a more intrusive supervisory process, a  
16 disciplinary regime with sufficient powers, a regulator that is willing to engage with  
17 lenders, a review of the current rules surrounding lenders' rights to access files and  
18 indemnity insurance structure. So The Council of Mortgage Lenders were not asking for  
19 solicitors to be given training, were they?

20 A. That is expressing a different question. This is about complicit to fraud. The complaint is  
21 nothing to do with complicit fraud, they are seeking better regulatory enforcement from the  
22 regulation authority which although part of The Law Society's institution is separate so  
23 many of these things that they wish to approach the Solicitors Regulation Authority for are  
24 not things The Law Society could deliver.

25 Q. So I think what you are saying is this letter is irrelevant to whether or not training is  
26 required?

27 A. No, because it is addressing a different point. The letter goes to the perception of lenders in  
28 a wide range of matters and suggesting that there are a number of things that need to take  
29 place that the industry needs to change. That suggestion was action needs to be taken and  
30 we developed the CQS as a result of it.

31 Q. Just continuing at paragraph 31, you refer to minutes of a meeting with the -- I think  
32 between The Law Society, the CML and the SRA on 4 March 2010. You were not at that  
33 meeting, were you? It is the minutes in the following tab?

1 A. No, it does not appear so.

2 Q. So anything you say about it in the document is only based on what is in the document.

3 Again I just ask you to look at that. The first paragraph under heading 1 refers to "the

4 serious and organised nature of solicitor involvement in mortgage fraud". It goes on to say:

5 "The common themes were that a significant but small number of solicitor firms have

6 been used for the sole purpose of committing mortgage fraud against numerous

7 lenders."

8 I suggest to you again that the concerns that were being discussed were regarding complicit

9 and deliberate solicitor involvement in fraud, is that right?

10 A. Well, no, that paragraph says two separate things. There were concerns about the serious

11 organised nature of solicitor involvement and, secondly a "small number of solicitor firms

12 have been used for the sole purpose of committing mortgage fraud against numerous

13 lenders". That may be used by clients or others. So there is a confusion I think that existed

14 within some lender organisations as to the length and breadth of the problem, but the

15 solution was to create what is referred to later as this "trusted community", so you knew

16 who was in the scheme, so that is the probity part which came as a result of this.

17 Q. Yes, thank you. That is very clear.

18 If I can ask you to turn to the bottom of the page, it says:

19 "The Law Society has a perception of the type of firm ...(Reading to the words)... over

20 firms with the intention of committing fraud."

21 So that is clearly referring to intentional fraud.

22 A. Yes.

23 Q. Over the page:

24 "The Law Society restates its offer to make funding available to expedite the

25 necessary action to investigate and close these firms based on evidence from lenders."

26 That is The Law Society offering to cooperate with lenders to get rid of the bad apples, as it

27 were?

28 A. Yes.

29 Q. Further down the page you get the regulatory response and three items are identified in

30 three bullet points. The first is perimeter control, vetting and tracking. That refers to identity

31 and --

32 A. Sorry, which page?

33 Q. Page 275.

1 A. Sorry?

2 Q. Page 275.

3 A. Okay.

4 Q. Under heading 2, "The regulatory response"?

5 A. I am with you, yes.

6 Q. Three key issues were discussed and you can see three bullet points, the first being

7 perimeter control, vetting and tracking. It refers to entry controls, identity and character

8 checks. So this is essentially along the lines of the probity checks, is that correct, is that

9 what perimeter controls refers to?

10 A. Yes. Well, it wants to address that part of the problem, yes.

11 Q. Then the second one is access to client files, which is something the lenders were asking

12 for. I am not going to ask you to speak about that, it is a bit of a dead end in these

13 documents I think.

14 The final one is Law Society accreditation.

15 A. That is a separate ...

16 Q. Sorry, Mr. Smithers, can you repeat yourself?

17 A. I am sorry, the access to client files is an entirely separate point.

18 Q. Yes, yes.

19 The last bullet point is Law Society accreditation:

20 "The Law Society outlined its work to develop an accreditation scheme that would

21 increase requirements over time in the initial period. The Law Society intends to

22 launch the scheme by the end of the year and will consult The Council of Mortgage

23 Lenders."

24 So it appears that The Law Society was volunteering the existence of this accreditation

25 scheme to lenders. Is that correct?

26 A. Well, we wanted -- I hope the documents show The Law Society was certainly wanting to

27 assure the lenders that they wished to be active in this space, for any number of reasons as a

28 membership organisation that is exactly what they should be doing, and the lenders should

29 not (inaudible) without continuing to consult or be part of anything that we were

30 developing.

31 Q. Then over the page it says:

32 "The Law Society was happy ...(Reading to the words)... for panel membership."

1 Just to ask you a quick question, there is no reference in this document that I can find to  
2 training having been discussed. Do you have a different view?

3 A. No, there is not. But it would not have been because it is not part of the problem.

4 Q. I thought you said at the beginning when we were talking about this document that actually  
5 it is discussing two problems. You said under the first paragraph I was putting to you that  
6 this was all about complicit involvement and you said no, that the first paragraph of this  
7 document is talking about two different things, so it is both deliberate solicitor involvement  
8 and non-deliberate and they were both being discussed?

9 A. My point was that there was a confusion I believe, a positive confusion in the mind of the  
10 lenders as to what was complicit and what was not. The Law Society scheme, the probity  
11 checks, were designed to address both sides. There is a reference there, and you referred to  
12 solicitors firms having been taken over. I think there were a very small number of sole  
13 practitioners, for example, who had sold out to someone else who had come in with the  
14 intention of committing fraud, so the firm looked like -- but in fact was owned by a third  
15 party. So that was another type of difficulty that we were trying to address through the  
16 probity checks.

17 Q. Then can I ask you to -- you can put that file to one side for a moment and take up file E2,  
18 so that is the other file I asked you to have. Can you turn to tab 2 please. You should have  
19 there the minutes of the Law Society Council on 24 March 2010, so that is some three  
20 weeks after the meeting we have just been looking at. This is not a document you refer to in  
21 your witness statement.

22 If you turn over two pages, page 87 in the corner, there is a heading "Council of Mortgage  
23 Lenders", top of the page. Do you see that? It says:

24 "Des Hudson reported that the CML and individual lenders had growing concerns  
25 about the ability of the SRA to combat mortgage fraud by solicitors. Lenders said the  
26 problem did not arise in the same extent in Scotland and Northern Ireland. It appears  
27 that a small number of firms were involved in organised crime."

28 So Des Hudson's perception and The Law Society's perception, I would suggest to you, was  
29 that the lenders' concern was about deliberate solicitor involvement in fraud. That is  
30 correct, is it not?

31 A. The lenders certainly had that concern.

32 Q. But The Law Society understood that the lenders' concern was about deliberate fraud, did  
33 they not?

1 A. The Law Society understood that that was one concern and this related to the relationship  
2 between the lenders and the regulator, rather than The Law Society in its representative  
3 capacity.

4 THE PRESIDENT: I think the point being put, Mr. Smithers, as I understand it there was that  
5 meeting between representatives of The Law Society, including Des Hudson and the CML  
6 and someone from the SRA which you were taken to before to discuss mortgage fraud, the  
7 meeting on 4 March at which you were not present, but you have seen the minutes.  
8 Following that, at what presumably is the next Council meeting on 4 March, Des Hudson  
9 reports making a report following the meeting of a couple of weeks before and he is  
10 reporting the concern of the CML and individual lenders because some lenders were also at  
11 that meeting and the only concern that he reports is mortgage fraud by solicitors and that the  
12 lenders were concerned that the SRA was not able to tackle it effectively. He does not  
13 report any other concern. That is the case, is it not?

14 A. No, that is what this report is about.

15 THE PRESIDENT: Yes.

16 MR. WOOLFE: Now you can put that file to one side again, Mr. Smithers, and go back to D1  
17 again. You refer to this paper at paragraphs 50 and 51 of your statement and you say at  
18 paragraph 51:

19 "We considered the design of the proposed scheme and produced a paper for the  
20 membership board meeting."

21 The paper itself seems to have been -- and you refer to this exhibit. The paper itself says the  
22 author is Katie Watmore --

23 A. Forgive me --

24 MR. WOOLFE: Sorry, tab number 14, sorry.

25 THE PRESIDENT: It is tab 14 in D1.

26 MR. WOOLFE: My apologies.

27 THE PRESIDENT: That is the paper you refer to in paragraph 51 I think, is that right? This is  
28 the Board meeting.

29 MR. WOOLFE: That is right, sir.

30 It is a minor point, Mr. Smithers, I do not want to spend too much time on it, but you said  
31 "we produced a paper", but if you look at the bottom of that page:

32 "This report has been prepared for the board and includes material already reviewed  
33 and approved by the Home Buying Review Project Board ..."

1 Which I think you were part of. But it says here "written by Katie Watmore". So it  
2 includes material you approved, but you did not actually write it, is that correct?

3 A. That is correct, yes.

4 Q. So paragraph 51 of your statement should be slightly amended then in that respect?

5 A. Yes.

6 Forgive me, the papers submitted to The Law Society are normally physically written by a  
7 member of staff. That is simply what is reflected in the paper.

8 Q. Turn over the page to where the text of the document starts:

9 "The purpose of the project ... essential that The Law Society provides leadership and  
10 support to help law firms maintain a leading role in conveyancing. The Law Society  
11 proposes to launch a suite of services designed to enhance the reputation of solicitors  
12 in the market, enable them to maintain their market share and increase their  
13 profitability."

14 So those are the concerns, are they not, it is reputation, market share and profitability, that is  
15 driving the launch of the scheme?

16 A. It is the same question you asked me earlier. Those were concerns, but the point of those  
17 concerns was poor consumer experience, increasing complaints of negligence which was  
18 affecting solicitors' ability to compete in the market, which was the way it was stressed.

19 MR. ALLAN: Mr. Woolfe, before you move on perhaps is it worth asking Mr. Smithers to  
20 comment on paragraph 3 of that paper?

21 MR. WOOLFE: I was just about to.

22 MR. ALLAN: Were you?

23 MR. WOOLFE: Yes.

24 MR. ALLAN: I am sorry.

25 MR. WOOLFE: So you see in paragraph 3:

26 "A membership accreditation scheme that established a quality standard for  
27 conveyancing practice, for example, could provide a platform for providing all the  
28 above objectives and be interlinked with the above proposition and/or Lexcel to  
29 provide resources or services, e-conveyancing portal, investment and partnership with  
30 third parties."

31 Again there is no reference to training in there, is there?

32 A. No, in that paragraph there is no reference to training.

1 Q. It refers to a quality standard. If I could ask you to turn over the page to paragraph 8, it  
2 refers to Des Hudson and Paul Marsh leading a presentation to lenders about the current  
3 proposals and status and will provide a high level review and so on, and:  
4 "... feedback from lenders as to whether they think the scheme ...(Reading to the  
5 words)... effectively addressed their concerns."  
6 So what that is about is what you were discussing with the President a few minutes ago,  
7 which is creating a trusted community for lenders, possibly by means of a portal and that is  
8 what they were proposing to engage with lenders about, was it not?  
9 A. That was one of the parts of the discussion at the time, and there had been considerable  
10 discussion about the electronic portal, it did not come to pass, but the concern was to really  
11 ensure that lenders were always part of the conversation.  
12 Q. And there is no reference to intending to discuss training with lenders, is there?  
13 A. There is no reference in that paragraph, no.  
14 Q. In fact there is no reference to training anywhere in this document, is there? Mr. Smithers,  
15 there is no reference to training in this document?  
16 A. No, no there is not, but that is not the purpose of the document.  
17 Q. We have seen this document was written by 26 April, you said before that the genesis of the  
18 scheme in December, so in December through to April there has still been no discussion of  
19 training, has there, in the document?  
20 A. It is not mentioned in this document particularly, but this was a very fast moving scenario  
21 where lenders were taking members off their panels and the market appeared to be  
22 fragmenting very quickly, so The Law Society was keen to react very quickly to design the  
23 scheme in the shortest possible time and launch it to cover all the things that we thought it  
24 needed to cover with as much discussion with lender and insurers as possible, so not every  
25 part of the eventual scheme had been decided at that time.  
26 Q. I suggest to you that in fact training has not been mentioned in any of the documents up to  
27 this point, has it?  
28 A. No, you are right, it has not been mentioned.  
29 Q. These are the documents you exhibit to your statement. Presumably if there were documents  
30 that did mention training earlier you would have found them and exhibited them, would  
31 you not?  
32 A. Yes.  
33 Q. So there are not any, are there?

1 A. There are not in this part of the scheme, but that is not what this was about.

2 Q. Can I ask you to turn to tab 12 of bundle D1. You should have the minutes of the Council  
3 meeting of 28 April 2010, which I think for the Tribunal's note is referred to in Mr.  
4 Smithers' statement at paragraph 45 to 49.  
5 Do you have that, Mr. Smithers?

6 A. Yes, I do.

7 Q. Can I ask you to turn to page 307. You have minute 162 referring to The Council of  
8 Mortgage Lenders and mortgage fraud and a report is noted about lenders' concerns, I think  
9 we have that report, and the detail of what The Law Society is doing in response to lenders'  
10 concerns. It talks about:  
11 " ... agreement with three major lenders to review a selection of cases, obtaining the  
12 SRA's agreement to take action to address lenders' concerns."  
13 Then they refer to:  
14 " ... development of an accreditation process to establish firms' probity."  
15 And contingency plans are also referred to.  
16 So the accreditation process that is being referred to there is explicitly linked to probity, is it  
17 not?

18 A. It is in this sentence, yes.

19 Q. Because that is what the lenders were concerned about, was it not?

20 A. That was a concern which was very (inaudible) concerned about, yes, under pressure from  
21 their own regulator to understand who was on their panel and in whose client account  
22 mortgage funds would be transmitted.

23 Q. And again there is no mention of training, is there?

24 A. Not in this paper, no.

25 Q. Because that was not what the lenders were concerned about, was it? It would not have  
26 been relevant to this point about The Council of Mortgage Lenders?

27 A. It does not mean the lenders were not concerned about it simply because it is not mentioned  
28 in this paper. This was about the probity of the scheme.

29 Q. Well, it is a report about The Council of Mortgage Lenders and their concerns about  
30 mortgage fraud, but if The Council of Mortgage Lenders were raising concerns about  
31 inadequacies in solicitors' training, one would expect to see it there, would one not?

32 A. That is not how the situation developed. They were concerned, under huge pressure from  
33 their own regulator, I believe, to understand who was on their panels, how mortgage money

1 flowed through solicitors' client accounts, in order to stop that fraud occurring, so that was  
2 the initial wish for them, that is what is being reported here. It is not the totality of the  
3 scheme, it is discussions about a part of it.

4 Q. Now, Mr. Smithers, I am just going to -- at paragraphs 56 to 58 of your statement you  
5 discuss a meeting between The Law Society and The Council of Mortgage Lenders on 29  
6 April. I am not going to take you to that, I am simply keeping the chronology in step.  
7 Then the next thing you discuss, there is a membership board meeting on 14 May 2010  
8 which I think is what happens chronologically next, but you actually refer to it at paragraph  
9 53, so slightly earlier in your statement, and the minute of that is at tab 15 of bundle D1, so  
10 perhaps can you -- perhaps can you read paragraph 53 of your statement first. You say:

11 "The minutes of the membership board meeting of 14 May 2010 (which I attended)  
12 noted the intention of The Law Society to launch a suite of services designed to  
13 enhance the reputation of conveyancing solicitors."

14 Can I ask you to turn then to tab 15, bundle D1. The first point to note is your name does  
15 not appear amongst those present.

16 A. No, it does not appear to, no.

17 Q. So should paragraph 53 --

18 A. I may well have joined just before that.

19 Q. So should paragraph 53 of your statement be amended, the words in brackets saying "which  
20 I attended", should they be amended to say "which I did not attend"?

21 A. My recollection is that I did attend it, I am afraid I do not have a recollection of a meeting  
22 six years ago. When I looked at this my memory was that I did, but I can't say for certain.

23 Q. I suggest that if the minute which is contemporaneous says you weren't there and people's  
24 recollection fades over six years, it is more likely that you were not there and that the  
25 minute is correct?

26 THE PRESIDENT: Is that --

27 A. I am not a member of the board, I would not have attended the next meeting or had an  
28 opportunity to correct the minute.

29 THE PRESIDENT: That may be so. What is put to you is is it possible that the minutes are  
30 correct and now that you look at it as a contemporary document that in fact this was not one  
31 of the meetings you attended? We see you went to lots of meetings. Is that possible?

32 A. Yes, it is. That is possible. That is indeed possible, yes.

33 MR. WOOLFE: One imagines that all the meetings tend to blur into one over time.

1 THE PRESIDENT: That was a comment, yes.

2 MR. WOOLFE: Then if I can take you to page 318 in that document and again this notes The  
3 Home Buying Review report that I think we have already looked at and there is some  
4 discussion of that paper:

5 "Members made the following comments about the quality scheme ... that it was  
6 similar to an accreditation scheme, it would be more popular with the profession than  
7 an accreditation scheme ..."

8 So it seems to have been perceived as something which is different at this stage from the  
9 other accreditation schemes that The Law Society were then offering?

10 A. Yes.

11 Q. And it refers to qualifying processes, working with the CML and so on, but again there is no  
12 reference to training, is there?

13 A. No, I should explain similar but not the same because all the other accreditation schemes  
14 with the exception of Lexcel were individually based around practice areas are the firm  
15 based accreditation schemes (inaudible) bullet point the shape of the business plan had yet  
16 to be decided.

17 Q. Then if I can take you -- again it is a matter of getting the chronology straight, I am afraid I  
18 am going to skip around a little bit in your statement to do that. At paragraph 60 of your  
19 statement you refer to a report of the Chief Executive of The Law Society for the Council  
20 meeting and that is on -- the report is dated 24 May. The document is at tab 18, though I  
21 think you quote the relevant ... or maybe you do not. Can you turn to tab 18 please and then  
22 turn within that document to page 337. It refers to meetings with the CML:

23 " ... could be an opportunity for members to comment ..."

24 Sorry, under 3.1, "Membership scheme", it says:

25 "Contact has been made with CML to progress ...(Reading to the words)... type of  
26 characteristics they are looking for."

27 So there is this intent to engage with the lenders at this stage of the design process. It says:

28 "Internally the membership scheme project is being led by The Law Society services.  
29 An interim project manager has been appointed."

30 Now The Law Society services, they are Law Society staff who, amongst other things, do  
31 offer services on a commercial basis. That is right, is it not?

32 A. That is part of a division.

1 Q. I just want to understand, because obviously we are not all members of The Law Society, it  
2 helps to have some context and explanation.

3 A. (Inaudible).

4 Q. There is a --

5 A. In a sense this was an accreditation -- sorry, just to help, other accreditations I think  
6 probably would have been specifically through membership services, and automatic  
7 services, because it involved a financial transaction in terms of the accreditation, so that is  
8 why it was put there, it would not imply anything else about it.

9 Q. Again there is no reference to any work being done in respect of developing training, is  
10 there?

11 A. No.

12 Q. Then can I ask you to turn back to tab 16 in this bundle and there is a paper there dated --  
13 dated in the bottom 9 June 2010, that will be presented to the membership board on 24 June  
14 and you refer to that at paragraphs 56 to 58 of your statement I believe. It refers to Des  
15 Hudson and Paul Marsh having made a presentation to The Council of Mortgage Lenders,  
16 paragraphs 4 and 5, proposals for a high level overview:

17 "... to solicit feedback from lenders as to whether they think the scheme effectively  
18 addresses their concerns and issues and ensure that they will continue do work with  
19 solicitors who are accredited."

20 There is no report coming back from that meeting -- sorry, at this stage, as we have seen,  
21 nothing in the proposal involved training, did it, up to this point?

22 A. It is a proposal to launch the scheme, it is not speaking about, as the previous Marsh paper  
23 did, years 2 or 3 (inaudible).

24 Q. But so Des Hudson and Paul Marsh -- this is reporting what has happened. There is no  
25 reference in this paper to lenders saying "Excuse me, this scheme does not contain training,  
26 we would like training please". There is nothing like that in there, is there?

27 A. There is not anything like that in this paper, that is correct.

28 Q. That is because the lenders were not asking you to incorporate training, were they, at this  
29 stage?

30 A. I was not part of those meetings, as you pointed out.

31 Q. Then you refer also at paragraph 58 to a membership board meeting of 24 June -- actually  
32 no, perhaps one more question on that document. If you can turn to the last couple of  
33 pages, page 324, 325, and the future timeline of the project you've got two tables. The first

1 one was key focus areas and critical deliverables in the middle of the page, can you see  
2 that? The first major focused area is viability testing. The second is accreditation scheme  
3 and the third is promoting the scheme. Within the accreditation scheme it refers to -- this is  
4 in the boxes on the right-hand side, second one up from the bottom:

5 "Scheme design and process, protocols, transaction forms, complaints and  
6 enforcement process."

7 It was not -- there is no reference to training in there, is there?

8 A. There's no reference to training at that point, no.

9 Q. This was the planning document, so if it was planned at that point you would spend time  
10 developing training, one would expect to see it reflected in this document, would one not?

11 A. As I said previously, this was being done extremely quickly and almost all volunteer effort.  
12 I do recall a discussion, I do not think it is minuted, where training had been spoken of,  
13 even the basic training for the senior responsible officer and the practice manager training  
14 which were going to be developed at the same time but were not ready for launch, so the  
15 critical point for us was launch of the scheme, even if those elements of training did not  
16 have to be completed until the end of the third year of accreditation were not ready at the  
17 point of launch.

18 Q. But if we look down at the key milestones below this we have a series of dates that are put  
19 in place for each of the stages. So somebody is taking a fair bit of care to make sure they  
20 have got each of their ducks in a row, as it were, before the scheme is launched. They have  
21 got different dates running from May to October, but there is no reference to getting  
22 somebody to design training, is there?

23 A. No. I think the final one is the launch of the scheme, as I just mentioned there was not  
24 sufficient time to do that. The training takes a while to develop and if you did not need  
25 training on day one, it would not be until the end of the first year or reaccreditation that you  
26 would have to demonstrate that training had been undertaken.

27 Q. You said it is not necessary to have training from day one?

28 A. No, I am saying that the scheme did not envisage that the training would take place at the  
29 point of accreditation, it would be undertaken after the probity checks had taken place.

30 THE PRESIDENT: But Mr. Smithers, so I can understand this, this is a time talking about the  
31 project and the project, as I understand it, is the Conveyancing Quality Scheme project, is  
32 that right?

