SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 — Case No. 11951-2019

BETWEEN:

SOLICITORS REGULATION AUTHORITY — Applicant

and

SIMON SOLOMON PINNER — First Respondent
DANIEL EDWARD MORRIS — Second Respondent

Before:

Ms A. Horne (in the chair)
Mr D. Green
Mr S. Marquez

Date of Hearing: 10-12 September 2019

Appearances

Ms Grace Hansen, Counsel, employed by Capsticks Solicitors LLP, 1 St George's Road, Wimbledon, London SW19 4DR instructed by the Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham B1 1RN for the Applicant.

Mr Giles Wheeler of Counsel, of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH instructed by FairPlane UK Limited 2nd Floor, Westgate House, Harlow, Essex, CM20 1YS for the First Respondent and the Second Respondent.

JUDGMENT

Allegations

1. The allegations against the First Respondent, Simon Solomon Pinner, and the Second Respondent, Daniel Edward Morris, made by the SRA were that, while in practice as a Partner at FairPlane UK Limited ("the firm")

ATE Insurance Policies

1.1 Between 28 April 2015 and 12 March 2018 failed to ensure that it was disclosed to clients of the firm to whom the firm recommended After the Event legal expenses insurance ("ATE insurance") brokered by Box Legal Limited ("Box Legal") that he had an ownership interest in Box Legal and thereby breached any or all of Principles 2, 3, 4, 5 and 6 of the SRA Principles 2011 ("the Principles") and any or all of Outcomes 1.12, 6.1 and 6.2 of the SRA Code of Conduct 2011 ("the 2011 Code").

1.2 Between 28 April 2015 and 12 March 2018 failed to ensure that it was adequately disclosed to client (sic) of the firm to whom the firm recommended ATE insurance provided by Leeward Insurance Company Limited ("Leeward") that he had a financial interest in Leeward and thereby breached any or all Principles 2, 3, 4, 5 and 6 of the Principles and any of all of Outcomes 1.12, 6.1 and 6.2 of the 2011 Code.

1.3 Between 28 April 2015 and 12 March 2018 failed to take reasonable, or any, steps to ensure that clients did not have relevant existing insurance before ATE insurance provided by Leeward was recommended to clients and thereby breached any or all of Principles 4, 5 and 6 of the Principles and Outcomes 1.6 and 6.1 of the 2011 Code.

Accounts Rules

1.4 Failed to ensure that adequate client account reconciliation statements as at 28 December 2017 and/or 31 January 2018 and/or 31 February 2018 were produced in breach of any or all of Rules 29.1 and 29.2 of the SRA Accounts Rules 2011 ("SAR 2011") and any or all of Principles 6, 8 and 10 of the Principles.

1.5 Failed to prevent transfers from the firm's client account which were in excess of the amount held on behalf of the clients concerned, causing a minimum shortfall of £20,717.49 at 28 February 2018 in breach of Rule 20.6 of the SAR 2011 and any or all of Principles 6, 8 and 10 of the Principles.

1.6 Between around 10 November 2015 and 22 March 2018 failed to promptly return compensation payments to clients totalling £4,623.39 in breach of Rule 14.3 of the SAR 2011 and any of all of Principles 5, 6, 8 and 10 of the Principles.

Documents

2. The Tribunal reviewed all the documents including:

Applicant

- Rule 5 Statement dated 24 April 2019 with exhibit NXB1

- Judgment in the case of Wingate and Evans v SRA and SRA v Malins [2018] EWCA Civ 366
- Forensic Investigation Officer Statement of Costs
- Applicant's Schedule of costs relating to investigation, preparation and presentation of the hearing on 10 September 2019
- Applicant's statement of costs as at date of issue

First and Second Respondents

- Answer of the First and Second Respondents to the Applicant's Rule 5 Statement dated 4 June 2019
- Witness statement of the First Respondent dated 19 August 2019 with exhibits SSP1-SSP16
- Witness statement of the Second Respondent dated 19 August 2019
- Skeleton Argument of the Respondents drafted by Mr Giles Wheeler dated 5 September 2019
- Judgment in the case of Connolly v Law Society [2018] EWCA Civ 366
- Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004
- Judgment in the case of West v Stockport NHS Foundation Trust and Demouilpied v Stockport NHS Foundation Trust [2019] EWCA Civ 1220
- Judgment in the case of Callery v Gray and Russell v Pal Pak Corrugated Ltd [2001] EWCA Civ 1117

Preliminary Issues

3. The Chairman informed the parties that there was a potential connection between her and one of the Respondents. She had noted from reading the First Respondent's witness statement that he had been employed as an assistant solicitor at B Solicitors from 1981–1987. The Chairman was employed at that firm as an articled clerk from 1983-1985. The Chairman had no recollection of the First Respondent and did not think that they ever worked together. Ms Hansen for the Applicant and Mr Wheeler for the First Respondent and Second Respondent both indicated that they had no objection to the Chairman hearing the matter.

4. During the course of the First Respondent's evidence reference was made to a company M, which managed the insurance company which provided policies to the Respondents' clients. It had not previously been mentioned. The Chairman declared that she is a non-executive director of an indemnity mutual association which is managed by M, and that she also acts for another mutual insurer which is owned by M. Neither advocate objected on that account.

5. The First and Second Respondents admitted allegations 1.3 – 1.6.

Factual Background

6. The First Respondent, who was born in May 1957, was and remained a partner in FairPlane UK Limited ("the firm") having been admitted to the Roll on 16 March 1981.

7. The Second Respondent, who was born in 1969, was and remained a partner in the firm, having been admitted to the Roll on 2 April 1997.

8. The First Respondent and the Second Respondent ("the Respondents") were the only two directors of the firm, each holding a 42% stake; the remaining 16% was split equally between their wives.

9. The firm's sole line of work was to assist airline passengers with claims for compensation for delayed or cancelled flights under EU Regulation (EC) No 261/2004.

10. The First Respondent was the firm's Compliance Officer for Legal Practice ("COLP"), Compliance Officer for Finance and Administration ("COFA"), and Money Laundering Reporting Officer ("MLRO").

11. Both the First Respondent and the Second Respondent held a current Practising Certificate, free from conditions.

12. The firm began trading in or around May 2015. On 18 February 2016, the First Respondent notified the Applicant by letter that there had been breaches of various accounts rules by the firm. These concerns were investigated by the Applicant ("the First Investigation"); the firm provided various information and assurances to the Applicant during the course of the First Investigation. Following receipt of the firm's client account reconciliation as at 30 September 2016 and the firm's qualified Accountant's Report for the period ending 31 March 2016, the Applicant was satisfied that efforts had been made to remedy the concerns with the firm's books of account and that outstanding concerns would be properly investigated. As a result, the First Investigation was closed in December 2016.

13. Concerns with the firm's accounts remained and the Accountant's Report for the period ending 31 March 2017 was also qualified.

14. A further investigation into the firm was opened and the Applicant's Forensic Investigation Officer ("FIO") Mr Sean Grehan attended the firm on 24 January 2018. The FIO identified a number of current concerns with the firm's client account reconciliations and with the firm's arrangements for and disclosure of information in relation to After the Event ("ATE") insurance for legal expenses.

Allegation 1.1

15. In each standard case, the firm advised clients to obtain ATE legal expenses insurance policies and arranged ATE insurance for clients unless the client instructed them otherwise.

16. The firm obtained ATE insurance through Box Legal Limited ("Box Legal"), an FCA regulated insurance broker which specialised in ATE insurance, from Leeward Insurance Company Limited ("Leeward"). The insurance premium was paid as a disbursement from the client's compensation.

17. Box Legal was owned entirely by the Respondents, each of them holding a 50% share. In their Response the Respondents stated that Box Legal did not benefit from this arrangement, and there was therefore no need to notify clients of their ownership of Box Legal.

18. Following concerns being raised by the FIO, the firm amended their literature and provided copies of new literature to the FIO on 12 March 2018. The amended client care letter disclosed the Respondents' ownership of Box Legal. The firm had since ceased to offer ATE insurance to clients.

Allegation 1.2

19. In addition to owning Box Legal, the Respondents both had a financial interest in Leeward. In addition Leeward had loaned a total of £550,000 to the firm.

20. The relationship between the firm and Leeward was disclosed to clients in the policy wording which was on Box Legal's website.

21. Amended copies of the client care letter and the Client Information Pack ("CIP") were provided to the FIO on 12 March 2018, both of which disclosed the nature of the relationship between the firm and Leeward.

Allegation 1.3

22. No advice was provided to clients that they might already have insurance. Clients were not advised to review their own existing insurance.

23. The client care letter provided to clients was amended on 12 March 2018 to include:

> "It is however possible (although unusual) that you may already possess either a) legal expenses insurance which would cover the costs and disbursements risk associated with this claim, or b) Insurance which would pay you the airline compensation you are claiming. We recommend that you check your existing Insurance policies (in particular any household or travel insurance you may have, or cover as part of your credit card benefits) and please contact us if you believe that you may have this type of cover."

Allegations 1.4 – 1.6

24. These allegations arose out of issues with the firm's accounts.

The Applicant's Investigation

25. The Applicant took the following steps to investigate the allegations which it made against the First Respondent and the Second Respondent: An Explanation With Warning ("EWW") letter was sent to the First Respondent in his capacity as the firm's COLP on 13 August 2018 by Ms R of the Applicant; the First Respondent was asked to respond on behalf of all of the firm's managers (that is both the First Respondent and the Second Respondent).

26. The First Respondent requested an extension to return the Response to the EWW and provided the Response on behalf of the firm on 5 September 2018. Pursuant to a request from the Applicant to provide further information, the First Respondent updated the firm's Response to the EWW, which was provided on 22 October 2018. A further amendment was made and provided to the Applicant on 24 October 2018

27. On 7 December 2018, an Authorised Officer of the Applicant decided to refer the conduct of the First Respondent and the Second Respondent to the Tribunal.

Witnesses

28. Mr Sean Grehan, FIO gave evidence. He confirmed the accuracy of the FIR. In examination in chief he stated that he had seen more recent client account reconciliations than those referred to in the Rule 5 Statement. In the 17 May 2019 reconciliation, there was an overpayment of £132.25 so there was a small shortfall on the client bank account. In the 18 June 2019 reconciliation, there was a client overpayment of £230.69. In cross examination by Mr Wheeler he agreed in respect of the former that in the 31 May 2019 reconciliation there was no reference to an overpayment and it had probably therefore been resolved. Regarding the latter he agreed that in the reconciliation as at 30 June 2019 there was no reference to an overpayment or the need for a reversal. Reconciliations were only required every five weeks. He made no criticism about these temporary shortages.

29. The witness agreed that the Respondents had produced information when asked, and responded to him in a timely manner during the investigation. He stated that there had been internal issues within the Applicant about the original investigation; it was subsequently felt that it should not have been closed because it might not have identified all the issues correctly. An anonymous whistle-blower had reported to the Applicant that accounting errors were continuing.

30. The witness stated that during his investigation he identified accounting errors going back to 2015 and the inception of the firm; he could not tell if they were the same problems identified by the previous investigation. When he returned to the firm on 7 March 2018 and was presented with the reconciliation dated 28 February 2018 the bank shortage had substantially reduced, but he still could not rely on the accounts. There were hundreds of thousands of pounds of unposted transactions. As he said in the FIR, payments posted to the books of account which had not been paid from the bank had fallen to £31,238.20. He agreed that monies received at the bank not posted to the books of account had also fallen drastically. The requests to the firm in the witness's email of 8 March 2018 were answered by the time set. The firm had identified that £4,623.39 of the £31,238.20 represented client money which had not been promptly paid to the clients upon conclusion of their matter. He also agreed that the firm had replaced £20,717.49 (£9,679.63 + £8,830.06 + £2,207.80) from office account to client bank account on 22 March 2018. He agreed that he could not identify any error in those figures. The witness also stated in the FIR that on 27 April 2018, the First Respondent provided him with a client account reconciliation as at 26 April 2018 and he noted that the adjustments from the earlier client account reconciliations had been cleared.

31. Regarding the ATE insurance, the witness agreed that the letter issued to clients when the firm was first instructed attached the CIP, which provided a link www.boxlegal.co.uk/downloads/FairPlanepolicy.pdf to the "ClaimSafe" ATE legal fees policy. He agreed that the document also stated:

> "The insurer of this policy is Leeward Insurance Company Limited ("Leeward"). Please note that the directors of FairPlane UK Limited have an interest in Leeward and may receive a payment from Leeward in respect of Leeward's annual profit, which will include Leeward's profit (if any) on the premium for this policy. It is not possible to estimate the amount by which the directors of FairPlane UK Limited may benefit from this policy (if at all), because any payment to them will depend on claim levels and Leeward's overall profit in any year."

The witness stated that he had accessed the link and was given the wording by the firm. It was difficult to say whether he thought what clients were told was inadequate; his role was to report factually, not to make allegations. He did not specify it as an issue in his FIR. He agreed that he would have said if he thought disclosure was inadequate, but on reflection he thought it might not be entirely adequate.

32. The witness was referred to the EWW letter from Ms R of the Applicant dated 13 August 2018. He had not seen it; it post-dated his investigation. It was put to the witness that the letter detailed what became allegations 1.1 and 1.3 but did not mention the issue of disclosure and Leeward. The witness stated that Ms R adopted the points in his FIR. He could not say if she reached an independent conclusion. She had not discussed her view with him.

33. The witness was challenged about a statement in his FIR concerning a meeting at the firm on 7 March 2019:

> "It was the managers' view that although possible, it was unlikely that alternative insurance policies held by the clients would provide appropriate cover to clients."

It was put to the witness that the Respondents' belief was that no alternative insurance policies were available as set out in the "RESPONSE FROM FAIRPLANE UK LTD TO LETTER FROM SRA OF 13 AUGUST 2018":

> "Paragraph 61.2 of the Report states: "It was the manager's view that although possible, it was unlikely that alternative Insurance policies held by the clients would provide appropriate cover to clients." This is not what was said, and it would not have been correct to make that statement, for the reasons below…"

Mr Wheeler also referred the witness to the next paragraph in the Response:

> "To the best of the knowledge information and belief of [the First Respondent] and [the Second Respondent] there is no annual or periodic insurance product (a "Before The Event" policy – "BTE Policy") In existence in the UK which would protect FairPlane's clients from the risk of incurring adverse costs when pursuing airline compensation claim (sic). The only policy which is available

is an ATE policy purchased after the relevant event has taken place to cover the legal claim relating to that event. [The First Respondent] and [the Second Respondent] have extensive knowledge of the legal expenses insurance market, having been directors of Box Legal since 2004, a company which specialises in legal expenses insurance."

The witness stated that his FIR was produced at the time and so it was reliable and he had another FIO at the meeting, Mr J who could verify what was said. The witness could not remember the particular meeting but his FIR was an accurate reflection of his understanding of what took place. The witness's team leader had suggested he make enquiries and he had looked at his own car and home insurance and did not find such cover but his enquiries were not extensive. His manager also looked at his home and car insurance policies. They found legal expenses insurance but none that related to this type of claim. The witness did not think he looked at travel insurance.

Findings of Fact and Law

34. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondents' rights to a fair trial and to respect for their private and family lives under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(References to the submissions below include both submissions made in writing and orally.)

35. **Allegation 1.1 - Between 28 April 2015 and 12 March 2018 failed to ensure that it was disclosed to clients of the firm to whom the firm recommended After the Event legal expenses insurance ("ATE insurance") brokered by Box Legal Limited ("Box Legal") that he had an ownership interest in Box Legal and thereby breached any or all of Principles 2, 3, 4, 5 and 6 of the SRA Principles 2011 ("the Principles") and any or all of Outcomes 1.12, 6.1 and 6.2 of the SRA Code of Conduct 2011 ("the 2011 Code").**

Allegation 1.2 - Between 28 April 2015 and 12 March 2018 failed to ensure that it was adequately disclosed to client of the firm to whom the firm recommended ATE insurance provided by Leeward Insurance Company Limited ("Leeward") that he had a financial interest in Leeward and thereby breached any or all Principles 2, 3, 4, 5 and 6 of the Principles and any of all of Outcomes 1.12, 6.1 and 6.2 of the 2011 Code.

Regulatory provisions cited in allegations 1.1 and 1.2

SRA Principles 2011

Principle 2	You must act with integrity
Principle 3	You must not allow your independence to be compromised
Principle 4	You must act in the best interests of each client
Principle 5	You must provide a proper standard of service to your clients
Principle 6	You must behave in a way that maintains the trust the public place in you and in the provision of legal services

Outcomes

Outcome 1.12 Clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them

Outcome 6.1 Whenever you recommend that a client uses a particular person or business, your recommendation is in the best interest of the client and does not compromise your independence

Outcome 6.2 Clients are fully informed of any financial or other interest which you have in referring the client to another person of business.

Indicative Behaviour

IB 1.4 explaining any arrangements, such as fee sharing or referral arrangements, which are relevant to the client's instructions;

Submissions for the Applicant

35.1 Ms Hansen explained that the date 28 April 2015 cited in the allegations was significant as the date of an agreement between Box Legal and the firm about how they would conduct business together. She submitted that the allegations could still be found proved if it was found that the firm was not speaking to clients for some days after that. Ms Hansen referred the Tribunal to the agreement at paragraph 1.3:

> "The Solicitor agrees that it will normally indicate to Claimants that they should not pursue their claim without the benefit of an ATE Policy, and where the Solicitor's Claimants purchase any particular type of ATE Policy (i.e. a motor policy, non-motor policy, industrial disease policy etc.), the Solicitor will use its reasonable endeavours to arrange that that type of ATE Policy is purchased by not less than 80% of its Claimants."

The "Solicitor" in the agreement meant the firm.

