The Respondents appealed the Tribunal's decision dated 27 September 2021 to the High Court (Administrative Court). The appeal was heard by Mrs Justice Lang on 13 October 2022 and Judgment was handed down on 31 October 2022. The appeal was dismissed.
Hetherington & Hetherington v SRA [2022] EWHC 2722 (Admin)

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12175-2021

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

MARGARET BRIDGET HETHERINGTON First Respondent
PATRICK CLEMENT HETHERINGTON Second Respondent

Before:

Mr B Forde (in the chair)
Mr G Sydenham
Mr P Hurley

Date of Hearing: 2–9 August 2021

Appearances

James Ramsden QC, barrister of Astrea Group Ltd, 7 Down Street, London, W1J 7AJ instructed by Daniel Purcell, solicitor of Capsticks LLP, 1 St George's Road, Wimbledon, London SW19 4DR for the Applicant.

Jonathan Goodwin, solicitor advocate of Jonathan Goodwin Solicitor Advocate, 69 Ridgewood Drive, Pensby, Birkenhead, Wirral CH61 8RF for the Respondents.

JUDGMENT

Allegations

1. The allegations made against the First Respondent by the Solicitors Regulation Authority ("SRA") were that, while in practice as a partner in and director of the Hetherington Partnership Limited ("the Firm"):

1.1. Between April 2011 and September 2017, she accepted instructions to act for purchaser clients in transactions, namely purchases of parking spaces or storage pods from companies linked to an entity named "Group First" ("the Schemes"), and, having accepted such instructions:

1.1.1. failed to give her clients adequate advice as to the proposed transactions;

1.1.2. failed to act in her clients' best interests;

and in doing so breached one or more of Rules 1.02, 1.04 and 1.06 of the Solicitors Code of Conduct 2007 in respect of matters arising prior to 5 October 2011("the 2007 Code"), and Principles 2, 4, and 6 of the SRA Principles 2011 in respect of matters arising on or after 6 October 2011 ("the Principles").

1.2. In acting for purchaser clients in respect of the Schemes in the manner set out at 1.1 above she preferred her own interests over the interests of clients and in doing so:

1.2.1. breached one or more of Rules 1.02, 1.03, 1.06 and 3.01 of the 2007 Code in respect of matters arising prior to 5 October 2011 and Principles 2, 3 and 6 of the Principles in respect of matters arising on or after 6 October 2011;

1.2.2. acted in a situation giving rise to an "own interest" conflict and so breached Rule 3.01 of the 2007 Code in respect of matters arising prior to 5 October 2011 and Outcome O(3.4) of the SRA Code of Conduct 2011 ("the 2011 Code").

2. It is further alleged against the First Respondent that by reason of the facts and matters set out at 1.1 and/or 1.2 above, or any of them she acted:

2.1. dishonestly;

2.2. recklessly; or

2.3. with manifest incompetence,

but proof of dishonesty, recklessness or manifest incompetence was not a necessary ingredient of a finding that the allegations set out at 1 above were proved.

3. The allegations against the Second Respondent are that, while in practice as a partner in the Firm, and while the Compliance Officer for Legal Practice ("COLP"), Compliance Officer for Finance and Administration ("COFA") and Money Laundering Reporting Officer ("MLRO") of the Firm:

3.1 Between April 2011 and September 2017 he failed to cause the Firm to:

3.1.1. give clients adequate advice as to the proposed transactions;

3.1.2. act in clients' best interests;

and in doing so breached one or more of Rules 1.02, 1.04 and 1.06 of the 2007 Code in respect of matters arising prior to 5 October 2011, and Principles 2, 4, and 6 of the Principles in respect of matters arising on or after 6 October 2011.

3.2 In allowing the Firm act for purchaser clients in respect of the Schemes in the manner set out at 3.1 above, he preferred his own and the Firm's interests over the interests of clients, and in doing so:

3.2.1 breached one or more of Rules 1.02, 1.03, 1.06 and 3.01 of the 2007 Code in respect of matters arising prior to 5 October 2011, Principles 2, 3 and 6 of the Principles in respect of matters arising on or after 6 October 2011;

3.2.2 allowed the Firm to act in a situation giving rise to an "own interest" conflict and so breached Rule 3.01 of the 2007 Code in respect of matters arising prior to 5 October 2011 and Outcome O(3.4) of the 2011 Code.

4. It was further alleged against the Second Respondent that by reason of the facts and matters set out at 3.1 to 3.2 above, or any of them, he acted:

4.1. dishonestly;

4.2. recklessly; and/or

4.3. with manifest incompetence,

but proof of dishonesty, recklessness or manifest incompetence was not a necessary ingredient of a finding that the allegations set out at 3 above are proved.

5. It was further alleged against the Second Respondent that by reason of the facts and matters set out at 3 above or any of them arising after 10 December 2012 he failed to ensure, or failed to take adequate steps to ensure, compliance with the Firm's obligations and in doing so breached his obligations as the COLP of the Firm under Rule 8.5(c) of the SRA Authorisation Rules 2011 and as the COFA of the Firm under Rule 8.5(e) of the SRA Authorisation Rules 2011.

Documents

6. The Tribunal reviewed all the documents submitted by the parties, which included (but was not limited to):

- Rule 12 Statement and Exhibit
- Respondent's Answer and Exhibits dated
- Applicant's Schedule of Costs dated

Preliminary Matters

7. Respondents' Application for Special Measures

7.1 Mr Goodwin applied for special measures on behalf of the Respondents. Person A, a former client, had made death threats of which both the police and the SRA were aware. Those threats remained real and present. Person A had recently been convicted of criminal offences in relation to threats made to others. Mr Goodwin submitted that in order to protect the Respondents from Person A, the Respondents should keep their cameras off when not giving evidence and when giving evidence, members of the public and press should only access the hearing by telephone. This would assist in preventing Person A from identifying the Respondents, in circumstances where he was not aware of their appearances. In the event that Person A was able to visually identify the Respondents, there was an enhanced risk to their safety.

7.2 In an email of 23 July 2021, Mr Goodwin stated:

> "For the avoidance of doubt, the proposal is that in the event my clients are minded to participate in the proceedings, my clients keep their video off until such time as they give evidence (in the event they are minded to do so), when the Tribunal can direct any observers to attend the hearing by telephone only, during the Respondents evidence, following which, and at the conclusion of the Respondents evidence, they can re-join by the hearing by video."

7.3 In its email in response, Capsticks stated:

> "Provided the SRA remains able to see and hear the Respondents give their evidence, and that the remaining parties attending can hear the Respondents this mitigates the impact on open justice, and therefore the Applicant does not object to the application by Mr Goodwin."

7.4 Mr Goodwin noted that the position as detailed in the Applicant's skeleton argument was now that the application was opposed.

7.5 The Tribunal was referred to the Tribunal's Guidance Note on Special Measures which stated:

> "When a witness gives evidence remotely, the Tribunal can ensure that that witness is not visible to any other party/the public. The Tribunal does this by directing those from whom the witness will be shielded to attend the hearing by telephone during the witnesses evidence."

7.6 Mr Goodwin submitted that in circumstances where there was grave concern about the threats made by Person A, the special measures requested were reasonable and proportionate and would afford the Respondents the ability to participate in the proceedings and to give evidence if so minded.

7.7 Mr Ramsden QC confirmed that the application was opposed. It was submitted that the application was analytically and evidentially confused. On 17 June 2021, the Tribunal refused applications for the proceedings to be held in private and anonymised. There

was no justification for revisiting the application that had already been refused. This division of the Tribunal was in the same position as the previous division that had refused the applications. The only additional information was that Person A had been convicted of criminal conduct in relation to threats made to others. It was significant, however, that he had not been convicted of criminal conduct in relation to any threats made to either Respondent.

7.8 It was explicit in the submissions on behalf of the Respondents that Person A knew who the Respondents were and how to contact them. It was difficult to see how knowing what the Respondents looked like made any difference. Mr Ramsden QC submitted that the Respondents ought to be seen by anyone attending the hearing; it was crucial that justice was seen to be done and not just heard.

7.9 As regards the submission that if the application was not granted, the Respondents may not participate in the proceedings, that was a matter for the Respondents and was immaterial to the Tribunal's determination of the issue. The Tribunal should focus on the substance of the application, any consequences that might flow from the Tribunal's decision was not a relevant consideration.

7.10 Mr Ramsden QC submitted that there was no good reason to reopen the application. Even if the conviction of Person A was material, it was marginal when one reflected on any significance it had. It was the Applicant's case that the application was extraordinary and confused; the imperative of visible and open justice overrode the Respondents' concerns as it the Tribunal had determined at the hearing on 17 June.

The Tribunal's Decision

7.11 The Tribunal determined that there was no evidence that Person A was not already aware of the appearance of either Respondent. The Tribunal noted that the application made was different to the previous application, in that this was an application for special measures, whereas the previous application had been for anonymity and privacy.

7.12 The principle of open justice was fundamental to all proceedings before the Tribunal and should only be interfered with when necessary for a fair hearing to take place. It had not been submitted that allowing the Respondents to be visible would render the hearing unfair, nor was it submitted that the quality of the Respondents' evidence would be impaired if they were visible whilst giving evidence. The Tribunal did not find that the threats made to the Respondents by Person A would be exacerbated if the Respondents could be seen if they chose to give evidence. Further, the recent conviction of Person A was not a factor that significantly affected whether the Respondents should be visible to any attendees. The conviction did not relate the Respondents and there had been no criminal proceedings in relation to the threats that had been made by Person A to the Respondents. The Tribunal determined that it was a matter for the Respondents as to whether they chose to give evidence if the application was not successful.

7.13 Accordingly, the Tribunal found that special measures were not justified in the circumstances and the application was refused.

Factual Background

8. The Respondents are siblings. The First Respondent was admitted to the Roll in November 1994. She was one of two partners in the Firm, with the Second Respondent. The First Respondent's expertise was primarily in conveyancing. The First Respondent held a practising certificate for the year 2016-17 until its suspension on 16 October 2017 by an Adjudication Panel.

9. The Second Respondent was admitted to the Roll in October 1986. He was the Firm's COLP, COFA and MLRO until the intervention into the Firm. The Second Respondent held a practising certificate for the year 2016-17 until its suspension on 16 October 2017 by an Adjudication Panel.

10. The Firm commenced trading in 1995. Since 19 January 2012 the Firm had been a limited company registered in England and since 28 February 2012 a recognised body with a registered office in Merseyside. The Respondents were the two Directors of the company.

11. According to the Firm's renewal application submitted to the SRA, the total turnover from the accounting period 1 April 2015 to 31 March 2016 was approximately £489,772. This was a reduction from turnover of about £845,000 in 2013/14 and £530,000 in 2014/15. The Respondents had at all material times held 50% shareholdings each, and therefore enjoyed an equal share in the Firm's profits.

Witnesses

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

- Victoria Jordan – former Forensic Investigation Officer
- John Owen – Member of Gordons LLP acting in the intervention
- Rachel Carneiro – Intervention Project Officer
- Client KB
- Client AC
- Margaret Hetherington – First Respondent
- Patrick Hetherington – Second Respondent

13. 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 the documents in the case and made notes of the oral evidence. 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

14. The Applicant was required to prove the allegations on the balance of probabilities. 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. The Tribunal considered all the evidence before it, written and oral together with the submissions of all parties.

Dishonesty

15. The test for dishonesty was that set out in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 at [74] as follows:

> "When dishonesty is in question the fact-finding Tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

16. When considering dishonesty the Tribunal firstly established the actual state of the Respondents' knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held. It then considered whether that conduct was honest or dishonest by the standards of ordinary decent people.

Integrity

17. The test for integrity was that set out in Wingate and Evans v SRA and SRA v Malins [2018] EWCA Civ 366, as per Jackson LJ:

> "Integrity is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members … [Professionals] are required to live up to their own professional standards … Integrity connotes adherence to the ethical standards of one's own profession".

18. When considering whether the Respondents' conduct was dishonest, lacking in integrity or reckless, the Tribunal had regard to the references supplied on the Respondents' behalf.

Recklessness

19. The test applied by the Tribunal was that set out in R v G [2003] UKHL 50 where Lord Bingham adopted the following definition:

> "A person acts recklessly…with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk."

20. This was adopted in the context of regulatory proceedings in Brett v SRA [2014] EWHC 2974 (Admin).

21. **Allegation 1.1 - Between April 2011 and September 2017, the First Respondent accepted instructions to act for purchaser clients in transactions, namely purchases of parking spaces or storage pods from companies linked to an entity named "Group First" ("the Schemes"), and, having accepted such instructions: (1.1.1) failed to give her clients adequate advice as to the proposed transactions; (1.1.2) failed to act in her clients' best interests; and in doing so breached one or more of Rules 1.02, 1.04 and 1.06 of the Solicitors 2007 Code in respect of matters arising prior to 5 October 201, and Principles 2, 4, and 6 of the Principles in respect of matters arising on or after 6 October 2011.**

Allegation 1.2 - In acting for purchaser clients in respect of the Schemes in the manner set out at 1.1 above the First Respondent preferred her own interests over the interests of clients and in doing so: (1.2.1) breached one or more of Rules 1.02, 1.03, 1.06 and 3.01 of the 2007 Code in respect of matters arising prior to 5 October 2011 and Principles 2, 3 and 6 of the Principles in respect of matters arising on or after 6 October 2011; (1.2.2) - acted in a situation giving rise to an "own interest" conflict and so breached Rule 3.01 of the 2007 Code in respect of matters arising prior to 5 October 2011 and Outcome O(3.4) of the 2011 Code.

Allegation 3.1 - Between April 2011 and September 2017 the Second Respondent failed to cause the Firm to: (3.1.1) give clients adequate advice as to the proposed transactions; (3.1.2) act in clients' best interests; and in doing so breached one or more of Rules 1.02, 1.04 and 1.06 of the 2007 Code in respect of matters arising prior to 5 October 2011, and Principles 2, 4, and 6 of the Principles in respect of matters arising on or after 6 October 2011.

Allegation 3.2 - In allowing the Firm act for purchaser clients in respect of the Schemes in the manner set out at 3.1 above, the Second Respondent preferred his own and the Firm's interests over the interests of clients, and in doing so: (3.2.1) breached one or more of Rules 1.02, 1.03, 1.06 and 3.01 of the 2007 Code in respect of matters arising prior to 5 October 2011, Principles 2, 3 and 6 of the Principles in respect of matters arising on or after 6 October 2011; (3.2.2) allowed the Firm to act in a situation giving rise to an "own interest" conflict and so breached Rule 3.01 of the 2007 Code in respect of matters arising prior to 5 October 2011 and Outcome O(3.4) of the 2011 Code.

