Neutral Citation Number: [2011] EWHC 613 (QB)

Case No: HQ09X04351

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2011

Before :

THE HONOURABLE MR JUSTICE BURNETT

- -

Between :

MARIA ABRAMOVA	**Claimant**
- and -	
OXFORD INSTITUTE OF LEGAL PRACTICE	**Defendant**

- -
- -

Oliver Hyams (instructed by **DPA**) for the **Claimant**
Peter Oldham QC (instructed by **Berrymans Lace Mawer LLP**) for the **Defendant**

Hearing dates: 31 January – 1 February 2011

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE BURNETT

THE HONOURABLE MR JUSTICE BURNETT:

INTRODUCTION

1. Maria Abramova, the claimant, enrolled at the Oxford Institute of Legal Practice ['OXILP'] to take the Legal Practice Course ["LPC"] in the academic year 2004 - 2005 as a step towards becoming a solicitor. She failed to pass the course. This is her claim for damages for breach of contract in relation to the provision of educational services provided to her by the defendant.

BACKGROUND

2. The claimant is a Russian national who is now settled in the United Kingdom. She was educated initially in Moscow where she did exceedingly well at school. She came to the United Kingdom in August 1999 when she was 17. Her purpose in coming to the United Kingdom was to try to gain entry to the University of Oxford. She commenced study on A levels. She took A levels in Russian, Spanish and Modern History gaining two As and a B. Thereafter she did a fourth A level in Ancient History, again securing an A grade. The claimant was offered a place at Oriel College, Oxford which she took up in 2001. She read Law. In 2004 she gained an upper second.

3. The claimant's ambition was to qualify and practise as a solicitor. She joined the Law Society as a student member. In November 2003 she made applications through the Law Society to commence the LPC. OXILP was her first choice of institution at which to undertake that course. The claimant was accepted by OXILP and commenced her studies there in September 2004. In the meantime the claimant had undertaken two legal work placements and in 2004, applied to a range of City solicitors for training contracts with a view to starting in September 2006. None of those to whom she applied offered the claimant a training contract. However, Clyde & Co. was prepared to offer the claimant work as a paralegal to commence in September 2005. Immigration restrictions were such that the offer could not be formalised until the following summer. The claimant worked for Clyde & Co. as a paralegal from the autumn of 2005 to sometime in 2006. Thereafter she moved to Gates & Partners where she works in the aviation department. By virtue of her law degree and work experience she undertook in Russia in 2006, the claimant is apparently allowed to practise law in Russia. Gates & Partners thus describe her on its website as a 'lawyer' rather than as a paralegal.

4. OXILP was established jointly by Oxford Brookes University and the University of Oxford to specialise in the delivery of professional legal training. It has since become fully integrated within Oxford Brookes University but at the time during which the claimant was a student there it was a joint venture.

5. Qualification as a solicitor is governed by the Law Society's Training Regulations 1990 made under the Solicitors Act 1974. At the time material for the purposes of this claim, the Law Society was the relevant regulatory body. The Course comprised a number of compulsory subjects, various practical elements and others known as 'electives'. The three compulsory subjects were Business Law and Practice,

Litigation, and Property Law and Practice. The practical elements involved skills assessments in Advocacy, Drafting and Legal Research together with Solicitors' Accounts and Business Accounts. The elective subjects chosen for study by the claimant were Private Acquisitions, Debt Finance and Private Client.

6. The broad timetable for the examinations envisaged that all compulsory aspects of the course would be examined by way of assessment in March 2005. The three elective subjects would then be examined in June. In May 2005 the claimant and her fellow students were notified of the examination results in respect of the first tranche of assessments. Unhappily, the claimant failed all three of the compulsory subjects and was assessed as "not yet competent" in Solicitors' Accounts and Advocacy. A letter in standard form was sent to the claimant indicating she would have to re-sit the failed topics. The practical subjects were subject to continuing assessment. She was told that she was entitled to re-sit the others at any sitting of the examinations before the end of July 2006. Opportunities for re-sitting these failed subjects were available in August/September 2005 or March 2006. It was thus possible to spread the re-sits over two sittings. The letter indicated the following:

> "however, in deciding when to attempt them, you need to take account of possible disadvantages in delaying your re-sits, in particular:
>
> - The impact any delay may have on your obtaining (or retaining) the offer of a training contract;
>
> - The fact that it can be more difficult to pass an assessment taken some time after the course of study on which it is based;
>
> - And the fact that it will be your own responsibility to update yourself on the relevant law.
>
> We will be asking you to notify us within 7 days after publication to you of your final results slip in July whether you wish to take your re-sits in August/September this year or whether you would prefer to defer to March 2006. Where you have more than one subject to take, you may if you choose split your re-sits between August/September and March.
>
> Your personal tutor will be happy to talk about the timing of your re-sit examinations before you reach your decision."

The reference to the results slip in July was to notification of the results in respect of the elective subjects which were to be taken in June 2005.

7. In the period between March 2005 and June 2005 the claimant satisfied OXILP with respect to both the practical elements of Advocacy and Solicitors' Accounts. In July 2005 she received the results of the elective examinations. The claimant passed Private Acquisitions but failed Debt Finance and Private Client. So it was that on 27 July 2005 the claimant received a letter reminding her that she now had five subjects to re-sit namely Business Law and Finance, Property Law and Practice, Litigation,

Debt Finance and Private Client. The timing issue was dealt with in the same way as set out in the letter of May 2005. The claimant was asked to notify OXILP by 5 August 2005 whether she intended to take all her re-sits in August/September or defer any of them till March 2006 (in the case of the compulsory subjects) or June 2006 (in the case of elective subjects). She was asked to speak to her personal tutor or other members of staff to discuss the timing of re-sits. Revision sessions were identified and she was 'strongly recommended' to obtain feedback in respect of the failed examinations. On 31 July 2005 the claimant wrote indicating that she wished to take all of the examinations in August/September. That is what she did. The claimant passed three of the five subjects but failed Property Law and Practice again, together with Private Client. The next opportunity to re-sit Property Law and Practice was in March 2006 and the first opportunity to re-sit Private Client was in June 2006. The claimant sat the Property Law and Practice examination for the third time in March 2006 but again failed. As a result of failing a compulsory element of the course on three occasions, the claimant failed the course generally. In those circumstances, there was no purpose to be served in her re-sitting the Private Client paper in June 2006. The stage had been reached where if the claimant wished to persevere in her desire to qualify as a solicitor she was obliged to undertake the whole course again.

8. The claimant did not do the course again. Instead she pursued two different options. First, she obtained authority to practise as a Russian lawyer (referred to above) and secondly she sought to qualify as a trial lawyer in New York. In 2007 the claimant sat the New York Bar examinations but was unsuccessful.

THE PLEADED CASES

9. The claimant relies upon section 13 of the Supply of Goods and Service Act 1982 which provides:

> "In the contract for the supply of a service where the supplier is acting in the course of business, there is an implied term that the supplier will carry out the service with reasonable care and skill."

OXILP does not dispute that this term was implied into the contract between the parties. The claimant additionally pleads:

> "It was accordingly an implied term of the Agreement that the Institute would exercise reasonable care and skill in, or in relation to:
>
> 17.1 the giving of guidance to the Claimant concerning the taking of written examinations; and
>
> 17.2 the giving of feedback to the Claimant if and when the Claimant failed an examination, including a written unseen paper."

OXILP does not accept that such additional terms were incorporated into the contract. Subject to its defence that the whole issue of the quality of its teaching is non-justiciable because it involves academic judgements, OXILP contends that these

matters pleaded by the claimant, which go to the heart of her complaints, are factual issues which fall to be assessed by reference to the implied contractual term which is indistinguishable from a common law duty of care which the law recognises is owed in a non-contractual educational environment.