35.2 Ms Hansen submitted that the agreement between the firm and the client included a fee for insurance; it varied but the fact of its existence was material. The insurance was obtained through Box Legal and it was accepted that the Respondents did not disclose that there was a relationship between the firm and Box Legal. The dispute was about whether the Respondents were required to disclose the interest to clients. The Applicant's case was that there was a clear requirement to do so (Outcomes 1.12, 6.1 and 6.2 and Indicative Behaviour 1.4 of the Code). Ms Hansen submitted that the relationship clearly fell within the meaning of Outcome 6.2. There was a financial interest because the Respondents owned both companies. The only other directors of the firm were their wives who had minority interest, and only the Respondents owned Box Legal. The fact of ownership was not material but the interest in the entity to which the clients were referred to buy insurance was. However Ms Hansen submitted that it was all the more serious a breach because not only were the Respondents solicitors, but they were also the two directors and owned the majority of the firm. The Respondents' position was that Box Legal did not make any money from this agreement. For whatever reason the initial agreement was set up, such that Box Legal

did not charge any sum of money to the insurer. Then, when the agreement changed between Box Legal and the insurer, so that Box Legal was paid a monthly sum of money instead of being paid by policy; Box Legal still did not charge Leeward for the airline claims it referred so one could deduce that Box Legal was still not paid to be the insurance broker. Ms Hansen submitted the payment arrangement was irrelevant as the Outcome referred to 'any financial or other interest' so it was not a defence to the allegation of breach of Outcome 6.2 that Box Legal did not make any money from this arrangement. The Applicant also asserted that, because the Respondents did not disclose their interest in the broker, their independence was compromised because they were recommending clients use their own business to broker the arrangement without telling clients it was their own business. The Respondents said they made no profit; that Box Legal did all this for free, but if a different broker had been used that other broker would be Box Legal's competitor and Outcome 6.1 was not achieved.

35.3 The Applicant alleged that Outcome 1.12 was not achieved because clients could not make an informed decision if they were not aware of the clear relationship between the solicitor recommending that they take out insurance and the broker being used. Clients might say they did not mind the connection between solicitor, broker and insurance provider, but they could not make an informed decision if they were not given the information. Ms Hansen also referred to failure to achieve Indicative Behaviour 1.4: which was not cited in the allegation but was referred to in the Rule 5 statement as indicating the need for disclosure.

35.4 The Applicant asserted that the Respondents were obliged to make the disclosure even if, as the Respondents said was the case after they changed the wording to make the arrangement clear in the client care letter (before the firm ceased offering insurance at all), no client ever objected and said they wanted to use their own broker. The amended text read:

> "The broker of this policy is Box Legal Limited ("Box Legal") which is owned by our principal directors. Box Legal does not receive any direct benefit or commission as a result of this policy, but it is possible that it may in the future receive some indirect benefit from the policy's insurer, although what type of benefit that may be, and the amount of it, is currently unknown."

The Applicant asserted that the information should have been disclosed to the clients from the very first time clients were advised to take out the insurance.

Allegation 1.2

35.5 Ms Hansen submitted that this allegation related to the same time period as allegation 1.1 and the same breaches of Principles and Outcomes were alleged. The Applicant alleged that disclosure of the financial interest of both Respondents in Leeward was inadequate rather than that it had not taken place at all. The precise nature of the interest had not been disclosed at the time the Rule 5 Statement was drafted. In addition Leeward had loaned a total of £550,000 to the firm. In his witness statement dated 19 August 2019, the First Respondent said:

> "Neither [the Second Respondent] nor I are officers or employees of Leeward, but we hold preference shares in Leeward which, after payment of all claims,

> expenses and fees, entitle us and our wives (each family in equal shares) to receive all of the profits generated by the policies placed by Box Legal with Leeward…"

He also stated:

> "It should also be borne in mind that FairPlane continues to owe Leeward £500,000 together with interest thereon at 3% per annum under the two loan agreements at pages 207 to 212 of NXB1 [the exhibit to the Rule 5 Statement]. Those agreements are personally guaranteed by [the Second Respondent] and I so they are currently our joint liability if FairPlane does not repay the loan. Leeward made 2 loans totalling £550,000 with both now repayable on 1st June 2020. Both loans are repayable as a lump sum, so FairPlane does not currently make instalment repayments, but it has repaid £50,000 to date, and will repay the balance in due course as profits permit."

Ms Hansen submitted that the agreements originally required the loans to be repaid in 2018 but the date had been changed to 2020. The loan went to the interest and the relationship between the firm and the insurer.

35.6 Ms Hansen referred the Tribunal to the way that the relationship was disclosed to clients:

- The firm's standard client care letter included the CIP of which the letter stated "please read all of it carefully, in particular..." and referred to three sections, including section 2 and section 3.

- Section 2 of the CIP detailed that charges included £20 for ATE insurance (this had previously been £27.50).

- Section 3 "strongly recommended" obtaining ATE insurance; advised that this would be purchased unless instructed otherwise; explained that the policy would be obtained through Box Legal from Leeward; and stated that the firm only provided ATE insurance from Leeward.

- Section 7 of the CIP headed "key facts" comprised a summary of the ATE insurance, beginning:

  > "(This is a summary of the cover... and sets out its significant features, benefits, limitations and exclusions. This policy summary does not form part of the policy terms and conditions and you should still read the policy wording, including its definitions, for a full description of the insurance terms. The policy wording is at:
  > www.boxlegal.co.uk/downloads/FairPlanepolicy.pdf"

- The insurance policy accessed via that web address disclosed:

  > "The insurer of this policy is Leeward Insurance Company Limited ("Leeward"). Please note that the directors of FairPlane UK Limited have an interest in Leeward and may receive a payment from Leeward in respect of

> Leeward's annual profit, which will include Leeward's profit (if any) on the premium for this policy. It is not possible to estimate the amount by which the directors of FairPlane UK Limited may benefit from this policy (if at all), because any payment to them will depend on claim levels and Leeward's overall profit in any year."

Ms Hansen submitted that the client care letter did not disclose the relationship with the insurer, although the later amended version did. The client was asked to look at the CIP with its strong recommendation to obtain ATE. The policy wording was not contained in the CIP, and it had no disclosure of the Respondents' interest in the insurer, instead the client was asked to go through the CIP which was not a short document at 24 pages. The summary of the insurance terms the CIP contained referred to Box Legal's website, rather than the firm's website, for the policy wording. The disclosure was contained in the second paragraph of the policy document. Ms Hansen submitted that the key issue was that the Respondents as solicitors recommended to clients that they take out an insurance with the provider, and the Respondents should have disclosed that there was an interest between the solicitors and the insurance provider. The Applicant said the disclosure was not adequate because it did not come in a document or conversation directly between the firm and its clients. The clients were not fully informed as required by Outcome 6.2.

35.7 Ms Hansen submitted that it compromised the independence of the solicitors not fully to disclose the financial interest to the clients. Going via the Box Legal website was not good enough, especially when the web link was hidden away in a 24 page document. To make an informed decision as required by Outcome 1.12 the client had to be aware that their solicitors could make money from the insurance premium. As with allegation 1.1 it was not a question of whether the client would have done anything differently; one could not speculate what they would have done; they were entitled to the information and the Respondents were required to give it. The Applicant also alleged that the Respondents did not achieve Indicative Behaviour 1.4; the explanation they received was inadequate because it was not provided to them directly. The disclosure only took place from 12 March 2018 when amended copies of the client care letter and the CIP were produced and provided to the FIO.

35.8 In respect of the breaches of Principles alleged in allegation 1.1 and 1.2, Ms Hansen submitted that whilst all allegations were made against both the First Respondent and the Second Respondent, the First Respondent was the COLP and the COFA of the firm. These positions of responsibility and their relationship to the allegations aggravated the seriousness of the allegations against the First Respondent.

35.9 It was submitted that by failing to disclose adequately or at all the Respondents' interests in Box Legal and Leeward, the Respondents failed to act with integrity, that is with moral soundness, rectitude and steady adherence to an ethical code. In Wingate and Evans v SRA and SRA v Malins [2018] EWCA Civ 366, it was said that integrity connotes adherence to the ethical standards of one's own profession. A solicitor acting with integrity would have disclosed their interest in proposed insurance arrangements to clients in a clear and transparent manner. They would not have hidden the disclosure away in a document not directly sent to the client, and would not hide the disclosure regarding Box Legal on the basis that they did not

actually make any money from the referrals. The Respondents therefore breached Principle 2.

35.10 It was submitted that the Respondents allowed their independence to be compromised by recommending that clients obtain (and, in fact, obtaining for clients, unless they received express instructions to the contrary) ATE insurance through an insurance broker which was wholly owned by the Respondents and from an insurance company in which the Respondents had a financial interest, without properly disclosing these arrangements to their clients. The problem was two-fold; the Respondents were shareholders in Leeward and received profits from it, and Leeward had made significant loans to the firm which had not yet been repaid. The Respondents' failures to disclose the facts and matters leading to the own interest conflict (or potential own interest conflict) demonstrated that they had allowed their independence to be compromised. The Respondents therefore breached Principle 3.

35.11 It was alleged that it was in clients' best interests to have the Respondents' interests in the broker and insurance provider disclosed to them so that they could make an informed decision The Respondents therefore breached Principle 4.

35.12 It was alleged that a solicitor providing a proper standard of service would ensure that their clients were provided with all material information about their claim, and would therefore notify clients of the solicitor's own interest in litigation funding arrangements which were being recommended, before recommending an insurance policy. The Respondents therefore breached Principle 5.

35.13 It was alleged that public confidence in the Respondents, in solicitors and in the provision of legal services was likely to be undermined by the Respondents' failures to disclose their interests in Box Legal and Leeward. The Respondents therefore breached Principle 6.

Submissions for and evidence of the First and Second Respondents

Submissions

35.14 Mr Wheeler dealt with allegations 1.1 and 1.2 together. He asked the Tribunal to consider the context in which the Respondents worked and sought to trade in an economically viable way. Claims were for a fixed sum in Euros based on distance, relating to delayed or cancelled flights, almost entirely under the EU Regulations. For example the compensation relating to the distance London to Rome was 250€. Passengers could claim for a delay of over three hours. There was no need to prove loss. Since airlines must deal with a large number of claims, their exposure to claims (and hence the justification for incurring costs and arguing points on appeal) was far greater than the amounts at stake for any one individual claimant. Solicitors could not charge much for the work so they had to deal in high volumes, with a large number of clients each bringing claims which individually were of low value. It was entirely possible that the solicitors did not need to obtain a large amount of information, for example they did not need to obtain further information about losses. The work was highly specialised and required knowledge of a considerable volume of highly technical case law. The right to compensation in those circumstances had been derived from case law. It was a highly litigious area. There were frequently significant

appeals relating to the scope of the airlines' obligations under the Regulations. Airlines responded in a way almost entirely designed to make life difficult for claimants, and to make it uneconomical for solicitors to work in this area, as set out in the First Respondent's statement:

> "Because of the resources and expertise necessary to carry out this work, it is only economic for solicitor firms to act in these claims if the work is done in bulk. There are therefore, to my knowledge, only 3 solicitor firms (including FairPlane) who carry out this work, of which FairPlane is the second largest. FairPlane takes on approximately 2,000 new clients each month, and is currently settling around 1,100 claims per month."

Airlines did not proactively pay compensation. Also from the First Respondent's experience where solicitors were instructed, claimants had a much better success rate than where individuals approached airlines.

35.15 As to the information provided to clients, Mr Wheeler referred to the client care letter which included under "Our terms and charges":

> "The details in your Client Information Pack are Important but you do NOT need to sign or return any of them - just keep them safely. Unless you tell us not to act any further on your behalf they will form the contract between us."

Thus clients were told the information in the CIP was important and needed to be read. The CIP advised:

> "1.2 How we will deal with your claim
>
> ...
>
> We will claim the sum we mentioned in the attached letter, but we will NOT claim any additional losses you may have suffered as a result of the problem with your flight. Examples of such additional losses are: extra accommodation or meal costs; extra separate onward transportation costs, loss of part of your holiday, disappointment or anxiety, missed meetings, events or opportunities etc. Whether you can make such a claim will depend on the terms and conditions of your airline ticket/booking and these obviously vary from airline to airline. Our philosophy however is to offer clients a streamlined service at a very low cost, and we therefore cannot advise you on your individual booking terms or deal with this type of additional claim.
>
> It is important that you are aware however, that in some circumstances making this current claim may lose you the right to claim such additional losses. This may occur if:
>
> a) Your airline states that your compensation is paid "in full and final settlement" of your claim, or
>
> b) A court makes a final decision on your claim (it is unlikely you can then claim further sums at a later date).

Both of the above will then prevent you from claiming any other compensation in the future relating to this flight or connecting flights. If therefore you have any additional losses which you feel must be included in this claim, then we will be unable to act for you so please immediately email us and ask us to take no further action on your behalf. Before you make that decision however, please note that if you are awarded any additional losses, then under current European Regulations, the money you are paid for those additional losses will be deducted from the fixed compensation we are claiming for you, so it will not be worth you claiming any additional loss unless it exceeds the fixed compensation we are claiming for you (the amount is set out in the attached letter)."

Mr Wheeler submitted that passengers could claim for additional losses on travel insurance.

35.16 Mr Wheeler submitted that in the Section headed "Charges" there was an obvious difference between what was charged and what the costs were. The arrangements operated heavily in the client's favour in most cases:

"2. Our charges

2.1 "No Win, No Fee" We have agreed to act for you on a "No win, No fee" agreement, known as a "Conditional Fee Agreement". Under this agreement we will not charge you anything if you do not receive any compensation. If however we recover any compensation for you, our charges are a maximum of:

a) 25% plus VAT of the compensation and interest we are due to send you and

b) £20 including IPT for insurance to protect you against any costs liability (see item 3 below) and

c) We will keep whatever we can recover from the airline, for our costs and disbursements (the money we have laid out on your behalf) plus VAT.

d) We do not make any separate charge for sending you your compensation by electronic bank transfer to a UK bank …

NB. We are also legally required to let you have an estimate of our charges, and we will notify you if our estimate changes. We estimate that if proceedings are issued, then our costs will be around £1,200, and that without proceedings, our costs will be around £200, but once again this formal notification has little relevance to you because you will never have to pay us more than Our Guaranteed Charges."

"3. Insuring against losing

3.1 Premium and benefits

> Although we believe your claim is likely to succeed, we strongly recommend that you insure against the risk of losing your claim. This sort of insurance is called After The Event Insurance ("ATE insurance"). As we have explained, if your claim is unsuccessful, you will not be liable for our costs, but if you lose your claim or even if you win it, you might also have to pay some or all of your opponent's costs, disbursements and VAT ("the Defendant's Costs"). These are unlimited …
>
> This premium for this policy is £20 Including IPT - it does not vary during the lifetime of your claim…
>
> …
>
> The policy gives you the ability to ensure that the airline pays you the correct level of compensation because if they refuse or offer to pay compensation which is too low (on our advice) you can confidently issue court proceedings."

Mr Wheeler submitted that clients were also told to read the policy wording and given a link to where to find it. There was no hyperlink but clients could cut and paste the email address; this was not a complex exercise. He also referred to the wording of the policy itself with its "Important Notice" at the top disclosing the firm's interest in Leeward.

35.17 Mr Wheeler submitted that the scope of the policy was quite unusual, covering any adverse costs awarded (up to a policy limit of £25,000) against the claimant, the claimant's own disbursements which would otherwise be payable by the claimant upon the failure of the claim, and (unusually for an ATE policy) the claimant's own disbursements payable upon the success of the claim insofar as those exceeded the recoverable costs:

> "Opponent's Costs that a court orders You to pay after a judgement against you;
>
> …
>
> a) The Disbursements
>
> (i) Those Disbursements which Your Appointed Representative has reasonably and properly Incurred, If:
>
> - Your Action is not Successful (excluding any Success Fee element of Counsel's fees), or
> - Your Action Is Successful but You are nevertheless ordered to pay part of Your Opponent's Costs…
> - Your Action Is Successful but under the Court Practice Rules You are unable to recover sufficient costs to cover the cost of the Disbursements you have incurred"

The claims were brought under the small claims track, but there was still scope for an adverse costs order for example for witness expenses. All the cases were heard in Liverpool and a train ticket could easily cost £100 if not more. In the context of the sums claimed these were not insignificant risks. Mr Wheeler accepted that the costs might be spread across all claimants but if for example a family of four claimed through the firm they could bear the entirety of the costs. One could not tell clients in

advance what would occur. It was a balancing exercise; the Respondents had to give advice to clients about their exposure including, potentially, to adverse costs. One needed to look at the totality of the policy. Counsel's fees could be £150 plus VAT and sometimes counsel attended a hearing but the court could not hear them and so a repeat brief fee was necessary; sometimes these costs were split between lots of people, but not necessarily. It would be entirely uneconomic to ask the client to pay or for the firm to bear the costs. Mr Wheeler submitted that insurance was critical, and essential in order for the claim to be brought on an economic basis, as otherwise costs would come out of the small amount of recovery. Also the costs risk was removed for a relatively small sum, a premium of £20 payable only on success, Mr Wheeler acknowledged that another of the firms in this market charged an administration fee, rather than an insurance premium, and that the firm now did so; insurance was a way to facilitate the claims, but not the only way. Solicitors could also choose to bear the costs risk themselves.

35.18 Mr Wheeler addressed a point raised by the Tribunal. He submitted that the purchase of the ATE insurance before it was known whether litigation would be required was inevitable in a block-rated premium situation. The First Respondent dealt with it in his statement:

> "When FairPlane first started to trade in 2015 there was, so far as I could ascertain, no broker or insurer offering ATE policies to cover the claims which FairPlane was dealing with, apart from Box Legal and its recommended ATE Insurer, Leeward. As far as I am aware, this remains the position. At the outset of trading, it was obviously not possible to provide Leeward with any record of previous claims, and difficult to provide Leeward with any reliable estimate of likely future claims. In the circumstances, Leeward's quotation £26.50 inclusive of IPT (later rising to £27.50 to take account of IPT increases), appeared reasonable. The ATE Policy premium which Leeward has charged has always been "block rated", i.e. the premium is applicable to all types of claim for flight delay/cancellation - Leeward does not look at the individual circumstances of each case to assess its prospects of success. This "block rated" approach is quite common, and has of course been approved on a number of occasions by the courts, the latest being in the Court of Appeal's judgement on 17 July, 2019 in West v Stockport NHS Foundation Trust & Demouilpied v Stockport NHS Foundation Trust [2019] EWCA Civ 1220. Having quoted a premium which reflected an average, across the board risk, Leeward then (as with all block rated premiums), needed to ensure that not only risky cases were being insured, but that most cases were being insured in order to provide a broad spread of risk and to reassure itself that there was no "cherry picking" of cases. It was in any event difficult to assess risk at the very outset, and accordingly this low-cost ATE Policy was routinely arranged."