<u>The Applicant's Case</u>

21.1 Mr Ramsden QC submitted that in summary the allegations against the Respondents arose out of the Firm acting for large numbers of purchasers (either individual clients or the providers of Self Invested Personal Pensions ("SIPPs"), dealing with individuals' personal pensions) who wished to invest in schemes operated by companies linked to an entity named "Group First". Clients were referred to the Firm by the Group First entity or entities, and in some cases the Firm's fees were met by the Group First entity. Under these schemes, individuals invested (personally or via the use of a SIPP) in a parking space or a storage pod, within a larger premises purporting to operate as an car park or storage facility. The Firm and the First Respondent acted on behalf of individuals, purporting to carry out conveyancing work on transactions involving the acquisition of parking spaces or storage pods.

21.2 Over £100 million passed through the Firm's client account in relation to the Schemes. The Schemes bore several hallmarks of dubious transactions, which indicated a high level of risk to clients, including:

- "guaranteed" high returns to purchasers against purportedly low levels of risk;
- promising purchasers an immediate capital growth in the value of their purchase of at least 25% due to the seller purportedly selling the units at a discounted rate so that with "guaranteed returns of 16%";
- contractual structures and documents which the individual purchasers would be likely to find complex and difficult to understand;
- the implied approval of major bodies including HM Revenue and Customs (HMRC) and the Royal Institute of Chartered Surveyors (RICS).

21.3 Mr Ramsden QC submitted that the contractual documents were grossly unfair to clients:

- the contractual documents provided for guaranteed rental income (and so a return on investment) for a short duration;
- the documents and marketing materials purported to offer a "buyback" facility, under which purchasers could sell their parking spaces or pods back to the Group First entity. However, the contractual provisions relating to this "buyback" rendered it highly uncertain and, effectively, unenforceable. As a result, there was an inconsistency between marketing materials (seen by the First Respondent) and the contractual documents which would be highly material to clients' decisions and interests;
- the Schemes imposed a requirement that, by documents which they entered into prior to instructing the Firm, purchasers authorise the Firm to release their monies to the seller's solicitors, JWK Legal Group Limited ("JWK"), at the very outset of their instruction of the Firm. These monies were described in the documentation as "non-refundable";

21.4 The Respondents ignored, or failed adequately to respond to, warning indicators as to the level of risk to which their clients were exposed, including:

- the Respondents allowed clients' purchase monies to be sent to JWK at the very outset of their instruction. They did so prior to taking any substantive steps on behalf of the clients including before exchanging contracts with JWK (let alone completing the purchase). The Respondents therefore allowed their clients' monies to be sent to JWK before their clients had acquired any security by way of an interest in or contractual entitlement to buy the assets concerned;
- Action Fraud Warning Notices relating to investments in car parking spaces dated 11 April 2014 and 21 October 2015;

- a Self Storage Association ("SSA") advice note issued in May 2014, and reissued in January 2015;

- the SRA warning card dated 10 September 2013 entitled "High-yield investment fraud"; and

- attempts by multiple clients to withdraw from the Schemes following an FCA investigation.

21.5 The advice provided to clients was all in pro forma documents. The First Respondent expressly declined to provide more detailed advice to a client who requested it. Many of the Firm's clients were based overseas and (it was to be assumed) were not familiar with the law and contractual provisions pertaining to the Schemes. By way of illustration Group First engaged sub agents in Vietnam for the purpose of sales of their schemes.

21.6 The failure to properly advise clients continued after the Respondents became aware of clients being dissatisfied with the services provided and the performance of the Schemes.

21.7 The Applicant's case was that the only plausible explanation for the failure to provide adequate advice, across a large group of clients and for a protracted period, was that the Respondents were placing the continued receipt of referrals from the Group First entities (and so the retention of the Group First entities' goodwill), and the resultant substantial fee income, above the interests of their clients in receiving full and proper advice about the degree of risk to which the purchases gave rise.

21.8 The Respondents dealt inadequately and improperly with a client complaint as to the adequacy of services provided, by (falsely) denying that they acted for the client concerned, and then by failing to rectify this on detection.

21.9 Between May 2011 and April 2017 the Firm acted on behalf of 6,792 clients in respect of the purchase of parking spaces or storage pods from Group First entities. Of those client matters:

- about 1,707 matters involved the conveyance of a parking space;

- about 5,085 matters involved the conveyance of a storage pod.

21.10 During the same period, the Firm received fees of approximately £2,902,690 (equating to about £400 plus VAT for each transaction) in respect of services provided on matters concerning the Schemes.

21.11 The FI Officer found that between 2013 and 2017, an aggregate total of about £101,148,059.10 passed through the Firm's client account in respect of such transactions by way of clients' purchase monies.

21.12 Prior to the inception of the Respondents' work on the Schemes, public warnings had been given, including directly to the profession, about the risk of becoming involved in dubious financial schemes. The first such warning was published in 1997. In 2009, a

Warning Notice was published which referred to features present in the Schemes, namely:

- High rates of return and low risk;
- Complex transactions;
- Obscure assets and security: the sale of individual storage units within a larger entity, and individual spaces within a car park, were not common forms of investment vehicle;
- Suggestion of support of a major body.

21.13 Group First, using subsidiary companies, acquired real estate (buildings subdivided into individual storage facilities, or car parks close to airports) and then promoted and executed the sale of individual storage units or parking spaces to individual buyers (either acting in person or purchasing using the vehicle of a SIPP).

21.14 The First Respondent requested a copy of a prospectus for the investments in 2012, by a letter to a SIPP provider. The SRA obtained a prospectus from the files held by the First Respondent. Mr Ramsden QC submitted that it could be inferred that the First Respondent was aware of the content of the prospectus including:

- under the heading "Summary terms of agreement", the prospectus stated that "Store First pays investors a fixed rental return of 8% for the first two years", "After two years, and every subsequent two years, Store First offer investors a further two years at a fixed rate", and "The new rate offered will be higher than the previous rate". It also acknowledged (in an apparent inconsistency with the statements recited above) that "Store First also has the option to break the lease every two years";
- the prospectus described a forecast total return for purchasers of 108% over 6 years;
- the prospectus stated that purchasers would be able to rely on a "guaranteed" buyback: "In Year 5, investors have the option to enter into a guaranteed buy-back scheme. In this scheme, Store First management Limited will guarantee to buy the Storepod back off the investor for the original price paid within the next 5 years";
- the prospectus describes the Firm as "Store First's preferred solicitor", identifying the First Respondent as the point of contact. The prospectus recorded that the Firm "have completed many sales of Storepods and as they are familiar with the product they are quick and efficient";
- a disclaimer at the end of the prospectus states that readers "should seek independent financial and legal advice on all information included in this document prior to making any investment decision".

21.15 A document relating to Group First car parking products and described as an "Investment Highlights – 2015" brochure stated that:

- the investment is "a low cost, high yielding investment product that's hands off and hassle free."

- Group First "... have introduced a single space scheme investment to the marketplace, evolving the potential of this lucrative product and enabling every investor to take their own highly profitable piece of the pie" and that "The nature of car park investment means it poses minimal risk and offers a stable and consistent income stream even under difficult economic conditions."

- "From day one of your investment, your car parking space will be subject to a six-year leaseback contract which guarantees rental income for the first two years at 8% net per annum... By increasing car parking rental prices in our annual upwards only rental review... we can then project that your returns will rise to 10% in years three and four, then 12% in years five and six."

- "By agreement, both the investor and Park First can call for the lease to be ended on the second and fourth anniversaries should they wish to do so, for example, for re-sale purposes."

- "When this six-year lease comes to an end our partnership with you will switch over onto a management contract for life"

- "On the fifth anniversary of your ownership of your Park First car parking space, you will be given the opportunity to request that we buy back the space from you. Subject to terms and conditions, Park First will purchase the space back from you for the original price paid. This has been set up as a safety mechanism designed for extenuating circumstances including death, incapacity or financial difficulty. ...The Park First developer buyback programme is great news for investors as it affords you with complete peace of mind that you will be able to sell your car parking space at a fixed, agreed amount, to an assured buyer..."

- "Investors receive a minimum 25% rise in capital value from day one" and "To ensure Park First customers enjoy a minimum 25% rise in capital growth from day one, we offer car parking spaces for sale at a discounted rate"

- "guarantees rental income for the first two years at 8% net per annum".

21.16 The First Respondent was therefore aware that her clients were offered: an immediate capital growth in the value of their purchase of at least 25%; a "guaranteed" high return, assured over a prolonged period and with low risk; and "complete peace of mind" through a "guaranteed" buyback option.

21.17 The FI Officer conducted a detailed review of 23 files relating to Group First transactions carried out on behalf of purchaser clients. Transactions effected by the Respondents and the Firm on behalf of clients followed a broadly consistent structure.

21.18 The contractual documents relating to the Group First car parking spaces scheme were:

- Contract of Sale - Stage 1 (also described as a "COS/reservation form");
- Contract of Sale - Stage 2 ("purchase contract");
- Head lease (under which a lease is granted to the buyer);
- Sublease (under which the buyer grants a sub-lease to a Group First entity); and
- Purchase option agreement (purporting to offer the buyer an option to sell the parking space or storage pod back to a Group First entity).

Client K

21.19 Client K was referred to the Firm by Group First by email on 15 June 2016, to represent him in the purchase of a car parking space.

21.20 Group First provided the Firm with a purchase pack comprising an instruction form, a completed "contract of sale – stage 1", proof of Client K's residency and his identification documentation.

Contract for Sale-Stage 1 (COS)

21.21 Prior to instructing the Firm, Client K signed a document described as "Contract of Sale – stage 1". Contrary to the description, this document did not effect a transfer but amounted to a "reservation" of a parking space.

21.22 The document instructed Client K to pay the full purchase price, namely £20,000, to the Firm's bank account, in consideration of which the nominated parking space was reserved for him. At this stage, and after payment of the purchase monies, he had no legal interest in, or contractual right to acquire, the parking space.

21.23 Client K signed the COS before the Firm was instructed and there is no indication that he had legal advice when doing so. The COS included the following terms:

- the purchaser became "immediately eligible to receive your 8% returns";
- the purchase price of £20,000 is non-refundable;
- the purchaser nominates a solicitor to conduct the transaction. The COS acknowledged that the purchaser could appoint any law firm, but stated that Group First would pay the purchaser's legal fees if the Firm was appointed to act on the transaction;
- the purchaser authorised the Firm to send the purchase monies to JWK for onward transmission to the seller, once his ID and proof of residency has been verified;

- changes could be made to the specification and location of the car parking plot and ancillary terms at Group First's discretion and without notification to the purchaser;

- the purchaser would be charged a fee of £75 plus VAT if any changes were made to the contract or if the contract was produced and the sale did not complete;

- Group First had the right to re-sell the car parking space if the purchaser failed to take appropriate action, or failed to respond to communication within 21 days.

21.24 The Firm sent a client care letter dated 15 June 2016 to Client K in which the First Respondent said:

> "I will investigate the legal title so that you will have a good and marketable title... Once the registration of your title has been completed I will forward to you a copy of that evidence from HM Land Registry".

21.25 The plot Client K purchased was in Glasgow. HM Land Registry does not register land in Scotland.

21.26 The letter sought to limit the extent of the Firm's retainer with Client K:

> "Please note that my firm will carry out solely the commercial conveyancing work for you and does not advise clients in respect of pensions advice, investment advice, financial services, mortgage products, survey and valuation advice or accountant or taxation advice"; and "our retainer ends once evidence of ownership is sent to you".

21.27 The letter to Client K said: "I understand that the seller of the above car parking space, Park First have agreed to pay all your legal costs". No information was provided about the Firm's professional charges.

21.28 The First Respondent asked Client K to remit the purchase monies of £20,000 to the Firm's client account and told him that the Firm would make payment of the purchase monies to JWK once identity checks have been undertaken.

21.29 Client K paid £20,018.00 to the Firm on 27 May 2016. On 27 June 2016 £19,458.21 was transferred to JWK and was referred to as "completion monies" on the client ledger.

21.30 On 29 June 2016 the Firm provided to Group First by email an invoice in the total sum of £541.79. The Firm's profit costs on this matter were £390 and were taken on 28 June 2016, some 296 days prior to completion.

21.31 JWK emailed the Firm on 31 May 2017 to confirm that the car parking space had been registered in Client K's name at the Register of Scotland. Registration was therefore effected 48 weeks after the "completion" monies were sent.

21.32 The Respondents and the Firm therefore received and paid on to JWK the purchase monies (described as "non-refundable") prior to providing any services to Client K, and in particular before Client K had received any advice on the transaction, and before Client K had therefore had the opportunity to confirm his instructions to proceed in the

light of any such advice. At the time of the transfer being made, Client K had not acquired an interest in, or contractual entitlement to buy, the asset to which the payment purportedly related.

21.33 No explanation was provided by the Respondents as to why it was necessary or appropriate, in such circumstances, for the money to pass through their account. At the time of the receipt and onward payment of the monies, no legal services had been provided by the Respondents or the Firm to the client.

21.34 It was accepted by the Respondents, that from May 2016 onwards, purchase monies were paid on to JWK at the commencement of an instruction and prior to the provision of any advice.

Contract for Sale - Stage 2 (purchase contract)

21.35 In the Purchase Contract, Park First agreed to grant to Client K a headlease of the parking space for a term of 175 years, in consideration of the payment of £20,000 and he agreed to accept the headlease. The Purchase Contract stated that the Tenant (Client K) "will pay" the Premium of £20,000, notwithstanding that in fact Client K's funds had been transferred to Group First's solicitors some months earlier. No attempt appeared to have been made accurately to reflect or record the fact of that payment in that document.

21.36 Completion and exchange appear to have taken place simultaneously on 20 April 2017, almost 10 months after the Firm sent Client K's money to JWK.

21.37 The headlease was annexed to the purchase contract. The provisions of a separate document entitled 'Minute of Agreement' were incorporated into the headlease. The Minute of Agreement was a 28-page document containing detailed and lengthy provisions which applied on the grant of a lease.

21.38 The purchase contract referred to a sublease to be granted by Client K back to Group First. However, the purchase contract contained no operative provisions in relation to the grant of the sublease.

21.39 No advice was provided by the Firm to Client K in relation to his obligations under the purchase contract.

Headlease

21.40 On completion, a headlease was granted by Group First to Client K for a term of 175 years. The term was expressed to commence on 1 February 2015 (about two years prior to completion) and the lease stated that he was deemed to have taken entry on this date.