33 A. Indeed, yes.

1 THE PRESIDENT: And it is talking about the future timeline of the project. Now, I can  
2 understand you saying that it had to be done quickly and it was not practicable to achieve  
3 training materials before launch, but if training materials, or training was part of the  
4 scheme, as conceived at this time, that is to say start of the project, would you not expect  
5 any competent person setting out milestones to have a further milestone saying "preparation  
6 and approval" or whatever, "discussion of training materials", even if that milestone might  
7 come after launch? Is it not a bit odd to leave it out altogether?

8 A. I think it is referred to in -- forgive me.

9 THE PRESIDENT: I am just saying it would be rather odd --

10 A. I think it is referred to in an oblique way, I agree with you.

11 THE PRESIDENT: It is referred to in an oblique way -- where is that?

12 A. In paragraph 10, the second bullet point, year 2, "Re-accreditation to raise standards for  
13 participation".

14 THE PRESIDENT: Yes, I see.

15 MR. WOOLFE: Mr. Smithers, just so I understand, you are saying that raised standards for  
16 participation in year 2 is an oblique reference to introducing a requirement for training; is  
17 that your evidence?

18 A. Yes, yes, that is my recollection, certainly in the many meetings that I went to there were  
19 discussions along those lines.

20 Q. But raise standards for participation is a broad term, is it not, it could refer to a myriad of  
21 things?

22 A. I mentioned it is an oblique reference. I would perhaps refer to my previous comment, you  
23 were talking about the key milestones. Key milestones were up to the point of launch  
24 which was seen as the critical point to demonstrate to lenders and others in the market that  
25 The Law Society had been able to launch a scheme. I think in retrospect things might have  
26 been done differently, but that is what this table is about.

27 Q. So you are saying it was envisaged that you might launch, run the scheme for a year and  
28 then introduce some form of training in the second year of the scheme?

29 A. No.

30 Q. That is not what you are saying?

31 A. No. It was envisaged -- that is what I am saying, again the minutes may not properly  
32 suggest it, which is why I referred to it as oblique, but in order to attain year 2 accreditation  
33 you would have to demonstrate that you had fully complied with the terms of the scheme.

1 Q. I suggest to you, Mr. Smithers, that is not what year 2 "raise standards for participation" is  
2 saying, that is saying that you will apply higher standards to be a member of the scheme in  
3 year 2 than you did in year 1, not that -- it is not simply saying "We will check in year" --  
4 that you provided training in year 1, is it?

5 A. As I said at the time, it was really important to launch this very quickly to show a market  
6 reaction and it was to be developed -- it was a work in progress as it went through which  
7 was not totally satisfactory but it met the timeline that was required.

8 At that time of course no members had confirmed that they would utilise the scheme.

9 Q. Mr. Smithers, I suggest to you that the reference to raising standards in year 2 is not a  
10 reference to introducing training. That is what I am putting to you. What is your position?

11 A. Well, I disagree.

12 Q. Thank you.

13 A. As I mentioned, it is an oblique reference to the need to raise standards throughout the  
14 profession and that that would take place and be evidenced on a yearly reaccreditation.

15 Q. Then --

16 A. The concept of raising standards otherwise referred to as "the bar" was an integral part of  
17 the scheme.

18 Q. Well, we have seen that in Mr. Marsh's paper. The idea was that the requirements would  
19 become progressively more onerous from one year to the next. That was what was meant  
20 by raising the bar, was it not?

21 A. Well, that was a suggestion in the initial paper as the scheme actually developed.

22 Q. Now, in the chronology there is something of a hiatus over the summer period, in the  
23 documents and in your statement, between late June and September, so that is where we are  
24 going to go to now. At paragraph 62 of your statement you refer to a report prepared by  
25 Sophie Brooks dated 4 September, which is at tab 19 of the bundle. This is focusing on the  
26 lenders' panel side of the issue and the concerns that are going on with that.

27 What this does, just to summarise it for you, is it sets out the background to panel

28 membership and concerns about what they call rationalisation of panel membership, which  
29 is the term for basically cutting the number of firms on each lender's panel. At page 344  
30 they go through Santander, Lloyds and so on and their concerns about impact on firms.

31 If I can take you to page 345, under the heading "Actions taken by The Law Society", and it  
32 refers to communication with lenders, that is one thing The Law Society was doing, trying  
33 to persuade lenders not to undertake these steps and you explain that and that is understood.

1 Then there is under the heading of "Mortgage fraud" various things referred to, including  
2 engagement with the SRA, analysis of data, promotion of due diligence and so on, best  
3 practice on mortgage fraud etc, those are the three bullet points.

4 Then under the heading "Supporting and informing the profession", the last one of these  
5 says:

6 "Work also continues on the development of a residential conveyancing membership  
7 scheme and a soft launch in October 2010. The aim is for the scheme to be  
8 implemented in early 2011."

9 So there is a distinction between soft launch and implementation:

10 "The scheme focuses not just on accreditation ...(Reading to the words)... updated  
11 protocols are being developed as part of the scheme."

12 So it describes the focus of the scheme and then mentions that protocols are part of it and  
13 there is no reference to training, is there?

14 A. Not in that paragraph, no.

15 Q. Then the following tab you have a meeting of the LAPB that took place on 14 September. I  
16 am not going to ask you questions about that, you mention it at paragraph 62 of your  
17 statement.

18 Then if I can take you now to bundle E2, so the other bundle, to a document that --

19 A. Can I close this?

20 Q. Yes. Bundle E2, tab 3. This is not a document that you mention in your statement, it is not  
21 exhibited to your statement, but under the minutes it says "Present" and includes your name,  
22 meeting of the Membership Board of 16 September 2010. Were you at that meeting?

23 A. Yes, that I think was the first meeting of the membership board in that iteration and I had  
24 just been elected to that board, yes.

25 Q. You say at paragraph 1 of your statement that you joined the Board on 1 September, so that  
26 would be correct.

27 A. Yes.

28 Q. Do you remember that meeting, your first meeting?

29 A. No, not very specifically.

30 THE PRESIDENT: I doubt anyone, Mr. Woolfe, can remember in detail a meeting from 2010,  
31 especially if you have attended so many meetings.

1 MR. WOOLFE: Absolutely. That is why I wanted to ask the question because I thought it was  
2 only fair to give him the chance to say. I certainly am not going to criticise Mr. Smithers  
3 for not being able to remember any of these.

4 If I could ask you to turn to page 5, you have at minute 6 a bold heading "The Law Society  
5 events overview" and then towards the bottom of that page you have an underlined heading  
6 "Commercial potential for accreditation scheme". It says:

7 "Katie [this is Katie Watmore] presented a proposal ...(Reading to the words)... ability  
8 to achieve/keep accreditation."

9 Now, just to be clear, this gets picked up in another meeting later on, but the accreditation  
10 schemes that that is referring to, those would be The Law Society's accreditation schemes  
11 for individual solicitors, would they not?

12 A. Yes, that is right.

13 Q. That is right, so this is talking about The Law Society's already existing accreditation  
14 schemes.

15 A. Yes.

16 Q. Then perhaps part of the minutes over the page, Linda Lee -- this is in the second paragraph  
17 on page 6:

18 "Linda Lee said the scheme members would need to demonstrate how the CPD course  
19 was linked to accreditation. This would be a unique point for the Society's training if  
20 marketed correctly."

21 I suggest to you that it was identified that by linking training to accreditation it could be a  
22 unique selling point for your training, that is the point that was being identified, was it not?

23 A. No, it was quite the other way round actually. It was a selling point for the accreditation  
24 because the training was designed for the accreditation and at that point The Law Society  
25 was not in that place at all, so developing accreditation schemes for which others were quite  
26 correctly selling CPD. This is about the accreditation schemes and the ability to enhance  
27 them by training solicitors with them.

28 Q. We will see how it plays out in other documents in due course.

29 Then if I take you to page 7 you have "Conveyancing Quality Scheme update."

30 A. I have page 7.

31 Q. It seems that Maureen Miller gave a presentation. It says "The chair welcomed Maureen  
32 Miller" and then there is what follows which seems to be a description of what she said:

1 "The Conveyancing Quality Scheme will provide ...(Reading to the words)... to  
2 maintain their market share and increase responsibility."  
3 I am not sure that word is the right one. Then it goes on to say:  
4 "There would be a protocol at the centre of the scheme which would require all  
5 members to adhere to. Each firm would have a senior responsible officer."  
6 SRO as they come to be called:  
7 "The integrity of the firm and the individual will be checked. The officer would  
8 monitor and enforce the Society's conveyancing protocols."  
9 So that is a description of what the scheme consisted of and there is no reference in that  
10 description --  
11 A. At that point, yes.  
12 Q. -- to training, is there? No reference to training?  
13 A. No, there was not, because it had not been launched at that time.  
14 Q. Then over the page, in the first paragraph that actually starts on that page, it says:  
15 "A paper would be submitted to the November council meeting ..."  
16 A. Sorry?  
17 Q. Page 8 of that document. It should be within tab 3, page 8.  
18 A. Sorry, I am with you now.  
19 Q. So the first paragraph which starts on that page:  
20 "A paper will be submitted to the November council meeting ...(Reading to the  
21 words)... not expected the Society would make a profit on this project."  
22 There is a phrase in there, "training assumption". I suggest to you that is not --  
23 A. I am sure that meant "trading".  
24 Q. "Trading", thank you, that is what --  
25 A. "Trading assumption", yes. That the scheme would last for at least 31 months. That  
26 paragraph is to do with budgeting of The Law Society resources.  
27 Q. That is very clear, thank you.  
28 Then I am going to take you to another document that is not referred to in your statement,  
29 which is over in the next tab, tab 4.  
30 THE PRESIDENT: We will need to take a break, Mr. Woolfe.  
31 MR. WOOLFE: Yes, now might be --  
32 THE PRESIDENT: Just for five minutes. Would this be a sensible moment?

1 Mr. Smithers, we have two hard working transcribers who you probably cannot see who are  
2 taking a note of everything and they need a break, understandably, so we are going to take a  
3 five minute break at this point.

4 Can I ask, Mr. Woolfe, how are you doing on time because you are on page 9 or 10 --

5 MR. WOOLFE: The bulk of my time -- I expect that once we get to the end of 2010 the rest of it  
6 will go much quicker because there is much less to do by reference to the documents.

7 Obviously we lost a certain amount of time this morning.

8 THE PRESIDENT: You lost about 20 minutes, I appreciate that, but I am just a bit concerned  
9 about progress and I think the Tribunal would like to perhaps ask questions for about 15, 20  
10 minutes at the end.

11 MR. WOOLFE: I realise it has been slow going, but there is less to come than one might think.

12 THE PRESIDENT: Right, well, you are feeling comfortable that we are on target?

13 MR. WOOLFE: Reasonably -- less so about the 20 minutes but ...

14 THE PRESIDENT: Well, maybe 15 minutes, but we have to be entitled to --

15 MR. WOOLFE: By 20 minutes, I meant the 20 minutes that I lost. I do not mean -- the Tribunal  
16 can take the time it lost for questions obviously.

17 THE PRESIDENT: Well, we have to be also aware of the time. Well, there we are. We will take  
18 a break.

19 (11.26 am) (A short break)

20 (11.35 am)

21 MR. WOOLFE: Mr. Smithers, I was taking you to a document which is in bundle E2, tab 4 and  
22 you should have there a paper written for the Membership Board meeting that was going to  
23 take place on 19 October. I think we have already heard you were a member of the  
24 Membership Board at that time. The date of the report itself is 4 October 2010.

25 So you will have received that paper as a member of the Membership Board, would you  
26 not?

27 A. Yes, I would.

28 Q. This seems to be a version of the proposal we already saw in the last minutes from Katie  
29 Watmore. Can you turn to page 2, headed "Purpose":

30 "This paper outlines the potential commercial opportunity linked with providing  
31 training associated with each of the existing accreditation schemes."

32 The second paragraph, at the bottom of the paragraph:

1 "This paper provides an initial outline of the support that The Law Society could  
2 provide for ..."

3 Sorry, the previous sentence:

4 "The recommendation of this paper is that in future accredited individuals, although  
5 seeking accreditation, would be required to demonstrate they have completed a certain  
6 amount of CPD training that linked with requirements within their scheme. This  
7 paper provides an initial outline of the support that The Law Society could provide for  
8 meeting those requirements, whilst also yielding the Society commercial benefit."

9 And you have a grid that sets out an overview of the benefits and under "Financial benefits"  
10 it includes huge potential increases in income and profitability from events, education and  
11 training, process improvement, standardisation of developments and delivery processes for  
12 all accreditation linked training, customer service improvements and also quality  
13 improvements providing better quality and consistency of support.

14 Then you can see there are two elements to the thinking -- sorry, under heading "Member  
15 need":

16 "The thinking behind growing accreditation ...(Reading to the words)... customer  
17 central organisation."

18 And it details what they are:

19 "The first aspect is that at the moment ...(Reading to the words)... commercial training  
20 providers."

21 So that is one of the two elements, part of the thinking in this, and the second one, I think in  
22 the last paragraph on the page:

23 "The growth of accreditation linked training also raises another aspect of customer  
24 centrality."

25 Then it refers to using something called "Blueprint" to pursue a segmentation methodology.  
26 Now, can I take you over to the following page and I am going to ask you a question. In the  
27 first paragraph on the following page it says:

28 "At this stage this paper proposes that the accreditation linked training be launched  
29 first in association with existing accreditation schemes."

30 So my question for you is this: it was envisaged, was it not, that this same approach could  
31 be extended to future accreditation schemes, including the CQS?

32 A. It may well have been. This paper sought to address that because the CQS had not been  
33 launched at that time. The paper put before the Board (inaudible) had about it.

1 Q. What this document shows is that The Law Society in respect of its existing accreditation  
2 schemes was considering a strategy of tying training to its accreditation schemes for  
3 commercial reasons, was it not?

4 A. Well, it depends how you -- they were not going to be free so there was an opportunity for  
5 income, but if you refer back to the previous paper I think it was the one you referred me to,  
6 which was tab 3, the membership board meeting specifically said in the second paragraph  
7 on page 8, "It is not expected (inaudible) commercial with profitability", commercial with  
8 income would probably be a better analogy.

9 Q. Sorry, I am not sure I entirely follow that. The document at tab 3 was actually an earlier  
10 one, so the document at tab 3 was not the meeting at which this table was considered. The  
11 document at tab 3 is the meeting of September. This paper is written in October.

12 A. No, the -- but it goes to show the meeting of the representative board's attitude to training,  
13 rather than The Law Society's staff who wrote the paper for another board.

14 Q. So The Law Society staff were concerned with pursuing commercial opportunities?

15 A. That indeed was their job to do so, yes. But The Law Society staff are underneath the  
16 governance which includes the Board and ultimately Council who are the elected or  
17 appointed representatives to represent the profession who make the ultimate choice on these  
18 matters. The staff would obviously -- commercial opportunities go back to the income.

19 Q. And The Law Society staff who were drafting this paper thought that by tying training to  
20 accreditation they could take business from commercial providers, did they not?

21 A. They indicated they would compete with them.

22 Q. Well, they say they are leaving potentially significant commercial opportunities to these  
23 providers, they want to take that opportunity away from them, do they not, they want to  
24 leave it to them?

25 A. No, that is completely different. There are a number of different commercial providers who  
26 all compete with each other. The Law Society was not in that commercial space at all, there  
27 was no good reason why it should not have been, particularly as the accreditation schemes  
28 were theirs. I do not think any of the schemes had any specific training requirements at that  
29 time. So it was not so the schemes required there to be training and for it to be provided by  
30 someone else.

31 Q. Can I just ask you to turn to page 4 of that document. You have in the middle of the page an  
32 overview of planned revenue, costs and profits and you have a series of projections and the  
33 text just under the heading says:

1 "After the initial investment in staff as well as at the point ...(Reading to the words)...  
2 profitable business enterprise over time."

3 So the staff in The Law Society were looking to engage in what they saw as quite a  
4 profitable enterprise, were they not?

5 A. That is what this paper says, but as I think is demonstrated later on, that was not what  
6 actually happened, certainly in terms of CQS.

7 Q. Then can I ask you to turn to page 6 --

8 A. And indeed that earlier paper referred to.

9 MS. SMITH: Sorry, I think we lost the end of that last answer.

10 THE PRESIDENT: He was trying to finish his answer, you interrupted him.

11 MR. WOOLFE: Sorry. Mr. Smithers, can you repeat what you just said please? I think we lost a  
12 bit of it.

13 A. From where, sorry? I think the point I was making was that this paper related to some  
14 schemes which at that time had no specific or compulsory education, so if education was  
15 provided that was specific to those schemes, that would provide a revenue stream. The  
16 intention of the Society through its Membership Board, its oversight board, was that  
17 schemes did not make a profit, as demonstrated by the previous paper, and my last sentence  
18 was when while this paper makes comments regarding the price of training, (inaudible)  
19 page 3 that is demonstrably not what happened with the CQS (inaudible) substantially lower  
20 than that.

21 Q. Then can you turn to page 6 of that document please. You have a table there which sets out  
22 in respect of each -- it says "Competitor name" and it sets out a series of very well-known  
23 names, CLT, College of Law, and so on, and the total number of similar training events,  
24 average price of training and so on, total estimated income from training. Then an estimate  
25 of the total market size, but it is assessing the total market size by reference to adding up  
26 what it thinks all these various competitors are adding. It seems to have quite detailed  
27 figures on the number of training events that he have this all run. My question for you is  
28 this: The Law Society was aware of the money that competitors were making and they  
29 wanted to take some of that, did they not?

30 A. No, I think the purpose of this is to analyse what the size of the market might be and really  
31 seeing what was in it.

32 Q. Now, if you return to your statement and we go to paragraph 77. You refer to a paper that  
33 was prepared for the meeting of the Membership Board that was to take place on 19

1 October. The paper itself is in bundle D2, so you can put away D1 now and just go for D2.  
2 Can you turn to tab 29 in that bundle please. If I can ask you to turn to page 572, so the first  
3 full page of text, you can see it is written by Ms. Bernadette Manley on 6 October, and  
4 under "Progress status" it says:

5 "With the revised transaction protocol at the heart of the scheme ...(Reading to the  
6 words)... client stakeholder service and quality assurance."

7 And under quality assurance it refers to:

8 "Monitoring and enforcement will be robust and members subject to spot checks and  
9 audit."

10 So of these four key principles, training is not one of them, is it?

11 A. No, but training would be a method by which the overall pillars would be delivered to give  
12 the accreditation status that it required.

13 Q. Let us look at that. So the first one is probity and it says that will be delivered by identity  
14 and status checks at the time of the application, so that is not about training, is it?

15 A. No.

16 Q. The second one is about practice quality standards and there refers to consistent processes  
17 and standards and it does not refer to training as a means of delivering those?

18 A. No, but you will be aware that year 1 training requires that the SROs take a course in  
19 practice management standards where they were not already accredited in the Lexcel  
20 scheme, so a method of delivering number 2 was specifically by a training module.

21 Q. So you are saying the SRO training would contribute to the second heading there?

22 A. Indeed, exactly that is what it did do.

23 Q. Then we have client stakeholder service and quality assurance and they specifically refer to  
24 monitoring and enforcement. Your reference to SRO training is pertinent because if you  
25 look under the "Training" heading it says:

26 "The application and accreditation process will include mandatory training for the  
27 senior responsible officer (SRO) who must be nominated by the applicant firm."

28 Now, this is the first time in the documents we have seen mandatory training is mentioned  
29 and here on 6 October it is only being mentioned in respect of the SRO.

30 A. No, the final sentence is.

31 "Courses are currently being developed for both the SRO and all key staff."

32 Q. Yes, that refers to "courses are being developed", but there is no reference to courses for  
33 key staff being mandatory, is there?

- 1 A. No, there is not. That language is not used in that paragraph.
- 2 Q. The CQS as it now stands does offer some optional courses, does it not?
- 3 A. Well, in relation to the training, I have not been involved in the development of it for the  
4 last two years.
- 5 Q. Now, if you go to tab 25 in the same bundle, the minutes of this meeting, the meeting of 19  
6 October of the Membership Board, and they are split across both tab 24 and tab 25, but it is  
7 tab 25 that we want. If I can take you to page 535 -- sorry, you are recorded as having been  
8 present at this meeting. At page 535 we have the outline of the -- at minute 32.3, at the top  
9 of the page, we have the outline of the report that we have just seen from Katie Watmore, so  
10 this is when it was presented to the meeting. Then perhaps under that it says, in the -- it is a  
11 paragraph beginning "There had been criticism", and it says:  
12 "There had been criticism that should not begin with Family ...(Reading to the  
13 words)... before implementing a full scheme."  
14 And the Board approved the outlined commercial model. So the Board was adopting the  
15 commercial model and said they were going to pilot it and see basically what market share  
16 they could generate. That is what was decided?
- 17 A. Well, the Board was approving -- well, the Board was approving the paper. They would see  
18 if there was takeup from members and if there was takeup from members then it was worth  
19 spending money to develop it, as any business would. If there was not, they would not. I  
20 think the criticism would be that with Family and Children work, Resolution, which I think  
21 -- I am not a family practitioner -- has highly developed training, would not give a proper  
22 overview of whether training provided by The Law Society would be acceptable in the  
23 market.
- 24 Q. Then the meeting moved on, straight after approving that linking of accreditation and  
25 training for those existing accreditation schemes, to considering the Conveyancing Quality  
26 Scheme and in the discussion therefore about the Conveyancing Quality Scheme, everybody  
27 would have been well aware of the idea of linking training and accreditation and that it  
28 could deliver a commercial benefit, would they not?
- 29 A. If the matter in respect of the other accreditations that had been mentioned previously.
- 30 Q. Then just over the page there seems to be some sort of update. There is a statement:  
31 "The CML confirmed that membership of the scheme would be a necessity ..."
- 32 A. Sorry?
- 33 Q. Sorry, Mr. Smithers, did you say something?

1 A. Sorry, I was going to say -- sorry, forgive me, do carry on.

2 Q. Over the page:

3 "The CML confirmed that membership of the scheme would be a necessity for panel

4 membership."

5 It is minuted. It does not seem that the CML did, at least immediately, require it for panel

6 membership, but this is what was thought at the time.

7 A. I do not think that minute properly reflects what was the case at the time. The CML was not

8 in a position to confirm that. The CML itself is not a panel manager. It is simply a

9 representative of all lenders. It is the individual lenders who have that power. I know that

10 the CML had expressed the view that if the scheme was successful, it could be used in that

11 way.