Mr Wheeler also referred to the first two paragraphs of the West v Stockport NHS Foundation Trust judgment:

> "These appeals raise a number of specific issues arising out of the respondent's successful challenge to the amount of the ATE insurance premium recoverable by the appellants. By common consent, however, the

> issues also raise a number of wider points relating to reasonableness and proportionality and the proper approach to the assessment of costs.
>
> The potential significance of these appeals led to this court's order that there be a fact-finding hearing, before two assessors, which resulted in a detailed report ("the Assessors' Report") being provided to the court for the purposes of the appeals. Details of that exercise are set out in Section 6 below. As a consequence of that report, this court has been able to reach a number of conclusions which were not previously open to first instance judges grappling with these and related issues."

Paragraph 13 of the judgment gave the background to one of the cases considered:

> "The ATE insurance policy was with ARAG. It was a block-rated policy. The particular features of such a policy are set out in greater detail in Section 6 below. For present purposes, it is sufficient to say that such a policy is not a bespoke policy, instead, it has a fixed premium set by reference to a wide "basket" of cases rather than individually assessed by reference to the risk of the particular case. It is a policy which, at least contractually, a solicitor with a contract with ARAG is obliged to use."

Mr Wheeler also referred to the key findings:

> "The assessors note that those terms provide that the panel solicitor must use the ARAG scheme as the insurance provider for ATE insurance in respect of all cases in agreed classes. At paragraph 44 they note that "the solicitor must recommend the relevant ARAG scheme policy to any eligible client when entering into the funding agreement."

And

> "In their conclusions as to cover, starting at paragraph 191, the assessors are clear that the limit of the indemnity plays a marginal role in the setting of recoverable clinical negligence ATE insurance premiums. The premium was primarily a function of the average cost risk. At paragraph 198 the assessors note that there is little incentive for solicitors to undertake any thorough or detailed ongoing review of the market, "at least where recoverable premiums are concerned". They explain that, provided that a solicitor and an ATE insurer have a good working relationship, clients are not burdened with unattractively high irrecoverable premiums and difficulties are not experienced in recovering from an opponent the recoverable element of the premiums for the client, there is little incentive to review the market..."

Among the issues to be considered by the court was what was optimum:

> "48. The following issues arise for our determination: i) How should a reasonableness challenge to an ATE premium be made and resolved?"

The judgment set out the principles to be derived:

> "56. We derive the following principles from these authorities: Disputes about the reasonableness and recoverability of the ATE insurance premium are not to be decided on the usual case-by-case basis. Questions of reasonableness are settled at a macro level by reference to the general run of cases and the macro-economics of the ATE insurance market, and not by reference to the facts in any specific case [McMenemy]."

The judgment set out the correct approach to assessing the reasonableness of premiums:

> "65. As regards a block-rated policy, such as the policies in the present appeals, the ability of the paying party to mount a sustainable challenge will be much more restricted. The majority of challenges to block-rated premiums must relate back to the market in one way or another, and would therefore require expert evidence to resolve. In particular, it will not usually be enough for the paying party simply to give evidence that another policy was cheaper. It is not for district judges or costs judges to have to plough through the detail of allegedly comparable policies, still less to be required to assess the effect of any differences in content. An expert's report would be required to the effect that the other policy was directly comparable to the policy under review.
>
> 66. Moreover, by reason of the contract terms commonly agreed between insurers and solicitors, an alternative block-rated policy may not in fact have been available to the receiving party in any event. That may not of itself rule out consideration of that policy as a comparable, but the challenge would involve difficult issues as to reasonableness to be resolved on the facts of the particular case.
>
> 67. Finally, a simple comparison between the value of the claim (either the claim made or the settlement sum) and the amount of the premium paid is not a reliable measure of the reasonableness of the ATE insurance premium. That would ignore the way in which the premium payable for a block-rated policy is fixed taking into account a basket of a wide range of cases. It is similar to the "swings and roundabouts" comments associated with fixed costs..."

Mr Wheeler submitted that the Court said it was perfectly reasonable for a solicitor to agree a premium with an insurer. From the client's point of view it was easier to challenge costs on an inter partes basis than individually. The Court was saying that block-rating was a perfectly reasonable approach inter partes so it was hard to see how it could not be right on a solicitor and own client basis. It was implicit that it was legitimate to enter into policies on this basis.

35.19 Mr Wheeler submitted that the point was addressed in Callery v Gray, Russell v Pal Pak Corrugated Ltd [2001] EWCA Civ 1117L:

> "The information placed before us shows that, in cases such with which these appeals are concerned, many solicitors adopt a similar approach to insurers when deciding on what terms to act for clients under CFAs. The uplift in their fees which they demand in respect of this category of business is set at a level designed to produce additional income on the cases which succeed which is

> adequate to compensate them for the cases which lose and thus earn them no fee. The cases which win have to subsidise the cases which lose. However, while this may be true of many, it is not clear how many. Lawyers are accustomed to assessing a risk without the need to carry out the actuarial calculations which insurers would consider appropriate."

The practice considerations were set out:

> "98. The defendants contend, however, that it is unjust to saddle defendants with the costs of the ATE insurance premiums and success fees without giving them a fair chance to identify those cases where liability and quantum is not disputed so that success is assured.
>
> 99. We see the force of this submission, but we have concluded that, at least in the circumstances of the two appeals, the prejudice to defendants is not as clear as is suggested and that it is outweighed by the legislative policy and by a number of practical considerations..."

The Court concluded:

> "100. For these reasons we have concluded that where, at the outset, a reasonable uplift is agreed and ATE insurance at a reasonable premium is taken out, the costs of each are recoverable from the defendant in the event that the claim succeeds, or is settled on terms that the defendant pay the claimant's costs."

Mr Wheeler submitted that while the Tribunal had raised questions about it, the Applicant did not allege it to be wrong to take ATE insurance at the time it was offered. (In making final submissions on fact and law, Ms Hansen submitted that the two authorities referred to by Mr Wheeler were not really on the point. They were about the recoverability of ATE premiums by the paying party at the conclusion of litigation.)

35.20 Regarding the allegations of non-disclosure, Mr Wheeler submitted that Ms Hansen accepted that Outcome 6.2 was the most directly on the point. The interest in the referral rather than in the "other person or business" must be disclosed. Here the real indirect benefit to the Respondents from the scheme came from their interest in the profits of Leeward, subject to various deductions. He invited the Tribunal to compare the premium income and profits per policy and submitted they could not have been particularly substantial. The First Respondent said in his statement:

> "It may assist the Tribunal if I indicate that as at the 15th August 2019, the premiums which Leeward has received and the claims it has paid are:
>
> Total premiums paid by FairPlane clients: £660,102.44 plus IPT @ 12%
> Total claims paid to FairPlane clients: £166,468.07."

The First Respondent also stated:

> "There is a substantial risk that at any time FairPlane's clients may be drawn into such disputes, and if those clients were unsuccessful, then the costs claimed by those clients could perhaps be in the region of £50,000 to £200,000, depending on the level and complexity of the appeals involved. In this regard there remain 2,239 ATE Policies still on cover with FairPlane's clients. Unfortunately the figure of 1,000 live policies in paragraph 13.4 of the Respondents' Answer is incorrect. It was obtained by looking only at the policies issued before 1 September, 2016, and not all policies ever issued. I apologise for the erroneous figure contained in paragraph 13.4 of the Respondents' Answer."

There were 2,239 policies still on risk and the Respondents received around £10.63 per policy. As to how these figures were arrived at Mr Wheeler referred to the First Respondent's statement:

> "Before 1 September, 2016:
> 10,816 FairPlane clients obtained an ATE Policy from Leeward between the time when FairPlane began to trade and 1 September 2016. This figure excludes 5,005 policies which were cancelled, none of which were charged for.
>
> After 1 September, 2016:
> 23,200 FairPlane clients obtained an ATE Policy from Leeward between 1 September 2016 and 1 May 2018. This figure excludes 7,891 policies which were cancelled, none of which were charged for. These 23,200 policies formed 2.1% of the value of all premiums brokered by Box Legal and insured by Leeward between 1 September 2016 and 1 May 2018."

Mr Wheeler submitted that the figure of £10.63 per policy came with huge health warnings as it was subject to costs such as that of administering the policies and of running the business; one was not talking of huge numbers and no one knew what the profit would be, including Leeward.

35.21 Mr Wheeler submitted that there had been no attempt to hide the Respondents' interest in the policy; it was disclosed in the policy wording which clients were told specifically that they should read. The First Respondent had given evidence that the fact the Respondents held preference shares in Leeward was not publicly available, and so if they had wanted to conceal their interest in Leeward they could simply not have mentioned it. The loan to the firm was not an interest of the Respondents in Leeward, but a liability of the firm to Leeward. The revised client care letter which was held up as a model made no mention of the loan and there was no reason why it should. It had not been alleged that the wording of the disclosure regarding Leeward was inadequate, but that it had been provided by the wrong entity. It was made by Box Legal because their web address was given, but Mr Wheeler submitted that the mechanism, and on whose server it was, were irrelevant. As to criticism of the disclosure not appearing in a document sent directly to clients, this was not the Applicant's initial view. Mr Wheeler reminded the Tribunal of what the FIO said in his FIR:

> "The firm's clients were not being informed of the firm's managers interest in Box Legal Ltd but were being informed of the managers' financial interest in Leeward Insurance Company Ltd,"

The FIO had seen what the Tribunal had seen, and had looked at the documents online. He had also been provided with a printed copy. He positively asserted that clients were informed of the financial interest in Leeward and made no criticism. If he had thought it was wrong he would have said so; he listed other breaches in his FIR. It was not just the FIO who was of that view. Mr Wheeler referred to the letter from Ms R in the EWW letter of 13 August 2018. She included a "Summary of Facts" in her letter which stated:

> "The report identified the following issues:
>
> ...
>
> - ...The policies were obtained from Leeward Insurance Company Ltd, in which the firm's managers also held a financial interest, which however was disclosed to the clients."

Ms R positively wrote that the interest was disclosed. If she thought otherwise she would have said so, and also if she thought the FIO had got it wrong. The allegation now made, challenged the manner of the disclosure provided, not the fact of it. There was therefore no basis for a finding of misconduct based on what the Applicant had seen and its initial view. (In making final submissions on points of law and fact, Ms Hansen submitted, regarding the fact that allegation 1.2 was not raised in the FIR or Ms Robinson's EWW letter, that the role of the FIO in these proceedings was as a witness of fact and not as an expert. There was no requirement on the Applicant only to bring allegations in the proceedings which had been raised in the EWW letter or investigation.)

35.22 Mr Wheeler submitted that the disclosure made regarding Leeward was adequate; it was made in perfectly straightforward terms in bold text at the top of a document made available to the clients, and they were told to read it. If the Tribunal found that the way the disclosure was made was wrong then Mr Wheeler submitted the manner in which disclosure was required was not expressly detailed in the rules. It required the exercise of professional judgement. A mere error of judgement ought not to constitute professional misconduct unless it was one no solicitor could reasonably or properly have made. Mr Wheeler referred the Tribunal to the judgment in Connolly v Law Society [2007] EWHC 1175 (Admin) (where there were numerous allegations denoted by roman numerals):

> "Charge (XXX)
> 54. This charged that the Appellant continued to act for two clients when there had arisen a significant risk of conflict of interest between them, in violation of principle 15.01 of the Guide to Professional Conduct of Solicitors 1996. The charge was dealt with by the Law Society and the Tribunal as a complaint by Mr O arising from the fact that the Appellant acted on behalf of two claimants, an NHS Trust and a Health Authority, in proceedings against a company, RO Lid, in which he had a substantial interest.
>
> ...

> 61. Before us, Mr Rhodes submitted that the existence of a conflict of interest is, as the Tribunal accepted, a question of professional judgment. The Appellant had considered the question of a conflict, and indeed had discussed it with colleagues on two occasions, and if he erred in his professional judgment in concluding that there was no conflict, that could not justify a finding of a disciplinary offence. His judgment was not one that could not be made by a reasonable professional man.
>
> 62. I accept that generally the honest and genuine decision of a solicitor on a question of professional judgment does not give rise to a disciplinary offence. But that does not mean that for a solicitor to act where there is a significant risk of a conflict of interest cannot be a disciplinary offence. If a solicitor does not honestly and genuinely address the issue, he may be guilty of an offence. And if his decision is one that no reasonably competent solicitor could have made, it may be inferred that he did not (or could not) properly address the issue. That inference may well be appropriate where, as in the present case, the reason given for the solicitor's professional decision is manifestly unsustainable. In the present case, the reason given for the solicitor's professional decision is manifestly unsustainable."

Mr Wheeler submitted that this case did not come close to meeting the test for professional misconduct. If there was an error, it was a balanced question on which people could reach different views, and the view the Respondents reached was well within the ambit of the judgement a solicitor could reasonably and properly form. It would be obvious to the Applicant if this was the case. The First Respondent gave detailed evidence about the judgement exercise he undertook. He said it was a balancing act; some information had to be placed later in the documents. If he had left some other information until later he would have been criticised. The fact that, with hindsight, he might do it differently, did not reach the hurdle of professional misconduct.

35.23 Mr Wheeler submitted that it was perfectly proper for the Second Respondent to allocate tasks to different people, and take the risk of a person getting it wrong. Although the conflict was also personal to the Second Respondent, both Respondents were in the same boat. It was not an unacceptable conflict to him. There was no reason to think that the First Respondent could not exercise judgment in a perfectly reasonable way. If the Tribunal took the view that the First Respondent got it wrong then the Second Respondent had to accept that or, if the First Respondent got it right or in a way not amounting to professional misconduct, the same applied to the Second Respondent. Even in a two-director firm it was acceptable to play to different strengths. It was reasonable for one of them to consider the conflict as the obligation was the same for both, and it would be remarkable if the Tribunal reached a decision that the First Respondent had acted properly but the Second Respondent had not.

35.24 With particular reference to allegation 1.1, Mr Wheeler submitted that, if one thought of a referral to an entirely independent third party with whom the solicitor had no other connection than to be paid commission, this was plainly caught by the rule. If there was no such benefit from the referral, conversely there was nothing to declare. It had been said by Ms Hansen that the ownership of the firm was not relevant, but Mr Wheeler submitted that the sub-ownership of Box Legal was not relevant either.

No interest in the referral had been identified. This was not the usual situation; in most instances a person had something to gain from a referral to an entity it owned, and disclosure would need to be made. Box Legal was a conduit and had no interest in the referral whatsoever. In his statement the First Respondent said:

> "From the commencement of Box Legal's trading in 2004 until 1 September 2016, Box Legal was paid an amount per (non-FairPlane) policy by Leeward of between £35 and £65 per policy, but Box Legal was not paid any fee by Leeward for the FairPlane ATE Policies."

And

> "After 1 September 2016, Box Legal was no longer remunerated by Leeward on a "per policy" basis but for tax reasons it instead received a monthly flat fee. The flat fee however was not based on the volume of policies, but was calculated simply to cover Box Legal's expenditure."

Again in his statement the First Respondent said:

> "it [Box Legal] received an average of between £61,718 per month and £69,173 per month from Leeward (depending on which period was selected). When it moved to a flat fee (and throughout the period 1 September, 2016 to 30th of April 2018) it received less than this - a flat fee of £58,000 per month so, in the same way as before the 1 September 2016, it is impossible to suggest that after the 1 September 2016, Box Legal was receiving any financial benefit for the FairPlane ATE Policies."

So, Mr Wheeler submitted, the firm received less money after the change than before; there would not be any difference with or without the firm's business. In neither case was any payment attributable to the policies arranged by Box Legal for FairPlane clients. The only substantive interest was through Leeward and that was declared.

35.25 Mr Wheeler submitted that it missed the point to ask what if a client wanted to use a different broker; it was the firm's scheme, set up by the Respondents for the benefit of the clients so the firm could run economically. The policies were only available through Box Legal. The policy was only sold to the firm's clients, they could have refused the ATE but could not get the benefit of the policy from some other broker or firm at a lower rate or in some different way, unsurprisingly in the economic context in which the scheme was established. Box Legal provided the link to Leeward; it was an entirely electronic process. The premium was kept down as Box Legal was not taking a fee from Leeward. Mr Wheeler submitted that essentially the Respondents looked at it and they did not take the opportunity to cream off a further fee for their benefit. They had no further identified interest beyond that in Leeward.

35.26 The Tribunal enquired if the involvement of Box Legal was identified anywhere in the material sent to clients other than in the CIP where it said:

> "Unless you instruct us otherwise, we will arrange for a "ClaimSafe" ATE insurance policy to be taken out with Leeward Insurance Company Limited ("Leeward") to protect you against the risks set out above. In doing so you

> will be agreeing to allow the insurer and our agents Box Legal Limited, to inspect your file …"

Mr Wheeler pointed out that the Key Facts part of the CIP stated that the policy was "brokered by Box Legal Limited (www.boxlegal.co.uk)". As to why Box Legal was used at all, if no work was done, Mr Wheeler reminded the Tribunal that the Second Respondent explained in evidence that all the systems were already in place for the firm dealing with Box Legal and Leeward. Leeward wanted Box Legal to be involved.

35.27 Mr Wheeler submitted that quite a number of further breaches were alleged but they were either duplicative of the points addressed above, or they had no foundation. The Applicant had related the same alleged underlying misconduct to as many Principles and Rules as it could. He submitted as follows regarding those additional alleged breaches. First, Outcome 1.12 added nothing; it just covered what should have been disclosed.

35.28 Regarding Outcome 6.1, Mr Wheeler submitted that the suggestion that the Respondents' independence has been compromised was based entirely on the alleged failure to disclose the Respondents' interest in Box Legal and Leeward. However, in circumstances in which the interest in Leeward was disclosed, and where there was no alternative policy available in the market, those matters did not demonstrate a lack of independence on the part of the Respondents. It was also plainly in the best interests of the firm's clients to obtain ATE insurance cover in respect of costs liabilities. Mr Wheeler submitted that he had already explained why ATE cover was critical for the clients to proceed. The Respondents were not steering clients to one corner of an overcrowded market. The policy was both cheap and comprehensive. Leeward was the only insurer offering ATE cover. The firm's clients were therefore being offered a unique advantage of significant benefit and at a low cost. As outlined above, without cover, it would have been difficult to justify litigation of claims under the EU Regulations. The only real alternative was for the solicitor to bear the costs risk, but there was no obligation on a solicitor to do so. In the circumstances, the ATE cover offered by Leeward was plainly in the best interests of the firm's clients. It was difficult to see how the Respondents' independence could have been compromised; inadequate disclosure of Leeward was not the same thing as lack of independence. Committing to a block rated ATE policy did not demonstrate a lack of independence.

