

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 10619-2010

BETWEEN:

SOLICITORS REGULATION AUTHORITY

Applicant

and

BRIAN LAURENCE MILLER

First Respondent

and

DAVID JOEL GORE

Second Respondent

Before:

Mr. J. N. Barnecutt (in the chair)

Mr. R. Nicholas

Mrs L. McMahon-Hathway

Date of Hearing: 31st May 2011, 1st, 2nd, 3rd, 6th, 7th and 8th June 2011
and 1st August 2011

Appearances

Timothy Dutton QC and Harriet Jones-Fenleigh instructed by Peter Steel solicitor of Capsticks Solicitors LLP of 1 St George`s Road, Wimbledon, London, SW19 4DR for the Applicant.

Michael Pooles QC and Jamie Carpenter instructed by Graham Reed, barrister, of Reynolds Porter Chamberlain, appeared for the Respondents.

JUDGMENT

Allegations

1. The allegations were that the Respondents:
 - 1.1 In breach of Rule 1.03 of the Solicitors' Code of Conduct 2007 ("the Code") allowed their independence to be compromised.
 - 1.2 In breach of Rule 1.04 of the Code did not act in the best interests of their clients.
 - 1.3 In breach of Rule 1.06 acted in a way that was likely to diminish the trust the public place in them or in the legal profession.
 - 1.4 In breach of Rule 2.04(1) of the Code entered into arrangements to receive contingency fees for work done in prosecuting or defending contentious proceedings before the Courts of England and Wales except as permitted by statute or the common law.
 - 1.5 In breach of Rule 3.01 of the Code acted where there was a conflict of interest in circumstances not permitted under the Rules, in particular because there was a conflict or significant risk that the Respondents and/or their Firm's interests were in conflict with those of their clients.
 - 1.6 In breach of Rule 10.01 of the Code used their position as solicitors to take or attempt to take unfair advantage of other persons, being recipients of letters of claim either for their own benefit or for the benefit of their clients.

Documents

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

Applicant:

- Rule 5 Statement as amended by Order of the Tribunal dated 14 April 2011 with exhibits (originally dated 9 September 2010);
- Applicant's written opening submissions with attachments;
- Skeleton argument for directions hearing on 14 April 2011.
- Applicant's procedural chronology for the directions hearing on 14 April 2011.
- Schedule of Letters of Engagement between Davenport Lyons and Underlying clients

Respondent

- Response dated 26 January 2011 to the Rule 5 Statement dated 9 September 2010;
- Respondents' opening skeleton argument with attachments;

- Respondents' closing skeleton argument;
- Witness statement of the Respondents, with exhibits dated 6 April 2011 by First Respondent and 7 April by Second Respondent.
- Respondents' application to adjourn substantive hearing.
- Bundle of Additional Authorities.

Agreed Documents

- Bundle for hearing (Files A1, B1-B4, C1, D1-D2, E1, F1-F2, G1-G2, H1-H5)
- Note on expert to expert meeting under CPR 35.12 between Andrew J Clarke and Peter Sommer dated 2 June 2011.
- Joint bundle of authorities

Preliminary Matter

3. An application for disclosure had been heard by a differently constituted Tribunal on 14 April 2011. Various directions and orders had been made. The Tribunal had reached its decisions regarding disclosure on the basis that the documents sought by the Applicant were arguably relevant based on the allegations in the Rule 5 Statement and based on the assertions made by the Respondents in their response. After inspection had been afforded to the Applicant's representatives, the Applicant had compiled and served the files H1 to H5, five lever arch files. Mr Pooles' application for adjournment related to the filing of those documents. It was his submission that they were compiled in more or less chronological order, not referring to specific issues or points, and with no commentary as to the points on which reliance might be placed. Mr Pooles relied on the contents of his application to adjourn, which had been handed in to the Tribunal that morning. He emphasised the reluctance with which his clients had arrived at their decision to make this application because if it were successful the matter would continue to hang over them. They were motivated by a desire to place before the Tribunal an appropriate picture so that it could see the totality of the matter, which was highly complex. He reminded the Tribunal that this was an unusual matter in that the clients had made no complaint themselves at any stage, and that the Respondents had been concerned about issues of legal and professional privilege. Those issues had been resolved after the April hearing by a comprehensive Rule 44B requirement in respect of which he had advised his clients, the Respondents, that their advisers could be permitted to view their underlying clients' material. In his submission it could not have been contemplated that the quantity of documentation which would emerge from the order for disclosure within seven working days of the hearing commencing would effectively add another 1,200 pages to the documentation for the purposes of reliance at this hearing. Mr Pooles repeated complaints made at the April hearing about what he submitted were the very broad spectrum allegations in the Rule 5 Statement. He informed the Tribunal that his clients were still reviewing the documents which had been enclosed in the H bundles. He submitted that it might be necessary for other representatives of the Firm to give evidence as there were allegations about things being done by the Firm as well as the

Respondents. Mr Pooles was also concerned that his clients would be expected to deal with points for the first time in cross-examination as and when Mr Dutton might put documents to the witnesses from those bundles. He referred to the length of time, four hours in the case of Mr Miller and three hours in the case of Mr Gore, which the Applicant's representatives anticipated would be necessary for cross-examining them. Mr Pooles expressed concern that there were in his view factual errors in the Applicant's written Opening Submissions, including an allegation that Mr Miller was related by marriage to Mr C of ACS:Law, the firm to which the cases had been passed on. Mr Pooles also submitted that the original allegations from the Rule 5 Statement had been "ramped up" by the addition of new factual allegations. He made reference to a case of the client Tw against E, which was not mentioned in the Rule 5 Statement but was in the Submissions. He felt that a parallel was impliedly being drawn between the conduct of the Respondents and/or Davenport Lyons and the conduct of Mr C in the MediaCAT litigation. Mr Pooles gave other examples of matters which concerned him in the Applicant's Submissions. These included the interpretation that a conversation by telephone with Counsel Mr F constituted advice; the introduction of matters relating to a claim against a Mr AS which was not pursued; the interpretation placed on issues about mistakes in data; the implications drawn from discussions which the Respondents had had with Chief Master Winegarten before the Norwich Pharmacal Orders had been sought; and the implications drawn from the Applicant's difficulties in finding certain documents during the inspection. Mr Pooles also submitted that while the documents in the H files had been obtained from Davenport Lyons this did not mean that they were within his clients' knowledge or possession; that was a misunderstanding of the basis on which proceedings in the Tribunal could conceivably advance properly.

Submissions by the Applicant's Representative in Respect of the Application to Adjourn

4. Mr Dutton reminded the Tribunal of the history of the resisted disclosure application that had led up to the hearing on 14 April 2011, including the service by the Respondents of their joint witness statement shortly beforehand on 7 April. Mr Dutton submitted that it made numerous assertions of fact without supplying the documents which might or might not support them. He went on to give examples. Mr Dutton submitted that the documents in files H1 to H5 were all either produced or received by the Respondents, who were supervising during the file share claims. They were their documents and the vast majority were where they were emailing each other. The reason for including those documents was to enable Mr Dutton when the Respondents gave evidence to challenge some of their assertions made in their witness statement. The documents did not raise any allegations which went outside the allegations in the Rule 5 Statement, rather they demonstrated what might be an accurate factual picture in relation to some of the assertions being put by the Respondents in their joint witness statement. Mr Dutton submitted that it was a little strange that the Applicant should be put in the position of defending the use of documents obtained by disclosure which the Tribunal had ordered should take place, it having been resisted, against a background where the conduct of the cases was the Respondents' and where they themselves appeared to be relying on some of the material. Sections D to N of his skeleton submission addressed the contentions raised by the Respondents in their own evidence and the length and detail of the skeleton argument was a result of the Applicant's representatives having been provided with a very lengthy witness statement by the Respondent, which they were entitled to test

against the contemporaneous documents. Mr Dutton submitted that he did not accept that the Rule 5 Statement created any difficulties for the Respondents as to the case they had to meet.

5. Mr Dutton went on to give examples to the Tribunal of matters upon which he submitted it would be legitimate for him to cross-examine the Respondents, having regard to the papers in files H1 to H5. These included issues around their reliance in the letters of claim on the evidence submitted to the Court in obtaining the Norwich Pharmacal Orders; and their contention in their witness statement that they had a bona fide belief that they had a prima facie case of infringement in every single case against each individual letter recipient. Mr Dutton advised the Tribunal that referring to these documents would not extend the period of time for cross-examination of either Respondent. These issues had been referred to in the skeleton argument for the disclosure hearing in April. Mr Dutton went on to give examples of other issues which he submitted he was entitled to cross-examine the Respondents on, including the inclusion or otherwise of reference to Norwich Pharmacal Orders in conditional or contingent fee agreements; the removal of the word “substantial” from the Firm’s website in relation to the legal position concerning a substantial infringement of copyright where a claim for breach was being sustained. He mentioned that the Respondents’ state of knowledge of the law as to the requirements for breach of copyright was referred to in the Rule 5 Statement.
6. In respect of the case of Tw and E, that case was referred to in the Forensic Investigation Report but Mr Dutton was content not to go into the case if the Tribunal felt that would be the fair thing to do, even though he submitted that the Respondents themselves had relied on it. He would however wish to be at liberty to cross-examine on it. In order to be able to proceed today, Mr Dutton was also prepared to take the same view of the case of AS save for the right to cross-examine. He felt more strongly about being able to go into the advice received from Counsel Mr F. He submitted that both parties were referring to the same note of the conversation. Mr Dutton submitted that the Rule 5 Statement set out references to the Respondents and the Firm, and he cast doubt on the suggestion that witnesses from the Firm might now be needed when they had not been considered necessary before. Mr Dutton pointed out to the Tribunal instances in the joint witness statement where the Respondents had themselves made references to other members of the Firm and the activities of its governing board in respect of these claims. Having regard to information being passed on to the Respondents’ clients, again this was mentioned in the Rule 5 Statement. In respect of the Applicant’s inability to find certain documents upon inspection, including signed retainers between the Firm and the Clients, this was not a matter upon which anything was going to turn.
7. Mr Dutton mentioned that he had witnesses present who had travelled from long distances, including Scotland. While he did not accept that the Respondents were being taken by surprise or were unable to address any of the points in his opening skeleton argument, if there were matters which the Tribunal felt should not be gone into he would be prepared to commence and work on the basis of such documents as either party wished to refer to in files H1 to H5 where the Tribunal felt it would not cause any prejudice. The reason that the Applicant’s representatives had submitted a long written outline was so that everyone would know what matters they relied on to support factual findings. It was more important to the Applicant that the matter

should go ahead than to have the documents, which they would otherwise wish to rely on.

8. Mr Pooles in reply emphasised the need for fairness and that the matters he had referred to were examples only and there were numerous others he could have given the Tribunal. He submitted that the Respondents had been deprived of a significant period of pre-trial preparation. There were also some advantages in an adjournment in that this would give the experts time to get together and possibly their areas of disagreement would significantly disappear. He also made points about what he submitted was the lateness of the submission of the files flowing from the disclosure exercise.
9. The Tribunal carefully considered the submissions which it had heard, first regarding the application to adjourn the hearing and secondly to rule that the Applicant should not be entitled to rely on any of the material in the files H1 to H5 and to not be permitted to advance any allegation not already fully particularised in the Rule 5 Statement. The Chairman reminded the parties that the Tribunal had previously indicated its view that the Applicant was tied to the existing Rule 5 Statement as amended. The Respondents had strongly resisted disclosure in this matter and the Applicant now sought to rely on some of the documents disclosed (by order of the Tribunal). The Tribunal thought it right that the Applicant should be able to do so. The Chairman noted that the Tribunal was sitting in a case where the documents largely emanated from the Respondents and from their files. He reminded the parties that the Tribunal sat as an expert Tribunal and if it considered at any stage that the Respondents were prejudiced by any particular document being adduced it could if appropriate discount that evidence. In the circumstances the Tribunal declined both applications.

Factual Background

Allegations 1.1-1.3, 1.5 and 1.6

10. The allegations, and the facts giving rise to them, concerned the Respondents' conduct as partners in the firm Davenport Lyons, when they were retained on behalf of various clients between 2006 and 2009 and made approximately 6,000 claims against individuals whom they alleged to have been involved in unlawful file sharing in breach of the Copyright, Designs and Patents Act 1988.
11. The First Respondent, Brian Laurence Miller, was admitted to the Roll in 1992 and was a partner in the firm of Davenport Lyons ("the Firm") from 2002 until 14 July 2009. The Second Respondent, David Joel Gore, was admitted to the Roll in 1978 and was and remained a partner in the firm. The firm had approximately 47 partners and practised from London W1. The First Respondent was at all material times a partner specialising in intellectual property matters. The Second Respondent was at all material times a partner specialising in litigation. He was also a member of the Firm's Governing Board.
12. In 2005 the First Respondent presented a paper to the Entertainment and Leisure Software Publishers Association ("ELSPA") on the subject of "Tackling Online Piracy". That paper concentrated, in particular, on improper file sharing of computer

games. The paper analysed a process pursuant to which evidence could be gathered against individuals who were sharing files. This involved the obtaining of a Norwich Pharmacal Order from the Court requiring an Internet Service Provider (“ISP”) to divulge the name and address of a person whose Internet Protocol (“IP”) address appeared to have been used for downloading a computer game in breach of copyright, and/or uploading such a game onto a file sharing website, also known as a Peer to Peer (“P2P”) website.

13. The 2005 paper advocated sending a letter before action seeking damages from an infringer with a possibility of a threat of an injunction. Section 6 of the paper detailed the “economies of scale” which would be achieved by bringing many actions of the same type. It also said it would be sensible only to pursue persistent infringers e.g. those uploading and/or downloading five or more computer games.
14. The paper addressed the risk to potential clients caused to their reputation by them taking what some might consider to be aggressive action.
15. The paper concluded in section 6:

“As can be seen from the statistics provided by the BPI [British Phonographic Institute], most cases settle early on, avoiding the need to issue proceedings against the infringer in question. In those cases where it becomes necessary to issue proceedings, we believe we have a cost-effective method of recovering over time most, if not all of the costs disbursed by ELSPA and its members, however far down the line they go. From the previous experience of Davenport Lyons and its experts, we do not believe a full trial will ever be necessary.”
16. Between about 2005 and 2006 the First Respondent became aware of a Swiss company known as “Ls” which had developed a software package which Ls claimed could be used to identify the IP address used in an infringing software upload.
17. In the summer of 2006 the First Respondent attended the Leipzig Game Show and at or after that Show sought to attract clients to the Firm who believed that their copyright had been infringed by uploading of their computer games, pornographic films, music and other such materials onto file sharing websites.
18. In the period between 2006 and 2009 the Respondent and the firm acted for the following six clients: Tw, Cm, RP, T, A and Dp.
19. Between late 2006 and 5 May 2009 (when the Firm stopped sending letters) the Firm sent a total of 6,113 letters to individuals who were alleged to be infringers in which the Firm alleged breach of copyright on behalf of the six clients. The First Respondent was at all material times the relationship partner for each of the six clients. The Second Respondent was responsible as litigation partner for matters concerning each of the six clients.
20. A table provided to Mr Roberts, the Applicant’s Investigation Officer, by the First Respondent on 11 March 2009 stated that the Firm intended to send a total of 13,745 letters to alleged infringers on behalf of the six clients. That table provides a

breakdown of the number of letters sent on behalf of each of the clients. More than 7,000 were for client Dp. The number of letters of claim sent out during the retainer on behalf of each of the clients was as follows:-

Tw	705 sent between 1 March 2007 and 31 May 2008
Cm	426 sent between February 2007 and 8 January 2008
RP	575 sent between 17 January 2008 and 31 May 2008
T	568 sent between 7 February 2008 and 31 May 2008
A	1,733 sent between 7 July 2008 and 1 November 2008
Dp	2,255 sent between 13 November 2008 and 9 February 2009

21. The letters of claim led to complaints being made to the consumer magazine "Which?" as well as to the involvement of the BBC which made a programme, Watchdog, on Monday, 8 December 2008. In addition, there were numerous expressions of disquiet by members of the public who had been sent letters and accompanying packs of documents, in writing to the Respondents and the Firm and in the written and electronic media.
22. When an individual wished to access or obtain a computer game, film or other such material, they could acquire the item by purchasing it from a retail outlet, or by legally downloading it on the internet, or by accessing the item illegally through a P2P website.
23. At all material times there were two P2P main websites: EMule (or EDonkey) and BitTorrent.
24. Whenever an individual gained access to the internet from a computer he or she would do so via an Internet Protocol ("IP") address which was usually a 12 digit number. Many IP addresses were "dynamic" and would change from time to time.
25. Further, if an individual, or household, houses or blocks of flats had computers with wireless access to the internet, it might be possible for persons who were not the holders of a particular IP address nevertheless to gain access to the internet at a given time through the IP address of a particular individual. There were also security issues about the use of cable connected internet access. The agreed views of the parties' IT experts are set out in the witness section of this judgment.
26. The Respondents and the Firm used two companies Ls and Dr, based respectively in Switzerland and Germany to provide material resulting from those companies monitoring internet addresses. The companies accessed P2P sites and, acting as fictitious users (or peers) pretended that they wished to access copyrighted material. The companies used their software to make connections with individuals who indicated that they had data (or part of it) available to be downloaded onto the companies' computers. The companies would then register the download and compare it with the original material in order to see whether it was copyrighted.
27. Ls provided the data of alleged infringers in relation to five of the clients and Dr provided the data relating to Dp.

28. Between 2006 and 2008 the First Respondent approached the clients to ask them if they were interested in taking advantage of the development of Ls's software to pursue alleged copyright infringers. If interested, the clients would agree to share in varying percentages with Ls and the Firm sums recovered from the alleged infringers. The clients entered into fee arrangements with the Firm.
29. The Firm having been retained by the clients, Ls would then be instructed to carry out a monitoring exercise and to provide to the Firm a list of IP addresses which were then used to obtain a Norwich Pharmacal court order. The order required Internet Service Providers ("ISPs") to disclose to the Firm the name and address of the customer who had been allocated the particular IP address at the time of the alleged infringement. Most ISPs did not object to the Norwich Pharmacal order being made provided their costs were paid. The ISPs sought recovery of their legal costs and these were generally agreed by the Firm on behalf of their clients. Once the Norwich Pharmacal order had been made the ISPs would in due course provide the Firm with the list of IP addresses and the names to which they were allocated. In all 18 Norwich Pharmacal orders were obtained.
30. The Firm would then prepare and send letters of claim to the alleged infringers, usually accompanied by a package of documentation. An example of the documentation and materials provided, were, in the case of the witness Mrs M:
 - A letter of claim, demanding that Mrs M pay compensation of £500 plus the ISP's costs of £25;
 - A statement report detailing, amongst other things, the name of the ISP and the IP address;
 - A copy of a letter to the ISP requesting disclosure of the details of the subscriber to whom a specific IP address related;
 - A copy of the relevant section of a spreadsheet sent to the ISP in relation to the alleged infringer's address;
 - A document requiring the alleged infringer to give an undertaking not to upload, download or otherwise make available the client's game, to delete any copies of the game from the alleged infringer's computer and to pay £525 to the Firm by way of damages and costs (or a variant on such a sum);
 - A payment form;
 - A credit/debit card transaction form;
 - A document entitled "Note on Evidence";
 - A copy of the Norwich Pharmacal order obtained on behalf of the client;
 - A document entitled "Code of Practice for Pre-Action Conduct in Intellectual Property Disputes".

Proof of Claims

31. In order for the Respondents' clients to establish a good claim against the holder of an IP address for breach of copyright they needed to establish, pursuant to sections 16 to 20 of the Copyright, Designs & Patents Act 1988, that the IP address holder had either downloaded or uploaded the copyrighted material in such amount as to give rise to a substantial infringement of copyright or to have "authorised" such an infringement.

Client TW

32. The first of the six clients which came to the Firm via the First Respondent was Tw. An engagement letter was signed by Tw on 23 November 2006. By that letter the Firm agreed to charge a fixed fee of £150 in respect of each alleged infringer to whom a letter of claim was sent plus payment of all disbursements. The letter made it clear that Tw would be responsible for all fees and expenses of Ls and asked for £2,000 on account. That payment was to cover 25 applications for Norwich Pharmacal orders. The letter excluded contentious matters. In respect of this the letter stated:

"The work will not include issuing court proceedings against any uploader where a satisfactory outcome is not achieved by the letter of claim. If it becomes necessary to commence court proceedings, a separate arrangement will need to be entered into to cover this work."

33. A Norwich Pharmacal order was sought and obtained from the court on behalf of Tw following an application before Deputy Master Behrens on 1 February 2007.
34. On 26 March 2007 the Second Respondent emailed Tw and sought payment of £10,000 on account of the ISP costs of £38,000 which the Firm had already agreed to pay as part of the Norwich Pharmacal order. Tw were reluctant to pay the costs and asked for the Firm and Ls to share the risk. The Second Respondent indicated in the same email that the Firm understood that Ls were prepared to make a contribution but that the Firm considered that its investment of time, of around £150,000, amounted to a disproportionate share of the risk.
35. Of the alleged infringers to whom letters were written from March 2007 on behalf of Tw in relation to a particular game, 19 disputed the claim in writing to the Firm. The Firm defended its position in all letters save one in respect of an 11 year old autistic grandson of a Mrs AS in respect of whom they agreed to take no further action.
36. On or about 1 June 2007 members of the Firm held a meeting at the High Court with Chief Master Winegarten. The purpose of that meeting was to organise the Firm's applications for Norwich Pharmacal orders which they were expecting to make on a large scale. At the meeting the Chief Master had said that the individual claims were potentially "trifling".
37. By 29 June 2007 the Firm had amassed a total of billing by reference to hours worked on file sharing matters of £221,580.50. The file contained a "billing guide" on which a handwritten note confirmed "please write off all time for everyone".

38. In 2008 the Respondents and the Firm adapted the terms of its retainer with Tw as follows. First, in April 2008 the Firm drew up and sent to Tw a “Conditional Fee Agreement” (CFA). This turned out, on counsel’s advice, to be an incorrect type of conditional fee agreement and on 10 October 2008 (or thereabouts) the Firm revised its CFA for contentious work into a Collective Conditional Fee Agreement (“CCFA”). On 14 November 2008 Tw signed the CCFA which provided for a 75% success fee in contentious matters. By this stage the Firm had narrowed down all Tw cases to 13 key claims out of which they intended to issue three.
39. In addition the Firm also revised its “non-contentious” retainer letter (dated 6 November 2008) and agreed that its charges should now be as follows: 25% of the net recovery for Ls, 25% to the client Tw, and 50% to the firm.
40. “Net recoveries” were defined in this agreement as the amount of damages and costs recovered from each uploader less disbursements, the ISP costs of complying with the Norwich Pharmacal order, and the Firm’s set-up costs of £2,500. By this stage the Firm also agreed with Tw that it would claim £600 for damages and costs from each of the alleged infringers.

Client Cm

41. Cm was an existing client of the Firm but not in relation to file sharing matters. On 21 June 2007 after earlier exchanges, the First Respondent reported to Cm that the Ls technology had revealed 26,000 alleged infringers of Cm’s copyright worldwide in one particular game that Cm was interested in protecting. In the same email the First Respondent suggested a level of damages of £500 and on 30 July the First Respondent asked Mr W of Cm to consider the amount of damages stating:

“...It needs to be like an “expensive parking ticket” to maximise recovery and at the same time, be a sufficient sting to warn (most of) them not to do it again...”

In an email of 25 July 2007 to W the First Respondent referred to a possible recovery if 4,000 letters were written, from 37% of the recipients (ie 1,500), which would generate a “gross revenue of £750,000.” In the period up to 8 January 2008 approximately 426 letters of claim were sent out on behalf of Cm. A recovery rate from those to whom the letters were sent of between approximately 30% and 35% was achieved. In June 2008 the First Respondent sought instructions to sue individuals. Cm was concerned about the adverse public relations implications of the pursuit of these claims. The Firm had its own public relations consultant and suggested that Cm’s public relations representatives speak to them.

42. On 21 August 2008 there were adverse public comments in the Games Industry Newsletter referring to the Firm’s activities as “This grubby, nasty little action....”.
43. Following the editorial and negative publicity surrounding the actions of the Respondents on behalf of Cm, Cm withdrew its instructions and no further work was undertaken on Cm’s behalf after September 2008. Some recipients of the claim letters sent on behalf of Cm responded in a similar way to those who protested in respect of the Tw claim.

Client RP

44. Work was undertaken on behalf of RP between about October 2007 and late 2008 in respect of a computer game. In the case of RP, one of the ISP providers disputed RP's right to a Norwich Pharmacal Order and although an order was obtained that particular ISP's legal costs amounted to £38,684. On 6 November 2007, the First Respondent advised RP that, based on £600 per letter plus ISP charge and the same recovery rate of 38% achieved for Tw, 1,338 letters

“should produce net revenue of £305,064 approximately....”.

On or about 17 January 2008 252 letters were dispatched to alleged infringers on behalf of RP. On 18 January 2008 the First Respondent informed RP:

“we have taken the decision to charge infringers for the number of times we have to pay for their IP address (and any legal charges the ISP has), plus the amount of one lot of damages, eg £600 in [the game]....”

On 6 June 2008 the First Respondent advised RP that the Firm was holding £65,010.27 on client account representing a recovery rate of 20.5% out of 575 letters written since 17 January 2008. Costs of £79,798.00 had to be provided for. He continued:

“...there is a negative balance on all of our accounts so far as any revenue share that might be due this month”

45. On or by 14 November 2008 the First Respondent agreed terms of business with RP for “non-contentious” work similar to those agreed with Tw and Cm. Pursuant to this agreement 33% of net recoveries were to go to Ls, 42% to the Firm and 25% to RP. The Firm agreed to deduct from “net recoveries” any disbursements, other costs or payments made in advance. Thus the Firm was to receive the largest reward from recoveries made pursuant to the agreement.
46. Further, a CFA was entered into with RP on or by 14 November 2008 in respect of litigation work. The success fee under this agreement was 75% of the basic charges should the matter conclude without trial and 100% of basic charges if the matter concluded less than three months prior to a final trial.

Client T

47. In respect of the client T the First Respondent proposed an agreement providing for 37.5% for Ls, 37.5% for the Firm and 25% to T in respect of taking action against file sharers in relation to one of T's computer games. The Firm stood to be the highest, or equal highest sharer of the monies obtained by the claims process. T was also concerned about reputational issues and Ls reassured them in October 2007.
48. On or around 16 October 2007 the First Respondent sent to T a revised “non-contentious” agreement whereby 33.3% of the net recoveries would be paid to each of

Ls, the Firm and to T. The terms of this engagement were similar to the terms of the “non-contentious” engagement on behalf of Tw, Cm and RP.

49. A Norwich Pharmacal order was made by the court on 17 December 2007 in favour of T. Thereafter 283 letters of claim had been sent out by or about the end of March 2008. The recovery rate by the Firm was approximately 19.9%.
50. On 26 June 2008 an agreement for contentious work was entered into between the Firm and T which contained a CFA which set the success fee at 33% of the Firm’s basic charges where the claims concluded at trial.
51. On 10 October 2008 a further contentious work agreement in the form of a CCFA was provided to T by the Firm. Under this agreement the Firm’s success fee was set at 75% of the basic charges.

Client A

52. In September 2007 the First Respondent approached A’s German lawyer to see if A was interested in file sharing claims and litigation. Ls had prepared a monitoring report on one of A’s games which showed 2,482 hits in the UK in relation to illegal downloads. In due course the Firm acted for A and one of its associated companies in relation to three of their games. On 15 February 2008 a “non-contentious” retainer letter similar to those used in the Tw, Cm and RP cases was sent to A. It provided a split of 35% of net recoveries to the Firm, 35% to Ls, 25% to the client and 5% to its law firm. A entered the Agreement on 3 April 2008. On 30 May 2008 a Norwich Pharmacal order was made and the firm sent out 1,381 letters of claim between 7 July and 10 October 2008. A further 352 letters were sent out in October 2008.
53. Client A withdrew their instructions from the Firm on or about 21 November 2008 stating in their letter to the First Respondent that they did so because of the adverse publicity generated by the campaign conducted by the firm.

Client Dp

54. In late 2007/early 2008 the Respondents approached Dp to see whether they would be “interested in a co-operation” with the Firm. The Firm understood from Dr’s German lawyer that Dp had acquired a number of “rights owners” whose products had been violated by file sharing systems. The work involved included films, music and pornography. The volume of these claims was considerably larger than previous ones. On or about 14 March 2008 a client care letter agreement was entered into for non-contentious work between the Firm and Dp, pursuant to which the Firm would recover 37.5% of net recoveries, Ls was to receive 37.5% and Dp would receive 25%. The Firm was the equal largest recipient of recoveries. On 9 April 2008 a CFA was sent to Dp. Following Counsel’s advice on 4 October 2008 a new CCFA was provided to Dp. Starting on 12 November 2008 the Firm sent out the first batch of 2,221 letters of claim on behalf of Dp.
55. Overall, while the scheme was in operation 6,113 letters were sent out, out of a total intended number of 13,745. The Firm made a total recovery of £370,000 out of which the Firm received for itself approximately £150,000. The Firm wrote off, or appeared

to have written off, just under £250,000 of chargeable time and entered into money sharing and conditional fee agreements.