12 My point was in the final paragraph I myself have confirmed that all courses would be

13 online, guidance would be amended to reflect this.

14 Q. Yes, I was about to take you to that. That is a statement about the nature of the courses --

15 A. Yes.

16 Q. But there is no minute of a discussion at this meeting about whether or not training should

17 be mandatory for all staff, is there?

18 A. There would not have been. This was a Membership Board, I think I am right in saying that

19 only one other member of the Membership Board undertook any conveyancing. The board

20 had oversight of these matters, it is not concerned with the details as such. The purpose of

21 these reports is for information purposes so that the board could be satisfied progress is

22 being made.

23 Q. Can I take you to paragraph 78 of your statement where you say "mandatory training was

24 always at the heart of the scheme and you refer to the intention that the first module would

25 be carried out by the SRO and you say:

26 "It was always our intention that all subsequent modules would be directed at all

27 staff."

28 Then you say:

29 "The CQS would meet the standards of the main lenders ...(Reading to the words)...

30 on a consistent and standardised basis."

31 There is no trace of that intention in the documents we have seen thus far, is there, Mr.

32 Smithers?

1 A. Well, I was present at many of their meetings, that was certainly the intention of the people  
2 and my strong memory, at the heart of this scheme, that was always to be the case and that  
3 is certainly my evidence on this matter.

4 Q. There are no written plans setting out what training would be required, are there, up to this  
5 point?

6 A. No. At this point, no, because at this point the scheme had either just been or had yet to be  
7 launched. As I say, apart from the very initial training for the SRO and the practice  
8 management services as part of Lexcel, nothing further had been developed at that time.

9 Q. And there is nothing in any of these documents to suggest that The Law Society had  
10 considered what the content of these subsequent modules that you refer to should be, is  
11 there?

12 A. No, they had not been discussed at this point.

13 Q. So your evidence is that the content of the modules had not been discussed, but it had been  
14 decided that there should be mandatory modules; is that your evidence?

15 A. Yes, because standards would be raised by having compulsory training for all involved.  
16 That would be the method of delivery. We had not discussed what the precise module of  
17 those would be at that point.

18 Q. So you did not approach it by thinking "What is it that everybody needs to know?" and then  
19 saying "Well, that must be made compulsory", you have set out on the premise that making  
20 some training mandatory would do something to increase standards and therefore that was  
21 what you were going to do; that is right, is it not?

22 A. Making training mandatory for all those who were client facing, regardless of whether they  
23 were part of the regulated community, solicitors, licensed conveyancers or legal executives,  
24 but also paralegals who were undertaking conveyancing was deemed essential in order to  
25 raise standards in all the firms where many of the volume firms particularly were using  
26 more and more paralegal staff who may not be adequately supervised, or at least there was a  
27 conception that they may not have been.

28 Q. There is nothing in the documents we have seen, is there, in which The Law Society  
29 considers whether it is necessary for training to be provided directly only by The Law  
30 Society, is there?

31 A. That does not appear in the documents before you.

32 Q. So I put it to you, Mr. Smithers, that when you say "We considered that it would be  
33 necessary for the training to be provided directly by The Law Society on a consistent and

1 standardised basis", that does not reflect the discussions in The Law Society at the relevant  
2 time.

3 A. No, it reflects the discussions that were taking place between those of us who were  
4 intimately involved in the development of the scheme -- as I said it was very fast moving.  
5 The Board reports are -- the boards meet only every couple of months or so, so much had  
6 moved between these. A small group of people who were part of the project board,  
7 including Paul Marsh myself, Richard Barnett and lots of others were involved in this and  
8 had those discussions, so those were not necessarily reported to the Board in that manner,  
9 but that was obviously the intention of those of us who were central to the scheme --  
10 certainly mine and I believe on the others' behalf.

11 Q. Anyway, there was no formal documented process by which you set about considering  
12 whether it was necessary for you to provide this directly and on a consistent standardised  
13 basis?

14 A. It is not mentioned there, but I think it required to be consistent in order to give probity to  
15 the scheme.

16 Q. If I can just --

17 A. Although perhaps I should add that --

18 Q. Please carry on, Mr. Smithers.

19 A. Sorry, I was simply going to add that it was well known in the market that the quality of  
20 training varied tremendously between different providers.

21 Q. You refer to the -- I am going to try and take this a bit quickly if I can. At paragraphs 80  
22 and 81 of your statement you refer to the launch of the CQS on 20 October by The Law  
23 Society President and there is a presentation in the bundle. That is at tab 30. This was  
24 where the President set out for the members of the property section of the Law Society, so  
25 perhaps the most important stakeholders, what the CQS would consist of. That does not  
26 mention mandatory training anywhere in that document, does it? Perhaps if you look at  
27 pages 55 and --

28 A. It does not -- no, I am familiar with it.

29 Q. So you accept that it does not mention mandatory training?

30 A. I am familiar with it. It does not, but for the reasons I mentioned previously, at that point  
31 training had not been developed. The reason it had to be launched at that point was we  
32 needed a big event to launch it at, I think the chair of The Council of Mortgage was also  
33 present and on that date it had all been fixed for the property section conference.

1 Q. Can I then take you to bundle E2, tab 5. Can you take out the bundle E2, the other bundle,  
2 and turn to tab 5.

3 A. Yes, I have it here.

4 Q. We have another paper written for the membership board by Ms. Bernadette Manley. It is  
5 very similar to the other one we have seen. This is dated 8 November and that is the  
6 important point about it. Then at paragraph 10 on page 3 it says again:  
7 "The application and accreditation process will include mandatory training for the  
8 firm's senior responsible officer."  
9 And it then goes on to say:  
10 "Courses are currently ...(Reading to the words)... all key staff."  
11 But as at 8 November it was still the plan, was it not, that mandatory training would only  
12 apply to the SRO?

13 A. You can draw that inference; from that paragraph that is not how I would read it. I think the  
14 mandatory training was always to be for the key staff. The senior responsible officer  
15 training was specific to the SRO only to confirm that the members would accord with the  
16 scheme and they would have oversight, but that phrase was always intended for all fee-  
17 earners, as I mentioned.

18 THE PRESIDENT: Sorry, Mr. Woolfe, which document are you in?

19 MR. WOOLFE: That was bundle E2, tab 5.

20 THE PRESIDENT: The report of --

21 MR. WOOLFE: That is a paper written for the membership board and it is dated 8 November  
22 2010. It is very similar in form to another one we have looked at from I think 8 October.

23 THE PRESIDENT: Yes. We have looked at this one.

24 MR. WOOLFE: No, I think you have --

25 THE PRESIDENT: Yes, we have.

26 MR. WOOLFE: The one I took you to earlier was I think one dated 6 October and this is dated 8  
27 November. They are very similar.

28 MR. ALLAN: You have must have given us the wrong tab because I have scribbled all over this.

29 THE PRESIDENT: Me too.

30 MS. SMITH: I think it is because I took you to it in opening.

31 THE PRESIDENT: Yes. No, you have not taken the witness to it, I am sorry. You have not. So  
32 you are in E2/5 --

1 MR. WOOLFE: The one of 6 October I did take you to a few minutes ago, which is very similar,  
2 is at D2, tab 29.

3 THE PRESIDENT: No, it was my confusion. This is the paper describing the launch, yes.

4 MR. WOOLFE: Essentially it is a very similar -- nothing really changes over that month.

5 THE PRESIDENT: Yes, and it refers to mandatory training for the SRO, yes.

6 MR. WOOLFE: Can I take you back to bundle D2, tab 32. You should have a minutes of the  
7 Council meeting of 10 November 2010, so just after this. I believe you were present. Then  
8 on page 597 Paul Marsh presented a paper which I do not think we have, but it updated the  
9 Council on progress in the Conveyancing Quality Scheme, aiming to restore the brand.  
10 Then it says:  
11 "Paul Marsh responded to points raised by Council members ...(Reading to the  
12 words)... beyond the Senior Responsible Officer to other members of the firm."  
13 So the Council clearly understood at that stage that mandatory training for all staff was not  
14 part of the proposal that was being put forward, it was being suggested as something that  
15 could be added to it; that is right, is it not?

16 A. I would not necessarily read it in that manner. The Council has maybe 95 people on it, of  
17 which perhaps 80 would be present. "A council member suggested there might be some  
18 merit", that does not mean it had not already been considered.

19 Q. But in this case it comes from a council member who apparently -- sorry, sir, I was straying  
20 into comment.

21 THE PRESIDENT: I am slightly puzzled by that answer, Mr. Smithers. This is under the  
22 heading "Paul Marsh", who I think was very involved, was he not, in preparing the scheme?  
23 That is right, is it not? Is it right Paul Marsh was closely involved?

24 A. Paul Marsh was -- he has been linked with the context of the scheme, he has not latterly  
25 been so involved in its design and launch, but he was the past president by that time.

26 THE PRESIDENT: Yes. He is presenting a paper updating the Council on the development of  
27 the scheme, is he not? Look at page 597.

28 A. Yes, at -- indeed, yes.

29 THE PRESIDENT: And is it reasonable to assume, before he presented the paper on the progress  
30 and the development of the scheme, that he would have familiarised himself with the  
31 progress and the development of the scheme?

32 A. Yes.

1 THE PRESIDENT: And he then responds to points raised by Council members as follows and  
2 then the first bullet, which includes what has been put to you:

3 "A Council member suggested there might be merit in extending the training required  
4 ..."

5 If it had been part of the plan, would his response not have been "That is already underway  
6 and is indeed part of the development we have in hand"?

7 A. I think this minute reflects the question that was raised, it does not necessarily speak out for  
8 the whole presentation. So it is quite possible that Paul Marsh had described it at this point,  
9 bearing in mind it is only November, and as the previous paper shows applications were not  
10 going to be processed until 1 December, the only course that would be initially required  
11 would be the SRO training because the others have not been developed at that point and I  
12 think for me it indicates that rather than a much more general understanding. As I say,  
13 this was a very fast moving development at this point, the emphasis being on launching the  
14 scheme and getting it out into the market, The Law Society having solutions to these  
15 existing problems and that any action taken by lenders and insurers should be put on hold  
16 until we had a chance to develop the scheme.

17 THE PRESIDENT: So your evidence is that this minute of the Council, as recorded, is not  
18 inconsistent with the fact that the people developing the scheme had already decided to  
19 extend training to others?

20 A. Yes.

21 THE PRESIDENT: I see.

22 MR. WOOLFE: Mr. Smithers, can I ask you to turn to paragraph 84 of your statement. Sorry,  
23 you start at paragraph 82 describing this meeting and you refer to Paul Marsh having  
24 presented a paper and you start to call his paper, which I do not think we have, "a report".

25 You say:

26 "The report further noted the CQS had been welcomed by the CML."

27 At paragraph 84 you say:

28 "It was reported ..."

29 Apparently written into the mouth of Paul Marsh:

30 "... that the intention was to develop courses for both the SRO and all key staff to be  
31 available online from January 2011."

32 Now, that does not appear from this document at tab 32, does it?

1 A. I do not -- forgive me, this is the minutes of the meeting, it is not the paper that Paul  
2 presented, so I cannot speak to what is in the paper that was presented. These are  
3 essentially the minutes so I cannot speak to the understanding of any individual Council  
4 member in receiving that.

5 THE PRESIDENT: I am sorry, I am not sure I quite understood that. Your evidence is it was  
6 reported, as I understand it, to the Council, was that right, because this is the Council  
7 meeting on 10 November 2010?

8 A. Yes, I believe it was, yes.

9 THE PRESIDENT: So it would be either a written report or an oral report; that follows, does it  
10 not?

11 A. Yes.

12 THE PRESIDENT: Well, you do not --

13 A. It does, yes.

14 THE PRESIDENT: You do not have the written report of Paul Marsh, the paper. We know there  
15 was one, you say so and the minutes confirm that, but we do not have that, so presumably it  
16 cannot be found after this length of time and it does not feature in the minutes of the oral  
17 report, so were you drawing on your memory when you said that in paragraph 84?

18 A. Yes, I was. I have not seen the paper, so yes, I believe I was.

19 MR. WOOLFE: Can I ask you to turn to tab 34 in the same bundle, Mr. Smithers. What you  
20 have there -- you refer to this at paragraph 86 of your statement as being "A project report  
21 for the CQS from the period from 1 December to 21 December". It is not dated, but one can  
22 infer that it was written after 1 December by looking under the key milestone -- the last one  
23 of those on the page says "Actual, 1 December", so clearly that milestone has been reached  
24 and so this paper must have been written at some point after 1 December and before 28  
25 January, so somewhere in that window.

26 PROFESSOR WILKS: Sorry, again, which tab is this?

27 MR. WOOLFE: Tab 34.

28 Can I ask you to turn to page 608. This is a project report. This is written by Law Society  
29 staff, as I understand it. At the bottom of that page "Training":

30 "Work continues on the development of mandatory courses ...(Reading to the  
31 words)... scheduled to be online by mid-January."

32 This is the first reference which we have seen in a document before us to some training, in  
33 this case the new protocol being mandatory for all relevant members of staff. So at this

1 point it appears to have been decided that all members of staff should undertake that  
2 training, that is correct, is it not?

3 A. Yes.

4 Q. Indeed training is in development, but we have seen nothing in the documents, have we, as  
5 to any decision-making process by which it was decided to make training mandatory for all  
6 staff?

7 A. No, you haven't, but the point was there were not any meetings -- there had not been any  
8 meetings between those two points in which to report back on the governance process.

9 Q. So what essentially we see from the papers is there is no reference to training at all in the  
10 early period. Starting in October one sees references to mandatory training for the SRO, at a  
11 Council meeting somebody suggests from the side-lines "Should we not add some training  
12 for all staff?". Your evidence is that there were some discussions going on about other  
13 training and indeed there is reference to other training courses being developed. Then we  
14 have a decision by some point after 1 December, but before 28 January, that there should be  
15 mandatory training for all relevant members of staff, but no formal process by which that is  
16 reached. That is a fair summary, is it not, Mr. Smithers?

17 A. No. I can refer you to in E2, the membership board minutes which are at tab 5. You have  
18 already taken me to this paper, which took place in November, so some time before this  
19 paper was written, where exactly as you referred to, "courses are currently being developed  
20 for both the SRO and all key staff". That is at paragraph 10 on page 3.

21 Q. Yes, I won't take you to that --

22 A. So there is no -- we didn't decide these courses were being developed.

23 Q. Yes, and I put to you, Mr. Smithers, the claimant's case which is that at that stage you were  
24 not considering making those cases for all staff mandatory. That is right, is it not?

25 A. No, my evidence is to the contrary, that they were intended to be mandatory.

26 Q. Well, that is not what it says in the documents, is it, Mr. Smithers?

27 THE PRESIDENT: Well, it is ambiguous, is it not?

28 A. It does not directly contradict that. It does not not say that.

29 Q. We have seen at the Council meeting on 10 November that it certainly must have been the  
30 understanding of the Council members hearing the report that it did not include mandatory  
31 training for all relevant members of staff, because one of them suggested that it should. So  
32 that is also inconsistent with your evidence, is it not?

1 A. Well, I'm sorry, the second -- your statement, contradiction in the mind of one Council  
2 member who asked one question which is what was minuted, we do not know what is in the  
3 mind of all the other Council members and indeed we have not seen the paper that was  
4 presented. So I would not necessarily draw that conclusion because The Law Society  
5 through its Membership Board and the number of Council members who sat on that  
6 Membership Board were already aware that there would be training for all.

7 Q. I want to move you forward now, Mr. Smithers, to the period in time when it was decided to  
8 have a course on mortgage fraud. It is paragraphs 101 and 102 of your statement and it is at  
9 tabs 46 and 47 of bundle D2. We have minutes of a Membership Board meeting. You can  
10 ignore the ones in it tab 46 -- sorry, the minutes at tab 46, papers submitted to that meeting  
11 are at tab 47.

12 This report predominantly concerns the governance of the CQS and the role of the  
13 Technical Panel, and I am not going to ask you to explain, there is a lot of stuff in the  
14 documents about how this was configured and I do not want to take the Court's time up with  
15 that now. But it was decided to keep the Panel on, even though some people were thinking  
16 it should go, because they wanted some further input from it and the point on which input  
17 was being considered -- this is in August 2011:

18 "The outstanding issues and processes ... on which the Panel is required to provide  
19 input are ..."

20 And I ask you to turn over the page --

21 A. Sorry?

22 THE PRESIDENT: This is tab --

23 MR. WOOLFE: We are in tab 47, Mr. Smithers. We have a document dated 19 August,  
24 "Governance proposals". Over the page to page 782 at point 10:

25 "The outstanding issues and processes on which the panel is required to provide input  
26 ..."

27 "The panel" being the Technical Panel:

28 "... are ..."

29 Then a whole series are listed, I'm not going to read them out. Just turn over the page and  
30 the fifth bullet point, and one of the points on which you were required to provide input at  
31 this point, were:

32 "Finalise the compulsory training requirement and review basis for any ongoing  
33 training needs for year 2 and beyond."

1 So it was being considered whether any -- to review the basis of whether any training was  
2 necessary, is that right?

3 A. It was the straightforward suggestion, that you (inaudible) governance. It was important to  
4 remember that the Membership Board was very keen to ensure that there was proper  
5 oversight of the scheme by people who were actually doing the job, that is people who  
6 undertook conveyancing. It was not run by staff who did not have conveyancing  
7 experience, so we were best placed to advise the Society -- in a sense we did not have any  
8 executive power, but we would make suggestions which would be reported back to the  
9 membership board which had oversight of the governance side. So those suggestions were  
10 left to that technical panel as the people best placed to understand that. Bearing in mind we  
11 were working in a vacuum here, there had never been anything like this developed before so  
12 we did not know how many members there would be in the first year, whether it would be a  
13 very small number and whether it would be worth developing training and indeed what the  
14 parallel in the market looked like, if a number of lenders had cut their panels dramatically  
15 clearly there would be no point in having a long-term plan or deciding what those should be  
16 at that point.

17 Q. Mr. Smithers, obviously I want you to give all the evidence on the questions you want to  
18 give. Time is pressing on, I do not want you to be up late into the early hours of the  
19 morning. If you could try to confine your answers to answering the questions that I ask it  
20 will get us through a bit quicker and Ms. Smith will ask you questions in due course.

21 A. Okay.

22 Q. Tab 48, the next one over, we have the minutes of the Technical Panel meeting of 18  
23 October 2011. So you at that stage, the technical panel, were the ones, as I just said, who  
24 would be advising on what training should be included in terms of the content. October  
25 2011. There is no discussion of what the content of training should be, is there? At the  
26 bottom of that page at point 7 under "AOB" --

27 A. Excuse me, which --

28 Q. This is tab 48, Technical Panel --

29 A. Which page?

30 Q. If you would turn to page 785, at the bottom of that page, point 7, it is the only reference to  
31 training in the document, you raised a point about SROs being unsure as to their training  
32 requirement and RA, who I think is Rebecca Atkinson, said she will put something in a

1 newsletter. So there is some confusion, somebody is clarifying it, but there is no minuted  
2 discussion of what should be the training requirements for the following year.

3 A. No.

4 Q. Then --

5 A. There is not, no.

6 Q. You refer to this meeting at paragraph 103 of your statement.

7 At paragraphs 104 and 105 you say you attended a Technical Panel meeting on 2 November  
8 2011 and you exhibit the minutes at tab 49, so can I ask you to turn the tab for a moment.

9 That minute is dated at the top 2 November 2012 and I suggest to you that it must in fact be  
10 2012 because if you look at the top of page 787 there is a heading, point 5, "Year 3 training"  
11 and at the end of 2011 you would have been discussing year 2 training and in 2012, end of  
12 2012 you would be discussing year 3 training, so the fact that it refers to year 3 training  
13 suggests that the date at the top of this minute is correct and it was 2 November 2012, not 2  
14 November 2011 as you say in your statement. Would you agree with that?

15 A. Well, not necessarily, on the basis that it was -- that the fraud training was developed for  
16 year 2, so there would be no point in discussing it for year 2. I cannot explain that  
17 discrepancy other than to say there would be otherwise little point in doing so. The meeting  
18 referred to paragraph 2 of point 5 the scheduled meeting with fraud members and the CML  
19 legal panel, is the meeting which led to the development of the year 3 training. So I think  
20 both the panel meeting date and also year 3 training may both be incorrect if that is correct.

21 Q. I suggest it is more likely that this minute is actually from November 2012 and that the  
22 meeting, when it says "fraud lenders", somebody has used the words "fraud lenders" but  
23 they were referring to another meeting that you would have in 2012.

24 THE PRESIDENT: If you look at, Mr. Smithers, the "AOB" on the second page of that minute, a  
25 reminder to be issued in The Gazette to remind firms of the Santander lender panel 31  
26 March 2013, that would be a little odd to do that in November 2011, would it not?

27 A. Forgive me, I think you are correct in that. I think I may have been mistaken.

28 MR. WOOLFE: So in fact your evidence needs correcting, that there was not a Technical Panel  
29 meeting on 2 November 2011, paragraphs 104 and 105 were events that took place in 2012?

30 A. Well, for this one, but what I am trying to explain is that we did actually have the training in  
31 year 2, which it refers to in the second paragraph, fraud lenders and fraud training in CML  
32 legal panel, so I think that is where my confusion arose because that clearly took place  
33 before the year 2 accreditation -- year 2 training was developed.

1 Q. Your evidence is you have some recollection of having had some meeting in 2011 and this  
2 document made you think that this was the meeting it was referring to, but actually the  
3 meeting referred to in the document must be some different meeting?

4 A. Yes. I should perhaps also explain in terms of timing, (inaudible) in October 2010, it did  
5 not start accepting applications until I think December or whatever the date was in the  
6 previous document, no one was accredited until January of 2011. Now, that was only the  
7 firms that started at that point and the trickle was relatively slow, so lots of firms would not  
8 be doing year 2 training until a year or two after. The year for the firm runs from the point  
9 of accreditation and reaccreditation, not in absolute terms from the launch of the scheme.

10 Q. Then if I could get you to --

11 A. I do also recall, it may not be clear here, that ...

12 Q. Mr. Smithers, you were speaking. Please carry on.

13 THE PRESIDENT: We lost you.

14 A. I was simply going to add that I do recall that the training rather followed after the event.  
15 We were very busy doing many many things at that time and because training was not  
16 something which they had to do at the beginning of each year, but were able to do I think in  
17 the first six months of the year, so if they were accredited for example in June 2011 for the  
18 first time, they would be reaccredited in June 2012, they would not have to do the next lot  
19 of training until the beginning of 2013, so the training was effectively catching up later on.  
20 In fact in some instances I recall had not being launched quickly enough, so the time was  
21 extended for the time it took to develop the training and having it tested before launch.