35.29 In respect of the alleged breach of Principle 2, Mr Wheeler submitted that at the highest there was misjudgement by the Respondents about the disclosure they were required to give. It might be a mistake but fell a long way short of lack of integrity. All that was said about it was at paragraph 45 of the Rule 5 Statement: "A solicitor acting with integrity would have disclosed their interest in proposed insurance arrangements to clients in a clear and transparent manner." Mr Wheeler submitted this just repeated the disclosure obligation. Lack of integrity must go beyond a technical failure to comply with the rules. There was no ethical failure here. The FIO and Ms R both said the Leeward interest was disclosed, and found it entirely unobjectionable conduct. As to the criticism of the non-disclosure of the interest in Box Legal, what interest did it have in all of this; none. Mr Wheeler submitted that it was difficult to see how Principle 5 regarding proper service was engaged at all. There was no complaint about, or criticism of the underlying work done by the Respondents. The

Second Respondent referred to the numbers of letters and emails commending the work they had done. The Applicant was seeking to lever a non-disclosure allegation to a principle that did not apply to these allegations. Nothing had been done by the Respondents to undermine public trust unless the alleged breach of Principle 6 referred to the non-disclosure allegations.

Evidence of the First Respondent

35.30 The First Respondent made the following changes to his witness statement: at paragraph 10.1 he had indicated that the firm's charges remained limited to 21% of the amount recovered, while the premium was reduced from July 2017. He should have said that the firm's total charges went up to a percentage of 25% from July 2017 to 1 May 2018. This required a consequent amendment to paragraph 16, which stated that the percentage rose on 1 May 2018. He also wished to amend paragraph 25.1 where he had indicated that one of the benefits that he and the Second Respondent received was that the latter received a small salary to reimburse him for expenses from Box Legal of "£870 p.m. until June 2017 and then £435 p.m. thereafter". In fact this payment came from the firm.

35.31 In cross-examination, the First Respondent clarified that the firm was the only solicitor purchasing policies via Box Legal for flight claims. There had been enquiries from others a couple of years previously, which came to nothing. The firm approached Box Legal which approached Leeward and the policy was developed. Before that no-one was providing these policies. Box Legal did not act as a broker to any insurers other than Leeward. The First Respondent agreed that, in human terms, he and the Second Respondent as directors of both the firm and Box Legal decided it would be a good idea to set up this type of policy. He clarified that some time before the firm started trading and accepting clients the insurance policy was developed between the firm, Box Legal and Leeward. The business model was not predicated on providing the policy to all clients, but that was how they decided to do it. The First Respondent confirmed that he had drafted the "Important Notice" at the top of the policy about the Respondents' interest in Leeward, but not the rest of the policy.

35.32 The First Respondent was not sure if the Respondents approached Leeward because it was the only insurer for which Box Legal broked; Leeward was amenable to doing it; if Leeward had not been able to do it, the Respondents would have had to approach someone else. He confirmed that at the point the policy was set up he and his wife already had shares in Leeward, as did the Second Respondent and his wife. The First Respondent stated that Leeward was not underwriting other ATE policies than those brokered through Box Legal for airline compensation claims. The Respondents and their wives owned the entirety of the entitlement to the profit of the policies taken out via Box Legal. In his witness statement the First Respondent stated: "Leeward must however, while it continues to trade, of course retain considerable reserves to meet future claims." The First Respondent stated that he had not looked at the implications of whether the arrangement could have been structured so that payment from Leeward came partly through Box Legal as a brokerage fee, but he must have thought about it. He agreed that if Box Legal had charged Leeward a brokerage fee it would have reduced Leeward's profitability and therefore the amount Leeward paid to the Respondents, but they would have received monetary benefit from Box Legal; that would be dependent on Box Legal's profits and what else was going on. His view was

that, as Box Legal received no payment, it was not necessary to disclose the relationship, and that situation was because of the decision he and the Second Respondent had made about the structure. The Respondents did not think owning Box Legal constituted an "other interest which you have in referring the client to another person or business". They did not think Box Legal was another business for the purpose of 6.2.

35.33 The First Respondent stated that if Box Legal had received some payment the premiums would have needed to be higher, although the risk would be the same. The arrangement meant that the premium was kept to the lowest figure for the client. All the money paid was an insurance premium, rather than being available to be put where the Respondents chose. The First Respondent stated that there seemed to be some notion of a money-go-round, because money ended up with the Respondents and their wives, but Leeward had its own management. The Respondents were entitled to receive money, at the complete discretion of the Board, as a dividend on particular policies. The First Respondent stated that he did not really know how the premium was determined when the policy was first set up. He had no information about whether the policy was likely to be profitable; he assumed Leeward thought that it would be.

Evidence of the Second Respondent

35.34 The Second Respondent stated that he had originated the correction to the First Respondent's witness statement regarding his salary. He confirmed his statement. He described his involvement in setting up the firm's case management system in his statement:

> "Within FairPlane, [the First Respondent] and I have separate roles. I deal with marketing, staffing and day-to-day operational matters. I also deal with accounts, and all aspects of FairPlane's case management system "Proclaim", including maintaining existing functions and designing and amending the system. [The First Respondent] deals with documentation, compliance and all legal aspects of the business, including some of the more complex issues on client's (sic) cases."

The Respondents had used Proclaim since 2004, and before that its predecessor. Proclaim did not cover brokerage work. So far as the airline cases were concerned the Second Respondent created everything in the firm's systems from scratch. His role had been developing the systems and work flow including the links to the accounts system and basic letters. As to why Box Legal did not charge Leeward, the Second Respondent stated that the systems of the firm and the Box Legal brokerage system ran side by side on Proclaim as different databases. The Box Legal system had already been set up for other work. It had been relatively simple to link the two once you knew how to do it. Policy requests to Leeward via Box Legal and claims made on the Leeward policies all went electronically. The procedures were to a large extent automatic. Creating the link between Box Legal and Leeward was a maximum of half a day's work, if that. The only human intervention was someone in the firm looking at the case and deciding if a claim should be made on the policy. In cross examination, the Second Respondent struggled to recall a discussion about the decision for Box Legal not to charge Leeward for the airline referrals. He agreed the

system could have been set up so that Leeward paid a fee to Box Legal for broking the policies. He thought the decision not to charge related to the accounting administration; it did not seem worth the hassle of dealing with a lot of these items on the Box Legal side because it was not something the Respondents wanted or needed to make money on. Before the Jackson changes Box Legal used to charge a small fee to the solicitor for other types of work. It did not occur to the Second Respondent to charge the firm for the airline work. The Second Respondent agreed that whoever was charged, the firm or Leeward, the money would come to the Respondents. Leeward did not know what the right level of premium would be; they had made a loss on cavity wall claims. This could have made a loss.

35.35 The Second Respondent stated that he and the First Respondent had looked at what other firms were doing and briefly discussed creating a package attractive to clients. There was another firm which did not arrange ATE, but charged an administration fee of £25. The Respondents did not think that would be very attractive to clients because the Respondents did not know what the arrangement said about disbursements and what would happen if a client lost. A better package would be where clients understood that they were covered by an insurance policy. The firm was brand new with very little assets and they thought that a promise from the firm would not be as good as an insurance policy. The Second Respondent was writing systems to all hours, and the First Respondent dealt with the package. They had discussed the unique nature; they were aware they would not recover counsel's fees. Otherwise the Second Respondent got on with his side of the work, and the First Respondent got on with setting up and drafting the handful of documents that the Second Respondent was not capable of drafting; the First Respondent had more technical legal knowledge.

35.36 The Second Respondent stated that the Respondents owned preference shares in Leeward from 2004, before the firm was set up. At the present time Box Legal was the only broker for Leeward, but the Second Respondent thought that the profit going to the Respondents was not limited to that which Box Legal referred. If another broker came on board the Respondents would be entitled to profit. He did not get involved too much regarding fees paid to Box Legal on policies. The Second Respondent stated that he had received dividends from Leeward, but they were not allocated according to policy.

35.37 The Second Respondent stated that he did not think there was a risk of conflict in the Respondents recommending the policy where they would receive a profit through Leeward or Box Legal, if it was disclosed to clients that they were common directors. He agreed with what the First Respondent said about the disclosure regarding Leeward being in a document not sent direct to clients. He thought the questions on the subject were theoretical. He stated that, with hindsight, the disclosure could have gone somewhere more obvious. He did not check on these conflict points, as it was not his role in the business. He agreed that, although the conflict was personal to him, he allowed the First Respondent to deal with it. As to whether the Second Respondent knew what the First Respondent was disclosing, he read the client care letter because it was quite short. He just looked at the documents from an IT view point. He did not look to check about disclosure in the client care letter, CIP or the policy. He and the First Respondent were run ragged; it was not his area, and he trusted the First Respondent to deal with it. It was put to him that a solicitor acting with integrity

would make his own checks about disclosure. The Second Respondent stated that not all the solicitors in a major firm checked what was disclosed in all documents. He rejected the suggestion that, if his independence was not compromised, he would have checked; the First Respondent was an exceptional lawyer. As to whether to check such matters would be in the client's best interests, he trusted the First Respondent implicitly. As to providing a proper standard of service the Second Respondent stated that the firm had hundreds of emails and letters about what a wonderful job they did. He disagreed that public trust would be undermined.

Determination of the Tribunal in respect of allegations 1.1 and 1.2 against both the First Respondent and the Second Respondent

35.38 The Tribunal had regard to the evidence including the oral evidence and the submissions for the Applicant and the First and Second Respondents. The Tribunal considered allegations 1.1 and 1.2 together because they related to a process involving three entities; the firm, Box Legal and Leeward. The Tribunal had heard evidence from both the First Respondent and the Second Respondent. The Respondents had both worked on setting up the structure in which the firm operated, while playing to their different strengths. In considering allegations 1.1 and 1.2, the Tribunal felt it was appropriate to consider the allegations against the First and Second Respondents together.

35.39 The Tribunal noted that Mr Wheeler had placed some emphasis on the fact that neither the FIO nor Ms R raised any issues about the non-disclosure regarding Box Legal. Ms Hansen submitted that it was not their role to raise allegations, and the Tribunal agreed that their role was to ascertain facts, and that it was open to the Applicant to make an additional allegation after the conclusion of the investigation, provided the Respondents had had an opportunity to answer it, which they had.

35.40 The Tribunal noted that Box Legal was mentioned only twice in the documentation which might be seen by clients; in the policy summary in the CIP, and in the Key Facts section. It was not disputed that all the clients who instructed the firm to make airline cancellation or delay claims were recommended to obtain ATE insurance via Box Legal with Leeward, and would be committed to purchasing such a policy if they did not opt out. Nor was it disputed that the First and Second Respondents did not disclose to the clients that they owned Box Legal (as to 50% each). The arrangement was structured in such a way that Box Legal did not receive a referral fee from Leeward in respect of the airline policies it broked. The First Respondent clarified for the Tribunal what Box Legal received. There were two different periods. In the early period prior to September 2016 it received all of its income, relating to all its non-airline policies, on a per policy basis. Thereafter Box Legal received a flat fee of around £58,000 per month, somewhat less than it had received previously. It only broked for Leeward, and received no direct payment for the airline business it referred. In evidence, the First Respondent stated he could not specifically remember whether he made a decision not to disclose the interest in Box Legal. He said it would have gone by default - there was nothing to disclose under Outcome 6.2, as there was no financial or other interest in the referrals. The First Respondent stated that the Rules were important, but this was a very small premium; the likelihood of it making any difference to the client seemed to be vanishingly infinitesimal. Clients were perfectly entitled to say they wanted to use another broker, but there was nowhere else

to get the policy from; it was the only available route. Also clients might not want insurance. The First Respondent stated that the Respondents had no reason not to act transparently, and it made no difference to the clients.

35.41 The Tribunal found that the other key aspect of the structure was that the Respondents and their wives received the profit Leeward derived from the ATE policies which Box Legal arranged for clients of the firm, as set out in the First Respondent's statement:

> "Neither [the Second Respondent] nor I are officers or employees of Leeward, but we hold preference shares in Leeward which, after payment of all claims, expenses and fees, entitle us and our wives (each family in equal shares) to receive all of the profits generated by the policies placed by Box Legal with Leeward."

35.42 The Tribunal had asked the First Respondent for clarification of the financial relationship between the Respondents and Leeward. The First Respondent explained that effectively the dividend was all the profits of the airline business, but he maintained that Leeward was not just passing the money through. Leeward had a segregated entity under Bermuda law for the ClaimSafe policies which operated like a separate company. It decided what to pay the Respondents after overheads. If the Board decided not to pay them the due profits, the Respondents would have to wind up the company. The Respondents had no power to declare a dividend themselves or to force the declaration of such. The Respondents' entitlement operated through a shareholders' agreement. No one else was entitled to the profits.

35.43 The Tribunal had heard evidence from the First Respondent that he considered conflict to be an important issue, but he felt its significance depended on the situation and the sums involved. As to whether the First Respondent thought the conflict of interest was a sufficiently important matter to go in the client care letter, he stated that, with the benefit of hindsight he would have taken any conceivable steps not to be sitting in the Tribunal because of the time, costs and stress involved, and that the Respondents could have evolved the most enormous document "A to Z" with every conceivable point and formulation of risk, but the trouble was it had to run alongside the practicalities of running a business and looking after a client, and the client was not well looked after if faced with a welter of information. The First Respondent testified that there were "10 or 15 important things" he would have liked to see in the first two lines of the client care letter. He said the Respondents tried to outline key points; he thought the policy was the best place to put the declaration about Leeward. The First Respondent was asked if he agreed that there being risk of conflict of interest went to the heart of the relationship between solicitor and client. He replied "amongst other things". He could not see what difference it made whose document it was that made the disclosure. It was important clients received factual information; it did not matter where they obtained it from. The Second Respondent had left the matter of what and where to make any disclosure to the First Respondent.

35.45 Having heard all the evidence, the Tribunal found as a fact that, whether or not Box Legal received a brokerage commission for the clients of the firm which it referred to Leeward, the First and Second Respondent benefitted from those policies by way of the dividend payments on the preference shares they and their wives held in Leeward. It was not relevant that Leeward made deductions for capital retentions or business

expenses before declaring a profit on the policies; the benefit was there. The Respondents could have decided to take some of that profit via Box Legal, by charging Leeward a fee for referring the airline business, but they had obviously chosen not to do so, presumably because it was more financially advantageous to derive all of the profit from Leeward by way of a share dividend. The conflict situation was further complicated by the sizeable loan which Leeward had made to the firm.

35.46 In respect of the adequacy of the disclosure regarding Leeward, the Tribunal viewed its placement in the context of the overall structure of the insurance arrangements. The clients received a client care letter together with a CIP of 24 pages. The disclosure about Leeward was obscurely referenced. In Section 7 of the CIP, the client was referred to the address of Box Legal's website (without a convenient hyperlink) as the location of the policy wording, and advised to read the policy wording. However, the CIP gave a summary of the policy terms, and it must have been foreseeable that some, or even many, clients would not take the step of locating and reading the policy itself. Only if the client did take the step of cutting and pasting the web address, and finding the policy, would he/she see the "Important Notice" at its head about the Respondents' interest in Leeward, which section the First Respondent testified he had drafted. The Tribunal also felt that the later in the available documentation information was provided, the less likely it was that the clients would take it on board. The First Respondent had himself given evidence about the Respondents' experience of misunderstandings by clients arising from information provided to them. The Tribunal considered that the obligation to advise clients of a conflict of interest arising from a solicitor benefiting from a financial product he/she was advising a client to buy, was not satisfied by placing such disclosure in a document which clients would only see if they accessed a web address provided to them towards the end of an "information pack". The First Respondent had taken a view about the importance of the conflict of interest, and had allocated it lesser priority than many other matters which he placed in the client care letter and the CIP. The disclosure did not even make it into the policy summary in the CIP. The Tribunal noted that greater priority had been given to telling clients that they should not instruct another solicitor, and not deal directly with the airline. The clients were not told why they needed to read the policy wording, and not just the summary of its terms. The Tribunal considered that the Respondents had placed their obligations of disclosure as solicitors very low in their order of priorities. By doing that the Respondents had deprived the clients of the opportunity to have the full picture of the way the insurance arrangements worked; the Respondents wholly owned a broker which referred the clients to an insurance provider from which the Respondents derived a financial benefit in the form of the profits on the policies referred. The Tribunal considered that if clients had known this, it might have given them pause for thought. The Respondents failed to make any mention of their ownership of the broker, and did not refer to their financial interest in the insurer in any document which they provided directly to their clients. Taken together the two disclosure failures comprised the mischief in this case. Incidentally the Tribunal felt that the conflict was enhanced by the fact that the relationship between Box Legal and Leeward ranged more widely than the airline policies; Box Legal only broked with Leeward, and received payments for the other work it did aside from those policies. The Respondents' interest in Leeward was disclosed but only indirectly, and it required effort by the clients to track down the policy wording where they would

happen upon the disclosure. The Tribunal agreed with the Applicant that this was inadequate.

35.47 The Tribunal considered Outcome 6.2 in respect of allegation 1.1. Mr Wheeler argued that the emphasis of the Outcome was on whether the Respondents had an interest in the referral as opposed to an interest in Box Legal, and the Tribunal agreed with this interpretation. The Respondents chose to use Box Legal to refer their clients to an insurance provider in which they had an interest. They also chose not to charge Leeward any brokerage commission for the work that Box Legal did in broking the policies or handling any claims which arose on them. The Tribunal had heard that around 2,000 new cases a month were being referred to Leeward via Box Legal, and that at any one time 23,000 cases were being handled. The Tribunal found that the Respondents did have an interest in the referral because, although they did not receive any financial benefit, as owners of Box Legal, from the referral, the payments they received as dividends on their preference shares in Leeward were enhanced by the referrals and the fact that no brokerage fee had been paid to Box Legal. The Respondents chose to structure the arrangements around the airline policies in a particular way, for whatever reason, but it did not change the ultimate benefit to them. The Tribunal found that the distinction which the Respondents made between the receipt of money from Box Legal and from Leeward was artificial; the Respondents used their own broker as part of an overall process. The Respondents had not informed the clients of the interest which the Tribunal found they had in the referral to Box Legal. The Tribunal found proved that the Respondents did not disclose to clients that they had a financial or other interest in referring them to another business (Box Legal) and thereby did not achieve Outcome 6.2.