10. The breaches of contract alleged against OXILP are set out in paragraphs 19, 20 and 21 of the Particulars of Claim:

> "19. The failure … by the Defendant to ensure that the Claimant's mock written examinations in [Property Law and Practice] and Private Client were (1) marked by a member of the staff of the Defendant or (2) at least the subject of some guidance by any such member …
>
> 20. The failure of the Defendant to give the Claimant any guidance with regard to examination techniques … For the avoidance of doubt:
>
> 20.1 there were no meetings held with the Claimant at the end of term I or term II to review her progress on the course; and
>
> 20.2 the Claimant received feedback on her performance on the Course only … before the final examinations in May 2005 …
>
> 21. The manner in which the Claimant was given feedback."

11. The claimant alleges that she was not warned by teaching staff that she might fail the examinations. She says that her first practical assessments in October and November 2004 were well received. She complains that she was not taught proper techniques for passing the written examinations before being told of her failure in May 2005. In particular, the mock exams she did were not marked by staff but by the students themselves and were not looked at by members of staff. The claimant's case is that, having failed the Property Law and Practice paper, she received feedback from Lindsey Harrison on 12 May 2005, during which she was told that Oxford graduates encounter particular difficulty in the examination techniques necessary to succeed on the professional course. She says that she received no help with this paper until 13 December 2005, itself inadequate, with further feedback on 23 February 2006. That too was inadequate. She then did a mock examination which was marked by Lindsey Harrison on 9 March but that teacher devoted only 10 minutes to the task.

12. The skeleton argument lodged by Mr. Hyams on behalf of the claimant explains the substance of her claim with commendable clarity:

> "1. …The claim is for a failure to provide appropriate tuition in examination techniques for the Legal Practice Course before the first set of compulsory written examination papers were

> taken by the Claimant and then inadequate assistance in relation to the retaking of those failed examinations.
>
> 2. The latter claim is less obviously a good one, since the Claimant did receive some guidance after she had found out that she had failed the examinations for which she received the results on 11 May 2005. However, the problem was that by that time it was very late in the day, only a month before the end of a 9-month course. In addition, and in any event, the key time for obtaining assistance on the examinations to be re-sat was at a time when the tutors were going to be for the most part absent, on holiday. …Furthermore, if any re-sit was unsuccessful, then the relevant tutor's time was going to be dominated by the need to teach the following year's cohort of students.
>
> 13. It is the claimant's case that the fact that no tuition in examination techniques was provided to her before she learnt on 11 May 2005 that she needed it, was clearly negligent in the circumstances, and therefore a breach of her contract with the defendant. In this regard, one has to ask what the Claimant paid her fees for: merely to listen to what she was told, and to practise? Surely not: the Defendant, if it was to comply with its part of the bargain between the parties, should have done something, and not just nothing, to assist the Claimant with her examination technique long before one month before the end of the course."

13. The claimant says that the practice of requiring students to mark some mock papers was negligent (i.e a breach of the implied term). This criticism, as indeed all criticisms of the teaching practices and techniques at OXILP, is not supported by any expert evidence. There is a dispute between the parties whether such evidence is required to make good a claim for negligent teaching in this case.

14. OXILP joins issue with the claimant on a number of her factual assertions and more generally contends that the LPC was at all times provided with reasonable care and skill.

THE CLAIMANT'S EVIDENCE

15. In a comprehensive statement setting out her complaints about the way in which she was taught, the claimant explained how lessons in the 'knowledge subjects' were conducted in small group sessions of about 20 students split up into groups of five or six. The groups would consider the question in issue and also present their homework. Each group would discuss the problem and then one of their number would write the group's solution on a white board. Individuals might add oral comments on a 'voluntary' basis. It is a recurrent theme of the claimant's evidence that much of what students were expected to do was voluntary in the sense that the staff did not adopt a dirigiste approach. The claimant says that 'with very few exceptions, teachers'

knowledge of the subject they were teaching went only so far as the answer sheet with which they had been provided for the session by the course leader or someone else.' The skills subjects were taught differently and lacked feedback. The mocks in Property Law and Practice and Business Law and Practice were voluntary and marked by the pupils themselves from resources available in 'the Vault' (as to which see further in paragraph [37]). The claimant was very critical of this feature of this course (indeed it is at the heart of her case). Mr Oldham QC, on behalf of OXILP, put to her the underlying reason why self marking is useful, namely that it forces a student to focus on the errors and shortcomings as he goes through the paper, rather than simply looking at the overall mark. The claimant indicated that she had not come across that before.

16. She said that there was no internal review of her work, and noted that at no time was she required to attend a review. In answer to questions from Mr Oldham the claimant accepted that she failed to attend session 14 immediately after the beginning of term in January and so was unable to say whether the mock was discussed then.

17. The claimant received her results on 11 May 2005 and was shocked to have done so badly. In cross-examination she said she did not think that she could fail and that she was bewildered by her failure. She saw Louise Seymour, the subject leader for Property Law and Practice and also an Examination Officer at OXILP. The claimant says that she was upset but remembers talking to Ms Seymour and being advised to see Sarah Allen because it was she who had marked the paper in Property Law and Practice. The purpose of seeing her was to obtain feedback on that paper. The following morning the claimant presented herself without an appointment at Ms Allen's office, she thinks at about 09.00. Because Ms Allen had a class at 09.30 she was unable to see the claimant. The claimant described Ms Allen as shouting at her and herself as being upset and crying. She then went to the office of Lindsey Harrison who is a lecturer in Property Law and Practice. She was also the claimant's personal tutor although she had not had a meeting with her before this. She described Ms Harrison as taking time to calm her down and saying to her that 'Oxford students always have a particular problem with this course, it is to do with exam technique'. In cross-examination she insisted that was what Ms Harrison had said rather than words to the effect that an academic approach was not what was called for in these practical examinations. The claimant said that Ms Harrison then went into Ms Allen's room and found her Property Law and Practice paper, went through question one with her but refused to go through the rest. She rejected the suggestion that she and Ms Harrison had gone through the paper on a later occasion and that Ms Harrison had not gone into Ms Allen's office because it was locked.

18. The claimant described seeing other tutors in respect of the balance of the subjects she had failed. She is critical of Anna-Rose Landes, who was the director of the course and had marked her litigation paper (but had not taught her), for failing to go over it with her and failing to give feedback in an appropriate way. The claimant accepted that she was very upset when she saw Ms Landes. She explained in her oral evidence that she had answered a question correctly but that for some inexplicable reason Ms Landes would not accept that. In short, she disagreed with the marker's view of what the correct answer to a particular question was. This is a feature of the claimant's approach to feedback which manifested itself again when she had failed the Debt Finance paper later in the year. The claimant was generally critical of the way in

which she had been taught Debt Finance and she said in cross-examination that she "argued and challenged" the paper and that she did "question on many occasions why my answers were not correct. They were being too rigid. I did say my answer was correct because I was making the same point."

19. Returning to the narrative from May, the claimant described Ms Allen as being 'abrasive' with her on more than one occasion thereafter. The claimant described one incident when she did not attend her assigned class but arrived at an alternative being conducted by Ms Allen. The claimant's view was that swapping classes was permitted but she accepts that she did not seek consent in advance. In fact, the relevant student guide says that swapping sessions is not normally permitted at OXILP because it might lead to both overcrowding and poor attendance, both of which may cause damage to learning. For that reason, swapping groups would be allowed only in exceptional circumstances which would include seeking permission from both the tutor whose group the pupil was seeking to attend and the tutor of the group from which the student was seeking release. Be that as it may, she described Ms Allen as shouting that she should have been warned in advance. The claimant became upset and humiliated. The claimant said that she left to compose herself and that Ms Allen followed her to try to calm her down. The claimant noted in her statement, 'I might have reacted disproportionately but it shows the state of mind I was in.'