22 Q. Then can I take you to bundle E2 please, Mr. Smithers, tab 12. This is a document you do  
23 not refer to in your statement, but it is a Technical Panel meeting that took place on 30  
24 November 2011. So there was a Technical Panel meeting in November 2011. The other  
25 one was not it, this is it. At item 4 on the second page of the minute there is some  
26 discussion of training minuted and "RA" that, is Rebecca Atkinson I think, requested you to  
27 feed into the training for year 2 protocol. So that is protocol training rather than mortgage  
28 fraud training. JS to talk to Peter and Andrew."

29 "Protocol training. A discussion took place on how long the year 2 training should  
30 be."

31 It was suggested two hours CPD. But there is no discussion in this document, is there, of  
32 mortgage fraud training?

1 A. No, there is not, but what was discussed here is not what happened because -- perhaps I  
2 should just explain. Peter and Andrew are Professor Peter Reekie and Andrew Crawford I  
3 think, who are two well-known conveyancing CPD providers, they asked me to write  
4 training and wanted it to be done in February but in fact the protocol training took place in  
5 year (inaudible), not in year 2.

6 Q. It says here there was a discussion that took place on how long year 2 training should be and  
7 it was suggested two hours. Two hours was selected because it sounded about right, is that  
8 the basis on which it was selected?

9 A. No, there were some broad discussions about -- no, there were some broad discussions, I  
10 recall, as to the length of time training should take, not to be intrusive, bearing in mind we  
11 were also asking people in firms who were not within the regulatory community to spend  
12 time training, which was time they would not be spent dealing, so the cost of loss of  
13 revenue to firms was also a concern. I think we concluded that two hours would be  
14 sufficient to get across the message that we were trying to get if it was delivered online,  
15 which is usually a much better way of doing that than necessarily sitting in the back of a  
16 hotel all day, and would be proportionate to what we were trying to achieve.

17 Q. Can I take you to paragraph 109 of your statement. You say there, starting "At the same  
18 time" -- so this is moving forward to -- you refer in paragraph 106 to a CLLC meeting in  
19 January 2012 and then at paragraph 109 you say "At the same time", so January 2012:

20 " ... I was working with the CQS technical panel ...(Reading to the words)... mortgage  
21 fraud would be the subject of year 2 training."

22 So you refer to a decision. There is no minute of any meeting or any paper which you  
23 exhibit in which that decision is embodied, it is just your recollection; that is right?

24 A. A decision was taken because it was compiled and released.

25 Q. Mr. Smithers, I am not disputing that a decision was taken, we all are aware of that.

26 A. Okay.

27 Q. You go on to say -- you actually say that:

28 "The lenders placed importance on mortgage fraud training."

29 Can I take you within bundle E2 to tab 13. This is a letter which The Council of Mortgage  
30 Lenders sent to The Law Society on 13 December 2011 and what it appears to be essentially  
31 is an invitation to tender. It says:

32 "We have agreement at industry level ...(Reading to the words)... in vetting  
33 conveyancing firms."

1 It is about the provision of information for vetting services:

2 "Also consider what ...(Reading to the words)... with lender systems."

3 So it is talking about some sort of technology system that also collates information and  
4 provides it to them. This sets out what the --

5 A. Yes, this is -- yes.

6 Q. -- mortgage lenders are interested in. I suggest to you what they are interested in is  
7 obtaining data to assess probity, are they not?

8 A. Yes, a number of lenders got together to see if they could standardize their process, so as I  
9 recall -- this is obviously not my -- as I recall The Law Society was asked to tender along  
10 with a number of others to provide a platform by which reaccreditation, or membership of  
11 panels might take place electronically. I think that is what this is about. The Law Society  
12 had already offered the CQS, but the CML, I think I am right in saying, were simply  
13 authorising the tender, they were themselves making the decision as to choice because that  
14 was down to the individual lenders in accordance with their own regulatory requirements.

15 Q. I am not going to -- I will take it up later on.

16 The lenders provided you say a scenario to you, paragraph 109, and you exhibit that  
17 scenario at tab 51, D2, tab 51. If I can ask you to keep that open. It refers to a Newcastle  
18 based solicitor being instructed by a lender, etc etc, I am not going to set it as a problem  
19 question for you or the Court.

20 Can I ask you at the same time to turn up in bundle E2 tab 15. You should have a string of  
21 emails between Ben Mullane and Peter Rodd. Later there are emails forwarding it, but if  
22 you read down it is between Ben Mullane and Peter Rodd. This seems to be the email in  
23 which Ben Mullane asks Peter Rodd to write the mortgage fraud training. It is sent on 27  
24 February 2012. If you turn to the top -- over to page 2, you see "Re lenders' input" and it  
25 says:

26 "Please see the attached scenario."

27 So that would have been the scenario -- that email would have sent this scenario that you  
28 exhibit at tab 51, because that is the scenario that was provided by the lenders; that is right,  
29 is it not?

30 A. I believe that the second page, lenders' input and those points 1 to (inaudible) separate  
31 typeface. I think that is a cut and paste of an email that I sent previously that resulted in my  
32 meeting at the CML.

1 Q. Thank you, that is helpful, but just to check, the scenario that Ben Mullane would have been  
2 attaching as coming from the lenders, just to check, is the one that you are exhibiting at tab  
3 51 to your statement because that is the scenario that was provided by the lenders?

4 A. Forgive me, yes. That is the one that was provided, yes.

5 Q. Can I just take you down to under tab 7, I am not suggesting -- it is under bullet point 7  
6 rather:

7 "Here is what Jonathan said of the scenario."

8 That would be you:

9 "There has recently been a case ...(Reading to the words)... areas where basic checks  
10 could have prevented some fraud."

11 So this scenario that the lenders have given you is based upon that -- you were saying was  
12 based upon that Lloyds Bank case?

13 A. It is I think based on that, but the fact that -- a change to protect those involved, I am sure.  
14 But there were scenarios that related to this type of fraud which is what we would have tried  
15 to make sure that everybody in the firm understood so they would be able to spot them.

16 Q. Can I take you to bundle C1, so it is a bundle you do not yet have open in front of you, it is  
17 a further bundle, bundle C1, claimant's exhibits, tab 7. You have sent a page -- perhaps let  
18 me tell you what this is. This is one of Socrates' training courses. Tab 7. You can see that if  
19 you turn to page 3 in the tab it is called "AML issues for property lawyers" and then if you  
20 turn forward please to page 19, you can see some slides there about the Lloyds TSB v  
21 *Markandan & Uddin* case.

22 What I am suggesting to you, Mr. Smithers, is that the input from lenders did not give The  
23 Law Society anything especially unique, did it?

24 A. Yes, it very much did, because Lloyds TSB, or Lloyds Banking Group, LBG, as I  
25 understand it drafted the scenario so they had direct input to the CQS which would give  
26 them some confidence and probity in knowing that would be delivered to everybody within  
27 it. The *Markandan & Uddin* case was very well-known, in fact I myself mentioned  
28 separately using that scenario and a number of other cases, but it was used to draw -- to  
29 highlight what the risks would be and deliver to everybody. So others were also lecturing  
30 on the case, but as you see here the case in fact was not about negligence but about breach  
31 of trust.

1 Q. You can put C1 away now, Mr. Smithers. If you turn back to bundle D2 -- actually turn to  
2 your statement briefly. You interpolate here -- so paragraph 111 of your statement you say,  
3 in discussing the conveyancing and land law committee meeting, you say:

4 "I reported that I was holding meetings with representatives from four lenders, Lloyds  
5 Banking Group, Santander, Nationwide and Barclays Bank ..."

6 And the implication seems to be that you were meeting them in relation to mortgage fraud  
7 and training, but that is not right, is it?

8 A. I believe -- in fact I apologise to the Tribunal, I think in fact there were more than four. I  
9 think Natwest Banking Group were also at that meeting -- forgive me, I looked at that later.  
10 So I think there were four and I think that is the meeting to which I referred when I met  
11 them in order to discuss how the CQS training would assist in tackling these scenarios.

12 Q. But if you go to bundle D2, tab 50, and turn forward to the page 792, "Update on the CQS",  
13 then over the page:

14 "The Society is working with the lenders on many levels to help ...(Reading to the  
15 words)... four lenders on 31 January."

16 So it appears from the minute that the meeting was in respect of separate representation, not  
17 in respect of the preparation of training. Is that correct?

18 A. If there has been -- that may well be correct. There were a number of separate discussions  
19 going on with lenders on a number of different occasions, so yes that may well have been  
20 correct. Separate representation was another subject not directly allied to this at that time, so  
21 that may indeed be correct.

22 Q. So your recollection is you had some legal lenders about mortgage fraud training at this  
23 time, but the one you refer to at paragraph 111 was actually about something else, but you  
24 had some other meetings with them?

25 A. I cannot say with certainty, I do not remember the exact contents of that meeting, but they  
26 were rarely on one subject, we often talked about a number of things. It may have been  
27 primarily about separate representation, but undoubtedly we would have talked about a  
28 number of things.

29 Q. Finally can I take you to the last tab in this bundle, tab 55, and we have a paper at tab 55  
30 dated 15 February 2012, prepared for the Membership Board. This is a director's report. At  
31 paragraph -- page 815 at paragraph 11, there we have it:

32 "The mandatory training for year 2 membership is being developed ..."

33 A. Page?

1 Q. Page 815.  
2 A. Sorry.  
3 Q. So the very last tab in that bundle.  
4 A. Yes.  
5 Q. Page 815, point 11:  
6 "The mandatory training for year 2 membership is being developed ...(Reading to the  
7 words)... our lender stakeholders."  
8 So by this point, 15 February, a decision has already been taken now that it will be a module  
9 focusing on mortgage fraud and that it will be 1.5 hours of CPD and that it will be  
10 mandatory, yet again we have not seen any reference in any of the documents to any form  
11 of considered process by which it was considered whether or not that was necessary, have  
12 we?  
13 A. As I mentioned previously, we were doing this in the dark. Lenders had not been  
14 particularly clear about what they would require to endorse the scheme so we had to try and  
15 estimate what was going to be necessary. If you had a scheme which after two years they  
16 could turn round and say "Well, we do not like it very much" we really would have wasted  
17 our time, so we were trying to anticipate what lenders would require and have discussions  
18 with them, but no lenders would actually give you certainty in advance. So -- as I also  
19 mentioned -- this was developing very fast. This meeting took place in February 2012 and  
20 we have already got to this point, by late 2011 we had not, so it is an indication of what I  
21 said earlier about a decision-making process, Technical Panel reporting back later, but as  
22 the boards do not meet very often. We did not have the luxury of waiting all the time for  
23 approval which could then take some months in a governance process. But it was certainly  
24 considered at Technical Panel level amongst those of us who set up the scheme that this was  
25 our best attempt, if you like, to gain the trust of the lenders and the lending community, also  
26 insurers, also clients, also complaints bodies, regulators and so on. So it was multi-faceted.  
27 Q. I would like to take you forward now to the similar decision in respect of the inclusion of  
28 AML training later in the year and I think everyone will be relieved to know that there will  
29 be fewer documents and it will take even less time. So if I take you now back to tab 49 of  
30 that same bundle, D2. We have the Technical Panel minutes of 2 November 2012, which  
31 are referred to under 2011 in your statement, and there is a reference, as we have seen, at  
32 point 5 to year 3 training, the training that will be coming in for the following year.  
33 A. Sorry, which -- forgive me, I am not quite with you.

1 Q. Sorry, tab 49, Mr. Smithers.  
2 A. Tab 50?  
3 Q. No, tab 49.  
4 A. Yes.  
5 Q. We have seen this document before. It is actually dated 2 November 2012.  
6 A. Yes.  
7 Q. On the top of the second page it is about year 3 training, so this is where there is some  
8 discussion of year 3 training.  
9 A. Yes.  
10 Q. "Ben Harrison to review accreditation letter ...(Reading to the words)... and CML legal  
11 panel."  
12 So it was decided that you would meet with the lenders. But that is the extent of the record  
13 that we have, is it not?  
14 A. Yes.  
15 Q. You can put that file away now and take out D3. Can I get you to look at tab 67 of that  
16 bundle and this is a minute of a meeting, for the transcript and the Tribunal's note, this is  
17 referred to in Mr. Smithers' statement at paragraph 129. At page 899 there is an update on  
18 the Conveyancing Quality Scheme and the last two bullet points there:  
19 "The CQS office resorted to doing general CPD for CQS members."  
20 I am not sure what that was.  
21 "Pete Rodd would be involved in the CQS training in 2013."  
22 So it has been allocated -- well, Peter Rodd would be involved. But there is no minute as to  
23 any discussion of what the content of the training should be, is there?  
24 A. No. As I mentioned previously, these are primarily reporting back through the governance  
25 process. Peter Rodd, I think I am right in saying, was the chair of the money laundering task  
26 force at the time, so whilst he was also undertaking conveyancing, he also had particular  
27 expertise in that and lectured on it, so he was (inaudible) expert on.  
28 Q. So if you were going to get somebody to write some AML training he would be a sensible  
29 person to go to, that is the point, but what I am putting to you, Mr. Smithers, is there is no  
30 record of any discussion at this meeting of what kind of training requirements should be  
31 imposed for year 3 and why those were going to be imposed?  
32 A. No, there is not in this -- there is no minute in this which indicates that, no.

1 Q. Then if you look at the next tab, which is a paper -- this is tab 68. It is a report of the chief  
2 of commercial and corporate affairs, dated at the bottom of the page as 2 January, to go to  
3 the membership board on 17 January. Can I take you to page 910 please. So start on 909,  
4 we have -- it raises the subject of the CQS and over the page on 910, paragraph 55:

5 "Year 3 membership training is in the process of being designed and will cover anti-  
6 money laundering."

7 So by 2 January it has been decided that there will be mandatory training in year 3 and that  
8 that mandatory training will cover anti-money laundering; that is correct, is it not?

9 A. Yes, those decisions effectively were taken at the technical panel whom the membership  
10 board had delegated to give technical advice. I think you may have seen in a previous tab  
11 which you referred to the Secretariat reports for the Technical Panel.

12 Q. Can I just get you to turn to -- you can put that file away now, Mr. Smithers -- paragraph  
13 131 of your statement. This is just after you have referred to that report. At paragraph 131  
14 you say:

15 "AML was a key issue facing conveyancing solicitors at the time ...(Reading to the  
16 words)... failing to do proper AML checks ..."

17 So we have not seen any minutes of that decision, have we?

18 A. We have not seen any minutes of that decision.

19 Q. I suggest to you when you say that you thought conveyancing firms would benefit, you  
20 simply mean you thought it sounded like a good idea to are firms to have some training, did  
21 you not?

22 A. No, patently not from the discussions we had previously with lenders that were taking place  
23 in January 2013. The scheme was being developed, it was in its second year by then with a  
24 large number of firms who were on it and one of its ongoing discussions in the market about  
25 what the threats were, there had been cases like *Markandan & Uddin* and various others, so  
26 it was a very live topic at the time. So, you know, there was no need to have any enormous  
27 debate about it. It was clearly something which needed to be done and, as it says here,  
28 making it absolutely specifically tailored to (inaudible). Emma Oettinger, who was policy  
29 advisor overall for AML who was assisting Peter Rodd, who I mentioned previously was  
30 the chair of the committee, reporting to the Legal Affairs and Policy Board, and he would  
31 oversee it as she was not a conveyancer herself -- to ensure it was specific to conveyancers,  
32 not just general AML training.

1 Q. You did not set out to consider in any detailed way whether or not there were any other  
2 alternative approaches to ensuring a proper standard of training, did you? You did not  
3 specifically consider whether it was essential for The Law Society to provide the training,  
4 did you?

5 A. Well, we had already -- and you have seen the minutes going back to well over a year  
6 before that that The Law Society was going to provide the training for the scheme.

7 Q. Yes, it was clearly envisaged that The Law Society would. What I am putting to you, Mr.  
8 Smithers, is that you did not properly consider, or did not appear to consider at all from  
9 what we have seen, whether or not it was necessary for The Law Society to be the sole  
10 provider. There is nothing about that in any of the documents, is there?

11 A. Well, we didn't consider that in respect of this matter, or indeed in respect of any other  
12 matters because there were many other routes of training available by many other different  
13 training providers for this. We were trying to get to that original aim of having a trusted  
14 community where everybody was working to the same standard, so to provide that  
15 consistency we regarded this as necessary for the whole to the scheme, to go back to my  
16 central point. We have not subsequently debated whether that needs to be amended.

17 Q. Then at paragraphs 136 and 137 you refer to a membership board meeting, though I am not  
18 the going to take you to the minutes just now because I think you quote the relevant part,  
19 you say:

20 "Helen Davies, a Council member, questioned why CQS training covered AML."  
21 She said "Why are we including AML in this?". Your answer was that the training had  
22 been specifically designed for all fee earners and in particular for members of in-house  
23 firms with no access to CPD and then you correct that in your statement saying you do not  
24 think it is accurate, what you mean is you were concerned about unqualified employees.

25 A. Yes.

26 Q. So that was a specific concern of yours, but the question put by --

27 A. Indeed, yes.

28 Q. -- Ms. Davies was a different one, which was "Why are we doing AML?", you said "We are  
29 doing AML because we are concerned about unqualified employees"; is that what the thrust  
30 of the exchange was?

31 A. Well, I think you have conflated two things. AML was clearly (inaudible) a large number of  
32 people who were client facing at firms were not qualified, they were paralegals, or where  
33 they were not supervised, it was identified as a greater risk to conveyancing because of the

1 large amounts of money passing through solicitors' client accounts and the increasing  
2 fraudulent attacks, so the training was necessary to ensure continued probity of the scheme  
3 and particularly getting to those individuals who were not qualified and therefore outside  
4 the regulatory net.

5 Q. But The Law Society could make sure that unqualified employees got access to money  
6 laundering training by a number of means, could it not? It could provide optional courses  
7 for them to do, or it could impose a requirement as part of the scheme that firms ensure that  
8 their unqualified staff are trained in anti-money laundering, but without insisting on  
9 providing the training itself. It could have done that, could it not?

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

21 Q. At paragraph 157 of your statement, page 22 of your statement, you say:

22 "The mandatory nature of the training was of paramount importance to the CQS as a  
23 quality standard which all accredited firms had to meet. If only certain firms had taken  
24 the module ..."

25 For example the mortgage fraud module:

26 " ... then the ...(Reading to the words)... met that standard."

27 But, Mr. Smithers, the CQS actually allows quite a wide variation in the training undertaken  
28 by solicitors, does it not, because of that very reason you gave, which is different firms have  
29 different accreditation years and you do not have to undertake the training in years 2 and  
30 years 3 until you've got within six months of your reaccreditation date? So to take an  
31 example, if a firm is accredited for the first time in April 2012, it would have become  
32 reaccredited in April 2013, which is before the AML training was launched -- sorry, become  
33 reaccredited in April 2013, so before the AML training was launched, on reaccreditation in

1 April 2013 it would become obliged to do the mortgage fraud training but then it would  
2 have six months within which to do it, so taking you through to October 2013. So in fact at  
3 any point between May 2012 when mortgage fraud training launched and October 2013,  
4 any given firm may or may not have done the mortgage fraud training, that is right, is it not?

5 A. Well, that is right because that is the nature of the scheme. Not everyone was joining in year  
6 1 and we needed, as a membership organisation, to make sure we had the confidence of  
7 members to get them in the scheme, which is why after four or five years the training has  
8 now been amalgamated to try and get everyone on the same page. That was not possible in  
9 the first year because of the number of people joining at different times.

10 Q. What I am suggesting is it cannot be essential for the CQS to ensure by means of mandatory  
11 training that firms have a minimum standard of AML knowledge, because the scheme  
12 operated from 2011 through to 2013 without any requirement for mandatory training on  
13 AML? That is right, is it not?

14 A. Well, as I say, the scheme developed over a period and we indeed have a membership  
15 (inaudible) the CQS voluntary, has to have the confidence of the members who we were  
16 asking to join the scheme (inaudible) lenders and others in order to continue to ensure  
17 probity. In an ideal world everybody would have done all the training at the moment they  
18 are accredited, but that is not how these things work, or are workable. So you are correct in  
19 your conclusion but the reasons for it are clear in the ways that the scheme is run.

20 Q. So in an ideal world everybody would have done the same thing, but in the real world they  
21 have not. Is that not inconsistent with what you say at paragraph 157 in the second sentence,  
22 which is:

23 "If only certain firms had taken a module, then the badge of CQS accreditation would  
24 not satisfy customers or mortgage lenders."

25 Well that was precisely the situation which they were in to are a number of years, in fact  
26 many firms might not have taken The Law Society's AML training until 2014?

27 A. Indeed, for a period of years. But the point when everybody is in the scheme is everybody  
28 would be on the same page, and the lenders accepted the scheme was growing as it went  
29 through, they did not raise an objection to it.

30 THE PRESIDENT: This was a sort of transitional stage as you were developing and enhancing  
31 the scheme, is that right?

32 A. Indeed, yes, yes.

1 MR. WOOLFE: But firms could present themselves as being The Law Society accredited as soon  
2 as they had their accreditation, even if they had not yet done any training?

3 A. That is correct other than to say that the (inaudible) is that the senior responsible officer will  
4 have signed an undertaking to enforce the practice management standards and various other  
5 obligations, professional obligations, which of course includes money laundering training  
6 generally. This training was specific only to conveyancing. So it is not to suggest that firms  
7 would not have otherwise undertaken training at this point.

8 Q. At paragraph 159 -- I will not be very much longer at all, sir.

9 THE PRESIDENT: Which means what?

10 MR. WOOLFE: Which means about five minutes maximum.

11 THE PRESIDENT: Five minutes.

12 MR. WOOLFE: At paragraph 159 you say:

13 "At no point am I aware The Law Society considered it would be feasible to use third  
14 party trainers."

15 Just to be absolutely clear, the syntax of that sentence is a little confusing, are you saying  
16 that you are not aware of The Law Society of having considered that point, or are you  
17 saying you are not aware of The Law Society having thought positively at some point that  
18 it would be a good idea? Can you just clarify what you mean by that firstly.