56. In respect of the work involved, the Respondents took the written advice of Ms M of Counsel on or about 30 June 2008. On 5 December 2006 the Respondents had also spoken by telephone to Mr GF of Counsel who had been involved in the British Phonographic Industry (BPI) litigation. In respect of the contentious business agreements the Firm took the advice of expert costs counsel. Contact had also been made by telephone with the Applicant, by a junior member of the Firm's team involved in the work, in respect of matters including their desire that staff dealing with telephone calls, in response to the letters, should not identify themselves for personal security reasons.
57. On 27 June 2008 Mr R wrote to the Legal Complaints Service (LCS) making a complaint of harassment against the Firm. He said:

- "1. They have made repeated demands for money that I feel are wholly unjustified.
2. Their demands in terms of value have varied from letter to letter, gradually reducing as it happens.
3. They appear to be demanding money on the basis of some German law that has not been tested in the UK.
4. They have obtained our details through a court action in which they appear to have deceived the court by saying they intended to use this information to instigate criminal proceedings.
5. They are taking these steps against thousands of other innocent people with my opinion the sole intention to extort money from them.

Something needs to be done about this, as many people will probably pay their demands without consideration. They claim that we have downloaded software from the Internet illegally but we cannot find any evidence of this on our computers and have confirmed this position to them in writing. Their view is that even if we did not we are still guilty for not protecting our Internet connection adequately. This is like saying that if somebody steals your car and then commits a crime with it you are guilty for not fitting an alarm, it's total nonsense.

I am aware that you have had a number of complaints against this firm already I therefore expect this matter to be dealt with, as it is a clear case of harassment. I have enclosed copies of the letters/emails I have sent out and confirm also that I have made a complaint to the Police who will not proceed without some legal position.

You will notice that there is a time delay between my initial contact with you, this is due to other victim's advice to ignore their threats I have now however had enough..."

Mr R did not in fact enclose copies of the Firm's letter because he said that they were "extensive in volume and it would be prohibitive in copying and posting." If the LCS felt there were grounds for his complaint he would then forward the originals. The LCS replied on 29 July 2008 including:

Our objective is to regulate solicitors in the interests of the public and users of legal services. All the information we receive as regulator of the profession is useful. Our powers enable us to discipline solicitors for misconduct (e.g. to reprimand them) and to place controls on how they practise.

As I understand it you have received a letter from Davenport Lyons demanding that you pay £891 or face Court action for illegally downloading software onto your computer. You have made an allegation of harassment in respect of the firms [sic] repeated demands for money which you feel are unjustified.

I confirm that I have carefully considered the information you have provided. I have, however, decided that there is no need for this office take any action as I am unable to find any evidence of professional misconduct in this matter.

Davenport Lyons are obliged to follow their client's instructions and act in their best interests. Furthermore, the firm is clearly acting on the information provided to them by their client in relation to this matter. I realise that you consider the firm's demands for payment from you to be unjustified as you state you have not downloaded any software illegally. In respect of this issue please be aware that Davenport Lyons have no obligation to check the veracity of the information their client provides them.

When solicitors are acting in the best interests of their clients, this can often mean that they are acting directly contrary to the interest of others, and on the basis of versions of events that are strongly disputed by the other side. Davenport Lyons are entitled to make threats of legal action on behalf of their client, if they consider it to be in their clients best interests. I must also advise that it is not for this office to determine whether Davenport Lyons have a valid claim against you. This is a legal issue which we cannot consider or comment upon and is for the Courts to decide. I would suggest that in order to help you resolve this matter, and to protect your own interests, you consider seeking your own independent legal advice to determine how you should proceed. You may wish to consider contacting your local Citizens Advice Bureau or local law centre for further assistance in this regard.

Mr R then asked the Legal Services Ombudsman to investigate. The determination dated 16 September 2008 rejected the complaint as constituting a legal issue between Mr R and the Firm's client, which ultimately could only be decided by the Courts. In mid October 2008 Mr K complained alleging that the Firm was trying to take unfair advantage of him. His complaint was rejected on 28 November 2008.

58. The letter writing campaign provoked considerable other complaints including:

- A large number of letters of response from recipients of the letters of claim, or from their legal representatives and/or MPs, denying any wrong-doing and describing the distress and suffering the Firm's conduct had caused them;
 - At least 60 individuals making complaints to the consumer magazine "Which?";
 - A letter from "Which?" dated 9 December 2008 to the then Chairman of the SRA Board, complaining about the Firm's conduct;
 - The BBC making a television programme "Watchdog" on 8 December 2008;
 - An article in The Guardian newspaper on 10 December 2008.
 - Criticism on the Internet with a number of forums dedicating sections to the discussion of the letters of claims;
 - Twelve complaints directly to the Applicant.
59. An investigation began following the letter received from "Which?", to the then Chairman of the SRA dated 9 December 2008. The "Which?" letter described the Firm's conduct as "consistently bullying and excessive" It made 18 allegations against the Firm including making incorrect assertions of strict liability; of a duty of care to all owners of copyright material; and of an IP address being incontrovertible evidence of copyright infringement by the ISP customer. It also covered the Firm's approach to refusal to settle by recipients of claim letters; its assertions about commencing legal proceedings and the costs involved; its approach to callers who wished to discuss the claim letters on the telephone; its claim to copyright in the materials the Firm sent out; its approach to evidence suggesting that an individual had not infringed copyright; its presentation of IT issues; its increasing the sum claimed in compensation over the period of correspondence and its approach to individuals claiming financial hardship. The letter continued:
- "We would stress that the thousands of letters sent by DL were primarily sent to individuals. Such a hard-hitting campaign was, and is, totally inappropriate where it is likely to target innocent and guilty alike. The tone and conduct adopted by DL was arrogant and inflexible and, again, totally inappropriate when dealing with unrepresented individuals unused to litigation. The threats made by DL were deliberately intimidating and intended to coerce addressees to submit regardless. For your information, we are not aware of the threats of legal proceedings being carried out routinely, despite an explicit statement that this would happen.
- Some of the allegations of illegal and unlawful file-sharing made by DL relate to the sharing of pornographic material. These allegations have resulted in extreme outrage to some individuals and in a number of cases have resulted in personal information and sexual preferences being alleged about members of a household, much to the distress of those individuals and households. Nevertheless, DL has not countenanced the effect of such a statement on an

individual or a household and has dealt with such potential issues with insensitivity unbefitting of the profession.

We believe the above shows ample evidence of an unjust, heavy-handed approach by DL which is in clear breach of ... the Solicitors' Code of Conduct 2007 ("SCC") ..."

The "Which?" letter led to a desk based investigation involving writing to the Firm. The initial letter from "Which?" detailed the circumstances of Mrs M and enclosed a complete set of correspondence between the Firm and Mrs M. It was followed up with details of a further 35 individuals who had received letters from the Firm. Subsequently details of a further 24 individuals were provided between 16 April 2009 and the date of the Forensic Investigation Report 23 September 2009, bringing the total number to 60. Before the Applicant began the inspection it had written to the Firm on 18 December 2008 following the receipt of the complaint letter from "Which?".

60. Mr Roberts, the Investigation Officer, and Miss W of the SRA conducted an interview with the Respondents and Mr B of Davenport Lyons on 10 June 2009. Mr Roberts wrote to the Firm on 17 June seeking clarification of various points, and the Firm replied on 15 July 2009.
61. In a letter of 10 March 2009 the Firm had confirmed that a total of 30 of the 6,113 cases were discontinued and they provided a schedule of those matters. Of the 30, the Firm confirmed that nine cases were discontinued as a result of the alleged infringers' representations and 27 individuals received a written apology. The Second Respondent advised the Investigation Officer during the June interview that most of the matters which had been discontinued related to two particular ISPs where there had been a technical issue with the disclosure of the IP addresses and a lack of integrity with the data. Mr Roberts noted from his investigation of the litigation matters that the Firm had issued proceedings in just five cases, and as at 6 May 2009 were considering a further six.
62. In managing the work, a document had been produced entitled "File-sharing Quality Procedures and Control" which was dated 11 March 2009. The Firm's employees working on the claims were provided with an information pack in or by March 2009. In the File-sharing Process Manual the Respondents recognised that recipients of letters might be "upset and/or concerned with the infringements being alleged". The Questions and Answers for Telephone Calls contain the following passage:

"We maintain that an internet account holder is responsible for his internet connection and therefore liable for any infringing activity occurring on it. In some cases you will find that the account holder is the parent of a child who has committed the act ..."

The Respondents in interview in June 2009 and subsequently in their correspondence denied that they committed any breaches of duty or that they were treating those who had not themselves uploaded the materials, but whose IP address appeared to have been so used, as being strictly liable for alleged copyright breaches. In the process manual used by staff working on the claims, there was an instruction that they should

not give out their names to members of the public and should ensure that their voicemail message did not state their name. They were instructed not to spend more than three minutes on a call and “Any formal response from an individual must be made in writing, particularly if they have any defence to put or criticisms to make of our evidence.” There was a process for approval of responses to individual correspondence either by the file sharing partner or the senior paralegal on a daily basis. There was provision for dealing with holders of the internet account claiming that a young child was responsible for the copyright infringement as it was possible that the client might seek to hold the parent or guardian responsible on the basis that they should have been supervising the activities of the child. The undertaking which alleged infringers were invited to give referred to “or permit others to do the same”. The importance of emphasising that their internet connection had been used to make copyright material available on the Peer to Peer networks was made in respect of callers. Individuals who asked what would happen if they did not pay were to be told that the client would consider whether to issue proceedings against them, and that the damages and costs sought would substantially increase after that point. In certain circumstances if wireless security was to be referenced in the response the First Respondent’s approval was required.

63. The Firm had concluded legal proceedings in relation to five alleged infringers and obtained summary judgments against the Defendants on behalf of their client Tw. Damages had been awarded. Three were completely uncontested and two were challenged after summary judgment had been made.
64. A number of the recipients of the letters of claim had sought legal advice. As at 11 December 2008 it was estimated that one particular firm L was representing around 250 alleged infringers.
65. Between January 2009 and 25 May 2009 the Firm transferred the file sharing infringement claim work and a number of the employees who ran the file sharing claims on a day to day basis to AC, trading as ACS:Law.
66. The Applicant enquired through Mr Roberts as to why the Firm had decided to give up the work. In a letter of 21 May 2009 the Second Respondent stated:

“The main reason for our decision was that we were losing money in carrying out this work and particularly in the current economic climate it was not financially viable. We told him [Dp’s German lawyer] that we had found another firm willing to take over the work subject to terms being agreed with his client. He said Dp would have no problem with this.... A week or so later we spoke to T, Tw and RP to say that we were ceasing to act for Dp and had found another firm to take on their work. We did say that we would continue the work if necessary, but they agreed to the termination of their retainers.”

In that letter the Second Respondent stated that Dp accounted for the vast majority of file sharing work. The bulk of the claims that were ultimately dropped were for Dp.

The Case of Mrs MacKinnon (Mrs M)

67. The case of Mrs M was one of those exemplified in the Applicant’s report. The Firm

sent a letter to Mrs M dated 8 July 2008. It was fairly typical of letters of claim sent at this time. In the letter the Respondents made a claim for breach of copyright against Mrs M, relating to alleged unlawful uploading of a game owned by A. In particular the letter of claim stated:

“Based on the evidence supplied to us, your internet connection has been used to make the Work available on peer to peer network(s), either through your own acts or by permitting others to do so, for third parties on the same network(s) to download. Such activity constitutes a breach of the provisions of sections 16(1)(d) and 20 of the Copyright, Designs & Patents Act 1998 (sic) (“the Act”). Where our client’s Work has been copied on to the hard drive of the personal (or office) computer (“PC”) used to make the Work available on P2P network, there will also have been a breach of the provisions of sections 16(1)(a) and 17 of the Act.”

68. In the next section of the letter there was an offer to settle involving Mrs M paying compensation of £500 plus “your ISP’s administration costs” of £25, making a total of £525. The letter went on to state that:

“Damages and costs are likely to be much greater than this sum. It is the sum that our client is prepared to accept (on this occasion only) by way of settlement to help defray its costs if you are prepared to give the undertaking sought and enclosed with this letter and settle the matter early by paying the compensation claimed in this letter.”

69. There then followed a claim as to how the costs figure was established but without any details showing figures, followed by “next steps requiring payment and undertaking”. Immediately after the “next steps” section was a statement that if within the 21 day time period specified, the amount claimed was not paid then:

“If it becomes necessary to issue proceedings against you, our client will be seeking as a minimum from you an interim payment of at least £1,000 and will request the Court to determine the level of total damages and costs which should be awarded against you and which are likely to be much higher

This section concluded that if the matter was not settled as required by the letter then the amount would rise.

70. The next section of the letter contained a recommendation that legal advice should be sought and also stated that “All submissions from you must be in writing”.
71. Accompanying the letter were the attachments running to 38 pages, including the Code of Practice for Pre-Action Conduct in Intellectual Property Disputes. The documentation did not include the detail of the funding arrangements which the Respondents had with their Client A.
72. Included with the letter was a document headed “Notes on Evidence”. The Notes stated:

“We cannot, due to the number of people we have written to, enter into further

detailed correspondence with you regarding our client's claim. In the event that you wish to dispute the matter, you will have an opportunity of doing so in any court proceedings, if it becomes necessary to issue them against you."

73. Included within the Notes of Evidence was the forensic computer analyst's evidence which stated, inter alia, as follows:

"Because of data protection law the ISP will normally require us to apply to the court for a so called Norwich Pharmacal (or disclosure) order. Full evidence of the nature of our claim against you is provided to the Court, which is then invited to order your ISP to disclose your contact details. This enables us to write to you. On the day set out in the Letter of Claim, such an order was made against your ISP, pursuant to which your ISP provided your name and address some weeks later and we were then able to write to you."

74. In section 3 of the Notes of Evidence under the heading "Evidence of copyright Infringement" the Respondents and the Firm stated:

"It is irrelevant for the purposes of our client's evidence how the Work came to be resident on the computer connected to the IP address in question at the time of upload and/or making it available on a P2P network. Prior to making the work available on P2P networks, it may have been copied from a CD or DVD ROM (or other medium) or indeed downloaded from either a bona fide website or obtained through file sharing on a P2P website, either by you or a third party using your internet connection. What our client's evidence shows is that the work was made available from an internet connection registered to your name on a certain date and time...."

75. Mrs M replied to the letter of claim made against her in a letter of 10 July 2008. She made it clear that:

- (1) She and her husband had not conducted or authorised any alleged infringement of copyright. They denied any illegal activity.
- (2) She and her husband ran a small consultancy business living on a limited income and used their computers for modest purposes using Word, Excel and PowerPoint for business as well as email and internet for client research.
- (3) They subscribed to Norton Antivirus and had Firewall protection. There was a possibility that a third party was illegally using their email address.
- (4) At the time of the alleged infringement, 2.51 am, they were in bed.
- (5) They had no young children nor guests in the house.
- (6) They found the experience of receiving the letter stressful and distressing.

76. Mrs M received a letter from the Firm dated 28 July 2008:

- (1) Stating that "Your computer could have been illegally accessed".

- (2) Stating that “Notwithstanding your contention, we are considering with our client whether to take proceedings against you in any event, during the course of which we may seek an order from the court allowing us to inspect your PC in order to test what you say.”
- (4) Referring to the terms and conditions of the contract with the ISP provider to which it gave rise, it was said, to impose a “positive obligation on you to ensure the security of your system”.
- (5) Alleging that a failure properly to secure the wireless router gave rise to a duty of care to “all the owners of copyright, whose rights may be breached thereby”.

77. On 29 July 2008 Mrs M replied confirming that:

- (1) She and her husband had no file sharing software on their computers and did not know what Peer to Peer meant.
- (2) They never used a wireless router.
- (3) Their internet security was a 2006 version.
- (4) They had contacted their ISP who had indicated little could be done from a security point of view.
- (5) They were intending to speak to their local computer service expert.

78. The Firm’s letter of 4 August 2008 stated:

“Being a primary infringement it is not relevant whether or not you actually knew you were committing prohibited acts.”

- 79. This assertion ignored Mrs M’s detailed response that Mr and Mrs M were not primary infringers.
- 80. The Inverness Computer Centre wrote a report dated 24 September 2008 indicating that Mr and Mrs M had done everything reasonably possible to protect their computer and that there was no trace of any file sharing across a Peer to Peer network.
- 81. Mr and Mrs M received a letter from the Firm dated 24 October 2008 indicating to them following further correspondence that no further action was being taken and on 14 November 2008 the client A wrote a letter of apology. The ISP had misidentified them.

Allegation 1.4

Litigation Services

- 82. Section 119(1) of the Courts and Legal Services Act 1990 defines litigation services

as including:

“any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide, and “proceedings” include “any sort of proceedings for resolving disputes (and not just proceedings in a court) whether commenced or contemplated.”

Services falling within section 119(1) involve a requirement for the firm involved to ensure that any such agreement complied with Section 58 of the same Act, including the requirement under Section 58(4)(b) that the CFA “states the percentage by which the amount of the fees which would be payable if it were not a condition of the agreement is to be increased”. Under Section 58 of the Act as amended by the Access to Justice Act 1999 a CFA which does not satisfy all of the conditions applicable to that section “shall be unenforceable”.

Witnesses

Mr Ian Roberts

83. Mr Ian Roberts, an Investigation Officer employed by the Applicant, was sworn and confirmed his witness statement of 18 March 2011, which in turn confirmed the contents of the Forensic Investigation Report dated 23 September 2009. The witness confirmed that the First Respondent had informed him that as many as 50% of alleged file sharers did not reply at all to letters of claim and they went into a pool to consider whether litigation action should be taken against them. At the time the Report was written the witness was only aware of six actions being taken against individuals and so far as he was aware any fee income received came from the letters of claim written under the non-contentious retainers rather than the CFAs or later the CCFAs. The Report covered whether the partners in the firm had given any thought to the allegations arising from films with adult content and how this would impact on the lives of alleged infringers. The envelopes were marked “Strictly Private and Confidential”, the heading of the copyrighted material was not placed in the heading of the letter so that the title of the work was concealed and advice was taken from a defamation partner. All the material copyrighted had been licensed by the British Board of Film Censors. He understood that there had been a lot of consultation at very senior level in the Firm on this issue and that it was discussed by the governing board in respect of which he had seen handwritten notes.
84. In respect of the calculation of damages the witness confirmed that other than what was in the letters that were sent to the alleged infringers, he had not seen a breakdown of how the figures demanded were arrived at. In his Report he had set out that at the interview on 10 June 2009 Mr Miller said, “we did not quantify them. it was a global figure.”

The amounts claimed started at £300 in the first Tw cases and rose to £500 or £600 for later claims and other clients. The Report set out that:

“Mr Miller replied that they had not realised how much time it would take to conduct the claims, the costs were going “through the roof” and the costs

would have to be claimed back from someone...”

Mr B of the Firm had told the investigators that:

“... ultimately the amount of damages was the clients’ decision based upon their advice.”

The documentation for staff also described the client’s claim as:

“not a precise calculation (although the ISP charges have been calculated quite precisely based on the administration and legal costs levied upon us by the ISP in question). Damages and costs are likely to be much greater than that sum, if the matter proceeds to court and our client succeeds in its claim. It is however the sum that our client is prepared to accept to settle the claim early without the need for legal proceedings.”

85. The witness confirmed in respect of bills to clients that he had prepared a table. It related to all six clients. In descriptions of two of the bills confirmed by the witness there were references to “the file-sharing litigation”.
86. In his interview on 10 June 2009 the witness had discussed with the partners the decision to claim an interim amount of £1,000 in the letters of claim. “Mr Miller stated that the request for interim payment arose from an informal conference call between Counsel instructed on another matter and Mr NG” [of the Firm]. He did not recall being given the name of the barrister and The First Respondent had confirmed to him “there was no record or attendance note of the discussion which was on an informal basis”.
87. In cross-examination the witness agreed that he had never been involved personally in bulk litigation, that this was an area of law which was rapidly developing and that the people at the Firm had generally been co-operative during the investigation. The witness also confirmed that so far as he was aware, none of the Respondents’ clients had made any complaints about them. He had not attempted to contact the clients. In respect of the number of mis-identifications by the Internet Service Providers of the owners of IP addresses, the witness agreed that he thought it was four or five cases out of the 6,000 plus letters of claim. The witness confirmed that he was aware that “Which?” had conducted a campaign seeking complainants as had Watchdog, and that there were a number of websites and internet fora where it was suggested that people might like to complain to the Applicant or to “Which?”. He agreed that it was not possible to determine what if any proportion of the complainants were genuine, ie not illegal file sharers.
88. The witness was asked about an earlier complaint made to the Legal Complaints Service by Mr R in respect of a letter of claim which he had received. He was aware of the content of the response from the LCS case worker rejecting the complaint.
89. The witness also confirmed that he did not recall any evidence that he had discovered to suggest that the Firm was not clearly acting on the information provided to them by their client.

Mrs Gillian MacKinnon (Mrs M)

90. The witness was sworn and confirmed the truth of her witness statement dated 9 July 2010. She had first known about the claim when she was alerted by her Internet Service Provider. They provided a telephone number for the Firm and so she had telephoned them. The person who answered the call had refused to give his name for security reasons. The witness continued:

“I became quite concerned. I said, “what can I do about this?” He laughed in a way I would describe as sneering and said “pay us”...”

Her initial reaction before phoning the Firm was that the claim might have been a scam, and then her reaction was that she did not know how to fight it as a forensic IT analyst had been referred to in the claim letter. The claim initially was for £500 with an interim payment of £1,000 if she did not pay. Having read in the newspaper about a person who had been “prosecuted” for illegal downloading and “fined” £16,000 she was really starting to get worried. In respect of the Firm’s letter of 28 July 2008 she had experienced:

“Extreme frustration and upset again and annoyance. ...”

This was particularly because there was a reference in it to a wireless router and what might happen if it was not properly secure. The witness and her husband did not have a wireless connection. She was also concerned because the letter said that she had a duty of care to client A, who owned the game in question. She thought:

“How can we possibly have a duty of care to a company we don’t know anything about? It is ludicrous, it is actually ludicrous to actually say that, how an ordinary person on the street can have a duty of care to a company, and one based in France. It makes no sense.”

In due course Mr and Mrs M had had their computer examined by a local computer expert. Before they went to “Which?” she felt that the protestations in their letters were having absolutely no effect on the Firm.

“...it seemed to be irrelevant whether or not we knew we had done something wrong. We hadn’t done anything... It seemed to be irrelevant what we were saying. It didn’t seem to take account of anything I had put in my letters beforehand. It didn’t seem to take account of the fact we were talking about a 66 year old man and a 54 year old woman. I wouldn’t have thought we were typical people who were going to be downloading. ... I would have thought that if you look at the profile of someone who is going to be typical of downloading this sort of thing, it is not going to be a 66 year old man who volunteers for the Local Council for Voluntary Services. None of that seemed to be taken into account at all. The fact that we said we didn’t have wireless routers didn’t seem to have penetrated anybody at all.”

When the Firm wrote on 6 August 2008 stating:

“Being a primary infringement, it is not relevant whether or not you actually

knew you were committing prohibited acts...”

Mr and Mrs M had contacted “Which?” magazine. After the matter had been dropped with an apology by A, the witness had followed up with a letter of 2 December 2008 to the Firm [seeking compensation]. She had to write again on 27 January 2009 because she did not get a response and received a letter from the Second Respondent.

91. In cross-examination, when asked about circumstances in her business as a consultant when she might have had to chase debts, the witness had agreed that sometimes people did not pay immediately and advanced excuses for not paying. She would generally disagree with them but did like to take account of the circumstances if they were explaining why they were not paying right away. She would like to think that she would apply a bit of logical common sense and look at the information they had given her. The witness agreed that she now understood that the reason why the letters came to her in the first place was because she was misidentified by her ISP, but it had not been set out in the Firm’s letter saying that they were not going to proceed any further. She had considered the Firm’s letter of apology very cursory and abrupt, and the final letter from the Second Respondent, while frank and polite, had been extremely late in the day. In respect of the reference in the Firm’s first letter about taking legal advice and the statement about their material being copyright, the witness felt there had been a slight contradiction and had felt it difficult at that point to show the letter to anyone until she had checked it with a colleague. She said:

“... having these statements in a letter is extremely intimidating, especially in a document of the length of the one that we received first off.”

The witness confirmed in response to cross-examination that she was a management consultant and a graduate. In re-examination the witness said that she imagined getting specialist legal advice would be quite expensive where she lived. She would not have access to it, and would not know where to start other than possibly going to the family solicitor. She confirmed that she and her husband would have been quite happy for their computer to have been examined, and that there would have been no need for the Firm to obtain a court order in order for that to be done.

Mr Ken MacKinnon (Mr M)

92. Mr MacKinnon affirmed the truth of his witness statement dated 9 July 2010. In his witness statement he had referred to the words which appeared at the end of Section 9 of the Notes of Evidence which had been attached to the letter of claim:

“Finally please note that the information and documents contained in this letter are the copyright of Davenport Lyons. Any unauthorised use, e.g. posting on websites and fora, will render the persons responsible liable to Davenport Lyons for copyright infringement, in addition to any liability which may be owed to our client for copyright infringement. Further action, in addition to that contemplated in this letter may result.”

The impact that this had on the witness was:

“I was horrified. I had already been through all the other stuff that had come

from Davenport Lyons. ... So when we read all the way through it and reached that stage, I thought “Oh, this is incredible”, because, first of all, it was sent to us. So far as I was concerned it was given to me and so it couldn’t be restricted. But then the more I thought about it, and having already had experience on the phone with the bully-boy tactics that they were using, I thought this was just another attempt to bully us into submission. So I spoke to my own solicitor and he said, “Rubbish, absolute rubbish. They have sent you this, you didn’t ask for it. You have the right to do something with it”. ...what impact did it have? It was just another nail in the coffin and the coffin was already pretty heavily nailed at that point.”

The witness had then informally consulted a policeman whom he knew through a hobby club. He was referred on to a member of the force who told him that it must be a scam. He had then carried out research and discovered that Davenport Lyons was a firm of solicitors, but one of his police contacts told him that if someone had set up a scam this size they would probably have set up a fake website as well. After client A had dropped the case against Mr and Mrs M in October 2008 they agreed to appear in an article in “Which?”. In cross-examination the witness agreed that the first letter from the Firm advised him to seek legal advice if he was in any doubt, and that he had spoken to others including a member of the Scottish Parliament and Trading Standards, as well as the police officers.

Ms Barbara Burch (Mrs B)

93. Mrs Burch was sworn and confirmed the truth of her witness statement dated 14 July 2010. The witness was a local school supervisor. She lived with her husband and two children, who in June 2008 would have been 1 and 4 years old. In her witness statement she had described her infrequent internet use. She received a letter from the Firm dated 16 April 2008 on behalf of their client RP in respect of a computer game. On receipt of the letter she had started to panic and burst into tears and telephoned her father. Her reaction was:

“...because it looked so official and scary at the time. I have never had anything like that come through the post before, and it made no sense because I didn’t do it. I had never heard of any of the things that they were referring to. So it made no sense to me and I panicked. I pure, blind, panicked.”

Her father had thought that it was a scam. She said in her witness statement:

“The letter appeared official so I trusted that if they had the evidence, then it must be true.”

In evidence she had felt that:

“Because the letter had come from a solicitor’s company in London, and you expect something that looks that official to be accurate ...”

The witness had written to RP in Poland rather than to the Firm because the letter from the Firm did not have a name on it that she felt she could write to. She also believed that the letter suggested there was no communication needed: she just

simply had to pay. When she heard nothing from RP she wrote to the Firm. The witness made it clear that she had never heard of the game or peer to peer sites and requested information with a full detailed breakdown of the claim. She received a response dated 9 May 2008 saying that there had been no mistake and that at the very least her IP address had been found responsible for the infringing act or acts identified. She was advised that the claim against her had been clearly set out in correspondence and that the Firm believed that they had provided her with all the evidence they were required to under the pre-action protocol. They then referred to the sum of £618.12 and what it covered, and that it was not a precise calculation. She was given seven days to provide the undertaking and payment or the Firm would seek their client's instructions to commence proceedings against her. She was becoming cross but expected a knock at the door from the Bailiffs or a court order at any minute. As a result, she lived with that constant fear. The witness had never received any communication to indicate that the claim was going to be withdrawn. She had contacted "Which?" and had appeared in the Watchdog programme. Watchdog had arranged for her computer to be examined by someone independently. She believed that the report set out that her computer was inactive at the time of the alleged download and that there was no evidence to support the allegations on any of the three computers examined, one of which was hers. In cross-examination the witness confirmed that she had instructed solicitors L and they had told her that she could assume that the proceedings had finished. She agreed that in her correspondence with the Firm she got a lot of assistance from documents she had found on internet fora, where there were templates. In respect of her husband's son who was in his early twenties and who visited the house, she stated that he only used the computer under her supervision. She had not felt inhibited from getting legal advice and had immediately gone to the CAB and to BT [her ISP]. The witness confirmed that she had a file sharing program on her computer which had been put there by her father when the computer was new. It was not something that she wanted on it. She did not use the computer very often because it had a dial-up modem which was extremely expensive. In re-examination she explained that she used to go to a friend's house regularly and use her broadband. Using her computer at home involved plugging in wires and she had small children and could not have the wires trailing.

94. The Tribunal also had before it a witness statement from Christopher Burch, Mrs Burch's husband, to the effect that he was at work with his son at the time of the alleged infringement and that prior to receipt of the Firm's letter and his wife appearing on Watchdog, he had no idea what peer to peer file sharing was.

Mrs Dawn Stewart (Mrs S)

95. Mrs Stewart was sworn and confirmed the truth of her witness statement dated 19 August 2010. The witness received a letter from the Firm dated 28 January 2008 in respect of a computer game owned by RP. She was shocked and surprised to receive it:

"Because it was official-looking. The wording used in it was of concern. It was a demanding letter. It was presuming - it was more or less saying I had done something that I hadn't done, and that all the evidence was there, and asking us to pay the money or it could go further and the costs could go further."

