SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11386-2015

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

DUNCAN NEIL GIBBINS, First Respondent
MATTHEW ROY EDMUND DEAN, Second Respondent
NICOLA KLIMKOWSKI Third Respondent

Before:

Mr I .R. Woolfe (in the chair)
Mr D. Glass
Mrs S. Gordon

Date of Hearing: 9-20 May 2016

Appearances

Richard Coleman QC of Fountain Court Chambers, Fountain Court, London EC4Y 9DH instructed by Paolo Antonio Sidoli, solicitor of Russell-Cooke Solicitors of 2 Putney Hill, London, SW15 6AB, for the Applicant.

Jonathan Greensmith, Solicitor of Keystone Law Audley House, 13 Palace St, London, SW1E 5HX for the First and Second Respondents who were in attendance.

The Third Respondent appeared and represented herself.

JUDGMENT

Allegations

1. The allegations against each of the Respondents were as follows:

1.1 The Respondents caused or permitted Rehab4Life Limited ("the Firm") to accept, and use, monies received from an investment fund totalling at least £3,117,022.50[1], in circumstances where it was improper for them to do so for the following reasons (and each of them):

1.1.1 they knew that the Firm had not complied with the terms of a Litigation Funding Agreement, pursuant to which the monies were purportedly advanced, and which, to their knowledge, was intended to protect the interests of the investment fund and/or the ultimate investors in the investment fund[2];

1.1.2 they knew that the Litigation Funding Agreement pursuant to which the monies were purportedly advanced did not reflect the purpose for which the Firm intended to use and/or in fact used the monies, and that the intended and actual use of the monies had not been properly documented by the Respondents;

1.1.3 they had no intention that the Firm would repay the monies within the time required by the Litigation Funding Agreement and/or they knew or were reckless as to the fact that repayment by the Firm within that timeframe was very unlikely;

1.1.4 they misused the funds received from the investment fund by failing to apply them only towards "Eligible Legal Expenses", as defined in and required by the Litigation Funding Agreement;

1.1.5 despite being on notice of the serious risk that the investment fund's investment manager, in arranging for the monies to be paid to the Firm, was acting fraudulently, or committing some other serious breach of duty, towards the investment fund and/or the ultimate investors, they failed to carry out any or sufficient enquiries reasonably to satisfy themselves that the payments did not involve any such conduct by the investment manager;

1.1.6 they unreasonably risked the Firm being a party to transactions in fraud of the investment fund and/or the ultimate investors, or which involved some other serious breach of duty by the investment manager towards them (or one of them); and/or

1.1.7 in all the circumstances, as the Respondents knew, the transactions pursuant to which the monies were received were dubious and the monies should not have been accepted or used.

[1] The amounts stated in the allegations take no account of the Firm's liability to pay the Facilitation Fee.

[2] The investors invested via a "feeder fund", which invested in the investment fund that made the loans.

The Respondents thereby acted without integrity, in breach of Principle 2 of the SRA Principles 2011 ("the Principles"); failed to act in the best interests of their clients, in breach of Principle 4; behaved in a way that did not maintain the trust the public places in them and in the provision of legal services, in breach of Principle 6; and/or failed to run their business or carry out their role in the business effectively and in accordance with proper governance and sound financial and risk management principles, in breach of Principle 8.

1.2 The Respondents caused or permitted representations to be made to the investment fund and/or its representatives, for the purpose of persuading it to provide funding to the Firm, to the effect that (a) no partner or employee of the Firm had been the subject of disciplinary proceedings by the Law Society, and (b) the Firm had put in place valid ATE insurance for each claim for which funding was drawn down, when they knew or had reason to believe that such representations were untrue and/or they failed promptly to correct them when they learned or had reason to believe that they were untrue. The Respondents thereby acted in breach of Principles 2 and 6 of the Principles.

1.3 The Respondents failed to pay the monies identified in allegation 1.1 into client account or, if they wrongly but honestly believed that it was office money, failed to open an office account whose sole purpose was to hold the monies pending their use for an authorised purpose, contrary to Principles 2, 6, 8 and 10 of the Principles and to rules 1.2(a), 1.2(b) and 14.1 of the SRA Accounts Rules 2011 ("the SAR").

1.4 The Respondents failed to deal with the SRA in an open, co-operative and timely manner and/or failed to notify the SRA promptly of material changes to relevant information (in particular, serious financial difficulty), contrary to Principle 7 of the Principles and Outcomes 10.3 and 10.6 of the SRA Code of Conduct 2011.

1.5. The First Respondent gave false and/or misleading information to the SRA contrary to Principles 2 and 7 of the Principles and Outcomes 10.3 and 10.6 of the SRA Code of Conduct 2011.

2. The Applicant alleged that the Respondents acted dishonestly in relation to allegations 1.1 to 1.3 (inclusive) and that the First Respondent acted dishonestly in relation to allegation 1.5. Further or alternatively they acted recklessly. The allegations did not, however, depend on the Tribunal making a finding of dishonesty or recklessness.

Documents

3. The Tribunal reviewed all of the documents submitted by the Applicant and the Respondents, which included:

- Volume 1 – Application and Rule 5 Statement dated 8 May 2015; First and Second Respondents' answer to the Rule 5 statement dated 17 July 2015; Third Respondent's answer to the Rule 5 Statement dated 17 July 2015; Interim Forensic Investigation Report dated 13 February 2013 ("the Interim FIR"); Final Forensic Investigation Report dated 2 December 2013 ("the Final FIR"); Tribunal's Memoranda dated 3 August 2015 and 22 January 2016; Applicant's Skeleton Argument;

- Volumes 2 – 6 - Documents from the Rule 5 Statement Exhibit “PAS1” in chronological order;
- Volume 7 - Witness statements;
- Volume 8 - Correspondence and Costs Submissions;
- Volumes 9 – 10 - Rule 5 Statement Exhibit “PAS2”;
- Authorities Bundle;
- Applicant’s Chronologies
- Respondents’ testimonials and statements of means

Preliminary Matters

Preliminary Matter 1 – Applicant’s application to amend the Rule 5 Statement

4. Mr Coleman applied to amend paragraph 6.2, to include the words “and binding”, and paragraph 88.4.2, to add the words “or alternatively were liable to be set aside by LAMP on the grounds that the PIP claims fell outside the scope of the delegated authority.” He submitted that it was common ground between the parties that a condition of the Axiom agreement was that each claim funded by Axiom would be supported by insurance. A number of policies for PIP matters were incepted using the Firm’s delegated authority, however the PIP claims fell outside the scope of that delegated authority.

5. The Tribunal was referred to email exchanges between Mr Strange (the then underwriting director at LAMP) and the Third Respondent, and also board meeting minutes, which, it was submitted, acknowledged the position that the PIP claims were not in fact covered by any insurance. The Tribunal was also referred to the comments made by the Third Respondent during her interview with the SRA’s investigator, where she stated that the policies were “void ab initio”.

6. Mr Coleman argued that when the Rule 5 Statement was drafted, it was put on the basis that the policies were void ab initio and valid insurance was never in place. It had appeared to be common ground, and it was submitted that this was plainly correct in law.

7. The Applicant then received the witness statement of Mr Strange, where it was stated that “the policies taken out under the delegated scheme were valid ATE policies but were voidable at LAMP’s election as the delegated authority criteria were not met.” Further, the First and Second Respondents, in their defence, stated “…It is to be noted that the ATE policies became void on 19 March 2013 after the Firm had ceased drawing down the Axiom loan. By the time the policies became void, Axiom failed and there was nobody to notify of the up-to-date position.”

8. Mr Coleman submitted that it was not obviously clear that the distinction between a policy that is void ab initio and one that is voidable was being taken by the Respondents, particularly where it had been acknowledged that the policies were void ab initio, and where the firm’s internal documents acknowledged that there was no insurance, voidable or otherwise. Further, the position was not clear, or even indicated, by the contemporary correspondence between the Third Respondent and Mr Strange.

9. The application, it was submitted, was a modest amendment to the existing allegation, to deal with the alternative scenario raised by the Respondents. The primary position of the Applicant, that the policies were not valid, was unchanged. However, in the event that the Tribunal did not accept that, the Applicant wanted to introduce the alternative as it was the Applicant's case that on either basis, whether the policies were void or voidable, there was either no policy at all or one that was not of any use to Axiom; Axiom should have been informed of the true position. It was submitted that there was absolutely no prejudice in the application as the Respondents had been informed of this over 4 weeks ago, and further there was no suggestion that any additional evidence was required on the point.

10. Mr Greensmith submitted that the application to amend was more than just a "minor amendment"; essentially it was a matter of fairness. The Applicant had taken some time in bringing the allegation before the Tribunal. It was submitted that there had been more than adequate time, if the amended allegation was the one they wished to make, to bring that allegation, and for that allegation to be the one that was certified as being part of the prima facie case against the Respondents.

11. The Applicant had submitted that it was not clear, or not necessarily clear that there was a distinction being taken between a policy that was void and one which was voidable. Mr Greensmith referred the Tribunal to a letter dated 23 October 2014, which was sent to the Applicant on behalf of the First and Second Respondents. In that letter it had been submitted that "From the moment the policies were incepted they were void<u>able</u> (to be distinguished from void)". He submitted that it could not have been made any clearer that there was a distinction being taken between policies which were void and those which were voidable.

12. It was submitted that in the circumstances the Applicant knew that the First and Second Respondents made that distinction, and relied upon it. Further, their position was clear before the case was incepted before the Tribunal.

13. In the circumstances, Mr Greensmith asked that the Tribunal take into account the chronology when considering whether it was appropriate and fair for the Applicant to be permitted to make what, in his submission, was more than just a slightly different allegation, particularly when the SRA could have brought precisely the allegation that it wished to bring right at the start of the proceedings and before the case was certified.

14. The Third Respondent submitted that she had responded to the allegations in the Rule 5 Statement, and found it "grossly unfair" that she was now being faced with an additional allegation where she had no real opportunity or time to consider it and make appropriate submissions. There had been no, or no satisfactory, explanation given as to why the application to amend had been made so late in the day, it being made on the day that the parties were required to certify readiness. Further, the Third Respondent submitted that the emails that had been referred to by the Applicant were a theoretical discussion about policies for PIP claims; some of the emails predated the time when the Third Respondent discovered that the Firm had in fact issued policies on PIP claims. Once it had been discovered in October 2012 that the policies had in fact been issued, the correspondence, it was submitted, made it clear that the policies were valid, and it was not until March 2013 that it was clear that the policies would be

voided. There was no doubt that the policies were valid but voidable at LAMP's election.

15. In response, Mr Coleman accepted that the point had been raised by the First and Second Respondents in October 2014. However there was no credible suggestion that the evidence of the Respondents would have been prepared any differently had the requested amendment featured in the original Rule 5 Statement. There would still be submissions on whether the policies were void or voidable, and there was still be debate about the Third Respondent understanding at the time, as well as that of the other Respondents. There would be some argument on the evidence as to whether the statements made to Axiom were misleading, even on the premise that the policies were voidable not void. This was a matter of argument and not evidence.

16. The Tribunal determined that wind was taken out of the sails of the Applicant's argument when it acknowledged, that by the letter dated 23 October 2014, it had in fact been notified that the Respondents intended to rely on the point that the policies were voidable not void. The Rule 5 Statement was issued some considerable time after that letter. In the circumstances the Tribunal did not consider it appropriate or fair to amend the Rule 5 Statement at that late stage, and accordingly the application was refused.

Preliminary Matter 2 – Respondents' application to adjourn the hearing

17. Mr Greensmith referred the Tribunal to Rules 21(1) and (2) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("the SDPR"), which provide the Tribunal with the power to regulate its own procedure. The Tribunal was also referred to its Policy and Practice Note on Adjournments, and in particular to the following:

> "3. The Tribunal will be reluctant to agree to an adjournment unless the request is supported by both parties or, if it is not, the reasons appear to the Tribunal to be justifiable because not to grant the adjournment would result in injustice to the person seeking the adjournment.
>
> 4. The following reasons will NOT generally be regarded as providing justification for an adjournment;
>
> **a) The Existence of Other Proceedings**
>
> The existence or possibility of criminal proceedings unless the criminal proceedings relate to the same or substantially the same underlying facts as form the basis of the proceedings before the Tribunal AND there is a genuine risk that the proceedings before the Tribunal may 'muddy the waters of justice' so far as concerns the criminal proceedings. Proceedings which are not imminent will not usually meet this criterion. Civil proceedings are even less likely to do so.
>
> 8. …..The efficient and timely determination of cases before the Tribunal will usually be in the best interest of all concerned and the Tribunal will always need to be convinced that the interests of justice in any particular case will be best served by agreeing to an adjournment. …."

18. Mr Greensmith submitted that there was a combination of matters which would amount to exceptional circumstances, such that an adjournment was the appropriate course of action to take. In relation to the issue of injustice, the Tribunal was referred to the Applicant's skeleton argument, which referred to the principal issue of injustice by reference to another case which had been heard by the Tribunal and where there was a pending appeal, and in particular to the following:

> "In short, the SRA will argue on appeal that even assuming that Wingate and Evans did not suspect any wrongdoing, it was improper for Mr Wingate to sign a contract for a very large loan, knowing, on his case, that it did not contain the true terms at the purpose to which the loan could be used, which were entirely undocumented, and that it contained promises that they did not intend to keep."

And further:

> "The core issue raised by the proceedings is whether it was proper for the Respondents to consent to the Firm receiving and using the money ostensibly pursuant to a written contract that, on the Respondents' own case, was wholly inconsistent with the purposes for which the Firm intended to use (and did use) the Axiom money, which were not properly documented anywhere, and that contained promises that the Respondents did not intend the Firm would keep."

19. It was submitted that the SRA were relying upon an argument in an appeal that had not yet been heard. This caused very significant concerns that problems would arise in the course of this hearing which would lead to injustice. The core issue was the subject of the appeal in Wingate and Evans, where the Tribunal had found that that the relevant conduct was not objectively improper. On the core issue the two cases were on substantially the same underlying facts, with there being a clear association between the cases. The core issues went to the heart of the objective side of what the Tribunal was being asked to consider in this case.

20. In such circumstances, the outcome of the Wingate appeal would impact upon the decision in this matter, that is whether it was (or was not) improper per se for a solicitor to sign a contract for a very large loan in these particular circumstances. Also, when considering injustice, the Tribunal were asked to consider the Respondents' Article 6 rights, which it was under a duty to safeguard.

21. By advancing the untested argument in this case, there was a real risk that there would be a muddying of the waters of justice. That risk applied not only to this matter, but to the appeal matter as well. It was important for the Tribunal to know what the Administrative Court would say on this important and crucial point that was directly applicable to this matter. The appeal was imminent.

22. In terms of best interests, it was in the interests of the parties, the public and the profession to await the outcome of the appeal. It was clear that the outcome of these proceedings would be an appeal; if the Tribunal found as it did in Wingate, then the Applicant would appeal the decision. If however, the appeal in Wingate was

unsuccessful, it would demonstrate that the SRA was wrong, and that it was not objectively improper per se, and that would directly impact upon this case.

23. The First and Second Respondents were no longer in practice, and did not intend to practice again, so there was no direct risk to the public that would result in the matter being adjourned. Further, there would be a substantial saving in costs that would result from awaiting the outcome of the Wingate appeal; there would inevitably be a narrowing of the issues. In granting the application, and adjourning the matter until after the appeal, the Tribunal would prevent any injustice without there being any negative impact upon the best interests of the public, the profession or the Applicant.

24. The Third Respondent endorsed the submissions advanced by Mr Greensmith. The skeleton argument submitted by the Applicant raised troubling issues. The allegations and skeleton arguments in both cases were substantially the same. The Third Respondent was concerned that by putting the appeal in issue before this Tribunal, the SRA appeared to be putting the Tribunal in an impossible position, namely that if this Tribunal took the same approach as in Wingate, it would be appealed. Further, if the Tribunal found against her, against the background of the pending appeal, it was potentially unjust and unfair, as the result of the appeal, if known, may have an influence on the Tribunal's approach. The position was unfair and unjust, and it was not possible, it was submitted, to have a fair hearing against the background of the pending appeal.

25. Mr Coleman invited the Tribunal to firmly reject what was, in his view, "a transparent attempt to derail a hearing…" The application was fundamentally wrong in principle and was made unacceptably too late. The application sought to turn paragraph 4 (a) of the practice direction on its head, as it was concerned with the situation where the decision of this Tribunal might muddy the waters of justice, in particular as regards criminal proceedings. That was an understandable concern when there were imminent criminal proceedings, but that was plainly not the situation with this matter. It was submitted that it was not sufficient that the decision made by this Tribunal may be of some relevance to the appeal, but plainly the decision of this Tribunal could not have "some inappropriate, unjust influence on the Wingate and Evans appeal in due course." Further the Tribunal in the Wingate case made it clear that that case turned upon its own facts, and that "nothing in this case should be taken as guidance as to how another division of the Tribunal would approach the facts and allegations in other cases."

26. Mr Coleman referred the Tribunal to the First and Second Respondents' initial response to the allegations, where when talking about other proceedings, it was stated that:

> "The outcome of the civil proceedings by Third parties can have no bearing upon an assessment of the conduct of Messrs Gibbins and Dean and the matter as known or understood by them at the relevant time. If the outcome of those proceedings is at all relevant then it is submitted that it can only be relevant insofar that it is supportive of Messrs Gibbins and Dean's position that at all times they acted with good faith, relying upon assurances provided from parties who were now accused of conspiring with each other."

Mr Coleman agreed with this statement, and submitted that it applied with equal force to disciplinary proceedings. Further, the core issues could only be the same in the two matters when framed at a "very high level of generality without regard to the detailed evidence to be adduced in the particular case." Each case would turn on its own facts; that was the very point made by the Tribunal in the Wingate case. Effectively, the Wingate case had no relevance to the instant matter, and so there could be no injustice caused by the Tribunal hearing this matter prior to the outcome of the Wingate appeal. Further, in relation to the Respondents' Article 6 rights, it was the Tribunal's duty to decide the matter on the evidence before it, applying the law as it best understood it to be; in so doing, the Tribunal could in no way be abrogating the Article 6 rights of the Respondents'.

27. It was unclear how the SRA could have muddied the waters, simply by mentioning the Wingate appeal and supplying the documents connected with that matter. The SRA did not seek to rely upon that case, and would, if agreed, be prepared to remove the decision, the Appellant's Notice and the Appellant's Skeleton Argument from the bundle, and thereafter make no further reference to it.

28. In relation to the submission that it would be in the interests of the parties generally to adjourn, because, inter alia, it would result in a saving of costs, Mr Coleman submitted that it was irrelevant to speculate. Further, there were "grounds for real scepticism that the appeal decision in Wingate and Evans would narrow the issues, particularly if it went against the Respondents in that case."

29. Further, the application was, in Mr Coleman's submission, made hopelessly too late. The Respondents had known for months, if not longer, that there were other proceedings relating to other solicitors. The decision in Wingate was published in April 2016, over a month ago. The Respondents may only recently have learnt of the Appellant's notice, but the potential for other claims raising related issues but based on different facts to be decided must have been known to them for quite some time. This, therefore, could not be a genuinely new point emerging for the first time within the 7 days preceding the hearing. If it was to be suggested that other proceedings had a bearing on this matter, that should have been raised by the Respondents a long time ago, and certainly no later than December 2015, when Wingate and Evans was decided.

30. The Chairman made it clear to all parties, as he had at the outset of the proceedings, that the Tribunal was independent, and any suggestion that it would be influenced by the approach of the SRA or concerned that its determination in this matter may be the subject of an appeal by the SRA, were simply incorrect; the suggestion that the Tribunal might be intimidated by the prospect of an appeal was wholly rejected.

31. The Tribunal had been directed to its Policy and Practice Note, and in particular to paragraph 4(a) which referred specifically to criminal proceedings and to a genuine risk of those criminal proceedings having the waters of justice muddied. In this case there were no criminal proceedings and there was no question, indeed the Tribunal determined that it was inconceivable, that any decision of the Tribunal in this case could influence the appeal in any way. Paragraph 4(a) referred to civil proceedings being even less likely to meet the criterion of other proceedings, and the Tribunal simply did not accept that paragraph 4(a) had any relevance to the instant matter.

Furthermore, the clear indication of that paragraph was that the Respondent/Defendant in the other case was the same as the Respondent in the Tribunal case. In the instant matter they were different.

32. Further the Tribunal could not know what would happen in the appeal, and indeed whether the appeal would continue to a full hearing. The submissions advanced in relation to it were speculative, in particular as to what the decision may be, and the effect that that may have on the instant proceedings. The Tribunal did not consider that the Wingate appeal had any bearing on the matters which it needed to decide, and in those circumstances did not consider that it was unjust to proceed. Further, the Tribunal rejected any suggestion that by continuing with the hearing it would in some way be abrogating the Respondents' Article 6 rights.

33. Accordingly, the application to adjourn was dismissed.

Preliminary Matter 3 – Provision of the transcripts to the Respondents

34. During the course of the hearing it became clear that the transcripts of the hearing were not being provided to the Respondents. Mr Coleman explained that the provision of the transcripts had been offered to the Respondents in correspondence prior to the hearing, and that offer had been declined. Mr Greensmith explained that the offer had been declined prior to the hearing due to the cost involved. He submitted that the reliance placed on the transcript, and in particular, Mr Coleman's quoting from the transcript during cross examination raised an issue of fairness between the parties. The Third Respondent endorsed the submissions made by Mr Greensmith.

35. The Tribunal confirmed that it had been unaware that the transcript had not been made available to all parties. Having taken instructions, Mr Coleman confirmed that it was agreed that the transcript would be provided to all parties. On that basis, the Tribunal made no directions or determinations in relation to the provision of the transcript.

Preliminary Matter 4 – The non-attendance of the First and Second Respondents on days 8 & 9

36. The First and Second Respondents were present for the first 7 days of the hearing. Mr Greensmith explained that they would not be able to attend for days 8 and 9 of the hearing. Both Respondents had already completed their evidence by that time. The Tribunal accepted that no discourtesy was meant by their non-attendance, and confirmed that they were not required to attend on those dates; they were legally represented and thus their interests were being ably represented by Mr Greensmith.

Preliminary Matter 5 – Closing Submissions by the Applicant.

37. Mr Coleman applied for permission to make oral closing submissions. It was accepted that this was not the normal practice of the Tribunal. However, anecdotally, where cases had taken more than a week, the Tribunal had often allowed and encouraged the Applicant to make closing submissions. Mr Greensmith had no objection in the circumstances of this case, suggesting that submissions from the

Applicant may well act as a helpful focus of the key areas of the case. The Third Respondent had no objection to the Applicant making closing submissions.

38. The Tribunal considered the submissions of the parties and determined that it would be helpful to have written and oral closing submissions from all parties. Accordingly, Mr Coleman's application was granted.

Factual Background

39. The First Respondent was admitted as a solicitor in 2000. At all material times he was a director and 45% shareholder in the Firm, which traded as Lindsays. The Second Respondent was admitted as a solicitor in 2000. At all material times he was a director and 45% shareholder in the Firm. The Third Respondent was admitted as a solicitor in 2000. At all material times she was a director and 10% shareholder in the Firm.

40. The allegations arose from the Respondents' dealings with the Axiom Legal Financing Fund, Segregated Portfolio and the Axiom Legal Financing Fund Master, Segregated Portfolio ("the Axiom Funds") and their management of the Firm. The Axiom Funds were established in the Cayman Islands for the ostensible purpose of providing litigation funding to law firms in England and Wales. The Respondents obtained funding from the Axiom Funds after signing a Precedent Litigation Funding Agreement ("LFA") on 24 February 2012. The Firm subsequently entered into administration.

41. Whilst it was alleged that the Respondents were on notice of the serious risk that the investment fund's investment manager was acting fraudulently, or committing some other serious breach of duty, towards the investment fund and the ultimate investors, the Applicant did not seek to establish that the investment manager had in fact acted fraudulently or committed other serious wrongdoing, since that did not need to be established in these proceedings for the purpose of addressing the Respondents' conduct.

<u>The Axiom Funds</u>

42. At all material times:

42.1 JP SPC 1 was a segregated portfolio company incorporated in the Cayman Islands in 2007 and comprising various sub-funds, known as "segregated portfolios";

42.2 Axiom Legal Financing Fund, Segregated Portfolio ("the Axiom Fund") was a segregated portfolio of JP SPC 1;

42.3 JP SPC 4 was another segregated portfolio company incorporated in the Cayman Islands;

42.4 Axiom Legal Financing Funding Master, Segregated Portfolio ("the Axiom Fund Master") was a segregated portfolio of JP SPC 4;

42.5 The Axiom Fund owned shares in, and was the feeder fund for, the Axiom Fund Master; and

42.6 Tangerine Investment Management Ltd ("Tangerine") was the investment manager of the Axiom Fund and of the Axiom Fund Master.

43. The phrase "the Axiom Funds" where used below refers to both the Axiom Fund and the Axiom Fund Master.

44. By 2012, investors had invested over £100 million in the Axiom Fund.

45. The Axiom Fund was promoted to investors as a feeder fund that invested in the Axiom Fund Master, which would provide funding to law Firms in the UK to finance the conduct of legal cases.

46. The Applicant understood that the basis on which investors invested in the Axiom Fund was set out in an Offering Memorandum ("the OM") dated June 2009, and Supplemental Offering Memoranda ("the SOMs") dated August 2010, January 2012 and July 2012.

47. The terms on which Tangerine acted as investment manager on behalf of the Axiom Funds were understood to have been set out in an investment management agreement dated 25 May 2009 between the Axiom Fund, the Axiom Fund Master and The Synergy Solution Ltd ("Synergy"), the previous investment manager. Tangerine subsequently became a party to the investment management agreement, as investment manager, in place of Synergy.

48. From August 2012 onwards articles appeared on the internet (including, in particular, on a website called "Offshore Alert") accusing Timothy Schools (a solicitor who had established the Axiom Funds), and Tangerine of fraud, and alleging that the Axiom Funds were a fraudulent scheme. On 26 October 2012, the directors of the Axiom Funds suspended the calculation of net asset values for participating shares and suspended share redemptions, with effect from 30 September 2012.

49. The Firm filed a notice of intention to appoint an administrator on 31 January 2013.

50. On 12 February 2013, Grant Thornton were appointed as receivers of the Axiom Funds, which remained in receivership at the time of the hearing.

51. On 13 February 2013, the Firm was placed into administration. The business and assets of the Firm were sold by its administrators to Duncan Gibbins Solicitors ("DGS"). DGS was an ordinary partnership between the First Respondent (80%) and the Second Respondent (20%). The Third Respondent was employed by DGS as a Business Development Manager from around January 2010. She was made redundant in around April 2013.[3]

[3] DGS itself subsequently entered into a Partnership Voluntary Arrangement in about July 2013

52. On 26 February 2013, the solicitors acting for the receivers of the Axiom Funds sent a letter to the Firm demanding repayment of the monies that had been provided to it, on the grounds that the monies had not been used in accordance with the terms of the LFA, and that this constituted an event of default under the LFA.