19 A. I am not aware The Law Society considered it was feasible. I do not recall specifically as it  
20 is so many years ago, but as it was always going to be part -- as you have seen way back  
21 from those meetings before the scheme was launched, or just after it was launched, that it  
22 would be an integral part provided by The Law Society and that was what was done. I  
23 would point out that while The Law Society is running those, the material is written by  
24 people who are outside, so The Law Society commissions material written by others which  
25 it produces through that and that is very similar to lots of other CPD providers.

26 THE PRESIDENT: Just to be clear --

27 A. So the material would essentially be the same, we are receiving it --

28 THE PRESIDENT: Yes. Is it your evidence that in all the discussions and meetings and so on  
29 you were involved in, as far as you remember, this possibility of using third party trainers  
30 was never discussed? By third party trainers I mean --

31 A. I do not recall any substantive discussion, yes.

32 MR. WOOLFE: Then at paragraph 160 you go on to uniformity of training being key, I have  
33 explored much of that with you already. But one specific point. You say:

1 "Delivery by electronic module rather than seminar ...(Reading to the words)...  
2 through our online CPD Centre."

3 Is it your evidence that that was always the case, you were always able to monitor  
4 completion through the online CPD Centre?

5 A. My understanding is that The Law Society was able to do that. The CPD Centre was the  
6 electronic portal, so I do not know whether the Society did do that, it was able to do that.

7 Q. Can I take you to bundle D9 -- this is another bundle, D9, Mr. Smithers, tab 87. We have a  
8 paper for the membership board dated 16 September 2015 and on page 1678, at point 26 --

9 THE PRESIDENT: Sorry, you are in it D9?

10 MR. WOOLFE: D9, tab 87 and there should be page numbers in the bottom hand corner saying  
11 16 --

12 THE PRESIDENT: There are not. Just a minute, I will find it if you give me the paragraph?

13 MR. WOOLFE: Paragraph 26, sir.

14 THE PRESIDENT: Yes, thank you.

15 MR. WOOLFE: Do you see that paragraph 26, Mr. Smithers, at the bottom of the page? It says  
16 there:

17 "At present individual staff members of CQS member firms ...(Reading to the  
18 words)... status of training for all relevant staff ..."

19 And so on. So it was only actually in the middle of 2015 that The Law Society actually  
20 began using the online CPD Centre to check completion, before then it relied on people  
21 sending in basically self-certificates that they had done it; that is correct, is it not?

22 A. I recall that in the accreditation the SRO had to confirm that training is taking place. This  
23 paper of course -- it says membership board, but in fact it was item draft for TLB, which is  
24 the leadership board, so this is an internal staff document, it does not relate to anything  
25 which the members through the membership board or the technical panel would have had  
26 anything to do with. In fact that is now long after I am -- I am not there at this point, I  
27 moved on from the technical panel. I do not know what the answer to that is other than I am  
28 pleased to see that if they did not do it before they now are, so that people are properly  
29 doing the training.

30 Q. When you say "We are able to monitor the completion of the courses through our online  
31 CPD Centre", your evidence is that you do not know what The Law Society is actually  
32 monitoring through the CPD Centre or whether it was monitoring by some other means?

1 A. My evidence is that they were able to do that, I believed, because it was done through The  
2 Law Society's CPD Centre.

3 Q. I suggest to you --

4 A. I was not involved in the technical running of the scheme.

5 Q. It cannot have been a terribly important feature if in fact they did not bother to do it until  
6 mid-2015?

7 A. Well, that is (inaudible) but I would say as a representative and someone who was  
8 instrumental in the setting up of the scheme, it would have been an important thing to do -- I  
9 was not aware that it was not being done -- because it gave probity to the whole scheme.  
10 You see it goes way back to mandatory training and the necessity to know everybody has  
11 done it. So I do not know what the process The Law Society followed because those are not  
12 my documents and I was not involved in that part of the scheme.

13 Q. Thank you, Mr. Smithers. Sir, those are all the questions I am now going to ask Mr.  
14 Smithers. I have some others on Lexcel, but I think in the interests of time I can put those  
15 to Mr. Murphy because he also talks about Lexcel and that might be more efficient.

16 THE PRESIDENT: Yes. Can I ask, Ms. Smith, do you have any re-examination?

17 MS. SMITH: I think I have about three points I would like to take Mr. Smithers back to.

18 THE PRESIDENT: Which will take --

19 MS. SMITH: 15 minutes?

20 THE PRESIDENT: Mr. Smithers, I am very conscious of the fact that it has now gone midnight  
21 in Melbourne, I believe, and you have been in -- well, not in the witness box, but you have  
22 been giving evidence for a long time, quite aside from the fact that it is very late. Equally  
23 we have been told, I believe that is correct, that you cannot return tomorrow morning, is that  
24 right?

25 A. Regrettably not, sir. I have a flight back to Canberra very early.

26 THE PRESIDENT: Yes. I understand that.

27 A. I am content to carry on though.

28 THE PRESIDENT: It looks as though there is about half an hour more, but no more than that.  
29 Are you able to carry on? I do not want to put you under any pressure because that just  
30 would not be fair on you.

31 A. I am content to carry on.

32 THE PRESIDENT: What I suggest we do is we have a five minute break and then we will carry  
33 on for half an hour.

1 MR. WOOLFE: Sir, can I just say, I would normally say, thank you, Mr. Smithers. Just by way  
2 of courtesy.

3 THE PRESIDENT: So we will just give you a five minute comfort break, or whatever the  
4 Australian expression is, and we will then complete the re-examination and some questions  
5 from the Tribunal.

6 (1.10 pm) (A short break)

7 (1.15 pm) Re-examination by MS. SMITH

8 MS. SMITH: Thank you, Mr. Smithers, I just have a small number of points I want to go back to  
9 with you. First of all, can I ask you to take up bundle D1, tab 11 please. This is right back at  
10 the very beginning of the process. This is a Legal Affairs and Policy Board meeting of 13  
11 January 2010, so very early in the process and you may recall Mr. Woolfe took you to this  
12 document and he took you to page 289 and 290, and he suggested to you that at this stage  
13 The Law Society's concerns were really about -- I think he put it solicitors' market position,  
14 solicitors' profitability and their market share of residential conveyancing. Do you recall  
15 that?

16 A. Yes, I do.

17 Q. He did not take you to pages 295 and I ask you to turn to that, and 296, where the proposal  
18 for a residential conveyancing management scheme is actually set out and in particular he  
19 did not take you to paragraphs 10 and 11 on page 296. Can I just ask you to look at  
20 paragraphs 10 and 11 on page 296 and then ask whether there are any comments that you  
21 want to make on those paragraphs, in light of what Mr. Woolfe suggested to you were The  
22 Law Society's concerns at the time?

23 (Pause).

24 A. Well, I think perhaps on point 11, bullet point 2, (inaudible) insurance market of lenders,  
25 demonstrate that (inaudible) the majority of the profession in the context of creating a  
26 trusted community amongst those who wished to do this specialist area of work was part of  
27 the whole context in creating the scheme.

28 There is also other thing to mention actually in point 10, bullet point 2, "using a vehicle or  
29 alternative business structure", I should perhaps explain at this point there were not any, but  
30 there was a concern that non -- solicitors firms but not owned by solicitors would enter the  
31 market to a considerable extent. The conveyancing market works on a system of  
32 undertakings and fundamental to the scheme is knowing who you have on the other side and  
33 whether you can accept their undertaking if they are a regulated individual. Now, it turns

1 out the number of ABSs in the market is relatively small and the majority in fact are  
2 conventional firms of solicitors even if they have external ownership, but at the time we  
3 were very concerned about identifying individuals and making sure that everybody, whether  
4 qualified or not, would work to the same standard, so we were not being judgmental about  
5 ownership and who did the work, but simply if they were doing it they did it to the same  
6 standard.

7 Q. Thank you, that is helpful.

8 Moving on to a different point, let us move on in the chronology. That document was  
9 January 2010. You were then taken by Mr. Woolfe to various documents from early to mid-  
10 2010 as regards the CQS and he put it to you that there was no intention on the part of The  
11 Law Society to include training in the CQS at that time, do you recall that?

12 A. I recall him saying that, yes.

13 Q. It was also suggested by him that training was not something that concerned lenders at that  
14 time, do you recall?

15 A. I recall he said that, yes.

16 Q. Can I ask you to keep bundle D1 there but just for this point go to bundle D2 please. If I can  
17 ask you to turn to tab 24. Tab 24 is minutes of the meeting of a Membership Board of  
18 October 2010. Part 1 is at tab 24, do you see that?

19 A. Yes.

20 Q. And part 2 is at tab 25. Now, this is October, so it is slightly later in the chronology, but it  
21 sets out quite helpfully what the process of developing the CQS was. If you look at page  
22 528 first please, under the heading of "Conveyancing Quality Scheme protocol", the third  
23 paragraph says:

24 "Michael Garson, Jonathan Smithers and Richard Barnett had drafted the protocol  
25 which had been circulated."

26 Then:

27 "The Board approved the CQS protocol."

28 Do you see that?

29 A. Yes.

30 Q. Then in part 2 of the minutes at tab 25, if you could turn to page 535, do you see at the  
31 bottom of that page item 33 "Conveyancing Quality Scheme update" and there is an update  
32 and the business case is referred to and then over the page, the top of page 536:

33 "The CQS would be launched at the Property Section conference on 20 October."

1 Then the last but one paragraph:

2 "Jonathan Smithers [so you] indicated that all courses would be online and the  
3 guidance should be amended to reflect this."

4 In light of those documents, the reference to the protocol, the launch and courses, can you  
5 explain what was the process of developing the elements of the CQS?

6 A. Well, through a number of boards and committees, sometimes also in other discussions that  
7 would not have been minuted. Those of us who were very closely involved were thinking  
8 along with our discussions with others how we could press this forward. It tended to be  
9 developed in what you might now regard as an ad hoc manner, for the very reasons I  
10 mentioned previously, because any membership body will have strict governance with  
11 boards and committees that meet in rotation. They do so because they are staffed by  
12 volunteers who give their time. We needed to react very quickly here, so there was an  
13 element of delegation, both Michael Garson and myself, Richard Barnett and Paul Marsh,  
14 were all, if I can use this phrase, senior members in the sense that we were all members of  
15 the Council, we were not just members of the committees and we had -- were known  
16 practitioners in this field, so The Law Society and other Council members had confidence in  
17 us that as we were suggesting this, given the Council has given the go-ahead for this money  
18 and the scheme had been launched that it would be developed in accordance with our best  
19 estimates as to what would be required to provide the aims, if you like, of the scheme, the  
20 probity, the confidence in the market, ability of solicitors to stay in the market, providing  
21 conveyancing services for a wide range of clients and so on and so forth. So there was a  
22 really wide context to this and it was developed in that way, not strictly in accordance with  
23 what a governance process might require because of the timing that was involved.

24 Q. You say you were given a certain amount of responsibility to develop what was required.  
25 What at this stage did you think was required?

26 A. I think at this point, which is -- forgive me as to the timing of this -- this is -- forgive me.

27 Q. Just before launch.

28 A. Just at the point when the scheme was being launched -- yes, just before launch -- we had  
29 concentrated at that point on the basic design of the scheme at launch, the documents that  
30 would be needed for solicitors to use the scheme. So a new protocol -- it is not quite  
31 described in here, I had written the first draft, Michael Garson had written the second draft,  
32 it then went out to consultation of it. Given our principal role in doing that we were

1 effectively the trusted individuals who went out to (inaudible) if I can put it like that, so I  
2 think I may not probably have answered your question.

3 Q. I think it might help -- I can take you back to D1 please. Can I take you back to the bundle  
4 D1 to tab 16, and this goes back a few months in the chronology as well. If you go to tab 16  
5 you will see that this is a Conveyancing Quality Scheme, formerly Home Buying Review,  
6 update of -- produced from the report on 9 June for the membership board of 24 June 2010,  
7 so middle of 2010. You were taken to page 324 with the key milestones and 325. I am not  
8 sure that you were taken to page 323, so can I ask you to look at page 323 and particularly  
9 paragraph 5, which refers to a lender meeting of 29 April 2010 with The Council of  
10 Mortgage Lenders and says in paragraph 5:

11 "They ..."

12 That is Des Hudson and Paul Marsh:

13 " ... provided a high level overview of the project to solicit feedback from members as  
14 to whether they think the scheme effectively addresses their concerns. The CML  
15 responded well to the proposals and agreed to engage with us in working groups to  
16 help provide input as the scheme is developed further. A first meeting with CML  
17 occurred on 14 June 2010 and further meetings are planned with The Building  
18 Societies Association and with other lender stakeholders and with relevant insurers."

19 So can you first tell me what input was it anticipated that the lenders would provide through  
20 these working groups?

21 A. I think it is probably fair to say we did not know at the time but were extremely keen to  
22 make sure that they had an opportunity to give input. The lenders were not particularly  
23 forthcoming in helping us. They were never going to say "Well, if you do this and this we  
24 will be satisfied with your scheme", they were always -- I think I recall the phrase actually,  
25 they said "We will want to look at the scheme when it is up and running, kick the tyres a bit  
26 and see if it is fit for purpose", but the purpose of having them close to it was that they had  
27 an opportunity to have input at the time. Similarly that is actually why we did the second --  
28 one of the reasons why we did the second year's training with them so that they had direct  
29 input into what was an extremely important point for them in the training schedule.  
30 I think your previous question was about what was required at launch. There are other  
31 documentation mentioned there. The protocol was the principal documentation. The  
32 TransAction forms, the contents form and another couple were being updated, they were not  
33 ready at that point, but we also then launched a new standard contract which was the

1 (inaudible) fifth edition which I and others helped to put together through the Conveyancing  
2 and Land Law Committee. So there was a new and up-to-date version of the contract  
3 because there were obligations in the protocol to ensure that a standard contract was used  
4 and not negotiated in a bespoke way which wasted time and cost. So there were a number of  
5 documents we were absolutely focused on getting those out in time for the launch so that  
6 when the Senior Responsible Officer signed the undertaking to use it, they had the  
7 documentation to go along with it, knowing as I said previously that the training would start  
8 at a later point.

9 Q. Right. As regards input from lenders, Mr. Woolfe took you to various meeting documents  
10 which recorded input from lenders in 2012 and in 2013 and you have explained as well the  
11 input from lenders at this very early stage. Could you just assist the Tribunal -- and in fact  
12 in answer to one of Mr. Woolfe's questions you said "Yes, we had lots of meetings with  
13 lenders at the time and we talked about lots of things". Could you just perhaps outline for  
14 the Tribunal the frequency and nature of your meetings with the lenders during your  
15 involvement with the CQS, specifically as regards the CQS?

16 A. Yes, I was not involved directly with very many of those meetings, they often took place at  
17 staff level between the senior staff involved and their equivalents in the different lenders.  
18 Different lenders deal with things differently. There are four or five lenders with the vast  
19 majority of the market, they will compete with each other, so one has to see them  
20 individually. I think it was a much more ad hoc approach than we were originally expecting  
21 because of course it took a while to get the scheme up and running. The CML could  
22 facilitate such a thing but they could not speak on behalf of the lenders because this scheme  
23 related to the risk base for each lender, so they were for the whole lending community, with  
24 the exception of building societies, (inaudible) represented smaller building societies, but  
25 not on behalf of everybody. So it was not I think as originally envisaged in this paper, very  
26 regular and frequent and minuted and so on.

27 Q. Those are my questions. I think the Tribunal has some questions for you. Questions from  
28 THE TRIBUNAL

29 THE PRESIDENT: Mr. Smithers, if you can see me, I do not want to keep you much longer. You  
30 have been asked a great deal about the history, the development of the scheme and so on.  
31 There is very little I want to raise about that, but just stepping away from it all can I ask  
32 you, your now former solicitors, though you are still a consultant, CooperBurnett, do they  
33 do a lot of residential conveyancing?

1 A. Yes. It was a very significant part of the firm. Yes.

2 THE PRESIDENT: In commercial terms, can you help us, I mean would it be practicable for a  
3 solicitor that does a significant amount of residential conveyancing to act only for cash  
4 buyers and not for buyers who are purchasing with mortgages?

5 A. No, no. There will be areas of the country with a much larger preponderance -- perhaps  
6 (inaudible) for example with a lot of elderly clients who would not have mortgages, but  
7 even in those areas you would need to be on a panel in order not to limit -- you could still  
8 do conveyancing and have a separate representation for a few clients, but it would be more  
9 expensive for them to do that, so for I would say the vast majority, 99 per cent perhaps or  
10 more, membership of panels is absolutely essential to keep a place in the market to  
11 undertake conveyancing.

12 THE PRESIDENT: Yes. That is rather what I suspected, and you have talked in helpful detail in  
13 your witness statement about how the development of the CQS was, at least in part, perhaps  
14 largely, but a response to moves by mortgage lenders to cut the size of their panels and that  
15 was of great concern to The Law Society membership and so to the committees on which  
16 you sat. I think that is the theme that comes through quite strongly for the reasons you have  
17 just mentioned. It seems to have been pretty successful as a scheme in that regard and if I  
18 look in your witness statement, which you have in bundle D, at tab 2, paragraph 128 on  
19 page 18, you refer to getting the news that Santander, which is of course a major lender,  
20 announcing that CQS accreditation would be a requirement for panel membership and you  
21 say "This was positive news". Would it be fair to say that all these efforts with the CQS,  
22 you were quite keen to achieve a situation where more and more major lenders made CQS  
23 accreditation a condition of panel membership?

24 A. No, I would not necessarily put it that strongly. Our first aim was to ensure that solicitors  
25 were able to remain on their panels. Just as regards panel membership, our aim was also to  
26 provide or ascertain an open and transparent criteria for lenders so the solicitors could know  
27 properly whether they would be on the panel or not. Our argument was adoption of the CQS  
28 gave them that and it also gave them the knowledge not only about probity, but also about  
29 standards, because lenders are not just about probity, lenders have an obligation -- a  
30 regulatory obligation but an obligation to their shareholders, or their depositors in relation to  
31 building societies, to have good title to the land over which a mortgage is being taken. The  
32 Building Societies Association and The Council of Mortgage Lenders have very extensive  
33 requirements of what is (inaudible) and they require excellent conveyancing when one is

1 giving a certificate of title in which one (inaudible) so one is taking a great deal of  
2 responsibility. It is in the lenders' very very strong interest therefore not just to have the  
3 trust of the community but a community of solicitors, firms and all the people within them  
4 that know what they are doing, if I can put it bluntly, that are less likely to make mistakes  
5 and can facilitate the conveyancing process which is better for their borrowers and assist  
6 lenders in ensuring that their security is as good as it can be, that land registration takes  
7 place in a timely fashion and there is a proper relationship between the lenders and the  
8 solicitors, so again part of a whole (inaudible) lenders who were not just interested in fraud,  
9 they are interested in a much wider group of obligations.

10 THE PRESIDENT: Yes.

11 PROFESSOR WILKS: Mr. Smithers, if I may, can I just follow up a related point. Is the  
12 CQS of assistance in joining lenders' panels where the lenders do not actually stipulate that  
13 it is mandatory? So, for instance, is your firm -- as a CQS member, does that give it any  
14 advantage in joining the panel for say Lloyds?

15 A. No, not necessarily, but each lender has their own panel criteria. If one is trying to get on a  
16 panel one will fill a form in and I suspect that some lenders will have questions. Lloyds  
17 Bank Group, for example -- perhaps I can just distinguish in the market. Santander does not  
18 generally hold client account money. Their relationship with lenders is -- sorry, with  
19 solicitors is of a mortgage lender and as an instructing lender for mortgage security.  
20 Whereas Lloyds Banking Group, along with Barclays Bank, NatWest, have different criteria  
21 because they hold substantial numbers of solicitors' client accounts, so they have a different  
22 commercial relationship and therefore greater knowledge of the firm themselves.  
23 So it may well be a criteria that will help some firms get onto the panels of lenders who do  
24 not necessarily stipulate or mandate to CQS, but that is a matter for each individual lender  
25 according to their own risk management profile.

26 THE PRESIDENT: I think we understand that it is a matter for each lender. I think Professor  
27 Wilks was just exploring, with your experience as a conveyancing solicitor -- we know  
28 there are certain lenders that make it an absolute requirement that a solicitor to go on their  
29 panel has CQS and the question is are there some other lenders for whom it is not a  
30 requirement, they have their own criteria, but it is something they might take into account?

31 A. I cannot adduce direct evidence but I strongly suspect that it would be.

32 THE PRESIDENT: Yes, thank you.

1 Given that not all lenders make it a requirement, but, as we know, a number of the major  
2 ones do, and we have referred to Santander, I think Nationwide, HSBC and so on, how  
3 important now is accreditation in the CQS for a solicitor that does a lot of residential  
4 conveyancing work? How important is it to get onto those panels?

- 5 A. Well, it is a question really for I think individual lenders, because they change criteria.  
6 Nationwide for example you mentioned more recently required CQS but had closed their  
7 panel to new applications for I think a year or two before that, so regardless of what you  
8 had, you still could not get onto the Panel. So lenders have to be receptive if you have an  
9 application. Some may require a length of time in the CQS before that. I do not know.  
10 Lenders have been known to change their panel criteria. The Law Society has long argued  
11 that they should be open and transparent; the lenders have long said they will not make  
12 panel criteria open and transparent. I believe the argument is that to do so would enable  
13 potential fraudsters to get in round the back door and eventually tick the boxes, if I can  
14 perhaps use that euphemism, and the lender should, like any client, have the ability to make  
15 its own decisions without publishing them. The Law Society did argue that lenders with a  
16 very dominant market position, with a relatively new -- with a very large number could  
17 affect the market and had a wider duty, but that argument was not accepted by the lenders.

18 THE PRESIDENT: In your statement you mention another goal of the CQS at paragraph 83 on  
19 page 12. It starts at the bottom of page 12 and continues at the top of page 13, the last  
20 sentence, you say:

21 "A further goal was to help to reduce negligence claims and minimise PII rates and  
22 the difficulty of obtaining cover."

23 Can you help us, has it been successful in that regard? If you are CQS accredited does that,  
24 with some PI insurers, help to get you a lower rate?

- 25 A. Again it is very difficult to give you a decisive answer. As far as I know, all major insurers,  
26 PI insurers, will ask that question. PI claims often take many years to work through. There  
27 were a great many claims for example since the 2008/2009 financial crash that worked their  
28 way through three or four years later, but as the property market has continued to rise they  
29 tend to diminish because the rise in the value of the property means that if it is sold  
30 (inaudible) does not look to claim against the firm, so it is somewhat hard to draw that  
31 parallel at the moment --

1 THE PRESIDENT: Can I interrupt you, I did not quite follow. My question perhaps was not very  
2 clear. Every solicitor and therefore every residential conveyancing solicitor will have PII  
3 cover and they will pay a premium every year, will they not, in most cases?