The witness had two teenage sons and she had asked them whether they had used peer to peer networks and whether they had copied or downloaded the game, and they had said not, thinking it was rubbish. She received another letter from the Firm and wrote to them stating that she was seeking legal advice, had not committed the offence stated and asking them not to send “intimidating threatening letters which are causing stress and anxiety”. She then obtained help from the student law office at Northumbria University and wrote again to the Firm offering to make a one-off payment of the recommended retail price of the game in question in return for them ceasing to pursue the matter. This was because she wanted the letters to stop. On 19 January the Firm replied saying they now wanted settlement of £606.02 rather than the £506.02 originally demanded. The witness had not paid the firm any money and nor had proceedings ever been issued against her. In cross-examination the witness confirmed that her sons knew what peer to peer file sharing was, and they did have the software on their computer. They had said that they hadn’t done anything illegally. She understood that if her sons were not in the house their computer was not on, but if they were in, it was. Her husband had checked the history on the computer. The witness agreed that her objection to the claim was that she was not responsible and that if she had committed an offence she would have understood why she was receiving the letter. In re-examination the witness explained that although she had offered to have the computer examined, she had not proceeded with that because the cost would have been to her and she was willing for the Firm to take the computer and have it examined. She had not, however, made that offer to the Firm.

96. The Tribunal also had witness statements from Mrs S’s two sons confirming that they would have been at school at the time the game was alleged to have been downloaded.

Roberta Armour (Ms A)

97. Ms A confirmed the truth of her statement of 4 December 2010. She had taken early retirement because of ill health, having previously worked for a major supermarket chain. Her daughter lived with her and they had one computer in the house. The witness had received a letter from Davenport Lyons dated 12 September 2008 giving times at which it said there was copying of a game owned by client A for the purposes of downloading by third parties. These were at precise times on 17 January and 30 January 2008. The amount claimed against her was £522.99 and her reaction on receiving the letter was disbelief. Neither she nor her daughter had been at home at those times and she thought the computer was switched off when her daughter was out. The game she was alleged to have downloaded was one which had been bought for her daughter in April of that year and in her response to the Firm she had said “I find it difficult to understand all the information in the letter due to having very limited computer knowledge.” She had advised the Firm that the game had been bought as a gift for her daughter, that it had been installed on the computer and registered online and that her daughter had joined the forum relating to the game on 3 April 2008. Evidence of registration and the purchase of the game had both been provided. The Firm responded:

“Subsequent purchase of the software does not prove an intention not to share...”

Her reaction had been:

“So when I got this, I felt they were saying that I was thick or something like that, and I didn’t know what I was talking about, you know, which I don’t. It just seemed they weren’t going to accept anything that we sent to them saying we were innocent.”

“... I felt they weren’t accepting my word that I hadn’t done this, and it was going to end up in court, and I was going to end up having to find money which I didn’t have, to pay court costs and all the rest of it. ... Once all these letters and that started I ended up in hospital with heart failure, just through stress. When I got this, I was really worried. So I think that was the time when I went to the solicitor. I asked them. I had also been in touch with “Which?” magazine, they got into it as well ... I was hitting my head on a brick wall ...”

The witness also testified that no-one had got in touch with her to say that they were not going to pursue the claim. There was the bundle of letters which had been exchanged and after that she heard nothing until the Applicant’s solicitors contacted her about this hearing. In cross-examination the witness agreed that she knew the case that was being made against her was that she had downloaded illegally a game which she had not done.

98. A witness statement was also read from Ms A’s daughter, K, confirming that she had obtained written evidence that she was not at home at the time when downloading was alleged to have taken place; that her mother did not know how to use the Internet and could not possibly therefore do what she had been accused of. She also confirmed that she did not use file sharing sites to illegally download games or any other content, and had had the game legally bought for her in April 2008.

Mrs Teodene Redrup (Mrs R)

99. Mrs Redrup was sworn and confirmed the truth of her statement dated 19 August 2010. She worked in a tourist information centre and on her day off volunteered at a drop in community centre for substance abuse. She had received a letter from the Firm dated 26 February 2008 in respect of a computer game owned by RP, alleging an infringement on 17 July 2007 at 21.42. It sought the sum of £758.32 from her, of which £625 was compensation and £133 ISP administration costs. The letter included:

“Please note that the amount claimed represents only a small proportion of the damages which our client believes it is entitled to claim from you, together with the costs our client has incurred in instructing us to proceed against you. If it becomes necessary to issue proceedings against you, our client will be seeking as a minimum from you an interim payment of £1,250 and will request the court to determine the level of total damages and costs which should be awarded against you. Accordingly, we reserve the right to increase the compensation due to our client if payment is not made within the time specified.”

The witness's reaction to that was:

"I was terrified, absolutely terrified."

The witness had initially believed that the letter was a scam. She had no way of paying the money. The Firm offered to accept payment by instalments (subject to completion of a means questionnaire) which would increase the amount owing by £100. The witness was invited to provide post-dated cheques within five working days, together with a signed undertaking to avoid any further action being taken. In her reply dated 21 April 2008 the witness said:

"I do not know where you thought I said I would pay in instalments. I have never even heard of the game you mentioned in your first letter, nor have I downloaded it."

In their reply on 29 April 2008 the Firm withdrew their offer of instalment payment and stated:

We do not claim that you have our client's work on your computer now, (although we do not exclude this possibility), nor do we claim that you necessarily downloaded our clients' work. Our claim is that your internet connection was used to make available our client's work through the process of either uploading or downloading it on the internet. As the owner of the internet connection, we hold you ultimately responsible for its use. We have already supplied you with sufficient evidence to establish this claim in our original letter of claim. We also believe the evidence is sufficiently clear."

They went on to give her seven days to pay and give the undertaking or they would take their client's instructions with a view to commencing proceedings against her without further notice. As the first letter had been understood by the witness to allege copyright infringement and this letter now seemed to be holding her liable because she was responsible for the internet connection, she felt that she was:

"Just getting in deeper and deeper... I found it really upsetting. I couldn't think, I didn't know what to do, I didn't know who to turn to. I rang everybody I knew. At this stage I ended up going to the doctor's with depression, because I couldn't handle the stress."

There had been some confusion because the witness was under the impression that she had a wireless internet connection, whereas in fact she had a plug-in modem. In a letter of 8 May the Firm had come back to her about failure to secure her wireless network. The letter included:

"There has already been a ruling in the German courts confirming that a wireless network is the responsibility of its owner, and any consequences of failing to secure the network fall upon the owner of it irrespective of who carried out the illegal activity. We are of the view that the English courts would take the same position. As the owner of the telephone line and therefore the internet connection, our client holds you ultimately responsible

for its use and security thereof.”

The witness went on to a forum on the internet for advice and wrote back to the firm on 10 May, again denying that she had downloaded or uploaded, and not agreeing that she was liable for use of the wireless internet if it was used without her permission. In their response on 20 May the Firm stated:

“We write to inform you that we have instructions from our client to issue court proceedings and these are being prepared.”

The witness understood them to mean that they had instructions. The correspondence ended there. The witness testified in respect of time spent during this period dealing with getting advice from friends and others about the matter:

“Apart from being at work, every waking moment. I was looking to magazines, I was on the internet, anything I could come up with, because I just couldn’t settle. It was like a black cloud all the time. So I even had to learn what Peer to Peer meant, because I didn’t know what it meant, what uploading and downloading was. So I had to educate myself. This took every night I came home from work.”

Neither the firm nor any other firm of solicitors had written to her to say they were withdrawing the claim.

100. In cross-examination the witness stated that she had asked her two sons if they had downloaded the game in question. She had shown them the letter and asked them if they downloaded it and:

“They both said no, and that’s enough for me because I have brought my two sons up to tell the truth.”

101. Also before the Court were statements from both the witness’s sons, one of whom stated that he had previously tried to use the file sharing network Napster, but this had allowed viruses onto his computer and since then he had not used file sharing networks, and did not use them at the time of the alleged infringement. He also confirmed that there was a wireless internet connection in 2007, but the computers in the house did not always have the necessary protection.

Statement of Leonard and Sonia Collict

102. Witness statements of Leonard and Sonia Collict were treated as read as part of the record as Mr Collict was undergoing medical treatment and unable to attend. He had been the recipient of a letter of 17 November 2008 written on behalf of Dp. The sum being sought from him was £500 plus £5.20 IP costs. The files in respect of him had been transferred to ACS:Law who had continued the claims against him. Mr Collict stated that they had made payment:

“The major reason for paying the sum demanded was that we were concerned to note the paragraph in the letter which stated that if the matter was to go to court, ACS:Law would seek an immediate interim payment from us of £1,000

which was certainly more than we could afford. However, we continued to fully refute the allegations that had been made against us.”

103. The witness statement of Ms Sue Davey against whom a claim had been advanced for Tw was also treated as read. The Applicant’s representatives had planned to call her but she was unable to attend because of work commitments.

Mr Alan Golding (Mr G)

104. Mr Alan Golding was sworn and confirmed the truth of his witness statement dated 4 June 2010. He lived at home with his wife and two children and was by profession a chef. He had received a letter dated 17 November 2008 from the Firm, accusing him of unlawfully infringing copyright in a film owned by client Dp. He confirmed that he had neither copied it onto his computer nor provided it to others for copying. The letter had alleged that there had been four identical hit times across four different IP addresses. Mr Golding testified that he didn’t understand a lot of the jargon in the letter but did understand that he was being asked to pay £511.08. His reaction had been:

“At first I thought it was a scam and then I called the police.”

The police had attended his house and come to the conclusion that the document was probably genuine. He and his wife had then contacted the Firm and the person they spoke to would not tell them their name. In further conversations with the Firm

“it was a case of pay it or be taken to court. There wasn’t a middle area.”

The witness had instructed a computer expert to check his laptop and in his short report of 22 November 2008 the expert had said:

“The laptop does not contain the alleged material, nor did it ever contain BitTorrent”

The report went on to confirm that the PC did not contain the alleged material and that BitTorrent, the Peer to Peer protocol that had been used, had been on the PC but had been removed. It was originally installed on 21 March and might have been present on 2 April, the date of the alleged infringement. The witness testified that BitTorrent was obviously something that he thought was a suitable program for his computer at the time, but he had deleted it more or less straight after he downloaded it, when he saw what it was. He had sent the expert’s report to the Firm. Their reply of 8 December 2008 suggested that whether he was at home was not relevant and advised him that unless he made payment and gave the requested undertaking within 14 days they would have no alternative but to take their client’s instructions with a view to commencing proceedings against him. His reaction had been:

“... Frightened. I just didn’t know what to do.”

In a letter to the Firm of 11 December he thanked them for recognising that he didn’t download the film, nor that he would ever do this with two young children at home but he had said:

“...you are holding me responsible for someone else’s perverted sense of humour by causing distress and frustration to my family...”

That had been his understanding of what the Firm was doing at the time. He had mentioned paying by instalments:

“... Because I got to a stage where I just couldn’t see - we had tried everything. We had tried to convince these guys that we hadn’t done anything wrong. In the end we couldn’t afford to go to court and pay extreme amounts of money. I was at such a low at this time that I just couldn’t see any other way out of it.”

On 30 January 2009 the Firm had written to him indicating that they would accept payment by instalments but the amount would go up by £100. In the meantime the witness had contacted “Which?”. The Firm’s response on 26 February 2009 had been:

“The investigation by the SRA could last for a number of months and does not impact upon the legal and factual issues arising in your case. Accordingly we need to continue to progress your case, but will of course be taking into account any recommendation made by the SRA in due course. Accordingly unless we receive your written undertaking and payment within the next fourteen days of receipt of this letter, or you are able to provide a satisfactory explanation as to why you are not liable for the acts alleged against you, we shall seek our client’s instructions to commence proceedings against you.”

105. Following a change in the witness’s circumstances he advised the Firm that he could not make payment and that he had passed their letter on to “Which?” and that he would seek advice from the CAB. He was then given a further 28 days to respond to the letter in detail or instruct solicitors. He instructed the same firm who were acting for various other recipients of letters of claim and they wrote on his behalf on 12 May 2009 denying that he had infringed copyright and mentioning that he had already written to the Firm numerous times protesting his innocence. It continues:

“We have no doubt that your client means well by seeking to protect its intellectual property rights from unlicensed file sharing. We have no doubt that unlicensed file sharing is damaging your client’s business. It follows that it is certainly within its rights to commence legal proceedings against individuals who have infringed your client’s copyright.

Your client’s problem is your inability to link the IP address to an individual or even a computer owned by or in our client’s possession (without actually inspecting a computer). Our client did not use the P2P protocols as suggested by you. It follows that:

- (1) he did not download the Work; and
- (2) he did not make the Work available to third parties.

Our client has never heard of the Work, downloaded it, installed it, nor dealt with the Work in any way whatsoever.”

The witness testified that he had never heard from the Firm that they were not proceeding with the claim against him or that it had been withdrawn, and that the correspondence had ended with his solicitor's letter of 12 May 2009. He confirmed the contents of his statement where he had said:

“This whole experience has made me very wary and untrusting towards Solicitors, which I had not been before...”

He had found the manner and tone of the Firm's letters threatening because regardless of what he said or wrote, every time he was told the same thing: that he had to pay up. In cross-examination the witness agreed that he had no difficulty with the owners of the rights of films or games or music seeking to uphold their rights in principle. He agreed that if he had been illegally file sharing, he wouldn't have been surprised to receive a solicitor's letter but:

“I would expect it to be firm, but not bullying and threatening.”

Mrs Kim Golding (Mrs G)

106. Mrs Kim Golding was sworn and confirmed the truth of her witness statement dated 16 July 2010. She had read the letter which had been sent to her husband by the Firm. Her reaction was that:

“I was very shocked and surprised, and very stressed as well.”

She had telephoned the Firm a few days later and asked for the name of the person to whom she was speaking. He had refused and told her:

“Well, your husband's got to pay it and I'm not giving you my name.”

The witness testified that she and her husband had told their children, then aged 9 and 14, what was happening and they were “upset and very concerned”. In cross-examination she agreed that her children only knew of the matter because she had discussed it with them. She only knew of it because although the letter was marked for her husband's attention he had shown it to her.

Expert Witnesses

107. The Applicant instructed Mr Andrew J Clark, who had prepared a report dated 28 April 2011 and a supplementary report dated 12 May. The Respondents instructed Professor Peter Michael Sommer whose report was dated 20 May 2011. Various other reports relating to information technology (“IT”) matters were referred to during the hearing: a report by RS of Ls on the Ls monitoring software of 22 September 2005; a report of AZ on the Ls monitoring software of the same date and a letter from AZ of 24 February 2006 explaining Ls's methodology; a report of CS of 6 December 2007 on the Dr monitoring software; and a report of CV dated 9 September 2008 prepared on the instructions of the Firm, relating to the validity of the evidence that the monitoring software provided.

108. Mr Clark and Professor Sommer met in a series of telephone calls and emails on 31 May and 2 June 2011. The basis of discussion was their reports. They prepared a note for the Tribunal dated 2 June 2011 setting out their areas of agreement. These included how peer to peer file sharing operated and how it was used by infringers to obtain copyright material, explanations of IP addresses included dynamic IP addressing. Put simply this meant that an IP address might be allocated by an ISP to an individual but was not necessarily retained by that individual for later internet transactions. An individual might have a series of IP addresses from within the pool available to the ISP. Other ISPs might not operate this system and a static address may be allocated by them to a subscriber. The experts also agreed that wi-fi hijacking was in general terms a means by which a subscriber's IP address might be abused by someone external to their premises. They agreed that because P2P downloads took a considerable amount of time the population of potential hijackers in any one situation was limited by the need for the hijacker to have a permanent location and permanent power supply from which to operate; in effect, this meant near neighbours in an urban environment. Statistics gathered simply to indicate the general level of unsecured wireless access points did not properly reflect the scale of the threat in relation to P2P infringing downloads. It was possible to break weak forms of wi-fi encryption and there was little risk of discovery during the traffic analysis for decryption process. However, once decryption had been successful the problems of the length of time for a download to take place remained.
109. Neither expert had seen any of the monitoring software, its detailed specification, or a detailed list of versions and lists of faults identified and remedied. The experts could only base their comments on reports of how it operated and available print-outs. They noted that both items of monitoring software must have gone through several versions. They agreed that they did not know the versions of the software that were in use at times relating to the collection of data upon which the Firm relied. They agreed that they could not make unqualified statements relating to the reliability of the software used but could draw some inferences on its operation. They agreed that the tests run by Z and CV were not exhaustive but did show the software was running effectively at the time at which the tests took place.
110. The experts also agreed that until a file was wholly downloaded it would not "run". But they regarded it as a reasonable inference that someone who was identified by monitoring software as being apparently in the course of downloading was in fact seeking to acquire the whole file. Moreover, even before the file was wholly downloaded, the downloading computer was in a position to provide others with copies of the pieces of the file which they had already acquired.
111. The experts agreed that the Firm had used a formula for the calculation of damages that involved using a limited number of snapshots from the monitoring software to estimate the point at which an individual started sharing a copyright work, and the point at which they had downloaded 100% of that work. There were then further extrapolations. Although not claiming expertise in assessing quantum of damages, the experts agreed that based on the types and quantity of technical information available there was no single obvious definitive formula but rather a variety of such formulae, many of which had some plausibility but against which objections could also be drawn. They agreed that the Firm had set up the basis of their formula clearly and provided the data in a transparent fashion.

112. The experts further agreed that a thorough examination of the hard disks and data media of someone accused of downloading infringing material would produce the best picture of their activities. They agreed that this was not the only way in which salient facts could be established, and they also agreed that on grounds of cost and intrusion such an examination should be contemplated once parties to potential litigation had failed to agree on the significance of evidence acquired by a monitoring software and ISP data. There were various other matters upon which the experts agreed but they did not relate to matters which had been of particular issue in the proceedings.

Mr Andrew Clark

113. Mr Clark was sworn and confirmed the truth of his report dated 28 April 2011 and his supplemental report dated 12 May 2011. The witness explained that when an IP address was identified as transferring infringing material, that merely identified a premises or a router; it did not identify the computer that was being used for the infringement, nor did it identify the individual who was doing it. From a technical point of view the witness could identify various possibilities which led to people protesting about the claims made against them. First it was necessary to validate that the monitor software produced the correct IP address. Second, the person who had received the letter might not have been the person who was moving data over that link. Thirdly, the data that was used by the ISP to cross refer the IP address to the subscriber might have been used erroneously and it was possible for a third party to get access to the credentials associated with that subscriber's modem so that it appeared that they were associated with that subscriber. There were three forms of internet connectivity: dial-up modem, ADSL modem and cable modem. Masquerading as someone else was possible in respect of an ADSL modem or a cable TV modem. In his report the witness had stated that possession of peer to peer filing software was lawful and the software could be used to share files that might be freely distributed without restriction. It was routinely used by software developers as a mechanism for sharing files that were of benefit to the community. The process of producing IP addresses in response to a Norwich Pharmacal order could involve a human being taking one entry from a database and looking it up on another system. As well as circumstances where someone "piggy-backed" on an unsecured wireless router in the vicinity, it was possible within a building, for example student accommodation where an individual was permitted to use the connection, for others in the building not to know what activities that person was undertaking. The report which the Firm had secured from CV had stated:

"Of course, identifying the IP address only identifies an ISP's registered client. Nothing can be assured about the actual identity of the computer user who may or may not be the client. Also, if the client has registered a false name, the IP trail alone will not correctly identify him."

114. Mr Clark explained, having regard to the fact that there were various versions of the monitoring software, that software would be changed to enhance it by adding new features and to remedy any defects which had been discovered.
115. In cross-examination the witness explained that peer to peer software as it presently

existed came into existence as a second tier of sharing of copyright material. The first tier involved people who were centralised information sharers from whom infringers could take copyright material free. However, it was easy to track down and close down such infringers. In second tier sharing the software operated specifically to engage in a process by which an individual collected pieces from others. Peer to peer software would typically, if left alone, once one had collected everything, continue to make pieces of the work available to others that requested it unless the individual operating the computer had specifically told the software not to. It was possible for someone to acquire a file legally and then copy it to their sharing folder so that it could be made available to others. The software made the decision as to where to collect the various pieces of the file sought from. Mr Clark confirmed that the person who was making the material available did not have to be present during the process, they simply had to have left their computer on, with the peer to peer software running. Downloading the entirety of a game or film would take a long time.

116. The witness agreed that the question of a dynamic as opposed to a static IP address had significance only in that it was a different way of allocating an IP address. In terms of the information provided by the ISPs, which they had gathered from various of their sources, he said that if their systems were operating correctly one would have a high degree of confidence that they would be producing the right answers. He agreed that the witness statements provided by the ISPs carried statements vouching for its level of integrity. Such statements would be relied on in the context of criminal proceedings for the purposes of the criminal burden of proof.
117. With reference to how someone not authorised might make a copyright work available via a particular modem, the witness stated that if someone was using your network without your knowledge you might be completely unaware of the fact. If you happened routinely to look at all of the LEDs on the front of your router and saw activity when you were not there you might be suspicious, but one could not assume that people would be able routinely to use your network and you would always spot them. The witness took the view, having regard to the amount of time required to download a game or a film that in a wi-fi rich environment where there were a lot of flats, an individual might discover that many of those were open and could be logged onto, thus creating a real opportunity to download a large work. He stated that he and Professor Sommer agreed that fake IP addresses were not at all practical. It needed real IP addresses to exchange real data. The witness agreed that it was a reasonable inference that a computer running peer to peer software at a particular IP address, where it was identified by the monitoring software as apparently being in the course of downloading, was in fact seeking to acquire the whole work, it having been commanded to do so by an individual, as that would occur unless the command was cancelled.
118. In terms of the method of calculating damages used in the Barwinska case (Claim No: PAT 08023) (Central London County Court, Patent County Court), (Judgment 21 July 2008), the damages were capped by reference to the average number of primary sharers that might have taken advantage of the Barwinska sharing offer. He took the view that it was not improper to choose just two data points and draw a line between them to estimate the period at which it was thought the material had been shared. In re-examination the witness agreed that there was an instance in respect of one of the ISPs where cloning or modification of cable modems had occurred, notwithstanding

his and Professor Sommer's general view about the use of fake IP addresses. He agreed that peer to peer software would seek out all of those locations that were able to provide all of the pieces and then download selectively from each of those sharers to do so as efficiently as possible. Someone might have a piece of a desired file but it might not be downloaded by someone else because the software never chose to download it from them. Mr Clark also confirmed that when a user installs such software they could configure it to limit the number of simultaneous connections that they allowed with others, and there were other ways in which it could be limited. One would have to look at the computer itself to see how the peer to peer software was configured. Some peer to peer clients would have the ability to say that they did not wish to share. The point at which someone chose to inspect a computer would depend on the correspondence between the two parties. In the criminal cases [in](#) which the witness had been involved as an expert, the computer was invariably examined but this was usually following seizure by the authorities. The witness also confirmed that it was possible to begin downloading, turn off the computer, move it somewhere else and resume downloading, eg by moving from one internet cafe to another.

Professor Peter Sommer

119. Professor Peter Sommer affirmed. He confirmed the accuracy of his report dated 20 May 2011 save for a slight change which had been made and referred to in the joint notes. The witness took the view that there were no absolute standards which applied in all circumstances for assessing the weight and reliability of evidence that was produced from computers in court. The sort of test he thought would need to be applied initially was: Is there sufficient reliability to write a first letter to an alleged infringer and write to them in particular terms? The underlying methodology for the monitoring software seemed to him to be probably the only one that could be used. The testing which had been done would give sufficient confidence to proceed.
120. In respect of cloned modems this was possible only in respect of a cable provider, one of whom had been involved in this matter. It was normally carried out by an infringer who wished to access television via someone else's cable connection. In terms of the ability of a computer owner to configure file sharing software to limit it, Professor Clark had testified that a program that had been configured so that the owner was not prepared to share files, would fall outside the investigation altogether. In terms of the possibility of using general wi-fi open access to download a large file on a piece by piece basis, the witness had not experienced that as a significant feature. It would be practically inconvenient for people to try to do that. He regarded wi-fi access by someone not the owner of the modem as a plausible excuse only where someone was living in bedsitter land. Other than going round and asking neighbours whether they were doing it, there would not be any other method of identifying by whom it was being done.
121. In cross-examination the witness confirmed that there was sufficiently reliable material to write a first solicitor's letter. In his report the witness had said:

“This process can be compared to a series of timed snapshots. The monitoring programs download the pieces and collect whatever information is available on each occasion. Each repetitive snapshot involves the monitoring software acquiring a piece of the entire work from whomsoever on the P2P network is

offering it. The information available to acquire includes IP addresses and other material which might uniquely identify a P2P user even where, as will happen over a period of time, the IP addresses will change... The output of the programs and the successive snapshots are thus able, potentially, to build a partial picture of the activities of individuals over time which can assist in formulating a prima facie case against them.”

The witness considered it a fairly remote possibility that the monitoring software would identify an IP address incorrectly. He agreed that having an IP address and the name of a person to whom it was allocated got him to the front door of a house figuratively speaking. He took the view that the subscriber to the ISP service was the most obvious person to be going to in the first place. Where that individual disputed liability there were various possibilities, amongst which the witness regarded it as a very very low likelihood that the monitoring software would make an incorrect identification. It was possible for the ISP to misidentify the name and address of the person to whom the IP address had been allocated. This had occurred. The third possibility was that a person’s modem had been used for uploading or downloading and a computer in the building or even their own computer had been used but they didn’t know that anything unlawful was occurring on it. In terms of use by another, there was also the wi-fi situation where someone in another location used the connection without the individual’s authority. In the previous scenario someone using the computer with authority might have carried out the infringement. In the face of a denial solicitors would have to make a judgement about whether to pursue the claim. If they had evidence of multiple hits over a prolonged period of time they would be less inclined to believe the recipient of the claim letter. Examining a computer was rather an expensive exercise. A judgement then had to be made whether the risk was worth it, having discussed it with the client. Where there was one hit only, the realistic choice was to drop the claim or inspect the computer. The witness agreed that the question of the reliability of the material supplied by ISPs was as Mr Clark had said, dependent upon the operation by them of their own processes. They were subject to various statutory requirements to retain data. During the course of this evidence it was clarified that in the letter of claim to Mr Golding, who had given evidence, that there had been a mis-transcription from the source material into the letter of claim, such that he was erroneously accused of infringement via four different IP addresses at the same point in time.

Mr David Joel Gore

Examination in Chief

[Throughout his evidence the witness used “we” here reported as “they”. The words the “firm” or “Respondents” have also been used where the sense indicated that they were appropriate.]

122. David Joel Gore was sworn and confirmed the truth of the composite witness statement dated 6 April 2011 which had been prepared by him and the First Respondent in respect of the proceedings. The witness had qualified in 1978 and spent most of his working life at the firm. He was a partner involved in intellectual property and copyright which was one of the practice’s specialities. He had also been a member of the governing board comprising four equity partners. Individual partners

charged with a particular task reported back to the board. It was part of the firm's system of work that each fee earner had to record their time on a daily basis. There was no expectation that the accumulated figure in the file sharing cases would be charged out against the retainers. The Firm was going to charge what had been agreed with the client. Time recording was a management tool designed so that the firm could have an idea of how much time people were spending. The firm's year end was 30 June and the write-off took place on 29 June 2007 as part of the practice of writing off work in progress that was not going to be billed, and so should not be liable for tax. The existence and the writing off of the figure did not impact upon any of the decisions that the witness took in respect of recommendations to the clients. The clients never complained about the operation of the retainer save in one instance where a client's title had been in dispute for a period and the firm had retained monies recovered pending the resolution of the issue in the client's favour. There was an expectation from the outset that litigation might have to follow from the claims, of which the clients had been made aware. The firm had quite a wide measure of discretion but would go back to the clients from time to time on points of principle, headlines, and main points. Defences to the letters of claim were looked at individually but not by the witness. They were dealt with in terms of themes and policies which would be discussed with the client. An example of such a theme was where the recipients were on benefit and couldn't afford to pay. The recommendation to the client was not to pursue them provided they produced evidence of benefits.

123. Having regard to the discussion with Mr F of Counsel it occurred at a very early stage of considering the claims and they wanted to pick his brains. He had been involved in the BPI cases. No materials were provided to him in advance of the conversation. They were interested in finding out more about the BPI file sharing claims that had been widely reported.

Cross-examination

124. The witness confirmed that the approach taken to the witnesses who had received letters of claim was probably not untypical of their approach to individual defences. He confirmed that he was aware of his duties as a solicitor. The witness agreed that when this file sharing work was being contemplated in late 2006 it had the potential to be a large scale operation involving thousands of members of the public. The BPI action had not been anything of this scale involving possibly 33 claims. The witness agreed that no-one in the UK had attempted to bring thousands of claims against file sharers. No separate advice was taken on the professional positions of those involved. A considerable amount of time was spent thinking and talking about all the implications in the early months. The witness agreed: that it was possible that prior to notification of the Applicant's enquiry that the firm intended to make approximately another 7,000 claims; that many individuals were in receipt of claims but very few led to court proceedings; that approximately £357,000 was paid in consequence of some 1,561 claims by members of the public and that around 4,000 claims were outstanding because Dp claims were transferred elsewhere and clients A and Cm withdrew instructions. As at January 2008 six claims had been issued against people who had not responded, and no contested claims were pursued. The witness was not involved but understood that it was the intention to start off by bringing 100 claims for Tw. That was delayed by the fact that they were seeking to arrange after the event insurance but the intention was there to issue a lot more.