53. On 21 May 2013, the receivers of the Axiom Funds commenced civil proceedings against various people associated with Tangerine (including an individual named DR), and others (including Mr Schools) seeking damages of over £100 million on various grounds including fraud, conspiracy, breach of fiduciary duty and breach of contract.

The Firm's application for funding from the Axiom Fund Master

54. On or about 17 January 2012 the Firm completed an application form for funding from the Axiom Fund Master, and submitted the form to Tangerine. The Firm applied for a facility of £8 million. The application form stated:

54.1 To the best of the Respondents' knowledge and belief, no partner or employee of the Firm had been the subject of disciplinary proceedings by the Law Society. That statement was incorrect since all the Respondents knew that AL, who was also a director of the Firm at that time,[4] had previously been subject to an adverse finding by the Solicitors Disciplinary Tribunal in January 2006 in relation to breaches of the Solicitors Accounts Rules.

54.2 The Firm's "estimated funding requirements" per case were £10,000 for clinical negligence cases, £3,200 for non-RTA personal injury cases, and £4,350 for personal injury cases. The historic percentage breakdown of the Firm's cases was 24% clinical negligence, 15% non-RTA personal injury and 12% professional negligence.

The draft Baker Tilly Financial Due Diligence Report

55. Baker Tilly prepared a draft financial due diligence report on the Firm dated 16 February 2012, based on information provided by the Firm, to enable the Firm's application to be assessed by Check Mate Audits Limited ("CMA") on behalf of the Axiom Fund Master. It was apparent from Baker Tilly's draft report that:

55.1 the Firm's management had estimated work in progress ("WIP") to be approximately £2.4 million as at the end of January 2012. This estimated WIP figure represented an increase of approximately £1.8 million since 31 March 2011. The figure was high in comparison with (inter alia) the level of fees billed by the Firm (£107,000) and of disbursements on the Firm's balance sheet (£54,000);

55.2 the directors were not drawing any salary from the Firm;

[4] AL was a director of the Firm between 2 May 2008 and 25 July 2012, although it was understood that he did not attend the office frequently after the end of 2011.

55.3 the Firm's net liabilities (excluding WIP) on the Firm's balance sheet had increased from £37,000 as at 31 March 2011 to £191,000 in the management accounts as at 31 December 2011;

55.4 the Firm was loss-making and that losses in the 9 months ending 31 December 2011 had been financed through loans from connected parties and from third parties and that this situation was "unsustainable" and that the Firm needed "to start turning WIP into cash".

56. The conclusions of the Baker Tilly's draft report were confirmed by the Firm's management accounts for the period from April 2011 to February 2012; over that period the net outflow of cash from the Firm was £207,399.43.

57. Baker Tilly's draft report also stated that its understanding of the "proposed transaction" in relation to which the report was required was the Firm's application to the Axiom Funds for a loan facility of up to £8 million "to fund disbursements" on litigation cases undertaken on the basis of conditional fee agreements ("CFAs"). The draft report also noted Baker Tilly's understanding that:

57.1 "... all cases would be funded, irrespective of whether funding is required (due to the bank balance being forecast to be increasingly in surplus)";

57.2 "... referral fees are not covered by ATE insurance premiums. Consequently the funding of referral fees by Axiom is different to other disbursements in that this cost is not recoverable by either insurance or from the defendant.";

57.3 the Firm "will have a significant level of funding from Axiom that will not have been utilised for payment of disbursements"; and

57.4 "this is not dissimilar to other Firms to which Axiom has provided funding and that CMA monitors the situation."

58. Appendix D of the draft report prepared by Baker Tilly contained the Firm's financial model. The model recorded that for each type of case the Firm intended to draw down funding for "disbursements", "acquisition costs" and the "ATE Policy", but that no funding would be drawn down for WIP. Under the section headed Funding, the model showed the following:

<u>Initial Draw Down on New Cases</u>

	Clin Neg	**Debt**	**RTA**	**Non RTA**	**Prof Neg**
Disbursements in total	£ 7,800	£ -		£ 1,660	£ 2,290
Acquisition Cost	£ 750	£ -	£ -	£ 700	£ 700
ATE Policy	£ 1,450	£ -	£ -	£ 850	£ 1,350
WIP Funding	£ -	£ -	£		
Total	£ 10,000	£ -	£ -	£ 3,210	£ 4,340

The version of the model attached to the draft report was described as being: "As revised for Baker Tilly 05/02/12 — remove any element of WIP Funding".

59. It could not be confirmed whether Baker Tilly produced a final report.

The Non-Disclosure Agreement

60. On 19 January 2012 DR emailed a Non-Disclosure Agreement ("the NDA") and to the First Respondent. The First Respondent forwarded this to the Second and Third Respondents (amongst others). Term 1 of the NDA provided that:

> "1(b) Each Recipient further agrees that:
>
> (i) information made available to it in the course of or for the purposes of negotiations relating to funding arrangements will not form the basis of any contract which will be constituted solely by the final agreement(s) to be entered into:".

On 20 January 2012, the Third Respondent sent an email to the First Respondent, which he (the First Respondent), forwarded to the Second Respondent (amongst others) which stated:

> "I have read the NDA which is seriously robust and which does appear to be retrospective effect in terms of all discussions we have had to date. That said, I think we can sign this off today and get it back to them"

In relation to the LFA, the Third Respondent advised:

> "I think we all need to read and digest it, then we can put one list of queries together".

61. The First and Second Respondents accepted receiving the NDA, but could not specifically recall reading it; none of the Respondents could recall signing and returning the NDA, and no signed copy was produced.

The Agreement to enter into the LFA

62. On 23 January 2012, the First Respondent sent an email to DR in which he asked a series of questions about the terms of the LFA. DR's reply of the same date stated:

> "I will work my way through and establish responses. As you may know the document suite has been put together by Mayer Brown and has been written in such a way as to be compatible with the Fund Offer Memorandum."

The substantive response was sent by email to the First Respondent on 29 January 2012. The First Respondent's questions (in italics) and DR's answers were as follows:

"We have gone through the agreement and have a few questions. I think most of them will be very short answers:

1. Definition of "Legal Expenses" specifically excludes WIP. Can we draw anything for WIP?

Whilst we do not specifically state that panel Firms can drawdown for WIP, what we have done in other models is to allocate funds which would be incurred for court fees. We typically expect no more than say 25% of cases to require all the court fees drawn down so this means there is a cash balance available for the Firm to use in relation to WIP. This could equally apply to other fees which Firms draw down against which may not always be incurred. The fact that we operate this fund by providing finance against models and not specific funding applicable to each case, we believe that the aggregation effect of the funding within each model type will provide sufficient opportunity to allocate against WIP.

2. Definition of "Termination Date" — 12 months from the date of the Panel Solicitor Agreement. Can we extend this to 18 months?

No — the intention of the loan term and related definitions need to align to a maximum of 12 month. If the loans extend beyond 12 months then the penalty will be the added monthly charges

3. Repayment of the facility — Clause 6 dictates that the Firm shall repay the facility in full on the Termination Date, i.e. under this agreement repayment has to take place 12 months after signing and it would appear to be irrelevant as to when utilised? Can this be changed to 18 months from the date of the individual drawdown?

No — See above

4. Clause 2.2(c) — The agreement is explicit that funds drawn must be exclusively utilised in respect of the individual claim as detailed in the Utilisation Request. Can we change this? I understood we could use it for other purposes for the business if need be.

Please see comments above at (1) which hopefully answers your question. If [used] against the Firm's WIP the Firm can obviously then use the funds for any business purpose. May also be worthwhile mentioning that if the Firm can find an ATE or other Insurance policy which insures WIP then we would be happy to specifically allocate funds against [WIP]

7. We had expected that the agreement should facilitate the running off of the book and not under any circumstances (other than default) require the borrowing to be repaid until the conclusion of each individual claim.

Except in the event of default or breach this is correct

> *13. Clause 10. The references to timescales seems to be at odds with the definition of Termination Date and Clause 6 dictating that the Facility has to be repaid 12 months from the date of the agreement.*
>
> 12 month term for each loan drawdown

63. At a board meeting which took place on 24 February 2012, the Respondents resolved to enter into the LFA. The board meeting minutes recorded the following entry:

> "**5 BUSINESS OF THE MEETING**
>
> 5.1 The chairperson reported that the business of the meeting was to approve the Company entering into a £15,000,000.00 committed unsecured loan scheme facility agreement between itself as borrower and JP SPC4 obo AXIOM LEGAL FINANCING FUND MASTER, SEGREGATED PORTFOLIO as lender (**Facility Agreement**) for the purpose of funding disbursements on individual clinical negligence and personal injury cases;…"

64. On 24 February 2012, the First Respondent on behalf of the Firm signed the LFA. The Respondents each considered the terms of the LFA at or about the time it was signed. Under the terms of the LFA, the Axiom Fund Master agreed to make available to the Firm a loan facility in an aggregate amount of £15 million.

65. The LFA set out various terms restricting and controlling the use of sums provided by the Axiom Fund Master. These terms, it was submitted by the Applicant, were evidently to reduce the risk that sums provided by the Axiom Fund Master to the Firm would not be repaid, and to protect the interests of the Axiom Fund and its investors.

<u>The Written Agreement</u>

66. Clause 2 of the LFA - "LOAN AND PURPOSE" - defined the scope. Clause 2.2 stated that:

> "(a) The Panel Firm shall apply the proceeds of each Loan towards payment of the Eligible Legal Expenses in relation to which the Loan was requested.
>
> (b) The Panel Firm may apply the proceeds of a Loan to fund the insurance premium relating to the Financial Guarantee Insurance.
>
> (c) For the avoidance of doubt, no amount borrowed under this Agreement may be used to fund the claims, proceedings, dispute resolution or cases of any other client of the Panel Firm, other than a Claimant in respect of a Claim or the Proceedings relating to that Claim (as detailed in the relevant Utilisation Request)".

Clause 1 of the LFA - "DEFINITIONS AND INTERPRETATION" - defined "Eligible Legal Expenses" as:

> "…the Legal Expenses relating to a Claim which is evidenced by an invoice, in form and substance the same as the form agreed in relation to that Claim prior to the first Utilisation in respect of that Claim;".

"Legal Expenses" were defined as:

> "… any sum payable in respect of Counsel's fees, expert's fees, Court fees, arbitration fees, the Legal Expenses Insurance or referral fees in relation to the Claimant's Claim or its Proceedings. Such expenses may include VAT where applicable, unless the Claimant is registered for VAT in which case the Claimant will be liable to pay the VAT element of such expenses. Such expenses shall not include any costs payable in respect of the Panel Firm's fees or any costs or expenses payable to one or more Opponents or to another party to the Proceedings;".

67. Clause 3 of the LFA - "CONDITIONS OF UTILISATION" - provided that:

> "**3.1 Initial conditions precedent**
>
> The Panel Firm may not deliver the first Utilisation Request unless the Investment Manager has received all of the documents and other evidence listed in Part A of Schedule 1 (*Conditions precedent*) in form and substance satisfactory to it. The Investment Manager shall notify the Panel Firm promptly upon being so satisfied.
>
> **3.2 Conditions precedent for each Loan**
>
> The Lender will only be obliged to comply with Clause 4.4 (Lender's participation) if the Investment Manager has received all of the documents and other evidence listed in Part B of Schedule 1 (Conditions precedent) in form and substance satisfactory to it and the Investment Manager has confirmed that it is satisfied that the Legal Expenses in relation to which the relevant Utilisation Request is being submitted are Eligible Legal Expenses. The Investment Manager shall notify the Panel Firm promptly upon being so satisfied.
>
> **3.3 Conditions precedent for first Loan in relation to a Claim**
>
> The Lender will only be obliged to comply with Clause 4.4 (Lender's participation) in relation to the first Utilisation Request in respect of a Claim if the Investment Manager has received all documents and other evidence listed in Part C of Schedule 1 (Conditions precedent) in form and substance satisfactory to it. The Investment Manager will notify the Panel Firm promptly upon being so satisfied and shall confirm that the relevant claim in relation to which the Loan is being requested is a Claim for the purposes of this Agreement or that it is satisfied that the purpose of the Loan as stated by the Panel Firm in its Utilisation Request is Legal Work…."

67.1 The documents and other evidence listed in Part A of Schedule 1 (see clause 3.1) included:

- various documents concerning the Firm's constitution and its ability to enter into the agreement;
- written confirmation from the insurers to the Axiom Fund Master that the Axiom Fund Master was or would be included as a co-insured under the Financial Guarantee Insurance policy;
- the executed fixed charge granted by the Firm over the collection account into which the Firm was required, pursuant to clause 7.6 (a)(iii), to pay the proceeds of the amounts due under invoices relating to the Eligible Legal Expenses.

67.2 The documents and other evidence listed in Part B of Schedule 1 (see clause 3.2) were:

- Details of the relevant Legal Expenses and copies of all related invoices.
- Others (i.e. documents and evidence) as relevant at the request of the lender.

67.3 The documents and other evidence listed in Part C of Schedule 1 (see clause 3.3) included:

- a copy of any conditional fee agreement with the claimant;
- a copy of the Legal Funding Facility Application Form for the claimant;
- a copy of the written advice regarding the claimant's prospects of success in its claim or related proceedings;
- a copy of Legal Expenses Insurance in relation to the claimant and claim.

68. Clause 4 of the LFA - "UTILISATION" - set out the requirements for each Utilisation Request in order for funds to be drawn down. These included provision that the Utilisation Request should specify the Eligible Legal Expenses and Financial Guarantee Insurance Premium (if applicable) in relation to which such Utilisation was requested, and that the Request should attach copies of the relevant invoices or explanation of the expenses.

68.1 Clause 4.2 provided that:

> "4.2(a) The Utilisation Request is irrevocable and will not be regarded as having been duty completed unless:
>
> (iii) it specifies the Client Account to which the proceeds are to be credited:".

69. Clause 5 of the LFA - "INSURANCE" - provided that "The Panel Firm shall procure the inclusion of the Lender as a co-insured under the Financial Guarantee Insurance policy, by way of a side letter or otherwise." Clause 12 detailed the Firm's undertakings. Clause 12.3 provided that the Firm, "shall maintain (a) the Financial Guarantee Insurance, and (b) other insurances on and in relation to its businesses and assets with reputable underwriters or insurance companies against such risks and to such extent as is usual for law firms."

70. Clause 6 of the LFA provided that "The Panel Firm shall repay the Facility in full on the Termination Date. The "Termination Date" was defined in clause 1 as "…the date falling 12 months from the date of this Agreement;" The Applicant submitted that as a result of Clause 6, the Firm was required to repay the Axiom Fund on 24 February 2013.

71. Clause 22 of the LFA – "ENTIRE AGREEMENT" provided that:

> "This Agreement and the other Finance Documents[5] are the entire agreement between the Parties concerning the subject matter of the Finance Documents. Any prior arrangement, agreement, representation or undertaking is superseded and, except as expressly provided, each Party acknowledges that it has not relied on any arrangement, agreement, representation or understanding not expressly set out in the Finance Documents."

The Facilitation Fee

72. The Respondents were aware that the investment manager would receive a payment of 50% of sums provided by the Axiom Fund Master to the Firm, as a so-called "Facilitation Fee" ("the FF"), and that the amount of the FF would be paid from the Axiom Fund Master's funds and added to the debt due from the Firm to the Axiom Fund Master under the LFA. The intention of the LFA appeared to be that the Firm would repay the Axiom Fund Master a sum equal to the FF when the loans were due to be repaid, although this was unclear.

73. The FF was in addition to interest charged on the loan of 15% for the first 12 months of the loan and 1.5% per month if the loan was outstanding for more than 12 months. Thus the Firm would be obliged to repay at least 165% of the principal amount borrowed from the Axiom Fund Master after 12 months.

The monies received by the Firm

74. The Firm received total payments of at least £3,117,022.50 into its office account from the Axiom Fund, purportedly pursuant to the LFA, the provision of the monies having been agreed and arranged by Tangerine. The Respondents were each aware of the receipt and the Firm's use of the monies. Taking account of the Firm's liability for interest and the 50% Facilitation Fee, the Firm's total liability to the Axiom Fund was in excess of £5 million.

[5] The definition of Finance Documents at clause 1 of the Agreement was "this Agreement, the Account Charge and any other document designated as such by the Investment Manager and the Panel Firm."

75. The details of the sums drawn down by the Firm under the LFA were as follows (ignoring the Firm's liability in respect of the FF):

DATE	AMOUNT	CASE TYPE	USE OF MONIES
02.03.12	£800,000	Clinical Negligence	Funding the Firm's general overheads and WIP
04.04.12	£312,000	Clinical Negligence	Funding the Firm's general overheads and WIP
22.05.12	£192,000	Clinical Negligence	Funding the Firm's general overheads and WIP
28.06.12	£219,172.50	Clinical Negligence	Funding the Firm's general overheads and WIP
02.07.12	£2,820	Clinical Negligence	Funding the Firm's general overheads and WIP
24.07.12	£454,580	Clinical Negligence	Funding the Firm's general overheads and WIP
16.08.12	£405,875	Clinical Negligence	Funding the Firm's general overheads and WIP
14.09.12	£243,535	Clinical Negligence	Funding the Firm's general overheads and WIP
14.10.12	£487,050	Clinical Negligence	Funding the Firm's general overheads and WIP

76. By way of a letter to the Firm, (care of the Firm's Administrator) dated 26 February 2013, the receivers of the Axiom Fund demanded repayment of a principal sum of £4,156,500 plus interest. None of the money had been repaid.

The Related Entities

77. There were a number of businesses in which one or more of the Respondents had an interest ("the Related Entities"), namely:

77.1 Duncan Gibbins Solicitors ("DGS") – The First Respondent held 80% of the equity; the Second Respondent held the remaining 20%. The Third Respondent was employed by the partnership.

77.2 Tri Star Costs Ltd – The Respondents were each (amongst others) Directors of the company, which drafted bills of costs and negotiated costs.

77.3 Tri Star Medicals Ltd – The Respondents were each (amongst others) Directors of the company which arranged medico-legal services.

77.4 Tri Star Legal Ltd - The Respondents were each (amongst others) Directors of the company which was FSA regulated. It brokered legal expenses insurance.

77.5 Tri Star Technology Ltd - The Respondents were the sole Directors of the company which provided IT and telephony services.

77.6 Tri Star Accounting Ltd - The Respondents were each (amongst others) Directors of the company which provided accounting and credit control services.

77.7 Zoodle Ltd – The First and Second Respondents were the sole Directors of the company which provided marketing expertise and design services.

77.8 Zoodle Events Ltd - The First and Second Respondents were the sole Directors of the company which provided training courses for external clients.

77.9 GDK Ltd - The Respondents were the sole Directors of the company which was a Ministry of Justice regulated company.

Use of the monies received by the Firm

78. From 2 March 2012 to 31 January 2013, the Firm made payments totalling £3,643,309.74 from the Firm's office account. Over the same period, total receipts into the office account net of monies provided by the Axiom Fund were £1,174,973.61. Thus at least £2,468,336.58 of the payments were made using Axiom monies.

79. The payments from the office account between 2 March 2012 and 31 January 2013 included payments to the Related Entities in the total sum of £2,442,727.43:

79.1 DGS - £681,274.00;

79.2 Tri Star Accounting Limited - £469,404.29;

79.3 Tri Star Technology Limited - £642,045.00;

79.4 Zoodle Limited - £207,000.00;

79.5 GDK Limited - £153,971.74;

79.6 Tri Star Costs Limited - £237,737.20; and

79.7 Tri Star Medicals Limited - £51,295.20.

The Firm also received the sum of £101,392 from the Related Entities in the same period.

80. The Respondents explained that the payments were for:

80.1 The general overheads of the Firm (such as staff costs, costs of leasing office space, marketing costs and IT costs) incurred both before and after the signing of the LFA, including for the conduct of WIP. The payments were made pursuant to services agreements entered into between the Firm and the Related Entities;

80.2 A loan of £155,000 from the Firm to DGS;

80.3 Loans totalling £32,000 from the Firm to Tri Star Accounting Limited; and

80.4 The repayment by the Firm of a loan of £150,000 made by Tri Star Costs Limited.

81. Each of the Respondents also increased the salary which they personally drew from the Firm following the receipt of Axiom funding; at a board meeting on 27 March 2012, the Respondents resolved that "all the directors would receive a salary of £50k ….effective from March."

82. The total sum of £20,000 was paid by the Firm to the Respondents (£5,000 to each of the First and Second Respondents; £10,000 to the Third Respondent), to repay directors' loans in March 2012.

83. Further payments totalling £1,075,826.64 were made from the office account for the Firm's general overheads and expenses including for staff salaries (£476,784.06), bank charges and loan repayments (£257,618.10) and other expenses (such as car and office equipment leases, insurance premiums, practising certificate fees, IT services and equipment, PAYE, National Insurance and VAT, mobile telephone bills, legal fees, and also the Firm's Christmas party) (£341,424.48).

The Amended Litigation Funding Agreement

84. On or about 30 October 2012, the Firm entered into:

84.1 an amended funding agreement with the Axiom Fund Master ("the October LFA");

84.2 an agreement with Tangerine headed "Legal Panel Agreement" ("the Panel Agreement") and/or ("the TIM Agreement"); and

84.3 a debenture in favour of the Axiom Fund Master ("the Debenture").

85. The October LFA was signed by the First and Second Respondents, and was in similar terms to and intended to replace the LFA.

86. The Panel Agreement was also signed by the First and Second Respondents. It provided that:

86.1 If the Firm did not meet the standards of a competent solicitor in relation to the funded cases or upon the termination of the Panel Agreement, Tangerine would have the power to remove some or all of the cases from the Firm and to re-instate them with another member of the Axiom funds' panel at Tangerine's entire discretion (clauses 1.2.2, 4.28, 8.3 and 9.1); and

86.2. The Firm agreed to obtain its clients' consent "initially" or "at the outset of a case" to permit Tangerine to remove cases from the Firm and transfer them to another panel Firm in such circumstances (clauses 1.3.3 and 4.10).

87. The Debenture purported to grant the Axiom Fund Master a first legal fixed and floating charge over the "Charged Property" which included "all files, papers and documents, whether in paper or in electronic form, relating to a Claim or Legal Work against which the Lender has made a Loan...".

88. The Firm entered into the October LFA, the Panel Agreement and the Debenture after being told by Richard Barnett of Barnetts Solicitors, that no further funding would be provided if the new documents were not signed. The Third Respondent's minutes of a meeting between Mr Barnett and the Respondents on 30 October 2012 recorded that: "The Board still agreed that the new suite [of documents] should be signed as continued funding is critical for the business."

89. Attached to the minutes of the meeting on 30 October 2012 was a note on the documents which had been prepared for the Respondents by David Johnstone. The note stated (inter alia) that:

> "The following notes relate to the obvious practical issues with the agreements and areas where the agreements perhaps go further than normal or go to the point where they do not sit comfortably with SRA regulation."

The note raised a number of concerns about the agreements including in particular the fact that the Panel Agreement purported to permit Tangerine to remove cases from the Firm at its discretion if it failed to meet the required standards of performance, and that the Debenture purported to create a charge over clients' files. As regards the permitted use of the loan, the note stated:

> "Clause 2.2 Purpose
>
> Previously there was an understanding with DR that whilst the Eligible Legal Expenses constituting the base loan amount were agreed it was acknowledged that the funding was in fact working capital and was not being set aside on an individual case basis to fund the specific disbursements further down the line. To borrow at the rates involved would be futile and self-defeating if the money was simply banked and set aside to earn notional interest.
>
> The wording before did suggest this, however from memory this is tighter and given the manner in which the funds will always be utilised, will mean an Event of Default will immediately exist on all loans?
>
> Given that DR is now somewhat removed and others are involved as regards managing the fund's solicitor facing activity, it would be good to have the reality reflected in the agreement.
>
> Failing that a formal side letter, given [DR] did explain that the previous wording was what it was because that was what they were presenting to investors?"

90. The note also pointed out that the documents purportedly required under the October LFA as a condition of drawing down funding would also "defeat the purpose of the funding" since the invoices for disbursements on funded cases would generally not exist when funds were drawn down by the Firm. The note added: "The contract does not therefore reflect what is anticipated?"

91. The note had been sent by Mr Johnstone to the Respondents by email on 25 October 2012. In that email, Mr Johnstone commented:

> "Whilst I appreciate that a commercial view needs to be taken, I have detailed areas where I think it would be prudent to document in Board Minutes the consideration that is given to the agreements. In particular I think it is important that you document how you could manage any potential for the lender to 'impinge upon the Firm's 'independence' ….. It would also provide an opportunity to document, where there are question marks over the validity of the terms, the views the directors have taken.
>
> Given the interest the SRA were showing in Andrew and certain other Firms of solicitors receiving funding from Axiom, it would be prudent to have a very clear paper trail of the decisions ultimately taken as regards utilising the Axiom Fund as a means of raising working capital.
>
> You are not dealing with a UK regulated financial institution but rather an unregulated offshore fund controlled by a very limited number of individuals ... you have a higher fiduciary duty than would perhaps otherwise exist and no doubt there s [sic] also increased requirements for caution within the Solicitors Rules.
>
> All the foregoing is of course in addition to the fact that there are a number of areas within the new agreements presented that cause concern in their own right.
>
> The agreements as presented indicate a desire to go way beyond what existed before in terms of influencing how the business operated..."

92. The Firm did not however receive any monies from the Axiom Funds after entering into the October LFA, the Panel Agreement and the Debenture, as the Axiom Funds were suspended on 26 October 2012.

93. On 31 January 2013, a Notice of Intention to Appoint Administrators for the Firm was filed at Court. On 1 February 2013, the Third Respondent contacted Steven Bint ("SB") at the SRA to inform him. Having been unable to speak to him directly, the Third Respondent emailed SB and stated:

> "I have an obligation to advise you that following an event that has significantly affected our working capital into Lindsays, we have taken the advice from an insolvency practitioner and as a result we have issued a Notice of Intention to Appoint, which you will have a copy of in the next day or so.
>
> ………………..
>
> I also have an obligation to advise you that there is an ongoing investigation of Lindsays and the investigator is Helen Maskell."

94. On 12 February 2013, Grant Thornton were appointed as the Receivers of the Axiom Fund.

95. On 13 February 2013, the Firm was placed into administration.

Witnesses

96. The following witnesses provided statements and gave oral evidence:

- Steven Bint – Supervisor in the Supervision Department of the SRA
- Helen Maskell – Forensic Investigation Officer in the Forensic Investigation Department of the SRA
- Duncan Neil Gibbins – The First Respondent
- Matthew Roy Edmund Dean – The Second Respondent
- David Johnstone – on behalf of the Third Respondent
- Alan Strange – on behalf of the Third Respondent
- Nicola Klimkowski – The Third Respondent

97. The written and oral evidence of the witnesses is quoted or summarised in the Findings of Fact and Law below. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to facts or issues in dispute between the parties. For the avoidance of doubt, the Tribunal read all of the documents in the case, made notes of the oral evidence, and referred to the transcript of the hearing. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read, hear or consider that evidence.