20. The claimant described herself as working very hard during the time after she was notified of her initial failure and that she passed her skills assessments. She was determined to pass the three elective subjects and explained that she read and researched outside the texts set by OXILP. Nonetheless, the marks she obtained were 'quite low'. She passed Private Acquisitions with 50% (the bare pass mark) but failed both Debt Finance and Private Client. In that last subject the claimant had achieved 47%. She saw her paper in July 2005 and said this of it:

> "It is not clear to me to this day why I failed this paper and the teacher was unable to provide an overall and concluding explanation."

21. The claimant continued her narrative concerning feedback on this paper by giving a concrete example of where she scored one mark when three were available. In answer to a question about what a lender could do if the borrower was in default, the claimant said that he could go for acceleration of repayment in accordance with the relevant clause of the agreement. Had she listed the three available options provided by the clause the claimant would have got three marks. As she observed:

> "I wonder whether there were any other instances of my not scoring top marks on other questions even when knowing the right answer in full."

This is an example of the 'rigidity' that the claimant perceived in the way that these questions were marked. She did not appreciate that a client wishing to know his options might wish to have them set out, rather than be referred to a clause in the agreement.

22. The claimant explained that she elected to retake everything at once to ensure that she could start as a paralegal with Clyde & Co in September. She accepted that she sought no advice on this. She remained in Oxford from the end of term (10 June) until the end of July when she returned to Russia for three weeks. She re-took the papers at the end of August and notification of the results went out on 10 October. The claimant said that she was surprised to fail Property Law and Practice because she had received most feedback in that subject. She contacted Ms Harrison who was happy to talk over the telephone and also made an appointment to see David Day, who was a lecturer in Private Client. She indicated that she could only see him at weekends or after 19.00 (because she was by then working in London) and Mr Day agreed to see her at 19.30 on 30 November. Unfortunately, she was unable to keep her appointment with Mr Day because of a problem with the trains.

23. The claimant then described three sessions with Ms Harrison going over her papers in Property Law and Practice. When she saw her examination paper the claimant was suspicious because her name had been written upon it. The papers are completed with only a reference number for identification purposes to help to eradicate unconscious bias in favour of candidates known to the marker. At the first meeting, the claimant recollects Ms Harrison telling her that she had done relatively well in the section of the paper dealing with leaseholds, but less well on the part relating to registered freeholds. There was also a section on unregistered freeholds. The claimant's recollection of the first meeting was that time was spent dealing with registered freeholds but not with unregistered freeholds apparently because Ms Harrison considered that everybody did badly at the latter subject. The claimant said that Ms Harrison suggested she should obtain another student's notes to help her prepare for the next examination. This aspect of her evidence was challenged by Mr Oldham. It was put to the claimant that she had told Ms Harrison that she had burned her notes and that was the reason why the assistance of another student might be needed. The claimant denied that. She accepted that she had indeed disposed of her notes, having thrown them away when she moved to London in September 2005. She insisted that she had said nothing of that to Ms Harrison and that the suggestion that she borrowed notes from a fellow student had come quite independently. The claimant said that she "was not particularly happy with the textbook which we had been required to use for the PLP examination" because in her judgement it did not adequately cover the ground. Ms Harrison offered to provide a different textbook, which offer the claimant took up.

24. The claimant described the next session as being devoted to revising the principles of registered title, unregistered title and other relevant principles. She complained that there was no consideration of examination questions or examination technique. She said that at the end of the second session she, the claimant, suggested that she should take a mock examination but that Ms Harrison was resistant. Nonetheless Ms Harrison provided her with a paper which had been set for students who had commenced their studies at OXILP in September 2005. The claimant was critical of this paper because she considered that it focused on issues more relevant for those with ambitions to join high street practices rather than city firms of solicitors. She explained that she "nevertheless completed the mock examination under examination conditions" and took it with her when she next saw Ms Harrison for the third revision session. Ms Harrison marked the mock and the score was a pass. With that

reassurance the claimant took the examination for the third time but, as has already been noted, failed.

25. The claimant's statement contained evidence concerning the approach to mock examinations at other institutions providing the Legal Practice Course. It bears repeating in full because it forms an important foundation for the contention that OXILP was negligent in its practice of requiring students to mark their own mock examinations.

> "A friend of mine today completed a telephone survey on my behalf of all the other LPC providers in the UK, and of the providers who responded to his questions (and that was 24), only one indicated that students themselves marked their mock examinations. Even in that case (Anglia Ruskin University), most of the mock examinations were marked by tutors as well. There were 10 providers who either failed to respond or refused to give the requested information."

26. The claimant further explained that having left Clyde and Co she joined Gates and Partners Solicitors in early 2007. An issue arose about the way in which the claimant was described on that firm's website. In a printout which reflected the content of the website on 17 November 2010, the claimant is described amongst much else, as:

> "Qualified and admitted to practice law in Russia, 2007. Currently working towards more qualifications in the UK and the USA (New York Bar). Member of the Law Society."

27. In cross-examination the claimant clarified that she was qualified to practise law in Russia by virtue of her having a law degree together with her experience as a paralegal. She accepted that the suggestion that she was currently working towards a law qualification in the United Kingdom was inaccurate. She had made an application to the Law Society to be exempted from passing the solicitors' examinations, but that application had been unsuccessful. She accepted that she was not a "member of the Law Society" but had been a student member. She accepted that she was not studying for the New York Bar and confirmed that she had failed those examinations in July 2007. The claimant rejected the suggestion that she had allowed a picture to be presented to the public through the website which was a misrepresentation of the true position. She said that the website was out of date and was being changed.

28. The claimant has decided not to retake the LPC because there is no guarantee that it would improve her job prospects. She also attributes her failure to pass the New York Bar examinations to a combination of a lack of specific tuition in preparing for them and psychological difficulty following her experiences at OXILP.

THE DOCUMENTARY EVIDENCE

29. Both parties drew attention to documents relating to the course at OXILP together with some observations from outside inspectors and examiners. The student guide for 2004 - 2005 contained a section entitled "about the course". It emphasised the importance placed on individual learning and preparation for sessions and in

particular that it was vital to follow the instructions in advance of attending any small group session. Another section entitled "how to do well on the LPC" identified a number of key factors. First, that the LPC involves a different approach from that appropriate to academic courses. Secondly, the need to keep up and work consistently and thirdly, the need to use the tutors if a student was having difficulty in understanding anything. A long list of points elicited from students who had undertaken the course was also set out. They included the following:

i) As you go along, look at exam questions and answers. This will enable you to recognise the difference between the undergraduate approach - i.e. you should not write answers to questions in essay style, state the legal principles briefly ... and then concentrate on application.

ii) Use the tutors' office hours to get clarification from tutors on points you don't understand. Tutors are available and very willing to help.

iii) Forget about your degree mindset. Focus on applying the law as it relates to fact scenarios.

iv) Look at marking schemes for the past exam papers to see what the approach is. Don't be afraid to state the obvious in your answers. You are given credit for identifying the important points you would have to address in practice - no matter how unoriginal.

v) Go to all the large and small group sessions.

30. The student guide explained that each student would be assigned a personal tutor. That tutor would arrange to see each student individually during each term. However, the guide added that students should not feel limited to these times and that personal tutors would be available to discuss problems not only about work but also about welfare issues. It went on to explain that should a student have particular concerns about an individual subject he should approach the subject teacher.