125. It was agreed between the parties that in order for an individual to be liable for a copyright infringement, that individual must have, him or herself, either substantially infringed copyright or authorised another to do so. The witness agreed that at the point the letters of claim were written it might well be the case that an individual whose IP address was associated with some form of uploading had no involvement with unlawful infringement but that would not be known until they had received the letter and dealt with the claim against them. With the prima facie evidence they had, the witness thought it was reasonable to write to the subscriber, and it was a reasonable inference, until the recipient told the Firm differently, that they were liable for infringement. He contended that it was the appropriate way to pursue the claims by a letter before action threatening proceedings if money wasn't paid within 14 or 21 days. He considered the system to be responsive. In the first quarter of 2007 there were queries about the evidence from recipients of the first letters. They changed the letters, trying to deal with people's concerns and improve on what they were doing. The witness accepted that there was an obligation to protect the reputations of the copyright owners or licences holders and that the First Respondent was principally responsible for the design of the scheme as it operated.
126. The witness was part of the file sharing team but not involved on a day to day basis in the sense of dealing with the responses or going to court, he was involved in the headline issues. Management of the firm took up a lot of his time. He agreed that he was the main witness on the Norwich Pharmacal applications which stated:

“I am a partner in the firm of Davenport Lyons and supervise day-to-day conduct of this matter.”

He was more involved in the Norwich Pharmacal work in 2007 but very little involved in 2008. What was said in his witness statement was something put in a rather formulaic way into witness statements. It was important to look at the substance of what he did. His involvement was relatively limited in terms of the overall operation of the scheme. He agreed that from his witness statement the court was intended to understand that recipients of the letters would be given a fair opportunity to address the allegations in the letters of claim, and not prejudiced by the ISP revealing their IP address. The witness agreed that in the non-contentious retainer agreement with T [dated 16 October 2007], written by the First Respondent, it said:

“In accordance with our Terms of Engagement, I will be your Client Care Partner and will also be the Matter Manager for this matter. David Gore (partner), JH (Associate), and NG (Assistant Solicitor) will also handle the matter on a day to day basis,

The witness did deal with the matter as necessary but not on a day to day basis. He did not think that it mattered unduly if the situation changed, so long as the clients knew who they were dealing with. He reported to the Management Committee on the operation of this activity. In respect of an email from the First Respondent of 18 June 2008 to an in-house lawyer at Cm, regarding Cm's concerns about PR, the witness explained that certainly before June 2008 he had advised the First Respondent that he would not be reading all the emails, and that if the First Respondent had anything specific he wanted to talk to the witness about he should come and do that, and they

would go through the matter and that was how they proceeded. It was therefore possible that he had not seen particular emails.

127. In respect of protecting the reputation of clients and the Games Industry article of August 2008 which referred to:

“This grubby, nasty little action, however, is about as far as any games company could ever get from the right way of tackling piracy.”

the witness agreed that it was certainly not pleasant but the clients were grown up entities who have been pursuing these claims in Germany before they had come to the firm and knew what the public reaction was. Cm had not done that but there were discussions about the possibility of adverse publicity with their in-house lawyer. He agreed that the adverse publicity led to Cm withdrawing their instructions because they did not like the reaction. The same was true of client A. While the witness was sure some people would be distressed to get the letters of claim, he did not believe that pursuing such matters on such a scale might harm the client's reputation. In respect of an article which had appeared on the BBC website, client A had been reported under a heading “Shocked and disappointed” as saying:

“The costs and lost revenue caused by the widespread illegal copying of games causes much damage to our industry, directly affecting the many talented, creative people developing the games, and also our customers. Taking action to defend our rights is necessary, but it is very important to us that any action taken is fair and appropriate. We believed that Davenport Lyons' methods were totally reliable and accurate. We were shocked and extremely disappointed when we found out that they had incorrectly accused one household of illegal copying. As a direct result we told Davenport Lyons to take no further action on our behalf.”

It was not correct that the Firm had incorrectly accused the M household. They had been given the information by the ISP verified on a witness statement.

128. The witness agreed that Ls had reassured T in respect of its concerns about reputation but Ls was not an apologist for the firm or its partners, but engaged as forensic computer experts. The proceeds were not being "shared" with them, both the firm and Ls had an entitlement. The money was all paid into client account and from time to time the firm accounted, making various deductions that had been agreed and then took its entitlement which was a percentage of what was recovered. It was a share of the proceeds in that sense. “Revenue sharing” was a shorthand in the firm's emails. The client T also had concerns about reputation and there was an exchange of emails with one of T's managers at the end of October 2008 with the First Respondent, including from the manager:

“My overall conclusion after delivering the report to our management was that the results they saw are insufficient for them to willingly invest more resources into the proceedings. As discussed at the very beginning of our cooperation the whole situation is not doing us any good in terms of PR and it's very hard for me to convince the board that it is worthwhile continuing the proceedings considering the figures provided in the latest statement...”

The witness had not seen this email but thought that there were figures to back up that the activity was having a deterrent effect.

129. Having regard to the telephone conference with Mr F of Counsel, on 5 December 2006, on which both Respondents and Miss H of the firm had been in attendance, the witness's attention was drawn to the note of the conversation. Counsel referred to Lord Woolf in *Credit Lyonnais* and also to the case of *Pattersons v Zirconis* where it has been stated that mere facilitation is never sufficient to create a liability for the facilitator. It should be remembered that a wireless network can be used lawfully as well as unlawfully, as per *Amstrad*. There had also been references to looking at the terms and conditions of the ISP to see if there were any obligations on securing the network using encryption. The witness agreed that the authorisation point was being discussed with Mr F but this was not advice from Counsel. There had been no instructions, they merely wanted to pick his brains. They had considered the matter in detail, and he did not agree that this was advice which affected the client's interests and should be reported to them. He suggested that mere facilitation never being sufficient to create liability was something that was absolutely arguable. He did not share Counsel's views. The witness accepted that they should advise the client about their view of their legal position and it was their view that they had a good and arguable claim. They had not specifically shared Mr F's views with their clients. The First Respondent in correspondence to the clients had told them that this point had not been tested in an English court and that no litigation was certain.
130. Having regard to the advice of Counsel Ms M of 30 June 2008, it had covered the issue of infringement involving "a substantial part" of the work. The witness commented that something which most people would not consider very substantial for copyright purposes could well be substantial. He agreed that the advice included:

"I was asked if I considered that the use of an unsecured wireless router fixed the holder of the IP address with liability for copyright infringement as having impliedly authorised the infringement. I think this is extremely unlikely..."

The witness had no knowledge of whether that view had been shared with the clients because he wasn't dealing with matters at that stage. He could say that they had shared with the clients, although not exactly when, that the wireless router defence was one where they advised that the clients should not be pursuing and the clients agreed. Counsel had been dismissive of an alternative claim in negligence:

"I conclude that the merits of such a claim in negligence are extremely poor to hopeless, saving cases where exceptionally a defendant admits letting someone else use his computer internet access in circumstances where it is obvious, or very likely, that he will use it to infringe. How likely a scenario is that?"

The witness agreed that the witness Mrs M was being written to on 8 July shortly after this advice was provided. The witness agreed that the Firm was holding IP address holders responsible for their connections, and therefore holding them liable for any infringing activity occurring on it - that is what they were advancing in the letters of claim. It was put to him that he had now seen two barristers' opinions which

indicated that that was not correct in law. The witness took the view that they had a lot of expertise in the area in the firm. It was discussed and their view was that it was a very arguable case.

131. Having regard to the investment of time in the activity, he agreed that he had told Tw in an email on 26 March 2007 that the firm had invested £150,000 worth of time:

“I understand from Ls that they are prepared to make some contribution. We for our part consider that the investment of our time of around £150,000 amounts to a disproportionate share of the risk. Your cash investment to date is \$4,000.”

but wishing to be profitable was not the overriding requirement. He agreed that more people needed to pay in order to increase the Firm’s entitlement but the time of the staff was that of those not working to full capacity so it was not uppermost in their minds. The witness regarded as “spin” an email from the First Respondent to Ls, including:

“We need to speak about a couple of things relating to my meeting with the management committee today. The first is that I gave figures to them on Tuesday based on stat reports received last week from your guys. They were showing around 11,000 IPs in total, and now I am told it’s only 4,000. This has caused some embarrassment, not to mention the fact that our estimates are way off the mark and considerably below what they should be. The management committee has requested that we receive the minimum of 25,000 IP addresses (to write 5,000 letters) within the next 12 months in order that this is a workable business...”

The witness stated that one of the considerations of the governing board was whether they wanted to continue the work. The management committee was concerned in the sense that they had made an investment and they were looking at whether they should simply pull the plug. Effectively they were looking at a sort of business plan on a quarterly basis, which the First Respondent was relaying to Ls. He agreed that the reality was that the firm needed to send more letters in order for this to become profitable and that it was writing to Ls in order to obtain reassurances that more letters could be written. An ex member of the management committee had produced the figures. The witness stated that the firm was not trying to make a fast buck but to do the work properly and to make a return based on that. The witness agreed that in October 2008 the firm needed to increase its percentage share. He also agreed that they hoped there would be a return from carrying on with the scheme in respect of Dp and aimed to make it as profitable as they could. It was in respect of Dp that the firm sent out the largest number of letters for any client. The claims for Dp covered music and pornography.

132. In respect of the letters of claim and pursuing them in terms of demanding a fixed sum of money in the manner of a debt collection, the witness stated that the methodology was to demand a fixed sum of money as settlement of a claim for infringement of copyright, but agreed the amount of liability was unknown. They had gathered evidence which they had shown to the clients that the damages would be considerably in excess of the amounts that were being asked for. The witness was referred to an

email of 9 February 2007 from him to NG of the firm about a recipient of a claim letter whose wife had replied that he had suffered a massive heart attack in 2005 and was on benefits and low income, and was seeking a payment plan. The email read:

“The difficulty in doing serial debt collection is to sniff out the true stories and the lies - the fact is that over a period of time someone has used the PC for unlawful purposes. My instinct is that the story is a bit far-fetched. They do not appear to be talking about unsecure wi-fi laptops but a number of PCs in their home ...(?), that somebody other than members of their family have been using. Maybe we should check with DH [of Tw], but if they are paying up after advice when according to their story they are on a low income and would qualify for legal aid, it is possible that there is something in our claim. Put some steel in your heart, NG - unless you all think I’m being too hardhearted.”

The witness said that they had done the first mail out and it was necessary to look carefully at what people were saying. He referred to a case where proceedings had been brought and someone who had initially denied liability later admitted it. He attributed the reference to debt collecting as “loose wording”. “It’s not the happiest email”. The witness stated that they were prepared to listen to what people had to say. What he was saying was that they needed to not just take what people were saying on face value. The witness was then referred to correspondence with Mr FM, responded to by his wife Mrs M, referring to a power of attorney. It said that the client’s product may have been illegally downloaded by somebody illegally accessing the internet. In an internal exchange of emails NG of the firm had set out:

“In my view they should be refunded (assuming it’s true), as clearly bad PR potential is huge - he’d been dead for 2 years!! It’s a bit like getting a post mortem council tax demand. We all remember the fuss the press made about those cases a few years back.”

The First Respondent’s reply to the email said:

“I think we should be careful here. First the letter does not say he is dead, but has had a heart attack and it is his attorney who is writing on his behalf. It is of course possible that a family member has accessed the addressee’s PC and infringed. If we just roll over in this situation and this is a hoax (obviously we have not seen the power of attorney at the moment and should ask for it), and it gets out on the forums, we will get this all the time. We should therefore get the Power of Attorney and then decide what to do in this situation. It may be that whenever the addressee is deceased or is very ill and they can show this, then we back down, for the reasons NG has stated.”

The witness agreed it was in response to this email that he had suggested that NG should put some steel in his heart. In respect of the inclusion in letters of claim of the threat of criminal proceedings the witness agreed that in a note of an internal meeting on 6 September 2006 it was agreed:

“that it would be a good idea if possible to include the threat of criminal proceedings in the letter before action to apply maximum pressure to the infringer...”

He took the view that it was appropriate to include the threat because they were confident that the person to whom they were writing had committed a crime, until they heard from them what they had to say, although he agreed that some of the recipients might have been innocent altogether.

133. Regarding fee arrangements, the witness agreed that they had been to Counsel to get advice about conditional fee agreements but not about the contingent fee agreements, under which they were actually collecting fees, even though at the September 2006 meeting concern had been expressed about whether the arrangement with Ls was champertous. This was because they had discussed it internally with the Head of Litigation and believed that the work fell under a properly non-contentious agreement. He was then out of the office for several months because of a bereavement and by the time of his return the first retainer agreement had been entered into. The CFA had been taken over by RB of the firm in March 2008 with the First Respondent involved to some extent.
134. The witness agreed that in respect of follow-up correspondence it had been suggested to people who said early on that they were not responsible for file sharing but that it was a third party, that they should identify the person they claimed was responsible and arrange for that person or their parent to send a signed undertaking together with the payment within seven days or proceedings would be commenced against them. In an email of 19 March 2007 JH of the firm wrote copying in the witness, the First Respondent and another person, saying inter alia

"Clearly the most reasonable approach in the Court's eyes would be to just ask for the third party's details and write to them separately. This has to be balanced against the extra work it would create for us and also of the likelihood of this actually coming before the Court. If we do go ahead and issue proceedings against the individual originally identified by the ISP, they will have to raise in their defence if someone else is responsible."

In response to the suggestion that this was shifting the burden of proof, the witness said that the recipients did not have to do what was suggested but it was necessary to test their statement that they were not responsible, and this was a way of doing it. He described as a sort of off the cuff remark the email advice given on 27 April 2009 to Ms SB of the firm by NG, about four categories of responses to the letters of claim, including people who said they had secured encrypted networking not working and did not see what else they could have done to protect themselves:

"Serve claim form on everyone who hasn't paid or lose credibility. The word on the forums is that we won't bother and that best course of action to either stick 2 fingers up or create nuisance value until we go away."

The witness's reply on the same day had been:

"agreed - main problem is getting instructions from client to sue and pay our costs on a normal basis, which I am writing to him about"

He disagreed that they wanted to create the impression that they were going to drive

the claims if necessary into proceedings in order to make more people pay up.

135. Having regard to the letters of claim, and particularly the analogy of theft of the game from a shop, the purpose of the letter was to create pressure in the sense of a normal claim that would be made by litigators. He agreed that the Norwich Pharmacal application referred to a prima facie case that the subscribers associated with the IP addresses had copied the work onto their personal or office computer without permission for the purpose of making it available on a file sharing website. The letters had not been exhibited to the witness statement for the Norwich Pharmacal applications, but the witness said the claim was set out very clearly, including both copying and uploading and making available. He agreed that a lay person reading the letter would be given to understand that they had improperly copied onto their own computer the game in question and that a number had written back saying they had not done that. They could have left out of the letter the information telling people that there was a risk that if this matter went to court the costs would be substantial but on balance thought it right to put it in. It was a judgement. He agreed that it was designed to create pressure to pay.
136. In respect of one of the letters to Ms D of 22 March 2007, which included a statement that they had advised their client that a claim against her would be successful, the witness said that they had not advised Tw that a claim against Ms D individually would be successful. Whether proceedings would have actually been taken against Ms D would have depended on what she had to say. They had advised Tw that they believed that these claims were justifiable and were likely to succeed, subject to any defences that people might raise. He agreed that some six months later on 18 September the First Respondent wrote to Tw including under the heading "The Risks of Litigation" a reference to the fact that the evidence Ls produced had not been tested in the English courts and that there was no guarantee it would be accepted, and also that even if it was accepted the wireless network defence had not been tested in the English courts, and there was a danger that that or another defence would succeed. The email also advised about real difficulties having regard to whether the costs being incurred were proportionate vis-à-vis the damages to be recovered, although they felt this problem would be surmountable. The witness interpreted that email as setting out that success could not be guaranteed. In respect of a statement in a letter to Ms D of 22 March 2007:

“Given the nature of our client’s evidence (which has already been presented to, and reviewed by the court in obtaining disclosure of your contact details)…”

the witness disagreed that this was intended to create in the mind of a lay reader that the court had already considered that there was a good claim and therefore they were to pay up. The witness also said that they did have instructions to start proceedings for Tw in March 2007 in the sense that they had spoken to the company and said that it would need to bring proceedings and the company had agreed. There had been talks about bringing test actions. They had instructions to threaten proceedings as part of their remit as Tw’s lawyers. The witness agreed that in the letters there was a reference to taking steps to enforce the debt created by any court action, against property. It was not intended to make an individual fear that his or her home might be at risk if they did not pay. It referred to property generally that could be the subject of

a warrant of execution. He agreed that someone receiving that letter would be entirely justified in fearing that if they didn't pay their home might be at risk. The witness went on to explain that when that was commented on by people in the responses it was removed because it was confusing. Recipients could take legal advice and were advised to do so in the letter. If they could not afford to take legal advice there were other sources where they might be able to get some help and it was clear from the witnesses that people did go elsewhere. He agreed that the 14 day period was ticking away in respect of recipients of letters getting legal advice.

137. In terms of the reference to the Code of Practice of Pre-action Conduct in intellectual property disputes of January 2004 and the statement that the claim letter was in compliance with it, its purpose was to refer to the protocol. The protocol referred to disclosing funding arrangements. In an internal email of 14 September 2007 the First Respondent had said:

“Subject to any comments DG may have it seems we are fairly complicit. The point about giving details of any funding requirements (depending upon what that means) could, as you say, cause difficulties, and is best avoided. ...”

The witness did not know what those difficulties were, but thought funding arrangements might refer to CFAs and matters of that nature, and there were not any CFAs at that stage. He agreed that they could have told their clients that they needed to give details of any funding arrangements, and that if the clients agreed there would have been nothing to stop them revealing the arrangements. It had not occurred to him that they needed to disclose the funding arrangements. He agreed that if to comply with the Code of Practice they should have been revealing the contingent fee agreements then they wouldn't have been compliant.

138. In respect of the pack of papers which accompanied the claim letter to Ms D [and others], the witness explained that the purpose was to deal with the fact that after they had sent the first round of letters people were writing in seeking evidence. The pack was not designed to add weight or credibility but to help people understand. He agreed that it would have been open to them to inspect computers where this was offered. Instead they decided where people raised the wireless router defence, that they would not pursue them and wrote to them accordingly. The second set of Notes of Evidence included the wireless router defence. The witness agreed that in a very few cases individuals who had offered inspection were still being pursued. In respect of a further threat to commence proceedings against Ms D they did not go back to clients every time they received a letter from someone denying liability. They were dealing with hundreds of claims. After the first letter had been written to Ms D a letter was being drafted to Tw seeking authority to commence proceedings. The witness explained that they had a retainer which said they would need to enter into a fresh retainer when they issued proceedings.
139. In respect of monies claimed against Ms D the witness stated that all that they claimed against each individual was the cost for the ISP's search against them and nobody else. The clients agreed that it would not have been right to charge for blank results from ISPs. An attendance note of the First Respondent's copied to him on 26 February 2007 was put to him. It said:

"In relation to proportioning any ISP costs where we get no data, he [DH of Tw] said he could see the commercial risk that would be involved if we did not do this. He wanted to have a discussion with Ls about deducting first from any monies that came in, the amount of the ISP charges. I said that this made sense and I suspect they would not have any problem with that. He said he would speak to them. In the light of the above, he agreed to increase the amount claimed from the infringers from £250 to £300 in order to cover the shortfall if less than 50% of the infringers did not pay up. His reasoning being, if the average ISP charge was £50 based on the £100 that he and Ls were getting and only £50 was recovered, this would break even on the costs."

The witness responded that this was a discussion with the client and it was a matter for the client as to the amount of the settlement sum that they wished to claim in the light of the overall costs and the model. He agreed that the firm would benefit from the increased sum but that they could have included an awful lot more in these sums if they had wanted to. These were the figures that the client came up with. He stated in respect of quantification of damages generally that it was a very important part of the claim. They did consider the damages very early on, and consideration continued right the way through.

140. In respect of the mention in a letter of 15 January 2008 to Ms D, of a default judgment obtained against someone described as falling into the same category as her where it was obtained against a non-responder, and she had responded, the witness stated that it was their job to pursue claims against people. The witness could see that someone who had not committed any wrongdoing might consider that this form of letter-writing might constitute harassment which Ms D said she would consider any further letters from the Firm to be. Having regard to the fact that Ms D then received a letter informing her that unless they received her written undertaking of payment within the next seven days they would seek their client's instructions to commence proceedings without further notice, the witness said that they would discuss with the client whether they would be taking proceedings against Ms D specifically.
141. In respect of replies from the firm to individual responses from recipients of letters of claim, the witness explained that they were bespoke but they were based on templated responses drafted by trainee solicitors or paralegals and then reviewed by a solicitor. He was referred to an email from NG of 8 March to the First Respondent copied to him and others. In it NG said:

"Sorry to keep banging on about this but if we have to keep drafting bespoke responses the business model simply isn't going to work, is it?"

The witness explained that at this point they were feeling their way in terms of responses and the matter was debated. The First Respondent had then produced template letters which the witness thought covered most of the issues that were being raised. When various responses were received to the first batch of letters they did pause in the sense of looking at the responses. A good percentage, 25% or more, paid admitting liability. 50% did not respond.

142. Having regard to the case of Mrs M where the claim was made about 15 months after that against Ms D, the witness confirmed that he did not have any reason to suppose

that she was anything other than an entirely truthful lady. He agreed that no reference was made in the letter to infringement needing to be substantial. The witness had no involvement in that word being removed from the firm's website. The theft analogy remained in the letter of claim. In respect of the interim payment of £1,000 which was demanded of her he was not involved in the decision making on that. The copyright claimed in favour of the Firm for the documentation which was sent to Mrs M was not intended to suggest that people should be prevented from taking legal advice. He was not aware of anyone other than Mr and Mrs M who thought that was the case. Mrs M had complained to him personally in a letter of 10 July. He did not think her complaint was obviously credible. He did not think there was specific profile for a file sharer. Evidence had been heard of older people having file sharing software. The witness did not know how a threat of proceedings could be made against Mrs M notwithstanding her contention that her computer might have been compromised through unauthorised third party access. The witness explained that the retainer with A confirmed that they would take a number of cases but not specifically Mrs M's at that time. He agreed that he was not aware of any consideration being given to obtaining a court order against Mr and Mrs M to inspect their personal computer and that to refer to that in the letter was off the point. Mr and Mrs M were advised that their ISP had already been put on notice of a breach of the terms and conditions of the contract between them and Mr and Mrs M. The witness did not know what the purpose of saying that to Mr and Mrs M was. There was no trace in the firm's files that the ISP had been put on notice. In respect of the reference in correspondence that Mr and Mrs M now owed a duty of care to all owners of copyright and the allegation of their breach, by failure properly to secure their wireless router, the witness explained that it was there as part of the overall thrust of the letter and in the advice of Ms M of Counsel there was a suggestion that it would be proper to write to people in that vein. It was part of what the firm was doing to get people to respond to the claims by paying, and the witness said that there would have been a lot of people unlawfully infringing. They did not expect people to pay if they were not liable. In respect of the question of the correctness of continuing to pursue Mr and Mrs M the witness could not comment because he did not deal with their case until after "Which?" had got involved and it had been established that they had been wrongly identified. He suspected that there was no consideration of the claim against Mr and Mrs M with the client at any point prior to the involvement of "Which?" three months after Mrs M had been written to. The follow-up letters were not dealt with by him and he very rarely dealt with follow-up letters. In respect of his non-response to Mrs M's complaint it was a source of frustration to the witness that the clear message from client A was that they were to pass everything on to A without responding. The retainer had been determined. In his response to Mrs M the witness had said "A solicitor acts on the instructions of his or her client".

143. In respect of the fact that the A retainer of 15 February 2008 did not include court proceedings and that under the heading "Funding of Litigation" it referred to funding five or so test cases from time to time, the witness agreed that they were threatening proceedings against every recipient of the letters. He believed that they did have a general authority to issue proceedings and to threaten proceedings against people.
144. It was put to the witness that one of the reasons why the whole thing went wrong was that he and his colleagues were pursuing claims on the basis that they were no different from volume debt claims. He was referred to an email of 8 September 2006

from him to KB, another member of the firm, following the Leipzig Game Show of 2006. He agreed that that would have been a day or two after the First Respondent had spoken to him about pursuing the scheme. It was put to him that in the email he said that he would like KB's input because of his experience of volume debt collection. The witness confirmed that he was perfectly content for the claims to be contested if they had written wrongly to individuals. Notwithstanding that the claims were pitched at £300 from a fairly early stage he did not expect people who genuinely said that they had not infringed copyright to pay. However he agreed that in the same email he had said:

“The payment is pitched low to make it affordable and less likely to be contested.”

The witness said this was a comment in an email. He rejected the suggestion that this was to ensure a sufficient rate of return even if people were not liable for copyright infringement. He was aware that they pursued people for payment even when they were protesting. He rejected the suggestion that people might give up because of the weight of the opposition and tactics used. There was a lot of information on the fora encouraging people not to pay. He confirmed that it was still his contention that there was nothing wrong with the model and his firm's proceeding with it.

145. The witness was referred to a case where a Mrs SM had responded to a claim in respect of music. The firm's letter of 27 March 2009 said “Assuming the child has no means to make payment to our client, and in the event that your child's written undertaking is not forthcoming within the next fourteen days, we shall consider with our client whether or not our client wishes to commence proceedings.” In a further letter of 30 March Mrs SM had said she was not responsible but her then 12-year-old youngest son had been. She said that she was unaware that either the software or the song were on the computer until she had received the Firm's letter and a friend had looked into it for her. They had long since been deleted. In her letter she had said:

“I therefore find it incredible that you demand that my son, a child, pay this, as he does not earn an income and in any event, your contention that he “remains legal responsible” is shrouded in ambiguity. You quote neither the age at which a minor becomes responsible, nor the legislation in which that age was enacted. So despite the fact it was not I that infringed your client's copyright, it is in fact I who have signed the undertaking and I who am settling your demand for payment. ... I will not have my child, who acted without any intention to break the law, to be the victim of your action. The true irony of all this is that he already owned a copy of the [music name] CD. I can guarantee your client, however that he will never buy another. My payment details are therefore enclosed under duress.”

The witness agreed that if the minor were to be actually held to account he would need a court order. He agreed that the mother said she agreed to pay under duress. The witness said that he certainly had sympathy but there was no denial of liability of downloading and uploading which had caused the client considerable loss. He also thought that a lot of 12-year-old children were quite savvy these days, and he might have been aware that he was illegally file sharing.

146. In re-examination the witness said that so far as he was aware, apart from the comment about the interim payment upon which Ms M of Counsel had raised an issue, she did not recommend any other significant changes in the way in which the letters of claim were to be framed. Nor had she expressed any reservations as to the propriety of the claims being made. He also confirmed that in the discussions with Mr F of Counsel it was Counsel's view that the terms and conditions of the ISP would be useful in providing evidence in court. That was the material which was being referred to in correspondence with Mrs M. He also said that if the figure suggested or sought in the letters of claim were significantly higher there would have been difficulty in getting people to pay and that it was in the interest of the clients that the figure should be lower. He was sure there had been a discussion with the clients about that.
147. In respect of the process manual and the use of template precedents the witness stated that it was not the intention of the practice that they should be used indiscriminately, and if he had been aware that this was happening he would have stopped it. The manual noted that all correspondence classified as sensitive needed to be examined carefully and consideration given as to whether standard precedents should be used. He confirmed that the manual dealt with a tier of seniority required in dealing with different issues. There were items that always required the involvement of a file sharing partner. These included:
- Any correspondence where the individual indicates that a Child might be involved in the file sharing, any recommendation for dropping of the case;
 - Any letters from important individuals or organisations such as MP, Consumers' Association, Trading Standards etc,
 - Any correspondence that is considered as sensitive."

Those matters were placed on the public website for frequently asked questions so far as he was aware. He would not have thought that it was possible from an immediate reading of a response letter to discern the truthfulness or otherwise of the responder. The fora showed that the attitude being taken by those who were admitting that they were file sharers from the very outset, was that a lot were saying that the amount being demanded was very low compared with what they would have to pay elsewhere, and they were seeking to assist people to respond to the claims and essentially not to pay.

Mr Brian Laurence Miller

Examination in Chief

148. Mr Brian Laurence Miller was sworn and confirmed the truthfulness of the joint statement dated 6 April 2011. The witness gave an account of his professional career, including a secondment to a computer games publisher and being head of legal and head of HR for an electronic media company for approximately two years. The witness stated that the first Norwich Pharmacal Order had been granted by Deputy Master Behrens whom he believed to be an expert in IT and computer law. Deputy Master Behrens had dictated the recitals to go in the order to the witness. The Deputy

Master had not asked to see a copy of the letter before action but the witness thought it was clear from the witness statement that they did make reference to the fact that people might have various defences, and it was discussed that they were going to be doing litigation. Having regard to the advice of Ms M of Counsel concerning the form of the letters of claim and various legal issues about the process, and statutory provisions, she said that her advice was subject to the need to refer the issue back to the experts. The witness confirmed that that had been done and that the experts had had no concern as to the legality of the search process.