4 A. Each firm will have cover, a premium which is calculated by reference to a large number of  
5 --

6 THE PRESIDENT: Yes, but my question is if a firm is a member of the CQS, as compared to a  
7 firm -- the same firm -- when it gets CQS accreditation, with some insurers can that lead to  
8 a lower rate of premium? You say that was one of the aims.

9 A. I am not aware that it does, but I think that -- well, it was one of the very long-term aims,  
10 and remember -- perhaps I can assist -- that this was partly through the work of Paul Marsh,  
11 the past president, who had been chair of the Solicitors Indemnity Fund, so insurance was  
12 very much front and centre for him. The insurance market has changed very substantially  
13 in the last six or seven years, it is predicted to get much harder with premiums rising, in fact  
14 many insurers have joined the market. The continued buoyancy of house prices has meant  
15 that lenders have suffered fewer losses, the number of repossessions have gone down,  
16 therefore the number of claims that might be made against us for negligence where a  
17 property has been repossessed and cannot be sold will also have gone down, so that in my  
18 view is more likely to have affected the premium. It cannot have made anyone pay more, as  
19 to whether it has made them pay less I cannot adduce any direct evidence. My firm has had  
20 accreditation from the start, so we (inaudible) claim since we have had it, but lenders tend to  
21 look at risk over a very long period.

22 THE PRESIDENT: Insurers, you mean?

23 A. Exactly.

24 THE PRESIDENT: So --

25 A. Sorry, insurers, forgive me.

26 THE PRESIDENT: So have I understood it, it is a question they ask but there is not much  
27 indication that it makes significant difference to the premium, is that a summary of what  
28 you are saying?

29 A. Yes. It may have, however, also aided a number of insurers to stay in the market. The  
30 question is not always just how much premium, but how much choice there is between  
31 insurers. The more insurers the more competition on price and premium there is, it is one of  
32 many many factors which we hope would tend to assist firms. As I say, when this -- I was  
33 talking about this in 2011, we were in the midst of a number of claims that had come out

1 from the 2008/2009 recession. In fact those would be entirely dissipated to the number of  
2 claims (inaudible) substantially, so it less likely to have had an effect on premium, but the  
3 fact that it is there means that insurers can look at it if they require it as a risk factor.

4 THE PRESIDENT: Yes, thank you. You mention in your statement at paragraph 132 on page 18 a  
5 council meeting in February 2013. There is no need to turn up the minutes because you  
6 summarise the position in your evidence here, the report from the chief executive. He  
7 concluded that:

8 " ... this would be particularly important for high street practitioners who would find it  
9 hard to compete with high volume alternative business structure firms. This is entirely  
10 consistent with my views of CQS."

11 So just making sure I have understood that, are you saying that one potential benefit for a  
12 firm having CQS accreditation is that it might help the firm to compete with an ABS  
13 competitor?

14 A. Yes, or indeed many of those (inaudible) firms will (inaudible) firms of solicitors, but doing  
15 one type of work. They were some types rather disingenuously referred to as (inaudible)  
16 factories. There is a lot of discussion in The Law Society about the extent to which small  
17 and large firms can be supported. Of course all solicitors are individual members but they  
18 trade generally through firms, whether they be sole practitioners or large firms. So many of  
19 those volumes, in fact I think pretty much all of those volume firms will rely on paying a  
20 referral fee to obtain work. They will pay those fees to mortgage introducers or probably  
21 more likely estate agents to have work introduced to them. Many of those type 3 firms will  
22 not pay referral fees, so they needed to find a way of standing out in the market to show  
23 they had a quality mark. I have not adduced evidence, but I do recall there being some  
24 research on the subject generally that it was very difficult, if not impossible, for members of  
25 the public to choose between one firm and another, which is why most people went on a  
26 recommendation. This was aimed at giving a mark which would help support (inaudible) .  
27 There was also likely a discussion, not minuted, because at this time the Legal Aid crisis  
28 was growing, LASPO was on its way, that conveyancing for small firms, it provided  
29 cashflow through the client account, enabled them to maintain banking facilities and a  
30 regular income. It enabled those firms to support other types of work that were (inaudible)  
31 and not very profitable. So there was a much wider access to justice point in helping firms  
32 do conveyancing. If they lost the conveyancing the firms probably would not be viable and

1 those other services could not be provided which means a larger group of people would not  
2 have access to solicitors' advice for a wide range of matters.

3 THE PRESIDENT: I can fully understand that. When you say -- I think the expression you used  
4 in your answer was "quality mark", this is a quality mark to the public, to consumers?

5 A. Well, to consumers, to lenders, to anyone who is interested in the practice and showing that  
6 we have created a trusted community of people who demonstrated certain standards.

7 THE PRESIDENT: Yes. You have referred, and you have been questioned extensively, about  
8 your discussions -- "your", I mean The Law Society's, the various staff members', your  
9 colleagues' discussions about mortgage lenders and the CML as the scheme was developed.  
10 We know that the solicitors wanting to be accredited and in the scheme pay a fee, we have  
11 some evidence of what the fees were. Was the level of fee something that featured in your  
12 discussions with the lenders?

13 A. No, I do not believe it did feature in that, no. I do recall discussions, there may be evidence  
14 elsewhere from others, about the level of the focus on the representative side --

15 THE PRESIDENT: Can I cut you short --

16 A. -- not just for the practitioners -- sorry.

17 THE PRESIDENT: I am sure there was discussion at various levels about the fee, I was just  
18 particularly interested in whether it was discussed with the lenders and I think your answer  
19 was it was not.

20 A. No. Forgive me.

21 THE PRESIDENT: Given the value of the CQS to solicitors that are heavily involved in  
22 residential conveyancing, for all the reasons you have given in your statement and you have  
23 just expanded on, if The Law Society were to increase the fees for accreditation by say 20  
24 per cent -- I am not saying it would do that, for lots of reasons it might not, but if it did do  
25 that no doubt there would be many complaints from solicitors, but do you think from your  
26 experience in this world that many residential solicitors would say "Well, then, we will not  
27 bother, we can do without it"?

28 A. Given that lenders now mandate it, I think it is right that few would. Certainly as you  
29 identify the profession would be very vociferous in any thought that The Law Society was  
30 profiteering which of course it has not done. I suspect also that lenders might show some  
31 disquiet if the accreditation scheme for a mutual society was being used to exploit in any  
32 manner. That may put their endorsement at risk. I do not know, I cannot speak for them.  
33 But I think it is based on a trust, if you like, that The Law Society in its representative

1 capacity has produced a good scheme which works in many many ways and helps them  
2 with their security and probity and so on and that that was its purpose and not a revenue  
3 raising one.

4 THE PRESIDENT: No, I understand that it would be most unlikely to happen, I am just trying to  
5 get a sense of how commercially important it is for solicitors such that they would complain  
6 but in the end have to pay? That was the point of the question.

7 A. Indeed. But can I just also add the training, what you have seen previously is that the  
8 training is provided at a much less cost than other commercial activity which The Law  
9 Society (inaudible) and that again was to ensure that firms were not adversely affected by  
10 huge costs. There are -- it is very expensive to carry out conveyancing with all the  
11 overheads, we did not want to add to that burden, so the scheme was never designed to be  
12 profit making, but to try and be perhaps self-funding or mutual, so that the conveyancing  
13 community will pay for their own accreditation, other Legal Aid solicitors were not cross-  
14 subsidising.

15 THE PRESIDENT: Yes.

16 Can I then just ask you about something you say in your statement at -- when you say in  
17 paragraph 18 at the beginning:

18 "In my view it would not be practical or economically viable for The Law Society to  
19 accept that courses by third parties are sufficient to satisfy the CQS standard, this  
20 would require The Law Society to audit course content and quality on an ongoing  
21 basis, recognising that courses change each year."

22 That is at paragraph 18 and I think you picked this up towards the end at 159 on page 22.

23 Well, I think, sorry, not 159, 161, at the top of page 23:

24 "In any event to approve third party providers to provide CQS training, for instance to  
25 provide the AML mortgage fraud modules, would have been costly and  
26 administratively burdensome."

27 And you set out some of the things it would involve and then you say in 163:

28 "My view is that it would be wholly impractical and cost prohibitive for The Law  
29 Society to approve third party providers."

30 Well, breaking that into the two things you have mentioned, the first is cost prohibitive, was  
31 any work done to look at what it would cost?

32 A. I am not aware that it was, that any work was done, and I think that is a supposition from  
33 those of us who run businesses and who are aware of how these things works. The cost and

1 time in doing all those things which are mentioned in 161 would be in addition to the  
2 would, which The Law Society was already doing and therefore would add to the cost of the  
3 scheme which would have to be reflected in a price charge and a margin for the external  
4 provider who was doing it purely on a profit basis as opposed to The Law Society doing it  
5 on a mutual basis.

6 THE PRESIDENT: Well, presumably the cost to The Law Society, that could be charged to the  
7 commercial provider, they would bear the cost not The Law Society, is that not right?

8 A. They might need to do that but there is then a cost to The Law Society in staff time and  
9 overheads in doing the things mentioned in 161.

10 THE PRESIDENT: Well, that would be reflected --

11 A. That has to be charged somewhere.

12 THE PRESIDENT: Yes, you would charge it to the provider. That would be the cost --

13 A. The provider, if they had a margin, would have to reflect that price.

14 THE PRESIDENT: Yes, and it may be as a result their fees for the courses would be higher than  
15 The Law Society and so they would not get much business, or it may be they are perhaps  
16 conceivably more efficient and their fee would be lower, but it would be left to the market.  
17 What I did not quite understand is why you say it is cost prohibitive to The Law Society,  
18 because would not the obvious thing to do to charge the trainer?

19 A. In a sense The Law Society is already outsourcing by asking external providers to write  
20 course material, as it does in many of the courses, so it is already going through that  
21 process, and ironically they are often the same people that lecture for other companies as  
22 well, so if The Law Society were to outsource it they then have to provide (inaudible) which  
23 then has to be checked and they check back to see that people are doing the courses and so  
24 on. If it was purchased through the CPD Centre we could confirm exactly what had been  
25 done and by whom in a quick and efficient manner, which is why it was viewed as not a  
26 direction I think The Law Society wanted to go down because it would be prohibitive for  
27 the reasons I have mentioned in 161. I appreciate this was a judgment made at the time, but  
28 I think a correct one.

29 THE PRESIDENT: But have I understood you, no effort was made to work out what it would  
30 cost and whether independent providers might be willing to pay that fee? That work was not  
31 done?

32 A. I do not believe any research was undertaken. I am not aware of any research being  
33 undertaken.

1 THE PRESIDENT: Then the other thing you say there, you say it would be wholly impractical,  
2 and that reflects I think what you have set out in 161, to check the suitability of the training  
3 companies and that is something that had been done, is that not right, by the SRA -- no  
4 longer but they did it for an annual fee, is that right?

5 A. My understanding was that they took a fee for accreditation. I am not aware of the extent to  
6 which the SRA investigated the probity or the depth or expertise of any of those companies  
7 in that and that is not data that would have been shared under governance rules because it  
8 would have been commercially sensitive The Law Society's representative would not have  
9 had access to that if it had been done.

10 THE PRESIDENT: No, but it is something that -- you say it is impractical, wholly impractical. I  
11 was just wondering -- someone else has been doing it -- whether it is impractical. I am not  
12 suggesting they would do it for you, but I am just trying to understand why you say it is  
13 wholly impractical.

14 A. Well, it could be done, but there are -- because there are a number of risks which will add to  
15 the cost and complication. For example, in point (f) in 161 I think one of the training  
16 providers was (inaudible) and that happened from time to time. We would not then have a  
17 record that we could go back and certify the probity on, so that would have added to the  
18 cost and burden on the scheme which we were trying to run on a cheap and mutual basis to  
19 provide certainty to the market.

20 We were also clear that we wanted to ensure that everybody had viewed every webinar and  
21 each part, so the webinars I think were designed with questions to be answered as you go  
22 through and there are some questions at the end to prove that everyone has seen the whole  
23 thing, as opposed to people turning up at a venue and sitting possibly for some amount of  
24 the time checking their emails and so on, which is one of the reasons why the SRA changed  
25 their training requirement, so we wanted to be really clear this was training that hit the mark  
26 for everybody without increasing the cost.

27 THE PRESIDENT: Is that not something you could specify in the requirements of how the  
28 course had to be designed and structured so that it is not something, is it, that only The Law  
29 Society could design a course that way?

30 A. No, it could be done, but in my judgment it would add to the administrative cost of the CQS  
31 to do that which would have to be reflected somewhere, either in the application fee or the  
32 cost of the training or in some other manner.

1 THE PRESIDENT: So that is what -- because you say it was never considered at the time, that is  
2 the basis on which you have reached the view that you set out in paragraph 163?

3 A. Yes.

4 THE PRESIDENT: Just one moment. Mr. Allan, my colleague, has a question for you.

5 MR. ALLAN: Mr. Smithers, my question is rather different. Could you take up bundle D1 and go  
6 to tab 18, page 337. This is a report of The Law Society Chief Executive, 8/9 June 2010.  
7 Mr. Woolfe discussed section 3, "CML update" with you and I just wanted to very briefly  
8 touch on the preceding section 2, which starts on page 336, headed "Nationwide" and it  
9 discusses the announcement that the Nationwide was removing I think 300 firms from its  
10 panel.

11 In your discussion with Mr. Woolfe there was some consideration of the extent to which  
12 lenders' concerns were focused on what were termed complicit solicitors, ie solicitors  
13 complicit in mortgage fraud. If you look at the paragraph at the very top of the page it gives  
14 some explanation there of why Nationwide terminated those panel members. Could you  
15 just comment for me on whether that bears on the issue of the extent of lenders' concerns in  
16 the context of your discussion with Mr. Woolfe?

17 A. Yes. Lenders were actually in a wide variety of different manners under pressure from their  
18 regulator, the FSA or whoever it was, in order to ensure that they knew who they were  
19 instructing and funds were not being put at risk. Nationwide made this statement. It does  
20 indeed go to the point that having implicated a fraud against Nationwide (inaudible)  
21 intention to defraud, it is simply they may be acting for a client who had, for example,  
22 fraudulently misstated their income on a mortgage application form and the solicitor was  
23 unaware of that, that sort of statement was the kind of point that we tried to highlight in  
24 saying that lenders should have open and transparent criteria. To remove a (inaudible) from  
25 a panel of a major lender which might have serious implications on their business simply  
26 because a client of theirs has done something seems to us iniquitous, but that does speak to  
27 that point.

28 MR. ALLAN: Specifically in saying that have you looked at the last sentence in the carry over  
29 paragraph:

30 "Nationwide said the firms removed have all been implicated in fraud against  
31 Nationwide, though not all had the intent to defraud."

32 A. I take that simply to mean that those firms had acted for clients who may have either been  
33 accused of fraud, or who lenders thought had been fraudulent. That fraudulence could be

1 something simply like misstating their income. Some of the lenders at that time, I have a  
2 feeling that they may have had those sorts of products where people did self-declarations of  
3 income which were widely used fraudulently -- I do not know if that is the case here. So in  
4 my own opinion I think some lenders were looking for any excuse to say to their regulator  
5 "We have been through our panel and none of these firms have had anything to do -- we do  
6 not have the time, expertise or willingness to go any further than that, so we have cleaned  
7 up our panel and therefore met our regulatory requirements". That is the context, if I can  
8 use the phrase, the pool in which we were swimming at the time.

9 MR. ALLAN: Thank you, that is all.

10 THE PRESIDENT: Ms. Smith, anything arising out of that?

11 MS. SMITH: No, sir, thank you.

12 MR. WOOLFE: Nor from me, sir.

13 THE PRESIDENT: Mr. Smithers, it is very late. You have been extremely patient with everyone.  
14 Thank you very much for assisting by agreeing to give evidence at this time and you are  
15 now released. Thank you.

16 A. Thank you very much.

17 THE PRESIDENT: We can disconnect. Now, it is 10 past 2. We obviously have to have a break.  
18 It is a question of where we go from here. We have had this morning a revised data analysis  
19 correcting those fairly obvious mistakes that came out yesterday. I think we would like --  
20 we got that just this morning, shortly before coming into court and no doubt so did Ms.  
21 Smith, so I do not think it would be right to ask Mr. George to answer questions, or rather  
22 not right to expect people to ask him questions on that now. It might be more sensible to  
23 proceed with Mr. Murphy and for Mr. George to come afterwards, if you are content with  
24 that?

25 MS. SMITH: Yes, I am content with that. We similarly only got it in our inboxes at 1 o'clock this  
26 morning.

27 MR. WOOLFE: Indeed I actually have not looked at it in any detail either.

28 THE PRESIDENT: I think in everyone's interests -- that was the main part of his evidence that  
29 was left over. I think then if we come back at 3 -- we started early, so I do not think we  
30 should sit late and Mr. Murphy can come back tomorrow. I can say that I do not think we  
31 need a whole day with the economists in this case and I think in fact -- and we are doing  
32 their evidence concurrently. I think half a day is likely to be adequate.

33 MS. SMITH: I hope with that we will still -- there are further questions I need to ask Mr. George.

1 THE PRESIDENT: No, I understand that.

2 MR. WOOLFE: Just for the Tribunal's information, I do not anticipate being anything like the  
3 kind of time --

4 THE PRESIDENT: No, you have been through this long history and Mr. Murphy was not  
5 involved in that because he only came much later.

6 So if we start at 3 -- well, we will see how we get on, but we will definitely stop by 4.30 at  
7 the latest, if not 4.15, so 3 o'clock.

8 ( 2.15 pm) (The short adjournment)

9 (3.00 pm)

10 THE PRESIDENT: Given that we started at 9 o'clock, and I think Mr. Murphy has been in court  
11 all day, and some of us were up because of events elsewhere even earlier, we will stop at  
12 4.15, so we obviously will not finish Mr. Murphy's evidence today but continue in the  
13 morning.

14 MS. SMITH: We might do, we will see. MR. GRAHAM MURPHY (sworn)

15 Examination-in-chief by MS. SMITH

16 MS. SMITH: Thank you, Mr. Murphy, you can sit down. Do you have some water there?

17 A. I have.

18 Q. Good. Can I check that you've got in front of you bundle D?

19 A. Yes.

20 Q. If I could ask you first of all to turn to the first tab, tab 1 in that bundle, you will see a  
21 document there "First witness statement of Graham Peter Murphy". In the top right-hand  
22 corner of that document it says "Date made 21 June 2016" but if you look at the last page,  
23 page 26, it says 21 July 2016.

24 A. That is correct.

25 Q. You can confirm this was made on 21 July?

26 A. It is 21 July and not 21 June.

27 Q. You can confirm that the signature on page 26 is your signature?

28 A. It is.

29 Q. The contents of this witness statement are true?

30 A. They are.

31 Q. Is there anything you would like to update or amend in this statement?

32 A. No.

1 Q. Can I ask you to turn to tab 3 and you there see a document, "The second witness statement  
2 of Graham Peter Murphy" -- I should have asked you with your first statement to confirm  
3 your full name?  
4 A. Yes, it is Graham Peter Murphy.  
5 Q. Your professional address?  
6 A. It is The Law Society of England and Wales which is based at 113 Chancery Lane.  
7 Q. This is your second witness statement indicated 30 September and the signature on page 13  
8 is again your signature?  
9 A. It is, yes.  
10 Q. The contents of this witness statement are true?  
11 A. Yes.  
12 Q. Is there anything you want to amend or add to in this statement?  
13 A. No, there is not.  
14 Q. Can I just, just to complete the picture, ask you to take out bundle B and ask you to turn to  
15 tab 2 of bundle B, which is, you will see, the expert report of Dr. Adrian Majumdar.  
16 A. Yes.  
17 Q. On that can I ask you to turn to page 23.  
18 A. Yes.  
19 Q. At paragraph 75 to 76 Dr. Majumdar says that he has been informed about what is needed to  
20 produce a training module for one type of firm as opposed to any other, what the subject  
21 matter expert would ascertain, etc. Could you just read those paragraphs and confirm --  
22 well, first of all, do you know who informed Dr. Majumdar on these matters?  
23 A. Yes, that was myself under consultation with other members of staff.  
24 Q. If you could just read what is in paragraphs 75 through to 77 and then confirm that you  
25 agree with what is set out there, or whether or not you agree to what is set out there?  
26 (Pause).  
27 A. Yes, I agree with what has been said.  
28 Q. Thank you very much, Mr. Murphy. Mr. Woolfe will have some questions for you. Cross-  
29 examination by MR. WOOLFE  
30 MR. WOOLFE: Thank you, Mr. Murphy. Can I ask you to begin with to look at -- you should  
31 have bundle D in front of you, that is your statement.  
32 A. Yes.

1 Q. If you go to tab 1, which is your first statement, the first point arises at paragraph 12 of your  
2 statement and the last sentence in that paragraph says:

3 "The CQS has been designed specifically for residential conveyancing practices in  
4 England and Wales who conduct residential conveyancing in England and Wales and  
5 the training modules would not be relevant to solicitors that are not active in this  
6 market."

7 Can I just confirm my understanding that by "this market" you mean the market for  
8 residential conveyancing in England and Wales?

9 A. That is correct, residential within England and Wales.

10 Q. But those training modules, the content of those training modules, particularly in terms of  
11 AML and mortgage fraud, would be relevant to solicitors who are practising in the market  
12 of residential conveyancing, whether or not they are members of the CQS, is that right?

13 A. As the statement says, it is for England and Wales, so that precludes Scotland, Northern  
14 Ireland, etc.

15 Q. I understand, we are talking about England and Wales. The question I am putting to you is  
16 the content of the training, the AML and mortgage fraud training in particular, would be  
17 relevant to all solicitors who practise in residential conveyancing in England and Wales,  
18 whether or not they were members of the CQS; that is right, is it not?

