IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1249/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11 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 4

A P P E A R AN C E S

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.

THE PRESIDENT: We will be observing, like all government buildings, the two minute silence for Armistice Day at 11 o'clock and there will be an announcement.

MS. SMITH: Thank you, sir. Submissions on Tribunal questions by MS. SMITH

MS. SMITH: I have managed to take further instructions overnight on the issues raised related to the financial schedule which is at E2, tab 54, so it might help if you have that open. Right at the back.

In particular the Tribunal asked The Law Society to come back to it on three things, first of all the reason for the apparent significant increase in training income from 2014 to 2015, that is CQS training income, secondly the existence of any forecasts made by The Law Society for CQS, and third whether The Law Society produces a business plan for CQS.

Now, you will see a cast of many sitting behind me. In particular I have three individuals here from The Law Society today, from whom I have taken instructions, or from whom it has been necessary to take instructions on these various points and obviously I can take further instructions from them if required. They are Mr. Tom Fothergill, who is just behind me, he is the executive director of delivery and performance at The Law Society, he was responsible for putting together the financial schedule and in his role at The Law Society he has oversight of the costs that The Law Society incurs. We also have Mr. Bryn Hughes who is the project manager responsible for accreditations generally and he is responsible for the operation of the accreditation side of the CQS product. Then finally Ms. Sunita Dhawan is also sitting behind me, she is head of training and events at The Law Society and she is responsible for the operation of The Law Society's training services as a whole, including the CQS training.

As we explained in the schedule at E2, tab 54, the CQS scheme does not function as a discrete product and it is not run by a single team at The Law Society. Indeed there is no single individual, and I think Mr. Murphy made this clear yesterday as well, at The Law Society that can provide instructions on the points you raised. There are in fact four different departments within The Law Society that have some level of responsibility for the different aspects of the CQS, that is the training and product development departments, those two that are led by Ms. Dhawan and Mr. Hughes, and also the operations department and the technical department.

The first question you asked us to come back to you on was to give some explanation for the apparent rise in training income -- substantial rise in training income from the CQS from

2014 to 2015 and in order to explain that I think I have to explain a little bit about how the figures were put together behind the schedule.

Focusing first on 2015. Generally in putting together this schedule The Law Society tried to take a conservative approach and only book income to the CQS that it was sure that it could attribute to the CQS, but I have explained the difficulty of the CQS actually impacting on a number of different departments within The Law Society.

The figure for 2015 --

THE PRESIDENT: Sorry, just to interrupt you, I can understand that regarding costs, but regarding income I do not quite understand why it is a problem.

MS. SMITH: I can explain why there is some uncertainty over the income figures, or there has been. I am told that the figure for 2015 for training income, The Law Society is confident that that figure is accurate, because all the training that is done for the CQS goes through the CPD Centre. Not all the training that The Law Society provides generally goes through the CPD Centre, but all the CQS training goes through the CPD Centre. By 2015 The Law Society had put in place structures and staff instructions that meant by 2015 all training through the CPD Centre had to be booked to a specific cost code. This allowed the training income from the CQS to be accurately attributed in 2015. There was a cost code in place and the staff were using it and by 2015 The Law Society was confident therefore that that cost code was being properly used for the CQS, so the training income for the CQS, we have a high degree of confidence that it is accurate.

THE PRESIDENT: Yes.

MS. SMITH: However, in the previous year, 2014, I understand that the new cost code was introduced during the course of this year, but there was still some uncertainty about whether staff were using it properly, and there was also the introduction during this year of a new financial system and while the cost codes and the new financial system were bedding down, we could not have certainty that they were being reliably used, so the figure that you see for 2014 for training income is only the training income that was booked to the CQS code, so it is only the income that The Law Society could be absolutely sure was training income from the CQS. However, unfortunately there was a sum of about £500,000 worth of unallocated training income in the CPD Centre. As a result of the cost codes only just having been introduced and staff not using them properly, there was a figure of unallocated training income and The Law Society could not allocate that directly to any particular product, although it was CPD Centre training income.

So in order to produce this schedule The Law Society elected only to include the income that it could be absolutely sure was CPD training income, but there is this substantial sum that was unallocated and The Law Society's view is that a substantial proportion of that sum is likely to have been CQS training income.

I am instructed that in 2015, 90 per cent of The Law Society's CPD income relates to CQS.

THE PRESIDENT: 90 per cent?

MS. SMITH: Yes. I must just stress, that is training that is delivered through the CPD Centre.

There is a substantial amount of other training that The Law Society provides that is delivered in different ways, face-to-face training, seminars, etc, but as for training delivered through the CPD Centre the CQS is a substantial chunk of that training income.

So there was the unallocated training income of about £500,000 in 2014, which is therefore very likely to have led to an understated CQS training income for 2014 in this schedule.

THE PRESIDENT: Yes. Is that -- what about 2013?

MS. SMITH: I am just about to -- it gets, I am afraid, not even more complicated, but yes.

So the first point to be made is that a substantial chunk of that unallocated income is likely to have been CQS income in 2014, so the figure in the schedule is likely to be a substantial understatement. The effect of that is while there has been an increase in training income from 2014 to 2015, and still reasonably significant, it is very unlikely to have been that 2.5 times increase and the reason for the increase over the years is explained in the schedule, in the notes to the schedule, that it is likely to be the cumulative effect of new CQS members taking the full back catalogue of the training modules, and you will recall this was one of the reasons in fact why the CQS was changed in 2015, that for new entrants, new firms, or new members of staff who joined, for example, the CQS in 2015, they would have been required to complete either seven or nine modules, all in one year, so that accumulation of past modules is likely to explain the ongoing increase in training. I will come to the future later.

So that is 2014 and 2015. As regards 2011, 2012 and 2013, there were no specific CQS cost codes in existence for those years, they only came in during 2014. So The Law Society had to find a way of allocating CQS training income as part of the CPD Centre training income and so what The Law Society did was to take the 2014 figure on the schedule for CQS training income as a proportion -- that is the figure on the schedule, not including the unallocated costs, so take the figure on the schedule for 2014 as a proportion of CPD Centre training income, and that was 41 per cent of the CPD Centre training income, and applied

that 41 per cent to the figures for total CPD Centre training income for the years 2011, 2012 and 2013. Now, given what I have explained, that also is likely to lead to an underestimate of training income for the CQS.

THE PRESIDENT: Given that you have told us that they know that in 2015 90 per cent of CPD Centre income is CQS, why use 41 per cent?

MS. SMITH: I think perhaps for -- perhaps with hindsight that was not the most sensible route to take, but I think it was in an effort to take a cautious approach, to use only income that they could be sure, at least for 2015 and 2014, was CQS training income and then the decision was taken to project that back for the previous years.

THE PRESIDENT: Yes, well, you have explained what has been done. It does suggest that, as you have said on instructions, the figure for 2014 was going to be a, I think the words were "substantial understatement", and the same must apply to the previous years.

MS. SMITH: Yes.

THE PRESIDENT: Is that not right?

MS. SMITH: That is right. This approach was taken I think through an excess of caution, but also if you then go on to read how the costs are allocated, they relate to income.

THE PRESIDENT: Before we get to costs, I have to say there is a statement under the heading "Income":

> "The Law Society is able to capture and record income received as it applies to a specific service. The income attributed to the CQS is therefore captured and recorded above as it applies to our accreditation and training."

That, I have to say, is a wholly misleading description of what has been done for every year prior to the last one.

MS. SMITH: I thinks to be fair there is an explanation of that in the following paragraph.

MR. ALLAN: But that only deals with the period, allocation within the periods, it does not deal with the -- the impression one gets from that paragraph is the totality of that income, if you run from 2011 to 2015, is accurately stated, it may not be properly allocated to particular years.

MS. SMITH: Yes.

THE PRESIDENT: That is a rather different point, is it not?

MS. SMITH: Yes.

THE PRESIDENT: I have to say, from any responsible company I would regard this as a pretty shoddy product and I would expect The Law Society, the body that represents the solicitors of England and Wales, to operate in what it produces for the Court to a high standard.

MS. SMITH: I can only apologise for that, but I think the main source of the problem was the very diffuse way in which this product is managed across the organisation.

THE PRESIDENT: I understand that, but it could have been explained, as you have very clearly explained it, so one could understand what has been done. I am not saying that they necessarily should have had better record keeping, but they should not have presented what they have in a misleading way. You have now presented it in a very clear way and then one can examine the figures accordingly, but if you had not given us that explanation, we would have been misled. But there we are.

Yes, so that is that point.

MS. SMITH: That is the first point. Perhaps I can move on to forecasts.

THE PRESIDENT: Just one moment. I mean is it right then that to get a more appropriate and reliable table one should treat the years 2011 to 2014 as 41 per cent of the total and to get an upper bound we should substitute as an upper bound 90 per cent?

MR. WOOLFE: Sir, just so I can understand what is being put, I understand you to be saying that the correct figures should be something between 41 per cent and 90 per cent but you do not quite know where in any given year?

THE PRESIDENT: Well, I do not think we can get a correct figure because of the way records were kept, but at least we can get a range within which the correct figure lies.

MS. SMITH: Yes.

THE PRESIDENT: The lower bound is what is -- well, we do not know for previous years. We know for 2014 that that is probably the minimum and it is a substantial understatement and there is no reason to think it would have been more than 90 per cent in 2014 I suppose, so that that would give us the range. Is that correct?

MS. SMITH: I think that is fair, yes.

THE PRESIDENT: Probably for 2011 a bit less than 90 per cent.

MS. SMITH: Because the membership figures were much less.

THE PRESIDENT: Yes, because there were less in the scheme, but just a moment.

(Pause).

I think we would like to have please by the course of next week a revised table, because I really do not think this is an appropriate ...

I mean I think we could get that by -- well, can it be done today?

MS. SMITH: Yes, I think we can.

THE PRESIDENT: Yes.

MR. WOOLFE: Sir, just on that, I was intending to make certain submissions on this table as it stood. Clearly I would like to have a chance to see any revised one before I make submissions: I can do some in relation to what has already been discussed, but if it comes late in the day, perhaps I could --

THE PRESIDENT: You can do it in writing, yes.

MR. WOOLFE: Thank you, sir.

PROFESSOR WILKS: If I could just take the line of accreditation as opposed to training income, the paper explains clearly that 2014/2015 is partly due to change to an accruals basis, which is straightforward.

MS. SMITH: Yes.

PROFESSOR WILKS: But if you could comment on the observation that presumably that increase in accreditation income is going to stabilise, or even fall now that the stock of firms has accumulated and paid the initial accreditation; would that be a correct understanding?

MS. SMITH: Yes, it would be, and I can give you some, again initial, indication as I was about to move on to forecasts as to what forecasts are for next year and also for the year that has just ended.

THE PRESIDENT: Well, before you do that, you talked about the way the training was done because it goes through the CPD Centre.

MS. SMITH: Yes.

THE PRESIDENT: What about the accreditation income line, the top line, is that accurate? Though that is not CPD Centre presumably, it is a different department.

MS. SMITH: No, it is a different department. I think it would go through the accreditations department.

THE PRESIDENT: That would be Mr. Hughes' department?

MS. SMITH: Yes.

THE PRESIDENT: Is that also accurate?

MS. SMITH: As far as I am aware that should be accurate, subject to the clarification in the schedule, in the notes to the schedule. I think it was accounted for on a different basis.

THE PRESIDENT: Yes.

MS. SMITH: On a more granular basis through that department.

THE PRESIDENT: Yes, and it does not show a great variation really. I mean it goes down in 2014, but otherwise one sees it does not show anything like the same pattern as training income.

MS. SMITH: No.

Can I then move on to forecasts?

THE PRESIDENT: Yes.

MS. SMITH: First of all, I can confirm on instructions that no centralised forecast for the CQS product itself has ever been produced by The Law Society. There are forecasts made for each of the four different departments that I have outlined which are each responsible for an element of the CQS and from these forecasts it is possible to piece together a rough forecast for at least some of the income and costs attributable to CQS, but no formal forecast is made, or has been made for the CQS product.

The four departments in question, as I have indicated, are the training department, which forecasts the income that it will receive from all of its training products, including the CQS and the costs to be incurred in providing that training; there is the product management department, Mr. Hughes' department, which forecasts the income to be received from application, accreditation and membership fees, including the CQS; and then there is the operations department which focuses on the costs of processing applications and the technical department which focuses again on costs in relation to the operation of technical panels appeals and such-like.

So it might assist -- and again with apologies that this has not been provided before now, but this information is very much hot off the press -- to bring the Tribunal up-to-date, and you have indicated an interest in the ongoing financial performance of the CQS. The Law Society's financial year runs from November until the end of October, so we have just got to the end of The Law Society's financial year. The 2015/2016 financial year has obviously then just finished. Now, I can give you some indication of the income from the 2015 to 2016 financial year and I can give specific figures subsequently confidentially if the Tribunal would like those, but just to give you an idea of the order of magnitude, the CQS training income, so that is the training income for 2015/2016, has gone down by about 17 per cent on the previous year, 2014 to 2015.

The accreditation income, which is from application and membership fees, we have an actual figure for the first 11 months and an estimated figure for the last month of the

financial year, but that is pretty much unchanged from 2015. These figures I should stress have not yet been audited.

THE PRESIDENT: Yes.

MS. SMITH: So we cannot give you associated costs, or an overall profit or loss figure at this stage, but my instructions are that the CQS is still loss-making. As regards forecasting --

THE PRESIDENT: Well, loss-making on the way costs have been allocated.

MS. SMITH: On the way the costs have been calculated, yes.

THE PRESIDENT: Yes. The 2015/2016 figure for training should, like the 2014/2015 figure, be accurate because that is the cost code.

MS. SMITH: Yes, because the codes are now in place and consistently being used by staff.

THE PRESIDENT: Yes.

MS. SMITH: As regards the forecast for the 2016/2017 financial year, we have managed overnight to bring together the figures from the four departments and to try to produce a forecast for the product, which is not how it is done internally or how it is accounted for internally, but we have managed to do that overnight and again obviously these projections are provisional, the specific figures are confidential, they can be provided to the Tribunal if you wish us to do so, but I can tell you that the forecast income for training from CQS shows a further drop of 12 per cent from 2015/2016 and the forecast figure for accreditation, that is application and membership fees, I understand is marginally lower than -- the forecast for income is marginally lower than those figures for this year.

THE PRESIDENT: Yes.

MS. SMITH: The third issue that you asked about --

THE PRESIDENT: Just a moment.

MR. ALLAN: Is there an explanation for the fall in training income?

MS. SMITH: It is the changes that were made in 2015/2016 from having members of the CQS, if they were joining for the first time having to take all accumulated seven or nine modules, the move then to the system where there are two update modules for each year which only last a year and you only have to take if you join for the first time the core modules and the two modules for that particular year. That is the basis for that change.

MR. ALLAN: Just to pursue that a little bit, and I may have got the terminology wrong, did that change fully affect the 2015/2016 figures, or were there some holdover people who might have done --

MS. SMITH: There were probably some holdover, because as I recall the dates to the changes, the change to the new update modules was September 2015 --

MR. ALLAN: But it goes back to Mr. Murphy's point yesterday, does it not, about the option that people had: some could stick with the old system, some could change?

MS. SMITH: Yes.

MR. ALLAN: What I am trying to get at is why is there a further 12 per cent drop in the year to come, but if there is some part of the 2015/2016 which is on the old system that might explain it.

MS. SMITH: I think that is right and also I think there is an anticipated lower figure for new members, slightly lower figure for new members, and of course the bulk -- well, the new members have to take, even on the new system, more training than existing members.

MR. ALLAN: The system will reach a plateau at some point.

MS. SMITH: Yes, we are getting close to it.

PROFESSOR WILKS: Ms. Smith, could I just follow up one point for clarification that you made earlier. When you started talking about forecasts, would you equate a forecast with a business plan? You say there have been no forecasts, has there actually been a business plan for the CQS?

MS. SMITH: That was where I was coming on to the third point, which is about the formal business plan.

PROFESSOR WILKS: Okay.

MS. SMITH: Again I can confirm that The Law Society does not produce a business plan for the CQS. The Law Society does produce a business plan for the whole organisation and within that The Law Society considers its activity plan for the year, which will include in relation to the CQS. But given the nature of The Law Society as a membership organisation I am instructed that the focus of business plans for schemes such as the CQS, the focus is on membership numbers, so while obviously the economic viability of a product is relevant to The Law Society, it has not been an overriding consideration for The Law Society when developing its products, because The Law Society focuses on "Is this working from the point of view of members, do we have enough people signing up", rather than with the intention of making a commercial level of return.

However, as I have explained, The Law Society has been changing its procedures in the last year, so that it is becoming more sophisticated in the way in which it allocates income and

costs to products, but obviously the driving force is the membership nature of the organisation.

PROFESSOR WILKS: Could I just follow up then a combination of the second and the third points?

MS. SMITH: Yes.

PROFESSOR WILKS: You say there are no business plans and I think you said there has never been any forecast ever made for the CQS, but if I took you back to some of the papers that we were looking at yesterday, in D2, tab 34, there is a project report that we did consider and on page 5 --

MS. SMITH: Sorry, tab 34 of which bundle?

PROFESSOR WILKS: D2, tab 34.

THE PRESIDENT: Yes, just a moment.

PROFESSOR WILKS: If you turn to page 5 of that tab there is at the end a small outline of what is called "Key risks issues" and at the beginning of that the risk is:

"The cost of the scheme could outweigh any benefits."

The mitigation is:

"The commercial model has been developed which states we are unlikely to get payback until year 4. Business case to be produced to go to the EMB."

There clearly was a business case at that point. It may be that you no longer have such a business case, but it is plausible that an organisation would have such a business case and that it might be rolled forward. Could you clarify where we stand on that?

MS. SMITH: Excuse me for a moment.

(Pause).

I understand that we have asked about references to this because obviously Mr. George brought up references to the business case in correspondence.

THE PRESIDENT: Yes.

MS. SMITH: As I understand it, this is a reference to the initial business case for developing this product.

THE PRESIDENT: Yes.

MS. SMITH: We have not been able to identify a document which is the business case. What we do not have is a yearly business plan, or annual business plan, or business plans developed after that.

MR. ALLAN: But what was submitted to EMB mid-August, 12/08, "Business case will be reworked and resubmitted", there is presumably something tangible that was at least in existence then?

MS. SMITH: Yes. I will have to double check through the documents again to see if we can find the minutes of that meeting at which it was presented. I know we have looked at this on a number of occasions and have not been able to find anything that is entitled "Business case".

THE PRESIDENT: Do we have the minutes here of the 20 October --

PROFESSOR WILKS: 20 October 2010.

THE PRESIDENT: We have quite a lot of minutes and I think all relevant minutes have been disclosed. It may be something that should be looked at. We do not want to spend too long on this, but if somebody can find a reference.

MR. WOOLFE: We do not have any minutes in the bundles from 20 October, 20 October was a presentation that Linda Lee gave at the Property Section conference.

THE PRESIDENT: That is different. This is 2010, we do not have the minutes of the management board of 20 October 2010?

MS. SMITH: No, I am afraid no.

MR. WOOLFE: There is a 19 October membership board meeting. Those minutes are at bundle D2, tabs 24 and 25.

THE PRESIDENT: What is the EMB?

MR. WOOLFE: I do not know what the EMB is. EMB may be a person rather than ...

MS. SMITH: I can help you on EMB, it means executive management board.

MR. ALLAN: So not membership?

MS. SMITH: Yes.

THE PRESIDENT: What we have got is 19 October is the membership board, but this is the management board, which is different presumably.

MS. SMITH: I am afraid so, yes.

THE PRESIDENT: Well, I think at least, even if the paper cannot be found, if we could have produced the minutes of the management board of 20 October 2010, that should be available.

MS. SMITH: I will.

THE PRESIDENT: It is clear that the minutes are kept. I think what is sensible with regard to this -- we cannot spend too much time on it now because we have got a lot else to get

through, equally Mr. Woolfe should have a chance to look at it, and if the documents can be produced -- give me just one moment and I will consult my colleagues.

(Pause).

We think that the sensible way to deal with this, Ms. Smith, Mr. Woolfe, with this aspect and the business plan aspect, is if The Law Society can have another look, and we have now, thanks to Professor Wilks, been pointed to the references, and submit any additional documents or explanation by the end of Tuesday of next week and Mr. Woolfe to have a chance to put in for the claimant any submissions in writing by the end of next Friday.

MR. WOOLFE: Thank you.

THE PRESIDENT: Rather than spending time on that. But we would please like, just on that E2/54 document, you have enough people, as you explained, from The Law Society here to do it by --

MS. SMITH: Yes, sometimes having more is helpful.

THE PRESIDENT: Well, on this point just by -- I would have thought it could be done by the time we come back at 2 o'clock, just the training income for 2011 to 2014, for those four figures to have what is said to be the upper range.

MS. SMITH: Just the upper and lower bound for those four figures, yes.

THE PRESIDENT: Well, I assume that is the lower range.

MS. SMITH: Yes.

THE PRESIDENT: In the way it has been done. It is an estimate, as we understand, for 2011 to 2013 and we understand now how it is done, but what then is said to be the upper range.

MS. SMITH: Yes. We can do that for those four figures.

THE PRESIDENT: Can that be done --

MS. SMITH: By 2 o'clock, yes we can. What we cannot do is if we put those figures back into the table they will have an impact on costs figures, etc.

THE PRESIDENT: Well, the costs are so -- given the way they are done, I am not sure they are really worth pursuing.

MS. SMITH: It is just extracting that row for training income and giving you the upper and --

THE PRESIDENT: Yes.

MS. SMITH: Yes, we can do that.

THE PRESIDENT: The range of costs even on this method would be so great that I do not think one can attach much significance to them. Yes.

MS. SMITH: Thank you, thank you for your patience.

THE PRESIDENT: If anyone wants to leave court to get on with that work, of course they are free to do so, from those behind you. Closing submissions by MS. SMITH

MS. SMITH: Thank you. Can I start in closing to highlight some important clarifications that Mr. Woolfe made in his opening on Day 1 of the hearing. At Day 1, page 6, line 1 of the transcript, Mr. Woolfe confirmed that the ambit of his claim is limited to the inclusion of mandatory AML and mortgage fraud training modules in the CQS which are provided by The Law Society. It is that which he says is the abusive conduct at issue in this case, so, as we understand it, what is in issue is the following.

First of all, the CQS "Understanding mortgage fraud" training module, which is described in Mr. Murphy's first witness statement at paragraphs 78 to 84 and the module itself is found at exhibit GM36. I am not going to take you to these at this stage. But it is important that that module was to be taken by firms that became accredited for the first time in 2012, or who became reaccredited and they had to complete that module within six months of their practice receiving notification of its successful application for accreditation or reaccreditation. After 2012 only firms becoming accredited for the first time or new members of staff at existing CQS firms had to take it.

It is also important to recall that that module was withdrawn in March 2016 as a result of the 2015 reorganisation of the CQS.