Findings of Fact and Law

98. The Applicant was required to prove the allegations beyond reasonable doubt. Mr Coleman submitted that as the standard of proof that the SRA had to discharge was the criminal one, the SRA's case would not be made out if "at the end of the case there is reasonable doubt created by the prosecution or [the Respondents]": Woolmington v DPP [1935] AC 462. The Tribunal had due regard to the Respondents' rights to a fair trial and to respect for their private and family lives under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. All allegations were denied by all Respondents.

99. **Allegation 1.1 -The Respondents caused or permitted the Firm to accept, and use, monies received from an investment fund totalling at least £3,117,022.50, in circumstances where it was improper for them to do so for the following reasons (and each of them):**

1.1.1 they knew that the Firm had not complied with the terms of a Litigation Funding Agreement, pursuant to which the monies were purportedly advanced, and which, to their knowledge, was intended to protect the interests of the investment fund and/or the ultimate investors in the investment fund;

1.1.2 they knew that the Litigation Funding Agreement pursuant to which the monies were purportedly advanced did not reflect the purpose for which the Firm intended to use and/or in fact used the monies, and that the intended and actual use of the monies had not been properly documented by the Respondents;

1.1.3 they had no intention that the Firm would repay the monies within the time required by the Litigation Funding Agreement and/or they knew or were reckless as to the fact that repayment by the Firm within that timeframe was very unlikely;

1.1.4 they misused the funds received from the investment fund by failing to apply them only towards "Eligible Legal Expenses", as defined in and required by the Litigation Funding Agreement;

1.1.5 despite being on notice of the serious risk that the investment fund's investment manager, in arranging for the monies to be paid to the Firm, was acting fraudulently, or committing some other serious breach of duty, towards the investment fund and/or the ultimate investors, they failed to carry out any or sufficient enquiries reasonably to satisfy themselves that the payments did not involve any such conduct by the investment manager;

1.1.6 they unreasonably risked the Firm being a party to transactions in fraud of the investment fund and/or the ultimate investors, or which involved some other serious breach of duty by the investment manager towards them (or one of them); and/or

1.1.7 in all the circumstances, as the Respondents knew, the transactions pursuant to which the monies were received were dubious and the monies should not have been accepted or used.

The Respondents thereby acted without integrity, in breach of Principle 2 of the Principles; failed to act in the best interests of their clients, in breach of Principle 4; behaved in a way that did not maintain the trust the public places in them and in the provision of legal services, in breach of Principle 6; and/or failed to run their business or carry out their role in the business effectively and in accordance with proper governance and sound financial and risk management principles, in breach of Principle 8.

The Applicant's Evidence & Submissions

100. The core issue raised by allegation 1 was whether it was proper for the Respondents to consent to the Firm receiving and using the money ostensibly pursuant to a written contract that, on the Respondents' own case, was wholly inconsistent with the purposes for which the Firm intended to use (and did use) the Axiom money, those purposes not being properly documented anywhere, and in circumstances where the written contract contained promises that the Respondents did not intend to keep. A further key issue was whether the Respondents could legitimately rely on the representations made by DR, that they could use the money for practice funding or any other purpose other than that contained in the LFA, notwithstanding the clear terms of the written agreement.

101. The Applicant submitted that there was common ground between the parties that in and of itself was fatal to the Respondents denial of allegation 1 namely (a) the LFA expressly limited the use of the money to disbursements on cases, (that being the key

purpose), and the payment of the Financial Guarantee Insurance ("FGI"); and (b) a substantial amount of the money provided to the Firm was not used for that specified purpose, but was instead used for practice funding or working capital. It was the Applicant's case that in entering into a written contract that the Respondents knew contradicted the intended purpose, and the failure to document at all what was said to be the true terms of the contract made the receipt and use of the money improper, and thus, on the Respondents' own cases, the essence of allegation 1 could be upheld.

102. However, the Applicant's case went much further. Mr Coleman outlined seven reasons that individually and cumulatively made the receipt and use of the Axiom funds improper.

103. Firstly, when each provision of funds was received and/or used, the Respondent knew that the Firm had not complied with the terms of the LFA, those terms being intended to protect the interests of the Axiom Fund Master and of the investors in the Axiom Fund (the ultimate investors in the Axiom Fund Master). The relevant terms are summarised in paragraph 67 above. It was common ground that the Respondents accepted that they drew down the money without following the procedure prescribed by those terms. In particular, the Respondents knew that the Firm had not provided Tangerine with details of Eligible Legal Expenses for which funding was requested or copies of all related invoices for any such Eligible Legal Expenses in accordance with clause 3.2 and part B of schedule 1 of the Litigation Funding Agreement. Only one utilisation request was ever sent to Tangerine. The request, which was dated 24 February 2012, confirmed that "We attach copies of all documents and evidence required under clause 3" and "We confirm that each condition specified in clauses 3.2 and 3.3 is satisfied on the date of this Utilisation Request".

104. The documentation and/or evidence required to be provided by the Firm was not provided to Tangerine, and there was no description of the Eligible Legal Expenses. Consequently, there was no due diligence of either the Firm or the cases to which the funding was said to relate; the careful monitoring, control and oversight of claims, and of the Firm, which was promised in the document sent to investors, and which was expressly provided for in the LFA, was not, in practice, observed or provided. In effect the content of the utilisation request, which was sent in purported compliance with the LFA, was inaccurate and incomplete. In fact, the Firm simply provided a list of cases that it wished to fund, and Tangerine would provide £8,500 for each listed case.

105. Further, the Respondents failed to pay the monies into client account as was required by clause 4.2 (a)(iii) (see paragraph 68.1 above).

106. Secondly, when each provision of funds was received and/or used, the Respondents knew that the Litigation Funding Agreement did not reflect the purpose for which the Firm intended to use or was using the money, and that the intended and actual use of the monies had not been properly documented. It was common ground that the Respondents did not intend to observe the contractual restrictions in the written LFA, and it was not disputed that at least a substantial part of the money advanced was used for purposes not permitted within that document. The Respondents acknowledged this implicitly in their written defences and openly during their interviews with the SRA.

107. In particular:

107.1 Most of the money was spent on the Firm's general overheads, and not on specific disbursements (Eligible Legal Expenses) supported by an invoice;

107.2 Most of the money went to the Related Entities and DGS, ostensibly for services provided (including recharges in relation to services that pre-dated the LFA);

107.3 Some of the money was used to repay loans that were said to be repayable to the Related Entities of the Respondents, including £5000 to each of the First and Second Respondents and £10,000 to the Third Respondent.

107.4 On 27 March 2012, shortly after the first Axiom loan had been received, the Respondents agreed to pay themselves a salary of £50,000 effective from March. This was a personal purpose. In the 11 months preceding the Axiom funding the Respondents had received only small amounts from the Firm: the First Respondent receiving £1,715.58, the Second Respondent receiving £2,131.58 and the Third Respondent £1,286.78. In the 11 months post receipt of the Axiom monies the Respondents received £30,730.91, £30,532.14, and £27,930.34 respectively.

Even on the Respondents' own case, the use of the monies to repay personal loans to themselves and substantially increase their salaries was "an impermissibly liberal interpretation of any sensible notion of practice funding, in the absence of explicit agreement, at least, with the lender".

108. It was accepted that some of the money would have been used for Eligible Legal Expenses as prescribed; Tri Star Medical Ltd had provided some reports. The amount used had not been separately quantified, however it was common ground that a substantial part of the monies advanced by Axiom had been used for purposes outside the scope of the written agreement; not drawn down in accordance with the agreement; and not supported by the requisite documentation and evidence.

109. Thirdly, at the time each tranche of funds was received and/or used, the Respondents had no intention that the Firm would repay the monies within the 12 month period required by the Litigation Funding Agreement and/or knew or were reckless as to the fact that repayment within that timescale was very unlikely. The First Respondent, in his witness statement explained that:

> "The life-cycle of cases of nature that the firm undertook and in respect of which WIP was calculated and built into projections is greater than 12 months so there is absolutely no doubt in my mind that Axiom and its advisers (including Baker Tilly) knew and were satisfied that money advanced against such cases within any facility would take longer than 12 months to be repaid and then made available for future drawdown as part of the agreed revolving facility. I know, because I was specifically told as much by DR, that there was satisfaction on this point by Axiom."

The difficulty with this was that DR specifically rejected in writing the First Respondent's request to vary the 12 month term in the LFA, in his email of 29 January 2012. Further, there was no evidence that Baker Tilly was aware of the

terms of the LFA; it was not advising on the LFA. The Respondents had tried to justify taking a loan that they did not intend to repay in accordance with the repayment terms contained in the LFA.

110. The common ground in relation to the three reasons outlined above were sufficient to uphold allegation 1 against each of the Respondents. In agreeing a loan agreement in the knowledge that it was flatly inconsistent with what was said to be the terms of the contract, and in the knowledge that it contained contractual promises that the Respondents did not intend to keep, they each fell well below the standards the public would expect of a solicitor under Principle 6. Further they acted without integrity in breach of Principle 2. Even on their own case, they signed an agreement whose terms they did not intend to keep. They signed an agreement knowing that it contained a false record of the true terms, and knowing that there was no document that recorded what they stated were the 'true' terms. This was inconsistent with the standards expected by the public of a solicitor. Further, a solicitor acting with integrity would not enter into such a contract.

111. Fourthly, the Respondents misused the funds received from the Axiom Funds by failing to apply them only towards "Eligible Legal Expenses" (as defined), as required by the Litigation Funding Agreement.

112. The first four reasons described above had already substantiated allegation 1. The remaining three reasons simply compounded the impropriety of the Respondents in their receipt and use of the monies. The fifth circumstance was that the Respondents were on notice of the serious risk that Tangerine was acting fraudulently, or committing some other serious breach of duty, towards the Axiom Funds and the ultimate investors. The Respondents, as experienced solicitors, would (and in any event should) have recognised and understood the implications of the following indicia of possible fraud or other serious wrongdoing on the part of Tangerine:

112.1 As the Respondents knew, the prudent approach to funding which was reasonably to be expected of an investment manager in Tangerine's position was wholly absent. No sensible or credible investment manager would act in the way that DR did.

112.2 As the Respondents knew, Tangerine had failed to ensure that the Firm complied with the terms of the Litigation Funding Agreement as regards both the purpose for which monies could be used and the manner in which they could be drawn down, and had failed to properly document the provision of funding. Despite the large amounts of money involved, and despite the fact that Tangerine was under a duty to act as a responsible investment manager, the arrangements put in place by Tangerine were informal in the extreme. The Respondents were not required to sign any document acknowledging receipt of the monies; the money just arrived in the Firm's account following a drawdown request from the Firm. The Firm also never received a formal loan account statement from the Axiom Fund Master or Tangerine setting out the sums borrowed and owed.

112.3 When the monies were accepted by the Firm, the Respondents were aware that the basis on which the Firm had accepted and intended to use the monies was inconsistent with representations made to the investors regarding the loans that the Axiom Fund Master would make. In particular:

112.3.1 the email from DR to the First Respondent of 23 January 2012 (paragraph 62 above) made clear to the Respondents that the express terms of the LFA reflected what the investors in the Axiom Funds had been told, yet DR's email to the First Respondent of 29 January 2012 (paragraph 62 above) was wholly inconsistent with those express terms; the suggestion that the money could be used inconsistently with the agreement, but that the agreement could not be amended made no sense. Further, DR provided no credible reason as to why there could not be a properly documented agreement of what the Respondents say was the true agreement, as to both the purpose for which the money could be used, and the terms of the agreement. Such concerns were also raised with the Respondents in the notes prepared by Mr Johnstone in October 2012 before the Firm entered into the October LFA, but they nevertheless entered into it.

112.3.2 DR's email of 29 January 2012 was incoherent and internally inconsistent; it did not make sense. It did not provide an answer to the questions asked, and simply raised questions about the propriety of DR's actions.

112.4 The Respondents knew that despite the Firm's poor financial condition, Tangerine made no proper assessment of the Firm's ability to repay and did not take any security. The Firm's ability to repay up to £15 million within 12 months had not been reasonably demonstrated, and the available information strongly indicated that it would be unable to repay the loan, let alone interest (15% for the first year, then 1.5% per month for each subsequent month) or the Facilitation Fee (50% of the principal amount).

112.5 The Respondents were aware of the 50% Facilitation Fee to which Tangerine claimed to be entitled. That fee was suspicious because of its size and the incentive that it gave Tangerine to lend recklessly on behalf of the Axiom Fund Master and also because it substantially increased the cost of funding to the Firm (thereby making the funding even riskier from the perspective of the Axiom Funds).

112.6 When the monies were accepted by the Firm, the Respondents were also aware that the basis on which the Firm had accepted and intended to use the monies drawn down under the LFA was inconsistent with statements contained in the Due Diligence Document. In particular:

112.6.1 ATE insurance would not provide any security to the investors in the Axiom Funds insofar as the monies were not used for "Eligible Legal Expenses";

112.6.2 In any event, the Firm had not obtained ATE insurance for each claim for which it had drawn down funding from the Axiom Fund Master (see paragraph 84 below) and in some cases the Firm was permitted to draw down funding without confirming or providing any evidence that ATE insurance was in place;

112.6.3 The Axiom Fund Master could not have any lien over or "own" any claim in respect of which the Firm drew down funding since the claim

belonged to the client not the Firm and for the same reason the Axiom Fund Master would not be entitled to transfer a claim to another panel Firm without the consent of the client;

112.6.4 The claims in respect of which the Firm drew down funding would not or were very unlikely to be completed within 12-18 months;

112.6.5 Tangerine did not ensure that there was "careful selection and monitoring" of case types or that there was any "ongoing monitoring or tracking" of the progress of cases;

112.6.6 Tangerine did not carry out any independent assessment (or require the Firm to produce any evidence that it had carried out its own assessment) of the merits of cases; and

112.6.7 The Firm's professional indemnity insurance would not in practice provide any effective protection for the interests of the investors in the Axiom Funds in relation to loans made to the Firm.

112.7 Further, notwithstanding the obligations under clauses 5 and 12.3 of the Litigation Funding Agreement, the Respondents failed to take any or any adequate steps to ensure that Financial Guarantee Insurance had actually been put in place to protect the interests of investors in the Axiom Funds.

112.8 The Respondents told the SRA that they did not obtain or read the Offering Memorandum ("OM") or the Supplementary Offering Memoranda ("SOMs"), despite the fact that these documents were specifically referred to in the Due Diligence Document and in Mr Rae's email of 23 January 2012 (see paragraph 62 above) and were publicly available. If the Respondents did not obtain or read the OM and/or the SOMs, the Respondents' were wilfully blind and/or reckless as to the contents of those documents in the light of the matters referred to in paragraphs 112.5 to 112.6 above. In any event, as the Respondents knew or ought to have known, the OM and the SOMs contained representations to investors that were inconsistent with the basis on which the Firm had accepted and used loans from the Axiom Fund Master. For example:

112.8.1 The January 2012 SOM did not provide for Facilitation Fees.

112.8.2 The January SOM 2012 represented that the loans would be short term, and would take on average 12 months to be returned; however, the Respondents did not intend or expect that the Firm would repay the loans within 12 months.

112.8.3 The January 2012 SOM represented that Axiom Fund Master retained ownership of cases, so that if the Firm failed the Axiom Fund Master would reclaim the case and hand it over to another panel Firm; however, as the Respondents were aware, no such arrangements (even if possible) had been put into place (at least prior to the execution by the Firm of the Panel Agreement).

112.8.4 The January 2012 SOM contained the following representations concerning insurance and security that would be obtained in respect of funding provided to law Firms:

(a) All funding provided to law Firms would be insured.

(b) In the event of a panel Firm's insolvency or ceasing to trade, the relevant cases would be passed by the lender to a new Firm.

(c) The Axiom Master Fund retained ownership of every case.

(d) The panel Firm in appropriate cases would take out "Legal Protection Insurance" with an "authorised' insurer. This insurance, which the January 2012 SOM said was often called "After The Event Insurance", was said to protect up to a maximum amount for all legal expenses, disbursements and fees in the event a case was lost.

(e) Investors were alerted to the risk that the insurer might fail but were reassured that all insurers used by the Axiom Master Fund would be regulated by the UK Financial Services Authority and vetted by Tangerine.

(f) If a case was lost the Legal Protection Insurance would pay the amount loaned. If the case was won, the amount of the loan together with insurance premiums and loan charges would be recovered from the losing party under the "Access to Justice Act of the United Kingdom".

(g) The "Solicitors Indemnity Fund" helped to ensure the solvency of solicitors Firms.

These representations made to investors in the January 2012 SOM regarding the insurance and security arrangements were false in the following respects:

(a) The Axiom Master Fund did not and could not "retain ownership of the cases", given the fact that the claims were owned by the client (not the Firm) and the fact that a client's freedom to choose a solicitor is unfettered.

(b) A typical ATE insurance policy would not cover the amount of the loan and would have as its insured the claimant in proceedings (not the panel Firm); ATE insurance would provide still less protection to the investors in the Axiom Funds if the loan was not used for Eligible Legal Expenses (as the Firm did) since ATE insurance did not cover the losing Firm's WIP.

(c) It was at the very least doubtful that loan charges would be recovered from the losing party.

(d) By 1 September 2000, the Solicitors Indemnity Fund had ceased to indemnify new claims, save for certain run-off claims made against practices that ceased at least six years earlier, having been replaced by other arrangements, and in any event the Solicitors Indemnity Fund (and the arrangements that replaced it) did not help to ensure the solvency of solicitors' Firms.

112.9 The Panel Agreement and the Debenture contained provisions which the Respondents must have known were contrary to the best interests of the Firm's clients. In particular, the Panel Agreement purportedly authorised Tangerine at its discretion to remove cases from the Firm and to transfer them to another Firm and required the Firm to obtain the consent of their clients to such a course of action in advance. Further, the Debenture purportedly granted a charge over clients' files to the Axiom Fund Master. The Respondents caused or permitted the Firm into these agreements even though they were aware from Mr Johnstone's notes that they raised concerns as to their compliance with the SRA Code of Conduct 2011.

112.10 The Respondents knew that Tangerine was acting as representative on behalf of the Axiom Funds. They knew therefore that Tangerine was required to act within its authority and in the best interests of its principal (and of the ultimate investors). Tangerine, and those acting for it, could not have reasonably appeared to the Respondents to be reputable investment managers, and any representations that they may have made to the Respondents concerning the scope of their authority and as to the terms on which the monies provided by the Axiom Fund Master were permitted to be used could not be taken on trust in view of each of the abnormal and suspicious circumstances described in sub-paragraphs 112.1 to 112.9 above.

112.11 The reasons set out in sub-paragraphs 112.1 to 112.10 individually and/or cumulatively put the Respondents on notice at all material times that there was a serious risk that Tangerine, in arranging and purporting to agree the funding to the Firm on behalf of the Axiom Fund Master, was exceeding its authority to act on behalf of the Axiom Funds and/or was not acting in good faith in its best interests and/or was taking unauthorised fees and/or was defrauding the Axiom Funds and their investors.

112.12 The Respondents could not therefore properly cause or permit the Firm to accept and use the monies received without carrying out enquiries that reasonably satisfied them that Tangerine was acting within its authority, and in good faith in the best interests of the Axiom Fund Master, and that the Axiom Funds and their investors were not being defrauded.

112.13 The Respondents each failed to make any or sufficient enquiries in this regard (such as disclosing the material facts to the board of directors of the Axiom Funds, and obtaining information from the Axiom Funds that reasonably dispelled any suspicion concerning Tangerine).

112.14 The Respondents deliberately refrained from making enquiries lest they learned something they would rather not know concerning Tangerine's conduct and its authority to arrange the funding.

113. Sixthly, in all the circumstances, the Respondents unreasonably ran the risks that:

113.1 The Firm was party to a fraud of the Axiom Master Fund and of the ultimate investors, or that involved other serious breaches of duty by Tangerine;

113.2 The Firm was benefitting from Tangerine's wrongdoing.

114. Seventhly, in all the circumstances, as the Respondents knew, or should have known, the loan and the LFA were dubious, and should not have been accepted or used.

115. As a matter of professional conduct, given the facts known to the Respondents, they simply should not have accepted the money without making further enquiries, and without making those enquiries up to the point where they could have been reasonably satisfied that, despite all the suspicious circumstances, there was no underlying wrongdoing and that Tangerine/DR were not exceeding their authority or otherwise acting improperly. Those enquiries would perhaps have included, for example, asking to see the supplemental offering memorandum, which had been mentioned in the due diligence document, but had not been provided; asking to see the information provided to investors, which DR had specifically warned would be incompatible with departing from the written contract; asking to speak to someone at the Axiom Fund.

116. The answers provided by the Respondents in their oral and written evidence in relation to allegation 1 did not stand up to scrutiny. In response to the Respondents' assertions that the LFA was not the entire agreement, and that the written agreement was orally varied, it was submitted that:

- Contractual variations of the magnitude suggested by the Respondents would, as a matter of common sense, be in writing, quite apart from the NDA and the entire agreement clause. A solicitor would not agree an oral variation of this magnitude without properly recording it in writing. And, indeed, DR clearly made the point in his email of 29 January that he was not prepared to amend the contract. The written contract was the contract.

- It was a striking feature of the Respondents' case that they had never clearly articulated what the oral variations were, when they were agreed and the terms that were agreed. Nowhere in their evidence or in the other documents could one find a clear explanation as to what the terms of the agreement were and as to when the money was to be re-paid. It was all vague, and that vagueness was again another indicator that the contract, as the Respondents well knew, was fully contained in the written document.

- It was unworkable as a matter of ordinary contract law, particularly when considering the entire agreement clause and the NDA. Further, it was not possible to orally vary a written contract before the written contract has been concluded. The Respondents' case was oral variations followed by the written contract with an entire agreement clause. It did not work either legally or as a matter of common sense.

- Finally, not only were the alleged oral variations unworkable as a matter of common sense or contract; they were unworkable as a matter of professional conduct; a solicitor could not properly make, what on the Respondents' own case, was a false and misleading record of the contract, containing terms that they did not intend to keep. Still less could they do so in circumstances which, objectively viewed, were suspicious.

117. The Respondents' assertions that the written agreement did not work was accepted, but only in so far as it did not work for the purposes they had in mind; that provided no conceivable excuse to enter into it in the first place and not to follow it in the second place. If the proposed contract did not work, the Respondents ought to have torn it up and started again with a proper draft that reflected the true agreement.

118. The Respondents relied on the Baker Tilly report, which they submitted, together with the model, made it clear that Axiom monies were to be used for practice funding. Mr Coleman rejected that argument. On the contrary the report referred to the use of the money for disbursements; this was entirely consistent with the LFA. Nowhere in the report did it make clear that Axiom monies could be used for practice funding. The nature of the funding was evidenced by:

- The "Initial Draw Down on New Cases" table (paragraph 58 above) which detailed the amounts required for the cost of disbursements. The 'WIP' line was left blank.

- The "Disbursements/Acquisition Cost" table, which particularised the likely disbursements and cost (e.g. medical reports, expert reports, counsel's fees, etc). Again, these totalled the amount to be drawn down per case.

- Under the "Profile for Payment of Disbursements: Clinical Negligence" table, it was clear that the anticipated funding provided, would be used for the payment of disbursements over the lifetime of the case, which was anticipated to be 12 months.

- When describing the "The Proposed Transaction" the report stated that "Rehab4Life Ltd has applied for a litigation funding facility of up to £8 million to fund disbursements…."

119. The First Respondent's assertion in his witness statement that the Baker Tilly report "had resulted in a positive assessment" was incorrect. The report was qualified, and stated expressly that the "work and findings shall not in any way constitute a recommendation as to whether a funding facility should be provided by Axiom." Further the report showed that the Firm was loss making, and that its liabilities exceeded its assets. Further it stated that:

> "Management estimates that WIP at the end of January 2012 was circa £2.4m….We have not investigated this further and would comment that this represents an increase of circa £1.8m compared to the estimated amount of WIP at 31.3.11 calculated on the same basis. We would also comment that this appears high in comparison to the level of fees billed of £107k, the level

> of wages and salaries at £140k and the level of disbursements in the balance sheet of £54k."

Also that:

> "The Company has net liabilities at 31.12.11 of £191k. If WIP was to be included at £58k……this would reduce net liabilities to £133k. Management…estimates WIP the value of WIP at in excess of £2m at 31.12.11. We have not investigated this further…"

And that:

> "….it is clear from the balance sheet movements that the losses incurred by the Company in the nine months ended 31.12.11 have been financed principally through loans from the Connected Parties [the Related Entities] and from third party providers. We would comment that this is unsustainable and the Company needs to start turning WIP into cash."

120. Given the nature of the findings of the Baker Tilly Report, Mr Coleman submitted that this was further evidence that the willingness of Tangerine to enter into the loan in the informal way suggested by the Respondents, was a further indicator that DR/Tangerine were not acting as an investment manager, acting in his principal's best interests would be expected to act. The Respondents' reliance on the report was, in any event, a red herring. Baker Tilly was not concerned with the terms of the LFA. However, even if, which was not accepted, the Respondents were right about the report, for the reasons already outlined above, it could not justify their signing a false contract which contained promises they did not intend to keep.

121. The Respondents' reliance on the argument that the model provided to Baker Tilly which showed that the funding was to be used as practice funding, was another red herring. The Respondents asserted that if the funding could not be used in the way they had anticipated, they would have "walked away". However, this did not justify their entering into a contract intending to breach the express terms, or ignore those terms, whilst ignoring the suspicious circumstances.

122. The honest evidence given by David Johnstone tended to undermine the Respondents' case. His evidence that in his experience it was historically common practice to amend legal financing precedents was not analogous to the facts of this case, and provided no assistance to the Respondents; he made it clear that any amendments would be clearly recorded in writing by way of "a side letter or an exchange of emails…..to ensure there was an understanding between the parties [sic] exactly how it was working." When asked by the Tribunal about the nature of the recording of any variation to precedent documents, Mr Johnstone replied that any changes would "absolutely" be recorded in writing "either an exchange of emails or an actual formal letter between the parties." Mr Johnstone accepted under cross examination that the Baker Tilly report, notwithstanding the model, did not describe the purpose of the funding as being for anything other than disbursement funding.

123. In response to the argument that they relied upon DR, it was submitted that:

- The reliance was not reasonable; it was, or ought to have been clear to the Respondents that he was not acting in the manner reasonably to be expected of an investment fund manager, acting in the best interests of his investment fund principal; his responses regarding the permitted uses and the repayment of the loan were wholly inconsistent with the express terms of the LFA.

- His email of 23 January 2012, in which he explained that the document suite had been "written in such a way as to be compatible with the Fund Offer Memorandum" meant that the Respondents knew, or ought to have known, that their acceptance and use of the monies was inconsistent with what the investors in the Axiom Fund had been told.

- The Respondents were told by DR that he was unable to record variations in writing as the agreement was in a standard form. Notwithstanding this, he agreed in his email of 29 January 2012 to amend clause 10.1(b) to change the rate of interest payable on loans outstanding for more than 12 months.