21.41 The headlease imposed obligations on Client K (as tenant) known as 'tenant covenants'. These included:

- a requirement to pay to Park First (as landlord) ground rent of £100 per annum, subject to 10 yearly rent reviews (for the first 100 years) when the rent would

increase by 25%. On the hundredth anniversary of the lease the ground rent would therefore increase to £931.32 per annum;

- a requirement to pay a service charge of £289 per annum; and
- a requirement to pay an unspecified sum in relation to insurance and other outgoings.

21.42 In addition to the covenant to pay rents, the headlease contained 27 further clauses imposing obligations and restrictions on Client K's ownership and use of the car parking space.

21.43 The Firm provided Client K with a two-page undated pro forma report on the terms of the headlease. The Firm acknowledged in the report (contrary to its client care letter) that it was not qualified to advise on legal title on Scottish transactions, and advises that a Scottish law firm ("the Scottish Firm") was instructed to check the title. However, the report did not contain a copy of the Scottish Firm's advice or summarise its findings, other than to say that the property had "good and marketable title". The report did not contain advice on the headlease tenant covenants, comment on whether the rights granted were sufficient or the service charge provisions were reasonable, and did not comment on the implications of the early lease commencement and deemed occupation date.

21.44 The report contained a notice at its conclusion which stated:

> "By signing and returning the contract to us we will assume that we have your unconditional authority to complete on your behalf and that you have read and understood all the obligations in the documents provided and that you have read and understood the replies to enquiries and that you are happy to proceed".

21.45 The Applicant infers that the report was provided to the client on or about 29 July 2016, at the same time as contract documents were provided, and more than one month after monies were sent to JWK on 27 June 2016. Such advice, if provided after the transfer of funds had occurred, was of no value to the client in enabling them to understand and assess the risk to which the transaction gave rise.

Sublease

21.46 The contractual documents included a sublease under which Client K sublet the parking space back to the Group First entity (as subtenant). The rent payable to Client K was lower than that set out in the marketing brochure, with a total discrepancy over the 6 year period of £5,160. No advice to this effect was given to Client K by the First Respondent.

21.47 The sublease incorporated terms contained in the Minute of Agreement. The Firm provided a one-page report to Client K on the terms of the sublease. The report referred to Park First's break rights and advised that no rent would be paid if the break right was exercised. The report made no reference to the Minute of Agreement but stated: "These obligations are clearly defined in this document."

Purchase Option Agreement

21.48 The Purchase Option Agreement, entered into between Client K and Park First Skyport Limited, specified that to exercise an option to sell the parking space to a Group First entity, Client K must serve notice on Park First in a prescribed form during the "option period", which is a one-month period commencing on the fifth anniversary of the Agreement.

21.49 The Purchase Option Agreement provided that the option, if exercised, would only be effective if Park First "has sufficient funds available to it to pay the £20,000", as to which Park First's decision was final and therefore not open to challenge by Client K. The Agreement stated: "In determining whether or not the Landlord has sufficient funds, the Landlord's decision shall be final and he need not act reasonably".

21.50 Upon service of an effective notice, Park First could delay completion for up to 5 years. The completion date was defined as the fifth anniversary of the service of the notice or on the expiry of 2 weeks' notice served by the Landlord during the five years after service of the notice (whichever occurs first). Completion of the purchase option agreement would, theoretically, take place 10 years after Client K first acquired the lease. At that point, Park First was required to pay £20,000 to Client K (inclusive of any VAT). Up to the date of completion Client K's obligations to pay rent and service charge would continue under the headlease.

21.51 The Firm provided Client K with a one-page pro forma report on the Purchase Option Agreement, which set out the mechanics of the option and also advised him that Group First had "absolute discretion" in relation to the purchase back of the parking space but went on to state: "You of course do not need to serve such notice, and if you wish, sell to an independent party at possibly higher price".

21.52 The report also stated: "From a legal point of view, there is no guarantee that this Company will even be in existence after this time period (maximum of 10 years) and therefore the agreement would be unenforceable." The advice offered by the Firm on this identified risk was limited to a statement in the report: "Please bear this in mind."

21.53 The Firm provided no advice on the extraordinary nature of these provisions including, for example, that the purported security of the "buyback" was valueless, and that certain terms might be susceptible to challenge as unfair terms.

Minute of Agreement

21.54 In the case of transactions involving car parking spaces at Glasgow Airport, the terms of a separate document entitled "Minute of Agreement" were incorporated into the headlease. The Minute of Agreement was a 28-page document containing detailed and lengthy provisions which applied on the grant of a lease.

Declarations

21.55 Before completion of the matter, the Firm required Client K to sign a 'Declarations form' in which he authorised the Firm to exchange contracts on the car parking space

without the need to undertake further searches. The form included the following declaration:

> "We are fully aware of the risks involved in not carrying out searches this has been explained to us in full by our solicitors [the firm]."

21.56 There was no evidence on the file of the Firm providing the explanations referred to. In contrast, the Firm had stated in its client care letter to Client K that:

> "The Sellers solicitors will have carried out various searches already ... If I feel that further searches are necessary I will contact you."

21.57 The Firm's client file did not record any contact between the Firm and Client K, the client on the subject of searches, save for the declaration above.

SRA Warning Notice 2013

21.58 Between 2011 and 2013 the Respondents acted in about 4,346 Group First transactions.

21.59 The SRA issued a Warning Notice on firms' involvement in investment schemes on 10 September 2013. The Respondents were or ought to have been aware of the Warning Notice; the First Respondent because of her involvement in investment schemes and property transactions, and the Second Respondent given his role as the Firm's COLP and COFA.

21.60 The following were noted as some of the characteristics of investment fraud:

- Very high rate of return and disproportionate rewards, often within a short time frame—this is also a common characteristic in Ponzi models which involve payments to investors from subsequent investors rather than from any 'profit' earned by the individual or organisation running the fraudulent operation"

- Overwhelming amounts of documents supposedly explaining the transaction…

21.61 The Respondents did not take any steps to reflect the content of the Warning Notice in the advice they provided to clients.

Action Fraud Warning Notices

21.62 During 2014 the Respondents acted in a further 720 transactions, of which 209 related to car parking plots and 511 related to self-storage units.

21.63 On 11 April 2014, Action Fraud, the national fraud reporting centre, issued a warning entitled "Emerging trend in Investment scams involving storage space", specifically addressing risks arising from transactions bearing certain of the features present in respect of the Group First transactions in which the Respondents acted. The 2014 Storage Space warning stated:

"Common features include members of the public being:

- Cold called by forceful sales personnel offering an opportunity to invest in storage space
- Promised a high return on their investment for a worthless or non-existent investment."
- "…Some consumers may receive initial dividend payouts but in the long term the investment may result in substantial loss."

21.64 The Respondents admitted that they became aware of the warning shortly after it was issued. After the date on which the Action Fraud warning was issued, the Firm handled over 280 transactions involving storage spaces.

21.65 On 20 October 2015, Action Fraud issued a warning entitled "Emerging trend in investment scams involving parking spaces". This Action Fraud warning stated:

"Common features include

- …Verbal and written promises of a guaranteed and questionable high rate of return. A buy-back scheme is also offered but there is absolutely no guarantee of an onward sale (as previously experienced by consumers involved in time share properties, for example)."

"Members of the public should be aware of the following

- Some consumers may receive an attractive initial dividend payout but there is no guarantee of long-term future dividends and the investment may result in long term financial loss."

21.66 The Respondents admitted that they became aware of the car parking notice on 21 October 2015 (one day after it was issued), after which they processed over 1,000 transactions involving parking spaces.

21.67 The First Respondent has stated that on becoming aware of the 2015 Action Fraud warnings, she relied on the research of a SIPP Provider, Rowanmoor, in order to be satisfied that the Action Fraud warning did not apply to Group First transactions. She further stated that she relied on her own experience. There was no indication, or suggestion by the Respondents, that either of them took any independent steps, such as contacting Action Fraud, to seek to establish whether the Schemes were of concern, despite the fact that the Schemes obviously bore some of the indicators highlighted by the Action Fraud warnings, including promises of high rates of return, no guaranteed long-term income and unenforceable buy-back provisions.

Aborted "buyback"

21.68 Also in 2015 the First Respondent became aware of a refusal by Group First to buy back a storage pod. The Firm had acted for Client TK in a purchase in 2013. On 20 October 2015, Client TK asked the First Respondent to assist with sale of his storage pod, having been informed, in an email from Group First which he sent to the First Respondent, that Group First had withdrawn an offer to buy the storage pod and stated

that "We are under no legal obligation to buy back the store pod and are within are (sic) rights to be able to withdraw from the offer". This appeared to be a reaction to a statement by the Respondents' client that the Group First scheme "will be the next Ponzi Scheme from the UK".

21.69 The First Respondent was therefore aware by no later than October 2015 of Group First having refused to buy back storage pods and of client concerns at the possibility that the Group First scheme amounted to a fraud. There was no indication that the Respondents took steps to investigate clients concerns or inform future clients of the risk of a refusal by Group First to buy back a storage pod.

21.70 Furthermore, the First Respondent wrote to Client K, in response to his request for assistance with the sale of his storage pod, stating: "My firm will be unable to act for you on the sale as only Scottish Solicitors may do so". She did not explain why she had considered herself able to act on Client K's behalf on the purchase of the storage pod.

21.71 From June 2016 onwards, the Firm began to receive notifications from clients of a wish to withdraw from proposed transactions. These requests were often in "pro forma" emails which cited "sales issues" or "regulatory issues" as the reason for cancellation. There was no indication that either Respondent took steps to investigate the concerns which were identified by some of their clients, in order to provide advice to other current or future clients as to the risks to which the transactions may give rise.

21.72 Between December 2015 and April 2017 the First Respondent dealt with Client M. During the retainer, Client M raised concerns about delay in progressing her transaction, and also raised a number of queries regarding the contractual documents with the First Respondent. The First Respondent declined to answer those queries and, in her email of 20 April 2017, effectively and unilaterally dis-instructed herself by declining to answer the queries and saying: "I will pass your file to another solicitor of your choosing". The First Respondent was therefore aware that she was unable or unwilling to answer clients' queries in respect of the transactions, while providing no explanation as to her unwillingness to do so. Mr Ramsden QC submitted that there was no conduct reason for the First Respondent to withdraw from acting for Client M, as no client conflict had arisen.

SRA Warning Notice 2016

21.73 A Warning Notice issued by the SRA on 21 September 2016 listed several schemes that had turned out to be fraudulent. Neither car-parking schemes nor storage pods schemes were listed, however, the following was referred to:

> "Hotel rooms – taking a lease of a hotel room. There is no obvious reason for someone wanting to invest in a hotel to take out a lease and pay for the conveyancing of one room. These arrangements may well be collective investment schemes".

21.74 The characteristics of the fraud involving hotel rooms (taking a lease and paying for the conveyance of a sub-space) were similar to the characteristics of the models offered by Group First, involving the sale of a "fraction" or part of a larger property in novel ways.

The Respondents were or ought to have been aware of the Warning Notice; the First Respondent because of her involvement in investment schemes and property transactions, and the Second Respondent given his role as the Firm's COLP and COFA. The SRA calculated that the Respondents acted on 205 sales after the Warning Notice was issued in September 2016.

Payments directly to sellers' solicitors at outset of instruction

21.75 The First Respondent stated, in the statement given in High Court proceedings against the SRA, that in May 2016 a new process was adopted whereby funds were sent from the Firm's Client Account to the sellers' solicitors at the outset of the matter, following the completion of anti-money-laundering checks but before any advice had been provided. The First Respondent stated that she was willing to follow this procedure, despite the obvious risks to clients, because of her "positive experience of dealing with similar transactions". However, as is set out above, she was by this stage already aware of client concerns and of explicit warnings as to the risks involved in transactions bearing features present in the Schemes.

SRA Warning Notice 2017

21.76 A Warning Notice issue by the SRA on 23 June 2017, of which the Respondents were or ought to have been aware; the First Respondent because of her involvement in investment schemes and property transactions, and the Second Respondent given his role as the Firm's COLP and COFA. The Warning Notice outlined that one of the SRA's concerns was:

> "Dubious or risky models are being presented as routine conveyancing or investment in "land" when the reality is very different".

21.77 That 2017 Warning Notice specifically mentioned investment models involving car parking spaces and storage pods. Firms were reminded that:

> "The fact that a law firm acts only for the promoter does not mean that they owe no duties in conduct to buyers or investors. Solicitors must not facilitate dubious transactions. They must not take unfair advantage. They must act with integrity. Solicitors must rigorously assess the transaction and refuse or cease to act if, applying all warnings we have issued and considering past cases, there is any doubt about its propriety or whether buyers or investors are being misled in any way".

21.78 The 2017 Warning Notice stated that firms should critically assess the documentation relating to the models in which they are involved to ensure they are fair. In addition, firms were informed that their client accounts should not be used to receive investments monies that could simply be paid directly to the investment company. The Warning Notice also referred to a 2015 case involving "landbanking" in which the judge commented:

> "It was a subtle and cruel fraud because it involves the concept of owning land, a commodity that the public are bound to think has value and on which they cannot lose and on which they can easily be persuaded that they can make very substantial profits."

Impact on clients

21.79 During the course of acting for buyers in transactions undertaken pursuant to the Schemes, a total of in excess of £101 million passed through the Firm's client account by way of clients purchase monies. Mr Ramsden QC highlighted some matters where clients had expressed dissatisfaction:

- Client KH was a 77-year old widow with Parkinson's disease, who invested £50,000 through the Firm in a Group First scheme after being cold-called. Client KH recalls a telephone conversation with the First Respondent. Having received £4,300 in "returns", Client KH had lost the bulk of her savings and stated: "Had I kept my money and not invested I would have been able to stop in my own home longer and fund additional care". Client KH is now in a care-home.

- On 7 November 2016 the First Respondent received an email from Client KM reporting that he had been told by Group First that a purchase would not be able to complete after a defined date because of a "regulatory issue". He asked the First Respondent for legal advice, including as to his entitlement to a full refund. The First Respondent replied that "from a legal position, we cannot enforce them to sign a contract and legally transfer ownership" (notwithstanding that Client KM had already made payments to Group First), and declined to provide further advice, telling Client KM that he should seek advice from a specialist litigation solicitor (while warning of the potential costs of doing so). The First Respondent was therefore aware by no later than November 2016 that clients were being informed by Group First of the possibility that if transactions did not complete, that they may not receive the funds they believed to be due, and that Group First were citing "regulatory issues" as a reason for delay in completion of transactions. The Respondents appeared to have taken no steps to investigate the "regulatory issues" identified or to inform other clients of potential delays or risk to funds or transactions as a result of such issues.