31. OXILP had student feedback guidelines, which were part of an internal document available to staff. In its section dealing with mock examinations it said this:

> "Mock examinations may be self assessed by students. In this case feedback takes the following form:
>
> 1. The tutor gives general feedback on the examination, either orally or in writing.
>
> 2. Students mark their own work in accordance with the guidance provided."

32. The guidelines also dealt with feedback and further help following an examination failure. As material:

> "8.1 This strategy sets out the steps which will be taken to ensure that appropriate and timely feedback will be provided to students to enable them to monitor their progress on the Courts and to learn from both formative and summative assessments
>
> 8.2 EXAMINATIONS (COMPULSORY AND ELECTIVE
>
> SUBJECTS, SOLICITORS' ACCOUNTS AND BUSINESS ACCOUNTS)
>
> All mock examinations should be completed, and all feedback to students should be provided before the summative examination.
>
> 1. Results will be published to students in individual communication.
>
> 2. Within one week of publication of the results, the examination paper and answer guide (with the detailed breakdown of marks removed) should be made available to the students in the Vault. The full mark scheme with a detailed allocation of the marks should never be shown to or made available to the students.
>
> 3. All students who fail the examination will be offered an individual meeting with the relevant academic tutor to review their examination scripts. Where possible, this should be the tutor who marked the script. They will be provided with their examination paper and will be taken through the examination with their own script in front of them.
>
> 4. Any other student who wishes to obtain feedback may also do so.
>
> 5. A revision session/surgery will also be offered to all re-sitting students, giving guidance on why students have failed.
>
> 8.3 FEEDBACK THROUGH PERSONAL TUTORIALS
>
> Students will be given general feedback on their progress though the course at the end of term I"

33. The Law Society conducted what were called 'pastoral visits' to educational establishments providing the Legal Practice Course. A pastoral visit occurred in April 2004 following which the quality of provision was judged to be "very good". The next pastoral visit occurred on 3 February 2005. The report following that visit was included within the bundles produced for trial. The 2005 report identified a number of "issues" which had been identified for consideration by OXILP in 2004. These were designed to improve the provision of services to students, in particular by enhancing the efficacy of teaching sessions. The 2005 report noted that OXILP had been conducting a careful review of the current assessment arrangements and that a new

strategy had been approved by the Institute for implementation in the academic year 2005/2006. The assessors

> "noted that the system of mock compulsory assessments was inconsistent and this was also an issue commented on by the students. There was no written formative feedback given to students in relation to the mock compulsory subject assessments. In BLP students undertake a mock assessment in exam conditions in SGS [i.e small group sessions]. During the break between the SGS that tutor looks at a few scripts. The students are then asked to swap their scripts with their neighbours. Students then mark the mock assessment with the aid of a model answer. The tutor then takes the students through the mock assessment, taking into account the issues raised by the scripts considered during the break between sessions. In PLP students do a mock subject assessment in a SGS in exam conditions which they mark after the session again with the aid of a model answer. Students must hand in their marks and tutors check that they have the marks of each student."

The conclusions of the assessors, which included what amounted to recommendations, pointed to the need to give further consideration to the design of small group sessions. Additionally, the assessors advised OXILP "to implement an assessment strategy embracing all assessments … and to include the provision of formative feedback for subject assessments and skills assessments". That was, at least in part, a reference back to the mechanism for marking and assessing mock examinations referred to in the quotation immediately above. The central point being made, as I understand it, was that the procedures applicable to mocks in different subjects were not consistent.

34. OXILP responded to that report in January 2006 with details of changes that had been made to the way in which mock exams were dealt with:

> "the assessments took the form of a shortened mock exam on the material they had covered so far. The assessments were marked by tutors on an answer grid and the assessments and marked answer grid returned to the students. Students who failed the assessment or were borderline were invited to an individual appointment with their tutor for additional oral feedback. It is obviously too early to have detailed feedback from students on the way this process has worked, but tutors noted in their pre-Christmas personal tutorials that the prospect of having the formative assessments on their return from holiday, concentrated the students' minds on revision and consolidation over the Christmas period. The process has also directed tutors attention not only to those students who are having difficulty and need extra support but also to those students who have underestimated the amount of work or level of detail that is necessary."

So far as Property Law and Practice was concerned, the timetabling of the mock exam in previous years had placed it in the last session before Christmas.

35. Each year OXILP was required to submit an annual monitoring report to the Law Society, in common with all providers of the LPC. That report contains statistics evidencing the overall success of the students. The report for 2004/2005 shows that there were 358 students of whom only five had failed to complete the course and 21 were still taking re-sits when it was compiled. Of the 332 who had by then succeeded, 48 passed after one or more re-sits. Of the remaining 284, 100 passed with distinction, 143 with commendation and 41 at the first attempt without those added accolades. The report included sections prepared by external examiners. The external examiner who dealt with Property Law and Practice was Ian Brookfield, the director of the Centre of Professional Studies at Cardiff University Law School. He included this within his observations:

> " the assessment was, to my mind, appropriately challenging and this was reflected, I would suggest, in an average mark of 66. The spread of marks was from 89 to 32, thus suggesting an assessment which allowed all students to show their ability and preparation. Whilst the number of distinctions obtained was probably at the top end, the number of students achieving a mark of 49 or less was exactly the same as for Business Law and Practice and higher than for Litigation and Advocacy.
>
> The assessment was marked consistently and clearly by the course team and overall I was impressed with the subject coverage and assessment. I would tentatively suggest the course team may wish to consider whether it might be appropriate to release some advanced material/information and whether a single assessment of three hours is sufficient."

He also noted:

> "The students to whom I spoke thought the property assessment had been the most challenging. They were comfortable that feedback was available if requested and thought that they were very well prepared for the assessment on property. They thought the assessments reflected the mock and that the timing and indeed the assessment as a whole was appropriate."

THE EVIDENCE FROM OXILP

36. Statements were served and oral evidence given by the following witnesses from OXILP:

i) Julie Brannan is the Director of OXILP. She qualified as a solicitor in 1984 whilst at Herbert Smith. In due course she became a partner there before giving up private practice to teach in 1994 ;

ii) Lindsey Harrison had eight years in practice as a property law solicitor before moving to teaching. She has been at OXILP for 17 years and taught Property Law and Practice throughout;

iii) Anna-Rose Landes joined OXILP in 2000. She graduated from Oxford University in 1984 and then took the Diploma in Law before being called to the Bar in 1986. She practised at the Bar until 2000;

iv) Louise Seymour was a lecturer in Property Law and Practice, its Subject Leader at the material time and also the Examinations Officer at OXILP, who worked in private practice as a solicitor before moving into teaching.

v) David Day succeeded Anna-Rose Landes as director of the course in 2007. He is a Cambridge graduate who qualified as a solicitor in 1977. Before joining OXILP he had 25 years in private practice;

vi) Sarah Dawe (nee Allen) worked at OXILP between 2003 and 2007 but has returned to private practice. She is a graduate of Oxford University, where she obtained a first in jurisprudence, and then collected the top distinction at OXILP when she did the solicitors' examinations in 1998. She qualified at Linklaters LLP;

vii) Jayne Dimmick worked at OXILP between 2002 and 2006 and then spent a year in private practice before returning. She read Spanish at Bristol University before qualifying as a solicitor and working in private practice for 20 years until 1998. After a break from practice she took up teaching at OXILP and in 2003 obtained a Postgraduate Certificate of Teaching in Higher Education.