- As a matter of contract law and as a matter of professional conduct, they were not entitled, in all the circumstances, to simply rely upon what DR stated his authority to be. As a matter of agency law, a third party cannot rely upon the agent's representation regarding his own authority. If the Respondents wanted to rely on DR's authority, they should have confirmed that authority with his principal, which was the Axiom Fund. The Respondents never confirmed DR's authority to act with Axiom, but all stated that they placed reliance on his representations.

- A third party cannot rely upon an agent's apparent authority if there are grounds for suspecting that the agent is exceeding his authority or otherwise not acting in the principal's interests. What is true of contract law, agency law, is plainly true as a matter of professional conduct as well in the context of receiving £3 million from an offshore investment fund.

124. Further, even in the absence of grounds for suspicion, there was nothing that was said by DR which could justify a solicitor signing a misleading document that was inconsistent with the 'true' terms and that contained promises that the solicitor did not intend to keep. The contention of the First and Second Respondents in their defence – "[i]t is arguable that the written agreement could never have come into effect on account of the conditions precedent having not been met", simply made matters worse; the conditions precedent were not met due to the Respondents failure to do so.

<u>The First and Second Respondents' Evidence & Submissions</u>

125. Mr Goldsmith on behalf of the First and Second Respondents submitted that this was an unusual case focussing as it did on the SRA's strict interpretation of the terms of a commercial agreement between the Respondents' Firm and a third-party funder. The SRA was not a party to that agreement but had brought its case upon a strict forensic analysis of a document, which did not represent the whole of the agreement. In so doing the case was brought on the premise that the Respondents and their

explanations were wrong, (and to that extent, the Respondents' explanations were ignored), notwithstanding that there was no evidence whatsoever before the Tribunal from the other parties to the Agreement, namely Axiom or Tangerine. The SRA had "elected to discount what was actually agreed by and between the actual parties (and which agreement was actually followed) and had instead bought a case based upon theory and supposition…". The Respondents, as parties to the Agreement were best placed to be able to inform the Tribunal (and previously the SRA) of the terms of that Agreement. The SRA, it was submitted, could not simply ignore the facts to make its case.

126. It would be improper for the Tribunal to discount the Respondents' evidence as to the true nature of the agreement and to adopt the SRA's forensic interpretation of the documents alone.

127. Detrimentally to the SRA's case, it became plain in the course of the cross examination of Mr Johnstone that the SRA fundamentally misunderstood this particular type of practice funding and funder. Mr Johnstone explained that the Axiom Fund was of the same nature as the DC fund in which he himself had previously been involved and which, it was submitted, placed him, given his particular experience and knowledge of the arrangement between Axiom and the Firm, in the perfect position to be able to guide the Tribunal through the matters which were to be determined. DC had provided practice funding to law firms involved in claimant personal injury. The level of borrowing was based on average disbursement costs; the money was paid into the business and then "that money gets utilised for any working capital purpose the business sees fit."

128. It was to be noted that the SRA's criticism of the Respondents did not focus upon their conduct as solicitors or in their representation of or service to clients but instead upon their dealings on their own account in an arm's-length commercial transaction between borrower and a sophisticated and professionally represented and advised commercial lender. There was no contractual relationship with the investors in Axiom, nor did the Respondents owe those investors any duties in contract, tort or equity.

129. Although he did not speak for the Third Respondent, Mr Greensmith submitted that it was important to note that the responses which had been given to the allegations by both the First and Second Respondents, and by the Third Respondent, matched, even though those responses had been prepared and given independently, the explanations and responses to both the questions put by the SRA and their responses to the allegations themselves were similar. This went to the credibility of the Respondents. Further, when considering the evidence and the Respondents' explanations it should be noted that those explanations had remained entirely consistent since the start of the SRA Forensic Investigation in November 2012. That consistency was important and also went to their credit and credibility.

130. The chronology of the documents, as presented by the SRA in its bundles, was helpful, in that it showed the way that matters had progressed. However, it should be recognised that that not all of the documents in the bundles were seen or known to the Respondents at the time that each document was produced or dated; the chronology did not represent the Respondents' full knowledge at a particular time. The Tribunal

must judge the Respondents on what they knew at the time of their actions, and not with the very substantial benefit of hindsight and the voluminous amount of new information which had become available particularly following the failure of the Axiom Fund. There was an explosion of material after the failure of the Fund, including the likes of the Offshore Alerts. Further, there was a lot more which was known to the SRA about Axiom generally and particularly at the time that it failed, than was known to the Respondents; not only about Axiom but also about the key individuals who were involved in Axiom.

Other Axiom Cases

131. The Tribunal was aware that this matter was one in a series of related cases, some of which had already been determined by the Tribunal. The SRA had investigated a number of firms that had received funding from Axiom. Helen Maskell confirmed in her oral evidence that "several firms were inspected on the same day." The Respondents knew nothing of that, at that time.

132. Reference was made, within the presentation of the SRA's case, to Tim Schools ("TS"). There had been a decision to refer the conduct of TS to the Tribunal but that decision was not published to the profession until almost a year after the decision to make the referral; that was not information which was in the public domain and so could not have been known to the Respondents.

133. A core issue in these proceedings, as defined by Mr Coleman was "whether it was proper for the Respondents to consent to the Firm receiving and using the Axiom money, ostensibly pursuant to a written contract that, on the Respondents' own case, was wholly inconsistent with the purposes for which the Firm intended to use (and did use) the Axiom money, which were not properly documented anywhere, and that contained promises that the Respondents did not intend the Firm would keep". It was understood that this issue is common across the proceedings against firms which reached agreement with Axiom.

134. Two cases had previously been determined by the Tribunal: Barnett & Swift [11249-2014] ("Barnett") and Wingate & Evans [11354-2015] ("WE"). Barnett, it was submitted, was distinguishable from the present case, on account of, amongst other factors, the hopeless position of conflict that Mr Barnett found himself in, in both advising and borrowing from Axiom. However, there were significant similarities between the present case and that of WE in which the Tribunal determined (correctly, in Mr Greensmith's submission) that it was not improper per se for a solicitor to sign, as part of the agreement between their firm and Axiom, a contract document which contained terms which were varied by agreement.

135. If the Tribunal were to determine that it was improper for a solicitor entering into an agreement to vary the terms orally and/or by course of conduct then there would be potential repercussions throughout the profession. Agreements between parties were varied orally and by course of conduct all the time, including by solicitors. It could not follow, as a matter of course, that a written contract, if varied, was improper; even where that variation affected significant terms. If that were the case then by extension the solicitor who engaged an employee under a standard form employment contract but by agreement changed the hours, or days, or remuneration, or job description of

the employee orally or by matter of course would be acting improperly. It was submitted that that could not be right: all the more so when, as in the present case, it involved an arm's length transaction.

136. WE was the subject of appeal by the SRA. Whilst the outcome of that appeal was pending, it was submitted that the Tribunal's decision in that case remained authority on the point. The Tribunal was invited to agree, as per the decision of the former division, that it would not automatically follow that the receipt and use of the Axiom money was improper.

The Baker Tilly Report

137. The Baker Tilly report was part of the due diligence into the Firm conducted for and on behalf of Checkmate Audits, who in turn were conducting due diligence for and on behalf of Axiom. The final version of the report (if one was created) was not seen by the Respondents and was not before the Tribunal.

138. The report was prepared following Baker Tilly's analysis of the sophisticated financial model built by Mr Johnstone and described by him in his oral evidence. He explained that he had spent a considerable amount of time going through the figures and projections with Baker Tilly. The level of detail contained within the spreadsheets, which were reviewed on screen with Baker Tilly, were of a size and complexity that made them unsuitable for printing.

139. Mr Johnstone's evidence was that there could be absolutely no doubt that Baker Tilly knew precisely how any facility granted by Axiom would be operated; namely monies would be used to grow the firm significantly over the years that followed. The report clearly set out industry average figures for the settlement of cases and this was worked into the financial projections.

140. Neither the Firm nor the Respondents ever sought to hide or disguise the fact that they intended to use the monies from Axiom in part to fund the expansion of the Firm and to increase cases. It was clear from the report that Baker Tilly had analysed the Firm's financial model. Since the decision to lend money to the Firm was made after the disclosure of the Baker Tilly report, it was assumed by the Respondents that Axiom was content with the findings contained in the report, including the Firm's financial model and the purpose for which the funds would be used; namely as working capital and to expand the business.

141. Despite Baker Tilly's analysis, the Applicant had proceeded on the (unthinkable) basis that Axiom and its professional advisers had overlooked this crucial aspect of the model. Baker Tilly was instructed by Axiom and not the Firm, and as such they owed a duty to Axiom and not to the Firm; the Firm had absolutely no influence on the advice given to and acted upon by Axiom and its appointed representatives, and the basis upon which Axiom proceeded to invest in the Firm. In all the circumstances, and upon the assurances by those appointed by Axiom to speak and act upon its behalf, the differences between the written agreement and the revisions to it by both oral variation and variation through conduct were not causes of concern.

142. The First Respondent was certain that “The model clearly shows that it is practice funding”, and more importantly that “Baker Tilly clearly understood it was practice funding…It’s quite clear they can see from the model…and it is quite clear, without any shadow of doubt, exactly what the monies are being used for…I just don’t think it’s in any way sensible to assume that Baker Tilly thought that we might borrow any given amount, but £3million, use maybe 20% of it for legal disbursements, and just leave the other £2.6 million in an account…paying interest on it…it would be wholly uneconomic and ludicrous to do that.” He did not accept that the report was stating that the money could only be used for disbursements. The report was “not providing a narrative and explaining to the fund manager how the fund could work.” He stated that the “fund manager will know what is and isn’t within their discretion as to allow what to fund.” When asked in cross examination why he had not corrected, what the SRA referred to as the “materially wrong” references in the report to disbursement funding, the First Respondent explained that Baker Tilly had spent a significant amount of time going through the model and there “is no possibility that certainly an accountant could misunderstand what was going to happen.”

143. The Second Respondent confirmed that it was his view, that when considered as a whole, the Baker Tilly report made it clear that the money was to be used for practice funding. Baker Tilly “couldn’t help but appreciate what was actually meant….[The model] went through very, very detailed triangulation, right down to sort of showing up at what point individual new solicitors would need to be employed, at what salaries, and what their bonuses might be, how the money might be spent, etc. So it was very clear.” In relation to the references in the report to disbursement funding, and the SRA’s contention that, contrary to the Respondents’ evidence, it was not at all clear from the report that the Axiom monies were going to be used for anything other than disbursement funding, the Second Respondent explained that when certain parts of the report were taken in isolation “certain parts…read by themselves, might not be clear. But when it is considered with the model, with the financial model, which is very clear, and you see the whole picture, then I am confident that it is clear.” The Second Respondent did not accept Mr Coleman’s suggestion that the report was contemplating that “all the money will be spent on disbursements and disbursements only”.

144. Mr Coleman’s criticism of the Respondents for referring to the Baker Tilly report as evidence that it was known that funds were to be used other than for disbursements alone was unfair, particularly as the report (and attached business plan and financials) referred to funding capital and to loans being drawn down “for 100% of the value of assumed levels of disbursements” “irrespective of whether funding is required”. Also that the Firm would have “a significant level of funding from Axiom that will have not been utilised for payment of disbursements. We assume that this is not dissimilar to other firms to which Axiom has provided funding”. This was also true of the criticism levelled at the Respondents for characterising the report as “positive.” Given that the Firm’s application for funding was successful, it stood to reason that the outcome was positive.

145. Reference by the SRA in the course of the hearing to the Firm being loss-making and to its liabilities exceeding its assets was also unfair, as the figures quoted were historical and without reference to the true value of WIP, which needed to be factored in so as to provide the full picture of the Firm’s finances.

146. Axiom had the benefit of professional advice, including that of Baker Tilly who had scrutinised the Firm's business plans and financial model. The model could not have been more explicit about the nature of the work and the way in which the funds were to be, and needed to be used, in order to expand the business. Success for the business and Axiom's investment in the Firm was centred upon that growth. Simply, unless the funds could be used as set out in the model, then the business plan and model simply did not work and the Firm would not have entered into the Agreement. Similarly, unless it was thought by Axiom and its professional advisers that the business plan and model worked, it was contended that Axiom would not have entered into the agreement either.

The Agreement between the Firm and Axiom

147. The Respondents' evidence was that the Agreement under which a borrowing facility was made available to the Firm by Axiom was part written and part oral. Each of the Respondents had confirmed their absolute assurance on this point, and on the purpose for which the borrowed funds were to be applied. The First Respondent stated that "it was clear from first contact with TS, from each of the conversations we had with DR, from any scrutiny of the business plan and financial models that our application was for practice funding." The Firm had been introduced to TS, who represented Axiom, by AL who had explained that he (AL) was "aware of a funder." When the First Respondent met with TS he made it "absolutely" clear that the monies required would be for practice funding. The Second Respondent confirmed that his "understanding is and was at all times that the funding was advanced upon the business plan and the complex financial modelling that formed the central plank of our application for funding." That understanding came from a number of sources; "[The First Respondent] who was conveying everything that he was being told from Axiom. From the model itself, which I had input in helping to put together in terms of the assumptions….From the contents of the business plan; I saw it as effectively mortgaging the WIP on certain cases, which could be used for practice funding, for any purpose in order to help grow the business."

148. The SRA contended that the only agreement between the parties was the LFA dated 24 February 2012. In support of its contention the SRA relied upon, inter alia, Clause 1(b)(i) (see paragraph 63 above) of the NDA Whilst the papers before the Tribunal included only an unsigned version of the NDA, it was accepted by the Respondents that this would likely have been signed. In reliance on that clause, the SRA asserted that the assurances and negotiations with DR about the application for funding and the use of the money advanced to the Firm would be superseded by the later written agreement. The Respondents – who were actually party to the agreement with Axiom, (rather than carrying out a forensic analysis of the document from paper alone) – disagreed. Prior to entering into the agreement with Axiom the Firm (in particular the First Respondent) had discussions with DR, who had been introduced to the Firm by TS. The Respondents' evidence was that the application for funding was predicated on the facility being for working capital, in order to allow the firm to grow in accordance with the financial plan and modelling that had been designed by Mr Johnstone. The signing of the LFA by the Respondents was conditional upon that. Had the funds not been available for that purpose, the Respondents would not have entered into the Agreement. The First Respondent explained that if the funding had been advanced "purely for legal expenses…..we would have just walked away". This

was the position not only when signing the contract, but during the negotiations where the First Respondent asserted that the Firm had made "the point very clear. If they said "it is just for legal disbursements and nothing else"…the discussions would come to an end and we would walk away…". The Second Respondent stated that "the full contract was the written agreement and the oral agreement which was shown to be the case through course of conduct over the eight months we took the funding".

149. The LFA, which was in a standard form, was provided to the Firm for consideration. This prompted the Firm to write to DR on 23 January 2012 with a series of questions about the facility, and to seek amendment of the document (see paragraph 62 above). The Second Respondent explained that Mr Johnstone assisted in the preparation of the questions. Mr Johnstone's evidence was that such standard agreements, with variations specific to the particular borrower, were not unusual in funding arrangements of this type.

150. DR did not provide a substantive response to those questions until 29 January 2012. In his short response of 23 January 2012, DR stated that the document suite had "been written in such a way as to compatible with the Fund Offer Memorandum." The SRA contend that this response was significant and should have alerted the Respondents that the variations suggested were incompatible with what investors had been told. The First Respondent explained that when he read that response "there was nothing there that would have leapt off the page at me". The Second Respondent when asked whether, on reading the DR email of 23 January 2012, he "appreciated that the oral variations…on some points fundamental to the contract….may well be incompatible with the fund offer memorandum" responded that he was "not sure that the logic necessarily follows that they must be incompatible. The terms were varied by an investment manager who we understood to be properly appointed. I think it is a reasonable assumption to make that any amendments he is able or willing to make are consistent with the fund offer memorandum."

151. DR's substantive response was emailed to the Firm on 29 January 2012 (see paragraph 62 above). The email had been characterised as "incoherent and suspicious" by the SRA; the Respondents did not consider it so. Whilst the SRA stated that "it is difficult to make sense of it", that is because they did not do as the Respondents did and see it in the context of all that was going on at the time: the application, the discussions with DR, the initial discussion with TS, and the financial model which (according to the Respondents and Mr Johnstone) only worked if it was in respect of working capital.

152. The Respondents interpreted the DR response as substantiating that which they had always been told, namely that the monies advanced under the loan were for practice funding. The First Respondent explained that "…we asked the questions to clarify the position as we understood it…the responses gave us comfort that what he was agreeing to was compatible [with what the investors had been told] and that things that he didn't agree to either weren't compatible and therefore couldn't be allowed or, I suppose, he just didn't want to agree them."

153. When it was put to the First Respondent that the email exchange was suspicious, he explained that:

> "that's just not true at all…..[The LFA] was drafted in such a way as to be compatible with the Fund Offer Memorandum. Well that is of course what we would expect. But it [the DR email of 23 January 2012] doesn't say at all that any variation whatsoever will clearly be outside of the Fund Offer Memorandum. As we understood it then, and we had no doubt whatsoever, DR had authority to make variations that were appropriate, and as far as we were aware those corrections he agreed to were in agreement with what the investors were being told…….From the email exchange and the conversations we had with DR we asked a whole load of questions and whether some things can be varied. He said yes to some and no to others. Now our understanding from this and from talking to him was the ones that he said no to were either ones that he would not or could not amend because it would not fit with what investors had been told, and the ones that he did agree to vary were the ones that were within his authority and power to vary and were within the parameters of what the investors are being told."

154. The First Respondent did not accept Mr Coleman's submission that he had "consciously turned a blind eye to the risk that the oral agreement was inconsistent with what investors had been told" because he did not want to discover the truth; if he did so, he would not get the money. The First Respondent explained that the parts of the contract that had been varied were, in his view, compatible with what investors had been told.

155. The Second Respondent explained that in relation to the questions raised in the Firm's email of 23 January 2012 "[DR] came back and confirmed various points which were entirely consistent with what he had previously said and the information that had been given to me as to how the fund could be used, and my understanding at that time was that the overall agreement was partly written, partly oral."

156. The First Respondent signed the LFA on behalf of the Firm on 24 February 2012.

157. The SRA placed significant emphasis on the entire agreement clause contained within the LFA (see paragraph 71 above) as precluding the Firm from using the funding for the Firm's general expenses or working capital. It was wrong to do so. The agreement between the parties was part written and part oral; the SRA was wrong to assume that the written contract was subsequent to DR's emails and the discussions between the Firm and DR. All discussions, at any time, and the conduct of the parties from the outset were in accordance with the manner in which DR (and others) had said the funding would operate. The variation did not cease from 24 February 2012, when the contract was signed. A written contract may be varied by subsequent discussion and conduct. The evidence from the Respondents was that that was precisely what happened in this case. The agreed course of conduct by both parties after 24 February 2012 was different from the strict terms of the LFA, such that the variation survives the earlier whole agreement clause.

158. The existence of the entire agreement clause within the LFA was accepted by the Respondents, however, it was submitted that the Tribunal could not overlook the law of contract which, notwithstanding the existence of the entire agreement clause, permitted the amendment or variation of written contractual terms by agreement at any time. Whilst it may be best practice for contract amendments to be either by way

of a supplementary agreement or side letter, there was no legal requirement for this in order for there to a valid agreement. Written contracts could be legitimately and legally varied and agreed orally or conducted alone. In the instant case, the agreement was varied by oral variations and through conduct.

The October LFA

159. It was common ground that the Axiom Fund was suspended in late October 2012. Around that time the Firm was in discussion with Richard Barnett, who was a solicitor and who represented Axiom. Mr Barnett presented the Respondents with the revised documentation which was considered by Mr Johnstone, at the request of the Third Respondent. Mr Johnstone's prime concern was that Firm's independence may be compromised in the light of some of the terms contained in the new suite of documents.

160. The First Respondent explained that he did not recall reading either the email or the attachment sent by David Johnstone on 25 October 2012 in relation to the October LFA, the Panel Agreement and the Debenture. He had been copied into the email, which was sent to him whilst he was on leave. Further, Mr Johnstone had been "retained as a financial modeller… [and not] … to provide legal advice on a contract." The concerns in relation to the October LFA and accompanying documents was in relation to the Panel Agreement and "as to whether there was a possibility that [the Panel Agreement] could somehow mean that we potentially [would compromise our independence]. But, from our conversations and discussions following the feedback we got from Richard Barnett [amongst others], I was comfortable that that wasn't going to happen and that was not the purpose of the document." The Second Respondent stated that he had not read the email or the note sent by Mr Johnstone, as he was out of the office at a wedding. On his return to the office he "had a conversation with Mr Johnstone…and Mr Johnstone said that he had reviewed the documents and he gave a general overview as to what he thought of the documents and his concerns. Having had that conversation, in my mind that, to all intents and purposes, superseded the email." To his best recollection, the conversation with Mr Johnstone was in relation to the Debenture and the concerns regarding possible liens on the files. Those concerns were discussed with Richard Barnett and "having been discussed with Mr Barnett in the meeting on 30 October, that satisfied me that there were not any concerns. As for the rest, the contract was not materially different to the original agreement which we had entered into, and which…was proceeding as expected." Mr Johnstone did raise some concerns about some of the clauses. Those concerns were raised with Mr Barnett "and when they were discussed with Mr Barnett, that gave me comfort."

161. The Respondents were content with the responses provided by Richard Barnett and were satisfied that the Firm's independence would be assured. All the Respondents resolved as a Board to enter into the revised documentation, although no monies were drawn down under the agreement.

162. It was common ground that monies totalling £3,117,022.50 were received by the Firm from Axiom, and that money was used by the Firm.

163. The money which was provided to the Firm under the terms of the agreement between March and October 2012 was used entirely consistently with the agreement between the parties. Each payment was properly made and could be properly made, including payments to the Related Entities for services provided to the Firm.

164. It was common ground that the Firm did not comply with all the terms of the written LFA; they did not need to. To do so would have been inconsistent with the whole Agreement between the parties, which was part written and part oral. It would be erroneous for the Tribunal, it was submitted, to ignore the actual agreement between the parties as the SRA had invited it to do. The whole purpose of the financing from Axiom was to facilitate the growth of the Firm and this was made clear and known to all parties and individuals from the outset.

165. The SRA had produced no witnesses to counter the clear and consistent evidence of the Respondents that the agreement was part written and part oral. As the Respondents were the actual parties to the agreement, they were best placed to be able to say what that agreement was.

166. To counter that, the SRA carried out a forensic analysis of the terms of the written contract alone and discounted the variation to it: a variation which was clear from the manner in which the Firm and Tangerine proceeded from the outset. The documents and correspondence clearly showed the basis upon which the monies were advanced to and used by the Firm. This was entirely consistent with the evidence of the Respondents and Mr Johnstone that the agreement was part written and part oral. The course of conduct showed that the Firm and the Investment Manager proceeded precisely as had been anticipated by the parties, and evidenced the oral variation of the written contract.

167. The SRA had failed to demonstrate that the Respondents knew that the purpose of the LFA was to protect the interests of the investment fund and/or ultimate investors in the fund. The Tribunal had heard evidence that the Respondents did not know what was said to investors in the fund. They did not see the Offering Memorandum or Supplementary Offering Memorandum, and as such had no direct knowledge of what the investors into the Axiom Fund had been told.

168. The research conducted by the Respondents prior to entering the LFA showed that Axiom was an award-winning fund. The Respondents took comfort from this. However, they and their firm had no contractual relationship with the investors in Axiom and owed them no duty in contract, tort or equity.

169. The Respondents believed that DR, the properly appointed investment manager (to whom they had been introduced by TS) was acting in the interests of the fund. They also believed that the agreement with their Firm, was similar to agreements made by Axiom with other firms; those other firms also receiving funding from Axiom which was practice funding.

170. The LFA was a document which the Respondents were required to enter into as part of the agreement with the fund; that agreement being part written and part oral. The Tribunal had seen and heard that the Respondents made the purpose for which the Firm intended to use the monies plain. The model, which was seen by Baker Tilly,

and, as far as the Respondents were aware, by Axiom, was comprised of various computer spreadsheets. The spreadsheets were not before the Tribunal (Mr Johnstone having indicated that they were not suitable for printing). The Tribunal had heard evidence that it was clear from the model, just as it was made clear by the Respondents in their negotiations, application and their conduct, that the purpose of the investment was to provide the Firm with working capital and to drive growth, leading to profit upon the settlement of cases and the conversion of WIP into cash. For each case against which an advance of £8,500 was made, Axiom would receive 15% interest in year one plus additional interest at 1.5% per month until the case settled, or the loan was repaid.

171. The draft LFA was provided to the Firm and questions relating to its terms answered by DR in his email of 29 January 2012. That email had been variously described by the SRA as 'suspicious', 'incoherent', 'internally inconsistent' and lacking sense. In their oral evidence the Respondents rejected those assertions. In considering the evidence the Tribunal must consider what was known to the Respondents at the time. What may appear suspicious now in isolation and with the benefit of hindsight did not so appear to the Respondents when viewed in the context of what they knew at that time. The LFA alone did not reflect the purpose for which the Firm applied to borrow and Axiom agreed to lend the funds, but it formed part of a wider agreement and this was the agreement that was followed by both parties to it from the outset.

172. The SRA referred to repayment of the monies "within the time required by the LFA". The LFA did not specify a date range for repayment "within" which the Respondents should repay the monies, but stated that payment would be on the termination date. The actual agreement between the parties was that the monies advanced against any particular case, if not repaid within the 12 months of the agreement, would attract enhanced interest of a further 1.5% per month from month 13 onwards. Repayment, either before or on the anniversary of the agreement was not required (rather the evidence suggested that it was in the interests of Axiom for repayment to be made later, so as to attract higher interest and thereby a greater return upon its investment in the Firm).

173. The parties including the Respondents entered the agreement in the knowledge that repayment was not required to be made on the Termination Date specified in the LFA. Mr Johnstone explained how repayment and enhanced interest was factored into the model which was scrutinised by Baker Tilly. Baker Tilly noted in its report that "Management assumes that loans are repaid in full to Axiom in the month in which a case is either won or lost."

174. The Respondents made clear in their evidence that the intended use of the funds was perfectly plain at all stages of the initial approach, negotiation, application for and operation of the facility under the agreement between the parties. It was always understood between the Respondents, TS and DR that the requested facility, if granted, would be for practice funding. In those circumstances, the funds received by the Firm were not misused by 'failing to apply them only towards Eligible Legal Expenses' as this was not a requirement of the oral and written agreement. Thus the Respondents had not breached the terms of the LFA as submitted; they had, at all times, acted in accordance with the agreed terms.

175. In addition, Mr Johnstone explained that the whole modus operandi of the Fund and for funding of this nature was to provide monies to be used as working capital by litigation firms and that reference to an aggregate but nominal figure for 'disbursements' against cases was designed to provide access to working capital, which could be used as the firm elected. The Second Respondent described this as "mortgaging" cases.

176. The Respondents described how DR's email of 29 January 2012 – which should be read, as it was by the Respondents at the time, in the wider context of discussions, the application process, business plan and financial model which had been scrutinised and which made clear, as Mr Johnstone explained, that the money was for working capital and to drive projected growth – provided comfort that money could be used towards WIP.