The second training module that is in issue is the CQS anti-money laundering module, described in Mr. Murphy's first witness statement at paragraphs 87 to 96. The module itself is found at exhibit GM41. Similarly, that was to be taken by firms becoming accredited or reaccredited in 2013, within six months, and thereafter only to be taken by firms becoming accredited for the first time or new members of staff. Again, that module was also withdrawn in March 2016.

The third module, which contained an element of AML training, is the CQS risk and compliance 2015 update that went live on 29 September 2015 and is described by Mr. Murphy in his first witness statement at paragraphs 138 and 139, and that module is found at exhibit GM90. As I said, that had just an element of AML and mortgage fraud in it, one of three topics covered by the update. It was only taken by firms, or is only taken by firms in 2015/2016 and it is not taken by any firms in subsequent years. So, as I explained, the new format for updates is they are live for a year and then they are replaced.

The fourth module is the CQS core financial crime module that was released in April 2016 and that is described in Mr. Murphy's first witness statement at paragraphs 136 to 137 and

145 to 148 and it is found at exhibit GM98. Again, that only contains an element of AML training, it is one of three elements to that financial crime module. As Mr. Murphy explains --

THE PRESIDENT: Just a second, the three elements are AML training, mortgage fraud and cybercrime, is that right?

MS. SMITH: Yes.

So as Mr. Murphy explains, members of staff who have already undertaken the mandatory training in years 1 to 5 of this scheme are exempt from taking this core training, it is only to be taken by firms becoming accredited for the first time, or new members who have not taken it at previous firms, after 2016.

So in our submission it is important to appreciate the relatively limited ambit of Socrates' claim because in our submission that goes both to questions of dominance, but also questions of abuse. The temporal limitation is also particularly important because it is relevant to the dates upon which dominance is relevant and as regards which abuse has to be proven.

MR. ALLAN: Sorry, just to be clear about the products in issue, is there also a further update for risk and compliance in 2016, or have I misunderstood that?

MS. SMITH: There is a further update for risk and compliance in 2016; it does not contain any element of AML or mortgage fraud.

MR. ALLAN: Right.

MS. SMITH: As to the future Mr. Murphy gives evidence that the purpose and the nature of the update modules will be basically new developments in the law and practice. So there is a possibility that AML may be an element of that future update training, but only to the extent that there have been new developments. So it is a different type of training.

Before I turn to the law and the various elements that need to be proven by Socrates, I think it is important to deal with a number of points that Mr. Woolfe made in opening on the facts.

THE PRESIDENT: Before you do that, you said what you have just said is relevant both to dominance and abuse.

MS. SMITH: Yes.

THE PRESIDENT: Also relevant, is it not, to the Chapter I case and effect on competition?

MS. SMITH: Yes. I always have at the back of my mind the Chapter I. It is obviously a separate point --

THE PRESIDENT: But it would be relevant.

MS. SMITH: The factual context for the effect element of Chapter I is essentially the same as the factual context for the abuse element of Chapter II, although obviously there are different legal situations, tests.

THE PRESIDENT: Yes.

MS. SMITH: I will go through the elements that we say Socrates has to prove in this case, but first I think it might be helpful to address a number of the points that Mr. Woolfe made in opening on the facts, particularly relating to the introduction of the CQS.

He made three points that he then sought to make good through cross-examination and those three points were quite important. I think they are basically the factual spine of his case.

The first -- I am quoting here from Day 1 page 10, lines 10 to 11. Mr. Woolfe said:

> "... the scheme [interpose the CQS] was set up for solicitors' purposes and specifically to enhance solicitors' reputation and not for the purpose of assisting lenders ..."

That was his first proposition. His second proposition, and this is Day 1 page 10, lines 14 to 17, he said:

> "... insofar as the lenders are interested in the CQS, it is about probity and it is about checking the identity, honesty and bona fides of the solicitors who they are doing business with and not about other aspects of the scheme ..."

His third proposition, which is Day 1 page 3, lines 33, to page 4, line 2, he said:

> "As you will see from the evidence in due course, there is no contemporaneous evidence that the lenders are interested to any significant extent in whether the Law Society includes a requirement to purchase training from it."

So that is a related but distinct point, but it is related to the second.

So, as I said, that is the factual spine of Socrates' case and Mr. Woolfe sought to make those submissions good when he cross-examined Mr. Murphy and Mr. Smithers, but we say that those factual contentions are not borne out, in fact contradicted by the evidence given by Mr. Smithers particularly and to a lesser extent by Mr. Murphy.

You have obviously read Mr. Smithers' written statement, you have seen him give evidence, but I would ask you to return to the statement and I would submit that his statement -- and I am not going to go through it line by line, you will be relieved to hear, but I submit it does make the following points clear.

First, The Law Society's intention in developing the CQS was to respond to market need, as it perceived it, and in particular to help conveyancers gain access to lender panels.

The CQS was designed to restore confidence in residential conveyancing firms for consumers, obviously, but also very importantly for lenders, and it was critical to the success of the CQS that it met the lenders' concerns in those regards. We say those fundamental propositions were not undermined by Mr. Woolfe in cross-examination.

But before I turn to deal with each of Mr. Woolfe's three points, it might be appropriate at this stage to address the question that was put to me yesterday about what significance, if any, the Tribunal should attach to the fact that The Law Society has not put in evidence from mortgage lenders.

Our submission is that no weight should be attached to this fact, for the following reasons.

Lenders are stakeholders for the CQS, you have heard that word used a number of times by The Law Society's witnesses. Effectively they are The Law Society's customers when it comes to the CQS and I hope it came through loud and clear that it is extremely important for The Law Society to keep the lenders happy and The Law Society did not want to impose upon the lenders the not necessarily pleasant experience of giving evidence in court, and of course any individuals at lenders who were going to give evidence would have needed to get sign off to participate in litigation, which is not necessarily a straightforward matter. So at the stage of considering what evidence to put in in these proceedings, The Law Society did make a judgment call and we did not ask any lenders to give evidence.

We took the view that the Tribunal would have before it evidence from The Law Society --

THE PRESIDENT: I do not want you to waive privilege, without very conscious decision, about, you know, what discussions were had. Be careful about opening that up because you cannot partially waive privilege.

MS. SMITH: No, I think I have probably gone about as far as --

THE PRESIDENT: You said you did not ask any lenders to give evidence, yes. You can waive privilege if you want to, but then that opens up a lot of disclosure. Yes.

MS. SMITH: So the Tribunal does not have before it evidence from lenders, but it does have before it evidence from the relevant individuals at The Law Society who dealt with the lenders: Mr. Smithers and Mr. Murphy. There is obviously disclosure and this evidence has been tested in court.

THE PRESIDENT: Yes.

MS. SMITH: We say that evidence is sufficient to enable the Tribunal to draw the conclusions it needs to draw in this case.

So going back to Mr. Woolfe's three propositions of fact, the first is that the scheme was set up for solicitors' purposes and specifically to enhance solicitors' reputation and not for the purpose of assisting lenders and I am not going to go through the evidence blow by blow, but we say that is clearly not the case, on the evidence, including the contemporaneous documents.

I took Mr. Smithers, you might recall, in re-examination to an LAPB meeting minutes of 13 January 2010 and I think it might be worthwhile just to remind ourselves of that, at D1, tab 11, it is the Legal Affairs and Policy Board minutes.

THE PRESIDENT: Yes. D1/11. I think you may be interrupted in a moment, but D1/11.

MS. SMITH: Yes, tab 11, 13 January 2010, the minutes of the meeting of the Legal Affairs and Policy Board. You may recall I took Mr. Smithers to pages 295 and 296 of that document.

THE PRESIDENT: Yes, we will pause. (Armistice Day silence)

THE PRESIDENT: Yes, the minutes of 13 January 2010 at D1 --

MS. SMITH: You will recall I took Mr. Smithers to page 296 --

THE PRESIDENT: Yes.

MS. SMITH: -- and the consideration there at paragraphs 10 to 11 of the challenges that faced conveyancing solicitors and the proposition to tackle those challenges through a membership scheme. I am not going to read it out, you have seen it.

THE PRESIDENT: Yes.

MS. SMITH: So in our submission, this document and other contemporaneous documents that are referred to in Mr. Smithers' statement make it absolutely clear that The Law Society's intention in developing the CQS was to enhance the reputation of conveyancing solicitors generally, but also, and importantly, to meet lenders' concerns.

THE PRESIDENT: Yes.

MS. SMITH: Mr. Woolfe's second proposition was that lenders were only interested in the probity, identity and honesty and bona fides checks of solicitors they are doing business with and not the other aspects of the CQS. I would make the following point on that: it is clearly not the case. Lenders get probity checks -- well, quite apart from the general concerns of the lenders that are illustrated by the contemporaneous documents, we say that proposition is clearly disproved by the fact that lenders get probity checks from the panel management services that they obtain from Lender Exchange, but nevertheless those lenders

that use the panel management service provided by Lender Exchange also have made the CQS a pre-condition of their panel membership.

Now, Mr. Woolfe took both Mr. Smithers and Mr. Murphy to a document that I would like to take you to, which is in E2. If I could ask you to put away D1 and get out E2, E2, tab 13. This is a letter from The Council of Mortgage Lenders of 13 December 2011 and you will recall Mr. Woolfe took both Mr. Smithers and Mr. Murphy to this letter and put to them the proposition that this showed that all the lenders were interested in were these probity checks, in shorthand. But what this letter is, you will see, is in effect an invitation to tender for what is described subsequently in the document as a "panel management solution". If you look in the penultimate paragraph of the letter:

> "This document is intended for potential suppliers to consider."

So they set out their requirements for the panel management solution and this letter sets out what potential suppliers have to consider.

In fact Mr. Woolfe himself, in opening -- and the transcript reference is Day 1 page 12, lines 16 to 18 -- described this document as:

> "... The Council of Mortgage Lenders' invitation effectively to The Law Society to tender for the provision of what became Lender Exchange ..."

So that is what this document is.

We know from Mr. Smithers' first witness statement, paragraph 125, that The Law Society did in fact submit a tender to The Council of Mortgage Lenders to provide this proposed panel management solution, but, paragraph 126 of his witness statement, The Law Society was unsuccessful in that tender. It was Lender Exchange who was successful in the tender to provide the panel management system.

We also know that lenders use both the Lender Exchange panel management service and also make the CQS a pre-condition for their panel membership. So lenders have got the probity checks through Lender Exchange, but they still supported the development of the CQS, they are still providing input into the CQS training, right up until the reorganisation in 2015, where they have provided very detailed input into the CQS training, and they still make CQS a prerequisite for their panel membership. So in my submission lenders clearly wanted more from the CQS than this probity checking element.

You can put away bundle E2 for the moment and we move on to Mr. Woolfe's third proposition, which is that there is no contemporaneous evidence that the lenders are

interested to any significant extent in whether The Law Society includes a requirement to purchase training from it in the CQS.

When you are considering the contemporaneous evidence in this regard, in my submission it is important to have in mind, as Mr. Smithers explained in his cross-examination, that the development of the CQS was, I think he put it, iterative. So it was developed in relatively short order in response to what was seen as a potentially catastrophic situation for small residential conveyancing firms.

The CQS protocol was developed first, that was put in place first, and the content and detail of the training modules was developed subsequently, but, as Mr. Smithers explains in his witness statement and in his cross-examination, the concerns of the lenders were at the forefront of The Law Society's mind from the very beginning of its thinking about and development of the CQS.

Presentations to lenders took place in early 2010 and feedback was obtained from lenders at this stage. See, for example -- I am not going to take you to it, but see, for example, paragraph 55 of Mr. Smithers' first witness statement referring to the management board minutes of 14 May 2010, so at this very early stage reports were coming back that a member of The Law Society, Mr. Des Hudson, had met with the lenders, he had made a presentation to them and he had obtained feedback from them. So at this very early stage the lenders were involved.

Can I take you to another document which dates from the middle of 2010, which is D1, tab 16. That is a report produced on 9 June 2010 for a membership board meeting of 24 June 2010, providing an update on the Conveyancing Quality Scheme, formerly The Home Buying Review. I took Mr. Smithers to this, you may recall, in re-examination. It is referred to in paragraph 58 of his first witness statement. But on page 323 of the bundle, paragraph 5, this paper reports back on a meeting with lenders on 29 April 2010 where The Law Society representatives provided a high level overview of the project to solicit feedback from the lenders, we see at paragraph 5:

> " ... as to whether they think the scheme effectively addresses their concerns and the issues and ensure that they will continue to work with solicitors who are accredited by the scheme, rather than other providers such as licensed conveyancers. The CML [The Council of Mortgage Lenders] responded well to the proposals and agreed to engage with us in working groups to help provide input as the scheme is developed further. The first meeting with CML occurred on 14 June 2010 ..."

So the meetings in April and then a further meeting in June:

" ... and future meetings are planned with The Building Societies Association (BSA), other lender stakeholders, and with relevant insurers."

So the close involvement of lenders was there from the very beginning and what The Law Society were concerned with was whether the project would effectively address "the concerns of the lenders".

Now, Mr. Smithers provides in his witness statement further detail on the contact with the lenders during this period, including at paragraph 103 of his statement that his colleague Des Hudson was holding monthly meetings with the lenders to discuss CQS at this point in time.

Now, the fact that the lenders might not have been providing detailed input on training issues from the start we say is not surprising given the iterative way in which the scheme was developed, but what is clear is that from the very start The Law Society was concerned that lenders engage in the development of the scheme. What was important was that the scheme could address the lenders' concerns and could provide reassurance to them as to the quality of the residential conveyancing members of the scheme. Obviously one of the ways in which quality could be assured was by the provision of uniform and consistent training. Training was in fact an element that was included in the CQS from the very beginning. As Mr. Murphy explained in paragraph 68 to 71 of his first witness statement, a mandatory training module on the conveyancing protocol was included in the scheme in year 1, that is 2011. That module was mandatory and was to be carried out by all relevant members of staff. Mr. Murphy makes that clear in his witness statement.

There might have been some slight confusion on this because there were also two further modules in year 1: an optional module which was called "CQS core practice management standards", which is described in paragraph 73 to 74 of Mr. Murphy's first statement, and a module called "CQS, the role of the SRO", which was mandatory for SROs only. But the first training module I referred to on the conveyancing protocol was mandatory for all members in the very first year.

So again, protocol first, get that in it place, get people trained on it.

The lenders got involved in the detail of the content of the training once it moved on to more substantive issues, particularly those in which they had particular interest, and that is mortgage fraud in year 2. Now, it is no accident that this mortgage fraud module was one

of the first substantive modules in the CQS. Mr. Smithers explains in paragraph 109 of his statement that:

"Given the importance lenders placed on mortgage fraud and the role that it had played in the reduction of lender panels, it was to be the subject of year 2 training."

Now, as Mr. Smithers also explains in that paragraph of his statement, paragraph 109, the mortgage fraud module was written with the specific involvement of the lenders. A representative from Lloyds wrote the scenarios for inclusion in that module and that scenario is at D2, tab 51 -- I do not need to take you to it, but it is there -- and there is an internal The Law Society email chain regarding the development of that module at E2, tab 15. Again, I do not think I need to take you back to that, but for your note that email chain is extremely important. It shows that the input of lenders was critical to the content of the mortgage fraud module and they in fact wrote part of it.

So that was the training in year 2. In year 3 --

THE PRESIDENT: I did actually have a slight question about that email chain, which I did not raise, I know, when -- I think it is all right, yes, okay. No, it is fine.

MS. SMITH: Yes?

THE PRESIDENT: Yes.

MS. SMITH: Is it about the difference between co-authoring and input?

THE PRESIDENT: That is right. I think that was resolved, yes.

MS. SMITH: Yes. There was input but the co-authors were The Law Society members, took the input, took the scenarios, worked it into their module that they developed.

THE PRESIDENT: Yes, that is right.

MS. SMITH: So that was year 2. As regards year 3, we know that there was a 2013 module on anti-money laundering training and as regards the development of that 2013 AML module, the document at D2, tab 49 -- I actually might just take you to that, D2, tab 49, on page 787. You will see item 5 is "Year 3 training" and as regards year 3 training:

"Jonathan Smithers and Peter Ryland are to schedule a meeting with ..."

What are described mistakenly I think as "fraud lenders", but lenders and CML legal panel. But again, in developing that year 3 training there was input, or meetings with the lenders and the CML legal panel by the authors of that training, Jonathan Smithers and Peter Ryland, I think. I will double check that. I think they were the trainers. But in any event there were meetings with the lenders in the development of that training.

So that is the early years.

Mr. Murphy gives detailed evidence of the lenders' involvement in the restructuring of the CQS in 2015 and specifically their involvement in the development of new training modules, and I am not going to take you back to it but I would ask you to revisit paragraphs 107, 130 to 133 and 142 of his first witness statement which make it clear that he was meeting lenders, or he and his Law Society colleagues were meeting lenders very regularly throughout this period, inviting and receiving their input on the training and I think you will recall in cross-examination he said, "I was meeting them weekly at this stage".

Our submission on those facts is that the fact there may not have been detailed discussion of the contents of the training modules in all of the documents that Mr. Woolfe took the witnesses to, particularly Mr. Smithers, does not undermine the fact that there was extensive involvement of the lenders in the development of training.

The documents that Mr. Woolfe took Mr. Smithers to you should also bear in mind when looking at those documents what the nature of those documents is. A large number of the documents that Mr. Woolfe took Mr. Smithers to were minutes of committees, relatively high level decision-taking committees; not generally documents produced by those who would have been involved in producing the training element, the operational aspects of the CQS, but those making the higher level decisions. So it is not surprising, in my submission, that in those meetings they do not descend to the level of detail as to the training.

In conclusion, what we say on this third proposition is that it is clear lenders wanted quality assurance from the very start and training was a core element of the way in which The Law Society proposed to achieve that quality assurance.

Can I then move on to the elements of the case that we say Socrates has to prove in this case and I will deal, if I may, first of all with upstream market definition and dominance and then very briefly with the downstream market definition, then abuse and objective justification -- you could probably predict this was the way I was going to deal with it -- and then I will briefly deal with the Chapter I prohibition, having set out my submissions more generally.

So starting with upstream market definition and dominance. The Law Society's case, as you are aware, is that the CQS should be viewed as a platform that serves two interrelated consumer groups: lenders and solicitors. So two relevant upstream markets can be defined: first the provision of quality assurance to lenders with regard to solicitors which provide residential conveyancing services in England and Wales; and, second, the facilitation of solicitors' access to lender panels in England and Wales.

In his opening submissions on Day 1 Mr. Woolfe said that in defining the relevant upstream market you should focus on the product, the focal product, the CQS, not on the nature of demand for the products, or where that demand is coming from, and you should carry out your standard SSNIP test, and if you do that, he said by reference to Mr. Williams' evidence, you end up with an upstream market definition that is, as they pleaded, the provision of quality, certification, accreditation, for law firms which provide residential conveyancing services in England and Wales, and he said solicitors would not substitute away from the CQS if there was a significant non-transient increase in price.

I drew your attention in opening to the CMA merger guidance, which in my submission makes it clear that the problems of applying the SSNIP test to two-sided products of a two-sided nature are well recognised. It is telling, I think, what Mr. Woolfe said about two-sided markets in opening. He said that you should only look at a two-sided market in very limited circumstances. This is Day 1 page 8, lines 23 to 29. He said:

> "... for the purposes of assessing dominance a two-sided market analysis is only relevant in very specific circumstances and we say those circumstances are these. "If you have a two-sided market with side A and side B, and are interested in examining whether conduct on side A is an abuse, the two-sided nature of the market is relevant only if the competitive constraints on side B are effective to constrain the specific behaviour on side A that you are looking at."

We say that is precisely what we have here.

THE PRESIDENT: I am not sure -- and the economists I think helpfully gave some evidence on that -- it makes a huge difference, because --

MS. SMITH: That was the point I was about to make, my Lord.

THE PRESIDENT: -- even if it is a one-sided market, if there is a constraint from the lenders it can be an effective constraint, so whether we need to get into the interesting theoretical question of whether this is properly two-sided or one-sided ... The definition you put forward of the two-side market I do feel rather narrows the focus even of what The Law Society said it was trying to achieve. Clearly access to lenders' panels may have been the crisis that forced the development -- that is your case and there is quite a bit of evidence on that from Mr. Smithers and the documents, that is what triggered the creation of the scheme, but even as envisaged from the start it was to try and get better premiums with insurers, not just lenders, it was to try and restore the confidence of the public, so it had a broader remit.

MS. SMITH: It looked a number of ways --

THE PRESIDENT: So it is not just facilitation to lenders' panels. That is a rather sort of narrow view of the product I think, even if that was the impetus to create it, it seems to me.

MS. SMITH: Yes. I think what we do say and what I was about to go on to say is whether one defines the market as a two-sided market or not -- and, as you say, it might be an interesting academic debate -- but what is important is the competitive constraint, and we say the constraints imposed by the lenders are not only relevant but extremely important in this case.

Now, this was obviously considered in the hut-tub evidence and you heard Dr. Majumdar's evidence on this. I think it is important to note that Mr. Williams as well -- this is Day 3, page 58, lines 15 to 19 -- accepted quite fairly that there was an "interdependence of demand on both sides of the market" between solicitors and lenders. But he said in his view that was not enough to lead to there being a two-sided market as defined. But it is that interdependence which we say is very important and the competitive constraints imposed by the lenders. As we say in paragraph 23 of our skeleton, market definition is not an end in itself, it is about assessing market power and in assessing the market power of The Law Society in this case we say an extremely relevant consideration are the constraints imposed by the lenders.

But if I can just, in that context, look first at market share.

THE PRESIDENT: Yes.

MS. SMITH: Now, Dr. Majumdar's evidence, and we would ask the Tribunal to prefer this, is that the most useful approach in the factual situation we have here is not to look at whether the CQS is the only product currently available of its nature, but the most useful approach is to look at the uptake of the CQS by lenders as a means of solicitors accessing their panels. His evidence is that it would not make sense to state that The Law Society is dominant or has market power if it had the CQS, the CQS was the only product of its nature available on the market, but no banks mandated it, or even just a small bank.

On Mr. Williams' market definition The Law Society would still have a 100 per cent market share, but that says very little, if anything, about market power.

THE PRESIDENT: Yes.

MS. SMITH: Now, Dr. Majumdar's evidence was that The Law Society was not dominant in his view when the CQS was being established, nor was it dominant in the first few years, in

2012 and 2013 in particular, when lenders mandating the CQS as a pre-condition of their panels accounted for only about 20 per cent odd of lending at the time.

He also made I think the important point that there is a difference between solicitors thinking at this stage that the CQS was an attractive and good value product because of the lender endorsement that there was at that stage, and it being a must-have.

THE PRESIDENT: Yes. Well, that is clearly right.

MS. SMITH: Yes. I would simply refer you to his evidence, Day 3, page 70, line 28 to 29:

> "... simply offering a value that is greater than the price does not make a product a must-have product."