37. Miss Brannan's witness statement gives details of the organisation of OXILP and the course. She describes the teaching practice as being "tell, show, do, review". She explains that this involves students being told the relevant legal principles or procedures. Then they are shown how the principles apply to a particular transaction. The students themselves then apply that learning to a problem. Finally the work is reviewed with both tutor and peer group. The large group sessions provide the instruction for the first two parts of the process whilst the small group sessions cover the last two parts. She expands upon the content of the electronic Vault. It contains course materials, handouts, past and mock examination papers together with marking materials, and other e-learning materials. Students have access to the Vault at all times. Her statement emphasises the availability of individual feedback to students who have failed an examination. She notes the provision of drop-in sessions immediately before the re-sit examinations. In her short examination in chief, Miss Brannan made reference to the annual monitoring report (referred to in paragraph [35] above) and expanded upon the role of the external examiner. The external examiner was appointed by the Law Society. He saw and re-marked a selection of scripts. Those scripts included all of those from candidates who had failed, all those at the borderline and a random selection of others. The external examiner attended the examination board, reviewed the course material and also met students.

38. Miss Brannan was carefully cross-examined by Mr Hyams, on behalf of the claimant, who put to her that the teaching methods employed at OXILP failed to give adequate preparation for the summative assessments. That is a short-hand description of a

subject examination at the end. Miss Brannan explained that the work done in small group sessions was concerned with real questions from examinations. The task being undertaken was thus very similar to an examination. These exercises, she said, were designed to put students into a way of thinking which provided the best preparation for examinations. So, the purpose was to work through tasks, transactions, and case studies. Following private preparation, the students work through the problems collaboratively. They are then discussed with the tutors at the end of the session. There is a plenary discussion at which the students bounce round ideas. In short, the small group sessions were closely aligned with the examination which was to follow.

39. Miss Brannan emphasised a feature of the course itself referred to in the course materials. The technique in answering examination questions was different from that required when undertaking an academic degree. At the beginning of each year she made that point to all the students. The essence of the course was directed towards problem-solving. That required a full understanding of the underlying legal principles, but then an ability to set out in a practical way what was required in any given situation. She described this as a "shift from law to facts". There were no marks for regurgitating the law.

40. Mr Hyams put to Miss Brannan that it was negligent to require students to mark their own mock examinations, particularly when the internal guidelines suggested that course was only a possibility ("may"). Miss Brannan explained why that approach was adopted for some subjects. Since the examination was concerned with practical problem-solving there were "right and wrong answers". So the marking exercise was entirely different from grading an essay produced for a university degree course. A marking grid should enable the students to work through the paper and mark it. Miss Brannan's view, which she explained was supported by academic research, is that self-assessment is valuable for students. Whilst going through the paper themselves, they learn where they have gone wrong and are in a good position to rectify any shortcomings. By contrast, should the mock be marked by the tutor, there is at least a risk that a student will do little more than note the overall mark and fail carefully to go through the paper to identify any shortcomings. Miss Brannan explained that the Property Law and Practice mock was done in session 13 just before Christmas. The tutor notes, which set out in detail the content of each of the 22 sessions, show that general feedback was given at session 14 immediately after the New Year. Unfortunately, for reasons which were not explored in evidence, the claimant did not attend that session. Mr Hyams was critical (with justification) of OXILP for failing to disclose those tutor notes until very shortly before trial. Miss Brannan recognised that they should have been disclosed earlier and apologised for their late discovery. Nonetheless, it was not suggested, nor could it have been, that the tutor notes did other than provide an accurate description of the structure of the course session by session. Miss Brannan also emphasised that students were always at liberty to seek advice and feedback from the subject tutors and also their personal tutor. This last point threw into sharp relief a difference of approach between the expectation of the claimant and the practice of OXILP. For example, the claimant complains that she was never "required" to attend a general feedback session with Ms Harrison at the end of the first term. By contrast, Miss Brannan explained that the practice was to place a list of appointments on a noticeboard from which the students were expected to choose and write in their names. Ms Harrison confirmed that she did this but that the claimant did not take one of the available slots and so never attended such an

appointment. The staff did not chase up students who had chosen not to avail themselves of an opportunity for feedback.

41. Mr Hyams questioned Miss Brannan about the monitoring visit in February 2004 and its recommendations for improvements in the assessments which are set out in Paragraphs [33] and [34] above. The report of the monitoring visit was not produced until August 2004. It was therefore too late to respond to it and make any appropriate adjustments before the beginning of the course in September 2004. That was why OXILP in early 2005 was still in the process of considering the points made. There was a draft strategy which was designed to achieve greater consistency across the different subjects.

42. Mr Hyams referred Miss Brannan to her detailed letter written on 21 September 2006 in answer to a letter before action written by solicitors then instructed on behalf of the claimant. That letter identified the claimant's underlying problem as being with examination technique. Miss Brannan did not accept that there was a failure adequately to identify the claimant's problem and repeated that the whole process of the small group sessions was designed to provide instruction in how to approach the examinations in a practical way. It was put to her that OXILP should have picked up the claimant's difficulty when the Business Accounts Assessment completed at the end of October 2004 was marked. The claimant scored 73% in that assessment which was a very comfortable pass. However, it was a low score compared with the others in her group and an analysis of the scores she achieved shows that she was strong on those aspects of the assessment which called for the deployment of acquired knowledge, but less strong in providing practical answers. Miss Brannan indicated that it would simply not be the practice to call in a student who had comfortably passed the assessment.

43. Lindsey Harrison elaborated in oral evidence on the procedure in place for taking and marking the mock examination in Property Law and Practice. She confirmed that the mock was undertaken during the last session before Christmas. She confirmed that students were expected to mark that examination themselves and then bring it to the first session, that is session 14, after Christmas. The mocks were then handed in so that she could make a note of the marks. There was discussion about the mock examination. For those who had marked themselves at 55% or below, a revision session was offered a week or two later. Because the claimant did not attend that session Ms Harrison has no record of her mark. She explained that the claimant could have attended the revision session. Alternatively, the claimant could have gone to see her at any time.

44. Ms Harrison confirmed the procedure that she used for making appointments to see her students at the end of the first term (and again at the end of the second term). She put up a notice identifying the appointment times which students could then select. This was the practice she has followed for 17 years. Occasionally students fail to take advantage of the opportunity for a meeting but it is not her practice to chase them. The course material explains the availability of these meetings and it is further explained at the beginning of the year.

45. Ms Harrison provided her recollection of events on 12 May both in her written statement and also under cross-examination. Her recollection differs from the claimant's recollection in a number of respects, but there is a significant correlation in

others. The claimant was in tears when she arrived at Ms Harrison's office. She agrees that she tried to calm the claimant down. She saw it is as trying also to bolster the claimant's confidence. However, she is clear in her recollection that on this occasion she did not take the claimant through her paper. That is because Ms Harrison did not have the paper. It was in Ms Allen's room and she did not seek to retrieve it, not least because it was Ms Allen's practice to lock her room. Additionally, Ms Harrison would not go through a paper, she said, with someone who was in an emotional state. She is equally sure that she did not say "Oxford students always have a particular problem with this course, it is to do with exam technique" because such a statement is simply not true. It is likely that she made an observation to the effect that the LPC is different from academic courses and that it is not uncommon for those who come from particularly academic backgrounds to encounter some difficulties in the transition. Ms Harrison explained that she suggested to the claimant that she should come back on another occasion to enable them both to go through the paper. Ms Harrison said that the claimant did indeed come back on another occasion, albeit that she is unable to remember the date. At all events, it was before the re-sit took place in August 2005. The detail of Ms Harrison's recollections surrounding this meeting is set out in her witness statement:

> "15. … it was a lengthy meeting and I do not recall the claimant stating that she had more questions for me.
>
> 16. … I have been teaching the LPC for 17 years and I am very experienced at giving feedback on failed exam papers and advising on exam techniques. It is usually possible that I can spot easily where a student's weaknesses are and where they are going wrong.
>
> 17. My practice in a feedback session is to set the mark the student has obtained in each part of the examination against the total marks available. I then home in on the areas where they have done particularly badly and where weaknesses are, rather than simply give the students the answers to the questions, which they can already obtain from the Institute's virtual library …
>
> 18. … the claimant scored particularly badly on the first exam question in part A (scoring only 18 out of a possible 48 marks). I therefore went through this section with her.
>
> 19. The PLP exam often follows the same basic format and part A usually involves students being given a hypothetical conveyancing scenario with a selection of pre-exchange documents … and being asked to consider the documents in the light of what they know about the client from the scenario given, identify issues/problems arising and applying them to the facts, and then to go on to say what can be done to resolve them. It is not enough to simply state the law or to treat the problem like an essay question.