Cross-Examination

149. The witness agreed that to be an infringer an IP address holder must have infringed the whole or a substantial part of the copyright in a work and if they had not been physically infringing they must have authorised the infringement of a whole or substantial part. The witness also confirmed that he was aware of his professional obligations.
150. The witness stated that not being a litigator he would not generally get into fee arrangements as this was obviously highly specialised. He stated that he brought the work to the firm, having met Ls at the Leipzig Game Show. He had written the ELSPA paper which generally laid out some ways in which one could proceed against a large number of people who might be file sharing. If you wanted to call that a scheme, which he then ended up doing quite by chance, as it were, a year or so later, then fine, but it wasn't something that hadn't been done before, not in such high volume but it was not unique. All of the processes used to run the scheme were supplied by the data suppliers, Ls and Dr on behalf of Dp. The witness agreed the letters received by the witnesses were not untypical. He did not think that the way they were approaching alleged file sharers was heavy handed. Listening to the witnesses had made him all the more convinced that the monitoring was accurate and that with the exception of Mr and Mrs M there were flaws in all of those who gave evidence, and from looking at the paperwork of the one or two who didn't, even then he could find matters with which he would have taken issue had it come across his desk at the time. Having regard to the fact that in his paper he had set out that the predominance of file sharing occurred in low income families his view was that there was still evidence that one of the witnesses on a low income was infringing copyright and that a lot of people on low incomes did commit offences, whether they were civil or criminal. In the context of not being able to know from the information that it was the person to whom the IP address was allocated who had been guilty of infringement, the witness said that there was an arguable case against the account holder, but if evidence from correspondence came to light that someone else had been involved then they might well either pursue them or enter into further correspondence with the account holder about them. Regarding the internal email exchange of 27 April 2007 about the four lines of defence people were raising, where it was suggested that claim forms should be served on everyone who hadn't paid or credibility would be lost, the witness said that the statement in that email was not followed. They did not issue claim forms against everybody. That was NG's opinion and it was the Second Respondent's opinion to agree with him. What NG said did not always go, although they did take note of legal advice that he gave initially. In terms of requiring people to write in, the witness said all submissions must be in writing. If someone wanted to make a legal submission about their case then they would ultimately also require that

in writing, but they could phone up and submit on the telephone, or tell the Firm what they thought had happened and it would be discussed with them, but they would then be asked to put submissions in writing. This was not intended to exclude telephone calls and many people did telephone. The witness did not necessarily accept that the member of staff who spoke to Mrs M on the telephone was rude, curt or laughed in her face. He found it incredible. He said that Mrs M tended to make extreme statements in her witness statement. It was not known what had really happened. He clarified that he had to accept Mrs M's statement on oath.

151. The witness disagreed that he had a mindset of disbelief which fuelled the way he dealt with cases. The witness took the view that authorisation of infringement could involve a person with an insecure PC and an outsider gaining access to it who had copied and infringed. It was still proper to pursue someone for money for infringement where they had not given permission for infringement because they had failed to secure their internet connection. The witness stated that this was an arguable case in the context of file sharing litigation. This was one of the many bases upon which letters could be sent out. He agreed that there was no English authority on the point. It would be a test case. There were foreign authorities. A Hong Kong case was referred to in Ms M's Opinion. The witness agreed that in the UK from 2006 to 2009 many, many households would have insecure wireless connections although less would now, because ISPs were delivering securer routers. It was an arguable case and a solicitor was entitled to send out letters to a potential defendant where he believed on behalf of his client that he had an arguable case. The witness stated that he disagreed with the view of Mr F of Counsel when he said that mere facilitation was not enough. Counsel was seeking to say that someone allowing their internet connection to be used by another was mere facilitation. The witness did not accept that that was necessarily a correct description of what was going on there, and it was in other words arguably authorisation. This was a point to be argued before a court. The witness stated that he was not responsible ultimately in deciding the legal issues and bases for sending out the letters. That was the litigation department's responsibility as he saw it, and throughout the matter he took the advice of people such as NG and then latterly RB who was advising much more on liability or negligence from January 2008. The witness did not regard the informal telephone conversation with Mr F as advice and he thought the telephone attendance note was wrong and that the call only lasted 18 minutes rather than 18 units. (Two hours). They were just gathering information. They did not relay the information about Mr F's views to their clients because they did not regard it as advice. They were aware before speaking to him that there was no English authority and were constantly talking about it as it was a test case. The witness believed that there was an email from NG commenting on the phone call and basically suggesting that they carry on. The witness throughout was not going to take responsibility as a non-litigator for any legal principles that were behind the case. He was prepared as the non-contentious lawyer to implement the scheme. If the firm's general view was that it was lawful he would supervise the paralegals, run the software, be responsible for automation, including sending letters of claim, drafting templates and so forth but at no point did he decide any legal principle or determine that this was how legally they would proceed, and therefore that they were going to proceed on that basis. He agreed that he was responsible for the letters, approved the templates and the follow-up letters but on the basis of prior discussions and agreement about what the legal principles were, how the scheme was to work, the basis or bases upon which they could correspond

with people, but if there were any issues that were unclear, or he was in any uncertainty at any time about any issue he would refer it to NG and/or others, copying in other people. There would be a debate and they would come up with an answer. It would not be him deciding. The witness agreed that he was the partner responsible for the day to day conduct of the client retainers and that the Second Respondent was the more senior partner with litigation responsibility. He agreed that the vast bulk of emails sent and received were from him and that he was effectively running the operation.

152. Having regard to Ms M's advice, which he had read, he stated that NG had been emphatic that the Amstrad case would not be applied to these sets of circumstances as it was old law, particularly in the light of proceedings going on in America regarding peer to peer. They had agreed with NG about this. The Amstrad case [CBS v Amstrad [1988] AC1013] indicated that the test for authorisation of infringement was whether third party use of the item/facility etc was bound only to be used for an infringing purpose or if it could equally be used for a legitimate purpose, there was no authorisation of the infringement. They thought Amstrad was being incorrectly applied by Counsel. He said that without exception they all thought that the opinion wasn't very good and that others had seen it since and said the same. He had not seen one solicitor yet who had read it and thought it was a good opinion. Quite the opposite. Initially they had not disagreed with the opinion but it was explained to him why it wasn't accurate in many cases, such as the Amstrad point, and he was led to be persuaded by that internally. The internal view was that the advice was generally not good in places and therefore was not to be followed. He felt that specialist lawyers were entitled to make up their own minds about such matters. In terms of the reference in the letters of claim to the use of the duty of care threat, where Ms M's advice had been that the merits of such a claim in negligence were "extremely poor to hopeless", the witness stated that RB of the firm led on this point and was adamant that you could argue a duty of care effectively to the world. He was an expert in agency law as well as solicitors' duties and liabilities and the witness was persuaded by that. They did press him to get an opinion from Counsel and RB told them that he had telephoned DM QC who had also confirmed that he felt RB was right and that they could run the argument. An email was located which showed the First Respondent sending the advice of Ms M to client A and three people at Ls. The witness anticipated that he the First Respondent would have mailed it to the other clients as well. That particular email did not show the First Respondent indicating that he disagreed with the advice, but the Tribunal was informed that there were other emails talking about discussions about the advice taking place.
153. The witness considered that in a peer to peer case the person did have control over the router in as much as they could say "you can use my connection, but not for file sharing". They could also install software that blocked any installation of peer to peer software on the network. Where it became apparent that people had insecure connections they suggested they take the advice of an IT professional to make sure it was properly secure so that damage did not ensue to third parties, copyright owners. It was put to the witness that his theory about people gaining access to computers was seen as a little beyond even his own information technology department and that he had wanted to give Ls unfettered out of hours access to the firm's IT work to carry out various software operations and his own IT person had said:

“You cannot run the argument one way for your case, and the opposite way for our own security, which is what you are trying to do.”

The witness submitted that on the Respondents’ theory they were saying that they would give notice to people that there was a duty to their client copyright owners and they had a duty of care and effectively were they to be again found to be infringing copyright they were on notice. The Respondents had told them and they would take action accordingly.

154. The witness was referred to an article which had been referred to him by AG, the supervisor of all the paralegals who the witness said was an expert in IT. The email from AG was dated 12 February 2009. The witness confirmed that he had not shared the paper or the advice in it with any of the clients. The paper examined hacking and using another’s wireless network to access the internet and concluded that there was no implied consent by not applying security to the network. The witness said that he was not sure that he remembered reading it and just as they wouldn’t share any other articles with clients they would not have shared this one. There were many articles saying different things. The witness said that they did not ignore the view. They added a paragraph to the last letter dropping the case where someone alleged that they had an unsecured or even a poorly secured wireless network. The witness said that they did maintain and still maintained that there was an arguable case that an internet account holder was responsible for his internet connection and therefore liable for any infringing activity occurring on it. Making the amendment in the letter did not say that they accepted the arguments put forward in the article which was from the USA. They were continually reviewing cases and thinking very carefully before deciding how to proceed. By the time they had got to February 2009 they decided that with the wireless type cases they would not pursue them at that point absent some special piece of evidence such as a username which might link the person to the infringement and therefore established that they were not to be believed.
155. The witness denied that in the letters of claim they were holding the recipients strictly liable for anything that happened on their internet connection regardless of what they said. The Firm did not use the words “strictly liable” but they were maintaining, as it said in the letter of claim, that they were potentially liable for authorisation. The Questions and Answers for telephone calls of 10 March 2009 said:

“We maintain that an internet account holder is responsible for his internet connection and therefore liable for any infringing activity occurring on it.”

The witness said the key word was “maintain”. They were not saying the recipients were infringing. It was an arguable case unless and until shown quite clearly otherwise, and ultimately it was a matter for a court to determine whether or not they had committed the infringement, not the Respondents. The text also covered cases where:

“You will find that the account holder is a parent of a child who has committed the act or a person sharing a house or flat with others who has the internet registered in their name. Some cases will involve individuals who have not properly or at all secured their wireless networks and thus allowed, either deliberately or negligently, a person or persons known or unknown to

commit the infringement. Again we believe that these people remain responsible for the infringements that we have evidence of.”

The witness confirmed that it was his belief as well as that of others. He suspected that this document and certainly the template letters were all run by the litigators. Everything was checked. He believed that AG, who was not a qualified lawyer but extremely knowledgeable about IT matters and experienced had drafted the Q&A. He agreed that he had approved it and that the version control showed his initials as the author. He had looked at it and amended it. He was the author on that basis. He wished to make the point that just because it also said it was authorised by him that he was not the only person other than AG who had been involved in the process. He would go through the templates with RB. He rejected the suggestion that because of his belief, firm or apparent, that he could hold the IP address holder liable for any infringing activity he had lost his objectivity and independence. The witness agreed that he had been seeking to suggest that RB of the firm bore responsibility for matters after January 2008. He agreed that RB was someone he considered reliable and trustworthy. He was the author of a book on solicitors’ duties and liabilities and it didn’t occur to the Respondents that they needed to seek professional advice other than from him on conduct matters. They had considered conduct matters. RB had written to the Applicant during the investigation on 6 November 2009. The witness had not seen the letter until after its despatch. Among other things RB denied that he had been the partner in charge as described by “Which?”. The witness said RB was in charge of litigation once he took over from the Second Respondent in or around March 2008. He was involved with difficult letters including with MPs. He was involved in quantification of damages and supervised the person who had day to day conduct of the litigation cases. The witness denied that he was seeking to offload onto others his own responsibilities. He was in a non-contentious Intellectual Property department in a larger law firm with at least two other partners. The litigation department had six or more partners. The witness said he was not about to become an expert in litigation but took the advice of the department concerned. Much of the work was copyright litigation so he did not take it upon himself to decide on points of principle or what things should say in documents. He ran it past people, as he properly should in a firm of that size. The witness stated that it was not true that RB had had no involvement in negotiating the terms of the firm’s retainers with its clients or the terms of any CFA. He thought that RB was the person who recommended taking counsel’s advice about retainers in June 2008 which led to changes being made. RB’s letter to the Applicant had been written after the witness had left the firm in July 2009 and the Applicant had not referred the letter to the Respondents for comments. He had regarded RB as trustworthy up until the time he the witness had left the firm. The witness confirmed that he believed he had got it right in relation to the file sharing scheme but rejected the suggestion that he would not brook criticism of it. That was not why he had changed from saying RB was trustworthy to untrustworthy. The witness maintained that he consulted the relevant people on every single point of importance in the matter. He did not go off on a frolic of his own.

156. The witness’s attention was drawn to an article in 2006 from Entertainment Law Review about claims made by the Recording Industry Association of America (the RIAA), who had filed 261 copyright infringement suits against individuals in 2003. It contained criticisms about the RIAA apparently being prepared to pursue

cases where the infringement was relatively minor or concerned minors, where many users agreed to settle out of court. The witness agreed it probably had echoes of some things in the Firm's file sharing scheme. He had read the article. It was drawn to his attention by an assistant solicitor in his department in June 2008. The witness stated that the RIAA had been criticised regarding a different system of monitoring. The Firm had very carefully researched areas relating to the age at which a child could be thought to know what it was doing under the law of tort and NG had done a very detailed note. The witness said it was not great that children were found to be doing these things, or that one had to even potentially contemplate issuing proceedings against a child, but unfortunately those things happened. He agreed that in order for a parent to be liable for the infringing activities of a child the parent needed to have authorised the infringement.

157. The witness was referred to the case which had been covered in evidence by the Second Respondent involving Mrs SM and her 12-year-old son in 2009. The witness was asked whether he felt comfortable in accepting the money where the mother said she didn't feel the child was legally responsible and she was paying under duress. He said:

"Well obviously that's her view, that the child is not legally responsible. The son is stated to be twelve years old. The note of advice we had from NG was that the law of tort said anything from seven upwards a child could understand the nature of what it was doing. So twelve years was considerably older than the age of seven so obviously from our point of view, the legal point of view, the child did know almost certainly, and absent scanning the child for illness etc or he was not capable of knowing what he was doing, that he did know what he was doing, and therefore would be legally responsible."

The witness agreed they hadn't written to the son but to the mother presumably because she took it upon herself to pay.

The witness suspected that proceedings would have been against the child and that there was an arguable case against either mother or child but they didn't know without full investigation of the case. He agreed the only evidence they had beyond the existence of the IP address was the mother saying that she had not authorised an infringement, but they had accepted payment and an undertaking from her which she said was under duress. The witness did not think that doing that contradicted the principle of upholding the reputation of the profession as the mother had taken it upon herself to pay to settle the claim. They would have parked the letter and thought about it but that didn't need to happen because the mother paid. The witness said they could have rejected the payment if they had wanted to and that would have meant suing the child and obviously no-one wanted to sue a child.

158. The witness was referred to another case, Mr MD, who was in extremely difficult circumstances. His response letter was dated 16 July 2008. He wrote again on 7 October 2008, having not received a reply. The letter concluded:

"I state again that I'm [sic] innocent and I haven't a clue on what's been going on. Hope this can all stop as this is effecting my health and also the well-being of my disabled wife."

The witness explained that there was concern that because of people constantly chatting on internet fora that the case had been dropped, others would do the same. That was the issue at stake. It was not that they did not believe these people, who clearly in many cases were writing very genuine letters about very sad circumstances, or that they were trying to press on relentlessly against such people, but that they had no choice under the policy that they adopted to proceed in the way they did. Eventually they did drop the cases, but this was how the policy worked, that they would bank the correspondence until such time as a decision was made with the clients as to who was going to be sued, who was not and so forth. The witness agreed that one reason that the policy was being run was because of their fear that others might learn that they had properly relinquished a claim and did not want word to get out for fear that it would damage the scheme. He also agreed that it followed that people such as Mr MD would be hanging around for months with threats of litigation hanging over their heads because of this policy. The witness said that another reason for acting as they did was that while he personally did want to drop some of the cases the general view was that they had the limitation period and did not have to. The Second Respondent, and later he believed RB when he joined in, had taken that view. In the end, especially after all the thought given to the wireless router scenario, they did put in the paragraph referring to that in the letters and began to drop cases against people. The witness accepted that this was late in the day. The cases were also put on hold for three months when the Applicant's investigation started in late December 2008. The period of delay lasted about seven months. He was not comfortable about the delay. His view was one of many in the firm. It wasn't so repugnant to him that he could not carry on but he did express the view that he was not comfortable with cases being left hanging over people who appeared to be making genuine comments in their letters. The witness agreed that the witnesses, with the exception of Mrs M against whom the claim had been dropped, had not received notices that claims had been withdrawn. The witness said the policy to put in writing in a letter that the case would be dropped only appeared in the template in February 2009 onwards from what he could see. He had left the firm in July 2009. The papers had been transferred to ACS:Law in April/May 2009 and as at May 2009 no notification had been given to people.

159. A further case, that of Mr WS was put to the witness. In his letter of 3 October 2008 Mr WS had stated that he had bought the game approximately three hours after the infringement allegedly occurred. He stated that he had the receipt but as he didn't want to go to court and argue with a huge company like the client A, he would be willing to pay, but because he was severely disabled and on a low income he asked to spread the cost. He sent evidence of his financial circumstances in a letter of 11 October 2008. In response to the question as to whether the circumstances gave him any concern about the scheme as it was being conducted, the witness said that they did not know whether or not this person committed the infringement, but assuming he had done, he would be very worried as to what was going to happen if he did not pay. That was the nature of a letter of claim and the circumstances of these cases. In respect of the terms of the Norwich Pharmacal order, based on unauthorised copying onto the individual's computer, it might be that he bought the game before the infringement, even if it was a matter of hours. He could have copied that onto his computer and then made it available on peer to peer networks. Or he might have gone onto a file sharing network to get the game, part of which as he was downloading it

from others, would have been copied onto his computer. The witness accepted that perhaps the order might have been slightly better drafted in as much as it should have said “(in whole or in part)”, but in reality the game would have been copied in the process of file sharing onto his computer. The witness agreed that the firm’s response said that purchase of the software did not prove an intention not to file share or provide a licence to do so, and that all illegal distribution of copyright works begins with somebody copying a legal or illegal copy of the work to their computer. He also agreed that this individual was asked to pay an additional £100 if he was to pay by instalments, and was told that a means questionnaire would be wanted, although he was on disability benefit. The witness stated that in respect of the 60 complaints to “Which?”, which were put to him, one of the people who had complained to the Applicant changed his story when sued. He accepted that the letters and the pursuit of the claims holding the IP address holder responsible were capable of causing serious distress to people but that the law permitted a letter to be written in those circumstances. He agreed that people who were not liable might choose to make payments on receipt of the letter.

160. Having regard to the relationship with Ls, they were, the witness said, forensic investigators who supplied the data. They were not clients, at best they might be seen as agents of the clients. The clients gave them a general mandate to communicate with the Respondents on a daily or as necessary basis, to deal with many issues that arose in relation to the data which was being captured on their behalf. He had not seen such a general mandate but that was his understanding.
161. Having regard to the funding arrangements, the client confirmed that Ls proposed that the firm would share a percentage of the net proceeds of claims after payment of the ISP charges. He agreed that there was a reference in the meeting note that the Second Respondent had been referred to, that there was a concern that the arrangement would be champertous and unenforceable. He agreed that the first retainer with Tw on 23 November 2006 a couple of months after the meeting was for a fee of £150 per letter and then the Firm had entered into a series of contingent fee agreements. He believed that the internal research came to the conclusion that the question of champerty only applied in public policy matters and that such agreements were no longer champertous. He also pointed out that he was not solely responsible for the retainer letter. NG had drafted the first one. The witness stated that he knew nothing about the issue of contentious or non-contentious retainers but was certainly aware that it was a very very delicate area where one needed to be very careful. He agreed that he had signed the non-contentious fee agreement letters but after they had been drafted by someone in the litigation department and discussed with them, as with everything else. He agreed that the size of the firm’s income depended upon the number of letters written and the number of payments received in consequence of them. The witness explained that the sharing arrangement came from Germany but they did not obtain a similar share to that in Germany because it was higher for the lawyers there because they did not have to pay for the ISP charges. He agreed that they sought Counsel’s advice from Mr SB about the conditional fee agreements but not about the contingent fee agreements. This was because they discussed it internally and felt it was perfectly lawful and they did research the points about champerty. He agreed that assuming there was no income from litigation then the monies from the letters of claim were recovered under the contingent fee agreement.

162. The witness said that writing a letter of claim was something that was done in the litigation department rather than the non-contentious Intellectual Property department. It was a litigation exercise. The Norwich Pharmacal applications had always involved someone from the firm appearing in front of the Master, along with respondents to every application who were the ISPs.
163. The witness was referred to the first Judgment handed down by Mr Justice Birss in the MediaCAT litigation [2011] EWPC 006, involving cases being pursued by ACS:Law, the firm which had taken over the cases from the Respondents' Firm. The witness agreed that the letter of claim used by ACS:Law was broadly speaking not far off the letter which his Firm had used. Mr Justice Birss QC was a patents county court judge. In dealing with an application for the discontinuance of 27 claims the Judge had commented about the Norwich Pharmacal process:

“... A Norwich Pharmacal application is not and cannot be the place in which to try the cause of action.”

The witness agreed that that was self-evidently correct. The Judge had also commented:

“It is remarkable, therefore, that the underlying cause of action on which all these cases are based has not been tested at trial.”

He agreed that the same would be true of all the cases, in this case none of them had yet been tested at trial. The Judge had said:

“Robust correspondence between lawyers and sophisticated parties is part of the legal process. However, letters which deal with issues of the complexity of the ones arising in this case need to be considered very carefully if they are addressed to ordinary members of the public.”

The witness agreed that such letters needed to be considered carefully. The Judge commented “The letters would be understood by many people as a statement that they had been caught infringing copyright in a pornographic film, that MediaCAT has evidence of precisely that, and that a court has already looked into the matter (a copy of the Order of Chief Master Winegarten is provided)”. The witness took the view that it depended on how you read the words “a court has already looked into the matter”. He said it was for people to take legal advice and be advised as to what the words meant, and that obviously a lay person trying to understand Norwich Pharmacal probably would not get very far. He agreed that the terminology in the letter alleging that the recipient was responsible for committing infringements whether directly or by authorising was one of the grounds in their claims. He agreed the MediaCAT letter sounded similar to the Respondents', although there could be a whole host of other things that ACS:Law were or were not doing that were not the same as what the Respondents were doing. It was put to the witness that the Judge had said:

“However it is easy for seasoned lawyers to underestimate the effect a letter of this kind could have on ordinary members of the public. This court's office has had telephone calls from people in tears having received correspondence

from ACS:Law on behalf of MediaCAT. Clearly a recipient of a letter like this needs to take urgent and specialist legal advice. Obviously many people do not and find it very difficult to do so. Some people will be tempted to pay regardless of whether they have actually done anything simply because of the desire to avoid embarrassment and publicity given that the allegation is about pornography.”

The witness said that the Respondents did not for one minute underestimate the effect of the claims. They were well aware of it and could see it. The witness explained that there was case law to say that even though the lawyer knows a recipient of the letter might suffer distress from receiving it, it was perfectly legitimate to send a letter on behalf of a client if those were the client’s instructions. It would not be acting in the client’s best interests if such a letter were not sent provided the content were lawful. He agreed that the recipient of the letter, as the Judge had said, needed to take urgent and specialist legal advice and that it was an unfortunate consequence when one sends a letter relating to pornography that there would be additional pressure on the person. The witness said that they had no choice but to send a letter in those circumstances to an IP address holder. He was not sure that it was right that you needed to be very careful to make sure before advancing claims that the person was in fact the infringer. It was for them to take legal advice but he could understand people might be embarrassed to take legal advice about receiving such a letter. In terms of comparisons with the particulars of claim that ACS:Law used for MediaCAT, the witness said that they would argue that there was a potential implied authorisation due to a lack of control, or failing to control security effectively, of the router. Mr Justice Birss had raised various legal points about what the act of authorising involved, and what unsecured meant. The witness agreed that ultimately when they got to the point of getting a case off the ground, these problems would have to be overcome. While they had not advanced particulars of claims beyond draft stage, because their judgments were obtained by default, the witness explained that they had started from scratch and had every intention of achieving or taking a test case against someone who did respond to the particulars of claim or the letters of claim, and who denied liability, and they would have taken them to court; they had just not got there yet. The Respondents could not have known that the defendants would not respond to the claims.

164. In respect of Dp, the witness agreed that its licence agreement gave Dp the right as a licensor for the purpose of prosecuting infringers. The witness was not aware that there had been concern about the use of such agreements to bring claims such as those being advanced by the Respondents leading to an amendment being moved in the debate in the House of Lords when the Digital Economy Bill was being discussed. The witness said that whether there was a matter of public concern depended on what was meant by that. He was sure some members of the public became concerned when they received a letter of claim dealing with adult content. He accepted that the concerns raised by Watchdog and by “Which?” if true, were matters of public interest. He denied the allegations against him. He said it had become apparent that an awful lot of the things that were said in the media either weren’t true completely or had been twisted somewhat, or when you delved deeper in the case there was a whole set of other facts and circumstances which actually in some or many cases showed the person had been infringing copyright.

165. Having regard to any pressure to obtain a profitable return on the file sharing business the witness said he was not under any pressure at any time. The governing board in the firm were always very open-minded about the whole thing. They saw it as a trial. Wanting 25,000 IP addresses was because business simply was not going to be profitable if a certain minimum number of letters of claim were not being sent out. They came to the conclusion that presumably 12,500 letters per annum needed to go out for it to be sustainable, and that if that was not happening the firm was going to say it could not carry on any longer. As to the amount in the letters of claim, the term “expensive parking ticket” was the client’s and the Respondents had adopted it. There was no way on earth that their costs would not be at least £500 in getting to that point. He had not done the calculation but it would be hard to see how it would not be.
166. The witness was directed to the attendance note of 26 February 2007 of the witness’s conversation with DH of the client Tw, about increasing the amount claimed from £250 to £300 which had been put to the Second Respondent. The witness said that the Respondents were not seeking to charge people for those people who did not pay, or charge the ISP charge to those people who did not pay, and the letter of claim quite clearly always broke down the ISP charge charged for that person’s disclosure and nobody else’s. The overall settlement sum was increased so that the results described in the attendance note did not happen. The percentage that paid suggested that either people were paying under duress or the Respondents were getting it right. The witness agreed that it could be looked at that one third of the recipients of the letters who paid were funding the operation. He also drew a distinction between calling the Firm’s returns a sharing of net revenue and a revenue sharing scheme. He agreed that he did refer to it as revenue sharing, talking loosely.
167. Having regard to errors made in the provision of addresses by ISPs, the witness explained that they always checked carefully to see if there were any inconsistencies in data, such as where the registered IP address holder was shown as the ISP itself. This was picked up before any letters were sent out. A number of weeks would often pass before letters of claim went out, and they would check the data and deal with problems arising from it.
168. The witness was then referred to an attendance note of a telephone call of 1 September 2008 involving the witness from an ISP, En, in which an employee of that organisation confirmed that he was waiting for data to be rechecked. He explained that En was currently enabling a new system for checking IP addresses and stated that in the interim both parties could wait until customers wrote in to state that they were not the correct customer, however he continued that this was an unsatisfactory method. En was using a particular software to check the customer details against the IP addresses but had discovered that the IP address and router were not matching. The main reason was that residential installations were not being carried out accurately by sub-contractors, and when routers were supposed to be changed this was not being done. En was providing data in respect of claims for clients A and Dp. In an email sent on behalf of the witness on 5 September to En it was stated:

“In relation to subscribers of yours who have received our letter in relation to the A matter, we have taken this matter off hold and are proceeding as though

it was business as usual.”

The witness agreed that it was possible, depending on when the errors were spotted, that they were writing to people who had been incorrectly identified. They decided to deal with it on an exceptions basis waiting for the customer to come back to them. The witness was not sure they could have done anything because the letters had gone. En might have come back and said it was all accurate and the last thing they wanted was to send out a whole raft of letters saying there was an error, or might be an error, and then to write and say there was not an error. It would call into question the whole process. The witness pointed out that these documents and another that he was referred to had come from the H files which had been disclosed shortly before the trial. He had not had an opportunity to look at all of it. In respect of an email of 15 September 2008 sent from En to him which said:

“The script produces an error rate which is possibly up to 15% of all details generated. Therefore, whilst the script provided us with the initial customer details for DP we do not feel we can stand by the data for the purposes of complying with the order [Norwich Pharmacal] without manually checking each of the records. Unfortunately we have to effectively start again with the manual exercise for each of the DP addresses. This same manual process will need to be used for all future orders.”

The witness pointed out that in these cases no letters had gone out at all. He did agree that letters were generally being written where there was the possibility that for one reason or another an ISP had provided the incorrect name and address for an IP holder but the witness did not consider this to be any different from a situation where a client made an error in instructions to a solicitor, who then wrote a letter of claim based on false premises, proceedings were issued and the client lost. He could not agree that that was misconduct. Equally it was open to the recipients of letters to take legal advice and for their lawyers to challenge the accuracy of the information provided by the ISP. In Mrs M’s case, when challenged, the Firm had written to the ISP and pressed them, even though under no obligation to do so. The witness agreed that it was probably right that when the Firm stopped acting thousands of people were left in the situation where for months and months they had had threats of proceedings hanging over them, possibly believing that they were going to receive claim forms through their doors. The witness said that it remained for decision in the Tribunal as to whether that was a perfectly proper system to operate. With the benefit of hindsight and experience one might do some things differently. It was an extremely complex process across several areas.