THE PRESIDENT: Yes.

MS. SMITH: He accepts, quite fairly, that when you just look at market shares -- as he has approached it, when you just look at market shares in 2014/2015 the position has developed and the position in his view, if you just focus on market shares as regards dominance, is not so clear in 2014/2015 when lenders mandating the CQS for their panels accounted for about 40 per cent of lending, but, he said, when you get to that stage you need to broaden your assessment of market power, you need to look outside just the market shares and you need to look at the competitive constraints imposed on The Law Society, in particular by the lenders.

We say the evidence that I have outlined --

THE PRESIDENT: Do you accept that by 2015 -- I think that was what Dr. Majumdar was close to accepting -- it had really become a must-have when you have 40 per cent of lenders, more or less -- I mean you have the cash buyers outside but you have the small lenders not counted, so he said they probably cancel each other out, which might be a good working assumption -- that was what he put forward and it seems reasonable -- that it is then for many residential solicitors very active in residential conveyancing a must-have.

MS. SMITH: I am not sure he went quite as far as that, but I think he said at that stage one's focus needs to shift to the competitive constraints.

THE PRESIDENT: Yes. He said it was finely balanced I think, which is ...

MS. SMITH: Yes, I think that is what his evidence was.

THE PRESIDENT: Yes, that is what his evidence was.

MS. SMITH: The focus does shift then because you are looking at much higher market shares, as it were, to the constraints, particularly exercised by the lenders.

THE PRESIDENT: Yes.

MS. SMITH: I have outlined the factual situation, but we say that The Law Society's evidence makes it clear that if the CQS fails to meet the lenders' requirements, particularly as to quality, the lenders will not accept it as a condition to their panels, and it is an all or nothing: either a lender accepts it as a pre-condition to their panels, or they do not. Once a lender decides that the CQS does not fulfil the purposes it wants it to fulfil, then it may seek to mandate the CQS and in our submission if the lenders believe the CQS is not of adequate quality, they will not endorse it.

Now, that is quality and we say that it is quite clear that lenders impose a significant constraint on the CQS as regards quality.

Mr. Smithers and Mr. Murphy confirmed, I think in response to questions from the Tribunal, that there was no specific discussions with lenders as to the exact price that was to be charged for the various elements of the CQS, but Mr. Smithers did say -- Day 2, page 75, lines 14 to 16:

> "Answer: ... lenders might show some disquiet if the accreditation scheme for a mutual society was being used to exploit in any manner. That may put their endorsement at risk."

It is our submission that although lenders do not constrain price in the same direct way, or perhaps to the same extent even, as they do quality, they do still have an influence on price. There must be -- and again whether you call it two-sided or what, there must be a sufficient uptake of solicitors for it to be worthwhile for lenders and vice versa. Again, as you will have heard very clearly from the evidence, The Law Society is a member organisation which in its very self exercises a restraint on the pricing.

THE PRESIDENT: Well, there must be a sufficient uptake, but we have now reached the point where it is a must-have, so it has got to be an extremely high price for solicitors to say "I will not take it". Is that really a constraint on exercise of market power?

MS. SMITH: I think the strongest constraint is obviously from quality.

THE PRESIDENT: Yes.

MS. SMITH: There is a probably upper bound constraint on price.

What is I think also informative in this regard is as regards competitive constraints exercised by lenders, Mr. Williams said -- Day 3, page 59, line 7 to 17 -- in response to a question I think from the President as to whether you need market power as to both quality and price, he said:

"I think it could be either so I do not think you need to find both to find dominance or market power ..."

He then explained it depends on the facts in the particular market:

"So both are relevant but you do not need both to find dominance; it could be either."

MR. ALLAN: But one might infer from that that if you have market power over price but not necessarily over quality, he would be saying you still have market power.

MS. SMITH: Yes, I see the point.

MR. ALLAN: I mean I think that is what he is saying.

Can I just ask you whether it is your appreciation of the evidence that in relation to those lenders who do mandate CQS as a part of their panel membership criteria, they see the CQS as a significant enhancement over the alternative criteria that are available to them?

MS. SMITH: I cannot put words into the lenders' mouths, but the evidence is that before -- this may give you some guidance -- before the CQS was introduced HSBC had reduced their panels to 43 firms. Alternatives were in place then at that stage -- this is 2008/2009. Lexcel was in existence in 2008/2009. Mr. Murphy explained it came in in about the early 1990s. So Lexcel accreditation was there. CPD requirements, SRA regulation of training was there in 2008/2009. HSBC cut their panels to 43 on the basis of their own criteria that The Law Society saw as arbitrary criteria. Once the CQS was introduced HSBC had involvement in the introduction of the CQS. They took away that arbitrary reduction, they opened their panel to membership on more objective bases, which included the CQS.

MR. ALLAN: So I suppose the way my mind is going is to consider that in relation at least to those lenders it might be the case that it would require quite a significant degradation in the quality of the training for them to want to go back to what was an inferior set of panel management criteria or processes that they had in place in the past.

MS. SMITH: I am not sure they saw it as inferior, it served their purposes very well, the reducing it to 43. They had a number of solicitors they could manage very easily, they could justify to the FSA, you know, "We have got this small number of firms, we are absolutely confident about them". I think for the lenders those small panels may have served their purposes very well. It obviously did not serve the interests of The Law Society's members, but it did serve the interests of the lenders. What is important here is what Dr. Majumdar explained I think in Day 3, pages 78 to 79 of the transcript, that lenders have alternatives they could switch back to, that they do not have to set up another accreditation scheme, they can put in their own criteria and they can self-supply, as he put it in his report, their

assurance criteria, their assurance services, and that supply side substitute, if you want to put it like that, could be set up pretty quickly. It could certainly be set up well within the couple of years that Mr. Williams said would be sufficient to exercise a sufficient constraint.

THE PRESIDENT: The arrangements they had in place did not involve any training requirement, did they, before?

MS. SMITH: No, they involved things like volume of transactions, so experience -- I suppose it is a proxy for experience -- number of members of the firm, perhaps again on the assumption that if you are a larger firm you are likely to be more reputable --

MR. ALLAN: But it is also important to remember that that would be against the backdrop of an SRA mandating requirement in place at that point and CPD compulsory training, so there was some level of professional qualification --

MS. SMITH: There was.

MR. ALLAN: -- though the fact that lenders lost confidence in it, in the whole process, might suggest they were not terribly impressed with what that was producing.

MS. SMITH: At an early stage what their emphasis was on was not just training generally, but training in mortgage fraud. They wanted that focused training on the issues that were causing them the concern, which is not just that there was complicit fraud, however they may have put it, but that solicitors were being used in order to allow fraud to take place. So it was mortgage fraud and training on mortgage fraud, not just general "You have to have training because we want everyone to be of good quality", but it was that specific training that they were concerned about, and that is what the CQS offered and the ability to get involved in setting that training, or ensuring that that training was in place and it was being done and it was being monitored.

It is also relevant I think in this regard, just the final point is that the update of the CQS also appeared to be linked to its recognition by lenders. We have seen the numbers of solicitor members increase substantially and Mr. Murphy also explained in cross-examination very usefully the comparison with the take-up of WIQS, the Wills and Inheritance Quality Scheme. While it is on its face a very very similar scheme, training, accreditation checks, etc, the take-up has been much lower, about 180 firms versus the now 3,000, and his view was that this is because it lacked that lender endorsement, for example.

So we do say that substantially --

THE PRESIDENT: Yes, although I suspect -- I know it was not put to Mr. Murphy -- ordinary solicitor's income from conveyancing is significantly greater than the charges for making wills.

MS. SMITH: I actually do not know.

THE PRESIDENT: There is evidence it is often related to the value of the transaction and most people who have made a will know the sort of fees involved.

MS. SMITH: I do not know, but we do say competitive constraints are exercised -- substantial competitive constraints are exercised on The Law Society by the members.

So the result of all those submissions is that we say The Law Society was not dominant, did not have market power at any relevant point in time for the purpose of these proceedings. Clearly we say it was not dominant, did not have market power in 2012 and 2013 when the impugned conduct took place, the introduction of the mandatory CQS training in mortgage fraud and AML.

Can I just briefly then touch on downstream market definitions.

THE PRESIDENT: I think if you are moving on to that it is probably the right moment to take a short break.

(11.45 am) (A short break)

(11.55 am)

MS. SMITH: Can we then move on to the downstream market definition and I will try to deal with that briefly.

THE PRESIDENT: Yes.

MS. SMITH: As is clear from the pleadings, we say there is a downstream market for the provision of AML training to relevant persons as defined in the 2007 Money Laundering Regulations, alternatively for the supply of AML training to law firms in the United Kingdom.

Now, as to the definition of that market and supply substitution, we rely upon the evidence contained in paragraph 75 to 78 of Dr. Majumdar's report, that is at bundle B, tab 2, page 23. I do not think I need to take you to it.

THE PRESIDENT: No.

MS. SMITH: It was confirmed by Mr. Murphy and not challenged by Mr. Woolfe that it was relatively straightforward for a firm established in providing AML training for say solicitors to add further courses to provide AML training to say estate agents or accountants.

We also rely upon the evidence before the Tribunal of the different AML courses that Socrates in fact provide for solicitors, estate agents and accountants. I put those to Mr. George in cross-examination, Day 1 page 60. He confirmed that for these courses the design is pretty much the same, the format is the same, much of the law is the same, some of the examples that are given in the training are the same and Mr. George stated, Day 1 page 60, lines 33 to 34.

> "Answer: So there is simply no point us reinventing perfectly good training on that point, which explains it to a lawyer."

So we say that the downstream market should be defined in this broad way.

THE PRESIDENT: Yes.

MS. SMITH: Then moving to abuse, which obviously also goes to effect for the purposes of Chapter I prohibition, but focusing first on abuse.

Mr. Woolfe indicated, Day 1 page 17, line 9, that he fully accepts the burden is on him to show that the test in paragraph 88 of *Streetmap v Google* is fulfilled, that is that the impugned conduct is reasonably likely to have an effect on competition. So in that regard can I just ask you to go back to -- I know we have been there before, but to the judgment in *Streetmap* and I would like to make some submissions on that. It is in the authorities bundle at F2, tab 23. The test is set out in paragraph 88 of the judgment, which Mr. Woolfe accepted was the test he had to fulfil, that:

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

Then there are a number of points arising from that.

The first submission we make is as per paragraph 90 of the judgment in that case we say that in determining the question whether impugned conduct is reasonably likely to harm competition, a very relevant consideration is what the actual effect of the conduct has been, if such evidence is available to the court or tribunal.

We also say, and I made this point in opening so I am not going to labour it, that the relevance of evidence as to actual effect is not limited to cases where no actual effect is shown. In determining potential effect it is relevant obviously to look at actual effect and it would be unreal not to take it into account.

My second submission is we also say that the effect on competition which must be shown to be reasonably likely must have an appreciable effect and perhaps given the indication by the Tribunal yesterday I can develop my submissions in that regard a little more.

First of all, we say that for the reasons set out in paragraph 96 through to 98 of the judgment in *Streetmap*, we say that appreciability is relevant to a Chapter II case when you are considering a relevant market abuse, as well as Chapter I.

THE PRESIDENT: Considering a related market?

MS. SMITH: A related market, yes. For the reasons given in those paragraphs. I am not going to repeat them, you are familiar with them, but it is a related market abuse and appreciability is in those circumstances applicable in a Chapter II case in related market abuse.

Then there is the question put by the President yesterday as to what does appreciable amount to in circumstances such as those in the present case where we also have a related market abuse. We say the starting point must that one is concerned here with conduct. The impugned conduct is conduct by an undertaking that is said to be an abuse on a related market, not the market where the undertaking is dominant. So the abuse takes place in the related market and on that market the structure of competition has not already been weakened by the presence of the dominant undertaking because it is not that market on which the undertaking is dominant.

THE PRESIDENT: Yes.

MS. SMITH: So it is conduct on a market where -- and this is the point made actually in the *Streetmap* case, but that is a starting point, it is conduct on a related market where the structure of competition has not already been weakened. That is in contrast to say a market abuse such as the *Hoffman-LaRoche* and *Post Danmark II* cases which are referred to in paragraph 94 and 95 of the judgment.

THE PRESIDENT: Yes.

MS. SMITH: That is the starting point, so we say that in considering effect in this downstream market where the structure of competition has not been weakened, and in particular whether that effect is appreciable, it is likely to be relevant to look at factors which have been taken into account in Article 101 cases on appreciability and we say that is because those cases, the Article 101 cases on appreciability, are similarly about whether anti-competitive conduct affects competition on a market which has not otherwise already been weakened by the presence of dominant undertaking. So there are parallels. Obviously it is not exact parallels, but there are parallels that can be drawn.

Obviously there is not a direct read-across --

THE PRESIDENT: Well, it would be a bit odd if you have two different standards of what is appreciable. You would get into huge problems. It is hard enough to work it out on one standard, on the facts.

MS. SMITH: Yes, absolutely.

THE PRESIDENT: In *Google*, where the facts were quite complicated on that point, but really the evidence of -- and it had been going on for many years -- actual effect was very thin indeed and so even though I said it was difficult, the evidence in the end pointed to that conclusion.

MS. SMITH: I will, if I may, go on to the application of the test to the facts in this case shortly.

THE PRESIDENT: The Article 101 test of de minimis I would have thought must be the same test for what is de minimis.

MS. SMITH: Yes, perhaps I can develop that slightly. I will go on obviously to apply this to the facts of the case, but at the moment just looking at the legal test --

THE PRESIDENT: What I am saying is assume Mr. Woolfe wants to advance a proposition there is a different level of appreciability --

MR. WOOLFE: I am not going to advance that. I will make submissions about appreciability being relevant and so forth but not really about the standards.

THE PRESIDENT: Yes, and whether it is relevant and then whether it is satisfied on the facts, but assume it is the same test, in other words the proposition that you have just made that there is a read-across, assume that is right.

MS. SMITH: Yes, okay. But perhaps I can just make a point about the impact that that submission has.

THE PRESIDENT: Yes.

MS. SMITH: Perhaps take it a step further, if I may, which is that obviously the primary approach to establishing appreciable effect in Article 101 cases is to look at the market shares of parties to an agreement, which is not directly applicable to a case such as the present, but we do say that the level at which market share thresholds are set in the de minimis guidance, in the case law, the level at which those market share thresholds are set may be of assistance when you are considering appreciability in a case such as the present and if I could just explain that point.

The de minimis notice obviously we are all familiar with, I am not going to take you to it, but that says that an aggregate market threshold of 10 per cent when looking at agreement between competitors, market shares below that level of 10 per cent can be held to be de

minimis. It could be saying, in effect, that 10 per cent of the market must be negatively affected in order for an agreement to have an appreciable anti-competitive effect and that may, we say, assist in determining what an appreciable effect might be in a related market case.

Obviously market shares are not the end of the matter and we also say it is highly relevant, particularly in this case, that the case law -- and I can refer you to cases of *Villeroy & Boch* and *Elopak* if necessary, I have copies of those judgments, but as well as market shares what is also highly relevant in determining appreciability in Article 101 cases is whether or not the market on which the competition is said to be affected is itself highly competitive or not, so the existing level of competition on a market.

THE PRESIDENT: We do not have any market share figures in fact for this market.

MS. SMITH: No, we do not.

THE PRESIDENT: Either as defined by you or defined by -- we do not know what --

MS. SMITH: No, we do not. We do not have any evidence as to the market generally, apart from the impact on Mr. George's particular business.

THE PRESIDENT: We have two market definitions, one bigger than the other, but on neither do we know what is The Law Society's share, or what is Socrates' share, indeed, but --

MS. SMITH: No, but as to deciding what is appreciable, I think some rough feel -- because, as you say, appreciability is a slippery concept -- some rough feel can be got by the magnitude of what is said to be an appreciable effect, and market shares, obviously we cannot say you look at the market shares of The Law Society and Socrates because this is not about an agreement, but in saying that an agreement which affects, or is affected by two parties which together have an aggregate market share of 10 per cent gives you some indication of the proportion of the market that has to be affected in order for there to be an appreciable effect and I put it no higher than that, but it may be that some guidance can be taken from that. Then other elements such as the pre-existing level, whether the market itself is highly competitive.

THE PRESIDENT: Yes.

MS. SMITH: We also say that then one has to switch back, as it were, to the fact that this is an Article 102 case and a further relevant factor is that that is set out in paragraph 98 of the *Streetmap* judgment, which is that competition by even a dominant company is to be encouraged and one wants to take, and one must take into account whether conduct of the

dominant undertaking is pro competitive on the market where it is dominant and we say that is also important in this case.

THE PRESIDENT: But that is the impugned conduct. In other words, the mandatory requirement that the training element of CQS must be taken from The Law Society and not from anybody else, is that pro competitive?

MS. SMITH: If one applies this approach directly: yes, because what was being considered in *Streetmap* was the impugned conduct.

THE PRESIDENT: Yes.

MS. SMITH: I would say that it goes not only to objective justification, but also to abuse as to the slightly different factual situation we have here where the impugned conduct is a part of broader conduct: to put it precisely, the training is an element of a product which is being offered by The Law Society on the upstream market. We say it is a fundamentally integral part of that product, and there is a dispute between the parties on that, but I do not think there is any dispute that it is an element of the product that is being offered by The Law Society on the upstream market for training.

So we say, moving from the legal test to the application to the facts of the present case, that it is of relevance in our submission that in the upstream market the development by The Law Society of the CQS is, we would say, ultimately pro competitive in that it improves quality, it facilitates access to lender panels by a greater number of firms of solicitors and ultimately increases choice for consumers, home buying clients, and Mr. Woolfe made it absolutely clear -- Day 1 page 2, line 25 -- he is not challenging the CQS itself:

> " ... nor are we challenging the inclusion in the CQS of some requirement that law firms ensure that their staff undertake training on certain issues."

He is challenging the reservation, in effect, of the training to The Law Society. But we say one needs to take into account the nature of the interaction in effect here between the upstream market and the downstream market, and we say the CQS as a whole as a product serves a useful and pro competitive purpose.

We say it is also relevant that it is agreed between the parties that the downstream market for AML training, however widely you define it, but it is agreed between the parties that that market is highly competitive, and those are Mr. George's words, paragraphs 15 and 17 of his second witness statement.

So those are relevant factors, we say, before one then comes to look at the extent of the impact of the impugned abusive conduct on the market.

THE PRESIDENT: Yes.

MS. SMITH: So as regards assessing the extent of the impact of this conduct, it is important I think first to recall what the ambit of Socrates' case is, going back to what I said at the very beginning of my closing, and what is actually in issue. That is the "tying" of training, but the tying of specific training. The obligation to take the specific AML and mortgage fraud modules from The Law Society.

The temporal element I think is important. The AML and mortgage fraud training modules were introduced, as we know, in 2012, 2013, withdrawn in March 2016. The financial crime update module which contains an element of AML is only taken in 2015 and then drops away. The financial crime core module, which again is only an element of AML and mortgage fraud, only taken by the limited number of firms joining, or new members of staff in existing member firms from 2016 and thereafter.

Now, that is the impugned conduct and that is what we say Socrates has to prove is reasonably likely to have an appreciable foreclosure effect in the downstream market.

This is also where the dominance and abuse arguments interact, because when you are focusing on 2012 and 2013 and the offering of training in those periods of time, we say The Law Society was not dominant in any event at that stage, but even if it was, can the foreclosure effect be proven. In determining that question I think first one has to think, given this impugned conduct that is in issue, when would you expect to see any effect and I think it is particularly informative in this regard just to go back to Dr. Majumdar's report, which records the number of members of the CQS for each of the years and that is bundle B, tab 2.

If I can ask you to turn to paragraph 59 of Dr. Majumdar's report at page 18, Dr. Majumdar sets out the number of firms subscribing to the CQS, members of the CQS, in each of the years. So we see that there were 864 subscribers in 2011; 1,787 in 2012, which is a jump of 923 members from 2011 to 2012; 2,607 in 2013, so an increase in number of members of 820 between 2012 and 2013; 2,730 in 2014, an increase of 123; 2,851 in 2015, an increase of 121; and 3,014 as at 5 May 2016, an increase of 162. So we see a substantial increase of about 800, 900 members in the first two years and then a leveling off of increasing numbers of members of about 100-odd, 123, 121, 163, in 2014, 2015 and 2016.

So that is the pattern of membership, the number of solicitors being members of the CQS at different years.

The second point is that training, the mandatory training modules were to be completed within six months of approval of your accreditation or reaccreditation.

There was a slight hint in the questions posed by Mr. Woolfe that training was not being completed within six months, but that it may be that firms were putting off their training until 2015, even though in opening he said what we are concerned with is the impact on competition in 2013. As regards that point, we make the point that training was required to be completed within six months under the scheme rules. Upon application for reaccreditation the SRO had to certify that such training was taking place. If such certification was not given we are told by Mr. Murphy the reaccreditation is not granted. We are also told by Mr. Murphy that checks are carried out and it was made clear by Mr. Woolfe it was no part of his case that those checks were inadequate, the policing in effect was inadequate.

Now, solicitors take undertakings seriously, particularly I would say conveyancing solicitors, it is the life blood of what they do, and there is no reason to believe in our submission that the SRO would have certified that training had been done, if it had not been done, and that we therefore say it is more likely than not that the training was carried out when it should have been carried out.

THE PRESIDENT: Yes.

MS. SMITH: So working on that basis we say that staff at the 1,787 member firms in 2012, 2,607 member firms in 2013 -- staff at those member firms could be expected to take the CQS mortgage fraud module in 2012/2013, within six months after their reaccreditation. Thereafter the numbers taking that module would tail off. As we see, there are only 100-odd new firms a year joining the scheme after that period of time, even if one takes into account new members of staff at existing firms.

Similarly we say, as regards the CQS AML module, that was to be taken by staff at all the 3,000-odd member firms in 2013 and 2014, and after that again the numbers taking the module would tail off because we have again only about 100-odd new firms a year joining.

Now, obviously the figures in the financial schedule are difficult to interpret, but even if you take the view that the schedule shows training income going up substantially -- it appears to be correct that training income is going up -- in my submission that is because new firms and new staff who joined later on in the history of the CQS had to do all the accumulated modules of training at once.

So simplifying the numbers just to make this example, say 100 new firms join the CQS in 2015, each with ten members of staff. Each of those members of staff would have to do, by then, all seven modules of the training before the scheme changed. So The Law Society would sell 7,000 modules of training. But that accumulation point does not change the point about the reduced impact of the CQS mortgage fraud and AML modules. Each of those, which are the subject of the claim, still only had to be taken once by those new members. The fact that training income went up because they also had to take at the same time five other modules does not detract from the point that they were only taking the relevant AML and mortgage fraud modules once.

So you cannot draw a direct line between increased training income generally for the CQS and expected impact on Socrates' business.