- Client KB is a semi-retired priest. He paid £15,000 to the Firm in connection with the Schemes, with the intention of securing an income for his two disabled sons. After receiving returns of £2,400, a break clause was exercised by the Group First entity with the result that he received no further rental income, and he has been told that the value of the store pods has diminished significantly. Client KB wrote a letter of complaint to the Firm. The Second Respondent wrote to Client KB on 16 December 2016 saying, falsely: "Please note we have checked our records and we have no record of you instructing this firm to carry out any legal work for you. Please note we were instructed by [BB] and you should liaise with them and raise any queries you have with them". The Second Respondent described this as an "honest but regrettable mistake" in his statement of 5 December 2017, but neither he nor the First Respondent explain when they became aware of the mistake. Notwithstanding that they acknowledge that the Firm had acted for Client KB, the Respondents appear to have taken no steps to rectify the position when they became

aware of the falsity of the Second Respondent's letter to Client KB. It was the SRA's case that the inappropriate and misleading response to Client KB's complaint is an aggravating feature of the failure to act in clients' best interests.

- Client AC, who is disabled and mostly wheelchair bound originally invested the sum of £200,000.00 which represented the compensation he received following an accident at work in the Schemes, for 10 car parking spaces. Over the first two years of the investment, Client AC received £35,200.00 by way of returns. Client AC received no further returns on his investment.

- Client JH acquired a Group First product by means of a SIPP. He understood that he was instructing the Firm to act on his behalf in respect of the transaction and was told by his SIPP provider that a payment had been sent "to settle your solicitor's fees". After making payment of £97,500, representing substantially the whole of his pension (accrued between starting work at 18 and the age of 50) Client JH received a single payment of £7,800 by way of returns, but no further payment. On writing to the Respondents, Client JH received a letter from the First Respondent which stated: "For the avoidance of doubt this firm was not instructed by you and therefore cannot enter into any further correspondence with you". Client JH also obtained a valuation report prepared by Mr Thomas, a RICS surveyor. Mr Thomas set out the overvaluation of the storage pods at the point of purchase, and their true value at present. He identified the risks to buyers in investing in the Schemes. Mr Thomas commented that he failed "to see any value in the Option Agreement". Client JH subsequently received a compensation payment of £50,000 from the Financial Services Compensation Scheme but lost the remainder of his money. His statement described the impact on his health and the lives of his family of his participation in the Group First scheme, in which the Firm acted.

Judgment in JH v The Hetherington Partnership

21.80 On 28 May 2020, judgment in a civil claim brought by Client JH against the Firm was handed down by His Honour Judge Robinson in Sheffield County Court. Client JH sought compensation from the Respondents. He argued that but for the Respondents failure to properly advise, he would not have invested in the schemes and thereby sustained significant loss.

21.81 In his judgment Judge Robinson found:

> "110. I have found that there was no reference to a leaseback or rental agreement in the literature seen by the Claimant. It follows that the claim relating to the Defendant's failure to secure such an agreement or to advise the Claimant of the absence of such an agreement must fail. Since there was no such reference, there cannot have been a duty to advise of the necessity for such an agreement. The claim on this ground fails…
>
> 112. The first point to make is that I am satisfied that the documentation sent to the Defendant for processing on behalf of Stadia was correctly processed by the Defendant.

> 113. The Report on Option and Report on Sublease documents were sent to Stadia. The Report on Sublease is an admirable summary, in clear language, of the effect of the sublease to Stadia. Similarly, the Report on Option document is in plain and simple language. It warns explicitly of the weaknesses in the Option Agreement from the investor's point of view. The observation that Store First may not be in existence in five years is an obvious one."

21.82 Mr Ramsden QC submitted that whilst admissible, the findings were not binding on the Tribunal. It was considered that the findings were limited to the facts and circumstances of Client JH's case solely. The findings were therefore based on a single "snapshot" of one client, who retained incomplete documentation and appeared to have given limited assistance in his evidence regarding documentation he could no longer locate.

21.83 Further, it appeared that Judge Robinson was only directed to the 2017 Warning Notice, however warning notices had been issued to the profession as early as 2013. It was the Applicant's case that, despite numerous warnings which were repeatedly issued and re-issued by Action Fraud, the SRA and the Self-Storage Association, the Respondents continued to act in facilitation of the schemes.

21.84 It remained the SRA's position that despite Judge Robinson's finding that the report on the sublease "was an admirable summary", the report failed to provide sufficient warning to the lay investor as to the serious shortfalls of the scheme. The report failed to highlight that a leaseback or rental agreement was necessary in order to achieve the promised rates of return. The sample report obtained by the SRA (in relation to Client K) had the explanation that the rent term of six years could be brought to end earlier if Group First desired under the "break clause". This appeared to be the standard report that was used by the Respondents in each case. That danger was not evidently addressed at all in the Client JH case.

21.85 There was a general duty to point out any hazards of the kind which should be obvious to the solicitor but which the client, as a layman, may not appreciate (Gosfield School Ltd v Birkett Long (A Firm) [2005] EWHC 2905). To similar effect Bingham LJ stated in County Personnel (Employment Agency) v Alan R Pulver & Co [1987] 1 W.L.R. 916 at 922D that:

> "If in the exercise of a reasonable professional judgment a solicitor is or should be alerted to risks which might elude even an intelligent layman, then plainly it is his duty to advise the client of these risks or explore the matter further."

21.86 It is the SRA's case that the inclusion of a break clause flagged an obvious risk to a reasonably competent solicitor who should have taken steps to advise their client to mitigate this risk, namely by making the client aware of such and advising steps such as a leaseback or rental agreement, or simply to walk away from the transaction.

21.87 The SRA did not consider that the advice rendered was "admirable" and in "plain and simple language". The Respondents were required to point out the obvious shortfalls in the documentation. The Respondents were in possession of a prospectus which labelled the buy-back as a guarantee. In Boyce v Rendells (1983) 268 E.G. 268 at 272, the Court of Appeal accepted the following general proposition:

> "if, in the course of taking instructions, a professional man like a land agent or a solicitor learns of facts which reveal to him as a professional man the existence of obvious risks, then he should do more than merely advise within the strict limits of his retainer. He should call attention to and advise upon the risks."

21.88 A solicitor owed a general duty to explain such documents to the client or at least to ensure that he understood the material parts (Clarence Construction Ltd v Lavallee (1980) 111 D.L.R. (3d) 582). It was not enough for the solicitor to argue that this was a matter of business in which they had no duty to advise.

21.89 The inclusion of the term "guarantee" in some of the promotional material may have led some investors to act on the understanding that the buyback was indeed a guarantee. Without the guarantee, the buyback was essentially worthless, and this should have been identified to each client, particularly given their vulnerabilities and inexperience.

21.90 In Neushul v Mellish Harkway (1967) 111 S.J. 39, it was held observed: "a solicitor who was carrying out a transaction for a client was not justified in expressing no opinion when it was plain that the client was rushing into an unwise, not to say disastrous, adventure". The Respondents therefore had a duty to ensure the clients knew of the full extent of the risks involved. The judgment in Client JH's matter did not dismiss these risks, simply concluding in Client JH's matter that the duty to warn was adequately discharged. This was a matter for the Tribunal to determine.

21.91 Mr Ramsden QC submitted that the Scheme contained the following indicators that the transactions were dubious:

- Clients had been promised substantial returns (including an "immediate capital value increase of 25%", and 8% per annum returns) at low risk. Such representations were set out in the marketing materials which had been seen (and requested) by the First Respondent;

- There were material inconsistencies between representations made to the Firm's clients by or on behalf of Group First and the contractual documents provided to clients, including as to matters likely to influence clients' decisions including the level and duration of rental income; and the availability and enforceability of the "buyback" option;

- The various warnings issued in respect of similar transactions to the Schemes, including the warnings issued by Action Fraud, the SRA and the SSA;

- The contractual documents provided to clients were confusing and unclear. It was unclear (and not explained to individual buyers, by Group First or the Respondents) why the structure involved multiple instruments, and why a sale agreement, a lease of the parking space or storage pod, a sub-lease, and an option agreement, and, in the case of Glasgow Airport parking spaces, a "Minute of Agreement" were all required;

- The Respondents allowed client monies to pass through their client account with payments being made to the recipients before advice was given, and in circumstances in which, on the Respondents' case, clients were already committed

to making payments, and so there was no obvious need for the use of their client account;

- The Respondents received complaints from clients to the effect that the schemes had not performed as expected and that they had lost part or all of the value of their investment.

21.92 Mr Ramsden QC that each of these features were known to the First Respondent, and some were known to both Respondents. There was therefore a risk, which the Tribunal could infer was obvious and known to both Respondents, that the Respondents were being used, in their capacity as solicitors, to lend credibility to an otherwise dubious scheme, and that the Schemes gave rise to a high level of risk of loss to clients, which should have been drawn to the clients' attention.

21.93 Furthermore, the contractual documents and the structure of the transactions were grossly unfair to clients. The marketing messages given to clients about the "buyback" option, and the inconsistency between those messages and the actual rights afforded to clients under the contractual documents, were not properly or adequately addressed by the one-page pro forma advice given to clients by the First Respondent.

21.94 The limitations and qualifications had the effect of rendering the option unenforceable. This, combined with the break clause in the sub-lease, left clients entirely dependent on any inherent or residual value in, and transferability of, the "investment", notwithstanding that the asset being transferred was part of (and dependent on the effective management of a separate business, managing the car park or storage facility. This risk should have been explained to clients but was not properly so explained.

21.95 The transactions were structured so as to require clients to make a 100% non-refundable payment through the Firm that would be released to JWK prior to receiving any advice from the Respondents and prior to exchange of contracts, and with no security provided to clients, which was highly unusual in conveyancing transactions and created avoidable risk to clients. No advice was given to clients as to the unusual nature of this requirement, or the degree of risk to which it exposed those clients above that ordinarily encountered in a real estate transaction; and clients were not advised that non-refundable payment clauses may be unfair and unenforceable.

21.96 Both Respondents were, and must have been, aware that they had been recommended as a "preferred solicitor", and that individual clients, with no indications of experience or expertise in such unregulated investment schemes, were acting in reliance on their purported advice and on the basis that the Respondents were acting in their best interests. However, the features set out above were also known to the First Respondent and readily discoverable by the Second Respondent.

21.97 While some basic information was given to clients, including about the buyback option agreements, the advice did not address the concerns identified above, adequately or at all. It further created the impression that it may be in clients' commercial interests in any event not to ask Group First to buy the product back: alternatives are identified (a) that clients may wish to "sell to an independent party at possibly higher price" or (b) that clients may wish to use the space themselves, the latter highly unlikely to be a viable or meaningful option generally but particularly in light of many clients being

overseas. The possibility of clients being left with an asset of a lower or no value was not addressed.

21.98 Mr Ramsden QC submitted that adequate advice to the client would have included at least the following points:

- Paying the full purchase price, on a "non-refundable" basis and before any conveyancing work had been undertaken, was highly unusual and created a significant and avoidable risk;

- The "buyback" element of the contracts was unenforceable, in that:

    - There was only a window of one month, five years after purchase, to give formal notice of a wish to exercise the "buyback" option, in a prescribed form with a witnessed signature;

    - Even if notice was given in that window, Group First did not have to buy the product back, since it was dependent on Group First's decision as to whether it could afford to do so, and they were not required to act reasonably in so determining;

    - Even if Group First agreed, they did not have to pay for the "buyback" for a further five years;

    - Group First could decide to stop paying rent after two years or four years, while the sub-lease did not end for six years;

    - Even after rent payments stopped, clients continued to be committed to terms of the lease including payments;

    - The marketing material was not consistent with the contract terms;

    - The investment was unregulated and no compensation arrangements existed;

    - Investment in an airport car parking business did not necessitate a conveyancing transaction involving solicitors.

- Although advice was given that clients may wish to "sell to an independent party at possibly higher price", they were not advised that the buyback option was not assignable, and so that the resale value may be affected;

- (Where applicable) the transactions were of a type identified by Action Fraud warnings as giving rise to a high risk to investors.

21.99 Allowing clients to enter into the transactions despite the above indicators and risks, and having given no or inadequate advice as to the presence of such indicators, amounted to a failure by the First Respondent to act in the best interests of clients. Clients and the public would expect a solicitor to have given such warnings. The inadequacy of the advice given was of a degree amounting to manifest incompetence which would undermine public confidence. The First Respondent therefore acted in

breach of Rules 1.04 and 1.06 of the Solicitors Code of Conduct 2007 and Principles 4 and 6 of the SRA Principles 2011 in failing to give such advice.

21.100 The Second Respondent breached the same obligations by failing to cause such advice to be given, in the knowledge of the features of the Schemes described above.

21.101 The Respondents further took insufficient action when indicators of concern about the Schemes arose:

- On becoming aware of the Action Fraud warning notices, they failed to take any proactive steps, instead relying on "research" which they do not claim to have seen and which was purportedly carried out by a SIPP provider which may have had a financial interest in the continuance of the Schemes and, according to the First Respondent, "her own experience" of the Schemes. The Firm's clients were entitled to rely on the Firm, and the public would expect a firm acting in such transactions, to satisfy itself, through its own independent research, as to whether the warning applied to Schemes on which it was acting and which bore many of the features recited in the warning.

- On becoming aware of Client KB's complaint, the Respondents effectively ignored it and sought, falsely, to deny ever having acted for him.

- On becoming aware that clients were seeking, in large numbers, to withdraw from the Schemes, they took no or no adequate steps to investigate the reasons for this in order to establish whether the interests of other clients were affected.

21.102 As regards the Second Respondent, Mr Ramsden QC submitted that the Tribunal could properly infer that the Second Respondent was aware of the matters relied on in support of this allegation:

- The Second Respondent was the only other partner in the Firm apart from the First Respondent and was senior to her in qualification. It was not credible to suggest that he was not aware of the nature of the work carried out by the First Respondent and the features of such work identified and relied on.

- The Second Respondent was the COLP, COFA and Money Laundering Reporting Officer of the Firm. In order to even begin to carry out the responsibilities of those roles effectively he must have been aware of the matters detailed, including the use of the Firm's Client Account.

- The files opened in connection with the Schemes represented a very substantial proportion of the Firm's income, and so, inevitably, the Second Respondent was dependent on such instructions for a significant proportion of his personal income derived from the Firm.

21.103 Mr Ramsden QC submitted that the inescapable inference of the conduct described above was that the Respondents preferred their own interests over those of their clients' by failing to properly advise their clients, or cause them to be advised, as to the risks arising from the Schemes, and that their purpose in doing so was to maintain the flow of new instructions received via Group First.