35.48 In respect of allegation 1.1 and Principle 2, the Tribunal adopted the definition of integrity set out in Wingate. It noted the judgment stated:

> "97. In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. See the judgment of Sir Brian Leveson P in Williams at [130]. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards."

And

> "101. The duty to act with integrity applies not only to what professional persons say, but also to what they do. It is possible to give many illustrations of what constitutes acting without integrity. For example, in the case of solicitors:
>
> ...
>
> (ii) Subordinating the interests of the clients to the solicitors' own financial interests (Chan);"

The Tribunal considered that the First and Second Respondents had placed themselves in a situation which gave them a real conflict of interest; an entity, Box Legal, which they wholly owned, made a referral which led to them deriving a

financial benefit from their clients taking out an insurance policy which they recommended, and which the client automatically purchased unless they "opted out". Incidentally the Tribunal noted that the CIP Section 3 "Insuring against losing" included:

> "We would advise you however that we are not insurance brokers. The legal expenses insurance market is complex and changes frequently. Accordingly we do not offer professional advice on all policies available in the market."

The Tribunal considered that this paragraph obscured or hid the fact that the Respondents were using a broker which they wholly owned, and of which they were the sole Directors. This wording was carefully drafted, but not transparent, and not calculated to identify Box Legal, or its role, or its relationship to the firm. The fact that the Respondents considered that the policy was of benefit to the clients, and they believed it to be the only one of its kind, did not relieve them of their obligations as solicitors. The Tribunal considered that their failure to make the disclosure regarding Box Legal put them squarely into the situation the High Court envisaged in Wingate at paragraph 101 (ii), and that by their actions they had failed to act with integrity and breached Principle 2.

35.49 The Tribunal also found that the Respondents were not independent of Box Legal as they owned it, and by their actions in failing to disclose their interest in it were inevitably in breach of Principle 3, the requirement to act with independence. The Respondents asserted that the insurance policy they recommended was cheap and a good product, and that no other was available, but they had failed to put their clients in a position to make an informed choice as to whether they wished to buy the product offered to them via Box Legal, or indeed whether they wished to deal via Box Legal at all, and accordingly the First and Second Respondents failed to act in the best interests of each client and so breached Principle 4. Acting in this way also constituted a failure to provide a proper standard of service and was a breach of Principle 5. The requirement to provide a proper service was not limited to the legal work undertaken, but extended to the recommendations made as to funding and insuring the proposed claim. The public expected solicitors to be open and transparent and to make appropriate disclosures; public confidence was likely to be undermined by solicitors who failed to disclose their interest in the entity which they owned and through which they provided an insurance product from which they benefitted financially. Given the disclaimer in section 3 of the CIP, set out at paragraph 35.48 above, the Respondents were effectively using their own broker firm, Box Legal, to recommend that product to their clients. Thereby the Respondents failed to maintain public trust in themselves and the legal profession and breached Principle 6. In respect of Outcome 6.1, the Tribunal could not determine whether it was in fact in each client's best interests to be referred to Box Legal, for the purchase of the recommended insurance product, but the Tribunal determined both that the Respondents had failed to act in their clients' best interest by not giving them sufficient information to allow them to make an informed choice, and that the recommendation to use Box Legal compromised the Respondents' independence. Therefore the Respondents failed to achieve Outcome 6.1. Outcome 1.12 required clients to be in a position to make informed decisions about the services they needed, how their matter was to be handled, and the options available to them. By their failure of disclosure about their interest in the referral to Box Legal, the Respondents failed

to achieve Outcome 1.12 because the clients could not make those informed decisions. The Tribunal did not consider it necessary to address Indicative Behaviour 1.4 in respect of either allegation 1.1 or 1.2 as it was not expressly referred to in the allegations.

35.50 The Tribunal found allegation 1.1 proved on the evidence to the required standard against both Respondents.

35.51 In respect of allegation 1.2, the Tribunal found as a fact that the Respondents showed an awareness of their obligation to disclose their interest in Leeward, but the First Respondent chose to bury the required disclosure in a document that the clients were less likely, or not likely, to reach in their reading, and the Second Respondent allowed him to do so by taking little interest in important documents provided to the firm's clients, or in the manner of disclosure of information relating to his own personal conflict. The Tribunal found the disclosure of the financial interests which the Respondents had in Leeward to be inadequate; the Respondents had placed their own interests above those of their clients; they were more interested in securing their own position by the information they prioritised for clients, and the Tribunal determined that this demonstrated a failure to act with integrity, and thereby a breach of Principle 2 according to the definition in Wingate.

35.52 The Tribunal agreed with the allegation in the Rule 5 Statement that the Respondents allowed their independence to be compromised by recommending that clients obtain (and, in fact, obtaining for clients unless they received express instructions to the contrary) ATE insurance through an insurance broker which was wholly owned by the Respondents and from an insurance company in which the Respondents had a financial interest, without properly and transparently disclosing these arrangements to their clients. They thereby breached Principle 3. The Tribunal found that it could not be in the clients' best interests to fail to give them adequate information of a circumstance which amounted to a conflict of interest, such that the client could not make an informed decision about whether they wished to purchase the product being recommended to them. The Tribunal found that the shortcoming in disclosure was compounded by the system of having to opt out of the insurance arrangement which the Respondents instituted for each of their clients. Thus there was a breach of Principle 4. This conduct inevitably constituted a failure to provide a proper standard of service and a breach of Principle 5, and it followed that that there was a failure to maintain public trust in breach of Principle 6.

35.53 As with allegation 1.1, the Tribunal had determined that the Respondents failed to act in their clients' best interests in the case of the interest in Leeward by making inadequate disclosure, and had compromised their independence which constituted a failure to achieve Outcome 6.1. The clients were not fully informed about the interest in Leeward and so could not make an informed decision, constituting a failure by the Respondents to achieve Outcome 6.2. Because the clients were not adequately informed they could not make informed decisions about the services they needed, how their matter would be handled and the options available to them, and so the Respondents failed to achieve Outcome 1.12.

35.54 The Tribunal found allegation 1.2 proved to the required standard on the evidence against both Respondents.

36. **Allegation 1.3 - Between 28 April 2015 and 12 March 2018 failed to take reasonable, or any, steps to ensure that clients did not have relevant existing insurance before ATE insurance provided by Leeward was recommended to clients and thereby breached any or all of Principles 4, 5 and 6 of the Principles and Outcomes 1.6 and 6.1 of the 2011 Code.**

Regulatory provisions cited in allegation 1.3

(Principles cited under allegation 1.3 are set out under allegation 1.1 and 1.2 above.)

36.1 Ms Hansen submitted that the time period for allegation 1.3 was the same as for allegations 1.1 and 1.2. It was not disputed that no advice was provided to clients that they might already have insurance, and so did not need to obtain ATE insurance and incur the cost of the insurance premium should their claim be successful. Clients were not advised to review their own existing insurance provision. This was particularly significant given that the firm operated on the assumption that clients would purchase ATE insurance unless the firm was instructed otherwise by the clients, and against the background of a failure to disclose the Respondents' own interests in the insurance arrangements. This was a clear breach of Outcomes 1.6 and 6.1 of the Code. The express requirement was set out at Appendix 1 (2) (a) (ii) of the SRA Financial Services (Conduct of Business) Rules 2001, and was:

> "(a) Before a firm recommends a contract of insurance (other than a life policy) the firm must take reasonable steps to ensure that the recommendation is suitable to the client's demands and needs by:
>
> ...
>
> (ii) obtaining details of any relevant existing insurance"

The Respondents sought to argue that there was no requirement to obtain details from the clients, only to take reasonable steps towards doing so, but Ms Hansen submitted that this could not be a reasonable interpretation of the rules. In any event, no steps were taken, or the Respondents' steps were inadequate. The Respondents' position was that they conducted a survey of the market and concluded from it that the only provider of this particular insurance policy with the key aspect required for this type of claim was the insurance policy they recommended their clients to take. At the point of recommending the product to their clients the Respondents were acting as solicitors not as insurance brokers; they could not be acting as brokers because they had not told their clients they were so acting. Their own survey of the insurance market could not satisfy them fully that this was the only policy available, because they could not have that expertise as solicitors. Ms Hansen submitted that the key issue regarding the survey was that the Respondents did not disclose to the firm's clients that the firm could not find any other policy; moreover the Respondents could have been wrong in their survey. They did not say they looked at every available policy. It was incumbent upon the Respondents to tell their clients that they might have other insurance and that they should review their policies. The Tribunal noted that there was no reference to the survey having covered travel insurance. Ms Hansen submitted that the Applicant's point was that the survey itself could not be an adequate response to the obligation placed on the Respondents as solicitors.

36.2 Ms Hansen also referred the Tribunal to the CIP Section 3 "Insuring against losing" quoted above, which stated that the Respondents were not insurance brokers and did "not offer professional advice on all policies available in the market". She submitted that this was at odds with the Respondents' defence that they undertook a survey and were satisfied that there was no existing relevant insurance. Here they were correctly saying that they could not offer advice on the full extent of the insurance market.

36.3 Breaches of Outcomes 1.6 and 6.1 were alleged. Ms Hansen submitted that the breach of Outcome 1.6 lay in not asking clients to look at any existing insurance; the Respondents did not ensure their recommendation of insurance was suitable, or in their clients' best interests, because the clients might have had some insurance, or had insurance that went some of the way even if it did not do everything. There was no consideration of addressing any insurance gap. Ms Hansen submitted that there was a breach of Outcome 6.1 for the same reasons, the Respondents could not know if their recommendations were in the best interests of their clients because they did not advise clients to look at existing insurance policies before paying £20 or so by way of premium.

The Tribunal queried the meaning of the words italicised in the quotation below from paragraph 47 of the Rule 5 Statement, which read:

> "the Respondents failed to act in the best interests of their clients by failing to take reasonable or any steps to ensure that clients did not have other existing insurance. ATE insurance was incurred by clients at a cost *and did not apply* if clients had other insurance cover."

(Italics added)

Ms Hansen checked the wording of the Exclusions section of the insurance policy, which read:

> "This Insurance does not provide cover:
>
> ...
>
> "13. for any Opponent's Costs, Disbursements or expenses that can be recovered under any other insurance except beyond the amount of that other insurance."

Ms Hansen submitted that the clients were being advised to take out insurance which could potentially not apply; this could not be in the clients' best interests.

36.4 It was alleged that the Respondents breached the SRA Principles as follows:

- They failed to act in the best interests of their clients by failing to take reasonable or any steps to ensure that clients did not have other existing insurance. ATE insurance was incurred by clients at a cost, and did not apply if clients had other insurance cover. The Respondents therefore breached Principle 4.

- A solicitor providing a proper standard of service would satisfy themselves of the client's insurance provision before recommending an insurance policy. The Respondents therefore breached Principle 5.

- Public confidence in the Respondents, in solicitors and in the provision of legal services was likely to be undermined by the Respondents' failures to satisfy themselves of clients' insurance provision before they recommended that they purchase an insurance product. The Respondents therefore breached Principle 6.

Submissions for and evidence of the First and Second Respondents

Submissions

36.5 Mr Wheeler submitted that the starting point had to be to consider from the evidence if there ever was a realistic prospect of any alternative ATE policy being available. In that respect Mr Wheeler highlighted five aspects of the evidence:

- No positive evidence whatsoever had been adduced that any such policy existed;

- When the firm did start to ask clients to check if they had existing policies no single client identified a policy that would provide such cover. It had been put to the First Respondent that, as he had changed the wording to raise the issue with clients, there must have been a problem previously; he was damned if he did and damned if he did not. He changed it even though he thought this was not necessary.

- Regarding any prospect of such a policy appearing, the First Respondent had spent years trawling the market for policies such as this, and had never found any as he set out in oral evidence and as follows in his statement:

> "29. During the first few months of 2015 and prior to the commencement of trading in June 2015 I conducted considerable investigation in to the availability of any pre-existing insurance policy which a client might have which would cover clients' claims for flight delay compensation, commonly known as "Before The Event" insurance - (a "BTE Policy"). This involved considerable checking of the Internet to see what BTE Policies were available, as well as looking at all available information in relation to flight delay claims. The websites of other solicitor firms who carried out this work were examined and I held discussions with the heads of the 2 other main solicitor firms who carry out this type of work in substantial volume. No evidence of the existence of any BTE Policy in the marketplace came to light. In addition I considered the relevant information already held in accordance with Rule 2 (a) (i) of Appendix 1 of the SRA Financial Services (Conduct of Business) Rules 2001. I was of course, perhaps uniquely, able to carry out this task because of my knowledge gained as a full-time director for, at that time, the previous 11 years, of Box Legal, an insurance broker and leading provider of legal expenses insurance in the UK. This was because up until April 2013 ATE Policies purchased by claimants were recoverable from unsuccessful defendants. This recoverability was subject however, to the successful claimant not having a

BTE Policy which the claimant could have used instead of purchasing an ATE Policy. This meant that I was intimately involved in considering the availability of BTE Policies and their terms. Premiums for ATE Policies sold before April 2013 continued to be recovered by claimants long after that date, so by 2015 this still remained an issue for Box Legal which I continued to consider.

30. Once FairPlane began to trade in 2015, I continued to make ongoing enquiries regarding the availability of any relevant existing BTE Policy in the marketplace. I did so by renewed searches of the Internet and by my general knowledge and my discussions surrounding flight compensation, the manner in which it was pursued and any available BTE Policies. Unfortunately I had no reason to record in writing the investigations I made either at the outset or after FairPlane began to trade, (since I am not aware of any specific requirement to keep records in that regard) and therefore I am unable to provide written evidence of those enquiries.

31. To the best of my information and belief, there is no insurance or BTE Policy in existence in the UK which would protect FairPlane's clients from the risk of incurring adverse costs when pursuing an airline compensation claim. The only policy which is available is Leeward's ATE policy (purchased of course after the relevant event has taken place) to cover that type of claim. This is mainly due to the nature of the compensation claim in which FairPlane acts. The claim by FairPlane's clients is for compensation where an airline flight has been cancelled or excessively delayed (broadly a delay of over 3 hours). This is not a contractual claim but instead arises solely under European Regulation (Regulation (EC) No 261/2004 of the European Parliament. This is because: a) a contractual claim may be excluded by the airlines in their contracts, and b) the Regulation provides for a fixed rate of compensation without the need to show financial loss under general contractual principles. This is not a regulation which is incorporated into English Law by statute or Statutory Instrument - under current EU arrangements it has direct effect in English law as a European Regulation. Legal Expenses Insurance policies are necessarily very carefully defined as to exactly what they will and will not cover. They may cover a number of tortious claims and may cover certain limited contractual claims but they are not generally drafted to cover claims for statutory compensation and certainly not entitlements by virtue of European Regulations. All airline compensation claims in which FairPlane acts are without exception brought only under European Regulation No 261/2004, and FairPlane does not at any time act for such clients on any other basis - in particular it does not at any time act in any contractual claim on their behalf.

32. In early October 2018, in response to queries raised by the Applicant, I arranged a spreadsheet analysis ("the Spreadsheet") of BTE Policies available in the marketplace to examine whether any of them covered airline compensation claims in which FairPlane acts (Page 297 of NXB1). In relation to the Spreadsheet, I comment as follows:

32.1 The Spreadsheet lists 30 insurance policies - 20 are home insurance policies and 10 of them are motor insurance policies.

32.2 The insurers on this list were selected simply by conducting a "Google" search of "home insurance" or "motor insurance" and then going to the website for that insurer to examine the terms of the policy they offer. Any home or motor insurance policy which does not include any legal expenses cover was excluded from this list.

32.3 This list did not purport to comprise of every single home or motor insurance policy available in the UK - to compile such a list would be extremely onerous. It did however contain most if not all of the major insurers in those fields, (as one would expect given that they were selected by Google search) and most of the UK well known insurance names are contained in the list.

32.4 The spreadsheet contains a link to the policy wording of each insurer listed in the left-hand column of the Spreadsheet. I felt that this was a more convenient method of providing access to the complete policy wording, rather than printing out the complete policy wording of each provider, although in my reply to the Applicant of 24 October, 2018 I offered the Applicant a printed extract from each policy wording if required (paragraph 24.4 on page 306 of NXB1).

32.5 I examined each policy wording to ascertain whether it covered a claim for any type of Statutory Compensation or specifically a claim made under a European Regulation, but none of the policies in the list covered such a claim. I limited my examination to an arbitrary figure of 30 insurance policies, but again I offered to examine further insurance policies if the Applicant requested this (paragraph 25 on page 306 of NXB1)."

Mr Wheeler submitted that what the First Respondent did in reviewing the market went well beyond what could reasonably be expected of a solicitor; he trawled the market before and after the firm started to trade; a considerable exercise.

- There was no sign of anyone bringing claims funded by an insurer in circumstances where it would be well known. It was a market dominated by three firms; they talked to each other and shared counsel. There was one court centre. It would be well known if any of them was handling such an insurance funded claim. If it existed it would be sold to hundreds if not thousands of people and there was not one.

- The First Respondent explained the economics of this sort of insurance; circumstances where one could not recover costs from the other side, so there was no economic benefit to BTE insurers to insure these claims. The First Respondent said that he could "not say never" but the reality was that there was no alternative policy.