So we do say that if the CQS AML and mortgage fraud modules do have any appreciable effect, you would expect to see it in 2012/2013, 2013/2014. What you actually see -- so starting with the -- obviously the Tribunal has to draw the best conclusions it can from the evidence it has available and the evidence is, as it never is, not perfect, but let us start with what we see on the evidence we do have. We have the factual analysis of the subscriber numbers and we have looked at both those analyses, that carried out for The Law Society by RBB, and Mr. George's own analysis. I think the Tribunal might have a further iteration of that analysis sent in by letter by Mr. George this morning. I do not know if you have seen that.

MR. WOOLFE: Have you not seen that, sir? Shall I hand that up?

To explain, there was a question from Ms. Smith yesterday, as I understand it, that Dr. Majumdar and The Law Society recognised all the figures along in table 2.

THE PRESIDENT: That is right, the 125 for 2011.

MR. WOOLFE: The letter explains that that column needed to be removed from the table and the other two columns from the left become what should have been in that column. So two years have become misplaced in a rogue year --

THE PRESIDENT: Yes, so it was a mistake. So this is a substitute table 2, figure 2.

MR. WOOLFE: That is right.

THE PRESIDENT: Do we have three copies? I have yours, I am sorry.

MS. SMITH: Perhaps we can put that again back in --

THE PRESIDENT: Give us just a moment, we had better put that away.

MS. SMITH: B, tab 4.

(Pause).

Can I make the following submissions on the subscriber analyses.

Obviously we fully appreciate the position that Mr. George is in and the limited resources he has available to him, but we do say that his analysis of the subscriber data is unreliable and that little weight, if any, should be put on it by the Tribunal. We say that for three reasons.

First, it is clear that Mr. George had difficulties in analysing the data and the figures in that data we say therefore are not reliable.

The second and third points relate to the impact of adjustments, or of the approach that Mr. George took. The second point is his definition of CQS firms. We say that because he defined a CQS firm to be one that has at some stage in the 2009 to 2016 period obtained CQS accreditation, so that it means a firm which cancelled its Socrates subscription in say 2013 might not in fact have become a CQS member until 2015, the effect of this approach is that one cannot draw any inferences from the figures he presents about whether CQS accreditation caused a firm to cancel their Socrates subscription, because the cancellation may have taken place a long time before the firm became CQS accredited.

THE PRESIDENT: I am not sure he is seeking to go that far. I mean "CQS firm", he used that term, which I have to say I found a bit unhelpful, but I think what he is really saying is residential conveyancing firms and I have used to define that a firm that has at any time been in the CQS, but that is just as a means to calculate firms in residential conveyancing. So I do not think it is designed to -- and if it does, for the reason you have given, it would not -- show a direct cause and effect, it is just to show whether a higher proportion of residential conveyancing firms than non -- I think that is the way we have to interpret it. It needed quite a bit of explanation, but we got there.

MS. SMITH: Well, we say simply no further inferences can be drawn from the figures.

THE PRESIDENT: Yes.

MS. SMITH: The third point we make is about Mr. George's use of the figures for 2016, which were produced on a completely different basis to those for previous years, so those figures cannot be compared, we say, on a like for like basis with any previous years.

THE PRESIDENT: Yes.

MS. SMITH: We rely, by contrast, on Dr. Majumdar's analysis and if I could just take you back to that. It is in bundle B at tab 3. Dr. Majumdar approached the data in three different ways to try to see what you could obtain from the data.

First of all he looked at renewal rates and that is section 2, table 1 and section 5, table 4, and what he was seeking to test by looking at renewal rates is that if the mandatory CQS AML training impacted adversely on demand for Socrates' AML training, one would expect to observe, after the introduction of that training in June 2013, that renewal rates fall, particularly because first there are a large number of CQS accredited firms amongst Socrates' subscriber base under 2013, and second because one would expect such firms to be less likely to renew their AML training subscription with Socrates after 2013. But the assessment of renewal rates shows no discernible difference, no material difference before 2013/2014 and after and that is shown in table 1.

Perhaps even more interestingly it is shown in table 4 when you look at renewal rates for CQS accredited and non-CQS accredited firms. Of course he is looking here at the date upon which they renewed, were they CQS accredited or not, and that shows that after 2013 CQS accredited firms appeared to have, if anything, a higher renewal rates than non-CQS accredited firms. One would not expect that to happen if CQS accreditation deterred the take-up of Socrates' AML training.

THE PRESIDENT: He shows a higher renewal rate for CQS accredited than for non-CQS accredited, but so does Mr. George, does he not?

MS. SMITH: He does, yes.

THE PRESIDENT: So that point, although you say you cannot rely on Mr. George's tables, but that point is actually the same point that comes out of his table, is it not?

MS. SMITH: Yes.

THE PRESIDENT: I am not sure the definition of CQS accredited is the same, is it?

MR. WOOLFE: I believe actually that Mr. George's equivalent table is the same.

MS. SMITH: I think it is the same, yes.

THE PRESIDENT: Yes, it is the same. So the figures are not always the same, but the general point about the higher renewal rate is made out by both.

MS. SMITH: I think Mr. George, to be fair, explains at the end of his statement when he is doing those figures that he took the same assumptions and the approach as RBB but just reworked the figures, tried to reproduce the figures.

THE PRESIDENT: Yes.

MS. SMITH: So that is the first approach that one takes to the data, which is the renewal rates.

The second approach that Dr. Majumdar took, the second viewpoint, was to look at the evidence on outflows and inflows from Socrates' AML training subscribers and that is

section 3, table 2. The submissions I make on these figures is that if CQS accreditation was a significant cause of firms cancelling their subscriptions with Socrates, or a constraint on the ability of Socrates to attract new customers, or lapsed customers, one would expect to see a large number of CQS accredited firms failing to renew their subscriptions and very few CQS accredited firms joining or rejoining Socrates to obtain AML training; in other words one would expect to see a net outflow that would be large relative to the total number of CQS accredited firms taking AML training with Socrates in any given year. But in fact the factual analysis, within its confines, shows that the net outflow is actually very small. In 2013/2014 it was only 20 subscribers, that is 5 per cent of total subscribers, and in 2015 it was in fact only three subscribers, which is 1 per cent of the Socrates CQS subscribers in 2015.

In fact the analysis also indicates that the net outflow before 2013 was in fact greater than the net outflow after. Obviously there is a limit to what one can take from this data, it is a relatively limited number of data points, but insofar as it shows anything it does not show, in our submission, that Socrates subscribers are more likely to cancel because they have to take the CQS training.

The third way in which Dr. Majumdar approached the data was to look at the incidents of CQS accreditation within subscribers to Socrates' AML training and that is section 4, table 3, and that shows the following.

That during 2013 to 2015, so after the mandatory training modules were introduced, Socrates had healthy demand for AML training from a large number of CQS accredited firms. In fact CQS accredited firms accounted for the majority of Socrates' subscribers during the 2013 to 2015 period.

Second, while it is the case that the total number of firms subscribing to Socrates has fallen since 2011 -- that is the total number of subscribers -- there is no evidence that that is due to the mandatory CQS AML training. The decline in subscribers is not systematically higher after 2013 than before. So again the high incidence of CQS accredited firms amongst firms taking AML training from Socrates is not consistent with that mandatory CQS AML training acting as a material barrier to those firms taking the Socrates Training.

So we say that what you can get from this evidence is that there is no indication that firms which obtain or retain CQS accreditation and therefore must take the CQS AML module from The Law Society, that they are deterred from taking further complementary other AML training from Socrates.

Those figures, we say, are supported by what one can take from the qualitative evidence, the witness evidence, the documentary evidence. Mr. George's witness evidence, paragraph 45 of his statement, was that he did not become aware of the CQS until the second half of 2015 and we say that if the CQS AML and mortgage fraud training modules had had an effect, one would have expected it to become apparent to Mr. George well before that date.

It is important in this regard in assessing this evidence that Mr. George's complaint is that his subscribers failed to renew their subscription. It makes no sense that Socrates' subscribers would wait until after they had completed the mandatory CQS training modules to cancel their Socrates subscription for the forthcoming year because they knew, and everyone knew, that those CQS training modules had to be carried out only once, so you would not wait until after you had done the training modules and then say "Well, for next year I am going to cancel my Socrates training"; in our submission if firms were going to cancel their Socrates subscription because of the CQS training requirements, they are more likely to have done so before their staff took the CQS training modules, most likely when the firms applied for reaccreditation or accreditation for a particular year, or when the training modules were introduced, because they then knew their staff would have to undertake those modules within the next six months and if those modules were going to cause them to cancel their Socrates subscription, they are more likely to have done so then. What they would not do, we say, is cancel their Socrates training 12 months, or 18 months after the last date on which their date were required to take the CQS training module.

THE PRESIDENT: This slightly assumes a degree of careful commercial planning by solicitors for what is, in running a firm, not the main priority, not a major piece of expenditure. So if one is being entirely rational and focused on every item of expenditure --

MS. SMITH: But it is not just something you can put to one side and forget, and that is the point I made, that it is part of the CQS firm that the senior responsible officer has to certify every year, upon reaccreditation, that the staff have carried out this training. So there is a limited period of time in which they can let it slide, even if they do not make sure it is done within the six months that they are required to do under the scheme rules.

THE PRESIDENT: It is a different point. I appreciate you have to certify and the training may have to be done within six months. I mean the decision about whether to cancel a subscription to Socrates, it may not be at the forefront of a solicitor's mind. There is a certain inertia factor. Then they finally realise "Oh, my gosh, we are paying twice for training and" --

MS. SMITH: No, they are not paying twice because what they are doing in renewing their subscription is taking out training for the following year, for the future, with Socrates.

THE PRESIDENT: Yes.

MS. SMITH: We say that in those circumstances, particularly when the advice that they are being given by their professional organisation, by The Law Society, is that their statutory obligation is to carry out AML training regularly, the advice they are getting from The Law Society is it has to be every two years, the advice they are getting from Socrates is that it is a matter of best practice to do it every year, it is less likely that, having been required to take out CQS training modules in the past, that that would then influence a decision to cancel future Socrates subscription, because they will not be paying for it twice, they will be -- they may have done in the past because they were not on the ball, if as the President said they are not on the ball, they do not cancel beforehand, but they have still got to do their AML training in the future.

MR. ALLAN: But is it the case, at least prior to the reorganisation, that a firm could choose to use the AML training module within CQS as a means of getting AML training at least for their conveyancing lawyers?

MS. SMITH: This is a point that I think you raised before in the course of the hearing and I can say with confidence the following. The Law Society never presented it as doing that, as fulfilling those requirements. Whether it does is a matter of judgment for the responsible partner in the law firm. We have evidence from Mr. Smithers, wearing his hat as a partner at CooperBurnett, that he did not think it was adequate and his firm took out general AML training as well as the CQS AML training for all their staff, including the residential conveyancing staff, and that is as far as I think I can take it. That is what we have, that is the evidence you have.

THE PRESIDENT: Yes. I do not think that was challenged.

MS. SMITH: No.

Now looking at each of the examples given by Mr. George in his witness statement, Richard Herne, Rutter & Rutter and Wainwright & Cummings, obviously you heard my cross-examination of Mr. George and my suggestion to him that in the circumstances, including this point I have made about cancelling future subscriptions when you have carried out your CQS training in the past, or your staff have carried out CQS training in the past, that it was more likely the CQS was just a convenient excuse rather than the real cause of the cancellations and you have seen the email exchanges and you heard the evidence on that.

However, even if, contrary to what I submit, you do accept that there was a causal link between those three cancellations and the CQS, that is only three cancellations which are purported to have a link to the CQS training and in our submission there is other evidence that clearly goes the other way, that the mandatory CQS training does not cause firms not to take separate AML training. I have already mentioned the evidence from Mr. Smithers. That is, for the note, his first witness statement, paragraph 176, as to what is done in his firm, in CooperBurnett.

It is also I think worth going back to the undisputed evidence, as Mr. Woolfe put it, of Mr. Hamilton, upon which Socrates actually relies, but if you go and look carefully at what he says, we say Mr. Hamilton's evidence does not support Socrates' case. I would like to take you to that witness statement because obviously he was not in the witness box, so it is worth perhaps going back to his witness statement. It is in bundle C, tab 2, where Mr. Hamilton explains he is a partner in Hamilton Davies. Then in paragraph 5 he says that he applied for CQS accreditation in 2013 and received accreditation in July, or Hamilton Davis did:

> " ... and we have been reaccredited every year since."

So up to the date of this witness statement his firm is still a CQS member. That is what he says about CQS. He makes other criticisms about it, but he says that is the factual position as regards his CQS accreditation.

If you look about what he says about his subscription to Socrates in paragraph 27:

> "For some years up to 2012 my firm subscribed to the Socrates AML training service. In 2012 ..."

So, I interpose, before his firm became a CQS member:

> " ... we decided to let that subscription lapse for a time as we felt we were up-to-date with our AML requirements. We renewed that subscription in January 2012 and are current subscribers."

Even though they are also members of the CQS. But then what is really important is the next paragraph:

> "The obligation to buy training from The Law Society as a condition of joining the CQS did not cause us to let our Socrates subscription lapse. It had already done so."

So his subscription was not cancelled, he says clearly, because his firm became a member of the CQS, it was for wholly independent reasons.

MR. WOOLFE: Could you just read the rest of the paragraph.

THE PRESIDENT: We are reading on, yes.

MS. SMITH: Yes. Then there is a point about how quickly he resubscribed. But what we say is he did resubscribe, even though he was a CQS member. He says:

"We would have been more likely to have recommenced our subscription sooner."

So that is the high-water mark of the evidence.

THE PRESIDENT: Yes. Well, but that rather shows that just looking at cancellations and leaving is a rather narrow lens. That is one possible aspect and he does not support that for the reasons you mentioned. The other aspect is people cancelled for all sorts of reasons. He says "We cancelled/did not renew because we felt we were up-to-date, we did not need any more AML training", so in the case of this particular firm, on unchallenged evidence, Socrates suffered a loss because -- he says "more likely"; it is not a definite loss, but you may say probable loss -- because they would have purchased the product from Socrates earlier than in January 2015. So it was a delayed rejoining.

MS. SMITH: Yes. Even at its highest on this one piece of evidence, which of course is contradicted by other evidence, which --

THE PRESIDENT: Well, it is not contradicted as such.

MS. SMITH: Not contradicted, but it shows other firms took different views and they kept both in place the whole time. But yes, taking this on its face, comparing it to the evidence of Mr. Smithers, which says that his firm kept both in place throughout the whole period --

THE PRESIDENT: Yes.

MS. SMITH: Then one looks at the nature of the CQS training modules versus the nature of the AML products sold by Socrates in the downstream market. It is important, I think, that when you stand back as well and take into account not just the evidence that has been put in front of you from witness statements, the data from the subscriber figures, you also look at the nature of what is at issue, the nature of the product.

From the Socrates point of view what I think is important is Mr. George confirmed that his AML product is sold as a firm-wide package. So you will have seen as well from the emails, the price that is charged depends on the size of the firm; if you subscribe you get it for the whole firm, including your residential conveyancers. So if you are in a firm that thinks "I have a number of people that do not do residential conveyancing, obviously I need to train them in AML, I have my residential conveyancers who might be doing their CQS training, I need to go out and buy AML training for the rest of my firm, I will buy the Socrates product that applies to the firm", it comes as a package.

Also we say that is the nature of the AML training that is offered by Socrates, versus the nature of the CQS itself. At the risk of repeating myself, the mandatory training is carried out only once. If, and it is a big "if", it has any effect, or it causes people to cancel say their Socrates subscription, that effect is necessarily going to be limited in time because you take the module once, you are then under a statutory obligation to carry out AML training regularly thereafter. You are advised by The Law Society your members of staff should carry it out every two years, you are advised by Mr. George that you should carry it out annually.

The fact that any cancelled subscriptions that might -- and I emphasise "might" -- have been due to the CQS, they may very well be reinstated the following year, that is in fact exactly the evidence that Mr. George gave in the witness box yesterday. If I can -- I do not know if you have the transcripts there?

THE PRESIDENT: Yes.

MS. SMITH: Day 3, page 48, I think it is worth looking at it, line 1 to 10. You will recall here --

THE PRESIDENT: Day 3?

MS. SMITH: Yes, Day 3, page 48.

THE PRESIDENT: Yes.

MS. SMITH: You will recall perhaps Mr. George saying how touching it was how loyal some firms have been.

THE PRESIDENT: Yes.

MS. SMITH: He said:

> "Answer: They have stuck with us, because they really like us, we have a fantastic relationship ..."

So they make the choice, as we have seen Mr. Smithers' firm did too buy two lots of training. He said he:

> "Answer: ... found no end of firms who were in the CQS and who had cancelled for a year or so, which is exactly what you would expect. They have only had to do The Law Society's training for one year, so they cancel for a year or so, so they never feature ... they appear to have renewed ..."

Et cetera.

So we say at its very highest, and of course our primary submission is it does not even get this far, at its very highest all Socrates has shown is that the mandatory CQS mortgage fraud

and AML training modules of 2012 and 2013 had a minimal and necessarily transitory effect on his business.

I see what the time is. I do have maybe just a couple of points to make on the other modules which might be conveniently done before we break. It is just to clear up --

THE PRESIDENT: Well, we do not want to go on long, so we can go for ten minutes but otherwise it is better we come back.

MS. SMITH: Absolutely. I only have about another 15 minutes at the most.

MR. WOOLFE: On this point?

MS. SMITH: No.

MR. WOOLFE: In total?

MS. SMITH: Yes. Maybe 20, you know how bad barristers are at estimating.

MR. WOOLFE: I am conscious Ms. Smith has been going for 3 hours and I do have to close the case. If we take 20 minutes after 2 --

MS. SMITH: No, I stood up at 10.45.

THE PRESIDENT: We did have time on the additional -- on The Law Society's figures. We lost quite a bit on that. But yes, you want your -- well, we will see how we go, but I think we will take our break now, if it might be 20 minutes I think it is better, and then you can see if you can reduce your 20 to 15 and --

MS. SMITH: That was finishing that one point and then 20 minutes after lunch, but I will do my best.

THE PRESIDENT: Sorry?

MS. SMITH: That was on the basis that I finish this one point and then --

THE PRESIDENT: Have you finished that point?

MS. SMITH: No, it was simply -- I will do my very best --

THE PRESIDENT: If you want to finish this one point -- you said (inaudible) at its very highest, or the claimant has shown --

MS. SMITH: That was on the 2012 and 2013 modules. I was just very quickly going to address the new modules --

THE PRESIDENT: Yes.

MS. SMITH: -- because although they are not front and centre of the pleaded case, they are mentioned in the pleaded case.

THE PRESIDENT: Yes. Why do you not do that and then we will take our break?

MS. SMITH: I will do that very quickly then.

We have identified that there is the update module, the core module, the core financial crime module --

THE PRESIDENT: This is the restructured scheme?

MS. SMITH: Yes.

THE PRESIDENT: Yes, we know what it is.

MS. SMITH: Yes. So as regards the core financial crime module, first of all Mr. George himself states that it is not sufficient in his view to meet a firm's obligation under the Money Laundering Regulations and that is paragraph 77 of his second witness statement. It might just be worth turning that up. It is paragraph 77, page 25, of his second witness statement. He says:

> "The new financial crime course is better. However, it deals with the important subject of AML as just one part of a single course. This is fine for someone who has had AML training recently, but not for someone who has not had AML training before."

Then he goes on to say:

> "My AML training is better."

So that is the first point on that.

The second point is a point I have already made, that that module is only taken by new CQS accredited firms, of which there are very few, and new joiners, which are again limited. It is only taken for 2016 and subsequently.

As regards the ongoing update training, this is now provided on an annual basis. There was an AML mortgage fraud element in the 2015 update. This is Mr. Murphy's second witness statement. There is no AML mortgage fraud element in the 2016 update and to the extent that there is, it will be limited to new developments in the law and, in our submission, we do say that that will be insufficient to meet the money laundering regulation requirements because it will be limited to updates.

Those are the only points. Thank you very much.

THE PRESIDENT: Yes, okay. We will be back at 2 o'clock.

(1.00 pm) (The short adjournment)

(2.00 pm)

THE PRESIDENT: Yes, Ms. Smith.

MS. SMITH: Thank you. I was dealing with the question of foreclosure effect and whether or not an appreciable effect on competition had been proven on this case and I would just like

to finish by drawing attention to what was said by Mr. George yesterday in response to some questions I think by Mr. Allan on the scale of the effect of the CQS mandatory training requirements -- this is Day 3, page 52, line 145. Mr. Allan asked Mr. George about the one-off nature of the CQS training modules and about the scale and effect that might have and Mr. George's -- this is Day 3, page 52, line 14. Mr. George -- you might recall this -- said "Well, it is pretty anti-competitive on my bank balance". You might recall his statement to that effect.

THE PRESIDENT: Yes.

MS. SMITH: We would just make the following submissions, that quite apart from the fact that the Tribunal has not actually been given any evidence by Mr. George as to the impact on his bank balance, such as his accounts or anything of that nature, there are two very important points that that statement really emphasises and these are the following.

First, even if -- and we do not agree that it has been established, but even if there were evidence of an appreciable impact on Socrates' business, that does not establish an appreciable foreclosure impact on the downstream market as a whole, it does not necessarily establish that. The claimant has put in no evidence, we would say, beyond speculation as to what the impact might be on other providers of AML training. We say that it would not be a safe assumption to make that the impact on Socrates can in effect act as a proxy for the impact on the rest of the market, particularly given the highly competitive nature of the market and that was illustrated quite forcefully by Mr. George yesterday when he gave evidence, Day 3, page 51, about the loss of one of his subscribers that he had been looking at the night before, I think it was BBH, to a competitor who offered webinars and he explained that this subscriber had said "Well I am going off to someone else because they are offering webinars". Now, that is not The Law Society, obviously the CQS training is not a webinar; it was another third party provider of AML training.

The second point I want to make is that, with the greatest respect, this Chapter II prohibition is not designed to protect the business of competitors, its purpose is to protect competition and ultimately to protect consumers. The claimant has failed to identify what it says the consumer detriment is. We say the CQS is a good value product which gets law firms onto lender panels and increases the choice available to consumers buying property.

The alternative training methods mooted by Mr. Woolfe, we say as a matter of fact there has to be some auditing and control of training if it were not to be provided by The Law Society, but I will develop my points on objective justification shortly. But if there is to be

training that is not provided by The Law Society under the CQS, that will increase costs and those costs might be passed on by The Law Society to the trainers, but that will increase the cost ultimately to the consumer.

THE PRESIDENT: Well, it depends whether the trainers are more efficient than The Law Society or not. It would be a competitive market, so we just do not know. We have no evidence of costs really.

MS. SMITH: It is really the question that just focusing on alleged minimal transitory effect on the business of one participant in the market says very little about what has to be established in this case, which is an appreciable foreclosure effect on the market as a whole in our submission.

THE PRESIDENT: Yes, that is your previous point.

MS. SMITH: Yes.