21.104 The extent of the Respondents' reliance on referrals from Group First, and the manifest inadequacy of the advice provided to clients, led to the inevitable inference that a conflict arose between the interests of clients in receiving thorough and accurate advice on the proposed transactions, and the interests of the Respondents in securing continued referrals from Group First.

21.105 In preferring their own interests, the Respondents failed to act with independence or in a manner which would maintain public confidence in them and the provision of legal services; the public would expect solicitors, and clients were entitled to expect solicitors, to act independently of the influence of potential further instructions or by reference to reliance on future referrals. The Respondents therefore acted in breach of their obligations as alleged.

The Respondents' Case

21.106 The Respondents denied the allegations.

21.107 In their Defence and Witness Statement dated 12 April 2021, the Respondents explained that the First Respondent was the sole fee earner involved in the commercial conveyancing work for the storage pods and car parking spaces, although the Second Respondent did check some searches and title documentation.

21.108 In witness statements prepared in relation to the intervention, the Respondents explained that they first received instructions in relation to storage pods in April 2011 and in relation to car parking spaces from around 2013.

21.109 They carried out due diligence in relation to Group First by way of company searches to check if they had any debt and to ensure the sites were mortgage free. They also investigated the title for each site prior to receiving instructions to act for the buyers. Copies of the documents that required investigation were received from JWK, solicitors for the sellers.

21.110 The First Respondent reviewed the title documentation provided. Fresh searches were not undertaken as the searches provided by JWK were recent and complete. The First Respondent considered that in those circumstances there was no purpose in obtaining fresh searches either as part of the initial investigation into title generally or on the individual client transactions. If necessary, queries would be raised with JWK.

21.111 The Firm received standard contract documentation consisting of a contract, head lease, sub-lease and a buy-back agreement. Those documents were reviewed and amended when necessary.

21.112 The client care letter that was sent out to all clients made it clear that the Firm was advising on the conveyancing transaction only, and also advised clients to obtain advice from accountants or independent financial advisors. The Respondents submitted that the client care letter clearly drew client's attention to the areas that the Respondents were not advising on.

21.113 The Respondents explained that each client received the following:

Report on Headlease/Lease

21.113.1 In effect, this was a report on title. It did not repeat all the terms of the lease, but pointed out key terms containing the purchaser's rights and obligations.

Report on 6 year Sub-lease

21.113.2 This advised on the main provisions in the sublease, including how to serve notice on the landlord requiring it to enter the sublease, the 6 year lease term and the break clause at years 2 and 4. It also drew the client's attention to further clauses in the lease that they were asked to read to confirm they accorded what had been agreed.

Report on the Option Agreement

21.113.3 This set out the key terms of the option, including the limited time in which it could be exercised (five years and one month), the further five year deadline for the Seller to exercise the option and the absolute discretion for the Seller on whether or not to do so. It also included a warning, in bold letters, that there was no guarantee that the Seller would even be in existence when the option became exercisable and, therefore the agreement would be unenforceable. It concluded with an invitation to contact the First Respondent if the client had any queries.

21.114 Between 2011 and 2016 the standard process was for a bill and cash statement to be sent to clients. Clients would return the signed Agreement together with the completion monies and instructions to proceed. Land Registry searches were undertaken and thereafter exchange and completion would happen simultaneously. The First Respondent would then deal with the SDLT and Registration of Title before providing the title documents to clients.

21.115 The First Respondent explained that there were two variations to those usual arrangements relating to transactions in Scotland and matters post May 2016.

21.116 When the purchase related to property in Scotland, the Firm instructed a Scottish Firm to provide a report on title. The Firm's retainer letter and Report on Lease was amended to show that it was the Scottish Firm that confirmed good and marketable title. There were also other differences regarding the administration of any purchase.

21.117 In March 2016, the Respondents were contacted by Group First asking if they would act for individuals primarily in relation to parking spaces at Gatwick and Glasgow airports. The Respondents were informed that these sites were extremely popular with individual buyers, with demand exceeding supply. JWK suggested that as they already had mechanisms to carry out anti-money laundering checks on buyers, they could continue to do so. The First Respondent explained that the Firm was content with the arrangement in circumstances where it was permissible to rely on checks undertaken by another regulated firm. At that time the structure of the transaction also changed to include the COS, pursuant to which the buyer agreed to pay the purchase price to the Firm, to be released to JWK on receipt of proof that JWK had performed the anti-money laundering checks. The First Respondent explained that COS provided that the funds

were to be released to JWK for onward transmission to the seller as a non-refundable deposit. The First Respondent accepted that such an arrangement meant that the client would have paid monies to the Seller prior to receipt of advice and before the parties were formally committed to the transactions. The First Respondent explained that this was not a matter of concern as her previous experience demonstrated that there would not be any problems, and she had already undertaken the necessary investigations on title and was thus aware that there were no difficulties in that regard. Further, notwithstanding the terms of the COS, the First Respondent had been informed by Group First that if a client wished to withdraw from the transaction, they would be given a full refund.

21.118 The Respondents submitted that most of the work undertaken was for SIPPs and not individual clients. As regards acting for purchasers of storage pods, the Firm ceased acting on matters after 15 May 2017 when the relevant Group First company was placed into administration. In September 2017, the Firm determined that it would no longer act in relation to parking spaces following the Warning Notice issued in June 2017. The Warning Notice required solicitors to provide purchasers with advice in relation to investment risk. The First Respondent did not consider that she was authorised or qualified to advise clients in that regard and thus resolved to no longer carry out such work.

21.119 The Respondents did not accept that they failed to provide (or cause the Firm to provide) adequate advice to clients regarding the proposed transactions.

21.120 As regards the COS, this was a reservation agreement. The COS was signed by clients prior to the Firm being instructed. Whilst there was a commercial risk in entering into the agreement, advice on the COS was outside of the Respondents' retainer; the Respondents were not retained to advise on the commercial risks of the transactions. Further, and as detailed above, the First Respondent had been assured if any client change their mind, they would be refunded in full. Additionally, having investigated title, the Respondents were aware that there were no issues such that the transactions were likely to proceed.

21.121 As regards the Option Agreement, the Respondents provided clear advice in the option report provided to clients, warning that there was no guarantee that Park First would still exist at the time the option became exercisable. Such advice was clear and adequate. The First Respondent considered that as a result of the advice provided in relation to the buyback arrangement, a number of clients chose not to enter into the buyback arrangement. The report on the Option Agreement was in simple language which an unsophisticated investor could understand. The report made it clear that:

- Group First was under no obligation to buy the property back, that any refusal to buyback did not have to be reasonable and that Group First's decision in that regard was final.

- Group First had five years after service of the notice to exercise the buyback option. There was no guarantee that Group First would still be in existence at that time and the agreement would then be unenforceable.

21.122 The report on the Sublease made it clear that the sublease was for a period of six years, but that the Group First subsidiary could end the sublease earlier. If that option was exercised, the client would no longer receive any rental payments.

21.123 The advice provided to clients covered all of the relevant matters and was clearer than the advice it was suggested should have been provided. It was not for the Respondents, as solicitors with conduct of the transactions, to advise clients not to enter into the transactions. The investigations into title did not show any issues with the title; clients were able to use the property for its intended purpose. Advice on the merits of the transaction were beyond the remit of the retainer and the expertise of the Respondents. Accordingly, clients were advised to seek independent advice in relation to that aspect.

21.124 The Respondents did not accept that they ignored factors that suggested the investments were dubious. As they were only instructed to undertake the commercial conveyancing, the Respondents did not, and had no reason to, investigate the merits of the transactions. The First Respondent explained that they were not aware of the returns promised to purchasers in the promotional literature. Whilst it was accepted that the First Respondent did see some promotional literature in relation to storage pods, that literature had been requested in order to advise a client on a VAT issue. The literature would have been read for that purpose only. Further, even if they had been aware of the promises made, the Respondents were not in a position to advise on whether the promised return was unusually high.

21.125 It was not accepted that the documentation was confusing or poorly drafted. The reports provided by the Respondents made the position clear, including providing clear warnings.

21.126 Whilst the Option Agreements gave Group First full discretion as to whether to buy any individual unit back, that complete discretion did not invalidate the transaction. In the event a unit was not re-purchased, the client retained ownership of the unit, and could dispose of it as they saw fit.

21.127 The First Respondent accepted that payment of the full purchase price as opposed to a reservation fee was unusual, however the agreement to pay the full purchase price was entered into by clients prior to the Firm being instructed.

21.128 As regards the submission that the Respondents continued to process transactions despite the Action Fraud Warnings, those warning were considered by the Respondents. The 2014 warning related to ‘boiler room’ scams where the space sold was either non-existent or worthless. The First Respondent explained that she was not concerned as by the time of the warning, the Firm had been acting in transactions for 3 years. The Respondents were aware that the storage pods existed, and title was successfully registered. The transactions did not fall into the category identified by the warning. The 2015 warning in relation to parking spaces was considered by Rowanmoor, who, following its own investigation, considered that the Group First transactions were legitimate. The First Respondent explained that the Respondents also considered the transactions to be legitimate given that they had been conducting those transactions for some time with title to the parking spaces being successfully registered with the Land Registry. The First Respondent was satisfied that she could rely on the investigations of Rowanmoor together with her own experience.

21.129 As regards the SRA Warning Notices detailed by the Applicant, the Respondents did not consider that any of the factors detailed in those notices were relevant to the transactions. It was not until the 2017 Warning Notice that storage pods and parking spaces were explicitly mentioned by the SRA. Having read the 2017 Warning Notice, the Respondents decided that they would no longer act in such matters due to the need to assess and advise on investment risk, an area in which the Respondents were not qualified to provide advice.

21.130 As to the client matters exemplified by the Applicant:

- The Respondents were unable to comment on what Client KH had been told. The First Respondent did accept that she had spoken to Client KH and believed that Client KH had confused the First Respondent with someone who worked for Group First. The First Respondent considered that Client KH would have received advice from the Firm in relation to each transaction. There was nothing about the transaction that would have put the First Respondent on notice that Client KH was vulnerable or in need of any additional advice.

- Client KM's purchase was unable to proceed as a result of an ongoing Financial Conduct Authority (FCA) review. Group First had agreed not to sell any more units whilst the investigation was ongoing. The First Respondent explained that she was not concerned as all affected clients had their monies returned. On 7 November 2016, Client KM emailed the First Respondent informing her that the sale would not proceed and that his investment was to be returned. Client KM had already received a payment of £10,000 by way of advanced rental income. He was to receive a further £90,000 which together with the £10,000 was the total amount of his investment. Client KM was not satisfied as he considered that he should receive the full amount of his investment back together with an additional £10,000 representing the advanced rental income as compensation for Group First having been in possession of his £100,000 investment since July. The First Respondent informed Client KM the following day that Group First could not be forced to complete. Client KM was also advised to seek advice from a Scottish litigation solicitor. The First Respondent explained that Client KM was so advised as a potential claim against Group First was outside of her area of expertise.

- The Second Respondent explained that when the complaint from Client KB was received, the First Respondent was on holiday. He gave a copy of the email to her assistant. He was provided with information that led him to believe that Client KB was not a client of the Firm, and that the Firm had been instructed by a SIPP. This was an honest mistake made by relying on the information he had received.

- Client M originally intended to conduct the transaction without legal representation. When she raised a number of questions that JWK were unable to answer, Client M was advised to instruct the Respondents. Insofar as the questions asked related to the title, the First Respondent explained that she was unable to advise on Scottish law and the Firm had relied on the Scottish Firm. The First Respondent requested the relevant documents. A number of the questions raised by Client M could only be answered by the Sellers. JWK were chased for a response to all the matters raised. Client M was dissatisfied with the amount of time it was taking to receive a satisfactory response. In an email to the First

Respondent, Client M detailed the circumstances in which she was prepared to proceed. The First Respondent considered that the professional relationship with Client M had broken down. She refunded Client M's fees and suggested she instruct other solicitors.

21.131 As regards Client JH, Judge Robinson found:

> "There was no duty to give any further advice, in particular on the wisdom of the investment ….
>
> ….
>
> The Report on Option and Report on Sublease documents were sent to Stadia. The Report on Sublease is an admirable summary, in clear language, of the effect of the sublease to Stadia. Similarly, the Report on Option document is in plain and simple language. It warns explicitly of the weaknesses in the Option Agreement from the investor's point of view. The observation that Store First may not be in existence in five years is an obvious one.
>
> ….
>
> Given my findings of fact in relation to the leaseback issue and the option issue, I do not see the scope for alleging that the defendant did not do the job properly. If what is being suggested is that the defendant should have given investment advice to anyone … I reject that suggestion and I repeat what I have said a number of times; the Defendant properly provided the Reports on Sublease and Option Agreement."

21.132 Given those findings, the Respondents did not accept that they had failed to adequately advise their clients (or cause their clients to be adequately advised). The advice given in the JH transaction was the same as the advice given to all clients. The Respondents advised all clients to seek appropriate independent advice; they could not and should not be held accountable if clients failed to do so. The Respondents considered that the decision and findings of Judge Robinson should be echoed by the Tribunal.

21.133 The Respondents highlighted that no other former clients had issued proceedings against the Respondents or the Firm in connection with the same advice. It was asserted that the reason for this was that the advice provided was adequate.

21.134 The Respondents noted that the no-notice intervention into the Firm and their respective practices, took place notwithstanding advice received from Ms G of the SRA that the advice given to Person A (which was in the standard form) was correct. The Respondents stated that they relied on that advice. In their oral evidence, both Respondents detailed conversations they each had with Ms G, in which Ms G assured them that there were no issues with the advice given to Person A or any other clients who had received the same advice. The Respondents relied on those assurances.

21.135 Mr Goodwin reminded the Tribunal of the burden and standard of proof. In their documents, the Respondents had referred to the delay in bringing the proceedings and the effect of that delay both on their health and their defence. The Respondents were

notified of the referral to the Tribunal on 7 June 2018, however the proceedings were not issued until 8 March 2021. The delay in issuing the proceedings meant that the Respondents were now being tried under the civil standard of proof. This was unfair and prejudicially affected their position. Mr Goodwin made clear that there was no application to strike the proceedings out for abuse. Had that been the case, the application would have been made at the outset of the hearing.

21.136 Under the civil standard, the Tribunal had to be satisfied that the conduct alleged was more likely than not. Case law provided that the more serious the allegation, the more cogent the evidence must be in order for any allegation to be found proved. The Tribunal should assume that some things were inherently more probable than others. Mr Goodwin submitted that a fair and common-sense starting position was that solicitors were honest, decent and hardworking individuals. The Applicant required to provide clear and cogent evidence before such an assumption could be dispelled.