19 A. Specifically for AML and mortgage fraud where there is no reference to CQS, that is  
20 correct, yes.

21 Q. Just to check, you are saying there is not any reference to CQS in those training --

22 A. There may well be. I am not totally familiar with either.

23 THE PRESIDENT: I think it is right that they are available --

24 A. They are available, indeed, yes they are.

25 THE PRESIDENT: -- to people who are not in CQS who can have a price for it.

26 A. Yes.

27 THE PRESIDENT: Just while I am on that, to what extent are they purchased by --

28 A. Very limited. I do not have the specific figures, but I would say tens rather than hundreds.

29 MR. WOOLFE: Picking up the same point at paragraph 90 of your statement on page 15, a  
30 similar point, in the last sentence of that paragraph, paragraph 90:

31 "The training is specifically tailored to conveyancing solicitors and contains a series  
32 of scenarios that ground AML theory in the practical day-to-day world of residential  
33 conveyancing."

1 Again the training is tailored to be suitable for conveyancing solicitors in respect of AML, it  
2 is not tailored only to be suitable for people who are members of the CQS?

3 A. Correct.

4 Q. And the scenarios could be relevant to solicitors whether or not they are members of the  
5 CQS?

6 A. I presume so, but I am not an AML expert.

7 Q. Can I just take you to bundle D7. I will try to make sure you do not have too many files up  
8 there at one time. It is always a hazard in cases like this. Can you go to tab 41 within that  
9 bundle please.

10 While I appreciate you are not an AML expert, this is exhibited to your statement.

11 A. Yes.

12 Q. Just perhaps looking through, if you go to page -- you see there are some slightly unclear  
13 page numbers in the bottom right-hand corner.

14 A. Yes.

15 THE PRESIDENT: Just to help me, is this the current version of the print-out of the online AML  
16 module?

17 MR. WOOLFE: I believe it is.

18 THE PRESIDENT: In the AML course?

19 A. This is the AML course as it was published when it was first launched in 2013. This course  
20 no longer exists as a full module within the CQS training regime.

21 THE PRESIDENT: Now it is part of financial crime, the new financial crime --

22 A. It is part of the core offering just for new starters.

23 MR. WOOLFE: So this would have been the version up until the restructuring of the CQS.

24 A. That is correct, yes.

25 Q. Just to give an example of what it is about, if you go to -- using the numbers in the bottom  
26 right-hand corner, they are numbered out of 70. If you go to 5 out of 70 you can see it starts  
27 to explain the legislative framework and it carries on for several pages. Then if you go to a  
28 page labelled 6 of 70 you should have "What is money laundering?" and an explanation in  
29 the middle of that page that:

30 "Attempted mortgage fraud is not money laundering ...(Reading to the words)...  
31 money laundering will become an issue."

32 And so on. So this is a general purpose AML course for conveyancers, it is not specific to  
33 CQS?

1 A. Correct.

2 Q. You can put that away now, that bundle. If I can just take you to the claimant's training  
3 which is in bundle C1 and there are two relevant tabs in this bundle, there is tab 5 which  
4 contains a version of the claimant AML training for law firms, AML for all fee-earners,  
5 and tab 7 which contains a module for AML for property lawyers. Just beginning with tab 5  
6 for the moment you can see if you go to page 10 within that bundle a definition of regulated  
7 business, there is a general AML definition. At page 17 it covers the need to carry out due  
8 diligence on page 17, do you see that? Then for instance on page 50 we have a couple of  
9 scenarios that are not specific to property, for instance the second one:  
10 "Scenario your client sends you more money than you need for no apparent reason."  
11 It suggests it should be paid out by the use of client account for money laundering purposes.  
12 So general AML purposes.  
13 Then if you turn to tab 7 which is the AML for property lawyers and perhaps look for  
14 instance at page 11 where it is discussing mortgage fraud. It is on the right-hand side of  
15 slide 15, that is what the law would be saying.  
16 Then at page 20 it deals with bogus law firms and so on.  
17 What I want to put to you, Mr. Murphy, you exhibit the equivalent training from The Law  
18 Society, is that there is really no difference in scope between the training that Socrates have  
19 produced and the training that The Law Society have produced. A solicitor who has looked  
20 at the AML for fee-earners and the property lawyers section has covered broadly speaking  
21 the same subject matter as someone who does The Law Society's AML?

22 A. It would appear so, yes, but, as I stated, the AML course that you showed me previously  
23 from The Law Society does not exist in that format any more.

24 Q. Understood. I also appreciate you are not an expert on AML. Can I take you to paragraph  
25 57 in your first statement. You say:  
26 "In my opinion based on my understanding of the operational side of the CQS ..."  
27 Just to be clear about the extent of your understanding, your focus is on the marketing of the  
28 CQS, is that right?

29 A. As the product manager I am responsible for the scheme in its entirety. We then have  
30 specialists that I work with that develop the training or undertake the assessments.

31 Q. Thank you.  
32 You say:

1 "It would be extremely difficult, if not practically impossible, for the training  
2 component of the CQS to be outsourced to a range of third party training providers."  
3 Then you go on to give a number of reasons for that. Can I just check before we go on to  
4 consider the reasons, what you are saying would be difficult would be the outsourcing of  
5 The Law Society's existing training, is that right?

6 A. Training per se would be difficult to be outsourced, yes.

7 Q. But you are looking at outsourcing in the sense of a third party training provider delivering  
8 training that is created by The Law Society?

9 A. Whether it be created by ourselves, or created by a third party.

10 Q. I just wanted to check the scope of what you were saying. So the reasons you give, you say:  
11 "It would remain incumbent upon The Law Society ...(Reading to the words)... to do  
12 so from our own resources."  
13 For the moment I will skip over the next sentence, we will come back to that. It says:  
14 "We would also be dependent on the assurances provided by such third party trainers  
15 that relevant members of staff had actually completed the relevant training and  
16 assessment modules."  
17 So one of the reasons you say it would be difficult would be a problem with tracking  
18 whether people had done the relevant training or not?

19 A. That is correct.

20 Q. I just want to check, because you say back at paragraph 64 that:  
21 "Now all CQS training is carried out via The Law Society's CPD portal."  
22 You say:  
23 "This is to allow the technical team to check the relevant individual has completed the  
24 required training at the time when they apply for reaccreditation."  
25 So it suggests that they monitor it at the point of reaccreditation, not in real time. But you  
26 say:  
27 "Prior to 4 August 2015 practitioners had to submit a copy of the CPD training  
28 records for all relevant persons."  
29 It is right, is it not, that prior to that date The Law Society did not monitor using its CPD  
30 Centre, it monitored on the basis of the certification provided by the members of the CQS  
31 themselves?

32 A. There was self-certification by the SRO, so the SRO was asked to supply certificates for all  
33 of the members of staff, but the technical team also had the capacity to look at the CPD

1 online centre if needs be. What has happened now is that has been opened up to all of the  
2 technical and operations teams.

3 Q. But when you say as a practical objection to -- in your comments on outsourcing training --  
4 that you would be dependent upon assurances provided by third party trainers, in a sense  
5 you would just be applying the system that you have applied for several years, from 2011  
6 through to 2015, which is certification by the SRO that the relevant staff have completed the  
7 training?

8 A. The reason that we changed it was -- have you ever asked a senior partner for his training  
9 certificates? That is why we changed it, because it is difficult to ensure that we had full  
10 compliance and that is why we have the backup system of being able to check online at the  
11 same time. So what I am saying here is if the AML market is competitive, so there is a  
12 number of different providers, we would have to check with every single one of those  
13 providers to ensure that whichever member of staff was using that particular provider we  
14 were able to check that particular person.

15 Q. But, for example, you could simply make it a condition of a training provider being  
16 accredited for the purposes of providing training that it agrees to provide that information to  
17 you?

18 A. We could, as part of an accreditation process, yes.

19 Q. That would not be a significant practical obstacle, would it?

20 A. It would be a practical obstacle because obviously the market, there is numerous providers  
21 of that service, so we would be asking our operational team to check numerous providers  
22 and that just becomes impractical.

23 Q. But you could charge the providers, could you not, you could charge them the cost of doing  
24 it?

25 A. Which we would then have to pass on to our membership and as a membership organisation  
26 we would not be particularly keen to do so.

27 Q. But you could charge the training providers. As I understand it, when The Law Society and  
28 then the SRA used to accredit training providers for the purposes of CPD, they used to  
29 make a charge for the purposes of accreditation to cover their administrative costs of  
30 accrediting a body, checking they did things properly.

31 A. Yes.

32 Q. Why could you not just do the same and that would cover any costs, you would not need to  
33 pass it on to your members?

1 A. Because, as you said, we would want to do it properly, so we would need to develop a  
2 complete quality assurance framework to ensure that the supplier was of a standard that we  
3 were happy with, as The Law Society, and also our stakeholders were happy with as well.

4 Q. I want to go back to something you said a moment ago --

5 THE PRESIDENT: Can I just ask, you used to do it for trainers before it was taken over by the  
6 SRA, used to accredit trainers?

7 A. I do not know.

8 THE PRESIDENT: Well, I think that is the undisputed evidence. Mr. Smithers felt that was then  
9 taken over by the SRA. You were not around at the time --

10 A. No.

11 THE PRESIDENT: -- so you cannot help us as to whether The Law Society did it properly or  
12 improperly.

13 A. No, sir, I cannot.

14 THE PRESIDENT: Can we assume The Law Society did it properly?

15 A. One would hope so, but because of the stakeholders involved, because of the lenders that  
16 were involved, we would need to formulate a proper quality assurance framework so they  
17 would be happy to continue to support the scheme. That obviously takes time and a  
18 considerable amount of money in actually developing the scope of that.

19 MR. WOOLFE: Can I just go back to something you said a few moments ago. You said it is  
20 difficult to get a senior partner to tell you who has done what.

21 A. Yes.

22 Q. Whereas now if you track it through the online CPD Centre it is more effective. So would  
23 you say that since that change in approach you have been more able to ensure that law firms  
24 are complying with their training requirements?

25 A. We have always been robust. Just because it is difficult does not mean to say it did not  
26 happen.

27 Q. Can I ask you to take up bundle E2 -- I will come back to that paragraph in a second, just to  
28 explore this for a second. Bundle E2, this is a file of documents disclosed by The Law  
29 Society but actually this document is not one that technically was disclosed so much as  
30 prepared by The Law Society. If you go to tab 54, so nearly at the very back of the bundle.  
31 I notice this document says "Confidential" on some of it.

32 THE PRESIDENT: Well, we wanted to ask about that. Presumably it is a document you are  
33 familiar with?

1 A. I am.

2 THE PRESIDENT: It comes from your side. To what extent is it confidential? Because it is  
3 something that counsel wants to ask you questions about apparently and he does not need to  
4 refer to a particular figure out loud so it goes on the transcript, but he may want to refer to  
5 changes in figures.

6 MR. WOOLFE: That is right.

7 THE PRESIDENT: Is that confidential?

8 A. Can I get some guidance?

9 THE PRESIDENT: Can we have some help on this.

10 MR. WOOLFE: Can I explain what I would want to ask about. I would want to ask about the  
11 changes in training income over time.

12 THE PRESIDENT: I assumed you would, yes.

13 MS. SMITH: Yes, it is just commercial data that is not publicly available. We have not made an  
14 application obviously for it to be treated confidentially for the purposes of this hearing, but  
15 if Mr. Woolfe is simply going to ask about changes over time I think that is fine.

16 THE PRESIDENT: Yes and degree of change I suspect, yes.

17 MS. SMITH: Yes.

18 THE PRESIDENT: So if you just do not read out the figures, but you can ask for explanations.

19 MR. WOOLFE: So that is helpful, Mr. Murphy, you said that you are familiar with this. It splits  
20 out income into accreditation income and training income and I want to focus on the  
21 training income line.

22 You can see a pattern of growth from 2011, 2012, 2013, that is going up in a more or less  
23 linear fashion, so it is roughly twice in 2012 what it is in 2011 but then adds roughly  
24 another chunk to 2013. We then have a fairly sharp jump up to 2014, although I think that  
25 may be partly the result of the length of the years for 2013 and 2014, but then I want to  
26 point out there is a very very large increase from 2013 to 2015. When looking at it I want  
27 you to bear in mind that the growth in CQS membership was very sharp, as I understand it,  
28 from 2011, 2012, 2013 to the beginning of 2014, but has been much slower since and we  
29 have had the evidence of that .

30 So the size of the growth in 2014 to 2015 of, roughly speaking -- it is about two and a half  
31 times in 2015 what it is in 2014, cannot be explained by growth in the number of CQS  
32 members, can it? It must be an increase in the amount of training you are selling per  
33 member?

1 A. I am not an expert in figures either.

2 Q. But you are on the marketing side as products manager?

3 A. Yes .

4 Q. So you must be aware broadly speaking of the income you are getting from it?

5 A. Yes.

6 Q. Like I say, you are aware of your numbers of CQS members and it is true, is it not, that you  
7 did not increase CQS members by two and a half times in 2014 and 2015?

8 A. No.

9 Q. Nothing like that, it went up by a small number of per cent?

10 A. Yes.

11 Q. So what I suggest to you is that that growth must represent a very sharp increase in the  
12 amount of training that each member is actually taking?

13 A. Not necessarily each member, because what you also have to remember is that we have in  
14 you joiners joining firms at any one particular moment in time and up until this point they  
15 were asked to do all of the prior modules as well. So if you had a new member of staff  
16 joining in the beginning of 2015, they were asked to do all of the relevant training that had  
17 preceded that.

18 Q. You are saying that would be more training in 2015 than there would be in say 2011?

19 A. Yes.

20 Q. But as I understand it, so we have 2011 when the modules were CQS protocol and specific -  
21 - 2012 when there was a protocol module and mortgage fraud was added, 2013 was when  
22 AML was added and 2014, but the rate of new joiners would be one imagines fairly  
23 consistent over time?

24 A. Yes.

25 Q. That would not account of an increase of two and a half times either, would it?

26 A. No.

27 Q. What I want to suggest to you is is that increase, that very rapid increase, due to an increase  
28 in the effectiveness of The Law Society's monitoring of whether or not people were actually  
29 doing the training?

30 A. No, I do not think it is. As I said, if you look at the market dynamics of the conveyancing  
31 market in 2013/2014, obviously there was a pickup in the amount of transactions being  
32 undertaken. There was a lot of new staff joining member firms and I would say that takes

1 considerable -- that probably amounts to a considerable amount within that spike between  
2 2014 and 2015.

3 Q. So you are saying that in 2015 there would have been a lot of new staff joining and hence a  
4 lot of new purchasers of --

5 A. The prior training.

6 Q. -- all the previous training?

7 A. Yes.

8 Q. That would have had quite a substantial effect on your income?

9 A. As it says.

10 PROFESSOR WILKS: Mr. Woolfe, if I could just come in for a moment. This is an  
11 interesting paper and I think we would like to come back to these numbers in some form  
12 later on. I cannot say I am wholly persuaded by your responses on the peak in 2015. Could  
13 I press you again as to whether more intensive auditing or monitoring wasn't a factor,  
14 because I think Mr. Smithers in his evidence earlier this morning did indicate that CPD was  
15 being used more actively from 2015. Have I misunderstood that?

16 A. In terms of the monitoring we have always monitored to ensure that the relevant staff --

17 PROFESSOR WILKS: But online through CPD?

18 A. Online through CPD we made the change in August 2015 to ensure that all of the technical  
19 staff and operational staff had read-only access, but prior to that there was also online  
20 access but not to the whole team.

21 PROFESSOR WILKS: And the implication of that is? Is there an implication?

22 A. The implication is we have always been able to monitor online the completion of training.

23 PROFESSOR WILKS: Okay, thank you.

24 MR. ALLAN: But how far did you actually do it?

25 A. How far --

26 MR. ALLAN: How far did you actually use the CPD portal to monitor the completion?

27 A. It was used constantly. But what we had was -- as I said, there was only a limited amount  
28 of people within the operations or technical team that actually undertake the assessments  
29 that actually had that access, whereas the changes that we made we ensured that everyone  
30 then had access that needed it.

31 MR. ALLAN: So prior to the change how far did the people who actually undertook the  
32 assessments rely upon the monitoring that was going on within the portal?

33 A. The primary monitoring was done by the certificates that the firms would send in.

1 MR. ALLAN: Thank you.

2 THE PRESIDENT: Is the reason you extended the number of people who could monitor online  
3 because that makes it more effective?

4 A. Yes. What we were looking for -- the whole of the CQS is about an iterative process, so it  
5 is looking at small changes that we can make across all of the different elements of the  
6 scheme, whether it be training, whether it be the application process, and this was just one  
7 particular area that we changed.

8 MR. WOOLFE: Just for the Tribunal's note, I am not proposing to ask Mr. Murphy any questions  
9 about the basis on which the profitability is calculated, I do not think it would be proper to  
10 do that.

11 If I can take you back to your statement, still at paragraph 67, and we have dealt about the  
12 point about dependence on assurances and I put to you that you were largely dependent on  
13 assurances previously and the system worked fine. Particularly on the other point now,  
14 which is "we would need to spend significant time and resource auditing third party training  
15 providers to ensure that training providers met a uniform standard". As I said to you a  
16 moment ago, if you were going to monitor them or accredit them, you could have charged  
17 them for that, could you not?

18 A. Yes, I am sure we could. Whether they would be willing to actually pay that fee is a  
19 different matter.

20 THE PRESIDENT: If they did not pay they would not be accredited, would they?

21 A. Well, exactly, so whether the market actually would allow us to charge, I do not know.

22 MR. WOOLFE: But in a sense if a training provider thought that it could pay the fee and it could  
23 offer something either much cheaper that was highly efficient, or something really different  
24 and better, innovative, it could try and do it and try and win the market from you, could it  
25 not?

26 A. It could, but at the same time would need to ensure that the price that the training provider  
27 charged our members was not extortionate.

28 Q. If it was high the members would not have to pay it, would they, they would just go with  
29 your trainer?

30 A. Yes, they would.

31 Q. So you do not need to price regulate, do you?

32 MS. SMITH: I just want to check The Law Society is providing training as well in this scenario?

33 MR. WOOLFE: In this hypothetical scenario, yes.

- 1 A. But the whole point about the training is the uniformity and the standardisation, which  
2 obviously we would not get if we had a whole range of third parties using it.
- 3 Q. I dealt with that with Mr. Smithers this morning and I am not going to do that again with  
4 you now.
- 5 But I was going to say if you accredit a training provider of being of a good quality and able  
6 to design appropriate courses, you do not need to audit the specific course or the delivery in  
7 every single course, do you, you can just look at --
- 8 A. Well, we do, because the lenders themselves would have questions and queries around that,  
9 how we ourselves are monitoring that quality of delivery.
- 10 Q. But in terms of monitoring you can do --
- 11 A. Or even in terms of the course content itself.
- 12 Q. You could monitor reactively, could you not? You could spot check. You wouldn't have to  
13 go and check every single delivery of every single course, you could just carry out a few  
14 checks and that would be a sufficient incentive to the competitive training market to deliver  
15 good content?
- 16 A. What would you class as a few checks? Where does it stop? We would need -- as I said  
17 before, we would need to develop a proper, formal quality assurance auditing process to  
18 ensure that we were happy with the content that was being delivered, the delivery methods  
19 that were being used and also to ensure that our stakeholders were also happy with the  
20 content as well.
- 21 Q. I suggest to you, Mr. Murphy, that that is not realistic, that you would not have to do all of  
22 that, that you could simply accredit providers based on proportionate checks as to the  
23 quality of the training they were providing?
- 24 A. CQS is all about reputation. I would not want to put the reputation of the scheme in  
25 jeopardy if I was not able to satisfy myself or my stakeholders that the quality of the  
26 delivery from third parties was up to scratch.
- 27 Q. Just looking across The Law Society's other accreditation marks that it hands out --
- 28 A. We do not just hand them out.
- 29 Q. No, you do not just hand them out, you award them?
- 30 A. Yes.
- 31 Q. Both to individuals and practices?
- 32 A. Yes.

1 Q. Other than the Wills and Inheritance Quality Scheme the others do not have mandatory  
2 training requirements to be provided only by The Law Society, do they?

3 A. No, they do not.

4 Q. So you are content to -- The Law Society are content to award those quality marks without  
5 checking that the person who has taken that training has had the specific mandatory  
6 minimum training?

7 A. Where we ask for training to be undertaken then as far as I am aware there is an audit  
8 process in place to ensure that the training is up to scratch.

9 Q. So there is an audit process in other cases?

10 A. There is quite a long-winded procurement process, I believe, for some of the individual  
11 training modules. Sorry, the training modules for the individual accreditation schemes.

12 Q. The Law Society does not insist on providing all of those itself?

13 A. Not for the individual ones.

14 Q. Can I ask you to go to volume C1 --

15 MR. ALLAN: Mr. Woolfe, are you moving away from the proportionality?

16 MR. WOOLFE: No, I am continuing on that but I am moving to Lexcel now.

17 MR. ALLAN: Can I just ask a question, which is would your concerns about the costs of  
18 monitoring and approval be different or reduced if the training had to be delivered online?

19 A. No, because we would still need to check the actual quality of that material, it would still  
20 need to be peer reviewed and go through that whole auditing process to ensure that it is  
21 compliant with what we need and what we want for the scheme to be, irrespective of  
22 however it is delivered.

23 MR. ALLAN: Thank you.

24 MR. WOOLFE: If you can take up volume C1 please. It will be tab 12 within that. If you turn  
25 over the first sheet which is an exhibit page you can see the front page of the actual  
26 document. This is the Lexcel England and Wales version 6 standard for legal practices.  
27 Before I ask you this, how familiar are you with Lexcel? You may be hugely familiar, or it  
28 may be not your area, I do not know.

29 A. I am the product manager for CQS and WIQS. Lexcel sits within the same product area, but  
30 I am not the product manager for Lexcel. So I have a limited exposure, but hopefully I will  
31 be able to answer your questions.

1 Q. Can I just ask you to look at page 3 of the document, using the numbering at the bottom  
2 right-hand corner, you have a section saying "About Lexcel", explaining what it is. The  
3 first bullet point:

4 "With ever increasing competitive ...(Reading to the words)... to meet expectations  
5 and assist regulatory compliance."

6 THE PRESIDENT: Sorry, which page are you on?

7 MR. WOOLFE: Page 3, within tab 12.

8 THE PRESIDENT: Thank you.

9 MR. WOOLFE: Bottom right-hand side. I just read out the first bullet point, sir. So it is about a  
10 quality management system to meet expectations, improve satisfaction and assist regulatory  
11 compliance. It says, my Lord:

12 "Designed specifically for the legal sector. Lexcel is The Law Society's standard for  
13 excellence in practice management and client care."

14 Then:

15 "It is a flexible supportive management framework ...(Reading to the words)... reduce  
16 cost and promote profitability."

17 It defines quality management procedures in seven areas and I think the ones of those we  
18 are going to be looking at come under people management and risk management, just so  
19 you are aware.