> 20. With this in mind, the claimant's problem was that she failed to provide practical advice in terms of what advice the client would wish to receive in that particular scenario. To assist the claimant to understand this better, I went through the questions which provided the best example of this problem - mostly questions in part A.
>
> 21. I was surprised to note in paragraph 10 of the claimant's letter of claim that she alleges this meeting was not adequate and lasted only 20 minutes. This is simply incorrect. The meeting was lengthy and was certainly not rushed. I did not cut the meeting short. Furthermore, the claimant did not suggest that the end of the meeting that she had any further questions. If she had done so, I would have answered them. I do not recall being pressed the time."

46. There is relatively little real disagreement between the claimant and Ms Harrison concerning the feedback and assistance that was provided to her after she had failed Property Law and Practice for a second time although Ms Harrison believes that additional help was full and thorough. However, the evidence each gives parts company in its description of the circumstances in which the claimant was advised to borrow notes from another student in her group. Ms Harrison explains in her statement that she sought to establish the claimant's revision technique with a view to offering advice and in that regard asked the claimant "whether she had a decent set of PLP notes and materials from which to revise". To her great surprise, the claimant said she had burned her notes. That was why she suggested to the claimant she should borrow a set. Ms Harrison recalls being so shocked at what the claimant had said she had done that she spoke to Louise Seymour about it after that meeting. Ms Seymour confirmed that in her evidence. She also explained that she had been the claimant's first port of call on 11 May 2005 following receipt of the bad news relating to the examinations. She describes the claimant on that day as "crying and sobbing". For that reason Ms Seymour concluded that there would be little point in obtaining the claimant's examination paper and going through it with her. Instead, she suggested that the claimant should contact Ms Allen (who had marked the Property Law and Practice paper). Not long afterwards, Ms Seymour spoke to both Ms Allen and Ms Harrison and later sent them an e-mail on 11 May which said this:

> "Just to let you know that I had a very tearful Maria Abramova see me earlier today. I suggested that she should e-mail [Ms Allen] to make an appointment to go through her exam with you although I explained that you were not around today. She was very upset about all her exams and I told her to arrange feedback for her litigation and BLP exams too."

47. Ms Allen confirmed in her evidence that she received this e-mail. She describes the claimant as arriving in her office doorway on the morning of Thursday 12 May. She was tearful and upset. Ms Allen explains in her statement that she was unable to see the claimant because she was due to teach. She describes her usual practice when giving feedback. She would go through the student's script in advance of a meeting to ensure she was prepared and to make notes. By that mechanism she would be able to identify the relevant weaknesses. That is why an appointment is necessary. Ms Allen

denies entirely the suggestion that she was other than polite to the claimant. Her recollection is that she suggested to the claimant that they should book a mutually convenient appointment. With that in mind Ms Allen turned to her diary but by the time she returned her attention to where the claimant had been standing, the claimant had disappeared. She adds that she has never shouted at a student. Ms Allen was later told by Ms Harrison that the claimant had visited her. Ms Allen says that the claimant made no further attempt to contact her, or to have feedback. In response to questions about whether Ms Harrison could have retrieved the script and undertaken feedback on 12 May, Ms Allen regarded that as unlikely for a number of reasons. First, it was her habit to lock her room when she went off to teach a class because a large volume of confidential material was in it and also she left her handbag there. Secondly, the scripts were in a box in her room. The script of any individual student would not have been readily identifiable for a reason that the claimant has herself spoken of: students are identified by their Law Society number on the script. To enable feedback to be given the correct script has to be located having first identified the Law Society number. Only then is the candidate's name written on it for convenience. Ms Allen confirms that the claimant turned up to one of her classes without having made the necessary arrangements to swap from her own class. She is able to confirm this because she has a table plan from the class concerned which is in a form that suggests that the claimant arrived unannounced. Ms Allen has no independent recollection of this class. She readily accepts that she may have pointed out to the claimant that she had not followed the appropriate procedure but denies absolutely any suggestion of shouting at the claimant or treating her in any rude manner.

48. Mr Day taught the claimant Private Client. He describes the claimant as being a pleasant individual during the small group sessions, if a little reticent. Having failed the paper at the first attempt, the claimant chose to undertake all the re-sits in August. The re-sit in Private Client was scheduled for the 31 August. Two revision sessions were organised for 23 and 24 August. The claimant did not attend those, albeit not surprisingly because she was doing other re-sits on those days. The claimant had not arranged feedback on this subject before she went to Russia at the end of July. On 25 August she e-mailed Mr Day and explained why she had not come to see him after the end of July or at the revision sessions. She asked whether Mrs Dimmick, the other Private Client tutor, might see her on the forthcoming bank holiday Monday. Mr Day was away at the time and so did not receive the e-mail. He observes that it was not advisable to try to obtain feedback so close to the re-sit. The letter from OXILP of 27 July had expressly suggested that e-mail feedback was available, so too was telephone feedback, yet the claimant had not sought either whilst she was in Russia.

49. Mr Day confirms that the claimant made contact with him following her second unsuccessful attempt at the Private Client paper, that he agreed to see her out of hours but that she indicated a train problem had prevented her attending. He also confirms that the claimant sent another e-mail at five minutes past midnight in the early hours of Tuesday, 13 December 2005 asking whether he might meet her later that day after an appointment the claimant had fixed with Ms Harrison. Mr Day was in Suffolk on the Monday. By the time he arrived at OXILP on the Tuesday and saw her e-mail, the claimant had left Oxford. Mr Day gave evidence about this e-mail traffic because in the letter before action the claimant had suggested that she had sent “numerous" e-mails to him during this period requesting assistance. This caused Mr Day considerable surprise because he had no recollection of such e-mails, beyond those

just described. Neither OXILP nor the claimant has been able to locate any other e-mails.

50. Mrs Dimmick describes herself as having developed a good rapport with the claimant. So far as attempts to make contact in August are concerned, Mrs Dimmick located an e-mail in which the claimant asked to see her on Tuesday, 30 August to discuss Private Client. The claimant had recognised in that e-mail that the Tuesday session was in fact devoted to a different subject. That e-mail was sent on 25 August and Mrs Dimmick does not know when she received it. She was away on holiday until that day and cannot now remember whether she went into the office on Friday 26 August, or not again until after the bank holiday, that is to say on Tuesday 30 August. The claimant came to see her during the afternoon of 30 August, that is the day before the re-sit in Private Client. It is fair to summarise Mrs Dimmick's reaction as one of concern that the claimant had left it far too late to get useful feedback and help. Nonetheless, she remembers going through the claimant's failed paper with her and thought that the claimant was satisfied with the exercise. When cross-examined by Mr Hyams, Mrs Dimmick also expressed concern that the claimant had taken no steps to obtain feedback while she was in Russia.