So in conclusion on anti-competitive effect, we say that the claimant has failed to discharge the burden on it to prove that it is reasonably likely that the training requirement would have an appreciable anti-competitive effect. There is no evidence, we say -- and I have been through the evidence, I am not going to go through it again -- of anti-competitive object or intent. The Law Society is a membership organisation, it was looking to create a product to support its members, not to exploit the commercial opportunity offered by the accreditation aspects of the CQS to get the members to buy training. That assertion was not borne out on the evidence.

Finally then --

THE PRESIDENT: So that deals with Chapter I as well then, you say?

MS. SMITH: Yes. I would like to say just one point about the law on Chapter I, but I will do that briefly. If I could just deal with objective justification.

THE PRESIDENT: Yes.

MS. SMITH: We say at its very highest all that the claimant can prove is that the CQS has a very minimal and transitory foreclosure effect. Against that one has to weigh the risks that would eventuate if The Law Society would not have been able to require CQS firms to obtain the CQS AML training from itself.

As I have said again and again, the key to the CQS is retaining the trust of lenders and assuring them that the training that CQS members undertake is consistent and uniform and above all that it is being carried out by all relevant members of staff involved in a conveyancing transaction.

If you take, for example, the extent of the lender input that Mr. Murphy gives evidence of in paragraphs 130 to 133 of his first witness statement, that was given in 2015, very detailed input by lenders, regular meetings between Mr. Murphy and the lenders and other members of The Law Society in order to develop the training, the revised training that was put in place in 2015 -- just taking that as an example and the amount of interaction that took place in developing that between The Law Society and lenders, how could that have been achieved if third parties were providing the training?

The Law Society would have to exercise --

THE PRESIDENT: I mean the evidence on the revised training, as opposed to how the revised scheme or restructured scheme would look and what it will require and so on, but the detail of training I think it was only Santander that actually -- in notes of meetings that Mr. Murphy did not attend -- talked about the actual content of the training. He said they were interested in training. That was rather vague.

MS. SMITH: Mr. Murphy did give evidence, there were the documents you were taken to but I would ask you to go back to the paragraphs that I have highlighted in his witness evidence, where he made it clear that he was at that stage involved in weekly meetings with lenders.

THE PRESIDENT: Yes, they discussed a lot, but how much it was simply about what would be included in terms of what areas will be covered and how often people have to do a course and an update and all that, as opposed to the actual detail of the training, that is --

MS. SMITH: The reassurance, I think is the point, that The Law Society has to give to the lenders. There is the content, the quality, the consistency, which is also important, ensuring that solicitors and staff involved in conveyancing transactions are all trained in a uniform way, know the same things, understand the same risks, for example about mortgage fraud, and also ensuring the monitoring that the training has been carried out by relevant members of staff. The Law Society would have to exercise a considerable amount of control over the training by third parties in order to continue providing that reassurance to the lenders that the CQS was achieving the aims the lenders wanted to achieve.

Now, Mr. Woolfe's suggestions, his first and second suggestion, which he says are the preferable ones, is a Lexcel type approach, or an SRA outcomes focused approach. We say that when you look at the evidence, Mr. Murphy explains what the Lexcel accreditation process involves. For example, neither of those approaches would allow the lenders to have the amount of input and control that they have had and that they need to have in order to be reassured about the ongoing fitness for purpose, in effect, of the CQS.

Those are not satisfactory alternatives because The Law Society would be unable to assure itself and consequently unable to assure the lenders as to the content and, as I said, the consistency and the fact that training has been completed.

Lexcel, as I mentioned earlier, was well established by the 2008 crisis, but we know that this did not suffice to meet lenders' concerns in 2008/2009.

THE PRESIDENT: Well, Lexcel did not cover anti-money laundering, did it?

MS. SMITH: Lexcel involves a requirement to have a plan or policy in place for anti-money laundering training and that is exactly the approach that Socrates is saying should be taken under the CQS. Lexcel does not mandate particular training, or even the content of that training, Lexcel says: you must have, as a matter of your practice management, plans and policies in place that ensure you carry out AML training.

Another of the drivers for the CQS was the inadequacy of the outcomes focused regulation. Outcomes focused regulation leaves it to the regulated party to fulfil requirements. Failures are only investigated when there is a cause to investigate failures. Control is effectively lost.

MR. ALLAN: Can we go that far when that is actually the approach which the SRA, which is the body responsible for regulating solicitors, has said is the preferred approach to take?

MS. SMITH: They are taking that approach to general ongoing professional education and one can see the approach that one would have to an outcome focused approach, as I understand it, and I am not an expert and I should not be giving evidence on this, but the point of an outcomes focused approach is that as a professional, as an individual working in a profession, I decide "Well, I need to understand X, Y and Z by the end of the year", I go out and find the training to enable me to do that and then I take that training, and then I report back and say I have achieved the outcome that I wanted to achieve.

What the CQS is about is ensuring that everyone in a residential conveyancing transaction knows, by reference to scenarios, or other types of actual content, when, for example, and how a mortgage fraud might be carried out, and the lenders want the people involved in the residential conveyancing transaction to be able to recognise when that sort of fraud might be carried out and to be able to understand -- they want to be assured everyone knows the same thing. That is what I say the difference comes down to.

We do also make the point that the CQS is already loss-making and that the loss of the training element may have an impact on the cost that The Law Society has to charge if all it was left with was the accreditation element.

THE PRESIDENT: Well, that puts a weight on that schedule which I have to say at the moment we do not feel it can carry for various reasons.

MS. SMITH: There is also evidence from the witnesses, but --

THE PRESIDENT: I mean there is evidence that the CQS is loss-making. Whether it is the training part that causes the loss, or the accreditation part, how it divides the costs between the two, even on that schedule there is no division of what costs go to accreditation and what costs go to training, so I really find it very difficult -- I think we all, speaking for my colleagues I think as well -- to draw much difference from what bit is loss-making. There is evidence that overall it is not profitable and it is carried out at a loss, but which bit causes the loss and how much we just cannot work out.

MS. SMITH: Insofar as it is of assistance I think there is evidence from Mr. Smithers in his witness statement -- I have to look at that -- which says in effect that one cross-subsidises the other, but I understand that is obviously limited.

THE PRESIDENT: I thought was the practising certificate cross-subsidised CQS, not that the accreditation -- it may do, but I do not think we have any evidence on it.

MS. SMITH: The last point I want to make in the two minutes left to me is, in Chapter I, the *OTOC* case. We do say that it is limited in its effect to the Chapter I, Article 101 situation, the Article 102 case was not before the Court, but ultimately the most important point we make is that we submit that the case does not put in place any different test for establishing anti-competitive effect and that is set out in the *Streetmap v Google* case.

In fact what it does say though is that maintaining high quality standards in a profession was accepted in principle as a justification for an allegedly anti-competitive practice and we do say that on the facts it is different and there is a real difference, we say, between the situation here where The Law Society has had to invest in the CQS, invest in getting lenders on board to develop the product, invest in keeping the CQS and its training relevant to solicitors and therefore creating a valuable product, and then offering that good value product to solicitors, but that is a very different situation from being effectively awarded a monopoly position over accountants due to the fact that as a matter of regulation you will provide the training to them, and that is the situation that we had in *OTOC*.

We say the second distinction in *OTOC* is that the OTOC, who were a professional association of accountants, arbitrarily delineated the training market and reserved a portion to themselves. The CQS is a different proposition which is not taken up by solicitors unless it is seen as valuable and it has a very limited amount of training involved in it to maintain

standards and for which we say there is good reason why that training is provided by The Law Society because of all the reasons we have been developing, rather than an arbitrary reservation of a certain amount of training to the professional association.

I think those are -- unless I can assist the Tribunal further ...

THE PRESIDENT: If The Law Society said to all solicitors "You have a statutory duty to have AML training under the regulations, in order to have your practising certificate you must buy that AML training from The Law Society", then that would be close to *OTOC* because it would be using its statutory position of authorising solicitors, saying "You have to get all training from us".

MS. SMITH: I think this is another point that has not really been developed but is important to bear in mind is the different roles between The Law Society and the Solicitors Regulation Authority. I think it is the Solicitors Regulation Authority who has that right, for example, to grant practising certificates without the statutory rights.

THE PRESIDENT: I thought the evidence was that the CQS is subsidised from The Law Society's income from granting practising certificates?

MR. WOOLFE: If I can assist on this, the Solicitors Regulation Authority is functionally independent from The Law Society but it is part of the same legal person, I think. I believe that is right. So it may be that -- and I understand that the practising certificate fee gets paid to the body, of which part gets taken by the SRA for its regulatory purposes and part goes to The Law Society in its role as representing the profession. I have no idea of the proportions, but that is as I understand it.

THE PRESIDENT: I am not sure they are legally the same person, although Mr. George thinks they are.

MR. WOOLFE: I thought they actually were, but I could be wrong.

THE PRESIDENT: But anyway, it will be the 2007 Act.

MR. WOOLFE: Certainly part of the practising certificate fee goes to The Law Society for representative purposes and part goes for regulation.

MS. SMITH: Yes, for prescribed purposes, including education and training, that is absolutely right.

THE PRESIDENT: Yes. Anyway, I was just -- whether it is or it is not, if there were a body that all solicitors had to get accredited by to be a solicitor, authorised by to practice and call themselves a solicitor, that would be --

MS. SMITH: So as a condition of that "You have to buy something from us" then it is more equivalent to *OTOC*, yes.

THE PRESIDENT: -- closer and you say this is rather different.

MS. SMITH: Yes.

THE PRESIDENT: Apart from anything else it is a voluntary scheme and it is done for this particular purpose, to serve members, yes.

MS. SMITH: Yes.

Unless I can assist you or your colleagues any further ...

THE PRESIDENT: Except that you were I think going to produce the revised figures.

MS. SMITH: I was. I am instructed it is being printed off as we speak, apologies for the delay.

THE PRESIDENT: Yes, thank you.

Mr. Woolfe I think you were going to supply us with a date.

MR. WOOLFE: Yes, that was the date on which Socrates began supplying the AML for property lawyers module: I understand the date is February 2011. It is in the letter which we handed up earlier in fact, but February 2011 was when that was launched. It has been in operation and been updated regularly ever since.

THE PRESIDENT: Yes. So it did not exist before, it came in about the same time as the mortgage fraud training in the CQS.

MR. WOOLFE: Yes, Socrates had the general AML training going back to its inception, I understand, the first product that Socrates launched, but then a specific AML for property lawyers module was introduced in February 2011.

THE PRESIDENT: Can I just ask for instruction on something that I should have asked Mr. George when he was in the witness box, but I forgot. It is just a clarification of something that he says in his statement. It is in paragraph 8 of his second witness statement, the main witness statement and it is the point you just make:

> "AML training plays a particularly important role in the Socrates business model. Not only is the service on which the business was first based and which still accounts for most of our turnover ..."

When he says "it" and "the service", is that the AML for law firms training, because he also has AML for accountancy and for estate agents, or is it all AML training?

MR. WOOLFE: Mr. George informs me that AML training for law firms is probably about half of total turnover and AML training in total is more than half.

Just for your note, because this is a figure I am going to refer to briefly later on, you get the size of Socrates' turnover actually identified in paragraph 6 of Mr. George's first statement - -

THE PRESIDENT: Yes, we have got that.

MR. WOOLFE: -- which I have not otherwise referred to, which is £750,000 per annum.

THE PRESIDENT: Yes, we have got that.

MR. ALLAN: Sorry, just to follow up the President's question and to be sure that we have got it right, when you say AML training for law firms, that is the AML training for law firms product as distinct from AML training for international law firms, or are you talking about - -

MR. WOOLFE: No, AML training for law firms in total.

MR. ALLAN: Including international?

MR. WOOLFE: Yes. Including all the AML modules for law firms and the international, yes.

Closing submissions by MR. WOOLFE

MR. WOOLFE: Sir, Ms. Smith began by summarising our case and the modules to which our claim relates and giving in essence an outline of the relevant facts. To speed things up, we accept that outline of the modules that are at issue and the dates on which they came into force and so forth, subject to three caveats which I will identify.

The first is what may sound like a small point, but is quite significant. Ms. Smith said on a couple of occasions that post the introduction of the financial crime training it was only when new firms joined the CQS that the obligation to take training would be triggered. That is not entirely accurate, because whenever new staff join an existing firm, they are also required to take the AML training under the scheme.

The second point on which we differ, and I will come to this more in due course, is about the significance of the update training in future. It is being said by The Law Society essentially that there has been an update on AML in the past, but there is no reason to think that AML training will come up in the future.

THE PRESIDENT: I do not think they quite put it that high. I think what is said is there is AML training, including the 2015 updates, there will not be in 2016, there may be in the future but it will only be new developments.

MR. WOOLFE: Yes.

THE PRESIDENT: That is what I think was said.

MR. WOOLFE: Yes, that is what I understand.

For your note on that point, the fourth EU money laundering directive is due to come into force in 2017, so there is quite a stack of new law to update people on that is going to be coming down the track.

THE PRESIDENT: In force when?

MR. WOOLFE: In 2017. 26 June is the deadline for implementation. Of course there may be an issue over whether or not we are in the European Union at that point. But the point about the money laundering --

THE PRESIDENT: I think we are for two years from March on any view.

MR. WOOLFE: Yes. I am not asking the Court to make a finding of fact on that point.

THE PRESIDENT: So that is to be implemented by 26 June 2017.

MR. WOOLFE: Yes.

The other point in relation to updates -- I will come back to this later on -- is that there is a certain tension between that contention that they may not bring forward AML training unless the law changes and so forth and their contention, which they repeat throughout their submissions, that the training element of the CQS is what delivers a minimum standard that will satisfy lenders. The idea that lenders, if they are interested in this, would be satisfied by people being in a scheme which trains them once and then does not keep them updated, as indeed the law requires that they should be, there is something of a tension between those two contentions.

The third respect in which we -- perhaps I slightly correct Ms. Smith's characterisation of the significance of when the modules were introduced and so forth, is that I think she implied at the end of her account that you had to see if The Law Society was dominant on the date when each module was introduced. Now, of course in each case the module was introduced, it became mandatory, and it continued to be mandatory for a considerable period of time, so it is a form of continuous conduct, so if at some point, hypothetically, it was introduced a month before, in your view, The Law Society became dominant, but when it became dominant they maintained it, it is continuous conduct, it would be an abuse.

THE PRESIDENT: As from that point.

MR. WOOLFE: As from that point, once all the elements of the statutory wrong are in place, dominance and abuse, we have a claim.

THE PRESIDENT: If one thinks in practical terms, suppose that The Law Society has one product it mandates and the requirements of a tie are made out, it starts it in year 1, it is not dominant in year 1 so there is nothing to be criticised, or unlawful in it doing so, then

halfway through year 2 it becomes dominant, one might say it ought to be allowed a reasonable sort of time to readjust itself and that could be done under the head of objective justification that you can be justified in maintaining it for some time until you can next be expected to rethink; would that be a fair way of putting it?

MR. WOOLFE: Exactly, one could imagine ... but as you can see in Dr. Majumdar's statement he points to a rising market share and even he seems to concede it is finely balanced somewhat later on and, for instance, in respect of the mortgage fraud training, it is introduced in 2012, it is maintained in 2013 and they add another module, there is some decision to maintain it, then the update training is still a decision to maintain the earlier training, so you can see that it does continue and it is not sufficient merely to analyse whether The Law Society was dominant at the point it was introduced.

THE PRESIDENT: Yes, I understand that.

MR. WOOLFE: Subject to those points, sir, I think I would like to move on to comment on the evidence that was adduced by The Law Society in relation to objective justification.

We do say, and I will not spend very long on the point, because I think it will become amply apparent from cross-examination, that the absence of contemporaneous documents to support The Law Society's case on objective justification is a striking feature of the case.

The Law Society now relies very heavily on statements of belief and opinion in the witness statements of Mr. Smithers and Mr. Murphy and about those statements we would observe that they do have the tendency, when looking back at the contemporaneous material, to highlight perhaps one phrase from a document which they repeat in the statement which does not really fairly reflect the overall thrust of the rest of the material, or to discuss their belief and opinion and then refer to documents in the course of that, but when you actually look at the documents in question they simply bear in no relation to the statements of belief or opinion being expressed and we do suggest that there is a certain degree of ex post facto rationalisation going on, or a projection back of beliefs that are now held into the past.

Perhaps one typical example of that which I think -- I could be wrong, but I think Ms. Smith referred you to, is the report written dated 9 June for the membership board meeting on 24 June.

THE PRESIDENT: Which year?

MR. WOOLFE: Of 2010, I apologise, sir. That is at bundle D1, tab 16. This is a document that was cited by Mr. Smithers in connection with engagement with mortgage lenders and you can see on page 323 of that document there is a reference to a meeting with The Council of

Mortgage Lenders, reference to seeking high level overview of the project and so forth. However, this is the key point: if you turn over the page you can see what the elements of the scheme that was being thought about at that time were and training does not feature in it. For your note, for instance, this is discussed at paragraphs 53 to 55 of Mr. Smithers' statement and at paragraph 55 he says:

"The lenders were always at the heart of this project."

And insight into this paper.

Just to be clear, we are not disputing that The Law Society wanted to engage with lenders, what we are focusing on is this contention from The Law Society, in their case on objective justification, that what the lenders demand is that The Law Society is the only body that provides the training and we simply say there is no evidence of that in the documents, and insofar as the statements give that impression, it is often a feature of coupling together broad statements like that, "lenders were at the heart of the project", reference to a document and when you look at the document it does not actually substantiate that.

THE PRESIDENT: I think Mr. Smithers said, in answer I think to a question from me, that it was never considered or discussed with lenders --

MR. WOOLFE: Indeed, I was going to come to that.

THE PRESIDENT: -- the idea of using -- it just did not feature at all that there might be third party trainers. It was always being presented this way.

MR. WOOLFE: Indeed, sir.

THE PRESIDENT: Once training came in. At that point it had not, but it came in fairly soon.

MR. WOOLFE: Ms. Smith in closing pointed to the fact that I had cross-examined Mr. Smithers about the inclusion of a mandatory model for the SRO and how that was plan and she suggested that there was some confusion here because she said mandatory training for all fee-earners was included from the start of the scheme in the sense of once the scheme was actually launched there was a mandatory module in there, and we do not dispute that once it was launched it was in there but what we were trying to find out was when was that decision taken to include mandatory modules for all fee-earners as opposed to just the SRO, and the only documentation which locates that is the Council meeting minutes of 10 November 2010 at bundle D2, tab 32 -- I will not take you to it, but you will recall, sir, that that is where a member of the Council suggests "Why do we not make all fee-earners do this training", and prior to that point there was nothing we have, and indeed nothing really after, explaining the reasoning process.

We make a similar point, sorry, in respect of the inclusion of anti-money laundering training and in respect of the inclusion of mortgage fraud training: there are simply no documents setting out why that decision was taken. All that Mr. Smithers actually says about it is at paragraph 16 of his statement, where he says:

> "In 2012 we decided to include the mortgage fraud module. Mortgage fraud was a key issue."

That is the top of page 4 of this statement. Then in 16(b):

> "In 2013 we decided to include an AML training module."

Perhaps it should more accurately say "for 2013", because the decision was taken in some point in late 2012.

> "... we decided to include an AML training module. The inclusion of AML training was a natural extension of the mortgage fraud training ... and we considered that conveyancing solicitors would benefit in receiving AML training tailored to the needs of conveyancers."

The point in issue is not whether conveyancing solicitors would benefit from AML training, nor indeed whether they would achieve some benefit by having mandatory training from The Law Society; the issue is whether that is actually necessary to the purposes of the scheme, which is a different one.

Mr. Smithers accepted that there was not detailed discussion in all of the documents regarding training. I would go rather further, which is to say there is no detailed discussion in any of the documents regarding training and submit that the overall impression that one gets, at its best, is that the solicitors who were being concerned with training at The Law Society -- I leave aside The Law Society staff for a minute, the solicitors -- were of the view that something should be done: this is something, therefore it should be done.

That is the position of the solicitors on committees and so forth.

As regards the position of Law Society staff we do call your attention to their awareness that tying training to accreditation schemes could be a driver of income and business for the training department and in that regard we rely upon the Katie Whatmore paper. That is at bundle E2, tab 5.

With those preliminaries I now will turn to market definition and dominance. I am going to try and take market definition and dominance fairly swiftly in order to get on to anti-competitive effect.

Our case, as you are aware, is that there has been a lot of heat about market definition and I think following the hot-tub yesterday it is now apparent there is quite a measure of common ground. We do not dissent from the proposition that it is relevant, or potentially relevant to look at lenders and see whether they might be a constraint on The Law Society. We did not think that they should form part of the relevant market definition. We think that it is simpler in terms of market definition, and sufficient, to analyse the CQS as what it is, which is an accreditation product supplied to solicitors. Indeed Mr. Murphy says at paragraph 8 of his statement:

> "The CQS is an accreditation mark for residential conveyancers in England and Wales."

We say that is what it is and that is what you should analyse it as.

Our case is that constraints from the lenders are not relevant to the abuse that is alleged in this case on the facts.

THE PRESIDENT: Is that the right question, that constraint is not relevant to this abuse? One could have a legal structure that worked that way, that for any particular abuse you say on that conduct it is their market power, but is not the rather simpler but perhaps bit easier approach of Article 102 to say the market definition is: is there dominance; if yes, then any conduct is proscribed; if no, then do what you like?

MR. WOOLFE: Yes, I agree. Let me put the point another way.

THE PRESIDENT: A lot of economists would agree with you that that might be the more appropriate question, but --

MR. WOOLFE: When you make a finding of dominance, dominance is the ability to act independently of customers and consumers, that is only a finding of an ability to act independently up to a point, hence the *Cellophane* fallacy and everything else, and this goes to the point you were addressing to the experts in the hot-tub, which is: dominance over price or dominance over quality, do you need both, or is one enough?

We would say any finding of dominance is a finding of a market power of a certain sphere. So you can reach a finding on dominance and it is not just binary are you dominant -- it is binary, you have to be dominant. But attached to that finding of dominance may be findings about the extent of dominance. Then you go on to consider abuse.

There are lots of contexts in which firms may not be in practice be able to exercise market power over price, or over quality, but can on the other. So for instance when a firm is subject to statutory regulation in some form it may be price regulated but able to exercise

market power by not supplying downstream competitors, or degrading quality, or something of this sort. It does not necessarily stop them having market power. So there is a certain sphere of dominance.

MR. ALLAN: I think you are going off onto a different tangent there because price regulation raises issues about mandatory compliance --

MR. WOOLFE: Yes.

MR. ALLAN: -- with applicable law and where that compliance is not in place then *Deutsche Telekom* tells us that abuse can still be relevant on the pricing point, so I am not sure you need to go there.

MR. WOOLFE: Okay, I am not sure I need to go there, but if you take the point that dominance will have a certain scope. It may be ability to raise price up to a point, it may be an ability to do with quality.