169. It was put to the witness that one of his partners Mr Ba thought that there was a flaw in the model in relation to the way they were advancing the wireless router claim. The witness rejected this on the basis that Mr Ba knew very little about IT.
170. Points regarding the letters of claim were then put to the witness. He confirmed that there was an analogy of theft used in the letter to Ms D. In letters including those in respect of pornography there was reference to the cumulative damage being caused to the client’s business. In the case of client DP, which only had a licence to pursue infringers for infringement, the witness could not recollect whether the letter of claim covered that point. He was then taken to the reference to the legal costs of

proceedings in the letter to Ms D. It was put to him that if the claim was worth less than £500 there would be no legal costs recoverable as it would be a small claim. The witness explained that they could never issue in a small claims court. Notwithstanding that Chief Master Weingarten said they were trivial claims, and he would require them to be brought in a local county court their research showed that the claims could not be brought in the Northampton County Court which dealt with bulk issue. They were deemed too complex and would have to be brought in the High Court. Damages might have been capped at £3,000 but the issue fee for the writ alone was £300 at least. That did not include costs involved in obtaining a Norwich Pharmacal Order and corresponding with the person and so forth. Elsewhere it was clear that the copyright owners were obtaining damages in excess of £2,000 and in some cases £4,000 and upwards. He did not know in detail what had happened in the cases that were issued as he was not involved in the day to day issuing and running, and so could not confirm that the cases in which they got judgments were undefended, apart from that of Mr E.

171. The witness was then taken to references to the client's evidence in the letters of claim. He denied that this was put in, in order to make it appear to the individual receiving it that a court had already reviewed the merits. It was simply a reference to the evidence, such as the expert evidence, the chain of title and all sorts of other things that they included in the court bundle. The lay person, it was suggested, should seek legal advice so they could understand that. The witness took the view that the cost of the legal advice would depend on who they spoke to. There was a firm of solicitors L where he thought it was £75 for advice and initially some letters were being sent in response to the letters of claim free. People also went to CABs and law departments of universities.
172. In respect of the letter of claim saying that the Firm had advised their client that a claim against the recipient would be successful, as set out in the letter to Ms D of 22 March 2007, sent on behalf of Tw, the witness said that they felt they had an arguable case against everyone to whom they wrote at the outset, and were likely to succeed when the test case eventually came to court. As to the statement about enforcing the debt against Ms D's property the witness responded that technically property could include her home, but he believed it was a general statement in relation to chattels and realty, and he believed that it was subsequently removed when they realised people thought it was their home being referred to, and they did not want to give any misleading impression. They did not just carry on willy-nilly with the wording.
173. Having regard to the evidence shown to Chief Master Weingarten and Deputy Master Behrens, the witness stated that the Masters did not ask to see the letters of claim but agreed that it was the obligation of solicitors to provide details of matters to the court. The witness said they did not consider putting the letters of claim in the bundle and he did not think that the letter was even completed until just before they got the disclosure from the first ISP. It could not be put in the bundle in any event. None of the litigators suggested putting the letter in the bundle. He was not sure that it was relevant to the Norwich Pharmacal application. The witness said that he could agree with hindsight that some people getting the letter might think that the Master had reviewed the claim. The witness was sure that a good lawyer specialising in these areas, or who understood what was going on, would be able to explain to them exactly what the wording meant. He did not think it was opaque to anyone reading it with

legal knowledge.

174. In respect of the meeting with Chief Master Weingarten, who was reported as saying that there was pressure to send as many cases as possible down to the county court, and that even if the claim was issued in the High Court it would end up in the County Court, the witness corrected his earlier statement and said that the research relating to county courts had related to issuing in bulk in Northampton, but he now recollected that claims were issued in the Central London County Court against London resident people only. It was put to the witness that the Master had made comments about the claims being trifling and that it was only in aggregate that they were not. The witness responded that he did not think the Master was aware of the likely damages that could be or were awarded when these matters got to court; in the case of Barwinska he thought it was £6,000.
175. The witness acknowledged that he was a salaried partner who had no financial interest in the profit of the firm. He wanted it to be a success. He agreed that he was held out as a partner to the outside world and had signed most, if not all of the non-contentious retainer letters pursuant to which a percentage of the proceeds of each claim came into the firm. He did not consider that the letters gave rise to an abuse of position, even in the case of the witnesses. He denied the proposition that he was in a frame of mind that everyone who was sent one of the letters was in his opinion to be held accountable for whatever happened on their IP address, and therefore everything that then followed was justified by reference to that belief. They would send the letters on the basis that they had an arguable case. They would review the correspondence and probe for further information and then have to take a view as to what the clients wanted to do with the cases. Until they got the answer there wasn't much they could do in terms of dropping the case, or whatever one thought should have been done. There was a policy decision to operate in that way, and that is how they operated. In re-examination the witness said they were legally entitled to work within the limitation period of six years but were sensitive to what people were saying, asking in the template letters for them to explain more. Aside from the witnesses there were huge numbers of correspondence claims where everything went as you would expect it to. There were letters where people wrote in thanking them for pointing out the infringement, sometimes hiring an IT consultant where their router was not secure.

Findings of fact and law

Introduction to the findings of the Tribunal of fact and law

176. Having regard to the large number of papers in the case and the fact that the Applicant's and Respondents' representatives relied on their respective skeleton arguments to a considerable extent, the material below includes references from the evidence and submissions given during the court hearing and the case papers. There was also some crossover between the various allegations which is reflected in this judgement.
177. Over a seven day period the Tribunal had carefully considered the documents including the Rule 5 Statement, the Respondents' statement in response to it, the submissions of the parties, the written witness statements and witness evidence and the various skeletons submitted by the parties' representatives. It had found the

evidence of the lay witnesses to be truthful and convincing. It had noted that the Respondents had agreed while giving evidence that the procedure followed with the witnesses who had appeared and those who had only given statements was not untypical, thus providing a firm basis for conclusions to be drawn. It had also noted the Respondents' submission that the witnesses were part of a subgroup selected by the Applicant and constituted a tiny percentage of claim recipients in spite of a campaign to stimulate complaints. In one case a complainant (E) denied involvement but later when represented admitted liability and made an offer of settlement. The Tribunal was satisfied that it understood how the scheme operated both from hearing the witnesses and from studying the evidence. The Tribunal had heard the evidence of the Respondents which had helped them to form a view particularly as to their approach to the file sharing claims and their respective roles. The Tribunal has noted the Respondents' submissions that the case against them had continued to change but it found the allegations to be sufficiently clear in the Rule 5 Statement. The evidence of the technical experts including their written reports and the joint note of the points of agreement between them had also been helpful. Considerable technical detail had been canvassed before the Tribunal and the panel felt that they had a good grasp of the basic principles including how illegal file sharing took place and how the monitoring of it was effected. Because several witness statements had alluded to it, the Tribunal wished to make clear that it understood that for file sharing to occur, while the computer in question had to be switched on, the person using it did not have to be present. The Tribunal had not had to determine technical issues as these had generally been resolved by agreement between the experts. The Tribunal had noted that any piece of a work was important to the work's viability but did not consider that this had any significance for their decision. The experts used different wording but the meaning was the same. The Tribunal wished to emphasise that it had not been part of its role to determine the Respondents' clients' case against any alleged file sharer, nor had the Tribunal taken any stance on the evolving law of copyright, although it considered what was decided law in England and Wales to be relevant to the issues in the matter. The Tribunal's findings as to fact and law were as follows:

Allegation 1: In breach of Rule 1.03 of the Solicitors' Code of Conduct 2007 ("the Code") allowed their independence to be compromised.

178. In the Rule 5 Statement it was submitted on behalf of the Applicant that both Respondents were aware of their duty of independence and that this alleged breach had been perpetrated in all the circumstances and could be summarised under five points.

A. The Respondents were the authors of the scheme pursuant to which they sought to attract client firms so as to embark upon making large scale claims against individuals.

It was submitted on behalf of the Applicant that the First Respondent had crafted and sold the scheme to clients. He had begun researching the pursuit of illegal file sharers in 2005 and presented a paper to ELSPA setting out a process by which the firm could pursue them on behalf of ELSPA members. He had said in an email to various people at ELSPA and copied to Mr BW who had worked for the Recording Industry Association of Americas, the RIAA on 1 August 2005 "we believe it will be important to persuade members

as soon as possible of the need for taking action against the pirates, whilst the market holds and funds are available.” The firm had copyrighted their work used in the scheme and when they passed the cases to ACS:Law they had granted that firm a licence to use the know-how that the Firm had developed. The Tribunal’s attention was drawn to frequent references in internal documentation to the ‘model’ and the requirements to make it work profitably for the Firm. These references included a report to the Firm’s management committee dated 10 March 2008 submitted to it by the First Respondent.

Versions of the ELSPA paper were sent to Cm and Tw. The First Respondent had attended a game fair to meet potential clients. The Respondents had marketed the scheme on a contingent fee basis at no risk to the client. Tw having initially been on a more conventional retainer were moved to a contingent fee scheme so that they would not have to put money up front. The Firm was looking for people to whom it could write [initially via Ls and then through Ls and Dr] so that the revenue arrangement could become profitable for the firm.

It was submitted on behalf of the Respondents that they were not the authors of the scheme in any way that compromised their independence. Such claims had been pursued albeit on a smaller scale in England and otherwise elsewhere. Tw was the first of the clients and was already pursuing claims in Germany and introduced the firm to Ls and the technical processes used to identify file sharers. The First Respondent had fleshed it out and put in place detailed procedures. The majority of the clients had come to the firm.

The Tribunal found that while the concept of pursuing illegal file sharers was already established in Europe and elsewhere, the First Respondent with the approval of the Second Respondent to whom he had taken his ideas, had authored a detailed scheme for pursuing individuals on a mass basis within England and Wales. The First Respondent saw an opportunity to offer a remedy to copyright holders who were faced with a very serious threat to their rights and who were suffering considerable damage at the time. The Tribunal did not find the development and marketing of a remedy of itself exceptionable, nor by itself that there were a large number of claims.

B. The Respondents had a financial interest in each and every claim which they pursued.

It was submitted on behalf of the Applicant that in respect of all the clients save Dp the Firm stood to gain an equal or greater amount of money, from the amount recovered from those that they pursued, and had a larger interest, than the clients. It was submitted that the Firm had a financial interest in persuading as many alleged infringers as possible to pay the settlement sum demanded with as little investment of staff time and effort as possible.

It was recognised on behalf of the Respondents that this financial interest did exist but submitted that it was no different from that of any solicitor save one working pro bono. It was not unusual for financial interest to be linked to success. In reality prior to the commencement of proceedings their interest

extended no further than a modest fixed fee and that it would always have to have been calculated by reference to a percentage because of the unpredictable nature of ISP charges. The Respondents, a salaried partner and equity partner respectively, naturally wanted the Firm to prosper but nothing more.

The Tribunal found that the Respondents did have a clear financial interest in each and every claim they pursued but again that of itself did not constitute a breach of the Code.

C. The Respondents wrote off substantial amounts of time (in excess of £300,000) and sought to recover sums through revenue sharing arrangements with their clients. The overall effect of this was to damage their independence.

It was submitted on behalf of the Applicant that the Firm invested a considerable amount of time in the model and wrote off a substantial amount of costs on 29 June 2007. The Second Respondent accepted that they needed to make recoveries from alleged infringers in order to go into profit. The amount in question was corrected during the course of the hearing from in excess of £300,000 to just under £250,000. By 26 March 2007 the Firm told Tw that it had invested £150,000 of its time in the development of the scheme. They said to Tw "...We for our part consider that the investment of our time of around £150,000 amounts to a disproportionate share of the risk. Your cash investment to date is \$4,000..." It was submitted that the First Respondent accepted in giving evidence that approximately one-third of those to whom letters were sent might pay, and if one-third paid, that might make the scheme have a return if sufficient letters were sent out. This was a revenue arrangement that was designed to come into profit if at least one thousand letters were written and 30% of people paid. The Tribunal was referred to the emails of 8 and 19 March 2007 respectively about bespoke responses and what the Court would regard as a reasonable approach to cases where third parties were blamed for infringement. It was submitted that thereafter the Respondents continued the campaign and asked Ms D by letter of 29 March 2007 to identify a third party and to arrange for them to sign the undertaking and pay, shifting the burden to the IP address holder, in order to keep the scheme going and the individual recipient of the letter paying where they might well have been innocent.

It was submitted that the Respondents wanted to distance themselves from the concept of revenue sharing because it was a sign of compromised independence. However their documents referred to gross revenue or revenue sharing. Use of the word "entitlement" instead added nothing. It might have been a net revenue share but it was a revenue share which compromised their independence.

It was submitted that it was common ground that the Firm needed to make a return. In an email of 21 June 2007 to Cm's in-house lawyer the First Respondent said "We find around £500 is about the right amount for damages and costs (plus any ISP charges for producing the name and address) although ultimately this figure is up to you (but it should not be below a basic of £400

plus ISP charges, otherwise the model will not work)". The amount demanded was later increased to serve the needs of the model. In an email to JW of Cm on 25 July 2007 the First Respondent wrote "If we wrote to just the 4,000 odd UK infringers alone and recovered £500 from, say 1500 of them just from writing the letter (ie about 37%), that would alone produce a gross revenue of £750,000." On 6 November 2007 the First Respondent said in an email to RP "Given that you have instructed us to charge £600 per letter plus ISP charge, we calculate that, based on a 38% recovery rate (which was what was achieved in Tw), 1338 letters should produce net revenue of £305,064 approximately (after payment of ISP charges), from which RP's share will be approximately £76,266. Accordingly, there should be more than enough to meet the costs of [the ISP]..." On 18 January 2008 the First Respondent emailed DH of Tw and Ls "Just to let you know that we have taken the decision to charge infringers for the number of times we have to pay for their IP address (and any legal charges the ISP has), plus the amount of one lot of damages, eg £600 in [game name].. We have started doing this for [game name] and will be doing it for T at the end of the month, unless there is a change of policy." It was submitted that this showed that the Firm was driving the decision making and that by that stage the First Respondent knew that that money was not being made from the scheme. [The Respondents asserted that it went beyond the Rule 5 statement to allege that decisions were not made jointly with the client.]

In the latter parts of the scheme (5 March 2008) the First Respondent emailed the client T (copying in the Second Respondent), that the Firm's management committee wanted "...a minimum of 25,000 IP addresses to be obtained (to write 5000 letters) in order that this is a workable business..." This had been dismissed as spin by the Second Respondent. It was submitted that the First Respondent would not have written spin to a client unless he knew that he needed to increase the returns from the scheme. It was clear that there was pressure to get a return out of the scheme. It was this that made them inclined to take on Dp as a client whose interest was in obtaining money for the uploading mainly of pornography. It was submitted that the investment of time and its write off created pressure on the Respondents. In an email to the First Respondent from Mr K of Dp on 19 March 2008 Mr K referred to the fact that the First Respondent had stated that "the Management Committee at DL sees a target per annum of 25,000 IP addresses, I am wondering how you have run the Ls business so far which generated only 1,800 addresses." In September 2008 the First Respondent recommended adding a £50 to £60 surcharge to cover the losses the Firm was suffering. On 22 October he emailed Ls "the staff costs alone are well over £200,000...we would like to request that our percentage share increases to 50% with effect from 1 November across all projects. We simply cannot operate profitably unless it does so..." It was submitted that it was the need to make the model work that came to drive the agenda, not the loss caused by any particular individual and that the degree of discretion within the firm meant that the Respondents were not simply acting on their clients' instructions. It was submitted that it was central to the loss of independence that the Firm's and the Respondents' interests lay in increasing the Firm's percentage share of the recoveries from the alleged infringers and in persuading as many infringers as possible to pay

the settlement sums.

It was submitted on behalf of the Respondents that there had never been an expectation that the clients would be billed the cost of the time recorded and this was not actually a write off. Recording time in this way was a management tool for this large firm, nothing more. The clients had been charged on the basis of the fee agreements entered into. The amount of fees represented an insignificant proportion of the Firm's overall income and did not compromise the Respondents' independence. The revenue sharing on analysis was no more than the original fixed fee regime with allowance for the fact that you could not predict at the outset how much the ISPs would charge in any particular set of cases. If the solicitors had insisted on a fixed fee and the ISPs' requirements had gone up it would have been the clients who would have suffered exclusively. It was submitted that there was no evidence that at any time any of the individuals at the Firm gave any consideration to recouping the investment. Regarding the pornography cases there was a real debate about whether to accept instructions.

The Tribunal found that the Respondents did have an interest in recouping the costs which they had written off in the form of time spent not billed to clients but that the decision to write off was a business decision the Firm was entitled to make. However the huge investment of time in developing the model/scheme and operating it created a pressure on the Respondents which was evident from the numerous communications on the subject of fixing the level of settlement monies to be demanded from recipients of the letters of claim and the numbers of IP addresses that needed to be obtained and letters to be generated. By way of example the Tribunal had noted an email sent on behalf of the First Respondent to Ls on 12 February 2008 where it was stated "...it would be helpful to have any comments you may have, which I can pass on to the Management Committee in support of our continuing work on these projects, as they are not at all happy about the limited financial return compared with the huge amount of investment we have made to the project." The scheme was in fact not profitable and ultimately the Firm closed it down and passed the outstanding work on, after two clients had withdrawn instructions and the Applicant's investigation had commenced. The Tribunal found it to be evident from the contents of the documents to which it had been taken, that making the scheme pay was an overriding consideration for the First Respondent, as operationally responsible for it, and for the Second Respondent, as partner with supervisory responsibility, and that this compromised their independence.

D. The Respondents did not enquire into the validity of a claim, nor consult their clients (see for example the M case) when problems arose in the way they were conducting claims. Instead they persisted in such claims.

In closing submissions the Applicant's Counsel submitted that the Respondents' evidence showed that the First Respondent was a zealot for the scheme. He had an unshakeable belief in his own theories to the point where he brooked no alternative view of the scheme. Those who disagreed were wrong. He had a tendency to seek to offload responsibility onto others more

junior where he was the partner responsible for the conduct of the case and as creator of the scheme.

Even after hearing the witnesses who had received letters, neither Respondent made any apology for the scheme. The First Respondent was unswerving. The Second Respondent's enthusiasm for the scheme had belatedly lessened. The First Respondent had an apparent unshakeable belief that people who came to give evidence might be untrustworthy or unreliable. This portrayed a person who had lost his independence.

It was submitted that there were concerns about the reliability of identification of individuals at least from one ISP, albeit not on a large scale. The Respondents were aware of the difficulties ISPs faced in matching IP addresses to registered holders. There were various instances where ISPs notified errors before letters were despatched. In the case of the ISP, En, on at least one occasion the First Respondent was advised by the ISP that it had misidentified subscribers. Rather than asking for the list of incorrectly identified subscribers and writing to them, to apologise and to confirm that the Firm and client A would not be pursuing the claim, the First Respondent informed En in an email of 5 September 2008 that the Firm would be "proceeding as though it was business as usual" and only if any of those subscribers "clearly believe that they have been wrongly identified", would it ask En to check whether they were on the list of incorrectly identified subscribers. Also the responses to the letters of claim raised concerns but the Respondents did not ask to inspect computers, or say they would reconsider with the client, but they pressed on. The Respondents were well aware that the data provided by the ISPs often contained mistakes. In the subsequent letters to infringers a system was developed with a file sharing process manual and template letters being used. This resulted in correspondence like that sent to Mrs M.

It was submitted on behalf of the Applicant that the scheme contained quite a wide measure of discretion and this was the Second Respondent's evidence. It was also submitted that the fact that the Respondents led alleged infringers to believe that they were liable for any infringing activity by their IP addresses without a legal basis for that contention showed their loss of independence as did their not making any proper assessment of the costs and damages that each alleged infringer might be liable for when they wrote the letters of claim, nor whether or not they could properly argue that each alleged infringer to whom they wrote was liable for the sum demanded. The desire to create that belief in the recipients was, it was submitted clear from the internal documentation. The Questions and Answers set out "We maintain that an internet account holder is responsible for his internet connection and therefore liable for any infringing activity occurring on it. In some cases you will find that the account holder is a parent of a child who has committed the act or a person sharing a house or flat with others who has had the internet registered in their name." The Respondents contended that they were entitled to take this view because either a subscriber had an unsecured or poorly secured wireless connection and/or had impliedly authorised another to use his or her IP address for infringing activity. This was contrary to the note of the

conversation on 5 December 2006 with Mr F of Counsel “mere facilitation is never sufficient to create a liability for the facilitator”. It was also contrary to the advice of Ms M of Counsel of 30 June 2008 when she said “I conclude that the merits of such a claim in negligence are extremely poor to hopeless, save in cases where, exceptionally, a defendant admits letting someone else use his computer/internet access in circumstances where it is obvious or very likely that he will use it to infringe. How likely a scenario is that?..” It was submitted that the Respondents advanced a mass campaign on an untried theory which was flawed with no English authority to support it.

It was submitted that the reliance on the fact and terms of the Norwich Pharmacal orders as justifying the claims was unsound. The court was making orders on the basis of unlawful downloading. Then as claims were advanced against individuals it was said that whether or not the material had been downloaded was irrelevant. So there was a dissonance between what the order said and the nature of the claims as they were pursued. In any event one could not rely upon the order as justifying the claim because it did not indicate that the court had expressed a view on the merits just that the IP address could be given to a particular holder.

Having regard to the amount demanded by way of settlement it was submitted that the letters of claim sought ‘an expensive parking ticket’ mentioned in an email to JW of Cm of 30 July 2007. It was demanded partly with the object of deterrence and to ensure that not too many people contested and that payment was made. Its purpose was to keep the scheme operative and not based on an assessment of the correct liability or possible liability of any particular individual. It was a scheme intended to generate revenue.

It was submitted on behalf of the Applicant that the approach to test cases showed that the purpose of the scheme was to generate revenue and not to test where liabilities lay and no proceedings were brought which turned into test cases. The ELSPA paper said that from the firm’s previous experience and that of its experts they did not believe a full trial would ever be necessary. Most cases settled early on. Of the 6,113 letters sent only 11 cases were issued and all were against people who had not responded. The First Respondent said that there were no test cases because A and Cm withdrew their instructions. If that were the case why were test cases not brought in respect of any of the other clients in the face of defences being raised?

On behalf of the Respondents the Tribunal’s attention was drawn to the number of emails which passed between the Respondents and their clients who were large and sophisticated entities and all of whom, save T, dealt through lawyers. It was also submitted that a significant measure of discretion to deal with issues as they arose, was a commonplace in low value high volume actions. When it became apparent that the evidence did not support the claim in the M case, it was abandoned, as were a relatively few others. There were numerous illustrations of client liaison and involvement. The Tribunal was seeing a very small sample of files selected by the Applicant. It was submitted on behalf of the Respondents, regarding the legal basis of the claims, that unless the monitoring software had logged the wrong IP address,

of which there was no example in the proceedings, or the ISP provided the wrong details, of which there was only one example, the Respondents were entitled to believe that infringement had taken place through the internet connection of the person identified by the ISP. There was no reason to doubt the reliability of the monitoring software or the ISP data and wireless hijacking was not straightforward. Of the eight witnesses who appeared only two gave evidence that at the relevant time they had any kind of wireless connection. Cloned modems [relevant to cable connections] and fake IP addresses were irrelevant. The only question was whether the account holder had committed or authorised the infringement. That would depend on legal analysis or factual circumstances. Every case needed to be considered on its own merits and a bare denial of liability could not be taken at face value. The same should go for a response obviously derived from a forum working to assist infringers.

The legal issues were rapidly developing, regarding on line file-sharing. The Tribunal was taken to Conger and Skone James on Copyright 15th and 16th editions and supplements. The development of case law showed that arguments could be advanced where there was no clear authority but which were later upheld by the courts. The decisions were moving in favour of the rights holders. It was submitted that it was legitimate for different practitioners to take different views, and it was at least arguable that an internet account holder was liable for what happened using their account, particularly if they had control over the use of the account or they did not secure a wireless router. The Respondents rejected what they took to be the Applicant's stance that the positions adopted by the Respondents on behalf of their clients were unarguable. There were other jurisdictions in which similar positions were being advanced. There were also relevant proceedings in Hong Kong and there was an EU Directive so there was harmonisation with civil law jurisdictions to a significant extent. It was also submitted that it was true but wholly irrelevant that the Respondents did not know whether any recipient was guilty when the letter of claim was sent. This was equally true in an individual case.

On behalf of the Respondents it was also submitted that it was perfectly correct and entirely reasonable to say that with bespoke letters the system would not work. The whole point was that rights were being enforced efficiently and economically in the interests of the clients. They were seeking to enforce their rights against a large number of people for as little expenditure as possible.

Having regard to the amount demanded by way of settlement, it was submitted that the Respondents were satisfied that if claims were advanced without an early settlement, damages and costs would be recoverable against infringers in sums substantially in excess of the settlement offer which included costs. The sum also reflected the cumulative experience of the likely level of recoveries. There was no legal or professional obligation to seek to undertake a detailed calculation of individual damages which would at that stage have been impossible. The threat of pursuit of damages which might have been recovered would have been far more worrying to a recipient. It would also

have been far more onerous to seek an open ended submission.

The letters of claim are also covered under allegations 3 and 6.

The Tribunal found that the Respondents, most particularly the First Respondent, had strongly taken up a particular interpretation of the law of copyright upon which there was no decided case in England and Wales. They had chosen not to be influenced by the views of Mr F of Counsel, whether or not those views had the status of an opinion, was not, the Tribunal thought, material. They had sought him out as having recent and relevant experience in the BPI case. They had then ignored the quite clear views of Ms M of counsel and continued to make statements in the letters which were unsupported by any English authority and which in the case of the negligence point they had been advised had extremely poor prospects of success. The Tribunal noted the foreign cases to which it had been referred. The Hong Kong case involved file sharing by individuals on a considerable commercial scale rather than individual activity such as here, but the key point was lack of decided authority in this jurisdiction, in relation to the force with which the Respondents asserted and persisted with their case.

The Tribunal considered the submissions regarding the amount sought by way of settlement. The cases of Barwinska and the level of damages assessed in that undefended case had been brought to its attention, described by the Respondents' counsel as the amount of time that it would have taken to download a programme as a whole and averaging out by reference to the infringements being undertaken. The Tribunal recognised the difficulties of fixing a figure where, as the Respondents admitted, they did not know how many times a file had been shared illegally. It noted the Respondents' submission that, if anything, what they asked was on the low side. The Tribunal was however concerned that the perhaps inevitable lack of rigour which resulted, led the Respondents in effect to seek to recover 'lost' expenses relating to other IP addresses from those where a registered owner could be identified. The Second Respondent had said in evidence that all they were proposing to charge an individual was the actual charge made against the client by the ISP. In an attendance note of the First Respondent dated 26 February 2007, copied to the Second Respondent, relating to one of the Tw games, the First Respondent reported on a conversation with DH of Tw about "proportioning any ISP costs where we get no data, DH said he could see the commercial risk that would be involved if we did not do this...". In light of the above, he agreed to increase the amount claimed from infringers from £250 to £300, in order to cover the shortfall if less than 50% of the infringers did not pay up..." The Second Respondent had said in evidence that they "...could have included an awful lot more in those sums if we had wanted to, but it was a matter for the clients to decide what they wanted to do, and those were the figures that they came up with." This approach was compounded by references in follow up letters, to liability for an interim payment of £1,000 if proceedings were commenced. This had no foundation in law and was questioned by Ms M of Counsel in an email on 10 July 2008. In respect of

individual cases the attitude of the Respondents was exemplified in the email from the First Respondent encouraging another staff member, NG, to put some steel in his heart. The Tribunal considered that the Respondents' "global" approach to arriving at the settlement figures showed that the Respondents had lost focus on the individual claims and their independence had been subordinated to the need for profit from the scheme.

The Tribunal was satisfied that the reports on the monitoring systems were such that a reasonable solicitor could accept them. The statements from the ISPs accompanying the information about IP address holders had certificates of truth on which the solicitors could rely. However, in their day to day dealings with the ISPs, once the Norwich-Pharmaceutical orders had been granted, it was clear that ISPs could and did encounter difficulties, for example in matching up their databases to identify the addresses. The solicitors were therefore on notice that care was needed. This would be particularly important where the letters related to pornography, as the Respondents themselves recognised. In evidence, the First Respondent had told the Tribunal that they looked at the data received to check for obvious illogicalities. However, they did take a cavalier attitude to certain data produced by the ISP, En, and sent out (or did not seek to correct) letters of claim while En was trying to resolve difficulties and expressly relied on the recipients of the letters bringing problems to their attention, as they did not want to hold up the process.

Having regard to the knowledge which the Respondents had about the file sharing population, which was evident from the First Respondent's paper for ELSPA, the Tribunal considered that the Respondents did not take enough care in dealing with responses which disputed liability, but rather persisted with the claims. The Tribunal did not criticise the bringing of mass claims but where that method was being adopted, solicitors could not treat responses en masse. While errors were not completely avoidable, they should not be justified by reference to the fact that complaints were proportionately small in number. They had to be dealt with individually. In evidence the Second Respondent said "They were looked at individually and I think they were. I mean I didn't deal with them personally, but they were looked at individually, I know that. I think we tended to deal with defences in terms of, if you like, themes and policies. We talked to the clients about policies or themes which emerged and what we should do about those." He had gone on to give the example of people in receipt of benefits, and the Respondents' concern that if such people were not pursued, the file sharers' fora would publicise it, and then a lot of people would have written in that way, and so evidence of benefit was required. However the Tribunal had been shown that in practice, individuals undeniably on benefit and/or in very straitened circumstances had been treated very badly, for example having demands to complete means questionnaires, and the firm had been prepared to take their money even when in the case of Mr WS, he had evidence of having bought the game the very day that he was accused of file sharing.