36.6 Mr Wheeler questioned whether the "Suitability" rule or any other rule could require a solicitor to advise clients on such a speculative basis; that one could not prove a negative; could not entirely rule out its existence so one must proceed as if it did exist. The rule referred to relevant existing insurance; Mr Wheeler submitted it must be relevant to consideration of the suitability of the policy the firm was recommending. If no relevant insurance existed there were no details for which to ask the client. The rule should not be read to require clients to undertake a futile or speculative search for what cover they might have. This would be a waste of time, and somewhat unfair to clients. He asked what would happen if clients started producing various policies that would have to be examined, only to be told that the cover did not exist. There was nothing wrong with a solicitor seeking to avoid that. It would delay matters for the client. The consequences of it happening on any significant scale would be a lot of unnecessary work, and charges would have to increase. It could not be in the interests of clients to pay a higher fee for speculative work in order to avoid a £20 insurance fee. Mr Wheeler referred the Tribunal to the First Respondent's statement:

> "37. I am aware that it is by no means unusual for solicitors to arrange insurance policies for their clients in circumstances where they know that the client will not already have an existing policy to cover the event being insured. This routinely occurs in conveyancing transactions, where solicitors obtain policies which are often tailored to cover specific problems and defects and which cover only the specific property which a client intends to purchase. It is inconceivable that a client would have a pre-existing policy which covered such a risk, and it would be illogical for solicitors to ask their clients whether they have such a policy. An example of such policies is contained on the website of "Searches UK", a company which provides residential title insurance to solicitors https://www.searchesuk.co.uk/resources/indemnities-insurance/. Some of the policies listed on that website, cover the following situations…"

The First Respondent went on to refer to breach of Restrictive Covenant, Chancel Repair and flying/creeping freehold and continued:

> "There are many more similar types of policy in everyday conveyancing use where it would be unhelpful and unnecessary for a solicitor to be obliged to ask its client whether they hold existing insurance for such a risk."

Mr Wheeler submitted that, even if there were some other policy to cover part of the claim against an airline, it would still not render ATE insurance unsuitable. As the First Respondent said:

> "there would inevitably be an excess on that policy which the client would be required to pay themselves, and that excess would inevitably be more than the £20/£27.50 cost of the Leeward ATE Policy premium."

As to how one could be sure such a policy would have an excess, Mr Wheeler said that insurance generally almost invariably had an excess. In making submissions on fact and law after the conclusion of the Respondents' case, Ms Hansen submitted that there were regulations that created burdens on firms, and on solicitors, and they

existed for good and proper reasons and were in the best interests of clients even if they created burdens.

36.7 Regarding the exclusion clause in the Leeward Policy; Mr Wheeler submitted that the fact the First Respondent did not have managerial responsibility for Leeward did not detract from the fact that Leeward did not rely on the clause. As to the cancellation clause which stated:

> "This policy may, at Our option, be cancelled by us for any breach of the EXCLUSIONS or CONDITIONS set out in this policy (sic) which event the policy will be cancelled and void in its entirety from the outset and the Insurer's accrued liability under this policy (if any) will be cancelled, in which event no claim will be paid, no premium shall be due from you, and any premium paid will be returned."

Mr Wheeler submitted that, if the exclusion clause was breached, this would lead to cancellation of the cover and return of premium. The latter was not paid up front, and so the client would be no worse off than if they had not taken the policy in the first place; the policy would just lapse.

36.8 The Tribunal sought clarification of the agreement between Box Legal and the firm at clause 4:

> "The solicitor may cancel any ATE Policy on the following grounds:-
>
> ...
>
> 4.1.4 Within 6 months of policy Inception, the Solicitor discovers that the Client, the Client's spouse or common law partner has a suitable legal expenses policy or membership benefit ("BTE Policy") which adequately protects the Client against any adverse costs and disbursements which he might be obliged to pay as a result of his claim being unsuccessful, and the Insurer of that BTE Policy has confirmed that it will cover the Client's risk and has assumed the risk when the cancellation is requested."

Mr Wheeler acknowledged that the wording did not quite work; it was at the solicitor's option and did not say the policy was cancelled or mention the exclusion clause but it must refer to that clause. If a policy emerged and a BTE insurer accepted the risk, the ATE policy would be cancelled. The BTE insurer would probably say it did not accept that its policy was engaged and so the ATE policy would come into effect. No one had ever exercised the right of cancellation. There was a danger of getting sucked into "what ifs". In any event it was difficult to imagine a BTE policy covering the client's disbursements if they were successful. Mr Wheeler submitted it was not even negligent to proceed regarding theoretical possibilities. There was no single example cited of where a client took out the policy in circumstances where it was not in their best interests to do so. The evidence demonstrated that the Respondents provided an excellent service to their clients, and acted entirely in their clients' best interests in arranging an ATE policy which provided critical protection against the risk of costs.

36.9 Having regard to Outcome 1.6 and the suitability of fee agreements, Mr Wheeler submitted that this was not a fee agreement, and he was not sure why this Outcome was cited. In any event there was no evidence that there were clients for whom this policy was not suitable.

Evidence of the First Respondent

36.10 The First Respondent stated that while he did not mention having checked travel insurance in his statement, he had looked at whether it might cover this area. Quite a large part of the firm's business depended on receiving bulk instructions. The firm had put a lot of resources into looking at the potential for receiving instructions from travel agents; one senior salesman worked on it for a year. Also the Respondents thought there might be travel insurers who might have subrogated claims, and so be a good source of work for the firm. Over the weekend before the hearing the First Respondent had looked on the internet at 30 travel insurance policies, but it was as he said; they covered only personal injury and death claims. Box Legal monitored the position regarding BTE policies in respect of its other business. The First Respondent's role had involved looking at BTE policies when, before 1 May 2013, ATE premiums were recoverable in proceedings; arguments were raised that a claimant should not be able to recover an ATE premium if they had BTE cover. Box Legal was dealing with around 2,000 policies a month, of which around 25% were cancelled, twenty percent of them because there was BTE cover, that is around 400 policies. This was mainly in the area of personal injury claims. These arguments were still arising at the end of cases. The defendants in personal injury cases were all insurers, so the First Respondent could ask around. The First Respondent stated that he was constantly involved in examining any insurance a client might have. This was within his knowledge on a regular basis.

36.11 The Tribunal enquired about the fact that all the clients were recommended to take out ATE policies, before it was known whether litigation would be necessary, and asked how many clients had to issue proceedings. The First Respondent stated that it was a higher proportion in the early days; 70% of all cases that were successful had to be litigated. This had dropped to the current rate of 53%. (Some cases could be rejected immediately, for example if the flights did not qualify as not emanating from or arriving in the EU, or where the delay was less than three hours.) It was the universal approach in the ATE market, almost without exception, to have a policy in place before one knew if proceedings needed to be issued. Occasionally a specific policy was required, or someone forgot insurance. It was a matter of convenience and risk in this type of case; the insurer needed to spread the risk across a wide range of cases. If one left it to the point of litigation, the insurer would say there were fewer cases to insure, but it had to pay out the same amount of money, so policies would be more expensive and the insurer would need to examine claims in more detail. They probably would not offer a single premium block policy across the board. The Respondent also stated:

> "18. It can be seen from the above that FairPlane has from the outset been an extremely high volume, low charge business. Since it began to trade, its average income per client has been around £100 plus VAT, including the recovery of fixed costs. This of course is extremely low bearing in mind that it has needed to provide a full professional service to clients and to issue court

proceedings on between 53% and 70% of all claims (see paragraph 6.10 above). FairPlane's profit is derived from its bulk procedures, which are very much dependent on the airlines not successfully disrupting those procedures."

36.12 The First Respondent described in cross-examination the "survey" he had undertaken of the insurance market before taking on clients and recommending the Leeward policy to them. It consisted of looking at policies. He had not kept records of the work; doing so was not required under the rules. It was a constant activity; not a single survey on a single day; it was not a survey in terms of a questionnaire or asking a question. The First Respondent stated that he had undertaken a further survey at a much later date in reply to enquiries from the Applicant, to show the accuracy of what had been done previously. He looked at a sample of policies and also had his own knowledge. He agreed that the more recent survey looked at home and motor insurance only. He agreed that, in advising the clients regarding insurance, the firm was acting as solicitor not broker, and that the legal expenses insurance market changed frequently, although the First Respondent stated that he was seeking policies constantly. He considered it was extremely unlikely that another policy existed that could provide what Leeward did, and he was only obliged to make reasonable enquiries.

36.13 The First Respondent was referred to the statement in the CIP that the Respondents were not insurance brokers. He stated that the solicitor had an obligation, whether or not a competent insurance broker, to make enquiries for the benefit of the client. He had a lot of knowledge because of the challenges Box Legal faced. He was referred to Appendix 1 (2) (a) (ii) of the SRA Financial Services (Conduct of Business) Rules 2001, quoted above, in respect of suitability of the policy and the solicitor's duty. The First Respondent maintained that there was nothing inconsistent in what he had done. He agreed he had not looked at every policy. He stated that the rule did not say that there was a requirement to ask the client if they had any existing insurance. He took steps which were reasonable because the Respondents knew there were no other policies. There was no information to show that his view was incorrect based on all the facts they had then and now. The First Respondent agreed that the policy had a potential exclusion if the client had existing cover, but stated that it was a standard wording. He did not think it would have a practical impact; in all the years the Respondents had operated they had never experienced that clause being put into effect; it would cause pandemonium among solicitors against whose clients it would be operated. The Leeward insurance form made no enquiry about that point. Every single BTE insurance policy he had looked at, whether travel, motor or personal injury, required submission of claims at any early stage, and hand in hand with that the policy enabled the insurer to nominate their own solicitor, so that there was someone in place at an early stage and costs were limited. If a client had another policy but had not claimed under it that policy was not operate, and they could not be paid out on it so the other policy was not relevant. He could not say categorically that he considered the exclusion clause, but it was not a surprising or a novel point to him, and the Respondents dealt with these issues day to day in their Box Legal capacity. The First Respondent stated that Leeward would be in difficulty in enforcing the clause because of the way BTE insurance operated. Clause 13 of the policy referred to money that "can be recovered" not "could" have or "might" be. He rejected the suggestion that he was recommending a policy that might not be operable. The exclusion clause only operated if the opponent's cost could be recovered from a BTE

insurer, that is that the client had notified the BTE insurer and so could claim, and clients would not have done so. The First Respondent considered the clause had no impact on his obligations which were to make enquiries.

36.14 The First Respondent stated that he thought the advice about checking for other insurance cover, given in the amended client care letter, was illogical; he gave it because the Applicant required it of the firm, in the face of a complaint and the investigation. He rejected the suggestion that, to go against giving his own independent advice to clients, even if the other advice was provided by the Applicant, was a breach of the Outcome. He did not think this wording was a breach of that requirement; it was an unnecessary and rather illogical extension of the requirement but not a breach.

36.15 As to the extent of the surveys the First Respondent had carried out, he clarified that the original work probably would have included credit card cover, because the Respondents were familiar with all the issues that came up on Box Legal policies, and what solicitors came up against when dealing with different insurers. The later survey did not cover it. It was home and motor cover. As to whether the first exercise was incomplete, the First Respondent stated that it was certainly more than reasonable, and included their existing and ongoing knowledge. He could not prove a negative that no suitable alternative policy existed.

36.16 The First Respondent was referred to clause 4.1 in the Box Legal agreement where it was stated:

> "The Solicitor may cancel any ATE Policy on the following grounds:-
> ...
>
> 4.1.4 Within 6 months of policy Inception, the Solicitor discovers that the Client, the Client's spouse or common law partner has a suitable legal expenses policy or membership benefit ("BTE Policy") which adequately protects the Client against any adverse costs and disbursements which he might be obliged to pay as a result of his claim being unsuccessful, and the Insurer of that BTE Policy has confirmed that it will cover the Client's risk and has assumed the risk when the cancellation is requested."

Mr Wheeler asked the First Respondent why this clause was included if there was only a speculative possibility that such a policy existed. The First Respondent was not sure. He was not aware of any policy being so cancelled under this part of the agreement between Box Legal and the firm, whereas quite a lot had been cancelled in total, nearly 30%, or 11,000 of 34,000 were cancelled.

Evidence of the Second Respondent

36.17 The Second Respondent stated that he left it to the First Respondent to deal with the survey of the BTE market when setting up the firm to see if other policies did what their policy did. They did not have any discussion regarding the survey. The Second Respondent was busy. As to his understanding of the policy's similarity to or differences from any other policy in the market, the Second Respondent stated that he used to work at a firm which acted for a major legal expenses insurer, and he knew

BTE insurance fairly well. He knew the policy they were trying to set up was rather unique.

36.18 Regarding the rule on the suitability of the policy recommended, at the time the firm was set up the Second Respondent was not aware of the rules in detail; he had not read the rule quoted. He knew a "demands and needs" statement needed to go out with the recommendation, but he did not know the wording required; it was not his area at all. Mr Wheeler pointed out that the policy summary within the CIP included:

> "Demands and needs
> This insurance policy is suitable for individuals pursuing a legal claim for damages via a solicitor where there are circumstances where that individual may become liable to pay his/her opponent's legal costs and/or disbursements plus VAT."

The Second Respondent stated that when setting up the firm he had not turned his mind to asking clients to look at any existing policies; because it was not his role within the business. The First Respondent was the person he trusted to deal with these elements. He would not let the First Respondent program his systems. He was not blaming the First Respondent, but the First Respondent's defence must be his defence; the First Respondent carried out a proper assessment within his knowledge and experience. He knew the First Respondent had carried out the survey by the time he sent out the first client care letters because the First Respondent gave evidence to that effect. He disagreed that, given his position in the firm as one of two directors, he should have satisfied himself that checks were made with clients; this was because in his view the First Respondent was a very good lawyer.

36.19 The Second Respondent confirmed that he had not discussed the issue of conflict with the First Respondent at any stage. Perhaps he over-relied on the First Respondent's side of things. He was not conscious of his personal conflict. In his view the client was getting a very good package, cheaper than usual, so he had not turned his mind to that side of things. When the FIO came in and pointed it out to him, he looked at the client care letter and asked why the disclosure regarding Leeward was where it was, and the First Respondent gave him the same explanation as he had to the Tribunal. He agreed that it would be raising client expectations of policies that did not exist to draw the possibility to their attention. The FIO asked the First Respondent to put such wording in, and the Second Respondent added it to the document because they were being told to do so, not because they thought it was necessary.

Determination of the Tribunal regarding allegation 1.3 against the First and Second Respondents

36.20 The Tribunal had regard to the evidence including the oral evidence and the submissions for the Applicant and the First and Second Respondents. The First and Second Respondents accepted that they did not ask any client if they might have had any existing insurance covering the costs risk involved in pursuing their claim against the airline. The First Respondent relied on his "survey" of the insurance market when the insurance arrangement was first established, backed up by a further review of the market when the allegations were raised against him. His evidence was that he considered it was extremely unlikely that another policy existed that could provide

what Leeward did, and he was only obliged to make reasonable enquiries. The First Respondent agreed that the Leeward policy had a potential exclusion clause which could be operated if the client had existing cover, but stated that this was a standard wording. He did not think it would have a practical impact because BTE insurers would decline cover if a claim was intimated late. The Second Respondent confirmed that he left it to the First Respondent to deal with the survey of the BTE market when setting up the firm, to see if other policies did what their policy did. The First Respondent also urged upon the Tribunal that it would put clients to unnecessary trouble, would potentially raise their expectations of cover elsewhere, and cause potential additional work to the firm, if they had to check other polices for individual clients. He also gave evidence that, once the question was included in documentation given to clients, not a single policy was put forward with the same cover, indeed no questions were raised at all by clients. The Tribunal noted this evidence and the experience which both Respondents had of the market for legal expenses insurance. The First Respondent took some steps to check what was available, but the Tribunal considered that relying on his "survey" and knowledge and experience, without asking the clients what cover they had, did not satisfy his obligations as a solicitor. The First Respondent conceded that his research could not be total. The First Respondent also conceded the existence of the exclusion/cancellation provisions in the Leeward policy. The Tribunal considered that the First Respondent did know better than the clients what was available in the market, and about the degree of risk that the exclusion/cancellation provisions might be activated by the insurance provider, but he could have asked the question in a way that made clear his view that it was unlikely clients had the benefit of such cover, thus minimising the risk of additional work while properly fulfilling his obligation. The Tribunal agreed with the Applicant's view that some obligations on solicitors created a burden, but this did not relieve them of the obligation to comply.

36.21 Outcome 1.6 required that a solicitor only entered into fee agreements with clients which they considered were suitable for the client's needs and took account of the client's best interests. Mr Wheeler questioned whether this Outcome was relevant to the circumstances of this case on the basis that the insurance policy did not form part of a fee agreement. The basis for alleging breach of this Outcome was not expanded upon in the Rule 5 Statement. The Tribunal agreed that the case for a breach of this Outcome was not made out on the evidence, and found allegation 1.3 not proved in that respect.

36.22 In respect of Outcome 6.1, the Tribunal considered that the Respondents placed more emphasis on the need to avoid being dragged into additional, and what they deemed to be futile, work in checking other policies which clients might produce, than on the clients' needs and best interests. Their agreement with Box Legal committed them to maximising the number of clients who took out the Leeward policy. Where the question about other cover was not asked, and in circumstances where the client did not have to make a positive decision to take the policy, but was given it by default, and where the whole arrangement was geared around the ATE policy, and the more policies taken meant in crude terms the greater the Respondents' dividend, the Tribunal found their independence to be compromised. The Tribunal determined that the Respondents had failed to achieve Outcome 6.1.

36.23 The Tribunal considered that in not asking clients about any other insurance cover they might have, before referring them to Box Legal, the Respondents failed to act in the best interests of each client; given the opportunity, clients might wish to make that check before deciding to allow the purchase of the Leeward policy to proceed. In the Tribunal's view the fact that clients might well not have to pay the premium was irrelevant to the issue of whether they should have been asked the question. The Tribunal found that the Respondents breached Principle 4 by their failure to ask. The clients looked to the Respondents for advice, and the Tribunal determined that delivering a proper standard of service included asking the question, and the Respondents breached Principle 5 by not doing so. The Tribunal considered that failing to ask the question was compounded by the fact that a policy was automatically purchased for each client unless they opted out. The Tribunal considered that in these circumstances there was a failure to maintain public confidence, and so Principle 6 was breached.

36.24 The Tribunal found all aspects of allegation 1.3 proved on the evidence to the required standard save in respect of the alleged breach of Outcome 1.6.

37. **Allegation 1.4 - Failed to ensure that adequate client account reconciliation statements as at 28 December 2017 and/or 31 January 2018 and/or 31 February 2018 were produced in breach of any or all of Rules 29.1 and 29.2 of the SRA Accounts Rules 2011 ("SAR 2011") and any or all of Principles 6, 8 and 10 of the Principles.**

Regulatory provisions cited in allegation 1.4

SRA Principles

Principle 6 is set out under allegations 1.1 and 1.2 above.