21.137 Mr Goodwin reminded the Tribunal that despite the way the case had been put, the Respondents were not accused of facilitating dubious transactions, or failing to have regard to the Warning Notices. The allegations were clearly particularised in the Applicant's Rule 12 Statement. The issue for the Tribunal to determine as regards allegations 1.1 and 3.1 was the adequacy of the advice given. It was of note that (not taking into account Client JH) there had been no complaints and no payments had been made from the compensation fund. Further, there had been no orders for damages to be paid by the Respondents to any former clients following civil proceedings. Indeed, the only matter that proceeded to Court was the JH matter.

21.138 Mr Goodwin submitted that were the Tribunal to find that the Respondents had failed to provide adequate advice, such conduct was negligent but was not sufficiently serious to cross the threshold of professional misconduct.

21.139 As to the Applicant's submissions regarding the Action Fraud Notices:

- The Applicant placed great emphasis on the Action Fraud Notices. The Respondents' evidence was that they saw and considered theses notices. As regards the 2015 Notice relating to parking spaces, the Respondents relied on their own investigations and those of Rowanmoor, a reputable SIPP provider.

- Mr Goodwin submitted that it was hypocritical of the Applicant to criticise the Respondents for failing to pay due regard to the Action Fraud Notices when the SRA itself had failed to take any steps to warn the profession until its Warning Notice of 23 June 2017. The SRA, as the profession's regulator, was tasked with watching emerging trends and alerting the profession. Whilst it was accepted that firms and solicitors should be alert to fraud or dubious transactions in any event, Mr Goodwin submitted that the SRA ought not to criticise the Respondents (let alone accuse them of being dishonest) for failing to take what the SRA considered to be appropriate action as a result of the Action Fraud Notices, when the SRA itself took no action to warn the profession until June 2017.

21.140 As to the Applicant's submissions regarding the SRA Warning Notices:

- The September 2013 Warning Notice related to high yield investment fraud. There was no reference in that Notice to storage pods or parking spaces. The common characteristics detailed were not relevant to the transactions. Even if some of the characteristics could be deemed relevant, the important issue was what the Respondents believed at the time. Both Respondents confirmed that they did not consider that the Notice was relevant to the work under the Schemes.

- The September 2016 Warning Notice related to investment schemes and the use of client account. There was no suggestion, and it was not the Applicant's case, that the Respondents allowed their client account to be used as a banking facility with no underlying legal transaction in breach of the accounts rules. Further, there was no specific reference to storage pods or parking spaces in the Notice. It was the Applicant's case that the Respondents ought to have had regard to the Action Fraud Notices (as detailed above). Mr Goodwin noted that SRA had not seen fit to expressly caution the profession in its 2016 Warning Notice. It was submitted that in the circumstances, it was reasonable to infer that there was not sufficient concern regarding parking spaces or storage pods to alert the profession.

- The 2017 Warning Notice specifically cautioned the profession about parking spaces and storage pods. The conduct complained of by the SRA occurred prior to the publication of the Notice. It was inappropriate to assess the Respondents' conduct taking into account a Notice that did not exist at the time of their conduct, and therefore could not have informed their conduct.

- The SRA submitted that the 2017 Warning Notice was a reminder of already existing duties. Such an assertion, it was submitted, was no answer to the point that the SRA failed, in any Warning Notice until the 2017 Warning Notice, to expressly and explicitly refer to parking spaces and storage pods.

21.141 Mr Goodwin submitted that the Respondents considered that the advice they provided was adequate, and that such a consideration was supported by other investigations, including by the SRA.

21.142 Person A complained to the SRA about the Respondents conduct. In a letter to Person A dated 26 May 2016, the SRA stated:

> "The firm set out their terms of engagement clearly in their letter to you of 4 February 2013 and recommended that you take advice from an accountant or financial advisor in relation to the investment. They also informed you that they were one of the panel firms … but confirmed that they did not take referral fees … for accepting your instructions and that their advice was independent. The firm also reported clearly on the terms of the lease, sublease and action agreement. I therefore cannot see that there was any misconduct on the part of the firm. … It does not appear proportionate for us to investigate the matter further based on the evidence I have reviewed."

21.143 Mr Goodwin submitted that whilst the Respondents did not see this letter until the intervention proceedings, they both spoke to Ms G who informed them of the threats made by Person A, the investigation and the finding that there was no misconduct. It was the Respondents case that Ms G confirmed that if the same advice had been given on all transactions, there was no misconduct in relation to the transactions. In her evidence, Ms Jordan confirmed that at some unknown point, the SRA considered that there was misconduct in relation to the transactions. She was unable to provide the letter written to Person A, stating that the Firm was being investigated. Nor was she able to provide any explanation as to why the SRA had taken a different view.

21.144 Person A also reported the Firm to Action Fraud. In a letter to Person A dated 7 December 2016, Action Fraud stated:

> "All Action Fraud reports are passed to the National Fraud Intelligence Bureau and we review every crime to identify investigative leads and opportunities to disrupt criminal activity. We have reviewed your report and I regret to inform you that we have not identified any leads that would result in a successful criminal investigation therefore your report has not been sent to a local police force or other enforcement organisation to commence an investigation at this time."

21.145 This letter was sent seven months after the SRA considered there was no misconduct and 14 months after the Action Fraud Warning Notice issued in 2015.

21.146 Additionally, Client AC complained to the Legal Ombudsman ("LeO") about the Firm's conduct. In a letter to the First Respondent dated 15 February 2019, LeO stated that the Firm's service was reasonable and that no remedy was needed.

21.147 The SRA sought to dismiss the findings of Judge Robinson on the basis that the advocates gave little assistance to Judge Robinson. Mr Goodwin submitted that the documents in that matter were the same as the documents that were before the Tribunal. Judge Robinson made a number of findings including:

- It had not been argued by JH that the Respondents were dishonest.
- Insofar as any advice was given, that advice was correct.
- There was no duty on the Firm to provide further advice, in particular on the wisdom of the investment.
- In any event, the reports supplied by the Firm were sufficient to discharge any duty there may have been.

21.148 Mr Ramsden QC submitted that the JH Judgment was based on a single "snapshot" of one client. That was not accepted. If the approach and advice given to clients by the Respondents in that matter was found to be adequate, then the advice to all clients was adequate. Mr Ramsden QC's submissions as regards the adequacy of the advice given were wholly inconsistent with the findings of Judge Robinson, LeO and the initial investigation by the SRA in response to Person A's complaint.

21.149 Mr Goodwin submitted that Mr KB conceded in evidence that due to his personal circumstances, he had not read the documentation he received properly or at all. Absent Mr KB informing the Respondents, they had no way of knowing what his personal circumstances were. Whilst there was sympathy for his personal position, his decisions were not attributable to a failure by the Respondents to give him proper advice. As had been found by Judge Robinson, the advice given was clear, simple and consistent across all clients.

21.150 Mr AC, was asked whether he was sure that his statement contained all matters of relevance. He confirmed that it did, however he did not detail that he had made a complaint to LeO that had been rejected 9 months before his statement was written. Mr Goodwin submitted that given Mr AC's clear and obvious failure to include the LeO matters, the Tribunal could not rely on his evidence, which, it was submitted, Mr AC had deliberately failed to mention as it was not supportive of his position.

21.151 Mr Goodwin submitted that the findings detailed above, including the SRA's own findings were demonstrated that the advice provided by the Respondents on the transactions was proper and adequate.

21.152 There was a danger of imposing duties that were beyond the scope of the retainer. The test the Tribunal should apply when considering the adequacy of the advice was the advice that could be expected of a reasonably competent solicitor at the time and not with the benefit of hindsight. Solicitors were not general insurers against their clients' decisions. The Respondents advised their clients to seek expert advice. Their obligation went no further; they were not required to ascertain that clients had sought advice as advised.

21.153 The SRA accepted that the Respondents had provided some advice. That advice had been described by Judge Robinson as admirable in plain and simple language.

21.154 Mr Goodwin submitted that there should be no adverse finding in relation to the First Respondent's evidence that she had no interest in the promotional literature. The promotional literature did not form part of the contractual documents and did not inform any advice she was required to provide under the retainer.

The Tribunal's Findings

21.155 It was the Respondents case that they were retained to conduct the commercial conveyance only, and that their duties were to advise on the contractual documents and nothing more.

The Contractual Documents

21.156 In evidence the First Respondent stated that she did not advise on the COS, as it had been signed by clients prior to her instruction. When asked if she had read the COS in detail, the First Respondent explained that she had not as it was "just a reservation form with the client's details". The Tribunal noted that the COS required the payment of the entire amount on a non-refundable basis. Mr Ramsden QC stated on signing the COS, clients agreed contractually to pay a non-refundable basis. Whether that money was in the Respondents' client account, or passed to JWK, clients had no legal right to enforce

the return of those monies. The First Respondent did not agree. She explained that the COS was a reservation agreement and monies were sent to JWK to be held to the Firm's order.

21.157 The Tribunal found the First Respondent's answers to be astounding. It was clear from the COS that clients were contractually bound and that there was no recourse to enforcement of the return of a non-refundable payment. Whilst the document had been signed prior to her instruction, it was this document that authorised the payment of monies from the Firm to JWK. In those circumstances, the Respondents were duty bound to read, understand, and advise their clients on the consequences of that document. They wholly failed to do so.

21.158 The Tribunal also found it concerning that the COS was referred to as a contract of sale when that was not the case. As the First Respondent agreed, it was a reservation agreement (albeit one that required a 100% non-refundable deposit). This should, at the very least, have been explained to clients by the Respondents.

21.159 The Tribunal found the First Respondent's explanation as regards the 100% deposit unsatisfactory. The First Respondent stated that it was easier to pay all of the money at once, as it saved clients' money for the transfer fees. The First Respondent did not, at any time, explain to the clients that the 100% deposit was non-refundable and, having paid those monies prior to any conveyance, those monies were at risk.

21.160 The COS also provided for the immediate payment of an 8% return once it was signed, ID information was provided and the monies paid. In evidence the First Respondent explained that she did not consider that this was a red flag. Further, she was unaware whether any clients received the 8% return immediately, although she was aware that some clients received the 8% return on completion.

21.161 The Tribunal considered that the 8% immediate return, prior to any transfer of title was a matter that ought, at the very minimum, to have caused the Respondents concern. The Tribunal considered that a reasonably competent solicitor would, having been instructed, ensured that the terms of the COS had been complied with, particularly when monies had been paid pursuant to the COS, and completion often took place some time after the COS had been signed and monies paid to Group First.

21.162 The First Respondent conceded in evidence that if she was advising on a one off transaction, she would advise her client not to enter into a contract that included a clause whereby the seller had the right to resell the parking space if the client failed to respond to any communication within 21 days. Mr Ramsden QC submitted that such a clause was dangerous and onerous. The Tribunal agreed with that submission, and considered that the Respondents ought to have advised their clients about their obligations under that clause. They failed to do so.

21.163 As regards the Purchase Contract, Clause 3 required the payment of the premium. That premium had already been paid pursuant to the COS. The Respondents made no enquiries relating to that clause in circumstances when they were aware that monies had already been paid in full. In her evidence the First Respondent explained that she did not advise on the content of the Purchase Agreement as exchange and completion generally happened simultaneously so there was no need to address a situation where

there was not simultaneous exchange and completion that there was "no need to bombard clients with information". The Tribunal found that answer to be incredible. At the very least the First Respondent ought to have advised of any risk, and explained that in her view the risk was minimal.

21.164 The First Respondent's advice in relation to the Headlease was inadequate. Whilst the report detailed the service charge and ground rent payable, and also advised clients to look at the particular clauses which defined clients' obligations, the report did not advise clients that if Group First exercised its option to stop paying rent after two years, the clients might still be liable for all charges save the service charge, or that it was not clear that they would be released from those obligations.

21.165 The First Respondent pointed to Clause 2.2 of the Headlease which stated that the client would have no liability to pay the Service Charge Proportion when the premises were unoccupied. The Service Charge Proportion was defined as:

> "…such proportion of the Maintenance Expenses that the Landlord or its agent reasonably attributes to the Leased Premises…"

21.166 The Maintenance Expenses were defined as:

> "… the Insurance Contribution and all costs and expenses incurred by the Landlord during a Financial Year in or incidental to providing all or any of the Services and the specific costs expenditure and other sums … but excluding any expenditure in respect of any part of the Development for which the Tenant or any other Tenant is wholly responsible …"

21.167 The Tribunal did not accept the First Respondent's evidence that in the event that the property was not occupied, the client would only be responsible for the Ground Rent. It was clear that Clause 2.2 did not release clients from their obligations under Clause 4, which meant that whilst receiving no rent and therefore not being obliged to pay the Service Charge Proportion, clients would still be liable for the maintenance and restoration of the property amongst other things. The Tribunal considered that it was not sufficient to tell clients to read clauses without explaining the effect of those clauses.

21.168 It was also inadequate to tell clients to pay particular attention to Clause 4.11 and to ensure that they were "fully aware of this clause in particular the issue regarding assignment of the space" without explaining what the issue in regarding assignment of the space was. The First Respondent did not make clear in the report that Group First could stop paying rent after two years, or that Group First could exercise that option whether or not the space was rented and that if they did, the client would still have a number of financial liabilities with no income.

21.169 In the Report on the Option Agreement, the Respondents did not advise clients that if they chose to exercise the buyback option, Group First could then take five years to buy the property back during which the client would be unable to sell to anyone else. The Tribunal found this was a fundamental issue upon which advice should have been provided. In evidence, the First Respondent suggested that she might have provided advice in that regard. The Tribunal did not accept her evidence in that regard, particularly as it had been the Respondents' case that the advice they gave was

contained in the reports and was consistent across all transactions and clients. The agreed expert evidence in the JH civil case was that the buyback clause was of no value. This evidence did not emanate from an expert valuation but from a consideration of the contract documents. The Tribunal considered that this was an aspect on which the Respondents ought to have advised their clients. Advice as to the efficacy of any clause did not equate to advice on the prudency of any investment, but to the contractual provisions upon which, even on their case, the Respondents were retained to advise. The advice provided, namely that the entity may not exist at the time the option could be exercised, was wholly inadequate.