177. Further comfort was provided by the Baker Tilly report which stated that the Firm would have a significant level of funding that would not have been used for disbursements in a manner "not dissimilar to other firms to which Axiom has provided funding" on account of funding being advanced "irrespective of whether funding [for disbursements] is required".

178. It was clear that the Axiom funds were not required to be applied only towards Legal Expenses as defined in the LFA; the funds were advanced to the Firm as working capital and applied as such, precisely as the parties intended.

179. The preceding submissions related to the first to fourth of the SRA's reasons in support of allegation 1. In relation to the fifth, sixth and seventh reasons outlined at paragraphs (112 – 114), the Respondents did not accept that they were on notice of the serious risk that DR/Tangerine were acting fraudulently or in serious breach of duty towards the Axiom Funds; that they unreasonably risked the Firm being party to a fraud or some other serious wrongdoing or that the Firm was benefitting from Tangerine's wrongdoing; or that in all the circumstances as they knew or ought to have known, the loan was dubious and should not have been accepted. In addressing these reasons it was submitted that:

- As far as the Respondents were aware, there was nothing dubious about the circumstances in which they received the funds from Axiom. The Respondents each conducted their own due diligence by means of online searches of Axiom which revealed them to be a reputable, award-winning segregation portfolio company. Nothing was uncovered as a result of the due diligence carried out which raised any alarm bells or should have made the Respondents cautious, reluctant to proceed with the transaction or even warrant further investigation. Tangerine was the duly and contractually appointed investment manager and as such was the liaison between the Firm and Axiom. Any information given to Tangerine could be seen as giving the information to Axiom. As such the Respondents were honestly and genuinely content to proceed with the arrangement on the terms they had discussed and agreed.

- Throughout the agreement, the Respondents acted in accordance with the approved business plan and the terms they agreed with Axiom's representatives. It was entirely open to Axiom, if it were unhappy or concerned with how the

arrangement was operating, to contact the Firm or to cease authorising the release of funds. Axiom did neither of those things; it continued to loan monies to the Firm. The irresistible inference to be drawn was that Axiom must have been satisfied with how the arrangement was operating. The position advanced by Grant Thornton (the receivers of the Axiom Fund) was made retrospectively, with the benefit of hindsight, and was for the purposes of commercial litigation.

- At the time that the reassurance was given by DR he was acting as the fully authorised agent of Axiom; the Respondents relied on what he told them. They had no reason to doubt or question anything that they had been told by him, and no reason to doubt that he was relaying everything told to him by the First Respondent back to Axiom. The Respondents were told, and believed, that they had authority from Axiom to use the funds for their intended purpose. This belief was further buttressed by their knowledge that Baker Tilly had understood, and indeed tested the Firm's financial model before Axiom agreed to invest in the Firm. Given DR's position in Tangerine, and Tangerine's connection with Axiom, there was no cause for suspicion. All and any suspicions concerning DR and Tangerine arose after the event, following the collapse of the fund. The Respondents could not be charged with the benefit of hindsight in the aftermath of the collapse of the Axiom fund and the allegations made against DR and others.

- Tangerine was the properly appointed agent and representative, duly authorised to contract on behalf of Axiom. There was no evidence to the contrary. There was also no evidence from Tangerine in this matter, and accordingly the arrangements put in place by them were not known. The cases against which funds were advanced were clearly identified in the draw down lists provided by the Respondents.

- The SRA's assessment of the firm as being in 'poor financial condition' was based upon the balance sheet which excluded speculative WIP. The First Respondent explained the Firm's rationale for having 2 balance sheets was that one included, and the other excluded, speculative WIP. Further, it was clear that if speculative WIP was taken into account, it having been estimated at circa £2 million, the Firm was not in a poor financial condition. Further, the Firm was not required to repay "up to £15 million within 12 months", as was asserted in the Rule 5 statement. A facility of up to £15 million was made available but at the rate of £8,500 against each case, for which repayment was not required "within 12 months" but at the conclusion of the case, including payment of an enhanced interest of 1.5% per month from the end of month 12 until the conclusion of the case. The Respondents and Mr Johnstone confirmed that the financial modelling demonstrated this to be affordable.

- Mr Johnstone – the only witness in the case familiar with funding models such as that operated by Axiom – made clear that the cost of borrowing (including the FF and interest), whilst high, was not "suspiciously" so and was demonstrably affordable on the basis of his financial modelling. Factoring in that the money would be utilised over three years (which was the assumption that always existed) it was only marginally higher than other commercial practice funding lenders.

- The Respondents did not accept that there was anything suspicious about the Firm being told it could recycle funds. (The First Respondent had explained that in the event that a case concluded before 12 months, the Firm could, at its election, recycle those monies into a different case. Those monies would then become repayable at the conclusion of the recycled case). It was not uncommon in business for companies to be offered a "revolving door" loan facility up to a certain limit, where the company was free to borrow as much or as little of the facility at any one time, the only restriction being that it could not exceed the limit.

- The Respondents confirmed that they did not read the Offering Memorandum or Supplemental Offering Memorandum; they could not, and did not know that the Firm's intended use of the monies was inconsistent with representations made to the investors. They were satisfied that Tangerine was acting within its remit, and did not read anything in DR's emails of 23 and 29 January 2012 to suggest to them that their intended use of the monies was contrary to investor expectations. Further, the Respondents knew that other firms had borrowed money from Axiom in the same way; they drew "comfort" from that knowledge.

- The due diligence document that they had previously seen was not in their contemplation when monies were drawn down under the agreement. They were satisfied that Tangerine was acting within its remit.

- The FGI insurance was arranged by Tangerine through Gable. This was seen in the emails from Tangerine. On 8 August 2012, Tangerine emailed the First Respondent and stated inter alia "The monthly routines and requirements of our new FGI insurance policy provider are much more detailed than the previous one." A further email on the same date from Tangerine to the First Respondent referred to "Our FGI Insurer". On 16 August 2012, Tangerine sent an email to the First Respondent within which, when itemising the disbursements made to the Firm, it particularised "FGI (paid) - £19,125". This, it was submitted, was further evidence of the oral variation of the LFA in practice.

- The Respondents did not recall reading Mr Johnstone's analysis before entering into the October LFA, the Panel Agreement and the Debenture. Further, the Second Respondent recalled conversing with Mr Johnstone in relation to his concerns; those concerns were raised with Mr Barnett, whose responses satisfied any queries. In any event, no monies were drawn down under the second suite of documents.

- The Respondents did not agree that there was any suspicion concerning Tangerine. They rejected the proposition that DR's email of 29 January 2012 made "no commercial or ethical sense". As explained, it fitted with the arrangement that been discussed and the funding that had been applied for. The Respondents did not consider the conduct of Tangerine to be extraordinary, nor contrary to the best interests of its client. The First and Second Respondents referred to personal experience of standard banking documents being varied by agreement with the relationship manager at a high street bank.

- The Respondents categorically denied the suggestion that they adopted a 'head in the sand' approach to the funding, or the LFA. The Respondents were satisfied that they were able to accept the funding, and that it was advanced precisely in accordance with the agreement between the parties.

- The Respondents denied that the transactions were dubious; they did not know or suspect the transactions to be dubious as alleged or at all. They took comfort from the involvement of TS (then a solicitor), the introduction to him by AL and the introduction by TS to DR, coupled with further comfort from the involvement of Baker Tilly as part of the due diligence undertaken by Axiom into the Firm. TS's subsequent referral to the Tribunal to face allegations of a lack of integrity, which pre dated their introduction to Axiom and their application for funding, was not a fact which had been published or could have been known to the Respondents at the time. On 5 July 2012 the SRA published its decision (taken in 2011) to refer TS to the Tribunal. The referral was not noted by the Respondents at the time and came to their attention sometime in October 2012, after it came to the attention of the Third Respondent upon her either being referred to or discovering for herself the Offshore Alert article of 22 August 2012.

180. The Applicant's position that the funds were to be used for Legal Expenses only was wrong, and could not be substantiated by the documents. The Tribunal should not simply focus on the written terms of the LFA and thereby disregard how the arrangement operated in practice; it would be improper and unfair to ignore the reality of what happened in this case. The permitted use of the funds was, at all times, much more widely defined. No proper or fair assessment of the Respondents conduct could be considered on a purely theoretical basis, founded on the interpretation of a single document. The Respondents' conduct should be examined taking into account what they knew at the time, and what actually happened, and not with the benefit of hindsight and an interpretation of documents. The Respondents consistently explained during the interviews and their written evidence that the written document, which was understood to be a common document used by Axiom in its dealings with other law firms, did not represent the totality of the agreement between the parties.

181. For all of the reasons cited, the Respondents denied that they misused monies received from Axiom, and accordingly denied that they failed to act with integrity, failed to behave in a way that maintains the trust the public placed in them and the provision of legal services, failed to act in the best interests of each client and failed to run their business and carry out their roles in the business in accordance with proper governance and sound financial and risk management principles. The Respondents denied that they had acted dishonestly.

The Third Respondent's Evidence & Submissions

182. The Third Respondent's case was that she was a decent, honest and hard-working solicitor. The Firm borrowed money from Axiom in good faith and in the belief that it was for working capital and disbursement funding for the Firm. The agreement by which the funds were borrowed was an ordinary commercial transaction, and was supported by a financial model, devised by Mr Johnstone, (utilising the assumptions provided by the First Respondent), which showed that the borrowing was affordable and sustainable.

183. The case against the Third Respondent was unusual in that she was not accused of misconduct in her relationship with or treatment of clients, but rather that the misconduct arose out of her dealings on her own account with a commercial lender.

184. The Applicant assumed that the LFA contained the entire agreement between the Firm and Axiom. This was incorrect; the contract between the Firm and Axiom was partly written and partly oral. The responses on this point had been consistent for all the Respondents both throughout their interviews with the SRA, and their written and oral evidence. This, it was submitted, went to the credibility of the Respondents.

185. The Third Respondent became aware of Axiom funding through AL. It was considered that this funding line provided the Firm with an opportunity for growth and expansion, enabling the Firm to carve out a niche and sustainable practice in complex, high value, clinical negligence cases.

186. In preparation for the application, the necessary documentation was created, which included a business plan, prepared by the First Respondent, a forecast, prepared by the group accountant JS, and a financial model, prepared by Mr Johnstone. Mr Johnstone had experience of building such models for claimant personal injury firms. The assumptions used to create the model were provided by the First Respondent. The Third Respondent participated in the majority of the internal meetings which related to Axiom, and was copied into most of the initial emails. She did not comment or raise any queries in relation to any documentation, as she relied on the experience and knowledge of the First Respondent, JS and Mr Johnstone, that this would be a viable and workable business model.

187. On 19 January 2012, Tangerine sent a panel agreement and the NDA to the First Respondent. Mr Johnstone provided feedback to the First Respondent, who in turn emailed DR for clarification of a number of matters, which included whether the Firm could utilise the funds for WIP (see paragraph 62 above). DR confirmed that "If [used] against the Firm's WIP the Firm can obviously use the funds for any business purpose." The Third Respondent relied upon this statement, and the representations made by DR, as cascaded to her by the First Respondent; the funding provided could be used as working capital for the Firm. When it was put to the Third Respondent in cross examination by Mr Coleman that "the written contract and the oral variations are fundamentally inconsistent…", the Third Respondent explained that "[the First Respondent] sought…clarification orally and by email. I was comfortable on the basis of relying on [the First Respondent] that this was working capital…..It would not have made any sense for the Firm to enter into a facility to essentially put the money into client account for it not to work. It was just too expensive…It would not have been a viable option to do that. It was taken out on the premise that it was working capital." Further, she did not accept that the oral variations were "fundamentally inconsistent" with the written terms, but rather that the variation "extended the term". She explained that it had been agreed that the monies could be used "for any business purpose and the financial model was entirely consistent with the Firm's intention of now it was using that."

<u>The Baker Tilly Report</u>

188. Mr Johnstone first met the Third Respondent in 2003. They had kept in touch, and when she began working for DGS she contacted Mr Johnstone for assistance in the FSA application on behalf of Tri Star Legal Ltd. Towards the end of 2011, the Firm instructed Mr Johnstone to provide a model to explore the viability of funding personal injury work, which focussed on the viability of utilising funding from Axiom; the model suggested that the funding would be affordable in respect of clinical negligence work. The model was tailored to incorporate all costs associated with the borrowing and demonstrated that for clinical negligence work in particular, the funding was viable, (assuming the assumptions provided were accurate within reasonable variances).

189. The model was very impressive, so much so that "[Mr Johnstone] was later asked to produce other models for firms on the same premise that it was working capital". This provided further credibility to the oral variation, allowing the funding to be used for WIP. Thus, the Third Respondent did not believe that there was anything suspicious about DR's informing the Respondents that funds from Axiom could be used as payment for WIP; that was what had been envisaged and discussed throughout negotiations. The Firm's business model did not work without the payments from Axiom being used in this way. This was the evidence of all the Respondents, and the position was confirmed by David Johnstone (whom the SRA described as a witness of truth) in his evidence. Mr Johnstone stated:

> "It was to fund the expansion of the business… There was never any question of that. It is underlying working capital…. The model from the outset was built on the basis that the funding available be restricted to values associated disbursements, but it came into the office account, was utilised, and flowed through the model….The level of borrowing was based on average disbursement costs… It was geared around what funds would be required or could be required at a point in time throughout the process for disbursements…The business borrows the money.. That money gets utilised for any working capital purpose the business see fit. And that is how the model was built."

When asked if he had any doubt that the facility was purely for disbursement funding, Mr Johnstone stated:

> "did I think this was a facility where somebody was going to borrow money, put it on deposit, and maybe one day utilise it to pay for a medical? Absolutely not. I mean, there is no logic in that theory whatsoever. As far as it was presented to me from the outset and at every point through the process, the money that was being borrowed on day one was coming at a significant cost and that cost was affordable, because it was being applied to grow the business.… I was tasked with testing whether or not it was affordable, because it was by no means the most expensive money in the market, but it was expensive money."

190. The Third Respondent placed great reliance on Mr Johnstone, and his advice. Mr Johnstone had commented on the LFA, those questions being sent to DR. He believed that they had been answered satisfactorily. Both the Third Respondent and Mr Johnstone were told by the First Respondent that DR was unable to change the wording of the contracts as they had to remain consistent. However, DR had provided agreement both orally, and via email (paragraph 62 above) regarding the purpose for which the monies could be used. This occurred prior to the finalisation of the model and the signing of the LFA, as the parameters of lending, including utilisation of the funds for working capital and the time for repayment of the funds, were built into the financial model prior to the submission of the application for funding.

191. The Third Respondent explained that the Baker Tilly report, together with the model, made it clear that the funding from Axiom was intended as working capital. The report itself made clear that this was the purpose in its reference to "…funding that will have not been utilised for payment of disbursements. We assume that this is not dissimilar to other firms to which Axiom has provided funding and that CMA monitors the situation." An examination of short extracts from the report alone, was not sufficient to provide the whole picture. In order to have more than "half of the story", the documents needed to be considered "alongside the financial model that was actually submitted to Baker Tilly and then on to Axiom"; the model was explicit about the nature of the work and the way the funds were to be, and needed to be, used in order for there to be the return on investment that Axiom would have anticipated.

192. The fact that due diligence had been undertaken by Baker Tilly, was another source of comfort to the Third Respondent. Baker Tilly was instructed by Axiom, and the Firm had no influence on the advice given to and acted upon by Axiom or Tangerine. Baker Tilly were a well-known and reputable firm of accountants; Axiom being their client was hugely reassuring for the Third Respondent.

<u>The agreement between the Firm and Axiom</u>

193. The Third Respondent asserted that the agreement between the Firm and Axiom was part written and part oral. She placed reliance on the representations being made to her by the First Respondent – "I trusted what [the First Respondent was telling me]. [He] was comfortable with what he was being told". When asked by Mr Coleman whether she would have "understood the importance of properly recording the terms of a substantial contract in writing", she explained that "I don't know that I would have done at that point because I would have been relying on [the First Respondent's] oral representations of what he was being told, and I think that he was also comforted by the fact that he received the [email from DR of 29 January 2012]….To the best of my knowledge I asked the [First Respondent] to get clarity. [He] was happy with what he received and was comfortable with what he was telling both [the Second Respondent] and I. At that time I was satisfied with what [he] was telling me. With the benefit of hindsight, many years later, yes, I can see the importance of that."

194. The LFA was in a standard form, and had been submitted to other law firms. Mr Johnstone's evidence was that it was standard commercial practice to gather a number of required changes to precedent agreements over time before amending central template documents. The refusal to amend the LFA therefore did not "raise any concerns". The lack of concern was further supported by the financial model that

was explicit about the use of the funds, and that it was expected that Axiom had seen. The contract was signed on the basis of the oral variations.

195. When asked by Mr Coleman whether she accepted that on her case, "the written contract is not only pointless, its positively misleading and confusing on the three central points about the contract: purpose, repayment period and client account", the Third Respondent explained that she was always led to believe that those three elements were varied. With the benefit of hindsight, it was not an accurate contract, "but my understanding is that DR had authority to act on behalf of the fund. So my understanding at the time is this oral variation…was known to the fund. [The First Respondent] sought to get that clarified by that email exchange (see paragraph 62 above). ….Apart from what [the First Respondent] advised and the email, there is nothing else….I was comfortable relying on what [the First Respondent] told me.

196. The Third Respondent explained that she did not appreciate at the time, having received the email from DR dated 23 January, that there was any risk that "any major departure" from the written contract might well be incompatible with the Fund Offer Memorandum. Further, when she read DR's substantive response to the questions posed, the emails reference to "any business purpose" satisfied her that they could use the money as working capital.

197. In relation to the Entire Agreement clause (paragraph 71 above) the Third Respondent explained that when she agreed to entering into the agreement, she believed that the oral terms superseded the written terms, such that the oral terms prevailed.

<u>The October LFA</u>

198. The First Respondent was sent a new suite of documents, including the October LFA, the Panel Agreement and the Debenture in October 2012. On 11 October 2012, the Third Respondent received an email from RL, which caused her to forward it to CKB, the Firm's regulatory advisor. The Third Respondent sent the suite of documents provided by Mr Barnett to Mr Johnstone to review.

199. In response to her email asking whether there were any SRA concerns regarding Axiom, CKB replied that:

> "Yes there are problems with some of the arrangements Axiom have entered into with some firms because they impinge on their independence, but yours is not one of these. Your agreement is fine because axiom do not have any say on how you handle client matters, e.g. whether you settle, issue, etc."

CKB had not seen the October suite of documents, and so was unable to comment upon them. The Third Respondent then emailed the First and Second Respondents, and Mr Johnstone, forwarding CKB's response. She stated that:

> "Based on [CKB's] response we should use this as an argument not to sign the new suite of documents from Axiom."

200. The Third Respondent then began to conduct her own research into the Axiom Fund. She discovered an Offshore Alert article, dated 22 August 2012, in which it was stated that TS had been referred to the Tribunal for eleven allegations including failing to act with integrity, acting where there was a conflict of interests, failing to act in the best interests of his clients, and behaving in a manner likely to diminish the trust the public placed in him and/or the legal profession. The article also detailed that this was TS's third referral to the Tribunal since his admittance in 1999.

201. On 24 October 2012, the Third Respondent sent an SMS message to AL, in which she stated:

> "I have read on the net that [TS] has resigned. Do you know what is happening with Axiom?

AL responded:

> "Yes. I know a fair bit and have been advising on the side. Tim is the subject of a witch hunt.….Tim is already the subject of inconsequential SRA proceedings but the combined result of all this is that in order to protect the integrity of the fund vis investors he has resigned as a director (but still retains 100% shares). There are now allegations of fraud which are outrageous….In the meantime the fund is suspended because this has unnerved investors.."

202. At some point after receipt of the October suite of documents, the Third Respondent emailed them to Mr Johnstone for him to review. She explained that she "used David as a sounding board, just because of his experience, and I wanted him to review the agreements and let me have his thoughts…because I did not know if I was completely way off point, or is there an issue?"

203. Mr Johnstone, having reviewed the documents, sent a response to all the Respondents (see paragraphs 89-91 above). The Third Respondent explained that her main concern, having read Mr Johnstone's email and review, was with the Panel Agreement. She did not want to sign the second set of agreements and was pretty sure that she would have talked "in high levels" of her concerns and Mr Johnstone's concerns, as she had put "such an opposition" to signing the second set of agreements, particularly as Mr Johnstone's position (upon which she placed great reliance) was not to sign the agreements. Further, she had regulatory concerns about the panel agreement.

204. She discussed her concerns with the First and Second Respondents; the First Respondent did not agree with her interpretation of the clauses that caused concern as he "didn't agree with what I was saying, and it was up to him; it was his call at the end of the day...I didn't want to sign the second set. But when you're sat in the room and [the First Respondent] is saying, "I don't read the agreement like that, I don't read it like you", I am not sure what else I am meant to do."

205. The Third Respondent accepted that the board minutes, which she created, stated that "The board still agreed that the new suite should be signed as continued funding is critical for the business." She explained that the board did agree, and stated that she should have made her concerns clearer in the minutes; she had attached

Mr Johnstone's notes, but did not go into detail in the minutes. The email chain, however, showed that she was not comfortable with signing the October documents.

206. The Third Respondent denied that the Firm had failed to comply with the terms of the LFA, as the terms were both oral and written. The entire agreement had been complied with in full. The permitted purpose had been clarified with DR, and his response was reasonably relied upon. The funds were used by agreement, and in accordance with the model to allow the Firm to grow. The financial model was known to Baker Tilly, Tangerine and Axiom. The intended and actual use of the monies was documented in the Firm's board meeting minutes of 24 February 2012, where it stated that "the facility would resolve/fulfil the working capital requirements of the business as currently envisaged for the forth coming 12-24 months." The board meeting minutes in the following months documented how money was being spent. The email from DR dated 29 January 2012, further documented the intended use; the intention was clear from the statement contained therein that the monies could be used "for any business purpose".

207. The intention had always been to repay the loan monies within the extended timescale that was the subject of the oral variation. The Third Respondent understood that the contract had been varied such that payment was to be made at the conclusion of the case. Where a case concluded within 12 months, that money could be recycled into another case, and would not be due until the conclusion of the recycled monies case. The intention to repay was evidenced by the cash flow forecast and financial models, which demonstrated when WIP would be converted to cash.

208. Given the above, the Third Respondent did not accept that the funds had been misused by the Firm's failing to apply them only towards Eligible Legal Expenses; this was not the agreement with Axiom.

209. In relation to the fifth, sixth and seventh reasons, submitted by the SRA as evidence of improper conduct, the Third Respondent did not accept that she was on notice of the serious risk that DR/Tangerine were acting fraudulently or in serious breach of their duty towards the Axiom Funds; that she unreasonably risked the Firm being party to a fraud or some other serious wrongdoing and that the Firm was benefitting from Tangerine's wrongdoing; and that in all the circumstances, as she knew or ought to have known, the loan was dubious and should not have been accepted. In addressing these reasons it was submitted that:

- She honestly and reasonably believed that the funding arrangement was entirely bona fide. Even if further checks had been undertaken, she was unaware of any publicly available information at the relevant time which would have suggested that the fund was not reputable. The SRA's decision of 25 August 2011 to refer TS to the Tribunal, was not made public until 5 July 2012, approximately five months after the Firm had subscribed to the fund. The only way that the outcome of the Firm's due diligence exercise would have been different, was if the SRA had made this information public earlier.

- She explained that "There was nothing, since December 2011, when the First Respondent was having discussions with DR that came to my attention to say "Whoa Nicky, big red flag, you need to act cautiously, proceed with caution.

There was absolutely nothing. If Baker Tilly, who were engaged by Axiom and/or Tangerine, could not find out there was something very strange going on, how could I find that out."

- The emails from DR of 23 and 29 January 2012, as opposed to arousing suspicion, provided the Third Respondent with "comfort" that her understanding of the purpose for which the monies advanced could be used, and that the information being cascaded to her from the First Respondent in relation to the variation of the LFA was correct.

- The Third Respondent raised her concerns, and those of David Johnstone with the First and Second Respondents in relation to the October documents. She accepted that her documentation in relation to those concerns could have been more detailed, however the notes and meeting minutes were for internal purposes only, and she had not expected them to be later subject to the type of detailed scrutiny as had taken place during the hearing.

- She was satisfied that DR/Tangerine was, at all times the duty appointed agent of Axiom, and was at all times acting within its remit. At no point did she see the Fund Offer Memorandum, and so was not aware of what investors into the fund had been told.

- The cost of the borrowing was not so high as to attract suspicion, particularly when account was taken of the time over which such borrowing had to be repaid. The interest rate, and the facilitation fee, over that period of time meant that the cost was comparable to other commercial practice funding lenders.

- She did not accept that she should have done more in terms of due diligence with regards to Axiom, or the individuals representing Axiom. Given the lack of information about the fund, it was unlikely that any further due diligence would have resulted in the Firm not entering into the LFA. Prior to the collapse of the fund, no-one had any reason to suspect that there was a problem with the fund. The due diligence that was undertaken showed the fund to be award-winning, thereby adding to the legitimacy of its operation.

The Tribunal's Findings

210. It was agreed that £3,117,022.50 was received by the Firm from Axiom between February and October 2012, and that those funds were used by the Firm. The decision to be made by the Tribunal was whether the acceptance and use of those monies was "improper" for each or any of the seven reasons set out by the Applicant.

211. **Allegation 1.1.1 – Knowledge of non-compliance with the terms of the LFA, which to the Respondents knowledge was to protect the interests of the Fund and the investors**

211.1 It was common ground that the Firm did not comply with all of the terms of the LFA. The case for the Respondents was that they were not bound by the terms with which they did not comply, as those terms had been orally varied; they had complied in full

with the entire agreement - that is the written agreement as orally varied. It was submitted that the Tribunal would be in error if it disregarded the oral variation, and found that the LFA contained the entire agreement. Each of the Respondents referred to the "oral variation" and the "entire agreement" or "final agreement", notwithstanding the entire agreement clause contained within the LFA. The Tribunal noted the complete absence of any record of the 'oral variation'; there were no attendance notes of the numerous conversations that the First Respondent stated that he had with Tangerine and/or DR, nor were there any emails confirming the content of their discussions. There was no documented evidence of the terms that had been varied. The Tribunal noted that, whilst giving evidence, each of the Respondents referred to the orally varied terms, however, none of the Respondents had particularised in their written evidence those terms contained within the LFA which they stated had been varied. Given the departure from some of the core and fundamental terms of the agreement, the Tribunal expected that experienced solicitors such as the Respondents, would and ought to have ensured that the "true" terms were expressly and properly documented.