20 The next bullet point:

21 "Achieving accreditation involves the submission of an application form and  
22 subsequent assessment by an independent assessment body."

23 It is awarded for three years and has reaccreditation and monitoring to ensure compliance.

24 So that is the structure that is set up.

25 The point we want to look at in the document involves some words which are defined so I  
26 am going to take you now to the definitions, which are on page 5, so we can see what they  
27 are. This is a glossary of terms used in the standard. The three which I want you just to be  
28 aware of are the three at the bottom, so plans, policy and procedure and they are defined  
29 differently. Perhaps I can just -- rather than read it out to you just ask you to read those  
30 definitions to yourself.

31 (Pause).

32 A. Okay.

1 Q. A plan is about where you are going to, a policy is about a general approach you take and a  
2 procedure is -- well, what is called a procedure. But a feature of each of these is that there  
3 needs to be a named individual who is responsible to each of them. The practice has a plan,  
4 there is a named person who is responsible for the delivery of that plan, similarly that the  
5 policy has a named individual, so it is not just a sort of "write down some plans", there has  
6 to be a structure around it.

7 Then can I ask you to turn to page 9 within this document and this is under the rubric of  
8 people management, and point 4.3:

9 "Practices who are Lexcel accredited must have a learning and development policy."

10 That policy has to have certain components:

11 "It has to aim to ensure that appropriate training is provided to personnel within the  
12 practice."

13 It has a separate requirement that supervisors and managers receive appropriate training, so  
14 possibly of a different kind to ordinary fee-earners, they are carved out. There also needs to  
15 be a procedure to evaluate the training and a learning development plan for all personnel.

16 Looking at the definitions we just looked at, there has to be someone who is responsible for  
17 the learning development policy overall, there has to be somebody, who may or may not be  
18 the same person, who is responsible for the procedure of evaluation, and somebody else  
19 who -- same person -- who is responsible for the learning development plan for each, for all  
20 personnel.

21 So that is quite a comprehensive structure, is it not, for ensuring that the practice has a  
22 commitment to appropriate learning and development?

23 A. (Nods).

24 THE PRESIDENT: You answered the question? I know you nodded but because of the  
25 transcript you need to speak --

26 A. Sorry, yes. There is, but then that is what the accreditation is all about, that is Lexcel, legal  
27 excellence.

28 MR. WOOLFE: Indeed. Can I ask you to turn to page 11 within this and look now under the  
29 rubric of risk management, that is point 5.13, so:

30 "Practices must have a policy to ensure compliance ...(Reading to the words)... (d) a  
31 plan for the training of personnel."

32 So under the heading of anti-money laundering, presumably because it is known that there  
33 is this need for anti-money laundering training, you've got a specific requirement if you are

1 Lexcel accredited to have a plan, with a named individual responsible, for the training of  
2 personnel in anti-money laundering, that is right, is it not?

3 A. Yes, that is what it says.

4 Q. So in other words the Lexcel accreditation encompasses anti-money laundering, does it not?

5 A. Yes.

6 Q. Because it falls within the rubric of legal practice management?

7 A. That is if the solicitor firm is compliant and they also fall within the regulations of AML,  
8 yes.

9 Q. So ensuring that a practice complies with anti-money laundering legislation is part of  
10 practice management, is it not?

11 A. Yes.

12 Q. Rather than the expertise of delivering legal services?

13 A. Yes.

14 Q. Lexcel accreditation is a means, in fact the means, by which The Law Society promotes  
15 excellence in practice management, is it not?

16 A. In practice management, yes, but obviously this is applicable to firms -- not only  
17 conveyancing firms, but commercial litigators and whoever.

18 Q. But when The Law Society awards accreditation under Lexcel it gives that firm a quality  
19 mark in relation to that firm's practice management standards, does it not?

20 A. Yes.

21 Q. That quality mark includes, because the practice management standards includes, includes  
22 AML, does it not?

23 A. Yes, but it is not specific to the individual area of practice.

24 Q. That quality mark includes an accreditation of that firm's approach to training, does it not?

25 A. It does, yes.

26 Q. Can I just ask you to put that to one side.

27 MR. ALLAN: Have you finished with Lexcel?

28 MR. WOOLFE: I am carrying on with the subject but I am putting the document to one side.

29 MR. ALLAN: I just wanted to ask a question to what extent the Lexcel accreditation in relation  
30 to AML includes an assessment of the adequacy of the training that is done by the firm. I  
31 mean the focus appears to be from the document on having a policy and the adequacy of the  
32 policy is a consideration, but does that drill down into the adequacy of the training itself?

1 A. No, there is no stipulation as to what training has to be provided. The stipulation is that  
2 there has to be plans, procedures and policies in place for them to do the necessary training,  
3 in this case the AML. It does not stipulate any quality threshold.

4 MR. ALLAN: Thank you.

5 MR. WOOLFE: Can I just ask you to turn back to page 3 in that document and if you look at the  
6 fourth bullet point on that page. Again the term for which accreditation is awarded is for  
7 three years, annual reaccreditation and then it refers to monitoring visits to ensure continued  
8 compliance. So The Law Society is assiduous, is it not, on checking on whether or not the  
9 firm is complying with the Lexcel standard?

10 A. Yes, but it does not say how many monitoring visits within that three year period.

11 Q. But Lexcel is not an inadequate scheme --

12 A. No, not at all.

13 Q. -- for ensuring minimum practice management standard, is it?

14 A. No, not at all.

15 Q. In fact it is an effective scheme, is it not?

16 A. Yes.

17 Q. Which includes AML?

18 A. Yes.

19 Q. I think we can close that file now and I can take you back to your witness evidence. I am  
20 going to take you to your second statement now, which is in tab 3. If you turn to paragraph  
21 9 of this statement, between paragraphs 9 through 12 of this --

22 A. Sorry, which paragraphs?

23 Q. Paragraphs 9 through to 12. This is where you set out how you see Lexcel as differing from  
24 the CQS and essentially at paragraph 9 you say:

25 "The primary difference between Lexcel and the CQS ...(Reading to the words)...  
26 awarded on the basis of policies and procedures."

27 And you say:

28 "It requires a minimum standard to be met by the firm as a whole."

29 You go on to say:

30 "The purpose of Lexcel is not to demonstrate that members ...(Reading to the words)...  
31 to ensure a given standard of practice management and client care."

32 But as we have seen, practice management includes AML, so Lexcel is in effect a way of  
33 ensuring appropriate compliance with AML?

1 A. If it is appropriate for that firm to be compliant with those rules, yes.

2 Q. You go on at paragraph 10 to draw a contrast with the CQS and you say that is about a  
3 minimum standard of expertise in the provision of conveyancing services, but AML, that is  
4 not about expertise in providing conveyancing services, is it, it is about practice  
5 management?

6 A. CQS is about a specific area of practice, conveyancing. Lexcel is not.

7 Q. Yes. So you are making a distinction that the difference between them is one is specific to a  
8 sector and the other is not?

9 A. Indeed.

10 Q. But that difference, that one is specific to a sector and the other is not, that does not require  
11 The Law Society to provide training in the one case but not the other, does it?

12 A. Sorry, I do not understand the question.

13 Q. The distinction I understood you had just drawn between Lexcel and the CQS is that Lexcel  
14 can apply to any practice --

15 A. Yes.

16 Q. -- whereas the CQS only applies to residential conveyancing firms?

17 A. Correct.

18 Q. But that distinction, I am suggesting to you, doesn't account for why you have to provide  
19 mandatory training in a case of residential conveyancing firms but not in the case of any  
20 other firms?

21 A. There is no stakeholders for Lexcel. We have to deal with stakeholders whether they be  
22 lenders or the insurance market and that is why it is different.

23 Q. In that case what you are saying at paragraph 10 -- you are placing a lot of emphasis then on  
24 the words at the top of page 3 about mortgage lenders. What you are saying differentiates  
25 the CQS from the approach sufficient in Lexcel is the fact that stakeholders such as  
26 mortgage lenders want you to provide training, is that your evidence is?

27 A. Yes. Lexcel there is -- Lexcel sets out the procedures and the policies that you have to have  
28 in place, it does not stipulate that you actually have -- as we have mentioned, there is no  
29 mention about the quality threshold of that training that needs to be provided.

30 Q. But as I was going through with Mr. Smithers this morning, there is no evidence, is there, of  
31 mortgage lenders requesting that you provide the training?

32 A. I speak to lenders on a regular basis, weekly. I was at The Council of Mortgage Lenders two  
33 weeks ago, I've got another meeting with them next week, we constantly talk about training

1 consent and also the application process and a whole range of other areas in relation to  
2 CQS. Training is not divisible from CQS. They are one and the same thing.

3 Q. But lenders would also be happy to accept Lexcel type accreditation, would they not?

4 A. I do not know. I cannot speak for the lenders.

5 Q. You are just telling the Tribunal that they desperately want The Law Society to provide  
6 training, but what I am suggesting to you is that they may be perfectly happy with the  
7 Lexcel type accreditation which ensures that a practice has appropriate policies and  
8 procedures in place to prevent money laundering?

9 A. It might have appropriate policies, but whether those policies are carried out, I cannot say.  
10 All I know is the conversations that I have with lenders on a regular basis, either face-to-  
11 face, or emails, or telephone calls, whatever it may be, they are constantly wanting to know  
12 about the training.

13 Q. Can I just ask you to turn -- do you have bundle E2 please, tab 13 of that? This is a letter  
14 that was disclosed by The Law Society. It was sent to them before your time. So I  
15 appreciate that you were not a recipient of this letter, but just to see what it does and why it  
16 is relevant to this point, they are inviting tenders for the provision of information in some  
17 sort of technology platform, to assist lenders in vetting conveyancing firms, they set out in  
18 the second paragraph of that.

19 Over the page under "Outline of the problem", in the centre of that page in italics "Outline  
20 of the problem":

21 "In operating open conveyancing panels lenders currently face ...(Reading to the  
22 words)... anecdotal evidence says they have lost a lot of money."

23 They are worried -- in the next paragraph they say:

24 "These risks are exacerbated by the lack of a comprehensive set of data on all  
25 conveyancing firms."

26 At the bottom:

27 "It is also very difficult to track individual fraudsters who move from firm to firm."

28 This is what lies behind the probity checks which form part of the CQS.

29 A. Yes.

30 Q. Over the page, they say "Information on conveyancing firms" and there is a list of  
31 information they would want the portal to provide. The fourth bullet point up from the  
32 bottom, the one thing they would like is "details of any accreditation, eg Lexcel

1 conveyancing quality scheme". That is suggesting lender are interested in whether or not  
2 practices had a Lexcel --

3 A. I am not denying that they are not, but I cannot speak for them, but this does say that, yes.

4 Q. That would be specifically in relation to conveyancing solicitors. They would be interested  
5 in are they Lexcel accredited.

6 A. Because they are lenders, yes, that would be conveyancing solicitors.

7 Q. They would be interested because Lexcel would connote -- this is in the context of fraud --  
8 that that firm had achieved excellence in its practice management including in the area of  
9 anti-money laundering?

10 A. Yes.

11 THE PRESIDENT: I may have misheard you, Mr. Murphy, when you were asked about the  
12 difference between Lexcel and CQS, you pointed out that CQS is for a specific sector,  
13 residential conveyancing. Did you say there are no stakeholders for Lexcel?

14 A. Not in the same way as CQS. So our stakeholders for CQS are our lenders, the insurance  
15 market and so on.

16 THE PRESIDENT: As well as members of the public.

17 A. Absolutely. As far as I am aware there is not that same cohort of stakeholders for Lexcel.

18 THE PRESIDENT: But the members of the public --

19 A. Other than members of the public, yes, obviously.

20 THE PRESIDENT: And they are quite important.

21 A. Absolutely, yes.

22 MR. ALLAN: Are you moving on?

23 MR. WOOLFE: I am -- almost, yes. It would be a convenient moment.

24 MR. ALLAN: I was just going to ask a quick question. Do you have any information about the  
25 overlap in membership, as it were, or accreditation for Lexcel and CQS? Is there a high  
26 incidence of accreditation to both, or are they --

27 A. I believe there is 1,300, 1,400, 1,500 firms or so that are Lexcel accredited, of which a  
28 proportion will be CQS members. I do not have those figures to happened, I can supply  
29 them later.

30 MR. ALLAN: It might be interesting.

31 MR. WOOLFE: This might assist the Tribunal: it is right, is it not, that firms were fast-tracked  
32 through the probity parts of the CQS if they were already Lexcel accredited?

33 A. That is my --

1 Q. Because the same information has already been collected?

2 A. Fast-track --

3 Q. That might be the wrong term.

4 A. Yes. But what we try to do is use the information that we have to hand, so if they are part  
5 of Lexcel then we can use that part of the application form to, as you say, fast-track them  
6 through the CQS process.

7 Q. I just want to take you to paragraph 12 of your statement and this point is -- I think one of  
8 the words in the statement might be a typo and I want to check whether it is or not.

9 A. Sorry, which paragraph?

10 Q. Paragraph 12 of your second paragraph. You are drawing a contrast between CQS and  
11 Lexcel still and you say that:

12 "CQS requires that training be provided by The Law Society so that all recipients of  
13 training receive exactly the same substantive and procedural knowledge and skills."  
14 And you are guaranteed stakeholders. You go on to say:

15 "Lexcel does not require training to be provided by any particular provider because it  
16 does not specify the type of training to be taken in the first place."  
17 That is a sort of statement of what the requirements of the scheme are. Then you go on to  
18 say:

19 "Instead the CQS requires provision to be made by each firm for training that would  
20 be appropriate to particular needs of that firm."  
21 What I want to check with you is that that word "CQS" should in fact be "Lexcel" in that  
22 last sense.

23 (Pause).

24 The first two sentences of the paragraph talk about CQS, you then go on to talk about  
25 Lexcel in the third sentence, in the fourth and final sentence of the paragraph you say:

26 "Instead the CQS requires provision to be made by each firm for training that would  
27 be appropriate to particular needs of that firm."  
28 That seems to be something that sounds like it is about Lexcel, I just wanted to check that  
29 when you say CQS that is a typo and it should be "Lexcel"?

30 A. Yes, I believe you are correct. I believe that should say Lexcel.

31 Q. Thank you.

32 I just want to check, so you are saying that Lexcel allows the firm to take training that is  
33 appropriate to its particular needs.

1 A. Sorry, I am just continuing to read, sorry.  
2 (Pause).

3 THE PRESIDENT: That effectively fits with the first sentence of your paragraph 21.

4 A. That is why I am just reading on.

5 THE PRESIDENT: I think it does look like just a typo.

6 A. Yes.

7 MR. WOOLFE: I do not have any further questions about that. I just wanted to check.  
8 Now, I suggest to you, Mr. Murphy, that there is no reason why The Law Society could not  
9 have adopted an approach similar to the Lexcel approach in relation to the training  
10 requirement for the CQS. It could have required CQS members to have a plan for the  
11 training of personnel in relevant areas, it could have specified what those areas were and it  
12 could have asked them to designate a responsible individual who would have to respond to  
13 an audit when The Law Society wanted to come along and check what training is actually  
14 being done and they could have imposed reporting requirements, and it could have had  
15 monitoring visits on Lexcel accreditation. That would have been a perfectly coherent  
16 scheme to ensure an increase in standards in the area of training in general and AML and  
17 mortgage fraud training in particular, would it not?

18 A. No, because, as I said, Lexcel does not stipulate what the actual quality provision should be,  
19 whereas if we are the authors of our content and we control it, as we do, then we have  
20 assurance that that training is of the necessary standard that it should be and our  
21 stakeholders also have assured.

22 Q. But the Lexcel type approach would allow training to be tailored to the needs of the  
23 individual, would it not?

24 A. If they have got an policy and procedure in place, yes.

25 Q. Because you actually say -- I think as corrected at the end of paragraph 12, "Lexcel requires  
26 provision to be made by each firm for training that would be appropriate to particular  
27 needs", so a large conveyancing firm might have slightly different needs in terms of training  
28 from a very small two-man high street firm, might it not?

29 A. Or two women.

30 Q. Indeed. I use one to include the other. But I take your point.

31 A. To a certain extent the SRO within the CQS firm also has this obligation at the moment,  
32 through their relevant persons and their key staff they can direct as to who should be doing  
33 the relevant training, so this is already -- this kind of framework is already established.

1 Q. But at the moment --

2 THE PRESIDENT: Sorry, can you help me, what are the key staff?

3 A. Okay, so if you have your accounts team, for example, someone that came in and did the

4 filing would not be classed as a key member of staff, but someone that pressed the button to

5 send the money for a transaction would be, so they would be required to do the training, but

6 they are not necessarily obviously a conveyancing solicitor.

7 THE PRESIDENT: So "key staff" is meant for non-fee-earners, is that right?

8 A. That is right.

9 THE PRESIDENT: Is that the expression?

10 A. There is a definition within my evidence, in one of the bundles, that highlights exactly who

11 should be doing the training and who should not and within that it also stipulates that in

12 relation to the key staff it is up to the discretion of the SRO, because obviously, as Mr.

13 Woolfe has said, not all firms are the same.

14 THE PRESIDENT: Yes. It is just understanding the expression. I missed the reference. So

15 those are non-fee-earners, but performing roles in the firm.

16 A. A key function within the organisation.

17 THE PRESIDENT: Yes, thank you.

18 MR. WOOLFE: Can I just check that that is essentially a binary choice, is it not: do they have to

19 do the training or not? It does not allow different training to be provided to different

20 members of the firm?

21 A. The training has to be undertaken -- we have one standard, as you know, one standard set of

22 training but as to who does that training, that is at the discretion of the SRO.

23 Q. Well, you provide a definition and everybody who in the SRO's opinion falls within that

24 definition has to do it?

25 A. Yes, correct.

26 Q. But of those who have to do it it is one set of training?

27 A. Yes.

28 Q. But a partner who is say the head of conveyancing at a large firm would need to have a very

29 different level of training in respect of anti-money laundering, would they not, compared to

30 say a legal executive who carries out routine conveyancing transactions under supervision?

31 A. Yes. But as I said, CQS is very much an iterative process, so it may well be in time we will

32 develop training that might address that very issue.

33 Q. And you might make that mandatory?

1 A. I cannot make that decision. As Mr. Smithers indicated earlier on, we have a very complex  
2 governance structure.

3 Q. What I want to suggest to you is that the Lexcel type approach, if I can call it that, would be  
4 superior in that it would allow the law firm, who would be writing its own policies,  
5 knowing their own circumstances, to ensure that different staff get training that is tailored to  
6 them. That is right, is it not?

7 A. It is a different approach. For CQS I do not believe it is the right approach.

8 MR. ALLAN: Would your concerns be allayed if you had some mandatory testing mechanism  
9 that individuals had to take, so you had your online test mechanism which everybody had to  
10 do?

11 A. If that test was exactly the same and the delivery of that test was exactly the same, some of  
12 my fears might be allayed, but I would need to then allay the fears of all my lender  
13 stakeholders as well.

14 MR. WOOLFE: Can I ask you actually to take up bundle C because what I want to ask you about  
15 is a question about the Solicitors' Code of Conduct regime in respect of training. We do not  
16 have a document for it, the relevant part is set out in Mr. George's evidence. So it is tab 3,  
17 and that is the second witness statement of Mr. George, and if I can ask you to turn to  
18 paragraph 37 which begins on page 12:

19 "All law firms, whether CQS accredited or not, are subject to various obligations to  
20 train their staff."

21 It notes the AML requirement. Then (b):

22 "The SRA code of conduct requires ...(Reading to the words)... appropriate to their  
23 work and level of responsibility."

24 That is the SRA code of conduct, a mandatory outcome. That does seem to acknowledge  
25 that individuals may have different training requirements.

26 What I want to focus on is paragraph (c) where it discusses the rules laid down by the SRA  
27 which require solicitors to have proper training. He refers to the old system of CPD, which  
28 I think everybody is fairly familiar with, where you have to do 16 hours every year and  
29 providers had to be accredited. At (ii) he says:

30 "A new CPD training regime has been phased in ...(Reading to the words)... to address  
31 identified learning needs."

32 In a sense a self-assessment process, and then you have to make:

1 "... an annual declaration ...(Reading to the words)... and some are done on a risk  
2 basis."

3 Then he identifies firms who are high risk and low risk.

4 This is a similar approach to the Lexcel approach but it is a slight variant of it. The SRA  
5 considers that this is the appropriate means of ensuring its solicitors are appropriately  
6 trained. It involves an outcome, a process that solicitors have to go through in terms of  
7 identifying their needs and then checking, enforcement, monitoring, verification, whatever  
8 word you want to use. That would be an acceptable approach to ensuring sufficient  
9 knowledge of the law, would it not?

10 A. Knowledge of the law, yes, not necessarily knowledge of the actual conveyancing  
11 transaction laid down in our CQS protocol.

12 Q. But the SRA code of conduct in respect of its requirements on solicitors to train is not unfit  
13 for purpose, is it?

14 A. No, not at all.

15 Q. You can put that file away now.

16 THE PRESIDENT: Have you finished with that point?

17 MR. WOOLFE: I have finished with that point.

18 THE PRESIDENT: Would that be a convenient moment?

19 MR. WOOLFE: That would be a convenient moment as much as any other.

20 THE PRESIDENT: Can you give just -- you do not have to, but just some indication how much  
21 longer you are going to be?

22 MR. WOOLFE: I would estimate about 20 minutes, maybe a little more than that.

23 THE PRESIDENT: Probably half an hour. Well, we will resume at 10.30 tomorrow morning.

24 Before we rise, there are a couple of things. One was we were going to be given a file for --  
25 it has been supplied, yes, it has, we have bundle E3. Then those additional pages of Mr.  
26 Williams' report that I seem to be missing.

27 MR. WOOLFE: Yes, the enlargements. Can it be supplied to you first thing tomorrow morning?

28 THE PRESIDENT: Yes. I think it is sensible to put the revised factual analysis from Mr. George  
29 behind the other one in bundle B.

30 MR. WOOLFE: Would you like perhaps another numbered tab tomorrow morning so that they  
31 can be (inaudible).

32 THE PRESIDENT: I do not think -- I mean it effectively corrects the figures in the previous one.  
33 Very well, 10.30 tomorrow.

1           You know, I am sure, Mr. Murphy, that you cannot discuss the case with anyone, your team  
2           or The Law Society, overnight.

3    A.    I understand.

4    MR. WOOLFE: Can I just say thank you for the Tribunal's patience today.

5           (4.20 pm)

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