As regards the lender constraints, as Dr. Majumdar puts them, he only puts them as constraints on quality and that is clear from his points of disagreement between the experts. There is no suggestion that they act as an effective constraint on price and the questions you were asking about whether or not the price of the CQS was ever discussed with lenders go directly to that point. But even if they are relevant to constraints on quality, one can see that it is likely to be asymmetric and only up to a point. So they may be concerned about a very significant degradation in the quality of the scheme, insufficient probity checks or whatever it may be, but they would not be concerned if the price/quality mix was different in some other respects, so they would not necessarily care about gold-plating, for example. Perhaps that is an aspect of the price point.

We say if you put that together it -- I am going to come on to Mr. Williams' analysis, but essentially we do say that The Law Society would have market power over price in respect of solicitors and it would have market power, does have market power, we say, to force training upon them irrespective of whether or not they would otherwise choose to take it.

THE PRESIDENT: For example The Law Society could add a further module which the lenders do not regard as necessary --

MR. WOOLFE: Yes.

THE PRESIDENT: -- but The Law Society puts it in and all the solicitors have to buy it.

Lenders might say "Yes, I would be quite happy with that", but they would not say "This is not really necessary and you are therefore getting more money from the solicitors than is really necessary".

MR. WOOLFE: Exactly. For instance, something that we might agree is a good thing, like equality and diversity training, The Law Society might think "This is a good thing, we will try to get it for our members; let us use this, this might be for good reasons, as it were, let us try to get equality and diversity training, and we will charge them for it" that would be completely different.

THE PRESIDENT: Would be indifferent.

MR. WOOLFE: They would be completely indifferent. That is exactly the point, sir.

The next point I wanted to come to was Mr. Williams' analysis of forgone revenue and the related point, your debate with the experts about what is a must-have and what is simply an attractive product.

Simple point on Mr. Williams' statement -- it might help if you were to turn it up and it is in bundle B, tab 1, and if I can ask you to turn to paragraph 54 which is on page 19. I will not read it out, but he there sets out his analysis of what an average firm's conveyancing revenues might be and therefore, in terms of using share of mortgage lending, what dropping out of the CQS might mean for solicitors' revenues under various assumptions as to which lenders were in the scheme. Essentially the point coming out of that is at paragraph 56, the figures above 56, he points out that even with only Santander remaining in the scheme, Santander having a mortgage lending share of about 12 per cent of the market, it would cost a solicitors firm about £12,000 of lost revenue to come out of the CQS. He contrasts that with the cost of being in the CQS and points out essentially that you could have a price rise of the CQS that is very very substantial and in practice solicitors firms would still have to continue to purchase it.

I would just like to translate that for a moment. Dr. Majumdar sets out at page 16 of his report, which is at tab 2, the amount of mortgage lending that is covered in each year, from 2011 through to 2015. Clearly it is 0 per cent at the start of 2011, 2012 is 13 per cent, so that is a higher share of mortgage lending than is represented by Santander alone, so we would say Mr. Williams' analysis, his opinion that it is sufficient if Santander is in the scheme with 12 per cent of the mortgage lending, you have 13 per cent of mortgage lending from 2012 that is covered by the scheme, which I think is made up of HSBC and Clydesdale together. If Santander is sufficient and HSBC and Clydesdale together is sufficient, and they were on board collectively from around -- Clydesdale March 2012 and HSBC from August 2012, according to page 15 of Dr. Majumdar's report.

Dr. Majumdar's response is to argue that the CQS may simply be a very attractive product rather than a must-have and he said that a rise in quality may lead to a rise in price in a competitive market. With respect, we would say that that point does not really bear upon this for three reasons.

First of all, Mr. Williams' analysis is not a matter of looking at a case where you have one undertaking in a market with several competitors who has managed to raise the price of his product, for some reason, and ask whether or not that price rise is due to some loss of competition on the one hand, or due to a rise in quality on the other. What we are concerned with in this case is the point that you pointed out, sir, which is that The Law Society technically has 100 per cent share of the supply from some point in 2011, but at what point does that 100 per cent share of supply get translated into a real position of market power and it is in that context that we say that the right analysis is what Mr. Williams has done, which is to look at when could a solicitor realistically not be a member of it if he does a substantial amount of conveyancing?

THE PRESIDENT: But the lost -- and you say that is when, you say 13 per cent is enough?

MR. WOOLFE: Yes, we say that is enough because the amount of -- as you can see from Mr. Williams' analysis, a conveyancing solicitor will be losing thousands of pounds. If 12 per cent of mortgage lending equates to about £12,000, similarly 13 per cent will equate to about £13,000. The price of the CQS is in the order of a few hundred pounds and a SSNIP of that is in the region of perhaps £85 or more.

Even if The Law Society is right that the CQS may be loss-making, and we have some problems with that, but even if that is right you can just see as a matter of orders of magnitude the rise in price would have to be very very significant before it was realistically going to become an irrational business decision to take the CQS, if you see my point.

But the fundamental question is at what point would solicitors switching away exercise a constraint on The Law Society so that it did not institute the rise in price and we say realistically it would have to be raising price many times over before solicitors started to switch away sufficiently.

I will perhaps come on to our second submission, which is that the competitive price is normally related to the cost of supply, whether marginal cost or long-running incremental cost or whatever, and it is true, as the Tribunal pointed out, that in two-sided markets one does not necessarily require that the price on one side of the market or the other correlates to marginal cost and that is true. However, you have to remember here the price is only

being charged on one side of the market and if in practice that price could be raised several times over so that The Law Society would be in a position if it wanted to earn super-competitive profits, that would be sufficient for a finding of market power.

Thirdly we say Dr. Majumdar offered this point in a sense simply as a thought, or as a problem, without any empirical, quantitative analysis to actually show how it bore upon the facts of this case.

The Court also has very clear qualitative evidence on this from market participants. We have Mr. Hamilton's undisputed evidence, that is bundle C, tab 2, at paragraph 6, which says:

> "We joined the CQS because some major mortgage lenders had made CQS membership a pre-condition of being on their panel."

Mr. Smithers says in his statement it is important to conveyancing solicitors to be present on the panels of as many mortgage lenders as possible."

That is paragraph 27 of his statement.

In oral evidence the Tribunal asked Mr. Smithers what would happen if The Law Society raised the cost of CQS accreditation by, say, 20 per cent, which I may observe is more than is usually applied for a SSNIP test, and his evidence was that very few -- I think he might have said few solicitors would abandon it.

THE PRESIDENT: Do you have a reference for that?

MR. WOOLFE: Yes, transcript Day 2, page 75, line 12.

There is also the article exhibited to Mr. George's statement -- that is bundle C1, tab 3 -- by Dame Janet Paraskeva, which states that the CQS has become mandatory. So that is another view of a market participant.

THE PRESIDENT: That is dated?

MR. WOOLFE: That is -- good question, sir. That is from this year, sir, 30 June 2016.

MS. SMITH: Can you say who she is?

MR. WOOLFE: She is the Chairwoman of the Council for Licensed Conveyancers and a past Chief Executive of The Law Society of England and Wales.

THE PRESIDENT: But 2016, I mean that is --

MR. WOOLFE: Yes, it is.

THE PRESIDENT: Even Dr. Majumdar -- I say "even", but Dr. Majumdar accepted by 2015 it is -- or 2016 that -- although he did not like the expression "a must-have", it is something that

would be difficult for a solicitor to do without, and he then went to look at countervailing constraints, so I am not sure this article helps on the earlier years.

MR. WOOLFE: No, it could only apply from this date, but it is helpful to have something that somebody said not in the context of this litigation.

THE PRESIDENT: Oh yes, that is true.

MR. WOOLFE: Then it is also important to bear in mind as a point of context the fact that solicitors would lose out by having to inform clients that they cannot do conveyancing work, so it is not just a matter of the forgone revenue on those transactions, but the lost opportunity to sell other services to them, and also the embarrassment and loss of reputation from saying "We cannot help you".

In respect of that, I will give you a reference at bundle D1, tab 11, and there are three documents behind that tab divided by pink sheets of paper. It is the second document in the tab which is a paper prepared for the LAPB meeting in January 2010 and it was the paper which presented the membership scheme and it was pointed out in that that:

> "Conveyancing is only part of the work done by a firm and the income from this area is often central to the viability of the firm. Conveyancing is also a critically important step in securing future business."

So clearly The Law Society understood at that point in 2010 that conveyancing may sometimes be a gateway to other services.

Now, there was the position of the alternative quality assurance products that The Law Society -- of course I am not going to spend very long on those -- Lender Exchange and Legal Management Services. We do say they are very different in nature, they are not an accreditation scheme.

Perhaps if we just observe one thing though, which is there is a tension here again in The Law Society's case between what they say on market definition and dominance about these kind of services and what they say under objective justification, because under objective justification they say "Lenders are terribly interested in training, it is very important to them, we cannot offer them something that does not include training" and yet under market definition and dominance they are saying "Oh, but lenders might switch to Lender Exchange and Legal Management Services", who do not supply training. You can see there is an inconsistency in the way they put their case. We say that those are in fact complements.

As regards supply substitution our case is that it is not a relevant constraint given the time period that would be required for it to come on board, particularly if it is the case that supply substitution would have to include some oversight of training, which a lender might find harder to procure, and we rely upon the evidence of Mr. Williams both in his report at paragraph 72 to 74 and 80 to 81, and also his answers in response to your questions to the Tribunal yesterday. I am afraid I do not have the transcript references for those, but I hope the Tribunal will recall that he said supply substitution was not a relevant constraint as at the time in question.

Moving now to the relevant downstream market. I also propose to be fairly short on this. We say that the scope of the relevant market is not something the Tribunal has to reach a final decision on, but we do say that for reasons both related to supply and demand, the market for AML training to law firms is distinct from the market for AML training to accountants and estate agents.

In Mr. George's second witness statement, paragraph 3, he points out they have different AML products for accountancy firms, AML for accountancy is quite distinct because accountants do not handle money and so forth. Just by way of comparison, the training for the law firms is available in the bundle at bundle C1, tab 5, and C1, tab 7. That is the general AML training and the module for property lawyers. Then the comparable training for accountants and estate agents is at bundle E1, tabs 1 and 2, and we say that the scenarios that are put forward are quite distinct in those.

Mr. George's oral evidence was that it took quite a lot of work to come up with those specific scenarios and that he in fact worked with, for instance, a firm of accountants -- I think he said MacIntyre Hudson -- the transcript reference where you can see it is Day 1 page 62, line 11, through to page 63, line 2.

Mr. George's evidence is also that demand from international law firms is quite distinct, they have different needs and he says that at paragraphs 4 and 16 of his second witness statement. At paragraph 4 he also says:

> "AML training for estate agents is a very different product."

So we do say that the scope of the downstream market is restricted to AML for law firms because of their distinct needs, but in any event we say it is not material to the point the Court has to decide.

THE PRESIDENT: Well, it is not material? We need to consider, do we not, whether the foreclosure effect is appreciable? That might mean how much of the downstream market is affected.

MR. WOOLFE: Yes.

THE PRESIDENT: It might be material for Mr. George's business, just as a pub tie can be material for a particular publican who is tied, but it would not have an appreciable effect unless you have the sort *Delimitis* accumulation --

MR. WOOLFE: Unless you have a network of -- yes, exactly.

THE PRESIDENT: -- and for that one therefore needs to look at the extent of it. It is only immaterial if you say "Well, even if the market is the broader market, it is still on any view appreciable".

MR. WOOLFE: Perhaps my answer will come out, because I am going to come on to --

THE PRESIDENT: That is speaking aloud, but that is the only way I can see it is immaterial.

MR. WOOLFE: I am going to come on to my submissions on appreciability in a moment, both as to whether or not it applies but then also if it does apply how it applies on the facts of the particular case, and as regards the second point I would say that where an undertaking effectively segments a market, a contractor says "You must take this from us", and it is substantial, that on the circumstances of this case -- now, in the *Delimitis* sense that may or may not have a restrictive effect if you are looking at that *Delimitis* type analysis, but we say on the facts of this case, if you are looking at appreciability then the best -- where you are looking at a tying -- not product exclusivity, which is *Delimitis*, but in a tying case when you are effectively forcing from one product to another, that appreciability may best be measured by the number of firms who are affected in absolute terms and the question is just is it de minimis and if it affects thousands of firms who are an important part of a distinct market it is not necessarily a question of looking just at market share figures.

THE PRESIDENT: Yes.

MR. WOOLFE: But can I come on to appreciability and then we will see ...

THE PRESIDENT: Yes.

MR. WOOLFE: Now, sir, as regards the general test for an abuse, or this abuse, I emphasised in opening that the relevant test is whether the conduct tends to restrict competition. That is the formulation used by the Court of first instance in *British Airways v The Commission*. The formulation there was tends to restrict competition, or in other words that the conduct is capable of having, or likely to have such an effect. We do say that it is good to bear in mind

the words "tends to restrict" or "is capable of restricting", as a counterpoint to "likely to have", because the temptation with the word "likely" is to stray into a "is it likely on the balance of probabilities that it actually has anti-competitive effect", which effectively amounts to a finding of "Does it have an effect", and since it is explicit in the case law that one does not have to prove actual effect, you should not slide into that kind of analysis necessarily.

Now, we do not say that the evidence of effect is irrelevant.

MR. ALLAN: Are there not two different questions: 1, is it necessary to prove an actual effect, to which the answer is clearly no it is not and The Law Society is not suggesting that; the second is what is the level of probability of an effect in the future, as to which -- and I would appreciate you comments on this -- the case law may have developed and if one looks at the more recent cases like Post Danmark II where the word "likely" appears and I think I am right in saying that the Advocate General, Advocate General Kokott, not known for being particularly liberal in these matters, said that "likely" means "more likely than not". I do not think the court particularly adopted that, but it might be indicative.

MR. WOOLFE: Our case in respect of tying, and I am going to develop this in a moment, is that you do not have to prove actual effect, you do have to prove a tendency to have an effect; and it cannot be fanciful, it has to be real. But in having regard to that, evidence that there may be an effect or otherwise is only one factor that goes into the mix and it is legitimate for the court to have regard to the nature of the conduct that is actually at issue. That is the submission I am going to develop. The court clearly has to be sufficiently persuaded that it is capable in a real sense, in the real world of having anti-competitive effect; that is what we say the test is.

On appreciability, which I am going to come on to, we say it is important to realise it is not a concept which requires the court to assess the degree of harm actually caused to market participants, it is a matter of evaluation, looking at the nature of the restrictive conduct in its market context and asking this very point: does it in a real sense amount to a restriction of competition.

I am going to refer briefly to a number of authorities, some of which are in the bundles and some of which are not. I may or may not bother handing you copies of the ones that are not because I think you will be very well familiar with them, but I can supply them if you want.

The first is the *Völk v Vervaecke* case, where if you recall the market shares in issue there were extremely low, in the region of a fraction of a per cent, and that was the context in

which the Court of Justice first referred to the concept, although if you recall it was slightly unclear in the judgment when you look at it whether it is appreciability in respect of effect on trade, or effect on competition, but it sort of blends the two together and comes up with the appreciability concept.

Ms. Smith pointed out, and I entirely accept this, that as it has developed it has tended to be looked at through market share, that has been the predominant mode of looking at it, and that is apparent in the Commission's notice on market definition as well.

As you will also recall in the *Expedia* case it was held that the appreciability requirement does not apply to an object restriction under Chapter I, simply for your note. In the interests of time I am not going to go through that.

It is also the case, as Ms. Smith pointed out, there are various authorities where they go through not just market share, but also other factors relating to the structure of the market. Its concentration, structural factors that make it more or less competitive. There is a context for assessing the restriction.

Then on a very small number of occasions the court sometimes looks more closely at the actual -- if I can say the conduct itself, rather than looking at it in terms of market shares. An example of that is this case called *Pavlov*, which I am going to hand up three copies of that, because you asked for some assistance on how it can be applied. (Handed).

The reason for drawing your attention to this is because the question you are asking is how do you take over the appreciability test from Chapter I and apply it in Chapter II and you think it would be the same and I am not saying it is any different in principle, however the case law is not of any great assistance in working out what it should be because it predominantly talks about market share, whereas of course when you are in the dominance -- it is often what share of the market is covered by the restrictions in question. If you are in a dominance case, you can see why appreciability in one sense does not arise because you have already got somebody with a sufficiently large market share to be dominant. So looking at appreciability through the lens of market share is not something that makes much sense when you translate it over to Chapter II.

THE PRESIDENT: Well, just pause a moment. If the effect of the abuse is in the dominated market --

MR. WOOLFE: Appreciability does not apply.

THE PRESIDENT: -- appreciability does not apply.

MR. WOOLFE: In fact there is a consistency there when you think about it, yes, that makes sense.

THE PRESIDENT: It only applies, on my view at the moment, if it is a related market case where there is not dominance. So you could apply market shares because you can look at the share of the tying supplier, which is not a dominant share in the related market, it is a share of whatever. I mean take the *Google* case, Google Maps had a certain share of the online mapping market where Google was not dominant and one could look at that share and say "Well, on that basis is that the be all and end all of appreciability. It is not the approach they took.

MR. WOOLFE: I am going to come on to talk -- I will be submitting to you that *Google* is a slightly different case from this and I will come on to that in a moment.

THE PRESIDENT: Yes, it is, but I am just saying you could apply market shares in a sense to say --

MR. WOOLFE: Yes. In that case where the conduct is effectively entirely pro competitive on one market and its only restrictive effect is said to take place on this secondary market, yes, it can make sense to look at market shares in that other market, but one of the things I am going to be submitting to you is that tying is not quite like that, because tying is not something that is normal pro competitive conduct on one market that merely incidentally happens to have some effect in some other separate market, tying is conduct which takes place on both markets and it is direct use of market power on the first market.

I simply draw your attention to *Pavlov* because the submissions that have developed by The Law Society on appreciability seem to be related not to insufficient market share, but rather their case is that harm does not seem to be eventuating, and they are looking at it in terms of its effect on Mr. George's business. *Pavlov* was a case where the Court did look not just at market share, in fact it did not really look at market share at all, but mechanism of harm in considering whether or not the restriction was appreciable and so therefore I call it to your attention.

I will briefly summarise it. It was a case involving Dutch rules that required members of liberal professions to be members of specific occupational pension schemes and certain medical specialists did not like being forced to be a member of a certain pension fund and they wanted to be granted an exemption. A lot of the issues, a bit like in the *OTOC* case, were about whether this was an undertaking or not and so on, but a question about competitive effect did arise and you can see that I think at paragraph 57.

The question arose under Article 85 as it then was, now Article 101.

Just to run through it, at paragraph 58 it was decided that it was a decision by an association of undertakings, so it fell within Article 85 for that reason. At paragraph 68 the court found that it did not fall within an exception that applied to collective bargaining agreements between the industry and so on. At paragraph 80 -- it held it did not fall outside of 85 for that reason. At paragraph 81 the court decided that the medical specialists were not acting as final consumers in this regard, so therefore it fell within 85 on that ground as well. Then at paragraph 90 they turn to consider object and effect.

At paragraph 93 you can see in that case the hypothesis they were considering about whether or not it was restrictive effect, which was essentially that it harmonised parts of part of the members' costs, and if you are aware, that cost harmonisation can lead to restrictive effect only insofar as it has an effect on downstream price. That is the usual sort of theory of harm in that respect. Then what they say at paragraphs 94 to 97 essentially is that that is so insignificant in the context of that market as a cost component, it is not going to feed through to price and therefore it is not appreciable.

I simply call that to your attention as a case where they looked at appreciability without looking at market share and I would submit that all they really did was to point out, in terms of appreciability, whether or not the mechanism of harm was plausible or not in that case. Therefore I call your attention to that, if you find yourselves casting around for what to do without market shares, that is an approach.

Now if I can return to the *Google* case. You are more familiar with it than anybody, sir.

THE PRESIDENT: Well, we are a tribunal of three.

MR. WOOLFE: It is in the authorities bundles, in the second volume of the authorities bundle, at tab 23.

The facts I would submit are important. Google was offering -- there are two markets that are apparent from paragraph 8 through to 21 and there was the search product and the online mapping product and as -- I think it is a very key paragraph of the judgment, paragraph 21, where the court pointed out that there are various ways in which a user can access online maps. So one of them is typing a geographical query into a general search engine, which would be "London" or something of that sort. Another would be typing in the name of the mapping provider you want to get to, so you might type in "Streetmap". Then you can also type in the website address of the mapping provider directly, and then we have APIs as well, which appear on other websites. Then also it is worth pointing out at paragraph 23,

smartphone apps as well. So essentially there were a whole series of gateways to online mapping.

The issue in the case was fundamentally whether or not something Google had done to improve its search product to make it more responsive to consumers' needs had incidentally blocked off one of those gateways to such an extent there was an appreciable effect. As it panned out on the case what it really boiled down to was the causal link between that conduct and the undoubted failure of Streetmap's business, and at the risk of oversimplifying the judgment somewhat, the thrust of the judgment is that the evidence simply did not bear out the proposition that blocking off that one gateway had actually caused the collapse, and one of the reasons for that was simply the lack of coincidence in time of the various effects.

It is also perhaps worth putting how the case was pleaded as well. That was not a tie-in case. It was put in part as a tie-in case, but effectively the court was analysing it as a case of discriminatory effect. So it was a case in which the only -- it was alleged effectively in order to be pro competitive on one market and not in any sense abusive in respect of the search market, but only to fall within Article 102 or Chapter II by reason of its effect on the other market.

We say the position in this case is a different one, in that The Law Society has not simply done something on the market for accreditation that happened to have had some effect on the market for training, it is very specifically -- in its supplier accreditation on the market for accreditation, it is tying training to that. It is requiring solicitors to purchase that from The Law Society and they are paying over real money for that. Tying in that sense has both potentially an exclusionary effect on the related market, but also to some extent an exploitative effect on the tied market as well. So we do say it does not quite fall within the framework of Google, which is a case where there is a clear distinction between pro competitive conduct in one market and anti-competitive effect on another.

Perhaps if I can also point out the case of *Hilti*, with which you will be amply familiar, and that is in volume 1 of the authorities bundles at tab 7. There were various allegations of abuse in that case. It was not simply a contractual tie case, it was also -- it was refusing to sell cartridge strips without nails in them, that is paragraph 5 of the judgment, and they were refusing to supply licences to people who might compete downstream on the market for cartridge strips I think. Perhaps it might be worth getting *Hilti* out to look at this.

THE PRESIDENT: It is F1, is it?

MR. WOOLFE: Yes, it is bundle 1, tab 7.

The conduct is set out in paragraph 8 of the judgment on page 22 of the report and you can see points 1 through to 8, but the whole thrust of that conduct was to prevent entry into the market for nails essentially and a component of that conduct was tying. So you therefore have a undertaking being dominant on one market and pursuing a course of conduct which spans both markets effectively.

If you run forward to paragraphs 99 to 101, which are on pages 45 and 46, and you will see at paragraph 101 much of this was actually acknowledged in the end to be an abuse by *Hilti*, so I do accept there is a limit to how far this goes in respect of tie in specifically.