What the Respondents said in the letters of claim and subsequent correspondence about their instructions from their clients varied. They explained this by reference to having general instructions that envisaged

bringing some proceedings, probably as test cases. However, the non-contentious fee agreements did not generally cover litigation, apart from the Norwich-Pharmaceutical proceedings, but the recipients of the letters would have understood that they did have instructions to sue from the date each letter of claim was sent. From their own evidence, the Respondents continued to press the claims until the point when they decided to stockpile various types of responses, until they decided to consult the clients about how to respond to particular types of defence, or, in the case of Mr and Mrs M, to recommend that the case be dropped. The First Respondent had said that he expressed some disquiet about this approach but the decided policy required it. The Tribunal took the view that this adherence to policy about the scheme was another indicator of the Respondents' loss of independence of mind in their role as solicitors. Indeed the Respondents' attitude to the activities of "Which?" supported this. The Tribunal found from the evidence of the Respondents that they did not generally consult their clients about the validity of individual cases, but dealt with them in bulk when they had accumulated a number with the same defence or issue, such as impecuniosity or receipt of benefit. Even more concerning was the fact that some recipients of claim letters were never told that the claim against them was not to be proceeded with, and this had left them vulnerable because of the limitation period which had not expired.

The Tribunal had heard the lay witnesses' experiences of trying to get their message across to the Firm, and their description of the feelings of fear, desperation and hopelessness that the Firm's handling of their responses had engendered. That, and the evidence of chains of correspondence rejecting their explanations, had satisfied the Tribunal that the Respondents had not enquired into the validity of a claim. It was acceptable in the clients' interests to test a response but the Respondents had gone unacceptably beyond that in persisting with the disputed claims. The Tribunal considered that this was because the First Respondent held an extremely strong belief in his interpretation of the law of copyright and the guilt of the IP address holders to whom his Firm had written, even those who had given evidence. The Tribunal had even perceived reluctance, in his acceptance of the truth of Mr and Mrs M's evidence, which was indicative of his absolute conviction of the correctness of his assessment of the claims. The Second Respondent had taken a similar stance in internal correspondence towards the recipients of claims as was particularly evident in his email to NG exhorting him to put some steel in his heart. The Tribunal considered that there was clear evidence on the papers and in the Respondents' witness evidence of loss of independence.

- E. The Respondents knew that their clients were concerned about loss of reputation. Nevertheless, the Respondents persisted in the pursuit of claims in circumstances where it was in their personal as opposed to their clients' interests that they should do so.**

This element is considered under Allegation 2

Overall the Tribunal found allegation 1 to have been proven. The basic facts

which the Tribunal found proved: that the Respondents authored a scheme to pursue alleged infringement of copyright, sought to attract clients to instruct their Firm and had a financial interest in the scheme did not of themselves constitute a breach of the Code. However the Tribunal found that the Respondents had lost their focus on fulfilling their role as solicitors. They became in thrall to the scheme and what they perceived to be the driving imperative to make it profitable for themselves and their Firm. Their judgement became distorted and they pursued the scheme regardless of the interests of their clients and the impact upon those whom they identified as potential defendants among the general public. The Tribunal felt that the Respondents' independence had been compromised to a significant degree.

Allegation 2: In breach of Rule 1.04 of the Code the Respondents did not act in the best interests of their clients.

179. It was submitted on behalf of the Applicant that the clients' best interests were harmed by the campaign. The Respondents knew of the risk of negative publicity from the running of this sort of scheme or campaign and knew that it was their duty to protect the reputations of their clients. The ELPSA paper referred to adverse publicity. In respect of client Cm, the firm's original stance was not to respond to requests for comments from the press, but that policy changed, and by mid 2008 they had given Cm details of the firm's PR consultants, so that Cm's advisers could talk to them. The clients were concerned about adverse publicity and their reputations were damaged. The Games Industry Weekly article of August 2008 was damning of the campaign. It appeared that following this editorial and the negative publicity, Cm decided to withdraw their instructions and no further work was undertaken on their behalf after September 2008. Client T was also concerned about negative publicity and on 29 October 2008 one of their managers JA emailed the First Respondent

"My overall conclusion after delivering the report to our management was that the results they saw are insufficient for them to willingly invest more resources into these proceedings. As discussed at the very beginning of our cooperation the whole situation is not doing us any good in terms of PR and it is very hard for me to convince the board that it is worthwhile continuing the proceedings considering the figures provided in the latest statement."

In the previous year Ls had reassured them in an email of 12 October 2007

"Whilst we understand your concerns, we are confident that you will suffer no loss of reputation in the UK as a consequence of Davenport Lyons' actions ("out-of-court"/"pre-action" basis in the first instance). Davenport Lyons are also of the opinion, that we talk about two essentially distinct categories of people; "file-sharers" anyhow not being potential/normal consumers/costumers [sic]. The "news value" of our actions against copyright infringers has likewise considerably decreased in the meantime and once again, we are convinced that your concerns will not materialize. With this background and as you also agreed to; should reality prove that there are no negative consequences of the forthcoming proceedings in the UK, then we understand that you will be prepared to revert to our standard compensation-split formula..."

It was submitted that the one third each party split that came about in the case of client T was because of client concerns about negative publicity.

180. It was submitted that the clients' best interests were not served by the adverse publicity which was generated from the pursuit of individuals in low income households. Individuals quite properly sought help from "Which?", the Applicant and MPs. It was submitted that the Firm's interest lay in maximising the revenue and was therefore an interest which was running counter to the clients' best interests. The clients' interests lay in the letter being worded such that innocent individuals were not being held liable for breach of copyright and in careful consideration of each response and the withdrawal of claims promptly, where it appeared that the recipient had been misidentified or had a good defence. There was no evidence of substance that the Respondents had a methodology in place from an early stage for unsustainable claims to be withdrawn. It was the First Respondent's evidence that withdrawal of claims only really got under way in 2009 and 30 claims were identified as withdrawn and 27 apologies given. In many cases it was suggested that claims were not actually notified as withdrawn. It was in the clients' best interests to be kept thoroughly informed about matters as they developed and for instructions to be taken at the earliest possible stage. The scheme was not being run for the recovery of damages against wrongdoers but as a serial debt collection scheme as the email from the Second Respondent to the First Respondent and others in the firm of 9 February 2007 showed: "The difficulty in doing serial debt collection is to sniff out the true stories and the lies..." even though they knew that was not what it was, as the Second Respondent said in cross examination. The recipients of the letters were pursued as if they owed a debt. While client A may have expressed thanks in their final letter, they were highly critical of the firm to the Watchdog programme and when A wrote to the First Respondent on 21 November 2008 withdrawing instructions they said "In light of the recent publicity that this procedure has attracted in the UK, you will no doubt appreciate that our brand image, which we are in the process of proactively reinforcing, has suffered as a consequence, there having been a clear disparity between the object of this course of action and the actual result obtained. Therefore, after careful consideration and discussion with our management team, we have reached the decision that the negative publicity generated is disproportionate to the positive effect against piracy that these actions may have had."
181. It was submitted on behalf of the Respondents that no attempt had been made by the Applicant to obtain the clients' input as to what they considered their best interests to be, in circumstances where it was accepted that there were a number of potentially competing issues for the clients. None of the very substantial commercial clients had ever complained about the pursuit of the claims. The Respondents were well aware of reputation from the outset and engaged with the clients on the topic. It was the subject of monitoring. Two of the clients changed their mind as to whether or not they wished to pursue the matters. In A's final letter they thanked the Respondents for their efforts. The clients were subject to vociferous and aggressive attacks. The clients, with the advice of their in-house lawyers in A and Cm's cases had decided to bring the claims. The primary interests of the clients were in preventing further breaches and in making clear to other file sharers and to those tempted to file share that they were susceptible to discovery and to the pursuit of claims against them thereafter. The result of this was shown in the comments made in February 2008 on a

file sharer's website which had been put before the Tribunal (and by the reduction in file sharing). It was always anticipated that there would be complaints in the electronic media. The clients had limited interest in recovering damages from those who were not engaged in the process of file sharing on a fully commercial basis. They understood that some claims would have to be brought to litigation because otherwise file sharers would learn about it from the internet and ignore claims. The Firm wished to obtain revenue but not from those who were not liable and so the letters of claim encouraged recipients to seek legal advice. The First Respondent was a salaried partner and had no financial interest.

182. The Tribunal found this allegation to have been proven. The clients faced a significant and very challenging problem in trying to protect their rights. The Tribunal fully recognised the scale of that problem. The Tribunal found that the Respondents gave priority to what they perceived to be in their own interests and of their Firm above the interests of their clients. This involved maximising the revenue which they could obtain from the making of claims even where a person was not guilty of infringement of copyright. They did not have proper regard to the risk of the adverse impact on their clients' reputations of the manner in which they pursued the scheme and when risk materialised the Respondents continued regardless. In individual cases where problems arose they did not ensure that their clients were properly consulted. It was not in the clients' interests that claims were never notified as withdrawn as in the case of some of the lay witnesses and it seemed many others. The Tribunal noted that while client A may have expressed thanks in their final letter they were highly critical of the firm to the Watchdog programme and their detailed reasons in the letter for withdrawing instructions showed that their best interests had not been well served by the Respondents. Client CM also withdrew instructions and T was persuaded to continue in the face of concerns in October 2008. Notwithstanding that the clients were generally sophisticated commercial entities, the Tribunal was concerned about the Respondents' lack of proper regard for the interests of their clients, for whom the problem of breach of copyright was a major issue which the Respondents' activities on their behalf did not properly help them to address.

Allegation 3: In breach of Rule 1.06 the Respondents acted in a way that was likely to diminish the trust the public place in them or in the legal profession.

183. It was submitted on behalf of the Applicant that the Scheme relied on the misleading, overbearing and intentionally intimidating nature of the letters, and the aggressive demands for payment, leading alleged infringers to believe that they were liable for any infringing activity by their IP addresses. These were the central features which were likely to diminish the trust the public place in the Respondents or in the profession. It was submitted that it was quite proper to rely on the features of the scheme. A central aspect of the way it was run was that innocent people were going to be caught in its wake. The Respondents admitted that people might be entirely innocent. Of the recipients of letters some 1,500 paid and about 4,500 did not. It could not be known how many were innocent. The evidence only took the Respondents to the front door of any flat or student accommodation but the campaign was pursued on the basis that the person to whom the address was registered would be held responsible and that was a fundamental flaw in the scheme.
184. The letters of claim had a devastating impact on many of the individuals who received

them causing enormous distress, upset and frustration and sometimes exacerbating health problems. The lay witness evidence demonstrated this. The Applicant also relied on the comments of Judge Birss QC who indicated in the ACS:Law cases that many individuals paid to avoid proceedings. An example was Mrs SC and Mr LC who maintained that they were innocent and provided witness statements confirming that, but paid after their case was transferred to ACS:Law in order to bring the stress the matter was causing them, to an end. Another example was the case of Mrs SM, whose 12 year old son who committed the alleged infringement. In a letter dated 30 March 2009 she confirmed that she would pay the settlement sum and provided the undertaking. She stated “My payment details are therefore enclosed, but under duress. I am far from convinced that my son is legally required to pay, but the continuing, threatening tone of your correspondence leaves me so concerned about what your client will do to my son next, that I feel I have no alternative but to pay your demand in order to protect him.” She also noted that: “The true irony is that [her son] already owned a copy of [the music work]. I can guarantee that he will never buy another.” The real risk that demands were being made from persons innocent of infringement and the making of claims without having conducted a proper assessment as to whether they could properly argue that each infringer was liable for such payment, were all indications of breach of rule 1.06. Leading infringers to believe they were liable for infringing activity via their IP addresses despite not holding a belief that the position was properly arguable in law, was likely to diminish the trust that the public placed in the profession. This was another element of the breach. Trust was in fact diminished.

185. It was submitted on behalf of the Respondents that it was difficult to know what was meant by this allegation. A solicitor did not, save in the most exceptional circumstances, owe a duty of care to an opponent. It was a commonplace in multiparty litigation for a claimant to assess responses and then to identify the optimum cases to advance to a hearing. There were vociferous complaints but the correct position was established by the Applicant in July 2008. The Respondents relied on the statements of law and practice set out in the Applicant’s letter to complainant Mr R of 29 July 2008 and of the Legal Services Ombudsman of 16 September 2008. It was not for solicitors to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the court. [*Orchard v South Eastern Electricity Board* [1987] QB 565]. The Respondents also relied on *Rondel v Worsley* [1969] 1 AC 191 regarding the need for those who are unpleasant, unreasonable, disreputable or had an apparently hopeless case to be advised, represented or defended. The fact of a complaint by “Which?” took matters no further. Solicitors had to do unpopular things on behalf of clients. The allegation seemed to be based on the Applicant’s counsel’s assertion that because of the number of claims there was in some way some obligation on the part of the solicitors to achieve some greater degree of certainty in their remedy before initiation of the proceedings. The claims were not hopeless or improper. They were supported by independent expert evidence of a prima facie case of file sharing at the individual IP addresses. In the absence of any satisfactory explanation the court would have been entitled to conclude that the subscriber was responsible for the file sharing and there would be an assessment of damages. The solicitor’s duty was to set out the clients’ best case without personal caveat. It was not necessary for the Respondents to set out potential defences or present the claims in anything other than the best possible light. Practitioners should not be bullied by the power of complaint or opinion alone.

186. The Tribunal found this allegation to have been proven. The Tribunal found the way that the Respondents presented their clients' cases to potential defendants was unacceptable. The Respondents' correspondence had been aggressive, overbearing, misleading and disproportionate. The Respondents were entitled to present their clients' cases in a robust fashion but even on the most favourable interpretation, they had only a prima facie case and were well aware of several important defences which might be available to potential defendants; and that they faced the additional hurdle that their evidence only identified an IP address, and not the user of it, at the time of alleged infringement.
187. The Tribunal was particularly concerned about the Respondents' approach in replying to and pursuing those members of the public who denied the allegations made against them. They did not deal appropriately with what could have been satisfactory explanations because they believed the people to be guilty in any event. Their disregard for the content of the responses was one of the worst aspects of the case. The damage to the trust in the Respondents and in the profession at large was apparent from the evidence of the lay witnesses who had been recipients of their letters and from the public reaction against the Respondents' conduct which their activities provoked, including via MPs, "Which?", the Watchdog programme and the Guardian newspaper. The Tribunal found the lay witnesses to have been truthful. It did not seek to adjudicate on the legal merits of any of the claims or the defences to them but had considered the impact of the manner in which the Respondents had presented their clients' claims. The graphic descriptions from the witnesses of their reaction to the letters went beyond the upset that would be expected from a culpable defendant. Some thought they were the victims of a scam and consulted the police. Particularly telling was the individual who had felt that as she has been contacted by a London firm out of the blue and she was, as she described it, a mere member of the public, she must have done something wrong. The case of the mother who advised the Respondents that she paid under duress where they could not have proved that she facilitated the file sharing by her 12 year old son was of particular concern. The Tribunal deplored what it considered the cynical view of the First Respondent that taking the payment was an acceptable alternative to taking proceedings against the child. The criticism from reputable entities looking after consumers' interests was very damaging, even if it transpired that one or more of their complainants was exploiting the situation to conceal their wrongdoing.
188. The adverse effect on public trust which the Respondents' conduct had occasioned was significant and should not be underestimated. The Tribunal regarded this as one of the more serious of the allegations.

Allegation 4: In breach of Rule 2.04(1) of the Code the Respondents entered into arrangements to receive contingency fees for work done in prosecuting or defending contentious proceedings before the Courts of England and Wales except as permitted by statute or the common law.

189. It was submitted on behalf of the Applicant that the Respondents and the firm were providing litigation services as defined under section 119(1) of the Courts and Legal Services Act 1990 ("CLSA") which defined litigation services as including "Any services which it would be reasonable to expect a person who is exercising or

contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide” and “proceedings” include “any sort of proceedings for resolving disputes (and not just proceedings in a court) whether commenced or contemplated”. The agreements (described as the “non-contentious fee agreements”) which the Firm entered into, and pursuant to which they shared a percentage of the damages, were conditional upon the successful recovery of damages and costs for a claim. The Firm waived any right to recover any other fee. It was submitted that the fees were therefore contingent or conditional fee agreements. This in turn required the Firm and the Respondents to ensure that any such agreement complied with section 58 CLSA including that the CFA “states the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased”. Under Section 58 as amended, a CFA which does not satisfy all of the conditions applicable to that section “shall be unenforceable”. The firm and the Respondents required the clients to enter into CFAs which were unenforceable and so were in breach of the Rule.

190. The Tribunal had before it a schedule of retainers. It was further submitted that the Respondents considered that they were involved in a litigation scheme. The First Respondent described it as such and so did the bills, and the letters written were letters before action. The Tribunal was referred to the case of Bilkus v Stockler Brunton [2001] EWCA Civ 101 for the definition of proceedings, including Lord Justice Burton’s view that “in or for the purposes of proceedings” should be construed as a composite whole. Work for the purposes of proceedings might be carried out before the proceedings had begun and it was submitted covered the work done by the Firm, such as obtaining reports from Ls and Dr, letters to the ISPs and the preparation of letters of claim. In any event the first set of non-contentious retainers included preparing, issuing and attending the hearing of the Norwich Pharmacal applications and the follow up to obtaining the orders - the letters before action against the alleged infringers. It did not matter that the proceedings were not started with part 7 or part 8 claim forms, nor that they were undefended. The Tribunal was referred to the second judgment of Judge Birss in the MediaCAT v Adams case where although the point was not fully argued he said “I would be astonished if the rule prohibiting contingency fees was to be interpreted as permitting them for Norwich Pharmacal applications...” In so far as it was argued that for the contentious business the Respondents had a collective conditional fee agreement, (“a CCFA”), they had produced such agreements but from the evidence it seemed that none of them was operated. All of the fees came via the non-contentious contingent fee arrangements which were unlawful. It did not matter whether the breach was intentional. Although the Respondents went to counsel on collective or conditional fee agreements, they did not do so regarding the contingent non-contentious arrangements.
191. Regarding whether the Respondents’ action was intentional, it was submitted that on 6 September 2006 there was an internal meeting attended by both Respondents where concern was expressed that the Ls proposed arrangement might be champertous because it might be sharing in the proceeds of a claim. Furthermore, in some of the retainers, the Respondents described the Norwich Pharmacal applications as contentious and they switched them or put them into the conditional fee arrangement.
192. The issue was whether the agreements were entered into in respect of contentious business. It was submitted that they were, because all of the letters of claim were

letters before action and therefore the first step in a process of litigation, even if litigation didn't follow. But, in any event, in four out of the six instances, the retainers contemplated were used for the Norwich Pharmacal proceedings, which were contentious business.

193. On behalf of the Respondents it was submitted that this was a highly technical area which was often counterintuitive and it was recognised as a field of specialist expertise. Despite their best intentions many solicitors entered into unlawful and unenforceable retainers. The Respondents' position was summarised: it was accepted that they entered into contingency fee agreements in relation to the file sharing claims; it was denied that the agreements related to contentious proceedings so the Rule was not engaged; if the Respondents had erred, they did so inadvertently and understandably given the complexity of the law. It was submitted that the crucial difference was whether proceedings had been issued and pursued against the alleged infringers. All of the non-contentious retainers expressly excluded the issuing of court proceedings against the alleged infringers from their scope. With one exception, which was an ordinary private retainer, the contentious retainers were all CFAs or CCFAs. Rule 2.04 imported the expressions contentious and non-contentious business from the Solicitors Act 1974 "Contentious business means business done whether as a solicitor or advocate in or for the purposes of proceedings begun before a court or before an arbitrator, not being business which falls within the definition of non-contentious business. It was submitted that the definition of contentious business excluded work done in litigation before the issue of proceedings. The Respondents relied on the Law Society's guidance dated October 2010 "Work done preliminary to proceedings is non-contentious provided proceedings are not subsequently begun. The key word was "begun". This was supported in Bilkus v Stockler [2010] EWCA Civ 101 where Lord Justice Burnton stated

"A dispute does not render business contentious unless court proceedings or arbitration proceedings are involved."

The Applicant's references to section 58 and 119 CLSA were therefore irrelevant. It was accepted that the non-contentious retainers employed by the Respondents did not satisfy the conditions of section 58(1)(a). They were valid and enforceable because they were not CFAs. They were not agreements with a person providing litigation services. The Court of Appeal had confirmed that a right to conduct litigation was not exercised before the issue of proceedings and the retainers excluded the issue of proceedings against the alleged infringers. Having regard to the Norwich Pharmacal applications it was submitted that these were not proceedings because they were not commenced by part 7 or part 8 claim forms and were disclosure before proceedings started. It was submitted that there must be a dispute between the parties for litigation to exist. The Tribunal was referred to various authorities relating to licensing, rateable value challenges and planning applications. It was submitted that there was no dispute with the ISPs. The Court of Appeal had described such orders as "not ordinary adversarial proceedings" and the White Book stated that "they are not really inter partes disputes". It was suggested that the non-contentious agreement in the MediaCAT case probably did not expressly exclude litigation. The Respondents were alive to their obligations and when RB of the firm suggested in September 2008 that the work be moved into the contentious retainers to avoid doubts this was done. Thus the inclusion of that work in the non-contentious retainer was for a limited period of

time only and the Respondents kept the legal correctness of their distinction between contentious and non-contentious work under review.

194. The Tribunal found this allegation to have been proven. The Tribunal considered that the Norwich Pharmacal applications constituted proceedings and constituted contentious business as did the other work within the scheme including the letters of claim. The Tribunal found that the Respondents had entered into agreements as described in the allegation. It noted that as early as 6 September 2006 the Respondents had concerns about champerty. Their meeting note said “There is concern that the arrangement being proposed would be champertous and unenforceable. Ideally we want to be able to agree with Ls that we will only receive payment of a fixed fee if the letter of claim results in payment from the infringer. The preparatory work would be carried out without charge. The client would need to be responsible for all disbursements...” The Tribunal had taken note of the comments of Judge Birss regarding applications for Norwich Pharmacal orders and the consequent letters of claim in the MediaCAT case. He had said “The whole exercise including all the letters from beginning to end is based on contentious proceedings...” The Respondents were not generally required to enter into the agreements but they had chosen to. Any sensible solicitor, when entering such agreements, where the requirements for them to be effective were complex, would consider the propriety of the agreements very carefully and if in doubt would consult their professional body. The Respondents had not done so in circumstances where they had chosen to consult counsel about the contentious business agreements.

Allegation 5: In breach of Rule 3.01 of the Code the Respondents acted where there was a conflict of interest in circumstances not permitted under the Rules, in particular because there was a conflict or significant risk that the Respondents and/or their Firm’s interests were in conflict with those of their clients.

195. It was submitted on behalf of the Applicant that a client’s best interests had to be judged objectively on the acts surrounding the relevant retainer. It was not for the solicitor to define them in their own interests. A solicitor’s duty to act in client’s best interests ran in parallel with their other duties. The clients had interests in recovering proper levels of compensation against actual wrongdoers and in the protection of their reputations as they sold in the open market. Dp had an interest in claims and recovery only. The Respondents had submitted that they also had an interest in deterrence. This was not accepted by the Applicant. It was submitted that the desire for deterrence led to penal language, the expensive parking ticket analogy and the imposition of fear.
196. It was further submitted on behalf of the Applicant that the Respondents and the Firm had an obvious self interest in the form of the share of the alleged damages suffered by the clients. They also had an interest in recouping the losses which they had written off in the form of time spent but not billed and in pursuing the scheme which they had been developing and continued to develop. It was submitted that this created a conflict of self interest and duty in particular in relation to the clients’ interests in recovering the same sums which the Respondents themselves wished to recover in the making of claims. The Respondents were required to advise their clients’ to seek separate advice before entering into arrangements with them to pursue claims pursuant to which the Respondents would be receiving a share of the proceeds of the

claims. No such advice was ever given to the clients. It was submitted that it was a misconception to compare this fee arrangement to a legitimate fee arrangement, as it was not lawful. This was a mass campaign embarked upon against unknown people at the point the IP addresses were found, pursuant to which the solicitors were going to gain their revenue and enter into profitability. The more letters they wrote, the greater the level of revenue, the better the prospect of profit. A fundamental conflict of self interest and duty lay at the heart of the scheme. If independent advice had been obtained a lawful arrangement could have been entered into and the clients could have ensured that there was a proper approach to the claims against individuals with properly tempered and moderated claims being made against people who were demonstrably infringers.

197. It was submitted on behalf of the Respondents that there was an absolute prohibition on acting for a client if there was a conflict or potential conflict of interests between them. Independent advice could not cure the problem. In any event it was submitted that there was no conflict. They were not competing for the same pot of money. In respect of every payment it was known in advance what the Firm's fee for securing the payment would be, so no argument arose. The only stage at which competition arose was at the outset when the parties were agreeing the terms of the retainer. The Firm was entitled at that point to negotiate in its own interests. The clients were sophisticated and expressed no concern and one client T negotiated a reduction of the Firm's fee. The Firm did not have a direct beneficial interest in the sums recovered. It had to pay the sums recovered into client account and then render invoices to the clients for the amounts due. It was also submitted that even if there were a conflict about the revenue, the clients had other objectives, namely to prevent further misconduct and the deterrent effect of the claims on other potential file sharers. The revenue was not therefore essential to them. It was submitted that if a conflict arose here, it would arise in any contingency fee arrangement and in very case where a solicitor pursues a claim against an impecunious client. It was repeated that there was no question of the Firm being influenced in any way by the "writing off" of hours recorded by reference to per hour payments.
198. The Tribunal found this allegation to have been proven. It found as a fact that the Respondents and the Firm had an obvious self interest in recovering from alleged infringers, revenue in the form of a share of the alleged damages suffered by their clients. Setting aside the enforceability of the agreements which formed the basis of the share, the Tribunal did not find this self interest of itself exceptionable. The Tribunal also found as a fact that the Respondents had an interest in recouping the investment of losses or resources which they had written off in the form of time spent not billed to clients but that the decision to write off was a business decision the Firm was entitled to make. Also the Tribunal found as a fact that the Firm had an interest in pursuing the scheme which they had been developing. The Tribunal did not take any points on the issue of deterrence. It was a matter for the clients if that was one of their objectives. They found that the contents of the letters including the analogy of theft and the threats of proceedings were motivated by the drive to make recipients pay, more than by any other consideration. The breach occurred when the Respondents failed to manage their and the Firm's interests and allowed self interest to reach a point where there was a conflict of interest and duty with their clients. The Tribunal found, and the Respondents admitted, that they did not give advice to their clients to seek separate advice before retaining the Firm or in one case creating a new

retainer for this area of work. The fact that most of the clients had their own local or in house legal advisers did not remove the need to alert them to the need to take advice independent of the Firm, even if that advice was that the agreement should not be entered into with the Firm. At that point there was a competition between the solicitors and the clients for shares of the revenue to be gained from the scheme. After that, the Respondents were committed to recovering as much money as they could from the scheme and pursuing it, even when it was damaging to the clients and that commitment came to override their duty to their clients to achieve their objectives. The Respondents' priority was the pursuit of a revenue sharing scheme for their own interests. The Tribunal regarded this as one of the more serious of the allegations.

Allegation 6: In breach of Rule 10.01 of the Code the Respondents used their position as solicitors to take or attempt to take unfair advantage of other persons, being recipients of letters of claim either for their own benefit or for the benefit of their clients.

199. It was submitted on behalf of the Applicant that the evidence which the Respondents had when they wrote the letters of claim was very thin. It did not identify the individual person using the IP address at the time of the alleged uploading. The Second Respondent accepted that the subscriber to whom the Firm wrote might not be the infringer and might not be involved in unlawful infringement. Even the First Respondent accepted in cross examination that the Firm did not know when they wrote the letters of claim whether or not the recipients were guilty of any infringing activity. It was submitted that despite that being the state of knowledge, the letter writing campaign that then ensued was intended to ensure that people paid, by the solicitors lending their weight to claims which were not properly advanceable in the way they were being advanced by these Respondents against the individual recipients. There were frequent references in the letters to the solicitors' views of the strength of the case. The references to the Norwich Pharmacal order were intended to lead an individual recipient to believe that the court had already formed a view of the strength of the case against them. There were references in the letter to their clients being advised about the merits and to their view that the claim would be successful. It was a solicitor run campaign and they had the central, possibly dominant interest in it. That led in accumulation to the breach of Rule 10.01.
200. In the guidance to the Rule it said "Particular care should be taken when you are dealing with a person who does not have legal representation. You need to find a balance between fulfilling your obligations to your client and not taking unfair advantage of another person. To an extent, therefore, 10.01 limits your duty to act in the best interests of your client. For example, your duty may be limited where an unrepresented opponent provides badly drawn documentation. In the circumstances you should suggest the opponent finds legal representation. If the opponent does not do so, you need to ensure that a balance is maintained between doing your best for the client and not taking unfair advantage of the opponent's lack of legal knowledge and drafting skills." It was not an answer to say that the letters advised people to take legal advice. The invitation to do so appeared right at the end of a complex letter surrounded by other complex material. The letter was so threatening in tone that the individual might think that taking advice was not a realistic option. Secondly the settlement sum was pitched at such a level that the taking of advice, let alone expert advice, was not realistically going to be possible. The Respondents were charging per

hour the sort of amount being sought in settlement. Thirdly the clock was ticking away on the demand for payment. It was 14 days for Ms D and 21 for Mrs M. Fourthly the notes of evidence which came with the document were copyrighted and had a potentially restraining influence on the taking of advice. Mr and Mrs M took advice on whether they could disclose the document themselves to their own solicitors. Judge Birss in his first MediaCAT Judgment put the position clearly: “A claimant or potential claimant in a civil case is not required by the law to write a mealy-mouthed or apologetic letter to a potential defendant. Robust correspondence between lawyers and sophisticated parties is part of the legal process. However, letters which deal with issues of the complexity of the ones arising in this case need to be considered very carefully if they are addressed to ordinary members of the public.”