Principle 8: You must run your business or carry out your role in the business and in accordance with proper governance and sound financial and risk management principles

Principle 10: You must protect client money and assets

SRA Accounts Rules 2011:

Rule 29.1 You must at all times keep accounting records properly written up to show your dealings with:

(a) client money received, held or paid by you; including client money held outside a client account under rule 15.1(a) or rule 16.1(d); and

(b) any office money relating to any client or trust matter

Rule 29.2 All dealings with client money must be appropriately recorded:

(a) in a client cash account or in a record of sums transferred from one client ledger account to another; and

(b) on the client side of a separate client ledger account for each client (or other person, or trust).

Submissions for the Applicant

37.1 Ms Hansen relied on the Rule 5 Statement in respect of this allegation. The Rule 5 Statement set out as follows: The FIO attended the firm's offices on 24 January 2018 and was provided with a copy of the firm's client account reconciliation as at 31 December 2017. The FIO noted a number of errors and omissions in the December 2017 reconciliation. The reconciliation detailed:

- Client funds held after adjustments totalled £160,591.45 and client liabilities totalled £187,382.46. Therefore, showing a book shortage of £26,791.01 (£187,382.46 - £60,591.45).
- Receipts posted to the books of account, but which had not been received at the bank, totalling £115,348.29.
- Payments posted to the books of account, but which had not been paid out from the bank, totalling £304,469.47.
- Monies received at the bank totalling £102,073.71 which had not been posted to the books of account.
- Payments made out from the bank totalling £130,120.93 which had not been posted to the books of account.
- There were adjustments for differences between the cashbook and the bank balances ranging from £0.01 to £2,695.47.

37.2 The client account reconciliations did not include the monies held in the Euro Client bank account.

- The balance of this account was £47.83 as at 31 December 2017 and £36.25 as at 28 February 2018.
- The monies held in the Euro Client bank account represented office money incorrectly held in a client bank account.
- The firm had transferred office money into the Euro Client bank account in anticipation of future bank charges which were being incorrectly debited from the Euro Client bank account.
- The firm subsequently closed the Euro Client bank account on 14 March 2018.

The firm's client account reconciliation as at 31 December 2017 showed that the firm's books of account contained a number of errors and omissions and were not in compliance with the SRA Accounts Rules 2011. The FIO identified a book shortage in client funds of £26,791.01. Due to the errors and omissions in the firm's books of

account as at 31 December 2017 the FIO agreed to allow the firm until the 28 February 2018 to bring the firm's books of account into compliance.

37.3 The FIO returned to the firm on 7 March 2018 was provided with the firm's client account reconciliation as at 31 January 2018 and as at 28 February 2018. The FIO noted errors and omissions as follows:

- Client funds held after adjustments totalled £130,875.37 and client liabilities totalled £133,274.80. Therefore, showing a book shortage of £2,399.43 (£133,274.80 - £130,875.37).
- Receipts posted to the books of account which had not been received at the bank totalling £77,358.88.
- Payments posted to the books of account which had not paid from the bank totalling £31,238.20.
- Monies received at the bank totalling £8,004.68 which had not been posted to the books of account.
- Payments made at the bank totalling £5,717.16 which had not been posted to the books of account.
- There were adjustments for differences between the cashbook and the bank balance of £5,054.81.

37.4 On 8 March 2018, the FIO sent an email to the First Respondent, which was copied to the Second Respondent, and Mr J who was working with the FIO. In summary the email set out that:

- The firm's client account reconciliation as at 31 December 2017 showed that the firm's books of account contained a number of errors and omissions and were not in compliance with the SRA Accounts Rules 2011.
- The firm agreed that they would rectify the position in relation to the firm's books of account by 28 February 2018, and provide the FIO with a compliant client account reconciliation as at 31 January 2018.
- On 7 March 2018 the firm provided the FIO with client account reconciliations for the periods ending 31 January 2018 and 28 February 2018.
- The client account reconciliations as at 28 February 2018 and 31 January 2018 showed that the firm's books of account still contained errors and omissions and were not in compliance with the SRA Accounts Rules 2011.
- The client account reconciliation as at 28 February 2018 showed "Receipts posted to the books of account which had not been received at the bank totalling £77,358.88". It had been identified that this figure in part represented a client bank account shortage which had arisen as follows:

- The firm had posted receipts to their books of account which had been allocated to various client matters.

- Although posted to the firm's books of account the funds had not physically been received into the firm's client bank account.

- The firm had made payments from client bank account of their client's compensation and transferred the firm's costs. These payments had been allocated to a client's matter when there were insufficient funds available for that client.

- This had caused a client account shortage to arise.

- Due to the error in posting the receipt, the client ledger account did not reflect the correct client balance.

- The FIO requested that the firm confirmed how much of the £77,358.88 represented a client account shortage. Once confirmed, the FIO requested evidence that the firm had replaced the client account shortage in full.

- The client account reconciliation as at 28 February 2018 showed "Payments posted to the books of account which had not been paid from the bank totalling £31,238.20". It was identified that this figure in part represented client money which had not been returned to clients promptly upon conclusion of their matter as follows:

  - The firm had completed an airline compensation claim on behalf of a client and received funds into their client bank account in relation to the client's claim.

  - The firm had posted a payment of the client's compensation to the client's ledger account.

  - Although they had made a posting, the actual payment of the client's compensation from the firm's client bank account to the client had not been made.

  - Therefore, the client had not been paid the compensation due following successful conclusion of a claim.

- The FIO requested that the firm confirmed how much of the £31,238.20 represented the firm's failure to remit compensation payments to their clients upon successful conclusion of their matter.

- The FIO asked the firm to explain the adjustments for differences between the cashbook and the bank balances of £5,054.81 as at 28 February 2018.

On 22 March 2018, the First Respondent emailed the FIO, copying in the Second Respondent amongst others, confirming the firm's investigations into the errors and

omissions and stating that a client account shortfall had been replaced and attaching documents.

37.5 It was submitted that, in light of the errors and omissions identified by the FIO, there was a breach of Rules 29.1 and 29.2 of the SAR 2011, which require that proper accounting records be kept. On 27 April 2018, the First Respondent provided the FIO with the firm's client account reconciliation as at 26 April 2018. Mr Grehan noted that the adjustments from the earlier client account reconciliations had been cleared. In the Response to the EWW letter, the firm accepted that the December 2017 Reconciliation, the January 2018 Reconciliation and the February 2108 Reconciliation were not compliant, but stated that the firm was endeavouring to rectify historic accounting errors.

37.6 The following breaches of Principle were also alleged:

- Failure to maintain adequate accounts would undermine public trust and so constituted a breach of Principle 6.

- The Respondents' failures in relation to management of client money and the client account demonstrated a failure to run their business effectively and in accordance with sound financial principles, and so constituted a breach of Principle 8.

- The improper transfers on the client account, the resulting shortfall on the client account, and the failures to return compensation sums promptly to clients, demonstrated a failure to protect client money, and so constituted a breach of Principle 10.

Submissions for and evidence of the Respondents

Evidence of the First Respondent

37.7 The First Respondent agreed in cross-examination that the Respondents did not anticipate the problems would be as great as they were, arising out of the bulk work and the conduct of the airlines. He stated that the firm had put in place systems to correct the problems, but the difficulty was with the reconciliation of what had already occurred. Until they reconciled past figures the Respondents did not have absolute control of whether the month's figures were correct. It took two years; it was an unbelievably large task to resolve. They thought they were doing quite well. They had got someone in who said they had experience of doing these things; not a run of the mill accounts manager. They worked very closely with that person but found out that what he had done had not put things right, and they had to start again. They were working day and night with a number of people. When the FIO came in they were getting very close to resolving the problems as a result of the work they had done. The First Respondent agreed there were still problems with the January and February 2018 reconciliations. It was put to him that in his statement he said:

> "Since the breaches were rectified, FairPlane's accounting procedures have been fully compliant, and there has been no re-occurrence of those breaches."

As to the points raised in evidence by the FIO, the First Respondent did not think those matters were breaches if they were promptly rectified. Mr Wheeler pointed out that the FIO said he had no criticisms regarding them.

Evidence of the Second Respondent

37.8 The Second Respondent confirmed that, whilst the First Respondent was the COFA on a day to day basis, he handled a lot of accounting issues. He dealt with queries that came up from staff where systems were not working correctly, and where new scenarios occurred for which the firm was not prepared. They had started the firm in May/June 2015 and self-reported to the Applicant in February 2016. The Second Respondent agreed he was aware that steps were needed to resolve accounting issues, although the First Investigation was closed in December 2016. The Second Respondent said "Absolutely yes" to the suggestion that he had the day to day management, so some responsibility rested with him to ensure the systems were adequate. He agreed that the responsibility rested with him to fix the problems which still existed. He believed they had not been in breach from late April 2018 onwards.

Determination of the Tribunal in respect of allegation 1.4 against the First and Second Respondents

37.9 The Tribunal had regard to the evidence including the oral evidence and the submissions for the First Respondent and the Second Respondent. The Tribunal found as a fact that there was ample evidence that there were issues with the reconciliations cited in allegation 1.4. The Tribunal found that the Respondents had properly admitted breaches of Rules 29.1 and 29.2. These accounting failings would fail to maintain public trust in the Respondents and the profession, thus breaching Principle 6. The First Respondent was the COFA of the firm, and the Second Respondent was responsible for day to day operation of the accounts. Both were directors of the firm and so both were directly at fault resulting in breach of Principle 8. The process of reconciliation was an important tool in safeguarding client money. The reconciliations were faulted because of the underlying accounting failures in the firm, and the Tribunal found that the breaches in respect of them constituted a breach of Principle 10. The Tribunal found all aspects of allegation 1.4 proved on the evidence to the required standard and that it was properly admitted.

38. **Allegation 1.5 - Failed to prevent transfers from the firm's client account which were in excess of the amount held on behalf of the clients concerned, causing a minimum shortfall of £20,717.49 at 28 February 2018 in breach of Rule 20.6 of the SAR 2011 and any or all of Principles 6, 8 and 10 of the Principles.**

Regulatory provisions cited in allegation 1.5

SRA Principles

Principles 6, 8 and 10 are set out under allegation 1.4.

SRA Accounts Rules 2011

Rule 20.6 Money withdrawn in relation to a particular client or trust from a general client account must not exceed the money held on behalf of that client or trust in all your general client accounts (except as provided in rule 20.7 below).

Submissions for the Applicant

38.1 Ms Hansen relied on the Rule 5 Statement which set out as follows: As a result of the errors and omissions in the February 2018 Reconciliation, the FIO was not able to express an opinion as to the firm's ability to meet its liabilities to clients. The First Respondent confirmed in his email of 22 March 2018 that there was a shortage in the client account of £20,717.49. The FIO identified in the FIR that there were three reasons for the client account shortage:

- £19,679.63 of payments made out of the firm's client account, when sums had not been received;
- £18,830.06 of payments made out of the firm's client account for a greater sum than had been received;
- £2,207.80 - an unexplained difference identified during the reconciliation.

Ms Hansen submitted that the first two reasons involved clients receiving more than they were entitled to, with the result that there were insufficient sums to cover everything clients were entitled to. The FIO set out in the FIR an example of the first type of error by reference to the client ledger for Client A, and an example of the second type of error by reference to the client ledger for Client B.

- It was recorded in the client ledger for Client A that the firm had received £232.55 in settlement of Client A's claim, and that this entire sum was paid out: £110.05 to Client A as compensation owed to him and £122.50 in settlement of the firm's fees. However, the firm had not received the payment of £232.55 into the client account; therefore the transfers from the firm's client account were for a greater sum than the money held in the firm's client account on behalf of Client A.
- The firm received £309.56 into their client account in settlement of Client B's claim, but incorrectly recorded in Client B's client ledger that £309.60 had been received. The sum of £309.60 was paid out: £201.09 to Client B as compensation owed to her, and £201.08 in settlement of the firm's fees. The sums transferred out of the firm's client account were greater than the funds held for Client B.

The firm remedied the shortfall on 22 March 2018, the date on which the firm identified the extent of the shortfall to the FIO. In the Response to the EWW, the firm accepted that there had been a shortfall in the firm's client account.

38.2 The following breaches of Principles were alleged:

- The failure to prevent a shortfall in the client accounts was a failure to maintain public trust and so constituted a breach of Principle 6.

- The Respondents' failures in relation to management of client money and the client account demonstrated a failure to run their business effectively and in accordance with sound financial principles. Ms Hansen submitted that there were a number of serious failings regarding the firm's accounts. The Respondents pointed out various difficulties which they had due to the volume of work they undertook, and the difficulties they had with the defendant airlines. The Applicant asserted that these were facts of the business the Respondents were running; it was a volume business where the other side was not always constructive. It was incumbent on the Respondents to have proper systems in place to protect client money. The Respondents therefore breached Principle 8.

- Ms Hansen relied on her submissions regarding Principle 8 above. The improper transfers on the client account, and the resulting shortfall of around £20,000 demonstrated a failure to protect client money. The Respondents therefore breached Principle 10.

Determination of the Tribunal in respect of allegation 1.5 against the First and Second Respondents

38.3 The Tribunal had regard to the evidence including the oral evidence and the submissions for the Applicant and the First and Second Respondents. The Tribunal noted that the First Respondent confirmed in his email of 22 March 2018 that there was a shortage in the client account of £20,717.49. The evidence supported the allegation and the Tribunal found the underlying facts proved. The Tribunal determined that, as money withdrawn exceeded money held for clients, Rule 20.6 had been breached. This would fail to maintain public trust in the Respondents and the profession and so constituted a breach of Principle 6. Proper governance and sound financial and risk management principles had not been adhered to by the Respondents in carrying out their roles and running the firm, constituting a breach of Principle 8, and allowing a shortage to arise on client account was a failure to safeguard client money breaching Principle 10. The Tribunal found allegation 1.5 proved on the evidence to the required standard; it had been properly admitted by both Respondents.

39. **Allegation 1.6 - Between around 10 November 2015 and 22 March 2018 failed to promptly return compensation payments to clients totalling £4,623.39 in breach of Rule 14.3 of the SAR 2011 and any of all of Principles 5, 6, 8 and 10 of the Principles.**

Regulatory provisions cited in allegation 1.6

SRA Principles

Principle 5 is set out under allegations 1.1 and 1.2 above. Principles 6, 8 and 10 are set out under allegation 1.4 above.

SRA Accounts Rules 2011:

Rule 14.3 Client money must be returned to the client (or other person on whose behalf the money is held) promptly, as soon as there is no longer any proper reason to retain those

funds. Payments received after you have already accounted to the client, for example by way of a refund, must be paid to the client promptly.

Submissions for the Applicant

39.1 Ms Hansen relied on the Rule 5 Statement which set out as follows: Following the concerns raised in relation to the February 2018 Reconciliation the firm's investigation identified that £4,623.39 of client funds had not been paid to 24 clients, despite the fact that the sums were owed. This was set out in the First Respondent's email to the FIO on 22 March 2018. (Ms Hansen submitted that 22 March 2018 was the date various concerns were fully recognised and rectified.) The details of these omissions were set out in a spreadsheet and the relevant client ledgers were also provided. The longest period that money was held was for 841 days. There was no reason for the firm to withhold these sums from these clients, and these omissions amounted to a breach of Rule 14.3 SAR 2011. It was accepted in the First Respondent's email to the FIO on 22 March 2018 that that this amounted to "a serious lapse of professional conduct". It was stated that the firm would send evidence of payment to the clients of money due to them to the FIO.

39.2 The following breaches of Principles were alleged:

- A solicitor providing a proper standard of service would promptly return to clients payments of compensation owed to clients. The Respondents did not do so, and so Principle 5 was breached.

- Failure promptly to return client money constituted a failure to maintain public trust; clients instructed solicitors to obtain compensation payments, and their trust would be undermined if the payments were not made to them, and so this constituted a breach of Principle 6.

- The Respondents' failures in relation to management of client money and the client account demonstrated a failure to run their business effectively and in accordance with sound financial principles. The Respondents therefore breached Principle 8.

- The failures to return compensation sums promptly to clients demonstrated a failure to protect client money. The Respondents therefore breached Principle 10.

Determination of the Tribunal in respect of allegation 1.6 against the First and Second Respondents

39.3 The Tribunal had regard to the evidence including the oral evidence and the submissions for the Applicant and the First and Second Respondents. The Tribunal found proved that some clients had waited two and a half years, dating back to when the firm was set up, to receive their compensation after it had been paid to the firm, and some waited five weeks; in all 24 clients did not promptly receive their compensation. The Tribunal found that this constituted a breach of Rule 14.3. There was a failure to provide a proper service by holding on to client money when there was no longer any proper reason to retain it, breaching Principle 5, and public trust would not be maintained by such failures, breaching Principle 6. The Tribunal also

found that the failure to return client money promptly constituted a breach of Principle 8 and Principle 10. The Tribunal found all aspects of allegation 1.6 proved on the evidence to the required standard against both Respondents, and that it was properly admitted.

Previous Disciplinary Matters

40. None against either Respondent.

Mitigation

41. Mr Wheeler submitted that regarding allegations 1.4 to 1.6 the Respondents accepted that from the outset the firm got into difficulties with its accounting records. These allegations were admitted by both Respondents, and they had both apologised in their witness statements for the mistakes. The problems were entirely with record keeping rather than anything more sinister. There had been no deliberate mishandling or misuse of client funds at all. No one had lost money or asked for and been refused payment due. The First Respondent explained in his statement the very difficult circumstances in which the firm operated it accounts. Mr Wheeler highlighted key points from the statement as follows:

- The defendant airlines had a pattern of being highly obstructive in dealing with these claims.

- Often payment claims were paid by the airlines without providing any information or reference as to whom payment was being made. They communicated by email to which it was not possible to send a reply, and often they did not permit incoming telephone calls. This was really quite an extraordinary pattern of behaviour on their part.

- It was very rare that firms were faced with frequent multiple payments, where the sender failed or refused to identify the money they had sent. Because this difficulty was unusual, the Respondents did not anticipate it happening (and certainly did not anticipate it happening in such large numbers) and so they did not have a proper system in place to log these frequent and multiple unidentified receipts.

- This had the knock on effect of the Respondents being unable to return money; they had to return money without a reference so airlines then complained that they were getting unidentified money and that created a further problem.

- Almost all remittances were electronic and so in some circumstances the bank could not even provide the name of the airline which had sent it to the firm. The Respondents none the less gave instructions for it to be returned in appropriate circumstances.