211.2 The evidence upon which the Respondents relied as proof of the oral variation was the email exchange between the First Respondent and DR of 23 and 29 January 2012, which, they submitted, documented the variation to the written agreement. The Tribunal examined the email exchange with great care. It was of note that a number of the clauses that the Respondents stated had been varied were not addressed in the email exchange. Further, the 29 January 2012 email itself was vague and unclear. What was clear was that it did not state that the entire amount per case could be immediately drawn down and used for practice funding. The Tribunal found that the email did not permit the Respondents to do with the money what they did, as DR's response was not, and could not reasonably relied upon, as confirmation of the variation of key terms of the agreement. The Tribunal referred to the Entire Agreement clause, and in particular the provision that the parties could not rely on any "arrangement, agreement, representation or understanding **not expressly set out** in the Finance Documents" (the Tribunal's emphasis). Not only were the alleged variations not set out in the Finance Documents, they were not set out at all. Had the Respondents been complying with the terms as set out in the LFA, they would not have needed to rely on the oral variation. The Tribunal did not accept that that the meaning and importance of this clause would not have been obvious to solicitors with the experience of the Respondents, when they read the contract in February 2012. Accordingly, the Tribunal found as a fact that the entire agreement was contained in the written contract, and that contract had not been orally varied. Further, the Tribunal found that the LFA was intended to protect the interests of the investment fund and/or the ultimate investors in the fund as pleaded. The First Respondent, whilst submitting that the contract was there for the protection of all parties to the contract, accepted that the "contract has been drafted in order to create just that; a contract…so that does provide protection to a lender…" The Second Respondent, when it was put to him that the clauses were for the protection of Axiom in particular responded: "Yes, I suppose that's fair". The Tribunal was satisfied that the Respondents knew that the Firm had not complied with the terms of the LFA. Indeed, this was admitted, albeit that the Respondents asserted compliance with the oral variation. Further, they each knew that the terms of the LFA were intended to protect the fund and the investors. In those circumstances it was improper for the Firm to

accept and use the monies from Axiom. Accordingly the Tribunal found allegation 1.1.1 proved beyond reasonable doubt.

212. **Allegation 1.1.2 – Knowledge that the LFA did not reflect the purpose for which the Firm intended to use and/or used the monies and failure to properly document the actual use of the monies**

212.1 The Tribunal found that the LFA did not reflect the purpose for which the Respondents intended to use, and in fact used, the monies. The Respondents all submitted that the purpose for which they intended to use, and did use the monies was for practice funding, and in particular to grow and expand the Firm. Each of the Respondents in their evidence accepted that Clause 2 of the LFA defined the purpose for which the monies would be provided, and that the purpose was, in effect, for disbursement funding only (including the payment of insurance). Each explained that a facility that was for the defined purpose would not have been financially viable. The First Respondent stated that if the purpose had not been orally varied "we would never have signed [the LFA], because it is funding that is useless to us." This reasoning was echoed by the Second and Third Respondents as well as Mr Johnstone. The First Respondent, in his email to DR of 23 January 2012 sought clarification as to, inter alia, the purpose for which the money could be used, as follows:

> "1. "Definition of "Legal Expenses" specifically excludes WIP. Can we draw anything for WIP"; and
>
> 4. "Clause 2.2(c) - The agreement is explicit that funds drawn down must be exclusively utilised in respect of the individual claim as detailed in the Utilisation Request. Can we change this? I understood we could use it for other purposes for the business if need be".

212.2 It was clear from those questions that the purpose for which the Firm intended to use the monies was not permitted by the LFA, and that this was known to the Respondents prior to the LFA being signed 24 February 2012; if the purpose was permitted, the questions would not need to have been asked. The response from DR was vague and misleading at best. Certainly, it did not expressly state that the money could be used entirely for practice funding. The Respondents relied on the comment made in response to question 4 of that email, namely that "the Firm can obviously then use the funds for any business purpose". However, this was to be read in conjunction with DR's response to question 1, which the Tribunal found, did not amend the purpose of clause 2. The Tribunal considered that even where it was said that the response was a variation, which it did not find to be the case, that variation was not such that the entire amount drawn down could be utilised as practice funding, or such that the funding was no longer disbursement funding. On the best possible interpretation of the response, the Respondents would have needed, at the minimum, to have made provision for future disbursements. The Respondents sought to rely on the Baker Tilly report, and the financial model to show that Axiom were aware of their intended purpose. The Tribunal found that the report did not support the Respondents' contention. There were very clear references in the report to the purpose of the loan being for disbursement funding. Indeed, when describing 'The Proposed Transaction', the report expressly stated that the application to Axiom by the Firm was for a litigation funding "facility of up to £8m to fund disbursements…"

Further, there were references throughout the report to funding disbursements. The draft report was seen by all the Respondents, none of them sought to correct the references to the funding being for disbursements. The First Respondent emailed RA of Baker Tilly on 17 February 2012, making comments on the content of the report in which he suggested amendments and clarified issues. He did not amend the references to disbursement funding, nor did he ask for references to practice funding to be added to the report to make the purpose clear. The Tribunal found that the purpose of the funding as defined in the Baker Tilly report supported the purpose of the funding as defined in the LFA. The Tribunal did not find any evidence, within the body of the report, to support the Respondents' contention that the report clearly showed that the money was for practice funding. The monies received from the Fund were not paid into client account in accordance with the LFA, but were credited to office account; indeed the payment of monies to office account was not disputed by the Respondents, who stated that this was a further variation to the LFA. In those circumstances, it was improper for the Firm to accept and use the Axiom monies. Accordingly, the Tribunal found allegation 1.1.2 proved beyond reasonable doubt.

213. **Allegation 1.1.3 – No intention to repay within the time required by the LFA and/or reckless as to the fact that repayment in that timescale was unlikely.**

213.1 Although the Tribunal determined that it was unlikely that the Respondents would repay within the time required by the LFA, it could not be sure, beyond reasonable doubt, that the Respondents had no intention of repaying within the requisite timescale. Some of the matters upon which money was claimed, were pre-existing matters, and there was no evidence as to when those matters would conclude. Further, there was no evidence as to the mechanism by which monies would be recycled into other matters. It was unclear as to whether the Respondents would inevitably recycle funds, or repay the loan to the Fund. The Firm had other matters ongoing; payment on those matters could be used to repay Axiom. The Tribunal noted that the average lifecycle of a case was 12-15 months. The Tribunal determined, beyond reasonable doubt that it was highly unlikely that the Respondents would repay within the time required by the LFA. Further, they knew that to be the case; indeed it was an assumption in their financial model. The Tribunal found that the Respondents were reckless as to repayment, and accordingly found allegation 1.1.3 proved beyond reasonable doubt to that extent.

214. **Allegation 1.1.4 – Misuse of the funds by failing to apply them only towards "Eligible Legal Expenses" as defined in and required by the LFA**

214.1 It was common ground that the Respondents did not apply the funds received only towards Eligible Legal Expenses as defined and required by the LFA. The Respondents case was that they were not required to do so by virtue of the oral variation. The Tribunal found, as a fact, that the Respondents had used a substantial amount of the monies advanced as described in paragraphs 78 – 83 above; indeed this was not disputed by the Respondents. Given the Tribunal's findings in relation to allegations 1.1.1 – 1.1.3 above, the Tribunal rejected the Respondents' submissions that the permitted uses were more widely defined that the definition contained in the LFA, and thus found that in failing to apply the funds towards Eligible Legal Expenses only, the Respondents had acted improperly. Accordingly, the Tribunal found allegation 1.1.4 proved beyond reasonable doubt.

215. **Allegations 1.1.5 and 1.1.6 – Being on notice that DR/Tangerine was acting fraudulently or in serious breach of duty towards the fund/investors; failing to carry out sufficient enquiries; unreasonably risking the Firm being party to a fraud or other serious wrongdoing and benefitting from DR/Tangerine's wrongdoing.**

215.1 Allegations 1.1.5 and 1.1.6 were closely related and the Tribunal considered them together. The indicia of fraud as alleged by the Applicant in paragraph 116 above were considered in great detail. The Tribunal found that, in all the circumstances, the Respondents knew that DR/Tangerine were not acting as a prudent investment manager, acting in the best interests of his client, would be expected to act. Solicitors with the experience of the Respondents should have expected, and indeed insisted upon the fundamental variations, (such as changing the purpose of the contract), to be recorded in writing; the extremely informal nature of the arrangements were concerning, and should have been of concern to the Respondents. The fact that Axiom were prepared to lend £15 million to a limited company, without requesting any security was also a concern. Further, it must have appeared as suspicious to the Respondents, that having requested a facility for £8 million, they were granted a facility for £15 million. The 23 January 2012 email from DR, and his comment to the effect that the contract had been written so as to accord with what investors had been told, was another warning sign, as was his substantive response of 29 January 2012. The Tribunal determined that these circumstances, taken together would and did put the Respondents on notice of the serious risk that DR/Tangerine, in arranging for monies to be paid to the Firm, were acting fraudulently or committing some other serious breach of duty towards the fund/investors. The matters relied upon by the Applicant as indicia of fraud that related to the FGI, due diligence document, and the October suite of documents were rejected as indicia of fraud by the Tribunal. It was clear from the documentary evidence that Tangerine had waived the requirement for the Firm to obtain FGI; the emails from Tangerine implicitly stated that Tangerine had obtained FGI on the Firm's behalf. At the time of downloading the due diligence document the Respondents were under no obligation to download the Offer Memorandum and/or Supplemental Offer Memorandum, although it may have been prudent to do so. The evidence of Mr Johnstone that the cost of the borrowing although expensive, was not suspiciously so, was accepted by the Tribunal. Further, any references to the October agreements, when considering the indicia of fraud known to the Respondents in February were misplaced. The Tribunal found that the Respondents failed to carry out any, or any sufficient enquiries. With the mounting and cumulative indicia of fraud, the Respondents should, at the very least, have obtained a copy of the Fund Offer Memorandum. This was an obvious step in light of the email from DR of 23 January 2012, which, taken in the round, should have caused alarm bells to be ringing in the ears of the Respondents. The oral variations were completely at odds with the written agreement, such that their cogency necessitated further investigation. None of the Respondents sought to clarify the position, despite knowing, as was found and accepted, that the LFA was written with the protection of the fund/investors in mind. Accordingly, the Tribunal found allegations 1.1.5 and 1.1.6 proved beyond reasonable doubt.

216. **Allegation 1.1.7 – in all the circumstances, the Respondents knew the transactions were dubious**

216.1 In light of the Tribunal's findings above the Tribunal found allegation 1.1.7 proved beyond reasonable doubt.

216.2 The Tribunal found that each of the Respondents acted without integrity; this was established beyond reasonable doubt on the basis of its findings above. The Tribunal also found, beyond reasonable doubt, that the Respondents had failed to behave in a way that maintained the trust the public places in them and in the provision of legal services; members of the public would be extremely concerned to know that solicitors were prepared to sign a contract intending not to comply with its key terms and to disregard signs that pointed to a serious risk of a substantial fraud being perpetrated. Further, the Tribunal found, beyond a reasonable doubt, that the Respondents failed to run the business, or carry out their roles in the business effectively and in accordance with proper governance and sound financial and risk management principles, in breach of Principle 8. On their own case, the Respondents failed to record the 'true' terms of the contract, those terms being at variance with the written terms. Solicitors, running a practice with proper governance, would not enter into a contract of such importance to the practice, without first ensuring that all terms were clearly and properly documented. The Tribunal did not find the allegation that the Respondents failed to act in the best interests of their clients proved beyond reasonable doubt. The Tribunal rejected that Applicant's submission that as the arrangement "hung by a thread" the Respondents were not acting in the clients' best interests. The Applicant did not provide any evidence to show that any clients suffered as a result of the Respondents misconduct. There was no direct correlation between financial difficulty and acting in a client's best interests, even where the funding had been advanced on the basis of the client's case. The clients were not financially exposed, and there was no evidence that the work undertaken was contrary to their interests. There was no evidence that any client failed to have the necessary work undertaken, or necessary disbursement incurred, due to the improper use by the Respondents of the Axiom monies. Accordingly, the Tribunal found beyond reasonable doubt that the Respondents had breached Principles 2, 6 and 8 of the Principles as alleged. The Tribunal did not find beyond reasonable doubt, or at all, that the Respondents had breached Principle 4. The Tribunal did not accept Mr Greensmith's submission that its determination in relation to this allegation, should it find the matter proved, would have repercussions for the profession as a whole. Amending a written agreement was permissible, and to do so was not, in and of itself, misconduct; nothing in the Tribunal's findings suggested otherwise. However, to enter into a written contract, which contained terms and conditions that were not intended to be kept from the outset, and thereby create a misleading and false record of that contract, was a matter of serious professional misconduct.

217. **Dishonesty**

217.1 As accepted by the parties, the test to be applied in considering dishonesty was that set out in Twinsectra v Yardley and others [2002] UKHL 12 ("Twinsectra"), as applied to disciplinary proceedings by Bultitude v Yardley [2004] EWCA Civ 1853 ("Bultitude") and Bryant v Law Society [2007] EWHC 3043 ("Bryant"). As per Lord Hoffman at paragraph 27 of Twinsectra:

> "…. there is a standard which combines an objective and a subjective test, and which requires that before there could be a finding of dishonesty it must be established that the (defendant's) conduct was dishonest by the ordinary standards of reasonable and honest people and that (he) himself realised that by those standards his conduct was dishonest."

217.2 This was the test which had been approved by the courts, and was applied by the Tribunal. The Tribunal noted that there was no suggestion that the Respondents' capacity to distinguish between right and wrong had been impaired by mental or any other illness.

217.3 The Tribunal found that there could be no doubt that reasonable and honest people, applying ordinary standards, would find that it was dishonest for solicitors to accept and use monies in circumstances where it was improper for them to do so. Further, reasonable and honest people, applying ordinary standards, would consider that it was dishonest for a solicitor to sign a misleading document that was inconsistent with the true terms; that contained promises that the solicitor did not intend to keep; and was therefore a false and misleading record.

217.4 The Respondents' position was that the LFA was not the entire agreement, but that it had been varied. The Tribunal did not accept this and found that the Respondents knew that the LFA was the entire agreement; there was insufficient evidence to say that the written agreement was varied in the way the Respondents alleged. To the contrary, there was clear evidence that the terms of the written agreement were intended to have effect.

217.5 The Respondents were provided with a draft minute to record their decision to enter into the agreement. That minute, provided by P Solicitors, clearly referred to disbursement funding as being the purpose for which monies would be loaned. The Respondents amended the details of the minute to include the date and parties, but did not amend the purpose for which it was said that the monies were to be received from Axiom. Further, on 24 February 2012, the day that the LFA was signed, the Respondents received an email from RF at P Solicitors, advising that he would be "concerned about clause 6 and the fact that the full amount will require refinancing in 12 months' time and the directors may experience difficulty in doing this as I thought Rehab claims are for serious personal injuries and the costs could take a long time to recover from the insurers." The Respondents did not inform RF that there had been any oral variation to the written contract, not when they asked for advice in relation to the contract, nor when he, on their case, was mistaken about the repayment term. The Tribunal considered that the Respondents, if they believed the term to be different, would have corrected RF. Further, in his email RF offered to have somebody from the banking section of his firm review the terms of the agreement. That offer was not taken up by the Respondents.

217.6 The Respondents were provided with a draft of the Baker Tilly report which clearly and expressly referred to disbursement funding; again, the Respondents made no effort to correct the wrongfully stated purpose in that document, despite suggesting other amendments to it. The Respondents' contention that the financial model clearly showed the purpose for which they intended to utilise the funding was not enough, the

Tribunal determined, to negate the very clearly stated purpose in the contract, the board minutes and the report itself.

217.7 When the Respondents were subsequently advised by DT on 6 December 2012, he referred to the facility as being a "12 month facility and without engineering a breach it is thought that the earliest the fund could seek to have the facility utilised repaid would be the end of February"; at no point did the Respondents correct DT's misunderstanding, by informing him that not only was it not a 12 month facility, but that the earliest that the Fund could recall the monies, without engineering a breach, was when a funded matter concluded.

217.8 The Tribunal found the Respondents explanations in relation to their failure to correct the documentation, and those upon whom they relied for advice, unconvincing.

217.9 The Tribunal considered the reasonableness of the Respondents' reliance on the DR emails. The Tribunal determined that even on its best interpretation, the DR email of 29 January 2012 suggested that only parts of the funding could be used for WIP. As the Tribunal had already found, the content of the email in and of itself, should have caused the Respondents to make further enquiries, and should have alerted their suspicions. In the circumstances, the Respondents were not entitled to rely on the email. Further, the Tribunal noted that whilst the Respondents claimed that the email confirmed the oral variations, there were matters that were not referred to in that email, which the Respondents claimed in their evidence had also been orally varied.

217.10 Whilst no money was drawn down in relation to the October LFA, the Tribunal noted that even though there were changes to the October LFA, the purpose for which the monies could be claimed were unaltered. The willingness of the Respondents to sign the October documents despite the very clear advice of Mr Johnstone to the contrary; the allegations, of which they were aware in relation to TS; and their knowledge of the suspension of the Fund, demonstrated the likely mindset of the Respondents when signing the LFA in February 2012. The Tribunal did not consider that the signing of the October LFA was determinative of the Respondents mindset in February, but it was evidence of the Respondents likely approach to the earlier agreements. For the avoidance of doubt, the evidence in relation to the October LFA did not affect the Tribunal's decision in relation to the honesty of the Respondents, or the propriety of their conduct. The Tribunal noted, and accepted, that the Third Respondent had reservations in relation to the October documents, however that concern did not seem to extend to the fact that the purpose in the October LFA was still for disbursement funding. Despite her "not being comfortable" with the Firm entering into the new contracts, on discovering that the documents had been signed, the Third Respondent did nothing; her inaction in that regard, fell below the standards expected of a solicitor.

217.11 In light of the Tribunal's findings above, the Tribunal had no hesitation in finding that the Respondents each knew that their conduct was dishonest. Accordingly, the Tribunal found beyond reasonable doubt that the Respondents had acted dishonestly; both limbs of the Twinsectra test having been found beyond reasonable doubt.

218. **Allegation 1.2 - The Respondents caused or permitted representations to be made to the investment fund and/or its representatives, for the purpose of persuading it to provide funding to the Firm, to the effect that (a) no partner or employee of the Firm had been the subject of disciplinary proceedings by the Law Society, and (b) the Firm had put in place valid ATE insurance for each claim for which funding was drawn down, when they knew or had reason to believe that such representations were untrue and/or they failed promptly to correct them when they learned or had reason to believe that they were untrue. The Respondents thereby acted in breach of Principles 2 and 6 of the Principles.**

The Applicant's Evidence & Submissions

219. The allegation concerned two representations namely:

2(a) that no partner or employee of the Firm had been the subject of disciplinary proceedings by the Law Society; and

2(b) the Firm had in place valid ATE insurance for each claim for which funding was drawn down

Allegation 1.2(a)

220. The Applicant submitted that it was common ground that at the time of the application, which was dated 17 January 2012, AL was a Director of the Firm. It was also accepted by the Respondents that each of them were aware of the findings of the Tribunal in 2006 in relation to AL when the application form was completed and submitted. The Respondents became aware of the Tribunal's findings in the course of conducting due diligence on the Firm prior to purchasing it in January 2010. Further, it was common ground that the statement was incorrect.

221. The Third Respondent accepted that she completed this part of the form, (again common ground) but that she made a genuine and regrettable mistake. This explanation, it was submitted by the Applicant, was unacceptable. The question was raised prominently on the form and was one of obvious importance. It was impossible to see how the question could not have prompted the recollection of AL's disciplinary record. The application form was so important that some care would have been taken in its completion, and the Respondents would have wanted to make sure that its contents were accurate. The First and Second Respondents had informed the SRA's investigators that they were "confident" that they would have seen the form.

222. Each of the Respondents readily identified that the position was untrue when it was presented to them in interview. Given the importance of the form, the Tribunal determined beyond reasonable doubt that the misrepresentation was deliberate by the Third Respondent when she completed the form, and was deliberately not amended by the First and Second Respondents when they reviewed the form; the concern being that disclosure of the disciplinary record may jeopardise their application. Thus each of the Respondents acted dishonestly by the standards of reasonable and honest people, and knew that their conduct was dishonest by those standards.

223. Even if the Tribunal were to accept that the misrepresentation was not deliberate, the Respondents had, on their own case, at least been reckless having completed and reviewed the form without caring whether the representations therein were true or false, and had thus acted without integrity contrary to Principle 2. Further, in failing to take due care to ensure the accuracy of the material information submitted to obtain a loan facility of £8 million, they behaved in a way that does not maintain the trust the public places in them and in the provision of legal services, contrary to Principle 6.

Allegation 1.2(b)

224. The Firm acted in a number of PIP breast implant claims ("PIP claims"). It was common ground that each claim, in respect of which funding was provided, had to be supported by legal expenses insurance or ATE. The Firm was able to incept ATE insurance policies using a delegated authority from LAMP Group Limited ("LAMP").

225. The Firm drew down funding against PIP claims as follows:

DATE	NUMBER OF PIP CLAIMS
7 March 2012	41
15 March 2012	4
16 April 201	5
16 May 2012	7
19 June 2012	14
August 2012	2
September 2012	6

226. When submitting the draw down lists to Tangerine, the Firm represented that the PIP claims were covered by ATE insurance. The Firm, when incepting policies for the PIP claims, used the delegated authority it had been granted by LAMP. The PIP claims fell outside the scope of that delegated authority.

227. The Third Respondent sent an email to Alan Strange of LAMP on 5 April 2012 asking: "What is your position on insuring PIP claims via Lindsays? Have you put a pricing structure in place?"

228. On 13 July 2012, Mr Strange sent an email to the Third Respondent stating: "I'm sorry it's taken a while to get back to you on this but I have been pondering how we may be able to provide cover for these cases. Unfortunately I'm not sure that we will be able to help ... I'm sorry that we have been unable to assist in this matter".

229. The minutes of board meetings attended by each of the Respondents on 13 August 2012, 11 September 2012 and 17 October 2012 recorded that the Firm needed to consider whether another insurer would provide ATE cover for the PIP claims because LAMP was unwilling to do so.

230. Further email correspondence continued between the Firm and LAMP regarding the PIP claims. During the course of the hearing, the issue between the parties narrowed. The Applicant accepted that the Respondents were not aware until 16 October 2012, at the earliest, that LAMP policies had been issued in respect of PIP claims. On 16 October 2012, the Third Respondent received an email from an employee in which

it was made plain that policies had been incepted, using the delegated authority from LAMP, for the PIP claims. Those policies, it was submitted by the Applicant, were void ab initio, as the Firm could not contract on behalf of LAMP in excess of the Firm's authority. In those circumstances, LAMP could not be bound except where LAMP had made representations to a third party that the Firm had authority, or LAMP had ratified the contract; neither of those exceptions applied in this case. The Applicant rejected the Respondents' argument that the policies were not void but voidable.

231. On 29 October 2012, the Third Respondent emailed LAMP and explained:

> "….we have insured PIP cases…..I am really sorry, the solicitor who had them in her name is no longer here and I have not got to the bottom of it. I need your guidance with regards to what we do now."

232. On 19 March 2013, Mr Strange sent an email to the Third Respondent confirming LAMP's previously stated position that it would not provide ATE insurance for the PIP claims.

233. Clause 12.9 of the LFA stated:

> "The Panel Firm undertakes to make prompt and full disclosure in writing to the Lender in the event that the Panel Firm becomes aware of any facts which would have had a material impact on the Lender to enter into this Agreement or on the decision of the Investment Manager to approve a Claim, if such facts had been known by the Lender or Investment Manager (as applicable) on or before the date of this Agreement or such Claim."

234. The minutes of board meetings attended by each of the Respondents on 23 November 2012 and 11 December 2012 recorded that the PIP claims were "currently uninsured until we provide LAMP with further information". The Firm did not at any time inform the Axiom Funds and/or its representatives that any of the PIP claims in respect of which it had drawn down funding did not have valid ATE insurance in place in breach of its obligations under clause 12.9 of the LFA. Further, each of the Respondents were professionally obliged to ensure that the misrepresentation was corrected in circumstances where the contractual relationship was continuing and the misrepresentation was material.

235. Mr Strange, in his oral evidence stated that:

> "[The PIP policies, having been incepted by the Firm were] outside of the delegated authority, so at our election we could avoid the policies, but we see from the email exchange, we were just seeing what we can do to help at the time….."

236. Mr Coleman submitted that whilst Mr Strange gave honest evidence, there was little that he could add that was relevant. He was wrong, as a matter of law, in expressing the opinion that the PIP ATE policies were voidable, rather than void ab initio.

237. The Respondents' claim that, notwithstanding their board minutes, which they produced, they did not believe the claims to be uninsured, should be rejected as incredible. In her defence, the Third Respondent states that she "voiced her concerns at a board meeting and advised the Board that Axiom would need to be informed that certain funded cases were not insured….[The First Respondent] unilaterally decided that informing Axiom of the uninsured cases would lead to the Firm being asked to return some of the loan monies. [The First Respondent] refused to take this step"

238. In failing to notify Axiom of the position with the ATE insurance on the PIP claims the Respondents acted without integrity and failed to maintain public trust in the profession. Further, the Respondents acted dishonestly.

<u>The First and Second Respondents' Evidence & Submissions</u>

239. Mr Goldsmith submitted that, given the drafting of this allegation, the Tribunal would need to find both allegation 1.2(a) and 1.2(b) proved for the allegation to be proved as a whole; it was not open for the Tribunal to find the matter proved to the required standard on part (a) or part (b) alone.

<u>Allegation 1.2(a)</u>

240. The first time that the Respondents became aware of the error was when it was pointed out to them by Ms Maskell during their interviews. The First Respondent could not recall seeing the application form before it was sent out, and did not recall sending the form out himself. The misrepresentation was "a regrettable mistake". There was no doubt that the form should have been accurate, but that he only became aware of the inaccuracy during the course of the SRA investigation. He denied that it was a deliberate mistake in order to secure funding; had he noticed the mistake, he would have rectified it. He denied that he had not taken the requisite care in reviewing the form, it was perfectly reasonable for him to trust that it had been correctly completed by a "fellow solicitor, a director and a shareholder…" In the circumstances, he had not acted recklessly, without integrity or in a way which would diminish the trust that the public places in the profession. The Second Respondent explained although he could not be certain that he had seen the form prior to its submissions, he "certainly did not see or notice that there was an error in any part of the form, but in particular that regarding….. the disciplinary proceedings…. If I had have seen it, then it would have been corrected immediately." He did not accept that failing to notice the error was due to an unreasonable lack of care on his part to ensure that the application form was materially correct.

<u>Allegation 1.2(b)</u>

241. It was accepted that the Firm drew down funds against 98 PIP claims, and that the draw down lists recorded that those cases had ATE insurance. It was not accepted that there was any false representation made to the Fund/Tangerine; the policies incepted were valid until they were avoided in March 2013, at which point the fund had already collapsed, and the Respondents were unable to notify anyone at Axiom/Tangerine of the position. The Respondents relied on the evidence of Mr Strange on this point.