201. All of the letters looked at, were addressed (and as the ELSPA paper also showed) to households which were likely to have very modest means. The sums sought would have been large to them, in Mr and Mrs M’s case with the threat of the sum increasing as the clock ticked on. The overriding objective in the Civil Procedure Rules was that the case would be dealt with justly, so far as possible being on an equal footing, saving expense, dealing with cases in a proportionate way. There was no pre action protocol for intellectual property claims, but even the Code sent to the recipients was not complied with. The Respondents did not apparently seek their clients’ consent to disclose the funding arrangements. It was submitted that the difficulty the disclosure would have given rise to, would have been to indicate to recipients that the firm had a predominant, or equal, interest in the claims and therefore the Respondents chose not to confront the difficulty. It was not disclosed to the recipients that Ls and Dr, the forensic analysts referred to in the letters, would be receiving a large percentage of any payment, and that Dr was related to Dp. The letters gave the impression that making any part of a copyright work available, however miniscule, was a breach of Section 20 of the CDPA 1988. On 21 May 2008 the First Respondent ordered that the word “substantial” be removed from the Firm’s website. Many of the letters stated that the client had evidence that the recipient had made the work available when the client did not. The letters gave the misleading impression that a recipient was liable for a breach of section 16 and/or section 20 of CDPA 1988 if their IP address was used by a third party to make a copyright work available, regardless of whether or not the recipient had authorised the infringement. The notes on evidence said that it was irrelevant how the work came to be resident on their computer. The client’s evidence showed that the work was made available from the internet connection registered to their name. These passages, when read in the context of the letters of claim and enclosures as a whole, were capable of leading the recipients to conclude that they were as a matter of law strictly liable. It was submitted that in order to establish a breach of section 20, the clients needed to prove that the recipient made the whole or a substantial part of the copyright work available or authorised another to do the same. Merely permitting a third party to use a connection was insufficient. Mr F of Counsel told the Respondents that, on 5 December 2006, and Ms M confirmed it. Mr B of the firm regarded this as a flaw in the model. The letters of claim emphasised the dire financial and other consequences the recipients would face if they did not settle the claim and subsequently lost at trial. The combination of the emphasis on the financial risk and the strength of the clients’ evidence was, it was submitted, intended to pressurise and intimidate an alleged infringer into paying the settlement sum, regardless of whether they were liable or liable for the damages element in the settlement sum. The letters included a threat to property where proceedings had not

even started and the Respondents did not know whether the recipients owned their properties. The letters offered the recipients the chance to avoid legal action. It was submitted that the settlement sums were not based on any genuine assessment of the costs and damages for which the recipients were liable but were arrived at to make the scheme viable for the Firm and the clients; to cause payment to be made; to act as deterrent to future illegal file sharing; and included a sum to cover costs which had been charged by ISPs to carry out searches for names and addresses other than those to whom the letters of claim were sent. There was a failure to give a breakdown of how the settlement sum was reached. The assertion that the Firm had instructions to commence proceedings was misleading as the retainers with clients A and T excluded proceedings. Many of the letters referred to the client seeking as a minimum an interim payment of at least £1,000. The letters required all submissions from the recipients to be in writing. The Respondents relied on one of the Firm's staff having contacted the Law Society's Professional Ethics Hotline in April 2007. She informed the Respondents that it was acceptable to say to third parties and to other solicitors that we will not accept instructions over the telephone but require all points to be made in writing and that it was acceptable to refuse to give out individual solicitor's names. This would increase pressure on the recipients. The Respondents relied on the Applicant having rejected complaints regarding the letters of claim they had received and that the Legal Services Ombudsman rejected a complaint from one of these individuals. This was done before the inquiry had been carried out and when the Applicant was unaware of all the facts.

202. The Applicant relied on the letters as a whole. They were designed, from the first letter, and what followed, to brow beat an individual into paying. The Tribunal was referred to the letters which had been gone through and the examples of Ms D and Mr and Mrs M. Having regard to the impact of the letters, it was accepted that someone in receipt of a solicitor's letter might become concerned or upset where a debt might be owed. However the letter must be properly drawn, and not drift into abusing the reputation of the profession, so as to obtain an advantage from an individual recipient. Here it was acknowledged that the individual recipients might have been innocent. The impact went far beyond the impact on a person who owed a debt. It was submitted that the Respondents had no qualms about accepting payment in the particular circumstances the Tribunal had been made aware of.
203. It was submitted on behalf of the Respondents that this allegation was not particularised. There was no effort to obtain an unfair advantage nor was any taken. Unpopular claims were being advanced, in a difficult area, in support of those who had rights to protect. The Applicant had earlier determined complaints and dismissed them, knowing that this was a mass mailing and that was the correct response. One of those decisions had been referred to and upheld by the Ombudsman. The focus of this application was through the prism of the reaction of the recipients of the letter of claim while the Respondents' primary obligations were at all material times to their clients and their conduct should be assessed in that context.
204. The suggestion to seek legal advice was important. The case being put was arguable and far stronger than that in a developing area of law. Links to the MediaCAT decision were inappropriate. It was not known what case was put to the judge. The alleged risk of misidentification had been grossly overstated or misunderstood by the Applicant. The letters of claim were forceful but proper. Any letter of claim might be

directed to an individual who was not liable. The arguable case of wrong doing by a third party was at the heart of the Norwich Pharmacal applications and rightly identified. In January 2006 the Hong Kong Court had accepted that there was a prima facie case that the subscriber was the infringer; [Cinepoly Records v Hong Kong Broadband Network HCMP 2487/2005.]

205. The letters were amended when concerns were raised as to the possibility that readers might misconstrue something. The letters were written in the context of a general retainer whereby the clients had authorised the pursuit of claims by way of litigation, those claims to be identified in the light of the responses to the letters of claim and completion of litigation funding arrangements. It was not objectionable to state that instructions had been received to issue proceedings. No letter of claim had to anticipate a potential defence or argue the law. No solicitor had to contemplate the possibility that a recipient of a claim might settle a claim for which they were not liable. That was a matter for the individual concerned.
206. Expert lawyers were involved in the preparation of the claims and an appropriately senior lawyer had input to sensitive correspondence. The reference to disclosing funding arrangements was misconceived. When the letters were sent CPR 43.2 did not require any information to be sent. It was not improper to calculate the settlement sums as they did. The clients were entitled to reach the sums in the way they did. The cases that were the subject of assessment of damages here and elsewhere exceeded the sums sought by a significant margin. The theft analogy was perfectly proper. No one who received the letters stated that the letter had represented that the court had reviewed the merits of the claim against them individually. No one gave evidence that the letter prevented them from obtaining legal advice. The Respondents would have been in breach of their obligations to their clients to accept a defence statement at face value.
207. It was also submitted on behalf of the Respondents that there was no evidence that the letters were intended to obtain payment for clients to which they were not entitled. The reference in the letters to the Norwich Pharmacal order was accurate. Someone might misread it as was done by Mr and Mrs M regarding the copyrighting of the letter. The Respondents accepted the guidance to rule 10.01 and the recipients were directed to legal advice. There was no evidence that recipients did not reach it because it was placed at the end of a document. The evidence did not bear out the submission that the settlement sum was pitched such that people would not seek legal advice – they had from lawyers, the CAB and from student law associations. It was startling to suggest that because the clients restricted the sum claimed this transformed their obligations. The 14 or 21 day deadline was standard in letters of claim. The Questions and Answers provided for giving a further 21 days to those who were seeking legal advice or a further 28 days to respond. The fact that some recipients were disadvantaged did not transform the solicitor's obligations.
208. The cases continued to be under review and at a later date a decision was taken that those alleging third party interference with wireless routers would not be pursued. Even at an early stage proper consideration was being given to case on an individual basis.
209. The Tribunal found this allegation to have been proven. It had noted that the

complaints by Mr R and another to the Applicant had been rejected and that the Legal Services Ombudsman had supported that view in respect of Mr R. However, it agreed with the Applicant's submission that the decisions had been arrived at on the basis of letters before a full enquiry had been undertaken. The complaint from "Which?" was detailed, convincing and comprehensive. The Tribunal had had regard to the comments of Mr Justice Birss in the MediaCAT case where there was clear relevance to this case. In prosecuting their scheme the Respondents were writing to a cross section of the public. Initially at least the letters of claim were sent to un-represented members of the public some of whom were likely to remain so. Some of them were also potentially vulnerable. The Respondents were well aware of that. The Tribunal did not accept the fact that the Respondents often dealt in the commercial world, rather than with the public, reduced their culpability. The Tribunal's views of the letters, which were also letters before action, were also set out in respect of Allegation 3 above. The Tribunal found that the Respondents' purpose in sending the letters was, and generally remained, to get people to pay up. The use of the "expensive parking ticket" approach meant that people would be reluctant to incur the cost of obtaining legal advice which might well exceed the sum demanded in the claim letters. In the view of the Tribunal this, together with the reference to legal advice being situated near the end of a complex document, and the copyrighting of the Firm's documents, supported this allegation. It had been put to the Tribunal that many of the claim letters had been sent out after the rejection of the two initial complaints. However, the Tribunal had noted that even when the Respondents were aware that the Applicant was looking again at their conduct, they continued as before. The letters were intentionally intimidating and went against the spirit of dealing with a case justly, as set out as the overriding objective of the Civil Procedure Rules. The letters presented some aspects of the law in a way that would be misleading to unrepresented individuals. Not every recipient of the letters gained access to legal advice. The Tribunal had also noted with concern, the relevance to this allegation of the Respondents' cavalier attitude to keeping people who disputed the claims, waiting for considerable periods, and in one case never telling them that the claims were to be abandoned. The Tribunal regarded the breach of this allegation as of particular seriousness and concern.

Previous Disciplinary Matters

210. None.

Mitigation

211. Mr Pooles informed the Tribunal that he had not made written submissions because the Tribunal was well acquainted with the facts of the case. Mr Dutton had submitted a skeleton argument relating to both the level of seriousness of the matters found proved and the issue of costs. Mr Pooles first went through allegations 1.1, 1.2 and 1.5 as intimately connected. The clients had faced particular difficulties because there was an element of novelty in the technology that underpinned the ability of infringers to breach their copyright in a comprehensive way. The technology was also subject to continual change. Mr Pooles referred the Tribunal to recent press reports illustrating the further debates and developments regarding the ways in which copyright holders were pursuing internet service providers in attempting to close portals for copyright breach. The stance which the Respondents had taken did have some favourable

outcomes, as illustrated by webchat which had been produced in evidence. It was not disputed that webchat had advised other potential infringers not to undertake the same course of action. Having regard to the Tribunal's view that the Respondents had lost focus and in that way compromised their independence in pursuit of the claims, Mr Pooles pointed out that they were not acting in isolation. Throughout, they had the support and assistance of junior and senior colleagues. Both senior members of the practice, and Counsel, were involved in reviews of what they were doing, and it was submitted that it was absolutely clear that no material was withheld from any of these individuals at any stage. It was accepted that there had been a failure to act sufficiently promptly in respect of defences raised, but the case of Mr and Mrs M demonstrated that albeit after delay where there was an exceptional defence, in that the ISP had been at fault, the case had become the subject of a concession. It was accepted that a point must have come when the Tribunal found that the line had been crossed, and the Respondents had lost focus on the important issue of independence. However, this had been inadvertent and all bound up in the scale and seriousness of the matter. Mr Pooles reminded the Tribunal that the case which the Respondents were advancing against potential infringers was not itself improper. The Applicant had submitted that it was. Mr Pooles submitted that this was an important element in determining the overall seriousness of the Tribunal's findings.

Allegation 2

212. Mr Pooles submitted that it was not in issue that the clients were aware of the risk of damage to their reputations from bringing the claims. This had been a point made in the First Respondent's initial presentation. He did say that this was something that the clients should not be unduly concerned about, but the Tribunal had found that during the course of the backlash provoked by the claims, a point had been reached when there was a failure to act in the clients' best interests, and this was a fundamental issue. Mr Pooles submitted that at the outset the Respondents had been determined to act in the best interests of their clients but the case had got away from them. The Tribunal might feel that this was unfortunate but it was not surprising, having regard to the novelty and scale of the exercise that they permitted themselves to be involved in. He also submitted that a measure of regard had to be had to the fact that there was no suggestion that the highly experienced commercial clients had made any complaint in respect of this aspect of the matter. Four of the five clients had already pursued such claims elsewhere. The Tribunal's finding was accepted, but once again the failure to act in the clients' best interest, overtook the Respondents in the course of the exercise when they failed to give proper consideration to the effect on their clients' reputations in the public mind.
213. Having regard to allegation 1.5 and the issue of conflict of interest with the clients, this arose in the course of the pursuit of the claims and had not occurred deliberately. The Respondents had failed to observe changes taking place in their relationship with their clients in the context of public interest in the matters being pursued. Mr Pooles submitted that there was nothing about the matters placed before the Tribunal that would lead it to conclude that there was any risk of repetition or otherwise, than to find that there had been an error of judgement that had had unhappy consequences.
214. Having regard to allegation 1.4 relating to receipt of contingency fees, Mr Pooles understood that the Tribunal accepted that this was a highly technical area. He

inferred that the Tribunal was satisfied that it was the inclusion of the Norwich Pharmacal applications that transferred the work from what could properly be formulated in the way that it was, into a breach of the rules, which Mr Pooles submitted was a technical breach remedied during the pursuit of the matter when the Norwich Pharmacal element was taken out of the ongoing fee arrangements.

215. Having regard to allegation 1.3 relating to diminishing the trust the public placed in the Respondents or the profession, Mr Pooles considered this along with allegation 1.6, relating to the Respondents using their position as solicitors to take or attempt to take unfair advantage of others. Regarding the initial letter of claim, this had been carefully considered by the Respondents, notwithstanding the Tribunal's adverse finding and criticisms. The Tribunal was asked to bear in mind that the letter was not something that they did as a frolic of their own. It was not concealed, but was the subject of entirely open and widespread discussion. Letters were amended when criticisms were made, and the Tribunal was directed to the fact that parts of the letters were removed when they were subject to criticism. The letters had been reviewed by other senior members of the firm. One of these, RB, was of high repute in the profession and became the firm's compliance partner. He was involved in later versions of the letters. The letters were also commented on by highly experienced Counsel, and no adverse comments had been made when they were considered by representatives of the Applicant. The Tribunal was asked to remember that over half the letters had been sent out after there had been a satisfactory outcome in respect of a complaint to the Regulator, which decision had been upheld by the Legal Services Ombudsman. Mr Pooles did not seek to play down the Tribunal's finding, but he submitted that it had to be reviewed in the context of the findings overall. The letters had not been drawn as they had, in a deliberate course of conduct from the outset, but were a consequence of pursuing the matter as the Respondents had, which conduct the Tribunal had found unacceptable. Mr Pooles submitted that it was always difficult for professional men to deal with opponents. The Applicant's investigators dealing with the earlier complaints had found the recommendation in the letters, that recipients should seek legal advice, to be acceptable. Mr Pooles submitted that the Tribunal had found this inadequate in terms of the recipients being able to deal with the contents of the letters. He prayed in aid that the matters subject to complaint were a very small percentage of the letters dispatched. The Respondents were deeply personally upset by the Tribunal's findings in respect of these particular allegations. Those findings might also reflect the difficulties which the profession found itself in, at a time when its relationship with the general public was changing, and the findings might reflect the Tribunal's view of that changing relationship. The Respondents' difficulties arose out of the scale of the exercise. This was their explanation, not an excuse. The First Respondent was not a litigator. The Second Respondent was. They were bringing to circumstances where they were dealing with the public direct, experience which they had gained while dealing with commercial concerns - this made it easier to understand how the Tribunal's criticisms arose.
216. Having regard to allegation 1.6 particularly, that they had taken unfair advantage, it had never been suggested that it was the Respondents' intention to do that at the outset. Mr Pooles submitted that there was no indication that the Tribunal felt that there had been such an intention. The Respondents were seeking to address difficult issues facing their clients. It was an issue of judgement at what point pursuit of the clients' rights became taking unfair advantage of others. Mr Pooles invited the

Tribunal to accept, that this allegation was the one which caused the Respondents the most embarrassment and pain. They found it deeply humiliating that the Tribunal had found that they had acted in this way.

217. Both Respondents were deeply embarrassed and humiliated that they had failed to fulfil their professional obligations when their careers had been spent maintaining professional standards. The proceedings had had an enormous impact on the Respondents and caused them great strain. They had already suffered considerable punishment. Their pursuit of illegal file sharers had provoked counter-attacks against them which were evident from webchat and general press comment. Mr Pooles then presented individual mitigation on behalf of each Respondent. The Second Respondent had submitted a statement setting out matters in his private life which were deeply personal and to which he had been subject at the time of the conduct in question. As well as setting out his circumstances, he had included that he was at all times acting on the advice of others in continuing to defend these proceedings. Mr Pooles wished to make it clear that it was his advice to both Respondents that it was proper for the proceedings to be defended. Both were solicitors of previous impeccable character. The Second Respondent had practised over a very long career and submitted references from distinguished solicitors and senior Counsel in his support. He was held in high regard by his professional colleagues. The weekend before these proceedings had commenced, the Second Respondent had suffered through a road traffic accident the loss of a younger professional partner with whom he had had a close relationship. The Second Respondent had had to give a great deal of consideration before deciding to submit his personal statement and Mr Pooles emphasised on his behalf, that it was not submitted by way of excuse, but by way of providing some element of explanation, in so far as the Tribunal found that he had made serious errors of judgement during the relevant period, after almost 30 years of unblemished practice, in the full glare of public sight. He had been a member of the firm's governing board. He had taken a measure of comfort from the earlier investigation of complaints by the Applicant and it was submitted that he was entitled to the fullest credit for the way he had dealt with the practice.
218. The First Respondent was a younger person with the bulk of his career ahead of him. The First Respondent had been made redundant, relatively shortly after these proceedings came into existence. This had made it almost impossible for him to get employment, apart from short periods of temporary work, and he had to tell potential employers of these proceedings. He was a salaried employee at the relevant time, and subject to the oversight of the governing board. Medical evidence of the pressure on the First Respondent and his wife had been submitted to the Tribunal. He had involved others in what he was doing throughout, and there was the clearest possible indication that notwithstanding the Tribunal's findings, he did not realise at the time that he was pushing at the boundaries of professional propriety. No concealment had occurred. There was an absence of that in every respect in this case. The Tribunal was asked to place a significant weight on that point in its considerations. It was acknowledged that the Tribunal had already decided that the Respondents' conduct was misconceived, but there had been no deliberate attempt at impropriety, and no question of dishonesty had ever been raised in any of the matters pursued. These were highly complex issues. It was submitted that the indications which the Tribunal had given of its findings differed significantly from the Applicant's reasons for pursuing the allegations. The Tribunal could conclude that the risk of the

Respondents re-offending was nil. The proceedings had already had an enormous personal impact on their personal lives and this impact would carry forward for the foreseeable future, in respect of the Second Respondent to the end of his career. The Tribunal's attention was drawn to a bundle of references which had been provided for the Tribunal.

Sanction

219. All the allegations against both Respondents had been found proved beyond reasonable doubt. The misconduct involved had caused serious damage to the trust which the public placed in the individuals and in the profession. This had been a very complex case and the Tribunal did not consider that the level of the Respondents' culpability was reduced because not every aspect of the criticisms raised against them in the Rule 5 Statement had been pursued at trial. At no point had any dishonesty been alleged against either Respondent. The Tribunal recognised that they had set out with good intentions but had lost their focus and allowed pursuit of the scheme to overtake their professional judgement. The Tribunal did not consider that the misconduct, while serious, merited their being struck off the Roll of Solicitors. An appearance before the Tribunal was a matter of the utmost seriousness for any solicitor, whatever its outcome. These particular Respondents had been particularly shocked to find themselves here. They had both suffered greatly on account of it, as evidence about their personal circumstances showed. The Tribunal had noted that the Second Respondent was a member of the firm's governing board for a period and must therefore expect to take a very high level of responsibility for what had occurred. The First Respondent had been a great enthusiast in creating and promoting the scheme. He had been its main driving force. These factors in respect of both Respondents negated, in the view of the Tribunal, any mitigating effect which their membership of a team and consultation of others might have had upon sanction. The First Respondent did not gain any particular financial advantage from pursuing the scheme and would not have done had it succeeded, save in terms of advantages in prestige within the firm. The Second Respondent as a partner would have derived significant financial benefit if the scheme had succeeded. The Tribunal had very carefully considered the respective roles of the Respondents. The First Respondent was essentially the architect of the scheme, which had given rise to the allegations. He was in day to day control of its operational management. However, he was an employee of the firm, albeit in a senior role. The Second Respondent was the partner with overall responsibility for the pursuit of the claims. He did not have day to day involvement, all the time, and had been subject to personal difficulties, but the Tribunal felt that he had an obligation to take an overview of the strategy which was being pursued. The Tribunal had decided that although their responsibilities for the conduct in issue differed, the level of the culpability of each Respondent was broadly the same for the serious problems which pursuit of the claims caused. Accordingly the Tribunal had decided to impose an identical penalty on each Respondent.
220. The Tribunal considered that at least some financial penalty by way of a fine was called for, having regard to the seriousness of the conduct in issue. It had also been very concerned by what it had perceived, during the Respondents' evidence, of their failure to recognise the import of what they had done. This led the Tribunal to consider that a period of reflection was needed for both Respondents outside the profession. Having regard to the impact upon the public at large, of the misconduct,

the Tribunal also felt that it was necessary to impose a penalty which made clear the seriousness with which the Tribunal viewed the cavalier attitude which the Respondents had displayed towards the recipients of the letters of claim, some of whom the Respondents knew would be innocent. Accordingly the Tribunal had determined that a combined sentence of a period of suspension and a fine would be appropriate in the particular circumstances of this complicated case. It had therefore decided to suspend both Respondents from practice with immediate effect for a period of three months and to impose a fine on each of £20,000.

Costs

221. Mr Dutton submitted an application for costs on behalf of the Applicant in the total sum of £452,232.24. He submitted that the matter had been strongly contested throughout the investigation and the proceedings in the Tribunal. Leading Counsel had been involved from late 2009, there had been an interim hearing where there was a significant resistance to a disclosure application on the part of the Respondents, and also an application to strike out which was not ultimately proceeded with, but which had had to be prepared for. The Applicant sought an order for detailed assessment of the costs if not agreed and for an interim payment in the sum of £226,116.00. Mr Dutton reminded the Tribunal that both parties had leading and junior Counsel and well resourced legal teams in a quite fiercely contested matter.
222. Having regard to costs, Mr Pooles asked the Tribunal to have regard, as an overarching principle, to the question of proportionality. Mr Pooles submitted that the Tribunal should place a cap on costs in any event. He submitted that they were grossly excessive, and gave as an example the expenditure upon experts, when, during the course of the hearing, almost all of the issues between them were eliminated. He asked for a cap so that the parties could then decide if it was worthwhile to incur the costs of an assessment or to treat that cap as a summary assessment of costs by the Tribunal. Mr Pooles submitted that the Applicant had undertaken a gold plated exercise and gave as a further example the fact that his own brief fee for the hearing had been only slightly more than that of the Applicant's junior counsel. He then made detailed submissions regarding the various categories of disclosure that had been ordered at the hearing on 14 April 2011. Some of the categories related to elements of the Applicant's case which had not featured as issues in the proceedings. He accepted that for the Tribunal to place a cap would effectively be a blunt instrument, but it was the means which the Tribunal was entitled to use to do justice between the parties.
223. Mr Dutton submitted that the disclosure provided for by the Tribunal's Order on 14 April 2011 had been given because the Tribunal considered that such disclosure might assist it. Both experts had in fact given evidence during the proceedings and he submitted that their evidence had been helpful. The fact that they had reached agreement had had the effect of limiting costs. Mr Dutton reminded the Tribunal that the burden on the prosecution in bringing the case was greater than that on the defence and he also drew attention to the history of the Applicant's application for discovery. The Tribunal had considered the six categories of documents sought, relevant to the proceedings. In order for the hearing date to be met, it had been necessary for the Applicant's legal team to volunteer to undertake an inspection exercise which had involved junior counsel and the Applicant's solicitors' team. The

costs incurred, arose out of finding documents which were considered relevant to the case. Having regard to issues of professional privilege which Mr Pooles had raised at the April hearing, Mr Dutton submitted that it had not eliminated any documents from the case. As Mr Pooles had done, Mr Dutton went through the categories of documents. He submitted that the fact that a document discovered, had not subsequently been used, did not mean that it was not necessary for the Applicant to pursue sight of it. The issue of dynamic and static IP addresses had been relevant early on because some information from ISP providers had not been reliable. The case of Mr and Mrs M was the starkest example. Mr Dutton also referred to the large number of lay witnesses whom the Applicant had called. It had been considered appropriate to select one or two in respect of claims brought by each of the five clients for whom the Respondents had been acting, and this had contributed to the costs. Mr Dutton informed the Tribunal that in all his experience of appearing before it, including in the miners' compensation-related cases, this was in terms of time and effort and complexity right at the highest end of the amount of effort and work required to bring the case to the Tribunal, so that it could be heard within the period allowed. In all the circumstances Mr Dutton submitted that no cap should be imposed. He felt that a costs judge would be able to consider the issue of proportionality.

224. Mr Dutton also asked the Tribunal to order an interim payment in the amount of 50% of the costs sought by the Applicant as he submitted that even if Mr Pooles succeeded in his submissions that the Applicant had done a gold-plated job, this would not reduce the Applicant's bill of costs below the interim payment sought.
225. The Tribunal had given careful consideration to Mr Pooles' application, that it both place a cap on the costs and refer them for detailed assessment if not agreed. Mr Pooles had argued that only the Tribunal could determine the proportionality of the costs which the Applicant had incurred in prosecuting the case because of its knowledge of the facts. The Tribunal disagreed with this argument. It was satisfied that a costs judge would be able to assess the costs including the question of proportionality. Accordingly the Tribunal refused the application for a cap to be placed on costs and ordered that they be referred for detailed assessment if not agreed. In making the Order the Tribunal had noted that although aware of their right to do so, neither Respondent had made any representations regarding their ability to meet a Costs Order.
226. The Applicant had applied for an interim payment on account of costs in the amount of half of the costs sought. The Tribunal had carefully considered that request and found that in itself it was reasonable, but it felt that having regard to the detailed assessment which was to take place, in which the amount of costs would be at large, a somewhat lower figure should be allowed by way of interim payment and ordered that the sum of £150,000 should be paid within 28 days and that costs should be subject to detailed assessment if not agreed.

Application for a Stay of the Order

227. Mr Pooles made two applications on behalf of the Respondents in respect of the Order. He sought a stay of its implementation pending an appeal to the High Court. He also asked that the stay be effective until 21 days after receipt by the Respondents

of the full reasons for the Tribunal's decision. It was open to him to draft a notice of appeal now but it would be more helpful and avoid having to reformulate his reasons if he could see the decision first.

228. On behalf of the Applicant, Mr Dutton submitted that this was a case where the Tribunal had arrived at its decision after a very thorough hearing and had reached its conclusions after equally thorough consideration in respect of which it had given an indication of the reasons for its decision to the parties. He submitted that serious misconduct had been found and that it would not be appropriate for the Tribunal to grant the Order sought. It should be a matter for the High Court to determine whether the Order should be stayed.
229. Mr Pooles submitted that if the Order were to take immediate effect, both Respondents would be immediately suspended, thus depriving them of an opportunity to challenge the Order in so far as it related to suspension. He also reminded the Tribunal that his application to the High Court would need to be by way of a vacation application.
230. After careful consideration and taking into account that the vacation had just begun, the Tribunal agreed to stay implementation of the Order for 21 days. It did not consider that it was appropriate in all the circumstances to continue any stay until after its detailed findings had been delivered. It felt that a 21 day period would at least give the Respondents the opportunity to consider if they wished to appeal at all and if they felt that they needed a longer period then it was open to them to apply to the Court.

Statement of Full Order

231. The Tribunal Ordered that the First Respondent, Brian Laurence Miller, solicitor, be Suspended from practice as a solicitor for the period of three months to commence on the 1st day of August 2011 and that he do pay a Fine of £20,000.00, such penalty to be forfeit to Her Majesty the Queen. It further Ordered that he be jointly and severally liable with the Second Respondent to pay the costs of and incidental to this application and enquiry, such costs to be subject to a detailed assessment unless agreed between the parties. The Respondents are to make an interim payment of costs in the fixed sum of £150,000.00 on or before 30th August 2011.

The Tribunal further Ordered that the Order above in its entirety should not take effect for the period of 21 days from the 1st day of August 2011, namely, the 22nd day of August 2011. However this Order is to be filed with The Law Society immediately.

232. The Tribunal Ordered that the Second Respondent, David Joel Gore, solicitor, be Suspended from practice as a solicitor for the period of three months to commence on the 1st day of August 2011 and that he do pay a Fine of £20,000.00, such penalty to be forfeit to Her Majesty the Queen. It further Ordered that he be jointly and severally liable with the First Respondent to pay the costs of and incidental to this application and enquiry, such costs to be subject to a detailed assessment unless agreed between the parties. The Respondents are to make an interim payment of costs in the fixed sum of £150,000.00 on or before 30th August 2011.

The Tribunal further Ordered that the Order above in its entirety should not take effect

for the period of 21 days from the 1st day of August 2011, namely, the 22nd day of August 2011. However this Order is to be filed with The Law Society immediately.

DATED this 3rd day of October 2011
on behalf of the Tribunal

J. N. Barnecutt
Chairman