- On a number of occasions the bank ignored the firm's above instructions, which created further record-keeping difficulties.

- Once the references were supplied, payments were either made in duplicate or for the wrong amounts.

- The firm had the situation where proceedings were sometimes issued and there was no indication whether the claim had been paid, or in fact the money had been returned. It was necessarily very difficult to prove in the circumstances what had happened.

- This was in the context, as the First Respondent said in his statement, that they were dealing with large batches of claims, with the airlines often making a single payment with no identifying information, in respect of 50 or 100 clients, so they had a few thousand pounds coming into the client account without the payer of that money giving any indication whatsoever as to whom those monies were intended to be paid, so an enormous logistical exercise had to be undertaken to work all that out.

- One also had to remember that a lot of these claims for compensation were made for one of three fixed sums of money, for example £250. So a lot of clients of the firm were due the same amount, but then exchange rate difficulties occurred; the sums were denominated in Euros and payment was made in sterling, but the exchange rate used was not necessarily clear to the firm. That made it still harder to marry up the payments received with the sums that were expected.

Mr Wheeler submitted that the above situation created an enormous logistical exercise, and in his statement the First Respondent gave an indication of the volumes that were being dealt with; 10,000 to 12,000 compensation payments a year. That led to 56,000 financial postings in 2017; that was 225 per working day. There were enormous numbers of transactions of which only a few needed to be wrong to create knock-on problems throughout the whole accounting system. The First Respondent went on to describe further issues which exacerbated all of this, in relation to the dealing between the firm and its bank. That was not to say there was not an obligation on the firm to sort it all out, but it was proper when assessing the seriousness of the Respondents' conduct and appropriate sanction, to take account of those circumstances.

42. Mr Wheeler submitted that these problems first became apparent in February 2016. The Respondents did not hide from them; they self-reported them to the Applicant. They had been entirely open and co-operative with the Applicant throughout about dealing with those breaches, and indeed in December 2016 the Applicant said it was satisfied with the steps the Respondents were taking to rectify, and there was no need for regulatory action. The remedial steps continued and the Applicant commenced a further investigation which arose because those problems had not been fully resolved. They remained ongoing in the sense that they had not yet been fixed. As the Second Respondent testified, it was not a case of the firm taking time to put in place new systems, to deal with new matters as they came in, those were dealt with fairly quickly. The problems that remained ongoing were the original set of problems which took a long time to solve. The matters that came to the Tribunal were the same as those which were still in the process of being rectified in December 2017. They then were successfully rectified by the end of April 2018. The Respondents were nearing the end of the process in any event. It was also striking that the figures before the

Tribunal for the client account shortfalls, and the sums not paid to clients in good time, were figures identified by the firm itself in its email of 22 March 2018, in response to the FIO's requests for further information. The Applicant simply adopted the firm's own analysis, and no one suggested it was wrong. The remedial action was complete and the Tribunal had heard evidence of the hours worked to rectify the problem, staff were taken on specifically to rectify the problem, and that plainly involved the firm carrying a significant cost in undertaking that remedial work.

43. Regarding the specific allegations: Mr Wheeler submitted that fact that the reconciliations were non-compliant simply reflected that there were ongoing problems that were unresolved at the time of those reconciliations (allegation 1.4). The client account shortfall was rectified on the day that figure was established (allegation 1.5). It arose because the firm had made compensation payments to clients in circumstances when payments had not been received from the defendant airlines. So the firm, by reconstituting the client account and repaying the shortfall, had effectively funded Respondent compensation payments to clients in circumstances where clients would not otherwise have had that money; an unusual instance of clients benefitting from a breach of the Rules at the direct expense of the firm. Mr Wheeler also submitted that it was important to emphasise that although the client account was in shortfall, it did not mean any other client was kept out of their money; there was no evidence of clients coming to the firm and seeking payment that was due to them and being told they could not have it.

44. As to allegation 1.6, Mr Wheeler referred to a spreadsheet detailing the payments, which had been sent to the FIO by the First Respondent as an attachment to the email of 22 March 2018. The spreadsheet showed the time for which payment was outstanding; for a quarter of the cases it was six weeks or less, some were much longer. Daily interest was shown, which the firm calculated and paid in respect of the delay. Reasons for the non-remittance were shown, for example where there was an attempt to make payment and the BACS payment to the client failed for some reason, and the Respondents had not had new details, and administratively it was not picked up. In a number of instances that was the position. It was true that other cases appeared to have fallen through the net, and payment did not appear to have been made at all. In some cases files were not provided to the bank to direct the bank to make the payment. Mr Wheeler emphasised that none of the clients complained or chased for payment; they were not told they could not have their money. All of these clients had now received a letter of apology and payment in full, and interest was calculated, and in addition they all received £50 in compensation. No one told the firm to do that, they decided to do it voluntarily. In the context of the amount of the compensation claims this was an entirely sensible amount to offer. These were 24 clients, a minuscule proportion out of around 50,000 clients for whom the firm had acted. Mr Wheeler also emphasised that one could see from the reasons these were not deliberate non-payments; they were not done for the financial advantage of the firm. These were failed payment attempts and administration errors.

45. Mr Wheeler also submitted that the firm was responsibly run. It provided a high quality service in a niche area of the law; one of only three firms specialising in this area that they knew of. The Respondents did not benefit from the breaches but paid considerable sums to sort them out. Although the Respondents did not claim financial hardship of any kind, Mr Wheeler asked the Tribunal to bear in mind the relatively

low levels of profit that the firm achieved which were detailed in the First Respondent's statement:

> "It may be helpful to indicate that FairPlane's profit since the inception of trading has been as set out below. These figures are taken from the year end financial statements prepared by FairPlane's accountants for each financial year ending 31st March, apart from figures for the year ending 31 March 2019 which are internal management figures…
> Y/E 31 March 2016 (£283,196)
> Y/E 31 March 2017 £71,037
> Y/E 31 March 2018 £75,165
> Y/E 31 March 2019 £140,984
> Total over 4 years £3,990"

There was a lot of "yo-yoing"; the last year was the best. Looked at in the round the firm had not made an enormous amount of money. The First Respondent also pointed out that the firm employed around 21 people, and acted for around 1,000 new clients each month. The Respondents were the only directors of the firm, so if the Tribunal had in mind imposing a period of suspension by way of sanction (which Mr Wheeler submitted the seriousness did not merit) it would result in the closure of the firm. There were some admitted solicitors, but the practical reality was that there was no one else who could, and who would be willing to, step into the shoes of the Respondents and actually run the business.

46. As to the contested allegations, Mr Wheeler emphasised that, even though the following points had been rejected by the Tribunal as an answer to the allegations, they were relevant to seriousness:

- The initial view of the Applicant was that the connection with Leeward was disclosed, and there was no objection to the manner in which that was done; the Tribunal disagreed, but this was not a serious shortcoming.

- As to Box Legal as a conduit, the Tribunal found that the interest ought to have been disclosed, but Mr Wheeler submitted it was a relatively minor technical breach of the Rules, and not one of real seriousness, and in reality the interest was in the profits of Leeward, and that was at the heart of all this.

- This was not an instance of clients being kept out of an otherwise open market by the firm seeking to keep business for itself. There was no real alternative insurance policy available, and the policy that was taken out was plainly for the clients' benefit and to their advantage. There was no evidence at all of any harm to clients, or that any clients complained about prejudice from entering into the policy, and so the inadequacy of disclosure regarding Leeward reflected a misjudgement, not something more nefarious, so the degree of culpability was not high.

- The Second Respondent's evidence was that he was working flat out trying to establish a new firm, and left matters to the First Respondent as part of the division of labour between them, and they were in precisely the same position where conflicts were concerned. He accepted that did not divest himself of

responsibility, but he could be overly criticised for adopting that approach; at worst it was a culpable oversight, but not an attempt to deceive clients or a deliberate attempt to conceal information from them. If the Respondents had wanted to do that, they could quite easily have not referred to their interest in Leeward at all. It would have been be extraordinarily difficult to find out about it, as the information was not in the public domain, as it was held in Bermuda and not subject to disclosure.

- Even though the Respondents argued the allegations should not be upheld, which they were entitled to do, they did not seek to maintain their previous conduct once it was drawn to their attention; the Respondents changed their practices immediately to highlight the points in a more prominent manner. Indeed, for reasons unconnected, they ceased to offer the ATE policy, and charged clients an administration fee instead, and ran the risk on costs themselves. No criticism was made of their doing that; it was perfectly legitimate, and was what other firms were doing. Clients now paid a £25 administration fee, rather than a £20 insurance premium. Mr Wheeler submitted that nothing turned on the difference between the figures. These costs were bound to vary over time but essentially none of this made any difference to what clients had to pay.

47. In conclusion, Mr Wheeler submitted that this was not wrongdoing that sat high on the scale, and he invited the Tribunal to tailor sanction on that basis.

Sanction

48. The Tribunal had regard to its Guidance Note on Sanctions (December 2018) and to the mitigation offered for the Respondents. There were three contested allegations which had been found proved, save for one aspect of allegation 1.3, and three admitted allegations concerning breaches of the SAR. The Tribunal felt it appropriate to consider sanction in respect of both the First and Second Respondent at the same time. The allegations arose out of the same facts and, although the Respondents had allocated responsibilities in the firm between them, neither had sought to place blame on the other, and the only issue after all other factors had been considered would be the degree of responsibility each should bear for what had occurred. The Tribunal assessed the seriousness of the misconduct in respect of the allegations regarding the airline cases. As to culpability, the motivation of the Respondents lay in their attempts successfully to operate at a profit the business model they had selected; they had tens of thousands of clients who, by default, were committed, unless they actively opted out or the policy came to be cancelled at a later stage, to an insurance premium which varied during the period covered by the allegations, but reduced to around £20, from which the Respondents and their wives benefited through their preference share dividends. Mr Wheeler estimated the net amount of the profit to be around £10.63 per policy. The firm might have achieved relatively low levels of profit from the airline claims work, but this did not necessarily apply to the Respondents' financial benefit from the insurance policies they encouraged their clients to buy. The Respondents' actions were clearly planned; they formed part of a chain of relationships from the firm they majority owned, through the brokerage they wholly owned, to the insurance company from which they benefited by way of a dividend on their preference shares. The Tribunal considered that the Respondents had acted in breach of trust because they had failed either completely or adequately to give information to clients to enable

them to understand the nature of the Respondents' conflict of interest, before deciding to take up the recommended policy. The Respondents had direct control of and responsibility for the system they devised, and what they told clients about it. They had joint responsibility, including for those matters where the Second Respondent chose to leave things to the First Respondent. There was a considerable difference in the Respondents' levels of experience. The First Respondent had around 40 years' experience as a solicitor, and the Second Respondent around 22 years. They had not in any way misled the Applicant, and should be given credit for co-operating in the investigation, and indeed they self-reported their accounting failures.

49. The Tribunal considered that the harm the Respondents' actions caused to clients could not be precisely ascertained. Clients might have committed to a policy they did not need, or would not have taken out if they had known of the conflict. (The Tribunal took no point upon the issue of clients being committed to the policy before it was known if proceedings would be issued.) The impact on the reputation of the profession was greater than the impact on clients because effectively the Respondents were making a secret profit from a system that clients were opted into. The Respondents had been found to have failed to act with integrity in this regard under allegations 1.1 and 1.2. The harm was such that it might reasonably have been foreseen; they did not check that their clients needed the policies, merely relying on an assumption borne out of their own experience that they did, and did not give the clients adequate information. There were some aggravating factors; the Respondents' actions were deliberate and repeated, indeed they formed part of a system the Respondents had created, and continued over a period of time. The Respondents were aware of the need to disclose conflicts of interest, but took the view that their obligations had been discharged, but they ought reasonably to have known that what they did failed to meet the requirements to protect the public and the reputation of the legal profession. There was a considerable level of mitigation regarding the accounts rules breaches; the Respondents self-reported, and they made good the shortages immediately the amount was drawn to their attention, and co-operated fully with the Applicant. The Tribunal considered that the Respondents had shown little insight into the issues giving rise to the allegations relating to the insurance arrangements; indeed the First Respondent asserted that amending the client care letter was illogical and unnecessary, and done only because the Applicant required it.

50. The Tribunal determined that no order or a reprimand was inappropriate because the misconduct was too serious. The finding of a lack of integrity inevitably meant that the misconduct was serious, but the Tribunal had regard to the fact that a want of integrity could arise from a broad spectrum of actions or inactions, and so could be regarded as falling within a wide category of misconduct from the serious to the extremely serious; the top of that bracket justifying a striking off. A fine was considered appropriate because the degree of harm caused to the affected clients, and to the reputation of the profession, was not such that a suspension or strike off was justified. Neither did the protection of the public in the circumstances of this matter necessitate a sanction of suspension or strike off. The misconduct was highly unlikely to be repeated. In the Tribunal's view the finding of breach of Principle 2, the failure to act with integrity, and the financial benefit to the Respondents took the matter into level 4 of the Tribunal's indicative fine bands, that is conduct assessed as very serious. The Tribunal then considered the level of responsibility of each of the First and Second Respondents; the First Respondent was the COLP and COFA of the firm,

and by far the more experienced. The First Respondent made the decisions about the extent of disclosure, and drafted key documents. The Second Respondent was less experienced, but he did not know the extent of the disclosure of his conflict of interest because he did not ask. He had decided he could leave all those decisions to the First Respondent, while he addressed himself to the firm's systems, because he trusted the First Respondent as a good lawyer and competent to make such decisions. He seemed mainly interested in the documents in so far as they affected his systems; he read the client care letter and skimmed the CIP. However this was a two director firm which meant the Second Respondent had a higher level of responsibility to look at such elements of the practice than he displayed. The Tribunal did not consider it appropriate to levy an additional fine for the accounts rule breaches. These were system failures, and not deliberate breaches. The Respondents were near the end of an exercise to rectify problems of which they were already aware when the FIO arrived, and they made good shortages as soon as the figures were crystallised. There was no ongoing financial harm to clients, as the Respondents compensated them for monies which had been retained in breach of the Rules, and had worked hard to address the accounting issues. The Tribunal determined that in all the circumstances a fine of £30,000 should be imposed on the First Respondent and £25,000 on the Second Respondent.

Costs

51. For the Applicant, Ms Hansen applied for costs in the amount of £29,773.00. Mr Wheeler made submissions about quantum. He submitted that the Applicant's supervision costs were calculated at £75 an hour for 19 hours, with no indication of what was done for that period. There was the EWW letter of 13 August 2018 of four pages, but that was not 19 hours' work. Mr Wheeler noted that Capsticks worked to a fixed fee of £18,500 for all their fees/disbursements incurred on the case (excluding VAT) but it was not known how that figure had been arrived at; it had to be justified by reference to work done, and there was just a total of nearly 106 hours with no indication of different hourly rates for partner, lawyer and paralegal. Mr Wheeler made no comment about the total hours claimed for review of case papers and case planning, which worked out at around £175 an hour for 15.7 hours. In that context Mr Wheeler submitted that to then spend 34.3 hours for investigation, and preparation of the Rule 5 Statement and documents for issue, was excessive. Breaking that time down Mr Wheeler noted that 20.2 hours was claimed for partner and lawyer, and paralegal time of 14.1 hours. In this part of the costs schedule one presumed paralegal time was spent on the Rule 5 Statement and bundle, as the Tribunal was not told what the paralegal was involved in. The Rule 5 Statement bundle was 331 pages long but it comprised the Statement and then virtually all one document, the FIR. It should not have taken 14.1 hours to compile that bundle. Pagination was largely automated and took seconds. Regarding the estimated time claimed for preparation for hearing, advocacy at hearing, travel to and from the hearing, Mr Wheeler submitted that the Tribunal would have to consider if 45.3 hours was excessive for a hearing of two and a half days. On that basis he suggested the costs should be reduced from around £30,000 to £20,000. Mr Wheeler also asked that the Second Respondent be given two months to pay the costs and fine; it was a matter of cash flow, not means. Ms Hansen responded regarding the time claimed from instruction to the Rule 5 Statement, regarding the consideration of further documents, that what the Tribunal had seen was not all the documentation relating to this matter. A considerable amount of work in

preparing the Rule 5 Statement included a consideration of what documents the Applicant had and what the Tribunal and Respondents would need to read to get to a hearing. There were other documents. The paralegal's role was not limited to preparing the bundle; their time was used to look at other documents, to allow time to be used proportionately for the whole preparation of the case. There were two different people involved in the preparation of the case; the partner spent the most time looking at the case when it came in the door. Ms Hansen the lawyer – had spent the most time on the Rule 5 Statement, although the statement was not hers. The Tribunal would appreciate the reason for the allocation between the two different people at different levels doing different amounts of work. As to complexity, there were a number of issues: there were two Respondents and in all the circumstances the time period and the time claimed was reasonable and proportionate. Ms Hansen had not previously heard a point being taken about the role of the Supervision department of the Applicant. It was at odds with the point taken during the hearing that the supervisor had not put one of the allegations into the EWW letter. So either the supervisor was someone just drafting the letter or was someone drafting the evidence in order to prepare allegations to go in the EWW letter, given the supervisor's role in reviewing the work of the FIO and preparing the letter. Ultimately the same allegations were brought against two Respondents and consideration was required as to how the allegations were put against two people. Ms Hansen submitted the time period was reasonable and proportionate.

52. The Tribunal determined that generally the amount claimed for costs by the Applicant was reasonable and proportionate, but it would make a reduction because the hearing had not taken the full three days for which it was listed. Costs were assessed in the amount of £25,000 to be awarded against the First and Second Respondent on a joint and several basis. The question of the timing of payment by the Second Respondent was a matter between the Second Respondent and HMRC in respect of the fine, and between him and the Applicant in respect of the costs.

Statement of Full Orders

53 The Tribunal Ordered that the First Respondent, SIMON SOLOMON PINNER, solicitor, do pay a fine of £30,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £25,000.00, such costs to be paid on a joint and several basis with the Second Respondent.

54. The Tribunal Ordered that the Second Respondent, DANIEL EDWARD MORRIS, solicitor, do pay a fine of £25,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £25,000.00, such costs to be paid on a joint and several basis with the First Respondent.

Dated this 25th day of October 2019
On behalf of the Tribunal

A. Horne
Chair