242. The First Respondent explained that prior to October 2012, he was aware that the Firm had a number of PIP cases, but he was not aware that they had been included in the draw down lists, and that the Firm had been advanced monies on the basis of those cases. At the point on 13 July 2012, when Mr Strange emailed the Third Respondent to say that LAMP were unable to assist in relation to the PIP claims, neither the Respondents, the Firm nor LAMP were aware that policies had been incepted on PIP matters. At the point that it was discovered that PIP claims had been insured (late October/early November), despite being incepted outside of the scope of the delegated authority, the policies were valid and voidable. He believed that the situation in relation to the policies would be quickly resolved. In the event that LAMP confirmed that the policies were void, the First Respondent stated that "we would have had the conversation with somebody appropriate [at Axiom/Tangerine] to explain the position if those policies were then voided." In relation to the board minutes referring the PIP cases as uninsured, the First Respondent believed that "that's a poor choice of words….as I understood it they were still active, delegated authority, albeit incorrectly issued, voidable insurance policies." The First Respondent did not accept that in failing to notify Axiom of the position when it was discovered that he had acted without integrity, inconsistently with the public trust that resides in him as a solicitor and dishonestly according to the standards of reasonable and honest people.

243. The Second Respondent also confirmed that prior to October 2012, he was aware that the Firm had a number of PIP cases, but was not aware that they had been included in the draw down lists, and that the Firm had been advanced monies on the basis of those cases. His understanding in October/November was that "there was confusion as to whether that insurance was valid, and that LAMP had asked for some further information so they could decide whether they were going to continue with the policies." It was his belief that the situation would be quickly resolved and that LAMP would continue to insure the claims. The Third Respondent's use of the term "uninsured" was "unfortunate". He did not recall the Third Respondent voicing her concerns over the policies and advising that Axiom should be informed; there was a short general discussion. Had it transpired that LAMP were not prepared to continue to offer cover, it was his "honest belief that we would have informed Axiom at that point."

<u>The Third Respondent's Evidence & submissions</u>

<u>Allegation 1.2(a)</u>

244. The Third Respondent accepted that the form should have been correctly completed. She did not accept that she deliberately completed the form incorrectly for the purpose of persuading the fund to provide funding to the Firm. She explained that the mistake only became known to her during her interview with the Applicant in February 2013. She was "appalled" that she had made such a mistake and took full responsibility for it, and had done so ever since it was pointed out. She denied that the mistake was in fact a deliberate and dishonest falsehood, and when asked whether she had taken adequate care in the completion of the application, the Third Respondent explained "I filled it out to the best of my ability. That clearly wasn't the best of my ability because that there is a mistake and I have accepted that since it's been brought to my attention."

Allegation 1.2(b)

245. The Third Respondent explained that she was making general enquiries with LAMP as to the insurance of PIP claims. The email exchange commencing 5 April 2012, when she asked about LAMP's position on insuring PIP claims, and the substantive response of 13 July 2012 in which Mr Strange explained that LAMP would be unable to assist, was conducted without either party being aware that policies had already been incepted for PIP claims. The SRA's assertion that the policies were voided by way of the email from Mr Strange of 13 July 2012 was a misinterpretation of the email chain, as it assumed that the parties were aware that policies had been incepted; they were not. The references in the board's minutes of 13 August, 11 September and 17 October 2012 related to the Third Respondent's efforts to find an alternative insurer, but that was still without knowledge of the inception of the policies. The discovery of the policies in October was a different matter to the previous discussions. Her record in the board minutes of 23 November and 11 December 2012, when she referred to the PIP cases as "uninsured" was "a bad choice of words". The Third Respondent explained that having worked for LAMP previously, her "gut feeling was that they were proper insurance policies", although she was awaiting LAMP's confirmation in that regard. Her description of the policies as 'void ab initio' was not the position; this could be seen from the email chain between her and Mr Strange. The Third Respondent agreed that due to the "question mark on the ATE", Axiom should have been notified in October. The Third Respondent voiced her concerns in relation to the policies at a board meeting, advising that Axiom should be informed. The First Respondent, she alleged, refused to inform Axiom as that would lead to the Firm having to return some of the loan monies. The First Respondent denied this.

The Tribunal's Findings

246. **Allegation 1.2(a) Misrepresentation in the application**

246.1 As it was common ground that the application was submitted containing the misrepresentation, the decision for the Tribunal was whether, in submitting the application, the Respondents had acted without integrity, had failed to maintain public trust, and had acted dishonestly or, alternatively, whether they were reckless and thereby failed to maintain public trust. There was no evidence before the Tribunal that, had the form been correctly completed, the Fund would not have approved the application. The explanation provided by the Respondents was accepted; the misrepresentation was a mistake by the Third Respondent. The Tribunal could not be sure that the application form was seen and reviewed by the Second Respondent; his recollection in both his interviews with the Applicant and during his evidence was that he expected that he would have seen the form, but was not sure. The First Respondent also did not recall seeing the application form, although it was the Third Respondent's evidence that she passed the form to him for submission. The Tribunal determined that, given he was the lead contact for the Firm with Axiom/Tangerine, the form would have been sent to him for him to submit. It was clear that each of the Respondents did not devote sufficient attention to the form; the Tribunal noted other areas of the form that were not fully completed. Each of the Respondents, in failing to properly complete and/or review the application, had acted negligently, and in so doing had failed to maintain the trust that the public placed in them as solicitors and the provision of legal services. Given the Tribunal's findings that the

misrepresentation was an honest mistake, the Tribunal did not find proved beyond reasonable doubt that the Respondents had acted without integrity.

247. **Allegation 1.2(b) misrepresentation re PIP cases and failing to rectify the misrepresentation when it became known**

247.1 The Tribunal accepted that the discussions up until October 2012 between the Firm and LAMP, and in particular, between the Third Respondent and Mr Strange, were in relation to insuring PIP claims in general; at that stage the Respondents were not aware that policies had already been incepted. The Tribunal determined that by 29 October 2012 at the latest, (by which time £833,000 had been drawn down for PIP cases), each of the Respondents were aware that ATE policies had been issued on the PIP claims, and that those policies had been issued outside the scope of the Firm's delegated authority. In their letter to the Applicant, the First and Second Respondents explained that "At the time it was discovered that the cases might not be covered by LAMP, all the relevant cases were at the pre-proceedings stage." The Tribunal found that this was clear evidence of the First and Second Respondents knowledge that there was a significant problem with the ATE insurance on those matters. In her Defence, the Third Respondent stated that the cases were "uninsured". Further, in both the Defence and in evidence, the Third Respondent accepts that Axiom should have been informed of the position in October 2012 when the error came to light. The Tribunal accepted that on discovery, the Respondents agreed that the Third Respondent, given her previous connection with LAMP, was best placed to liaise with LAMP with a view to resolving the issue, and that it was the Respondents' intention to either come to an arrangement with LAMP, or source another provider. However, the Tribunal found that this did not alter their obligation under the contract or their professional obligation to inform Axiom. Clause 12.9 (which none of the Respondents alleged had been subject to an oral variation) was quite clear; the Respondents had undertaken to inform Axiom/Tangerine of any facts which would have had a material impact on Axiom/Tangerine's approval of any claim. The Tribunal determined that the requirement for ATE insurance was absolute, thus the issue with the insurance was material; indeed the Respondents did not claim, or seek to claim, that it was not a material matter. The Tribunal determined that the Respondents, irrespective of their efforts to remedy the position, should have informed Axiom on discovery as was their professional and contractual obligation. The Tribunal determined that in failing to do so, the Respondents lacked integrity and diminished the trust the public placed in them as solicitors and the provision of legal services. Accordingly, the Tribunal found beyond reasonable doubt that the Respondents had breached Principles 2 and 6 as alleged. In light of the Tribunal's findings, it was not necessary for the Tribunal to determine whether the policies were 'void ab initio' or 'voidable', the status of the policies in October made no difference to the Respondents obligations.

248. **Dishonesty**

<u>*Allegation 1.2(a)*</u>

248.1 The Tribunal found that the Applicant's allegation of dishonesty fell at the first hurdle; reasonable and honest people would not find it dishonest for a solicitor to make an honest and genuine mistake, hence the allegation of dishonesty was not

proved, and it was unnecessary for the Tribunal to consider the subjective test for dishonesty.

Allegation 1.2(b)

248.2 The Tribunal could not be sure beyond reasonable doubt that the Respondents conduct, in failing to notify Axiom of the problem amounted to objective dishonesty; a reasonable person might not find the failure to report dishonest when, although the issue was known, it was believed that the policies were nonetheless valid. Accordingly, the Applicant's submission on dishonesty again fell at the first hurdle, and thus it was unnecessary for the Tribunal to consider the subjective test for dishonesty.

248.3 Given the Tribunal's findings in relation to both allegations 1.2(a) and (b), it made no determination in relation to Mr Greensmith's submission that to find the allegation proved, both parts would have to be found proved.

249. **Allegation 1.3 - The Respondents failed to pay the monies identified in allegation one into client account or, if they wrongly but honestly believed that it was office money, failed to open an office account whose sole purpose was to hold the monies pending their use for an authorised purpose, contrary to Principles 2, 6, 8 and 10 of the Principles and to rules 1.2(a), 1.2 (b) and 14.1 of the SRA Accounts Rules 2011.**

Applicant's Evidence & Submissions

250. The Applicant submitted that the monies provided under the Litigation Funding Agreement were not at the free disposal of the Firm; could be applied only for the purposes for which they were provided; and in the highly suspicious circumstances should not have been received at all. However, having improperly received the monies, the Firm should have paid them into a client account, where they should have been held unless and until they were disbursed for a permitted purpose, i.e. the payment of "Eligible Legal Expenses".

251. Clause 4.2(a)(iii) of the LFA provided that the money should be paid into client account (see Paragraph 68.1 above). The position of the contract was further reinforced by the SAR. Rule 12.2c of the SAR provided that:

> "12.2 Client money includes money held or received:
> (c) for payment of unpaid professional disbursements;"

252. Given that the LFA was specific in that the funding was disbursement funding, Rule 12.2(c) applied; the monies received from Axiom were client monies. Rule 14.1 required that client monies be paid without delay into client account; Rules 1.2(a) and 1.2(b) 1.2(a) required that other people's money must be kept separately from money belonging to the Respondents or the Firm, and that such money should be kept safely in a bank or building society account identifiable as a client account.

253. The various arguments put forward by the Respondents were of no avail given the entire agreement clause and the NDA; the contract was the written contract - the position under both the Accounts Rules and under the contract was clear: it was client money; it must go into client account; it must be used for the specified purposes only

254. It was common ground that monies received from the Axiom Fund were paid into office account. It was also common ground that the money was not handled in accordance with the rules that apply to client money. This, standing on its own, was an extremely serious allegation as £3 million of the Fund's money, (clients' monies on the correct analysis), was not paid into client account and was not cared for in accordance with the SAR. That was something for which every Director in the Firm was responsible, however, in this case, in terms of the culpability of the Respondents, the Tribunal did not need to consider strict liability as all the Respondents knew the terms of the loan agreement and they were all aware of their obligations under the SAR.

255. Had the SAR been followed, then the £3 million of money received from the fund, ultimately from investors, would not have been dissipated; it would have been preserved in client account, used in accordance with the agreement and ultimately available to be returned to the Fund.

256. Alternatively, if the Respondents wrongly but honestly believed that the monies were not client monies, then they should have:

- paid them into an office bank account whose sole purpose was to receive the monies, where they would not be mixed with other office monies (and/or consequently utilised for general running expenses or dissipated by the account being in overdraft); and

- kept proper records of the monies received from the Axiom Funds to ensure that the funding was expended for an authorised purpose and/or that it was repaid in accordance with the Litigation Funding Agreement upon the conclusion of the funded cases and/or the recovery of costs.

257. The Respondents did neither of these things. The Respondents' conduct amounted to breaches of Principle 2, integrity; Principle 6, public trust; Principle 8, sound financial and risk management; and Principle 10, protecting client money.

258. The Respondents committed the breaches in order to facilitate the wrongful use of the monies for purposes that were not authorised by the LFA. The Respondents' conduct was dishonest by the standards of reasonable and honest people. As experienced solicitors, they would have appreciated that it was dishonest by those standards. Further or alternatively, their conduct was reckless as to the risks to which the Fund/investors were exposed as a result of the money not being kept in client account in accordance with the SAR.

The First and Second Respondents Evidence & Submissions

259. Mr Goldsmith submitted that the Respondents had agreed with DR/Tangerine that the funding was provided for general practice purposes and to drive the growth of the business. The business plan and financial modelling clearly set out how the funds would be used by the Firm. The monies advanced were therefore not client money and were rightly paid into office account. The Respondents denied breaching the Principles and SAR as alleged and denied that they had acted dishonestly. The First Respondent explained that it was not client money but was office money. The Second Respondent explained that the position as he understood it to be was the that money was advanced for working capital, and as such could be paid into office account.

The Third Respondent's Evidence & Submissions

260. The Third Respondent explained that the financial model provided to Axiom and Baker Tilly clearly showed that there was no intention to separate monies drawn on the Fund into client account or a separate office account; the Firm's intended use of the funds as practice funding was completely transparent and agreed; "it was never client money, it was never intended to be client money and that is not how [the Firm] utilised it." As the monies were not client monies, she denied all the allegation in its entirety, including the allegation of dishonesty.

The Tribunal's Findings

261. The Respondents' case was that the contract had been orally varied by DR/Tangerine, such that the monies were practice funding/working capital and consequently could be paid into office account. The Tribunal had already found that the terms of the LFA were for the protection of the Fund/investors. It was clear that investors had been told that monies would be allocated to cases, paid into client account, and used to pay disbursements. Further, they were told that both ATE and FGI insurance would be in place in relation to each claim; their investment was protected both by the regulation to which solicitors are subject, and insurance in the event that a claim was not successful. Having found that the entire agreement was the written agreement, it followed, and the Tribunal found as a fact, that the funds were client money and thus subject to the SAR; the money was advanced for disbursement funding and as such was caught by Rule 12.2(c). It having been accepted by the Respondents that the money was not paid into client account, the Tribunal found proved, beyond reasonable doubt, that the Respondents breached the SAR as alleged. Further, the Tribunal found proved, beyond reasonable doubt, that the Respondents had breached the Principles as pleaded. The Respondents, in the knowledge of their professional obligations, had used a substantial amount of client money for their own purposes; this clearly showed that the Respondents had acted without integrity. They failed to properly account for the monies, which they would have been able to do had they acted in accordance with the Rules. The Tribunal found beyond reasonable doubt, that in acting in the way that they did, they failed to run their business in accordance with proper governance and sound financial and risk management principles; failed to protect client money and acted in a way that diminished the trust the public placed in them as solicitors and the provision of legal services. The public would be dismayed to learn that solicitors could be so mistaken in relation to the purpose for which money had been given to the Firm. The Solicitors Accounts Rules were sacrosanct,

and designed for the protection of client money. The failure by the Respondents to pay the money into the Firm's client account meant that the money was not protected; the Respondents had improperly used the monies and consequently no monies were returned to the Axiom Fund. This, the Tribunal found beyond reasonable doubt, was clear evidence that the Respondents had failed to protect client money.

262. **Dishonesty**

262.1 For the reasons detailed in allegation 1 above, the Tribunal found that the Respondents knew that the written agreement was the entire agreement. Applying the Twinsectra test, the Tribunal found that there could be no doubt that reasonable and honest people, applying ordinary standards, would find that solicitors who used client money for their own purposes had acted dishonestly, and therefore the objective test was satisfied. The Respondents were aware, as they all accepted, of the obligations of the SAR. Notwithstanding this knowledge, the clear clause in the agreement, and the failure to document any other agreement, the Respondents spent over £3 million of client money. The Tribunal found that the misconduct arose from the Respondents' intended, and actual use of the monies to fund and develop the practice; this was entirely inconsistent with the agreement, and the Respondents each knew this to be the case. As detailed above, the Tribunal found that the Respondents' repeated submissions that the written contract had been varied by DR/Tangerine, were unsustainable and unreasonable. The Tribunal was satisfied beyond reasonable doubt that the Respondents each knew that their actions would deemed dishonest by the ordinary standards of reasonable and honest people. Accordingly the Tribunal found the subjective test satisfied and that dishonesty was proven beyond reasonable doubt.

263. **Allegation 1.4 - The Respondents failed to deal with the SRA in an open, co-operative and timely manner and/or failed to notify the SRA promptly of material changes to relevant information (in particular, serious financial difficulty), contrary to Principle 7 of the Principles and Outcomes 10.3 and 10.6 of the SRA Code of Conduct 2011.**

Allegation 1.5 - The First Respondent gave false and/or misleading information to the SRA contrary to Principles 2 and 7 of the Principles and Outcomes 10.3 and 10.6 of the SRA Code of Conduct 2011.

The Applicant's Evidence and Submissions

264. The Applicant submitted that on 25 October 2012, the First Respondent sent an email to Tangerine stating that "the minimum net amount of funds we need transferred to us in November and the following three months is £240,000.00 per month. This is the amount we need cleared in our bank account each month. Our models are built on this being the minimum figure."

265. On 20 November 2012, the Respondents met with KPMG who were conducting a review of the loans made by the Axiom Funds. Handwritten notes of that meeting record that the First Respondent told KPMG that the Firm required £240,000 per month in funding for a few months to "survive".

266. On 23 November 2012, there was a Board meeting of the Firm attended by each of the Respondents. The minutes recorded (inter alia) that: "The Board has taken the decision not to recruit any more staff until we know the position of the Axiom funding. If we do not receive the funds of £240k on the 27th November 2012, we will have no option but to commence redundancy proceedings."

267. On 28 November 2012, there was an urgent meeting of the directors of the Firm attended by each of the Respondents. Handwritten notes of that meeting recorded that they decided that the Firm had "sufficient cash flow, profit, funding and liquidity to postpone considering redundancies for one week."

268. On 29 November 2012, the First Respondent provided a document to the SRA which stated (inter alia):

> "Lindsays has a robust business plan built on a very strong financial base. Lindsays does not require, and nor should it at any stage in the future require, any further funding from any sources and will repay the majority of its borrowing in 2013 so that it is debt free by March 2014.
>
> Now that the Lindsays Solicitors advertising campaign has come to an end as planned, Lindsays costs circa £86, 000.00 per month to run and we receive circa £20,000.00 in monies per month from the Legal Services Commission and the commercial debt recovery work alone. In addition, there are large amounts of profit costs that come in from the clinical negligence work that, as can be seen from the forecast, are way in excess of the amounts needed to cover the overheads and cash requirements.
>
> Lindsays Solicitors will not require any additional staff through 2013 nor any capital expenditure.
>
> In addition, these separate businesses mentioned above [i.e. the Related Entities] make more than £170,000.00 per month in profits. The Directors and shareholders of Lindsays Solicitors are independently wealthy enough to add the money every month that Lindsays needs to operate even if Lindsays Solicitors did not receive any profit costs from work it has done.
>
> Lindsays Solicitors has a very healthy bank balance with circa £247,000.00 in cash at bank with profit costs being received on a regular basis."

269. On the same day, the First Respondent also told Ms Maskell that:

- The Firm would not be seeking to borrow any more monies from the Axiom Funds or if they did it would be no more than about £200,000;
- The Firm's cash flow projections showed that it could repay the existing loans from the Axiom Funds and make healthy profits going forward and that there was no impact on clients as it was a business loan to the Firm; and

- If the Axiom Fund sought repayment of the loan, both he and the Second Respondent had other profitable businesses which could inject funds into the Firm and also that the Firm could sell some WIP if necessary.

270. These statements stood in contrast with the Firm's internal documents, and its records of its communication with Tangerine and KPMG. The statements made by the First Respondent on 29 November 2012, in particular that the Firm did not require and would not be seeking further funding from the Fund, and that it could repay the existing loan were untrue.

271. On 6 December 2012, the Respondents met with DT, an Insolvency Practitioner, to discuss the Firm's financial position in the light of the suspension of the Axiom Funds. The Respondents and DT discussed insolvency processes at that meeting. The minutes recorded that: "Whilst the business had cash at present to meet liabilities as they fall due, the fact that Axiom could fail and either call in the money in 2013 or engineer a breach to do so means that the business has to act as though that was likely to happen." Further that: "It is a 12 month facility and it is thought that the earliest that the fund could seek to have the facility utilised repaid would be the end of February."

272. The minutes also recorded that the Firm owed approximately £5 million to the Axiom Fund. At this stage, if not earlier, the Firm was in serious financial difficulty. The minutes described the Firm's solvency as questionable, and various insolvency options were outlined. The Respondents' explanations that these were mere discussions were dismissed: those conversations and comments only made sense on the footing that the Firm was in serious financial difficulty. At that point, the Respondents were each under a duty, under Outcome 10.3, to notify the Applicant; they did not do so.

273. On 19 December 2012, the Respondents approved the Firm's financial statements which showed that the Firm was insolvent (with net liabilities of £817,000) and loss making (having made a loss of £780,000). On 20 December 2012, a Board meeting of the Firm took place which was attended by each of the Respondents. The minutes record that: "It was agreed that regardless of the outcome of matters in respect of the Fund it was becoming less likely that the Fund would recommence trading and that had to lead to an increased possibility that the current loan is recalled. Advice to date was that even if the Fund did re start without the potential for longevity the business could not consider taking further funding." The Respondents therefore resolved to novate the Firm's Legal Services Commission ("the LSC") legal aid contract to DGS because this would need to be completed in advance of any insolvency process in relation to the Firm.

274. On 25 January 2013, the First Respondent told the SRA that he did not believe that the Axiom Fund would demand repayment of the loan within a month and that he believed that the Firm would still be given time to repay the loan even if the Axiom Funds were wound down, and that in a worst case scenario, where repayment of the loan was demanded by Axiom, the Firm would sell off WIP and shrink. This statement of his belief was untrue. The Firm had noted that the loan was likely to be recalled and had resolved to novate the LSC contract to DGS.

275. On 29 January 2013, following a further meeting with DT, (at which the Second Respondent was not present) a decision was taken to put the Firm into administration. On 31 January 2013, the Firm filed a notice of intention to appoint administrators on 31 January 2013. DT advised that the Respondents should inform the SRA of the position. On 1 February 2013, the Third Respondent left a voicemail message and emailed Steven Bint to inform him of the issue of the Notice.

276. Mr Coleman rejected the Respondents' assertions that they relied upon the advice of DT in relation to their regulatory obligations. Each of the Respondents accepted that they were aware of those obligations, but did not advise or show DT the relevant regulations. The Third Respondent rightly accepted under cross examination that by 20 December 2012, when the Firm decided to novate the LSC contract, it was highly likely that the Firm would go into administration.

277. The Respondents, therefore, failed to deal with the SRA in an open, co-operative and timely manner contrary to their regulatory obligations as pleaded. Specifically, they failed to provide regular updates in relation to the deterioration in the Firm's financial position, and also thereby failed promptly to notify the SRA of the serious financial difficulties of the Firm.

278. In respect of allegation 1.5, the First Respondent's statements to the SRA concerning the Firm's financial position on 29 November 2012 and 25 January 2013 were untrue, and were made in the knowledge that they were untrue or not caring whether they were true or false. The First Respondent's conduct in this regard was dishonest by the standards of reasonable and honest people. As an experienced solicitor, he would have appreciated that his conduct was dishonest by those standards. Alternatively, he acted recklessly.

The First and Second Respondents' Evidence & Submissions

279. The Respondents accepted that they were under a duty to promptly report issues which amounted to serious financial difficulty to the SRA under Outcome 10.3, however "serious financial difficulty" was not a defined term. Further, there was no guidance in the Code of Conduct 2011 as to how it should be interpreted. Accordingly the difference between financial difficulty, and serious financial difficult, was an exercise in judgement. The fact that that exercise resulted in a different decision from that which the SRA believe should have been taken was not, in and of itself, evidence of misconduct. This was all the more so when the judgement was exercised on the basis of professional advice. The Respondents had at all times, sought the advice of external professionals, which was perfectly proper. The advice received was that, although the financial position of the Firm was uncomfortable, it was not catastrophic and could be managed by reducing overheads. The Respondents were advised on 16 January 2013 that they did not need to inform the SRA. On 29 January 2013 the advice changed and the Third Respondent notified Mr Bint on 1 February 2013.

280. The meeting on 6 December with DT was not arranged to discuss insolvency options, but was to discuss 'what if' scenarios given the circumstances in relation to the Fund. It was submitted that there was nothing in the minutes of that meeting that was contradictory to the information given to Ms Maskell on 29 November 2012.

281. The First Respondent explained that in the meeting with DT on 6 December "we were not considering insolvency. We were just discussing to make sure we were doing everything right and [DT] ran through the general options in insolvency". At that point, the Firm was not in serious financial difficulty, and thus the obligation to report was not engaged. Even at 16 January 2013, no formal decision had been made to put the Firm into administration. It was not until the meeting of 29 January 2013 "where everything changed." The advice to put the Firm into administration came "out of the blue" and "was a bit of a shock". The meeting was not simply a question of timing, with the decision having already been made; the plan until that point, was to continue with the Firm in a "shrunken" form. When Mr Coleman stated that:

> "From start to finish, that is from when you first handed the document to Ms Maskell on 29 November…you consciously and deliberately evaded your reporting obligation to the SRA and consciously misled Ms Maskell, didn't you?",

The First Respondent replied that:

> "We provided full, complete and honest answers…when the advice changed…we followed that advice correctly and notified the SRA quickly and did everything we could to make sure that the matters were handled with the minimal of impact for any clients."

282. The Second Respondent explained that the £240k per month, mentioned by the First Respondent to Tangerine and KPMG was only needed to continue to grow the business and was not required for the business to survive. The business plan remained robust, but would need to be reviewed if further funding was not forthcoming. He accepted that at 29 November 2012 he, in isolation, did not have sufficient money in his account to put into the Firm, but that the three of them combined could have come up with a solution. The meeting on 6 December 2012, was a precautionary prudent meeting, arranged for the purposes of obtaining advice from an experienced practitioner. At that stage, the Firm's solvency was not in doubt; the future solvency may have been questionable but the then current solvency was not. Even at 16 January 2013, it was still not evident that the Firm was in serious financial difficulty, it was their intention to trade through. He relied on the advice of DT that the SRA did not need to be informed; DT was an experienced practitioner who had been fully appraised of the situation.

<u>The Third Respondent's Evidence & Submissions</u>

283. From October 2012 onwards, following the news of the suspension of the Axiom Fund, the Respondents were trying to manage the situation and assess the next steps. When asked by KPMG at the meeting on 20 November how much the Firm needed to survive on, the First Respondent stated £240k per month. Due to the uncertainty, the Respondents considered cost savings and began rationalising the Firm. They took advice from DT in a meeting on 6 December 2012, so as to understand their options, given the lack of funding. They had a further meeting with DT on 16 January 2013, where he advised that 'at this stage, a formal decision to place the business into an insolvency process has not taken place and therefore it would not be the appropriate time to discuss the matter with the SRA during their visit next week.' The Third

Respondent relied on this advice. The Firm also used the services of a risk and compliance consultancy. In a meeting on 16 January 2013, they were advised by that company that 'subject to the business retaining sufficient liquidity to trade and look after clients' best interests then no need to discuss with the SRA during their visit next week'. The Third Respondent relied on this advice. In a meeting on 29 January 2013, DT advised that the Firm should be placed into administration and that the SRA should be informed; thus on 1 February 2013, the Third Respondent informed the SRA of the position. The Third Respondent accepted during cross examination by Mr Coleman that by 6 December 2012, the Firm's solvency was questionable, and that by 20 December 2012 "it was becoming highly likely" that the Firm was going to be put into administration. She confirmed that whilst relying on the advice of DT, at no point did she refer him to the Code of Conduct or the Principles, which specified her regulatory obligations.