But if you can see how the court dealt with the refusal to supply licences, at paragraph 99:

> "The Court observes that it is clear from documents before it ...(Reading to the words)... six times higher than the figure ultimately appointed."

So demanded an unreasonable sum:

> "A reasonable trader, as Hilti claimed to have been ...(Reading to the words)... undeniably constitutes an abuse."

So it is looking at the features of the behaviour, which are -- it is a refusal to supply a licence, but one might say the anti-competitive effect would find itself on the downstream market to which the licences would be used, but a finding of abuse is made simply on the basis that Hilti is acting unreasonably, is acting in a way that differs from normal competition, which is the definition of an abuse.

The next paragraph is regarding selective discriminatory policy towards their competitors and their customers:

> "The strategy employed by Hilti ...(Reading to the words)... from establishing themselves in the market."

Now, I appreciate these are findings of fact in that case, but my point is simply this: an appreciability analysis has not previously been applied in tie-in cases under Article 102, or comparable cases, even though they do have this feature of having both a dominated market and a related market, and therefore I would submit it is not enough simply to say "Well, part of the allegation is effect on related market, therefore appreciability applies".

MR. ALLAN: Should we be a little bit cautious about reading too much into the fact that the court has not addressed a particular point?

MR. WOOLFE: Yes.

MR. ALLAN: Just quickly looking at, for example, paragraph 96 onwards, basically arguments of the parties, I do not think *Hilti* put the issue of appreciability in issue, so one in those circumstances might expect the court not to address the point.

MR. WOOLFE: Indeed, but *Google* in a sense was -- it arose in a sense as a novel point because it was being raised -- appreciability had generally been understood to be excluded by the case law and the question is on the particular facts of *Google* what was it that took *Google* outside the scope of that case law. The case law that is referred to specifically focused on the fact that competition on the dominated market is already distorted and therefore any further distortion is a bad thing.

The point I am making is this, that tying is conduct that takes place on both the dominated tie-in market and the other tied market, the conduct spans both of them, and it is exclusionary on the tied market potentially and exploitative on the tie-in market as well, so it does have both aspects to it.

Another point is it has not to my knowledge ever been put that an exploitive abuse has to meet a threshold of appreciability on the dominated market either, so ...

So we do say that *Google* can be distinguished on the facts, but I would like now, if I can, to come on to the actual facts and anti-competitive effect, because our case is that there is appreciable anti-competitive effect, not simply that you do not need to worry about it.

THE PRESIDENT: Would that be a sensible point to take a break?

MR. WOOLFE: I think it probably would be, yes.

THE PRESIDENT: We will take five minutes.

Has your paper arrived? You said it was just being produced.

MS. SMITH: Yes, it is now available, apologies for the delay.

THE PRESIDENT: Perhaps we can take it with us and have a quick look.

MS. SMITH: Mr. Woolfe and his client can have a look at it over the short break as well.

(Handed).

What it effectively does is in table 2 -- table 1 is as before and table 2 are the four figures for training income calculated on the basis of the upper bound of 90 per cent of the CPD Centre training income and then on the second page is effectively the explanation I gave orally this morning to the Tribunal.

THE PRESIDENT: Yes.

MS. SMITH: The confidential figures, I should stress, at the bottom of pages 2 and 3, they are forecasts and recent income figures which again are subject not only to confidentiality but

also the fact that they are still subject to finalisation and auditing, but they give you a feel for the figures now and going forward.

What we have not done in this document is any analysis of what the impact might be on costs. We had a discussion earlier about that.

THE PRESIDENT: No, we said we did not expect you to do that. Right, thank you.

Fine, keep it to five minutes.

Mr. Woolfe, we can go until 5 o'clock, we really cannot go any longer.

MR. WOOLFE: I do not see a problem with that.

(3.35 pm) (A short break)

(3.50 pm)

MR. WOOLFE: Sir, moving now to anti-competitive effect, I propose to deal with this under two headings: the first is a submission that you can infer by the very nature of the tie that it is capable of having an anti-competitive effect, and the second is the factual analyses, and under those I will submit that there is, when you look at them carefully, evidence on which you can safely infer that there is likely to be an appreciable anti-competitive effect.

To begin by just looking at the nature of the training requirement itself, the first point is that there can be no doubt that the purchasing behaviour of solicitors firms is being affected. Thousands of firms are contractually bound to purchase training, including AML training, starting from 2013. AML is a component of financial crime now for new joiners, they are contractually bound to purchase that training from The Law Society. The numbers are given -- Mr. Smithers took you to paragraph 59 of Dr. Majumdar's expert report -- that is bundle B, tab 2, paragraph 59 -- to pick two numbers, 1,787 firms in 2012, 2,607 firms in 2013 and over 3,000 firms now. So there is no doubt that a substantial number of firms, representing tens of thousands of solicitors, are being affected by this tie-in requirement.

Second point, it has not been argued by The Law Society that solicitors would have bought this training from The Law Society anyway. There is no absence of effect on behaviour argument from The Law Society. For what it is worth, in Mr. Murphy's first statement at paragraph 116, paragraphs (c) to (d), he sets out the evidence from the roadshows where over a third of solicitors did not even find The Law Society's training helpful and one would think that is a minimum condition for solicitors purchasing it from The Law Society at all, let alone whether they actually thought a competitor would do it better or not.

Mr. Hamilton's uncontested evidence at paragraph 29 of his statement, that is bundle C, tab 2, is that he says:

"It is not likely that I would have bought AML mortgage fraud or other training from The Law Society if we had not been required to do so within the CQS rules."

So a large number of firms are doing something they would not have done otherwise.

The third point is The Law Society itself anticipated that tying training to accreditation schemes would take training business away from their competitors and that is the Whatmore paper, bundle E2, tab 5. They foresaw, I quote, "huge potential increases in income" and they expressed concern about "leaving significant commercial opportunities to commercial training providers". They felt if they did not tie they were leaving these opportunities out there, but they could get them by the tying.

You can get a sense of the materiality of this by looking at the revenue in question. We now have The Law Society's updated schedule, for what it is worth. I submit that even on the old basis, ramping up to a training income of [CONFIDENTIAL] by 2015, it is substantial, and even more so if one looks at the upper bound estimates at the lower part of this page.

One can see that bearing in mind many of these solicitors would not have purchased that training from The Law Society had it not been for the fact that it was mandatory, you can see that there is a very substantial effect in terms of cost for those solicitors.

One might appreciate not all of that income relates to anti-money laundering, some of it relates to CQS protocol and so forth, but one could compare those figures to the turnover of Socrates, which is in the evidence as £750,000, Mr. George's first statement, paragraph 6, and Mr. George's second statement at paragraph 17 states -- and this was not contested -- that Socrates is the leading provider in the AML market and so if the leading provider has a turnover of about 750,000 one can see that the amounts of revenue that are being taken out of that market are pretty significant.

The final point on the argument that simply by its nature one can look at this conduct and conclude that it affects competition is the similarity of the training provided by Socrates and The Law Society and the evidence -- the uncontested evidence that the training competes directly with Socrates' product. In Mr. George's second statement at paragraph 67(a) he refers to The Law Society's training as standard AML training, at 67 and 69 to 74 of the same statement he points out that it competes directly with his product and he goes through the features of it.

Ms. Smith did ask Mr. George questions about the training from the point of view of testing whether or not there might be supply side substitutability, but I do not think that she contended that his training would not adequately train for AML.

At paragraph 24 of Mr. Hamilton's statement his evidence is that he regarded The Law Society's training as designed to enable firms to comply with the Money Laundering Regulations. Now, whether or not it was intentionally designed to do so is another question, but from the point of view of somebody who is running a firm where they are actually purchasing the training, he saw it as something which would fulfil for that year, for that period, his requirement for Money Laundering Regulations.

You also have his evidence at paragraph 28 of the same statement, unchallenged, that he would have resumed to purchase his from Socrates sooner had he not been obliged to buy from The Law Society, and at paragraph 29 of the same statement -- sorry, let me just check -- I think Ms. Smith did take you to paragraph 29, but I think it is a significant point. At paragraph 29 he says it is not likely that he would have bought AML mortgage fraud or other training from The Law Society:

> "... if we had not been required to do so by the CQS rules ...(Reading to the words)... commercial sense to buy both services."

The point there is that it is not simply a matter of access to the market, buyers' behaviour is being affected and competition is no longer taking place on the merits. So one can imagine if somebody comes up with innovative anti-money laundering training, this tie has the effect that solicitors cannot choose to purchase money laundering training which they think better meets -- well, they can choose to purchase money laundering training that might better fit their needs but they are unlikely to do so, whereas in a free and unrestricted market without the tie, they may well have done.

THE PRESIDENT: So have I understood it, your point is that you are not challenging the CQS, we know that, you are not challenging a requirement in the CQS that a member should have anti-money laundering training appropriate for residential conveyancing, that either duplicated, or perhaps on The Law Society's case was more specialised than the general AML training that solicitors need to have for regulatory reasons, so it created this new demand/requirement which is substantial, as one can see from the income, and that new demand was reserved to The Law Society.

MR. WOOLFE: Exactly.

THE PRESIDENT: That is the point you are making --

MR. WOOLFE: That is precisely the point.
THE PRESIDENT: -- and it is an appreciable demand.
MR. WOOLFE: That is why the analogy with the *OTOC* case is, we say, a good one and also why we say appreciability is satisfied simply by looking at the number of firms, because in a sense you have this -- the issue is what is the counterfactual, and the counterfactual is not no CQS, the counterfactual is, we say, the CQS but without the requirement that the training be purchased from The Law Society, therefore you have to look at the world with this bit of demand in and that bit of demand has been exclusively reserved to The Law Society, and this is where *OTOC* comes in because if you segment a market and take a chunk of it for yourself, in a sense it does not make sense to look at market share because you have taken -- you have now created a sort of sub-market of your own and the question is simply whether that sub-market is sufficiently large to be worth worrying about.
MR. ALLAN: Are you then going as far as to say actually we do not even need to look at the effect on Socrates' business because the fact that there is a requirement to purchase training from The Law Society itself establishes an anti-competitive tie?
MR. WOOLFE: Well, a solicitor could turn up and, I would say, run a case on abuse without having to worry about the effect on Socrates' business, however we are concerned about the effect on Socrates' business because that is the way we have put our case and also because ultimately we seek damages.
THE PRESIDENT: Well, damages is a different -- damages is obviously only concerned with the effect on Socrates.
MR. WOOLFE: Absolutely, but if there is no anti-competitive effect in relation to some training then no, no damage could arise to Socrates, if you see my point.
But going back to the point, the correct counterfactual is to look at the world with the CQS but without the requirement that the training is purchased from The Law Society and in that world this income, as set out in The Law Society schedule, which we know is bounded in some way --
MS. SMITH: Of course that is the income for all training -- I am starting to get a bit confused now. That was the income for all training and Mr. Woolfe made it absolutely clear that his case is limited to AML.
MR. WOOLFE: I accept that.
THE PRESIDENT: Mr. Woolfe said it cannot be all that income but he is saying --
MS. SMITH: Of course not. It is a small portion of that.

THE PRESIDENT: -- it is a part of it.

MR. WOOLFE: One would expect it to be zero of that in 2011 and potentially quite a significant proportion in other years but we do not know precisely, we do not have the information. No, I fully accept that.

The point is that Socrates would have had the chance to compete to meet that demand and it has been denied the chance to do so. So you can simply say: look at that, it has not had the chance to do that, that is an anti-competitive effect.

I want to move on to the factual analyses. The point that I was going to preface them with is the one that I have just covered, which is you have to be careful with eliding anti-competitive effect on the one hand with harm to Socrates' business on the other, because Socrates is only one market participant, and beyond that you have to be careful about eliding anti-competitive effect with evidence of specific cancellations in the past, because, as I say, if you are looking at the counterfactual as a matter of Socrates could have had access to this additional demand and if you are looking at simply losses over time, it is a matter not only of cancellations but also of people who did not join who otherwise would have done and so you have to consider both of these.

I am going to give you two points of context which we need to have before we look at the factual analyses, one of which is the one I have already covered, which is paragraph 59 of Dr. Majumdar's report, where he sets out the growth in the number of CQS members over time from 2011 to 2014. We see a very sharp rise. So there is zero at the end of 2011, 864 by the end of that year; 1,787 by the end of 2012; 2,607 by the end of 2013, and then it continues to grow gradually up to a figure of about 3,000 thereafter, so growth is much slower, and it is important to realise very fast growth rate at the start and much slower at the end, although it continues.

You can sees how that translates in terms of Socrates' subscribers at the factual analysis prepared by Dr. Majumdar which I will take you to now and that is at tab 3 of bundle B, I would ask you to turn that up. If I can take you to page 5 -- this is page 5 in my version -- and table 3 is set out at the top and this is where Dr. Majumdar sets out in each year the number of subscribers that Socrates had, so these were on Socrates' list at some point in that year and those who were CQS accredited in that year and not CQS accredited in that year. I ask you to follow along the second line in that table and you can see that in 2011, 168 of Socrates' subscribers were CQS accredited. In 2012 -- sir, do you have the table? You should be in tab 3.

THE PRESIDENT: Yes.

MR. WOOLFE: The table is at the top of page 5.

THE PRESIDENT: Yes.

MR. WOOLFE: In the second line on that table, "CQS accredited subscribers", it starts off with 168, rises to 319, rises again to 415 and one can see that this is consistent with the rapid growth in the total number of CQS subscribers in the country. Socrates subscribers are law firms, some of them conveyancing firms, therefore as that population of firms across the country starts signing up to the CQS you see it reflected in Socrates' subscribers as well. Very rapid growth there.

However, whilst the number of firms in the CQS across the country, as set out at paragraph 59 of Dr. Majumdar's report, continued to grow from after 2013 in 2014, 2015, carried on going up from about 2,600 to about 3,000, you can see the number of CQS accredited subscribers to Socrates' service goes down and that is we would say a marked difference and an important one.

Just in terms of looking at this table, it is important to realise, if you look at for instance non-CQS accredited subscribers in any of those years, when that number is going down it may be going down for -- in a sense they may be disappearing from that group to one of any of three other groups. Firstly, they may be becoming CQS accredited but remaining with Socrates, in which case they would now appear in the second row. So you get some switching, one imagines. Secondly they may not get CQS accreditation but simply leave Socrates and thirdly they may take CQS accreditation and leave Socrates. It is just important to bear that in mind. We say that is partly why the percentages at the bottom, the percentage shares CQS accredited subscribers are apt to be somewhat misleading.

THE PRESIDENT: Is this the same definition of CQS accredited --

MR. WOOLFE: In table 2?

THE PRESIDENT: We are looking at table 3, are we not?

MR. WOOLFE: I am looking at table 3.

THE PRESIDENT: Is it the same definition that Mr. George used, in other words --

MS. SMITH: No.

MR. WOOLFE: I will come to that. I will come to his in a moment and I will explain to you what you can infer from his.

THE PRESIDENT: What is the --

MR. WOOLFE: Here, these are just were they CQS accredited in that year.

THE PRESIDENT: In that year.

MR. WOOLFE: Yes.

THE PRESIDENT: So this is -- right.

MR. WOOLFE: I believe this is were they CQS accredited at any point in that year. I believe.

THE PRESIDENT: Yes, thank you. So it really is CQS accredited.

MR. WOOLFE: Yes.

PROFESSOR WILKS: If I could also come in, Mr. Woolfe, while we are looking at the tables, I do not think at any point you have ever put an order of magnitude on the number of subscribers you think you have lost as a result of CQS and I wondered if you felt inclined to do so.

MR. WOOLFE: There are some -- Mr. George's table 2, as I am going to come to, has some cancellations and I will talk you through where those come from in a moment.

If you look at the proportion of share of CQS accredited subscribers, it appears to stabilise, but of course it stabilises as a proportion of a lower total number of subscribers, and indeed if there is an anti-competitive effect of the tying, this is precisely what you would expect to see as a pattern, which is the number of CQS accredited subscribers goes down and indeed the total stock of subscribers go down, because it is not a case of "Oh, well, these people do not become CQS accredited but remain with Socrates", because of course they become CQS accredited and then they leave, so the natural pattern would in fact be precisely what you see here from 2013, 2014, 2015, which is whereas the proportion of CQS firms in the market generally is rising, it is falling as a proportion of Socrates' subscribers and Socrates' total number of subscribers is falling as well.

Now if I can take you to Dr. Majumdar's table 2 and this is one of the ways in which The Law Society tried to show there is no effect and we submit that the analysis in net outflows is meaningless for two reasons. The first is the one that I put in cross-examination to Dr. Majumdar, which is you are matching an outflow from one year and an inflow from another year. That is the first reason. The second reason is the difference in the CQS accreditation conditions as applied between the two rows, and this is a highly important point.

So to take 2011/2012 as an example and to look at the second row in the table, table 2, this is CQS accredited firms that joined or rejoined Socrates, so in order for these 11 firms to qualify they are firms who joined Socrates at some point in 2012 and who are CQS accredited in both 2011 and 2012. That is the definition Dr. Majumdar applied to that line of his table.

Now, that number would be bigger if he had only asked how many firms joined in 2012 who were CQS accredited in 2012, irrespective of whether they were CQS accredited in 2011, and you can understand that because as we have already seen in the previous page, Socrates had many more subscribers who were CQS accredited in 2012 than in 2011. They had 319 CQS accredited subscribers in 2012, only 168 in 2011. So you can see that necessarily if you have got some of those -- assuming there are some subscribers in 2012, it is likely that that figure would be larger.

That same effect is probably going to be true across the 2011 to 2013 period when the CQS is growing rapidly, but it is not likely to be true later on in the period. So by reason of the use of that CQS accreditation condition in row 2 that does not apply to row 1 as well, it effectively tends to push down inflows in the early part of the period, but not in the later part of the period, and so if you are looking at, as Ms. Smith tried to do -- taking this net outflow figure which I say is not a proper outflow anyway, but tracking that over time when it has these effects that affect the inflows over time and you are comparing it as between the inflows and outflows, we say that simply you cannot infer anything from these net outflows, and you cannot infer anything from their pattern over time either.

If you do just look at line 1 in isolation you can see an effect which is consistent with what I have said about the total number of Socrates subscribers, which is a rising pattern of CQS accredited firms who failed to renew with Socrates in 2013/2014. You have a substantially higher number in that year and that, to be clear, means that their subscription lapsed at some point in 2013.

MR. ALLAN: In relation to the criticisms you make, are you saying that the failure to recognise some CQS accredited joiners of Socrates in the first few years runs out, or ceases to be significant in say 2013/2014?

MR. WOOLFE: I would say that because that is roughly when the growth rate levels off, in that it does not have the same -- if you are looking at the number of firms, going back to table 3, especially in Socrates subscriber terms, if you compare the 2011 and 2012 figures for CQS accredited subscribers you can see that there must be a lot of firms who are CQS accredited in 2012 who were not in 2011, but when you get to 2013/2014 there are not going to be so many firms who are CQS accredited.

MR. ALLAN: So that information is perhaps more useful to us, you would say, or you would accept, for 2013/2014 and 2014/2015? Just the second row.

MR. WOOLFE: Yes, it becomes closer to being what it appears to be, which is simply those firms who have CQS accreditation who join. But reliance is being placed on it for the pattern over time and that is my point, that actually looking at it over time will not work because of the CQS accreditation condition that has been applied.

MR. ALLAN: Yes, but I want to see how far we can rely on some part of it maybe.

MR. WOOLFE: Yes.

MR. ALLAN: Also in relation to your criticism about the matching in the net outflow calculation, do we address that essentially by -- I know we do not address your under-recording problem, but would we address the matching problem by shifting the figures in the second row one column to the right, so that 11 would match against 45, 22 would match against 58?

MR. WOOLFE: That in a sense would bring the failure to renew and the joiners into alignment.

MR. ALLAN: That is why I asked that question.

MR. WOOLFE: In that sense, yes, and then it would get rid of the mismatch point, yes.

MR. ALLAN: The mismatch.

MR. WOOLFE: It would deal with the mismatch, it would not deal with tracking of joiners over time problem.

MR. ALLAN: Dr. Majumdar might not agree with that as an appropriate thing to do, but we could at least see the dimensions of the impact if we were to test it that way.

MR. WOOLFE: That is right.

MR. ALLAN: Thank you.

MR. WOOLFE: Now turning to the renewal rates, those are set out in table 4 of Dr. Majumdar's report and it is important to appreciate that these rates are in a sense simply the flip-side of CQS cancellations and you can get that from table 5 on page 10 of his report. It does require a little bit of looking at but you can understand the two rows in that table. It is a question -- in the first row it is saying that in both A and B in that table it is a condition that they are CQS accredited in the second year, so you can see that in respect of 2011/2012 both are requiring firms to be CQS accredited in 2012, irrespective of whether they are CQS accredited in 2011 or not. Then the top line is saying they are on Socrates' subscribers lists in both years, 2011 and 2012, and the bottom line is they are on Socrates' subscriber list only in 2011. So just to understand what these figures actually are, if you go back to the 90 per cent that is in table 4 under 2011/2012, this means, for 2011, of those firms who subscribed to Socrates in 2011 and who were CQS accredited in 2012, how many of their

subscriptions lapsed in 2011 and how many carried on to 2012 and it is essentially saying that of those firms who subscribed to Socrates in 2011 and who were CQS accredited in 2012, 90 per cent continued to have a subscription in 2012, 10 per cent did not.

So again you would have this mismatch of time point. You can see a dip, for what it is worth, in the 2013/2014, which essentially means more subscriptions lapsed in 2013 than in other years proportionately.

But again, these are only proportions, you have this overall declining stock of firms as we have already seen in table 3, and we would say the second row of table 3 is really the most relevant evidence in the whole of Dr. Majumdar's report.

Now, I am going to come on to explain the relevance of the analysis carried out by Mr. George, if I may. The first thing I would like to do is to make clear what is meant by each year in this analysis. I wanted to be looking at figure 2, the latest version of figure 2 that Mr. George supplied.

MS. SMITH: Last night's letter.

MR. WOOLFE: Yes, this morning's letter.

I am going to talk through the columns and what they relate to and as you have seen --

THE PRESIDENT: Just one moment.

MR. WOOLFE: I have another clean copy here if needed. (Handed).

PROFESSOR WILKS: Thank you.

MR. WOOLFE: You have the years across the top, 2010, 2011, 2012 and so on, and I am going to talk through what CQS accredited means in a moment and why it is relevant, we will come to that. But simply as regards what each of the columns means, Mr. George explained in evidence and he clarified as well in a letter this morning, that each column indicates the number of firms which had an AML subscription with Socrates in the previous year, but did not have in the year that is shown here. So to take the figure for 2012, for example, this shows 129 cancellations. What that means is they do not appear at all on Socrates' subscriber list for 2012, they did appear on 2011. So to that extent, that one, the 2012 figure, would map on to Dr. Majumdar's 2011/2012 figure. So these actually mean that it is -- it is apt to confuse, but again the 2012 figure here actually means a subscription which lapsed in the course of 2011. I hope that is now clear.