21.170 In evidence the First Respondent explained that the Minute of Agreement that was expressly referred to as forming part of the obligations under the Sublease, was not a document on which she offered any advice. The First Respondent explained that if there were any issues, the Scottish Lawyers would have raised them as that was what the Firm had paid them to do. The Tribunal considered the First Respondent's evidence on this issue extraordinary. The First Respondent caused clients to sign a document on which she did not, and did not intend, to provide any advice, notwithstanding that the document formed part of the clients' obligations.

21.171 As regards how the First Respondent satisfied herself that she had discharged her duty to ensure that clients understood the documents, the First Respondent stated that in her experience, she knew what clients needed to know and what they did not need to know.

21.172 In her 2nd Witness Statement of 5 December 2017, the First Respondent stated:

> "I am aware that marketing material for any investment cannot be relied on and I was not particularly interested in the brochures since I would be providing my report to clients which pointed out the relevant terms and conditions for the contract documentation. I was solely interested in what the contract documentation actually contained and the clients were advised by me at the outset to take advice from their independent financial advisor, surveyors and valuers".

21.173 The Tribunal determined that advising clients to seek independent advice from other specialists did not negate the Respondents' responsibility to ensure their clients were properly advised. The Respondents sought to abrogate their responsibilities. It was for the Respondents to ensure that their clients were fully advised as to the effects of the clauses of the various contracts. The information provided by the Respondents in their various reports fell far below the advice that was necessary to ensure that their clients were in possession of all necessary information in relation to their transactions. The Tribunal did not consider that the Respondents were required to advise clients as to the prudence of the transactions, however it was their role to advise clients as to the nature of the transactions generally and as to the effectiveness of the documents to achieve their purported purposes. The Respondents failed so to do.

The Promotional Material

21.174 It was clear that the First Respondent had seen the promotional literature in relation to storage pods. The First Respondent sought to distance herself from knowledge of the promises made in that document on the basis that the document was read for the sole

purpose of providing VAT advice. The Tribunal did not accept the First Respondent's evidence in that regard, particularly given that the Firm's client care letter stated:

> "This Practice specialises in commercial conveyancing work and understand that you may have been recommended by Park First. If you have been recommended by an introducer, we have to investigate how these clients were acquired by the introducer. The reason for this is that we need to be satisfied that any introducer has not acquired the clients as a consequence of marketing or publicity or any other activity which, if done by a solicitor would be in breach of the Solicitor Practice Rules and in particular by "cold calling". If you have any queries regarding this please write to ourselves. We will be reviewing this matter every six months."

21.175 The promises made in the promotional material were plain and clear; the Tribunal did not accept that the First Respondent when reading that material could have missed those promises or failed to understand that the promises made did not match the contractual documents on which she had been retained to advise. The reality, it was determined, was as the First Respondent stated in her second Witness Statement – she was not particularly interested in what was in the brochures.

21.176 The Second Respondent was asked whether he accepted that any promises made to clients in the client care letter were promises that the Firm was obliged to keep, unless the client was specifically informed that the Firm would not do so. The Tribunal did not consider that the Second Respondent answered that question satisfactorily despite the question being asked three times. When asked why the Firm did not comply with the assertion in the client care letter that it would investigate "marketing or publicity", the Second Respondent explained that he did not see how it was relevant to fixed price conveyancing and that he considered that the Firm had kept within the Rules and that it related to cold calling.

21.177 The Tribunal considered that neither Respondent gave a satisfactory answer to questions about why they did not read the marketing material, or that having read it, the promises made therein were either not noticed or were not relevant to the retainer, particularly in circumstances where their retainer letter specifically referred to marketing material and a 6 monthly review. Clients, having read the client care letter, would have believed that the marketing material had been reviewed by the Respondents, and not being advised otherwise, would have considered the promises made in the marketing materials to be true.

The Warning Notices and Action Fraud Notices

21.178 The Tribunal did not accept that the Respondents had given any proper consideration to the SRA Warning Notices or the Action Fraud Warning Notices. It was the First Respondent's evidence that following the 2015 Action Fraud Warning, she "paused" working on the schemes, however the First Respondent was unable to say how long that "pause" lasted, whether that was for days, hours or weeks.

21.179 It was the Respondents' case that they relied on their own investigations and those undertaken by Rowanmoor to satisfy themselves that it was proper to continue with the transactions. However, the Respondents were unable to explain what investigations

they undertook following receipt of the 2015 Action Fraud Notice. Further, the First Respondent stated that she did not know what internal checks Rowanmoor had undertaken, and did not know if she had contacted Rowanmoor to ascertain what investigations they had carried out. The First Respondent thought that Rowanmoor would have written to her to say that they were happy to continue and would send further instructions. The Tribunal found the First Respondent's answers on this issue incredible. The Tribunal did not accept that the First Respondent would not be able to recall how long she ceased working on the transactions whilst undertaking investigations given the financial importance of the transactions.

21.180 The Second Respondent's evidence was that he had no recollection of seeing the email of 21 October 2015, in which Rowanmoor stated that it was halting investments in parking spaces following receipt of the Action Fraud Notice. Nor did he have a recollection of the investigation or action he took, although that did not mean he did not take any action. The Tribunal found the Second Respondent's evidence in this regard to be incredulous. The Tribunal did not accept that an experienced solicitor would not recall investigating whether the work which formed the largest part of its income was in fact a Ponzi scheme. The Tribunal found the Second Respondent's answers incapable of belief.

21.181 The First Respondent explained that she did not consider that the 2014 Action Fraud Notice applied to the transactions as it referred to an emerging trend, and she had been acting on the matters since 2011. Again, the Tribunal found this answer to be incapable of belief.

21.182 The Respondents highlighted that the SRA Warning Notices did not expressly refer to storage pods and parking spaces, however, when the Respondents had notices that expressly referred to the work they were undertaking, they ignored those notices and then sought to provide explanations as to why they considered that the notices were not relevant. It was not the case that the Respondents suggested that as the Action Fraud Notices were not issued to the profession, they were unaware of them. Rather that they were considered and determined to be irrelevant. Such a stance, the Tribunal determined, lessened the force of any argument as to the SRA not issuing an express warning until 2017.

21.183 The Respondents asserted that the SRA Warning Notices of 2013 and 2016 were considered and found to be irrelevant to the transactions the Firm was undertaking. The Tribunal found that there were elements in each notice that were directly applicable to the transactions, and that this would have been clear to the Respondents, even if the transactions were not a mirror of those described in the notices. The 2013 Warning Notice referred to a high rate of return within a short timescale. Investors were promised an 8% when the COS was signed. This return was to be paid prior to any transfer of legal title. Investors were also told that the product was being sold at a substantial discount with no proper explanation as to why.

21.184 It also referred to poorly drafted and confusing documentation. The documents did not match what the Respondents were told. The COS made plain that monies were paid on a non-refundable basis, however the First Respondent was told that if the transaction was not successful, clients would receive a full refund. The assertion made was not supported by the contract documentation. The Respondents did not suggest or insist on

amendments to the contract documentation so that it reflected what they had been told. The Respondents were unable to explain the purpose of all the documents used for the transactions, or the reason for inclusion of particular clauses. For example, the First Respondent was unable to explain the purpose of Clause 3 in the Purchase contract in circumstances where monies had already been paid under the COS.

21.185 The 2016 Notice warned that "Fraudsters have paid attention to warnings and moulded their schemes. They will now usually avoid offering ridiculous profits but will still mention returns that are very high compared to conventional investments, such as 20% per year. The return is only one of the red flag indicators." It also referred to monies being held in trust when that was not the case. For the schemes, it was suggested that monies were being held to order when that was not the contractual position.

Other Determinations

21.186 The Respondents relied on the determinations of LeO, the SRA's initial response to Person A's complaint and the decision of Judge Robinson.

21.187 The letter to the First Respondent from LeO stated that the complaint from Client AC was that the Firm had incorrectly advised him that he could sell the parking spaces two years into the lease. There was no evidence as to what documents were before LeO, and what matters they investigated. Given the lack of information, and the seemingly narrow investigation, the Tribunal placed no reliance on the LeO findings.

21.188 The allegation made by Person A was that the Firm was involved in investment fraud. The Tribunal was not considering whether the Firm and the Respondents were involved in investment fraud, rather it was considering (amongst other things) whether the advice provided to clients was adequate in all the circumstances. Additionally, and as with the LeO investigation, it was unclear what documents the SRA had in its possession when it was considering Person A's complaint. The letter to Person A made clear that there might be follow-up action in future. It was clear from the later investigation into the Respondents' conduct that the SRA had decided to conduct further in-depth investigations.

21.189 In evidence the Second Respondent stated that he had had a telephone conversation with Ms G, then at the SRA, who had assured him that the advice given to all clients was correct. The Tribunal accepted that he had spoken to Ms G, but did not accept that he had had the conversation as detailed. The first mention of this call was during his evidence; there was no mention of such an assurance being provided to the Second Respondent in the numerous documents submitted by the Respondents in their defence. This was surprising given that it was the Second Respondent's evidence that he continuously had "flashbacks".

21.190 Similarly, there was no evidence as to the documents before HHJ Robinson. The Tribunal was considering the Respondents' conduct through the prism of the Respondents' regulatory duties. As detailed, it had found that the Respondents had failed to advise clients on a number of material clauses and, in some cases, had provided no advice or explanation as to documents the clients were required to sign. The Tribunal considered that solicitors were required to advise clients as to risk. Such advice did not equate to investment advice. The Tribunal did not accept the assertion

that the Respondents should have advised clients not to enter into the transactions, however they should have fully explained client obligations and the meaning and effect of material clauses; they failed to do so.

21.191 The Tribunal noted that it was the evidence of the First Respondent that having understood her duties as defined in the 2017 Warning Notice, the decision was taken to no longer accept instructions under the Schemes.

Witnesses and Clients

21.192 The Tribunal found the evidence of Ms Jordan, Mr Owen and Ms Carneiro to be factual and straight forward.

21.193 Client KB did his best to assist the Tribunal. He was honest as to his failure to read the documents, the reasons for not reading the documents and that his failure to do so was not the fault of the Respondents. The Tribunal accepted that Client KB had contacted the Firm by telephone as described. To the extent that this was denied by the Respondents, the Tribunal rejected the denial. Client KB, who the Second Respondent had denied was a client of the Firm, was questioned as to why he had not further contacted the Firm to insist that he was a client. The Tribunal considered such a line of questioning to have been unnecessary and inappropriate and misdirected.

21.194 The Tribunal did not accept that Client AC had deliberately left the LeO complaint out of his statement as the complaint was not decided in his favour. It also accepted that he had been informed by the Firm that the investment was viable. It had been the First Respondent's evidence that notwithstanding the adverse findings about Group First, the investments were legitimate viable investments.

21.195 The Tribunal found the evidence of the Respondents to be evasive and specious. They were unable to answer difficult questions which were either responded to with a question to Mr Ramsden QC, or the response given did not relate to the question asked. The Tribunal noted that Mr Ramsden QC, on a number of occasions and in relation to both Respondents, had to ask the same question a number of times. The Respondents had provided numerous documents in support of their defence, some of which were voluminous in length and content. The Respondents, during their evidence, stated that there were missing documents and files that ought to be in possession of the SRA or its intervention agents. The Tribunal noted that a number of the documents referred to were not mentioned by the Respondents prior to their giving evidence, nor were they requested from the Applicant.

Breaches

21.196 The Tribunal found that the Respondents' failings were more than negligent and crossed the threshold into professional misconduct. It was the Respondents' case that they were only retained to conduct the commercial conveyance and advise on the contract documentation. As detailed, the Tribunal found that the Respondents had failed to advise (or cause the Firm to advise) on a number of material clauses in the contracts, and had failed to advise on some of the contractual documents in their entirety. The advice that was provided, whilst not incorrect, was not sufficient such as to discharge their duties to their clients. The Tribunal noted the failures to take proper

account of the Warning Notices from Action Fraud and the SRA. The Tribunal considered that the Respondents' failures in that regard formed part of the background against which their conduct was to be assessed.

21.197 The Tribunal found that the Respondents' failure to take proper heed of the SRA Warning Notices (save the 2017 Warning Notice) and the Action Fraud Warning Notices resulted from the Respondents not wishing to cease what was the main source of income for the Firm. The Tribunal did not accept the First Respondent's evidence that she did not consider that the 2014 Action Fraud Notice applied to the work she was carrying out on the basis that she had been undertaking the work since 2011, and the 2014 Notice referred to an "emerging trend". Such an explanation was extraordinary.

21.198 The Tribunal found that the Respondents, in failing to adequately advise their clients, had failed to act in their best interests in breach of Rule 1.04 and Principle 4. Acting in their clients' best interests would have included providing clients with full advice as to the meaning and effect of the contract documentation. It was not enough to provide a limited report on the documents, telling clients to read the clauses without explaining the clauses in full.

21.199 Members of the public expected solicitors to advise them on legal documents when they had been retained for that purpose. In failing to do so, the Respondents had failed to maintain the trust placed in them and in the provision of legal services in breach of Rule 1.06 and Principle 6.

21.200 The Tribunal found that the Respondents had deliberately failed to provide clients with full advice so as to preserve the income generated from the schemes. If clients had properly understood the risk of the investments and their obligations, there was less likelihood that they would have proceeded with the transactions. The Tribunal determined that in deliberately failing to provide full and proper advice so as to maintain their income stream, the Respondents had acted where there was an own client conflict in breach of Rule 3.01 of the 2007 Code and Outcome O(3.4) of the 2011 Code. Client M had required a number of enquiries to be made as regards the transaction. The First Respondent, having asked some question and not having received answers that were satisfactory to Client M, unilaterally terminated the retainer. The Tribunal considered that no conflict had arisen due to the nature of the queries, and thus there was no reason arising from the queries for the First Respondent to terminate the retainer. In evidence, the First Respondent explained that it had been a mutual decision, however, in her second Witness Statement, the Respondent stated that she considered that the "professional relationship with [Client M] had broken down". When asked about the difference between her oral and documentary evidence, the First Respondent explained that she was not in a "great way" when she wrote the statement, that Client M was frustrated and whether that frustration equated to a breakdown in the relationship was "a moot point". The Tribunal did not agree. Either they came to a mutual agreement to end the retainer, or the First Respondent considered that the relationship had broken down. The Tribunal considered that in unilaterally terminating the retainer, the First Respondent was not of the opinion that the professional relationship had broken down despite her assertion to the contrary. As there was no client conflict arising from the queries, the Tribunal determined that the First Respondent terminated the relationship so as to preserve the relationship with Group First, the Firm's then major source of income. The Tribunal found that in preferring the interests of the

income of the Firm over their clients, the Respondents had failed to act with independence in breach of Principle 3 and Rule 1.03. That such conduct failed to maintain the trust of the public in the Respondents and the provision of legal services in breach of Rule 1.06 and Principle 6 was plain.