The Tribunal's Findings

284. **Allegation 1.4 - The Respondents failed to deal with the SRA in an open, co-operative and timely manner and/or failed to notify the SRA promptly of material changes to relevant information (in particular, serious financial difficulty), contrary to Principle 7 of the Principles and Outcomes 10.3 and 10.6 of the SRA Code of Conduct 2011.**

Allegation 1.5 - The First Respondent gave false and/or misleading information to the SRA contrary to Principles 2 and 7 of the Principles and Outcomes 10.3 and 10.6 of the SRA Code of Conduct 2011.

284.1 Principle 7 required the Respondents to "comply with your legal and regulatory obligations and deal with your regulators…in an open and timely manner". Outcome 10.3 required that they "notify the SRA of any material changes to relevant information about you including serious financial difficulty…" Outcome 10.6 required that the Respondents "co-operate fully with the SRA…at all times…"

284.2. The Tribunal determined that although it was clear that, from October 2012, the Respondents were aware that the Firm was suffering some financial difficulties, those difficulties were not such that at that stage their obligation to report was engaged; rationalising the business, including making redundancies was not, in and of itself, evidence of 'serious financial difficulty'. However as at 6 December 2012, at the latest, the Tribunal found as a fact, that the Firm was in serious financial difficulty; that this was known to each of the Respondents; and that their obligation to report was engaged at this time – the Respondents each failed to comply with that obligation. The knowledge of the Respondents was evidenced in their meeting minutes. All the Respondents were present, as was Mr Johnstone (who had arranged the meeting) and DT. The Tribunal did not accept the Respondents' contention that when going through the various insolvency options with DT, they did not have in mind that the Firm was in serious financial difficulty. On any interpretation, those types of discussions would only arise in a situation where they were more than just a possibility; the options were being weighed in the balance of how best to proceed. DT referred to the need for a going concern qualification to the accounts; the Tribunal found that this was further evidence that the Firm was in serious financial difficulty.

Within the minutes there was discussion in relation to sums outstanding to HMRC. It was recorded that:

> "4.4 As regards PAYE it [i.e. the Firm] should settle the current month's liability on the due date and not allow the arrears to increase. Again to allow the balance to increase at a time when solvency is questionable may expose the Directors to personal liability on that proportion of the debt.
>
> 4.5 No point in attempting to catch up on arrears instantly as if anything happened imminently the administrator would simply seek to have the monies repaid."

284.3 Those points in the minute were very telling of what the situation was, and showed, in the Tribunal's determination, the extent of the Respondents knowledge at the relevant time; they were aware that the Firm was unlikely to survive, due to its serious financial position.

284.4 By the time of the meeting on 20 December 2012, the situation had further deteriorated, such that the board "considered that the only way to preserve the value associated with the Legal Aid work and pipeline will be to transfer the LSC contract and all associated staff to DGS". In considering the Fund's potential challenge to the transfer the Respondents "wanted to ensure that they were in a position that the decision could not in any way be detrimental to RH4L creditors." The Tribunal considered that if the Respondents were not aware until 29 January 2013 of the serious financial difficulties that the Firm was facing, they would not have considered how to "preserve the value" of the LSC contract or discussing preservation of costs for creditors; in the absence of serious financial difficulties, there would have been no need for that type of discussion and consideration. It was clear, and the Tribunal found as a fact, that the Respondents were even more acutely aware of their serious financial predicament on 20 December 2012; again they failed to comply with their notification obligations.

284.5 The Respondents did not inform the SRA of the true state of the business in an open and timely manner, nor did they report material changes promptly. The Respondents effectively provided the SRA with a fait accompli; the notice of intention to appoint an administrator had been lodged before the SRA was notified. The Respondents each sought to rely on the advice of external instructed agencies. The Tribunal determined that their reliance on that advice was misplaced; the Respondents could not properly rely on advice that itself was not proper. The Respondents failed to notify those advising them of their regulatory obligations. Those obligations could not be abrogated by the Respondents; they, and they alone were responsible for discharging those obligations. In light of the Tribunal's findings it was satisfied to the requisite standard that the Respondents had breached Principle 7 and the Outcomes as alleged and pleaded. Accordingly, the Tribunal found allegation 1.4 proved beyond reasonable doubt.

284.6 Given the Tribunal's findings in relation to allegation 1.4, it followed that the First Respondent's oral and written representations to Ms Maskell on 29 November 2012 and 25 January 2013 were false and misleading. The Tribunal found that the First

Respondent had actively sought to mislead Ms Maskell. It was clear, and the Tribunal found that the First Respondent knew that the statements made to her, both orally and in writing were manifestly untrue.

284.7 On 29 November 2012, the First Respondent asserted that the Firm was, in effect, financially stable, and not requiring further funding. However, seven days later, the Respondents were taking advice from an Insolvency practitioner, where issues in relation to the Firm's potential administration were discussed. Nothing had happened in that space of time to change the position of the Firm to that drastic extent. Further, he asserted that in the event that Axiom sought repayment of the loan, both he and the Second Respondent had other profitable businesses which could inject funds into the Firm. The Tribunal determined that the Related Entities were in fact only profitable due to the Axiom monies they were receiving for services provided to the Firm. This was clearly the case, as once the funding stopped and the Firm went into administration, the Related Entities followed a similar course shortly thereafter.

284.8 On 25 January 2013, the First Respondent was representing to Ms Maskell that the Firm was in a position to repay the loan, the worst case scenario being that the Firm would sell off WIP and shrink. Four days later, the decision was formalised to put the Firm into administration. Again, the Tribunal found that there was no ostensible difference between the Firm's position on 25 January and that on 29 January, and that the First Respondent knew this to be the case. Accordingly, the Tribunal was satisfied to the requisite standard that the First Respondent had breached the Principles and Outcomes as pleaded and alleged. The Tribunal's findings were sufficient to establish a lack of integrity.

285. **Dishonesty**

285.1 Applying the Twinsectra test, the Tribunal found that there could be no doubt that reasonable and honest people, applying ordinary standards, would consider that a solicitor who deliberately and knowingly misled his regulator had acted dishonestly, and therefore the objective test was satisfied. The Tribunal further found that the First Respondent knew that the information he provided was untrue and misleading, and that he was aware at the time of doing so that his actions would be considered dishonest. The Tribunal thus found that the subjective test was also satisfied and that dishonesty was proven beyond a reasonable doubt.

Previous Disciplinary Matters

286. None recorded against any of the Respondents

Mitigation

<u>First and Second Respondents</u>

287. Mr Greensmith recognised that the Tribunal would pay careful attention to its Guidance Note on Sanctions when determining the appropriate sanction, and also pay appropriate attention to the requirements of the Human Rights Act when applying its powers. The Tribunal was asked to view the totality of the misconduct and to

consider what was appropriate for all of the allegations rather than in respect of each of them.

288. It was recognised that the Tribunal had found dishonesty proved to the criminal standard, and that the almost inevitable consequence of that would be that the Respondents were struck from the roll. There was a small residual category of cases in which the striking from the Roll would not be the appropriate finding; Mr Greensmith, during mitigation was going to provide a little background and context that the Tribunal could use when considering what was appropriate in the particular circumstances.

289. The Tribunal's finding of dishonesty was both serious and would be considered by the Tribunal as an aggravating factor when considering sanction. The Respondents were embarrassed and ashamed to be before the Tribunal. They had always sought to give explanations, rather than excuses. It was right that they had freely entered into the agreements; they did so to try and innovate. They were looking for new funding in order to expand their practice. The First Respondent had explained a number of times during his evidence that the funding was not needed to continue the practice as it then was; it was funding which was wanted with the intention of expanding and offering something more to clients than they currently did. The First Respondent stated that the funding was something that the Firm could have walked away from, and it is true in that sense, they could have walked away from this, and in hindsight, they should have done so. They could have continued with the successful practice that they had without the need for that expansion.

290. The Applicant's entire case had been pinned on suspicion of fraud; suspicions of fraud within Axiom and of those who acted for and around Axiom. Indeed, the Axiom Fund unwound as a result of those suspicions, the Offshore Alert articles and everything which snowballed as a result. Whilst both the SRA and indeed the Respondents in their defence had been careful not to assert that there actually was a fraud, it appears that misconduct and indeed deception by others involved in and around Axiom were factors in the events which unfolded. If it really was the case that there was a fraud, then the Respondents were taken in by it.

291. Although it was a difficult submission to make on behalf of the First and Second Respondents, Mr Greensmith suggested that they had perhaps been extremely naive. The profession is built upon trust, the ability to trust one another and the ability to trust other solicitors, and perhaps the Respondents had been rather too trusting of others and what they had been told by others. There were a number of individuals with whom they had been in contact, either directly or to whom they were introduced, who were subsequently found to be dishonest and/or lacking in integrity and were struck off the Roll; both Mr Schools and Mr Barnett had been struck off the Roll by the Tribunal. At the time that they had dealings with Mr Schools, and were introduced to him and the Fund, the Respondents did not and could not know what was to come. There were dealings later on with Mr Barnett; a solicitor dishonest and struck off, and that dishonesty and strike-off upheld on appeal. Mr Schools introduced the Respondents to DR, whose current whereabouts were not known. The Respondents trusted DR; they trusted what he said on behalf of, as they saw it, the Axiom Fund. As a result of what was suggested was perhaps naivety and misplaced

trust, the Respondents had now lost confidence in their decision-making abilities throughout life.

292. In respect of allegation 1.4, the Tribunal had heard of the trust which the Respondents placed in their advisers at various times; trust in advisers could occasionally be misplaced as appeared to have been the case here.

293. In terms of the Respondents personal circumstances, there had been a sea change ever since the SRA knocked on their door in November 2012. They no longer worked; they had not practised as solicitors for some considerable time; and there had been a complete role reversal within each of their family environments.

294. They had been unable to switch off from these matters, and had not done so since the beginning of the Applicant's investigation. They had been assisting the supervisor in the orderly closure of their Firm, and assisting the supervisor under the terms of the PVA in maximising the recovery for creditors; the Applicant was aware of their involvement in that. Their future earning potential was not good, and whatever the decision of the Tribunal, it was not their intention to ever practise as solicitors again.

295. The First and Second Respondents were both currently in individual voluntary administrations; they were in a PVA and would be so until November 2016. They were living on handouts from family and friends. They had no income stream of their own and they did not know what they were going to do.

<u>The Third Respondent</u>

296. The Third Respondent adopted the majority of Mr Greensmith's submissions made on behalf of the First and Second Respondents in mitigation. The seriousness of a finding of dishonesty was recognised. The Third Respondent referred to her human rights as set out in the Tribunal's Guidance Note on Sanctions, and asked the Tribunal to consider the proportionality of any sanction within that context; she was currently working in compliance and a severe sanction would potentially have a disproportionate effect on her ability to work. She had already provided the Tribunal with details of her role and my experience. She hoped that the Tribunal would consider the dishonesty finding in context. In her view, the Applicant's case was that there may essentially have been a fraud by third parties; the submissions of Mr Greensmith were adopted in that regard. There was the additional element for her of the reliance and trust she placed on what she was being told by the First Respondent in terms of what was being communicated. Finally, the Tribunal should not underestimate the personal stress that the circumstances and the case had put her under over the last few years.

Sanction

297. The Tribunal had regard to its Guidance Note on Sanctions (4th Edition – December 2015). The Tribunal's overriding objective, when considering sanction, was the need to maintain public confidence in the integrity of the profession. In determining sanction, it was the Tribunal's role to assess the seriousness of the proven misconduct and to impose a sanction that was fair and proportionate in all the circumstances.

298. The Tribunal found that the Respondents were all equally culpable for the misconduct. It was noted that although the Third Respondent was a minority shareholder, her salary was the same as the other Respondents; there was no distinction to be drawn between her and the First and Second Respondents in terms of their respective responsibilities. The Respondents were all admitted to the Roll in the same year, and although their post qualification experience was different, they had all been working since qualification; again, no distinction could be drawn between them. The decisions made were the decisions of the board; the minutes showed that the Third Respondent was present at all board meetings and, other than the signing of the October LFA, there was no evidence that there was any meaningful dissent by the Third Respondent in relation to the material decisions made. The board agreed large payments out to the Related Entities, and whilst the Third Respondent asserted that she questioned the First Respondent in relation to those payments, she, along with the other Respondents, agreed and sanctioned the payments. Her reluctance to enter the October LFA was not supported by her actions. Having expressed concern, she did nothing further when she, on her case, discovered that the October LFA had been signed. Further, her issue with the October documents did not relate to the Firm's entering into a further contract that again did not reflect the true terms, but related more to the Panel Agreement and potential compromising of the Firm's independence. The Tribunal determined that in those circumstances, the Third Respondent had acquiesced in the intended continuance of the misconduct. The fact that the First Respondent was the main point of contact with Axiom/Tangerine, and was designated to deal with the financial matters of the Firm, did not absolve the Second and Third Respondents of their responsibilities in that regard, nor did it make him any more culpable for the misconduct, or them any less.

299. The Respondents did not seem to be motivated by personal gain; their motivation was to use the money to grow the business. Other than the pay rise which they awarded themselves on receipt of the funding, (which in itself was not excessive), and the repayment of the directors loans they had previously made to the Firm, the funds they received were used for business purposes. Over £3 million pounds was drawn down and misused by the Firm. Including the FF and interest, the Axiom Fund lost in excess of £5 million. As at the date of the hearing, no money had been repaid to Axiom. Substantial harm had been caused to the Fund and its investors, as well as to the reputation of the profession. Members of the public would be dismayed to discover that the Respondents had signed a contract, which they knew from the outset, contained terms for the protection of the investors and their investments, with which they did not intend to comply.

300. The Respondents' conduct was aggravated by their proven dishonesty, which was deliberate, calculated and repeated, and was in material breach of their obligation to protect the public and maintain public confidence in the reputation of the profession; as per Coulson J in Solicitors Regulation Authority v Sharma [2010] EWHC 2022 Admin ("Sharma"):

> "34. There is harm to the public every time that a solicitor behaves dishonestly. It is in the public interest to ensure that, as it was put in Bolton, a solicitor can be "trusted to the ends of the earth"."

301. The Respondents' misconduct was further aggravated by its continuance over a significant period of time, and, as was shown by the signing of the October documents, its intended further continuance. They had acted in breach of trust by accepting client monies which they used improperly, (and for their own purposes) in complete disregard of the regulations put in place for the protection of client money.

302. The Respondents sought to suggest that they were victims of a possible fraud that had been perpetrated on the Fund. The Tribunal did not accept this. Had the Respondents complied with the terms of the LFA, then the money that had been drawn down would either have been in client account, or utilised for disbursements, in which case it would have been recoverable either by a successful outcome, or under the ATE insurance. In those circumstances, the Fund would have lost far less money than it did lose, as a result of the Respondents' misconduct. The Respondents showed very little insight into their misconduct, and other than a few concessions made during cross examination, suggested that their conduct was right and proper throughout. As had been found in allegations 4 and 5, they failed to co-operate fully with the Applicant, and had made no admissions.

303. The Tribunal had regard to the cases of Bolton v Law Society [1994] 1 WLR 512 CA, Bultitude v Law Society [2004] EWCA Civ 1853 and SRA v Sharma [2010] EWHC 2022. It was clear from the case law that the usual and proportionate sanction in a case of dishonesty was a striking off order, save where there were exceptional circumstances. The Tribunal had found multiple dishonesty findings in relation to each of the Respondents. The Tribunal had regard to the character references submitted, and the previous unblemished record of the Respondents. The Respondents did not submit, and the Tribunal did not find, any exceptional circumstances in this case. The only appropriate and proportionate sanction, in order to protect the public, and maintain public confidence in the integrity of the profession and the provision of legal services, was to order that each of the Respondents be struck off the Roll.

Costs

304. Mr Coleman sought an order for the SRA's costs, including the costs of the investigation. The total of the SRA's legal costs, excluding the investigation costs, but including all disbursements, counsel fees and VAT, was £159,031.08. The investigation costs were £74,596.70. Mr Coleman invited the Tribunal to summarily assess the costs and order that the Respondents between them pay 75%, split equally between the Respondents. This approach recognised that this was not a case where the costs would have been the same if there were only one Respondent. It was, of course, open to the Tribunal to divide the costs differently if it determined, having regard to the fact that allegation 1.5 was made against the First Respondent only, to change the sharing ratios between the Respondents. The SRA however, would be content with an equal split.

305. In terms of the legal costs, it was submitted that they were properly and proportionately incurred. This was a complex case with a lot of paperwork, not all of which had made its way through to the final hearing. The Applicant had suggested a 25% discount in recognition of two factors. Firstly, if the matter went to a detailed assessment, experience showed that there would be some sort of discount; and

secondly a 25% discount had been applied across the board, including the investigators' costs. The Tribunal may take the view that the investigators' costs were less likely to be subject to a significant discount on a detailed assessment than perhaps a legal bill would be.

306. If the Tribunal were not prepared to summarily assess costs, an interim payment in the sum of 50% was sought, recognising that 50% would be a realistic view of the very least that the SRA would be awarded on a detailed assessment. In terms of the breakdown of that bill, was £132,000. Mr Coleman did not address the Tribunal in relation to his own fees. The solicitors' fees, ignoring disbursements, were in the region of £50,000 - £60,000, which it was submitted, was proportionate when one had regard to the complexity of the case. The case had been properly brought, and the costs were fair, reasonable and proportionate. The SRA's general position was that it takes a proportionate response as regards enforcement of any costs order.

307. Mr Coleman submitted that whilst the investigation costs were higher than the 'run-of-the-mill case', they had been properly incurred. Ms Maskell had provided a supporting document which explained the huge amount of work involved in investigating the case. In cross-examination it was suggested she had not gone far enough. She conducted a number of interviews with the Respondents, analysed a lot of complex material over a period of time, and produced an extremely helpful final report, which certainly assisted the preparation of the case and was referred to appropriately at several stages during the course of the hearing. Matters of this complexity had to be investigated carefully and thoroughly, that is what happened in this case.

308. Mr Greensmith submitted that the SRA's own costs, were not just large, they were massive. It was accepted that it had been a complex case. There were Axiom loan agreements, panel agreements, debentures, applications and so on, which needed careful consideration and careful consideration several times. Whilst it was anticipated that the Tribunal had read the documents several times over the course of the hearing, it had not taken six months to do so. The investigation costs were the equivalent of 107 seven-hour days; more than 21 full working weeks. A helpful comparison might be the WE matter. Whilst cases were fact-specific, the total costs for two FI reports in that matter were £20,683.14. Further, Mr Greensmith questioned whether the nominal rate applied by the SRA was a true cost to the SRA. The total costs in this matter was extraordinary; Mr Greensmith asked the Tribunal to substantially reduce those costs.

309. In terms of the legal costs Mr Greensmith submitted that they were not proportionate. Whilst Mr Coleman had very eloquently put the SRA's case, it was submitted that, had Mr Sidoli presented the case, he would have done so just as admirably without the need for the payment of counsel's fees, which, it was observed, came in at less than the FI costs, which it was suggested must be a first in Tribunal proceedings. There were lots of documents; the photocopying bill for providing all of those documents was itself fairly large. One of the reasons for that, was that the trial bundle contained a chronology of the documents in four of the volumes. The papers which were originally lodged with the Rule 5 statement were not in chronological order and so had been reordered; that created duplication of paperwork. It was also an exercise which could just as easily have been undertaken at the point of issue. The

transcription service, although nice to have, was not a necessity. The service was offered to the Respondents in correspondence prior to the hearing; their position was it would have been nice but it was not affordable. Notwithstanding that, it was still claimed against the Respondents. It was accepted that the transcripts were provided, but that was instigated by the Tribunal. Mr Greensmith submitted that this was a matter that could properly be summarily assessed by the Tribunal, and he invited the Tribunal to do so in a massively reduced figure from that which was claimed.

310. In respect of the ability to pay, means statements had been provided to the Tribunal; those statements spoke for themselves; the Respondents had no money. They were in an IVA's which were due to end in November 2016; the First Respondent paying £400 a month into his IVA, and the Second Respondent paying £350 into his IVA. The money they used to pay this liability came from family and friends; the Respondents had no income stream of their own.

311. Mr Greensmith submitted that when determining the appropriate costs order the Tribunal should only take into account the current financial position, and should not consider future earnings potential. In allegation 1.5 occupied very little of the Tribunal's time or of the SRA's preparation time; it was a small allegation in the grand scheme of things. In the circumstances, the costs should be equally split between the Respondents. Given the First and Second Respondents financial position the order for costs against them should not to be enforced without leave of the Tribunal.

312. In terms of a costs order, the Third Respondent submitted, the order should be individual; it would be wholly unfair for a joint and several order to be handed down. Further, the Tribunal should take account of the additional allegation against the First Respondent, and reflect this in the division of costs as between Respondents. The costs generally were "eye-wateringly high", and seemed to include work at DGS. Further, the Rule 5 Statement and the skeleton argument in this matter were very similar to that in the WE matter, and the Tribunal should note that when considering the costs.

313. The Third Respondent submitted that the weight of the resource of the "SRA machine" was disproportionate to her position as a self-represented Respondent; the Tribunal should take that imbalance into account. Finally, the Tribunal was in possession of her statement of means which she believed showed that she was of limited means.

314. The Tribunal sought clarification on the charges and values of the Third Respondent's properties. The Third Respondent confirmed that as at December 2015, there was a mortgage of £61,000 outstanding on her rental property; the value of that property was approximately £100,000. The equity in that property was split. The other property, as at December 2015, had a mortgage of £120,000; the value of it was approximately £250,000 - £280,000. Again, the equity in that property was split.

315. In response to the representations on means and costs made by the Respondents, Mr Coleman submitted that a straightforward costs order should be made without requiring the Applicant to seek permission to enforce. The Respondents' financial affairs, on the face of it, were complex and worthy of investigation. There was a

degree of complexity about the Respondents' finances with too much opacity to see through in order to justify suspending or qualifying the costs order that would otherwise be made

316. In relation to the Third Respondent's properties, she stated that they were tenancies in common with a 50/50 equity split for one property and 60/40 split for the other. The SRA looked at the Land Registry title official copy entries, which showed that both properties were registered in her sole name; there was no mention of a tenancy in common. The Third Respondent, in response explained that she had declarations of trusts on both properties, so the equity was split. The Third Respondent was not in an IVA and had significant income of £5,600 a month net. In relation to her outgoings, she included savings of £500 per month, and pension arrangements of £400 a month. The figure produced largely offset her income, but the outgoings were not all strictly necessary in terms of the degree to which she could afford a costs order; the outgoings figure was inflated from the perspective of what was strictly necessary to maintain a reasonable standard of living month to month. There were two properties with, on the face of it, substantial residual equity, especially if the claimed tenancy in common said to be supported by a declaration of trust but not reflected at the Land Registry was ignored. Further, there was a pension for which there was no value. The burden was on the Respondents to satisfy the Tribunal were unable to afford a costs order, and would not be in a position to come to some sort of reasonable arrangement with the SRA on the back of an unqualified costs order that you may make. The Third Respondent had certainly not discharged that burden. It was not good enough to assert valuations or equity splits without supporting evidence. An SRA search showed that one of her properties was likely to be worth £306,000 by reference to comparable properties.

317. The First Respondent had a family trust. It was for him, as it was for all the Respondents, to persuade the Tribunal that he did not have the means, whether strictly speaking his own or other sources to which he could have recourse, to meet a costs order. To discharge that burden, if someone has a family trust, there would need to be transparency about what the trust is, what its terms were and what the prospect was of getting a handout from a family trust. At some point in 2013, the First Respondent's interests in the Related Entities was transferred from his own name, into that of his family trust. To discharge the burden of proof that rests on him, he would have to persuade the Tribunal that he could not meet a costs order at all, including by having recourse, perhaps, to generosity of the trustees if it was a discretionary trust. He had valued his property at £259,000. The SRA had found particulars for a similar property in the same street for £360,000. He valued his second property at £220,000, which he purchased 10 years previously for £232,000. As was the case with the Third Respondent, it was for the First Respondent to discharge the burden of showing unaffordability.

318. The submissions made in relation to the First Respondent's family trust were repeated for the Second Respondent, whose position in that regard was identical. In relation to the property which he mentioned in his statement, the position, on the face of it, was surprising. The Land Registry documents showed that the property was bought for about £140,000 more than it was now said to be worth. It was purchased for £670,000 in 2012. It was now said, by the Second Respondent, to be worth only £575,000. A Zoopla valuation indicated that the property was valued at a still higher

figure of £736,000. Further, the Second Respondent had another property which he sold in 2014. The IVA documents indicated that it was heavily charged, but no information has been provided about what happened to the proceeds of that sale. Again, the discharge of the burden of unaffordability had not occurred.

319. The position in relation to all the Respondents was similar; there were questions which simply had not been squared off and answered in the way they would need to be in order for the Tribunal to make a costs order not to be enforced without the permission of the Tribunal.

320. The Tribunal considered carefully the Applicant's schedule of costs and the submissions of the parties, and determined that it was proper to order the Respondents to pay the Applicant's reasonable costs of the investigation and the proceedings. The Tribunal found the costs of the investigation to be excessive and disproportionate notwithstanding the complexity of the case and the 25% discount offered by the Applicant. There was insufficient evidence that all of the costs had been properly and reasonably incurred. The Tribunal considered that reasonable and appropriate costs for the investigation were £35,000, approximately half of the amount claimed. The Tribunal also accepted the submission of Mr Greensmith in relation to the costs of the transcription service; this was a cost that the SRA should bear. Likewise, the photocopying charges had escalated due to the reorganisation of the evidence. Further, a large number of the documents provided to the Tribunal were not referred to during the proceedings; the Respondents should not bear the costs for that. The Tribunal, determined that the appropriate discount to be applied to the legal costs was approximately 33%, leading to a figure for those costs, including VAT, of £94,000. Accordingly the Applicant's costs were summarily assessed in the aggregate amount of £129,000. The Tribunal agreed that the costs should be split equally between the Respondents, and also agreed that the order should relate to them individually. The evidence of means provided by the Respondents was inadequate and unsatisfactory. In the circumstances, it was not appropriate to require the Applicant to seek permission for costs to be enforced.

Statement of Full Order

321. The Tribunal Ordered that the Respondent, DUNCAN NEIL GIBBINS, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £43,000.00.

322. The Tribunal Ordered that the Respondent, MATTHEW ROY EDMUND DEAN, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £43,000.00.

323. The Tribunal Ordered that the Respondent, NICOLA KLIMKOWSKI, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that she do pay the costs of and incidental to this application and enquiry fixed in the sum of £43,000.00.

Dated this 7th day of July 2016
On behalf of the Tribunal

I. R. Woolfe
Chairman