So if you are looking at effects that actually started to happen in 2013, the column you start looking at is the 2014 column. I hope that is clear.

Now, just to explain the logic of why you can draw conclusions on the basis of these figures and the definition of CQS firms. What this analysis essentially does is to divide subscribers into two populations who are likely to have slightly distinct characteristics, and they are divided on the basis of are they ever in the CQS or not. There are two reasons to do that: one is to look at changes over time in what each population might be doing and the other is to enable comparisons to be drawn between the two populations. So there are two different types of comparisons our one is setting out to do.

Applying the criteria of were they ever in the CQS allows you to identify a population of firms with perhaps distinct characteristics. We know about these firms, that they must be conveyancing firms. We also know that they are firms who either at any point are signed up to the CQS or have the propensity to be signed up to the CQS because we know that they ultimately did. One can look over time at that group of firms and what their behaviour in terms of cancellations with Socrates is like.

Now, Ms. Smith in cross-examination and in submission made a lot of the fact that we do not know, she says, in any given year whether these firms are in the CQS or not. We say that concern is in a sense misplaced because we are not actually interested in whether the CQS rules applied to the firms in 2011 say, because nobody is suggesting that the launch of the CQS and firms merely being members of the CQS before there was a requirement to purchase anti-money laundering training, or mortgage fraud training came into effect -- nobody is suggesting that that mere fact is liable to affect their behaviour.

As regards the contention that we do not know if they are in the CQS or not, if you look for instance at the figure for 2014 of these CQS firms that cancelled, were they ever in the CQS, one can actually see from figure 1 of Mr. George's analysis, which is in the bundle, that in 2014, 60 firms who were actually in the CQS are identified as leaving in that year, so you can see that as time goes on, but because, as Professor Wilks pointed out, a lot of people are joining the CQS early on, very few people leave, we understand the renewal rate is something like 97 per cent, so as you get towards the period we are really interested in, the "in fact are they ever firms in the CQS", are firms that are in the CQS anyway.

But the reason for doing it --

THE PRESIDENT: Well, table 1, CQS firms leaving means firms that were in if the CQS at that time, is that right?

MR. WOOLFE: Yes, in the CQS in the year in which they do not figure in the subscriber list, yes.

THE PRESIDENT: So it is a different definition?
MR. WOOLFE: It is a different definition, yes. Mr. George did try to make clear what he had done and I appreciate that the rubrics in this table may have been confusing but he did try sincerely to convey the reasons for the analysis.
THE PRESIDENT: So what you are saying is that of the 2014 figure for "CQS firms cancelled", ie conveyancing firms cancelled, which is what it really means --
MR. WOOLFE: Well, sir, I would just pause there because I know Mr. George said that he saw it as a proxy for CQS firms, but I think it is important -- whatever his intent may have been --
THE PRESIDENT: Proxy for conveyancing firms.
MR. WOOLFE: That may have been his intent in doing it, but I think if we are looking at what inferences we can draw from it, it is important that we are precise about what it actually means: were they ever in the CQS, but of course there may be conveyancing firms in the non-CQS category as well who for some reason did not -- so it would -- what it actually is is firms who joined the CQS at some point, that is the criteria.
THE PRESIDENT: Okay, conveyancing firms who might be interested in the CQS.
The 68, which means, as I understand it, that they were subscribers in 2013, but no longer in 2014, is that right?
MR. WOOLFE: Sorry?
THE PRESIDENT: I am looking at 2014, the 68 were subscribers in 2013.
MR. WOOLFE: That is right, yes, and they no longer are in 2014, so subscription --
THE PRESIDENT: They are treated similarly, are they, as under 2014 of figure 1 --
MR. WOOLFE: In terms of allocating leavers to years, as in working out which column they come in, they are treated identically.
THE PRESIDENT: So that that 60 in figure 1 under 2014 is a subset of the 68 in figure 2?
MR. WOOLFE: Yes.
THE PRESIDENT: Is that right?
MR. WOOLFE: I believe that is right.
MS. SMITH: This is all rather --
MR. ALLAN: Although whether the -- those members are the 68 who were actually CQS subscribers in 2014.
MR. WOOLFE: Yes, so the --
MS. SMITH: I should just say this did not come out in Mr. George's evidence and it is certainly news to me about this new interpretation of the figures. I mean it is -- I know the figures

have been changing daily, but now we are changing how they were put together and really it is not an acceptable way of proceeding. This was not brought out in Mr. George's evidence that some figures are a subset of something else. There was absolutely no suggestion of that.

MR. WOOLFE: We had agreed, as I understood it, that the figures were going to be as they were prepared and we were going to make submissions as to how they should be interpreted.

MS. SMITH: Yes, you are now telling me what they mean which is not the evidence Mr. George gave, what they are actually made up of.

THE PRESIDENT: Well, I think it is always clear that some are a subset of the others, because some are the total number of firms and some are subscribing.

MR. WOOLFE: If I can put it as a matter of logic. Table 1 shows that 60 firms were identified as CQS firms leaving, so they are firms who were in the CQS in 2014 who ceased to subscribe, who were Socrates subscribers for that year. Now, those are firms who were ever in the CQS and therefore, as a matter of logic, they are a subset of the --

THE PRESIDENT: The 68?

MR. WOOLFE: The 68.

Now, what I want to come on to is what you can actually infer by looking across chronologically through time; this line of CQS firms cancelled.

So simply look at the number of firms: 55, 46, 54, 52 -- that is from 2010 through to 2013 -- and then you have a jump in the year that is labelled 2014 which, as we know, is subscribers whose subscription actually lapsed in 2013. Then you have a fallback to roughly the previous level and then a jump. Now, the 2016 figures, there are separate issues with those.

THE PRESIDENT: Yes, I think there are difficulties about those.

MR. WOOLFE: Yes, leave that to one side for the moment. But you can see, we say, a spike in CQS cancellations in that square.

Now, this is why the comparison is useful, because there may be many reasons why more firms may cancel in one year than another. Socrates may be better or worse at marketing in one particular year or whatever. There may be other pressures on performance and costs. But if you look at what is going on with the behaviour of non-CQS firms, the firms who we know for a fact were never in the CQS and therefore were never subject to the time rule, we can see there is some volatility, but there is no similar spike in 2014.

So we see, we say, quite -- you have quite a distinct spike, looking along the behaviour of CQS firms, firms who were ever in the CQS, of whom we know many were actually in the

CQS in 2015, and no comparable spike in respect of non-CQS firms. We say that also is consistent with there being an anti-competitive effect with the anti-money laundering training.

Sir, can I just check one reference? (Pause).

So --

THE PRESIDENT: I appreciate the spike is greater, but there is a spike in non-CQS firms cancelling as well. So there is something --

MR. WOOLFE: In ...?

THE PRESIDENT: In the year you are looking at, 2014.

MR. WOOLFE: There is a --

THE PRESIDENT: A peak?

MR. WOOLFE: It goes up by 5, from 48 in the previous year.

THE PRESIDENT: You say: well, there was a spike, a more significant one in 2012.

MR. WOOLFE: Yes.

THE PRESIDENT: But there are obviously certain factors that are causing firms, irrespective of CQS, to leave, it seems.

MR. WOOLFE: Precisely. This is an attempt to separate out the effect of the CQS condition, the training requirement, from other factors; that is essentially what this analysis is trying to do. So Ms. Smith in cross-examination made it -- we should bear in mind Mr. George's explanations in response to Ms. Smith's questions. Mr. George is not an expert. He is not used to being cross-examined on data analysis. What I would ask you to do is to look at the calculations as they are done and see what inferences you could draw from them.

THE PRESIDENT: I appreciate, of course, Mr. George is not an expert. But this is the evidence --

MR. WOOLFE: Yes.

THE PRESIDENT: -- for which we are being asked to find effect, so we just have to assess it for its strength.

MR. WOOLFE: Yes, exactly.

THE PRESIDENT: Not for the fact that certain mistakes were made that perhaps have been corrected and may allow for that. But all I am saying is: there are clearly various factors that would cause firms to cancel, as you would expect.

MR. WOOLFE: Yes.

THE PRESIDENT: But that have nothing to do with the CQS. One can see that from the -- well, certainly 2012, the non-CQS firms cancelling.

MR. WOOLFE: Yes.

THE PRESIDENT: There is a great spike.

MR. WOOLFE: Again --

THE PRESIDENT: Again, it is nothing to do with the facts of this case. Something was going on.

MR. WOOLFE: Yes.

THE PRESIDENT: We do not know. So the fact that there are occasional spikes seems to be a pattern of the behaviour of this client base, and of just a few firms here or there or firms going out of business or firms merging can radically affect the figures, because a difference of five makes a difference on this sort of pool. That is all I am saying.

MR. WOOLFE: Yes, sir.

What I wanted to make clear was: Mr. George has led you(?) as to how he compiled the figures, by the interpretation of this, what we are talking about now. So yes, my submissions will be that if you look at -- there is obviously some relatively small data-set and a relatively small series over time. It is not 20 years of month-by-month sales data or something. We have got half a dozen years.

MR. ALLAN: If you take them all together, both categories, it is a highly heterogeneous set. If you were doing a robust regression analysis of this to identify whether CQS membership is the proximate explanatory factor, you would test for an awful lot of other variables, wouldn't you?

MR. WOOLFE: Yes, so one -- (Overspeaking)

MR. ALLAN: (Overspeaking) What modification(?) practice would do, and so on and so forth.

MR. WOOLFE: One might do all kinds of things, if one --

MR. ALLAN: Until you have done that, how much weight can you put on it.

MR. WOOLFE: In a sense, we say the quite clear evidence comes out of Dr. Majumdar's table, where we see the total number of people who are subscribers of Socrates, who are CQS subscribers in that year. We see a rising trend where the CQS population of the country grows, but then while the CQS population of the country carries on rising, it falls off for Socrates. We say that is, in fact, probably the best evidence about it there.

THE PRESIDENT: I appreciate you made that point. Technically table 3 --

MR. WOOLFE: All things -- if one can see that, it is consistent with that picture. We do appear to have a fairly steady cancellation behaviour of CQS firms over time. It is in the range between 46 and 55 across the period of 20 --

THE PRESIDENT: If what you are seeking to say is that --

MR. WOOLFE: This is why --

THE PRESIDENT: -- when one looks at this, it is consistent with Dr. Majumdar, which I have not, I confess, had to work through yet and will not at this time on a Friday afternoon, but will later; that is one thing.

If you are saying that even if we are not impressed by Dr. Majumdar's table 3, we can independently draw inferences and conclusions from this figure 2, that is where I think we are struggling, as to maybe how robust it is as an independent basis for conclusions. Do you take my point?

MR. WOOLFE: Yes. You have heard Mr. George give his evidence.

THE PRESIDENT: He put a lot of work into it and he wants us to look at it. We understand that.

MR. WOOLFE: It is a matter of what one can realistically do with the data that one has. What I have just explained to you is that in principle, what has been done is not something outlandish and strange, as I think Ms. Smith is trying to imply. There is actually a logic to it which does make sense. Yes, the problem that you hit is that there is volatility in the data and we do accept that.

But we would say that, if you just look at the CQS firms over time, there is not the same degree of volatility in those; and yet you have this clear spike in 2014. Now, that does come from a relatively small data-set, but we do say it is evidence of anti-competitive effect.

THE PRESIDENT: But you say it is Dr. Majumdar's table 3 which is the most relevant, you would say?

MR. WOOLFE: Yes. (Pause).

THE PRESIDENT: Yes, fine. Thank you.

MR. WOOLFE: I will just move on to objective justification and I can actually be fairly short on this.

The burden of establishing objective justification rests upon The Law Society. They have to show that any anti-competitive effect is counterbalanced or outweighed by the advantages; and the conduct must be proportionate in the sense that --

THE PRESIDENT: That is established, is it? The burden is on them, is it?

MR. WOOLFE: Yes, in the Google case.

THE PRESIDENT: They discussed it in Google?

MR. WOOLFE: Yes, Google at 142. I can take you to it, if you want.

THE PRESIDENT: No, the reference is good enough.

MR. WOOLFE: The proposition that objective justification requires exclusionary effect to be counterbalanced or outweighed by advantages is at paragraphs 143 to 145 of Google. The requirement of proportionality that there must be no less anti-competitive alternative that is capable of producing the same efficiencies or advantages is at 143 to 146 of Google. We also rely on the OTOC case in respect of the analysis of indispensability.

You asked, sir, yesterday -- I must give you an answer -- what weight should be placed upon the fact that no mortgage lender is here. Just to be clear, we do not say, it is no matter of drawing adverse inferences from absence. It is simply the case that the burden rests on The Law Society. They have not adduced evidence and the question is what conclusions you can draw in the absence of the evidence.

This is why we rely upon what I started in my closing submissions, which is that the nature of the witness evidence upon which Ms. Smith places heavy reliance is very much in the realm of general assertion of belief that is unconnected with documents or what was actually under consideration at the time.

Then I was going to take you to three documents in respect of objective justification.

The first is the letter from The Council of Mortgage Lenders at bundle E2, tab 13. This is the letter that I described, and Ms. Smith I think agreed with me that it was a correct description, of being in effect an invitation to tender by The Law Society for the provision of a, sort of, information portal for account management solutions.

THE PRESIDENT: Which tab is this?

MR. WOOLFE: Tab 13 of E2. (Pause).

I will just observe that this is, in a sense, I would say, the best evidence we have of what lenders were thinking about, when they were talking about protecting themselves from fraud. This is what they themselves were asking for, in terms of a direct request, rather than The Law Society projecting onto the lenders what they think the lenders wanted or what they think they could obtain from them, in the interests of their members.

Now, the covering letter explains what this is, and then over the page we have a document, the lender conveyancing panel management, that describes the problem. I will take you down to the heading, "What is needed":

"The discussions at industry level indicate that there is appetite to explore the creation of a comprehensive data source or sources on conveyancing firms. The objective is to get to a situation where there is a readily available supply of consistent comprehensive and accurate data about conveyancing firms which lenders can readily use to assist them to assess the suitability of conveyancing firms on their panel. The development of such a tool will enable them to remove and appoint firms using their own risk-based approaches, whilst gaining benefits of more comprehensive databases to enable them to set their own panel entry criteria."

So you can see there that what lenders are really interested in doing is getting information so they can make their own risk assessments.

Then over the page, they set out the kind of information they might be interested in and it does include, under bullet point 4 at the bottom, details of any accreditation, e.g. Lexcel/Conveyancing Quality Scheme. I will point out: Lexcel is not something that incorporates mandatory training standards. The Conveyancing Quality Scheme was, but at this point did not yet have anti-money laundering. This is the set of information that lenders are interested in having, in order to protect themselves against fraud risk. There is simply no mention in there of a need for mandatory training. What they are really interested in is having information about it.

MR. ALLAN: But this is an information portal?

MR. WOOLFE: This is an information portal.

MR. ALLAN: Which was being put out to tender?

MR. WOOLFE: Yes, that is what this is. But the way that the case on mandatory justification has been put is that lenders were terribly concerned about fraud and anti-money laundering and they wanted to be protected against that risk; and this is why The Law Society has to directly provide training.

What I am going to come on to, move on to the next point about Lexcel, there are alternative -- the fact that the Council of Mortgage Lenders, insofar as they are interested in accreditation, at this point saw Lexcel or the Conveyancing Quality Scheme as, in a sense, interchangeable pieces of information. This again --

THE PRESIDENT: Personally, I think you are over-interpreting that. Lexcel is one form of accreditation; CQS is another. I think it is not contested that they do different things.

MR. WOOLFE: Well, we would say they do different things, but what I will get on to -- I will take you to the Lexcel ...

What Lexcel does do is address the kinds of risks that the Law Society have been saying that mandatory training is designed to address in this particular case.

THE PRESIDENT: Proceed.

MR. WOOLFE: So if I can take you to the Lexcel standard which is at bundle C1, tab 12. This is, in a sense, a response to the question which the president posed to Ms. Smith earlier on today. I may have missed it, but I thought the question was that your understanding was that Lexcel did not deal with anti-money laundering.

THE PRESIDENT: Yes.

MR. WOOLFE: But my submission is actually: it does deal with anti-money laundering. You can see that, when you read it. I would urge you to read it quite carefully.

THE PRESIDENT: Yes. Indeed, that is what Ms. Smith said to me, in answer to my question. She pointed out that it does include anti-money laundering, but that did not prevent HSBC and, was it Nationwide, proceeding to cull a lot of solicitors from their panels, even though they may have had Lexcel training.

MR. WOOLFE: But on this, there is simply no evidence at all that we have seen of any lender saying: mandatory training -- not just mandatory training, but mandatory Law Society-supplied training is what we want.

THE PRESIDENT: Oh, that is a separate point. But that is not a Lexcel point. That is a separate point, I think.

MR. WOOLFE: Just for the Tribunal's note. On page 11 of that document, we have paragraph 5.13 and that involves having a policy to ensure compliance with anti-money laundering legislation.

MR. ALLAN: Sorry, which paragraph?

MR. WOOLFE: Paragraph 5.13, and this is the requirement to have a policy to ensure anti-money laundering legislation, including a plan for the training of personnel.

THE PRESIDENT: Yes.

MR. WOOLFE: My point is: they may have chosen to cull practices who have Lexcel, but The Law Society did not, so far as we can see, propose a similarly structured set of requirements with more intensive monitoring, which would have been another possibility.

Ultimately, anti-money laundering training is only, in a sense, a means to an end, that end being effective anti-money laundering procedures applied within the firm. So the procedures --

THE PRESIDENT: And an understanding of what gives rise to risk.

MR. WOOLFE: Yes. I was just going to say, there is simply no evidence at all that any lender ever said: we want directly supplied training.

The only reference in any of the documents from somebody outside The Law Society that mentions -- this is whether training should be supplied or not -- is in bundle D9, tab 81.

You have an e-mail dated 21 May 2015; and this is from Aon who are an insurer, not a lender. The Law Society's case, as advanced, focussed entirely on lenders.

Indeed, under CQS assessments, Aon appear to specifically raise the question of the statement of -- what the Society scheme will be doing to evolve with the requirement of statement of competence, rather than CPD requirements. What are you doing to move away from mandatory training? To what extent is competence ...

Which would -- I do not want to over-interpret.

THE PRESIDENT: No. But it is actually neither, is it?

MR. WOOLFE: But what is striking is that that bears upon the question, in a sense, of whether The Law Society needed to provide the training itself. But it is the only reference in any of these documents I have seen that does, and it does not do it in a way that suggests any concern with other people providing training.

THE PRESIDENT: Well, there are documents, such as in particular the Santander document, about lenders being interested in being involved in the development of training.

MR. WOOLFE: Yes.

THE PRESIDENT: But there was no discussion, it was not even raised on the evidence we have heard, whether, now that the scheme was by this stage so embracing of conveyancing solicitors, The Law Society could devise a syllabus or a criterion --

MR. WOOLFE: In which these --

THE PRESIDENT: -- at which the lenders, they could discuss what has to be covered in that training; and then it could be left to the market to provide it.

MR. WOOLFE: Exactly.

THE PRESIDENT: There was no evidence that was ever discussed.

MR. WOOLFE: No. The Law Society's evidence is along the lines of: we thought this would be a good idea that people were a bit better at this kind of stuff and we went and we spoke to some lenders about that. Now, that is --

THE PRESIDENT: Well, perhaps a bit more than that.

MR. WOOLFE: Yes. They have got some input from the lenders about that.

THE PRESIDENT: Yes.

MR. WOOLFE: But there is no evidence at all. In terms of indispensability or proportionality, that: is a less restrictive means available? The Law Society's evidence does not begin to show that there is no less restrictive means available.

I will not take you through every single document where this was not discussed, because I have -- Mr. Smithers has said that they did not.

Now, turning very briefly to chapter 1. It is common ground -- under the agreement, it is common ground that there is a professional training need in the United Kingdom. We have to show object or effect.

We do say that because you do have this -- sorry, can I just take instructions for a moment, sir?

THE PRESIDENT: Yes. (Pause).

MR. WOOLFE: Sir, we accept that on the basis of the OTOC case, that we cannot sustain the case on object.

THE PRESIDENT: Yes.

MR. WOOLFE: But we run a case on effect, which is essentially the same as I have run before you.

In respect of that effect case clearly in appreciability, the requirement does have to be met on the case law. We say that it is met by reason of the evidence which we have produced, both the qualitative evidence, the point that this is a reserving element of demand for the Law Society that cannot be supplied by anybody else.

THE PRESIDENT: It is the same.

MR. WOOLFE: It is the same. Also the factual analysis evidence as well, which --

MR. ALLAN: Is there any difference between your chapter 1 case and your chapter 2 case, beyond a requirement for market power, so far as The Law Society is concerned?

MR. WOOLFE: We would -- on my case, I appreciate it might be slightly different, but yes, we have a lower threshold for market power effectively under chapter 1.

MR. ALLAN: Is there any other difference?

MR. WOOLFE: We accept that appreciability applies because we have an argument about it in respect of chapter 2, but that is essentially --

THE PRESIDENT: Is there any difference on objective justification?

MR. WOOLFE: No. I think it is not framed strictly as objective justification, as that of an exemption; but the key point is indispensability, we say, in this case. On that, the evidence is precisely the same as on necessity under objective justification.

THE PRESIDENT: Yes.

MR. WOOLFE: Although perhaps one other point, which is that it is a requirement as well that it not eliminate competition in respect of a substantial part of the market, which is a harder requirement for the Law Society to meet, given that there was this element of reserving a section of demand for it, as such.

Now --

THE PRESIDENT: Just a moment. (Pause).

MR. WOOLFE: So we clearly have a claim for injunctive relief, but I would imagine you would reserve judgment and we would discuss that when you come back, if necessary.

THE PRESIDENT: I think your speculation that we are going to reserve judgment, even if it were not four minutes to 5 ...

MR. WOOLFE: All I am interested in is: you do not want to hear any submissions about the formula(?) at this stage?

THE PRESIDENT: No, no. If we were to find in your favour, if we do find in your favour, then there would be a separate hearing to determine what follows.

MR. WOOLFE: Thank you, sir. In that case, those are my submissions.

THE PRESIDENT: Just give me a moment. (Pause).

You will recall, I know, both of you, that your side is going to produce any documents it can find on that, following up from 2010, the document Professor Wilks drew attention to; by Tuesday, end of Tuesday; you will have a chance to make any submissions in writing by the end of Friday.

You have all done a great deal of work on this case, we are very conscious of that; and we thank you very much and you will be informed of our decision in due course.

MR. WOOLFE: If I can extend our gratitude to the Tribunal again for its patience over the last four days with some very long sitting hours. We appreciate it.

THE PRESIDENT: Yes. That also applies to the court staff here, or the Tribunal staff.

MR. WOOLFE: Absolutely; and to the absent transcribers as well.

THE PRESIDENT: Thank you.