51. Anna-Rose Landes did not teach the claimant. She recalls speaking to the claimant in May 2005 when the claimant visited her office to seek feedback on her failed Litigation exam paper, which she had marked. The claimant was upset and tearful on arrival. The claimant, she says, had an unusual reaction when being told why her answers to the questions were wrong or deficient. The claimant did not seem able to accept that she had made significant errors and was hostile and defensive. Ms Landes' impression was that she could not take constructive criticism which resulted in her having to spell out in a direct manner why the answers were wrong. The claimant found it extremely difficult to accept that she had done badly. Ms Landes confirms in her statement that some academically bright students have difficulty in adjusting to thinking in a practical rather than an academic way. During cross-examination Ms Landes politely resisted the suggestion that she did not know her subject.

EVALUATION OF THE EVIDENCE AND FINDINGS ON DISPUTED FACT

52. The claimant was a witness who, in my judgment, was ready to blame anyone but herself for her misfortunes. She was inappropriately, and in my view without foundation, willing to make criticisms of those who taught her. The evidence of the teaching staff that the claimant was unable or unwilling to accept that, in many respects, her answers were wrong or inadequate was clearly accepted by the claimant in the oral evidence she gave in court. I came away with the clear impression that when the claimant said that it did not occur to her that she might fail, she meant it. She still finds it difficult to comprehend why she failed. Furthermore, she continues to labour under the impression that when she was told by various members of staff that her answers were wrong or inadequate, that in fact the answers were right. A clear example of casual and unwarranted criticism concerned her comment that the teachers at OXILP had no relevant knowledge beyond the answer sheet from which they were working. It is abundantly clear that the teaching staff at OXILP were, without exception, well qualified and experienced. The focus of much of the criticism advanced by the claimant was on the teaching of Property Law and Practice. I regard it as fanciful to suggest that Ms Harrison, who had been teaching the subject for over 10 years before the claimant became one of her students, was other than

knowledgeable, practised and experienced in the subject. I am unable to accept the claimant's suggestion that Ms Allen was rude to her or shouted at her at any time. Rather, the incidents described by the claimant (the unannounced attempt to get feedback on 12 May and turning up for a lesson without having made the necessary arrangements first) are examples of a well-established pattern of her expecting the staff to accommodate requests for assistance from the claimant at short or no notice. These two examples occurred at a time when the claimant was distraught or upset. That emotional state accompanied many of her meetings with staff at points shortly after she had received disappointing news relating to her examination results. I am confident that the descriptions of these encounters given by the teaching staff are accurate and that the accounts given by the claimant have been coloured by her emotional state at the time and also by her unwillingness to accept that she had been dealt with fairly or appropriately. The evidence from the staff that they gave the claimant every assistance when she asked for it was compelling.

53. There were, in addition, times during her evidence where I concluded that the claimant was being less than frank. To deal with the serious inaccuracies which appear on the website of her current employer with little more than a shrug of the shoulders and a suggestion that the information was out-of-date was worrying. The claimant did not deny that she was aware of the content of the website and in answer to the suggestion that she allowed a false picture to be presented to the public she simply answered that the website was being changed. That was no answer. It is in my view an accurate statement to suggest that the claimant was quite content to allow the false picture to be presented. That false picture was being presented on the basis of information she had provided to her employer but failed to keep up-to-date. The other particular aspect of the claimant's evidence on which I conclude she was not being frank concerned the disposal of her notes. It is incredible to suggest that she said nothing about disposing of them until Ms Harrison quite independently raised the possibility of borrowing another student's notes. Leaving aside the evidence of Ms Harrison and Ms Seymour for the moment, the probabilities are against it. Why would a suggestion of that sort come out of the blue without an anterior discussion about the claimant's own notes? There would be no need to borrow other notes if one's own notes were adequate. But, in any event, I accept the evidence of Ms Harrison that the claimant indeed said to her that she had burned her notes. I also accept Ms Seymour's evidence that this rather astonishing information was almost immediately passed on to her by Ms Harrison. The fact that the claimant now accepts that she "disposed" of her notes when she left Oxford for London provides further support for the conclusion that she said something of this nature to Ms Harrison.

54. Where the claimant's evidence of particular events differs from that of the staff at OXILP, I prefer their evidence. Each was careful in giving evidence, both in the written statements and when cross-examined. None showed the slightest animus towards the claimant, even when provoked by unfair criticism.

55. I did not understand the claimant to challenge the suggestion that she did not take advantage of the opportunity of a meeting with Ms Harrison before Christmas 2004 because she failed to sign up to one of the available slots. Neither did I understand her to challenge the contention that she missed the session immediately after the New Year in 2005 with the consequence that she failed to notify Ms Harrison of her self-marked Property Law and Practice mock result. As a result she did not get the benefit

of the general feedback at that session. Furthermore, the claimant did not attend the feedback session available shortly thereafter.

56. I accept the evidence of Ms Seymour, Ms Allen and Ms Harrison concerning the events on 11 and 12 May following receipt by the claimant of notification of her failure. In all their dealings with the claimant she was very upset. I am satisfied that Ms Harrison's description of the meeting on 12 May is accurate and that she did not go through the Property Law and Practice paper with the claimant on that occasion. Rather, that happened on a separate occasion. I am also satisfied that her description of the care with which she went through the paper with the claimant is accurate. Similarly, to the extent that the claimant is critical of the way in which Ms Harrison gave feedback in the three sessions that preceded her second re-take, I consider that criticism to be unfounded.

57. I do not accept the claimant's evidence that the small group sessions failed to prepare her for sitting the Property Law and Practice paper. I accept entirely the description of such sessions given by Ms Brannan.

LEGAL PRINCIPLES

58. OXILP's primary contention is that the complaints made by the claimant about the way in which she was taught are not justiciable because they engage the Court in evaluating academic judgements which it is ill-equipped to do. In support of that submission Mr Oldham relies upon observations of Lord Woolf MR in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 at paragraph [29]. That was a case in which the claimant brought an action in contract the essence of which was that the university concerned should have awarded her a degree and not failed her. Lord Woolf's observations arose in the context of a discussion of the usual mechanism for challenges (namely via a Visitor or Judicial Review) and involved an indication that most claims brought in contract which amounted to a challenge to academic judgement would be struck out. The statutory mechanisms in place which enable students to question the results of examinations have become more elaborate in the intervening 11 years. But the essence of Lord Woolf's point that a Court is not well placed to engage in questions which go to academic merit remains good law. That said, I do not consider that the claimant's attack of OXILP in this claim engages academic judgement in the sense being discussed by Lord Woolf. She is suggesting that the teaching was lacking in reasonable skill and care, rather than basing a claim on a disagreement about the outcome. She is not suggesting that OXILP should have awarded her a pass. Albeit perhaps reluctantly, she is constrained to accept that she failed the course because she failed Property Law and Practice three times. The classic example of an argument concerning academic judgement would arise if a student sought to suggest that his papers should have led to the award of a first class degree rather than a 2:1. That is a debate in which a court would be very reluctant to engage. But that is not this case. It is common ground that there was a contract between the claimant and OXILP. The claimant paid the course fee and OXILP agreed to provide the course, together with certain books and materials. Section 13 of the Supply of Goods and Services Act 1982 implied a term that the educational services would be provided with reasonable care and skill. The effect of that term was to imply a term that the educational services would be provided without negligence.