21.201 The Respondents conduct also breached Rules 1.02 and Principle 2. Solicitors acting with integrity would not prefer their own interests over their clients. Nor would solicitors acting with integrity fail to provide proper and adequate advice to clients regarding their transactions. Having read warnings that related to the work they were undertaking, solicitors acting with integrity would have carried out some investigation into the work they were conducting to satisfy themselves that the warnings did not apply to the work they were undertaking. The Tribunal, as detailed above, found that the Respondents had failed to do so in order to preserve their income stream. Accordingly, the Tribunal found that the Respondents' conduct was in breach of Rule 1.02 and Principle 2 as alleged.

21.202 The Tribunal found allegations 1.1, 1.2, 3.1 and 3.2 proved on the balance of probabilities.

22. **Dishonesty**

<u>The Applicant's Case</u>

22.1 It was alleged that the Respondents acted dishonestly by the ordinary standards of reasonable and honest people, in respect of all or any of the matters particularised above, in that they:

- Failed, in the case of the First Respondent, properly or adequately to advise clients on the contractual documentation, and in the case of the Second Respondent, failed to cause such advice to be given;

- Failed because they preferred their own interests in receiving future referrals from Group First entities over the interests of their clients;
- Allowed over £100 million to pass through client account in relation to the Schemes;

- Released, or allowed the release of, client monies representing the full purchase price:

    - before any exchange or completion;

    - without ensuring any protection of the purchaser's money;

- Failed to have regard to direct and specific warnings about these schemes from Action Fraud;

- Did not inform their clients of the Action Fraud warnings;

- Failed to have regard to SRA warnings;

- In the case of the First Respondent, acted in the knowledge of the features detailed regarding the dubious nature of the transactions, the nature and structure of the contractual documentation and transactions, and the inadequacy of the advice given.

22.2 Notwithstanding the facts and knowledge set out above, the Respondents acted as they did in the Schemes.

22.3 Ordinary decent people would consider it dishonest for the First Respondent to act or continue to act given her knowledge of the facts and matters set out above. She did so because to provide proper advice would have meant that any rational client would not have bought the product and the lucrative flow of referrals to the Firm would have stopped.

22.4 Ordinary decent people would further consider it dishonest for the Second Respondent to allow the Schemes to proceed as they did given his knowledge of the nature, volume and value of the transactions being handled by the First Respondent and involving the use of the Firm's Client Account.

The Respondents' Case

22.5 The Respondents denied that their conduct was dishonest. Mr Goodwin submitted that the Applicant had failed to provide any cogent evidence as to the aggravating features. Its case was based on inference and speculation without any evidence. That this was the case was clear from the Rule 12 Statement in which the Applicant particularised its case:

> "The SRA's case is that the only plausible explanation for the failure to provide adequate advice, across a large group of clients and for a protracted period, was that the Respondents were placing the continued receipt of referrals from the Group First entities (and so the retention of the Group First entities' goodwill), and the resultant substantial fee income, above the interests of their clients in receiving full and proper advice about the degree of risk to which the purchases gave rise."

22.6 Such an assertion, it was submitted, amounted to no more than speculation and inference in the face of the Respondents' repeated and consistent explanations. There was no evidence to challenge the Respondents' genuinely held beliefs that the advice they gave to clients was adequate and appropriate.

22.7 Similarly, as regards the allegation that the Respondents dishonestly preferred their own interests to that of their clients, the Applicant's case was that:

> "The inescapable inference of the conduct … is that the Respondents preferred their own interests over those of their clients' by failing to properly advise their clients, or cause them to be advised, as to the risks arising from the Schemes, and that their purpose in doing so was to maintain the flow of new instructions received via Group First."

22.8 Mr Goodwin submitted that such an assertion was again speculation and based solely on inference. Further, the Applicant had, since the commencement of the investigation, sought to place the worst possible complexion on the Respondents' conduct and had not taken into account any explanation from either Respondent.

22.9 The correct application of the Ivey test required a two-stage approach. Firstly, the Tribunal should establish the Respondents' state of knowledge and belief as to the facts at the time. It was clear that the belief need not be reasonable but should be genuinely held. Secondly, the Tribunal should apply the objective standards of ordinary and decent people.

22.10 The Applicant had called no evidence to challenge the explanations given by the Respondents as to their genuine belief at the time. There was no evidence to support the assertion that the Respondents' conduct was dishonest. The Applicant's position was that both Respondents, over a period of six years, knowingly involved themselves in transactions of a dubious nature. Such an assertion, it was submitted, was fanciful, misconceived and not supported by any evidence. Prior to 2011, the Firm was financially successful, working with a number of large, reputable organisations. Given the success of the Firm, the Respondents were not motivated by financial gain to knowingly commit misconduct.

22.11 Ordinary and decent people would not consider the Respondents' conduct to be dishonest. Ordinary and decent people would understand that the Respondents were only retained to undertake the commercial conveyancing and to ensure that title passed to their clients. All clients received proper title as a result of their transactions.

22.12 A proper application of the test in Ivey demonstrated that there was no basis for a finding of dishonesty. Moreover, it was inherently improbable that the Respondents' conduct was dishonest as alleged.

The Tribunal's Findings

22.13 The Tribunal considered that the Reports prepared by the Respondents were deliberately limited so as to avoid transactions from not progressing and to preserve the Firm's major income stream. It was the Respondents' case that they were retained to undertake the commercial conveyancing only. This included advising on the contractual documents. For the reasons detailed above, the Tribunal found that the advice given was wholly insufficient. The Tribunal considered that the insufficiency of the advice was deliberate. Not only did the Respondents fail to advise on all of the material contract clauses, they also failed to undertake the investigations that they expressly stated they would in their client care letter. Further, they ignored the very clear warnings contained in the Action Fraud Notices which were directly relevant to the transactions. Those failings, the Tribunal determined, were deliberate failings on the part of the Respondents.

22.14 The Tribunal did not accept that at the time the Respondents considered that they were not required to do more. They were both experienced solicitors who knew that in order to advise their clients adequately, they were required to read all of the contract documentation and to advise clients fully as to the meaning and effect of clauses. That the First Respondent was 'not interested' in the content of the COS, Minute Agreement

and promotional material was indicative of her indifference to the Firm's clients, and her preference of the Firm's fees.

22.15 The Tribunal considered that ordinary and decent people would find it dishonest for solicitors to deliberately provide limited advice so as to ensure that the transactions upon which they were instructed would proceed. Further, it would be considered dishonest for solicitors to prefer their own interests over the interests of their clients. Accordingly, the Tribunal found the Respondents' conduct was dishonest as alleged.

22.16 Given the Tribunal's Findings as to dishonesty, the Tribunal did not consider recklessness or manifest incompetence which had been alleged in the alternative. Further, the Tribunal determined that it was not necessary to recite the parties' submissions as regards recklessness or manifest incompetence in its Judgment.

23. **Allegation 5 - by reason of the facts and matters set out at allegation 3 above or any of them arising after 10 December 2012, the Second Respondent failed to ensure, or failed to take adequate steps to ensure, compliance with the Firm's obligations and in doing so breached his obligations as the COLP of the Firm under Rule 8.5(c) of the SRA Authorisation Rules 2011 and as the COFA of the Firm under Rule 8.5(e) of the SRA Authorisation Rules 2011.**

The Applicant's Case

23.1 Mr Ramsden QC submitted that by reason of the facts and matters set out in allegations 3.1 and 3.2, the Second Respondent failed to take all reasonable steps to ensure the Firm and its managers and employees complied with the Principles, the 2011 Code and the SAR 2011. Further, the Second Respondent failed to report the breaches to the SRA promptly or at all. In failing so to do, the Second Respondent breached his obligations under Rule 8.5 of the SRA Authorisation Rules 2011.

The Second Respondent's Case

23.2 The Second Respondent denied that he had failed to comply with his compliance duties as alleged. The submissions and evidence as regards the transactions detailed above were repeated. In addition, the Second Respondent explained that he had been severely prejudiced by being suspended as working as a solicitor for nearly four years and could not recall the responsibilities and duties of his compliance roles.

23.3 In their Answer, the Respondents referred to the receipt of £60,000 that did not relate to an underlying legal transaction. That money was properly and appropriately dealt with in accordance with the Rules.

The Tribunal's Findings

23.4 The Tribunal did not accept that the Second Respondent was unaware of his compliance role duties as he had not been in practice. He could have reminded himself of those duties by looking at the information on the Applicant's website, or by looking at the SRA Authorisation Rules 2011, cited in the allegation. Pointedly and tellingly, the Second Respondent did not know that the acronym KYC stood for Know Your Client.

23.5 The Second Respondent, when asked in cross examination why the Firm did not comply with the promises made in its client care letter as regards reviewing the promotional and marketing material stated: "I don't understand why we didn't". The Tribunal considered that on being further pressed by Mr Ramsden QC, the Second Respondent sought to evade and avoid answering the question by referring to cold calling, and inferring that the paragraph related only to cold calling and he did not understand it to relate to anything else. The Tribunal rejected the Second Respondent's explanations. The letter was clear as to the action the Firm would undertake. The Tribunal agreed with Mr Ramsden QC's observation that in saying that the client care letter related only to cold calling, the Second Respondent's evidence was "wholly incredible and thoroughly disingenuous".

23.6 As regards the FCA investigation, the Second Respondent explained that he could not recall what he did or what happened. Nor was he able to recall what action he took following receipt of the email from Rowanmoor expressing concern that the transactions were part of a Ponzi scheme. The Second Respondent was similarly unable to assist the Tribunal as to what action he took following receipt of any of the warning notices. The Tribunal found it incredible that the Second Respondent could not recall any action he took as the Firm's Compliance Officer after receipt of notices that directly affected and expressly mention the work the Firm undertook. It was even more astonishing that he had no recollection of action taken when an email suggested that a major source of the Firm's income derived from a possible Ponzi scheme.

23.7 The Second Respondent asserted that, notwithstanding that the monies paid under the COS were non-refundable, those monies did not belong to Group First. The Tribunal considered that as the COFA, the Second Respondent should understand the status of monies passing through the Firm's client account. It was clear that the Second Respondent did not understand the status of those monies as he had either not read, or properly understood the contract documentation.

23.8 That the Second Respondent had completely failed in his obligations as the Firm's Compliance Officer was plain. Accordingly, the Tribunal found allegation 5 proved.

Previous Disciplinary Matters

24. There were no previous matters before the Tribunal for either Respondent.

Mitigation

25. Mr Goodwin submitted that in light of the Tribunal's findings, there were no submissions as regards sanction.

Sanction

26. The Tribunal had regard to the Guidance Note on Sanctions (8th Edition). 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.

27. The Respondents deliberately failed to take any action despite express warnings relating to the legitimacy of the transactions. They failed to advise (or cause advice to be given) relating to the material clauses in the contracts that detailed their clients' obligations. Further, they failed to advise on key contractual documents, or the meaning and effect of clauses contained within those documents. Such failings were motivated by the Respondents' desire to preserve their source of income. Such conduct was in breach of the trust placed in the Respondents by their clients to be fully and properly advised. The Respondents had direct control for their misconduct. The First Respondent fully understood her duties as the solicitor with conduct of the matters. The Second Respondent understood his duties as the Compliance Officer for the Firm. The Respondents were experienced solicitors knew how important it was to advise on all aspects of contractual documents. Even of their own case, namely that they were retained in relation to advise on the commercial conveyance only, they had failed to provide adequate advice.

28. The Respondents' failings had caused significant financial harm to a number of their clients who lost substantial amounts of money as a result of the transactions. They had also caused harm to the reputation of the profession.

29. The Respondents' conduct was aggravated by their proven dishonesty, which 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:

> "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"."

30. Their conduct was deliberate, calculated and repeated over a number of years and over 6,000 transactions. The Respondents had been evasive in their evidence and had deliberately failed to answer straightforward questions put to them in cross-examination. Their conduct was a complete departure from the standards of integrity, probity and trustworthiness expected of solicitors. Their clients ought to have been given full and proper advice. That did not occur. The Tribunal found many of the Respondents' answers to questions to be incapable of belief, and demonstrative of their disregard for their clients' interests.

31. In mitigation, the Respondents had had previously unblemished careers.

32. Given the serious nature of the allegations, the Tribunal considered and rejected the lesser sanctions within its sentencing powers such as no order, a reprimand or restrictions. The Tribunal had regard to the case of Bolton v Law Society [1994] 2 All ER 486 in which Sir Thomas Bingham stated:

> "….Lapses from the required standard (of complete integrity, probity and trustworthiness)….may….be of varying degrees. The most serious involves proven dishonesty….In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced by the solicitor, ordered that he be struck off the roll of solicitors."

33. The Tribunal did not find any circumstances (and indeed none were submitted) that were enough to bring the Respondents in line with the residual exceptional circumstances category referred to in the case of Sharma. The Tribunal decided that in view of the serious nature of the misconduct, in that it involved dishonesty, the only appropriate and proportionate sanction was to strike the Respondents off the Roll of Solicitors.

Costs

34. Mr Ramsden QC applied for costs in the sum of £113,797.24 which comprised of £48,500 + VAT legal costs and £55,597.24 internal costs including the preparation of the Forensic Investigation Report. Mr Ramsden QC submitted that the legal costs claimed were reasonable, and that they included his costs for appearing at the hearing. He further confirmed that the costs claimed were reflective of the costs of the proceedings only, and that no part of the costs of the intervention were included in the costs claimed.

35. Mr Goodwin submitted that there was no objection or concern regarding the legal costs claimed. As to the investigation costs, there was insufficient information to assess whether those costs were reasonable. However, the costs claimed for the investigation seemed excessive.

36. The Tribunal agreed that the legal costs claimed were reasonable and proportionate. The Tribunal determined that the costs of investigation were higher than expected. There were items claimed that the Tribunal considered should have taken less time than that claimed. The Tribunal considered that it was appropriate in the circumstances to reduce the investigation costs. Accordingly, the Tribunal ordered that the Respondents pay costs in the sum of £98,000, which was the reasonable and proportionate amount in all the circumstances.

Statement of Full Order

37. The Tribunal Ordered that the Respondent, MARGARET BRIDGET HETHERINGON, 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 £98,000.00, such costs to be paid on a joint and several basis with the Second Respondent.

38. The Tribunal Ordered that the Respondent, PATRICK CLEMENT HETHERINGTON, 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 £98,000.00, such costs to be paid on a joint and several basis with the First Respondent

Dated this 27th day of September 2021
On behalf of the Tribunal

B Forde
Chair