59. The law has recognised that even in circumstances not involving contract a claim for 'negligent teaching' is, as a matter of legal theory, sustainable. See *Phelps v Hillingdon Borough Council* [2001] 2 AC 619 per Lord Nicholls of Birkenhead at 667:

> "I can see no escape from the conclusion that teachers do, indeed, owe such duties. The principal objection raised to this conclusion is the spectre of a rash of 'gold digging' actions brought on behalf of under-achieving children by discontented parents, perhaps years after the events complained of. If teachers are liable, education authorities will be vicariously liable, since the negligent acts or omissions were committed in the course of the teachers' employment. So, it is said, the limited resources of education authorities and the time of teaching staff will be diverted away from teaching and into defending unmeritorious legal claims. Further, schools will have to prepare and keep full records, lest they be unable to rebut negligence allegations, brought out of the blue years later. For one or more of these reasons, the overall standard of education given to children is likely to suffer if a legal duty of care were held to exist.
>
> I am not persuaded by these fears. I do not think they provide sufficient reason for treating work in the classroom as territory which the courts must never enter. 'Never' is an unattractive absolute in this context. This would bar a claim, however obvious it was that something had gone badly wrong, and however serious the consequences for the particular child. If a teacher carelessly teaches the wrong syllabus for an external examination, and provable financial loss follows, why should there be no liability? Denial of the existence of a cause of action is seldom, if ever, the appropriate response to fear of its abuse. Rather, the courts, with their enhanced powers of case-management, must seek to evolve means of weeding out obviously hopeless claims as expeditiously as is consistent with the court having a sufficiently full factual picture of all the circumstances of the case.
>
> This is not to open the door to claims based on poor quality of teaching. It is one thing for the law to provide a remedy in damages when there is manifest incompetence or negligence comprising specific, identifiable mistakes. It would be an altogether different matter to countenance claims of a more general nature, to the effect that the child did not receive an adequate education at the school, or that a particular teacher failed to teach properly. Proof of under-performance by a child is not by itself evidence of negligent teaching. There are many, many reasons for under-performance. A child's ability to learn from what he is taught is much affected by a host of factors which are personal to him and over which a school has no

> control. Emotional stress and the home environment are two examples. Even within a school, there are many reasons other than professional negligence. Some teachers are better at communicating and stimulating interest than others, but that is a far cry from negligence. Classroom teaching involves a personal relationship between teacher and pupil. One child may respond positively to the personality of a particular teacher, another may not. A style of teaching which suits one child, or most children in a class, may not be as effective with another child, and so on. The list of factors could continue. Suffice to say, the existence of a duty of care owed by teachers to their pupils should not be regarded as furnishing a basis on which generalised 'educational malpractice' claims can be mounted.

Lord Slynn of Hadley had earlier stated:

> "The recognition of the duty of care does not of itself impose unreasonably high standards. The courts have long recognised that there is no negligence if a doctor "exercises the ordinary skill of an ordinary competent man exercising that particular art."
>
> > "A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. … Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view." (*Bolam v. Friern Hospital Management Committee* [1957] 2 All England Reports 118 at page 122 *per* McNair, J.).
>
> The difficulties of the tasks involved and of the circumstances under which people have to work in this area must also be borne fully in mind. The professionalism, dedication and standards of those engaged in the provision of educational services are such that cases of liability for negligence will be exceptional. But though claims should not be encouraged once the Courts should not find negligence too readily, the fact that some claims may be without foundation or exaggerated does not mean that valid claims should necessarily be excluded."

60. Lord Clyde also referred to the *Bolam* test which he described as a 'deliberately and properly high standard.'

61. In my judgment, the approach to a claim brought in contract in reliance upon section 13 of the 1982 Act is for practical purposes the same as for one brought in negligence. I do not accept Mr Hyams' submission that the contract between the claimant and OXILP should have implied into it the two additional specific terms identified in

paragraph [9] above. Rather the giving of guidance relating to examination technique and feedback after an unsuccessful attempt at an examination may fall to be considered as an aspect of breach of the implied statutory term. A claimant must generally establish a breach of duty/contract which satisfies the *Bolam* test. The law recognises that there are cases involving the alleged carelessness of individuals operating in a professional environment where the *Bolam* test does not apply. In *Connor v Surrey County Council* [2010] 3 WLR 1302 at paragraph [66] Laws LJ said:

> The *Bolam* test applies the common law duty of care in cases where the defendant, when he commits the putative wrong, is acting in a field requiring some special knowledge or expertise. The paradigm is the professional such as the doctor: *Bolam* was a medical case. In such instances a particular rule is required because what is or is not careless – negligent – cannot be ascertained simply from the general understandings of ordinary experience and common sense. Gross cases aside the layman cannot know, nor can the judge, whether a particular practice in the operating theatre ought to be condemned as negligent. The bare fact that it causes damage gives no answer, for (manifestly) negligence is not a tort of strict liability. In expert cases the court needs expert evidence – expert evidence of the range of acceptable practice.

62. Connor was a case involving psychiatric injury to a teacher caused by the negligence of the local authority in dealing inadequately with conflict between and complaints generated by the Governors. The Court of Appeal concluded that the *Bolam* test had no resonance in those circumstances, because the business of responding to complaints required no specialist skill or learning. Mr Hyams submits that the complaints made by the claimant about the teaching at OXILP similarly do not call to be judged by reference to the *Bolam* test. That is not a submission I can accept. The central complaint made by the claimant is that she should not have been left to mark her own mock examination in Property Law and Practice. Furthermore that a member of staff should have gone through it with her. Similarly, she argues that she should not have been left to her own devices to arrange feedback on that mock examination but that she should have been called in for feedback, all the more so because she had (as she would contend) exhibited some incipient difficulty when doing the Business Accounts paper in the Autumn term. She also suggests that the small group sessions, coupled with alleged inertia on the part of those teaching her, resulted in their failing to spot her weaknesses and take steps to ameliorate them.

63. All of these are matters which, in my judgment, require to be assessed by reference to the *Bolam* test. This is, in short, a claim for a failure to provide 'appropriate tuition' (see the summary set out in paragraph [12] above). This is far from being a 'gross case' and in my judgment expert evidence is required to make good the claim, quite apart from the need for the claimant to make good the factual basis of her claim.

DISCUSSION OF THE CLAIMANT'S ARGUMENTS IN THE LIGHT OF THE EVIDENCE AND LEGAL PRINCIPLES

64. It is common ground that students at OXILP marked their own mock examinations in Property Law and Practice (and Private Client). Miss Brannan's evidence explained why that approach was adopted. The claimant suggests such a course was negligent on three bases. First, she had not come across the practice before and it is her opinion that it was mistaken. Secondly, the telephone survey conducted by a friend suggested other LPC providers did not follow the practice. Thirdly, the outside review of the OXILP LPC course was critical of aspects of the assessment process. Mr Hyams submits that this last aspect has particular importance because of the expertise of the review's authors in the discipline of post-graduate law teaching.

65. The claimant's opinion of the matter cannot carry her case anywhere. The telephone survey conducted on her behalf does no more than provide unexplained and unexplored evidence that other institutions did not adopt the same practice. That said, I attach very little weight to that paragraph in the claimant's statement (set out in paragraph [25] above). The identity of the person conducting the survey is not provided. There is no detail of the institutions to which he spoke. There is no identification of the persons to whom he spoke, their positions or their ability to speak on behalf of their employers. There are no notes which evidence the questions and answers. Whilst Mr Oldham took no point that the proper procedures for introducing hearsay evidence had not been followed, this evidence provides a vivid illustration of why hearsay evidence must be approached with caution. Its lack of specificity makes it virtually worthless in establishing the proposition that OXILP was out on a limb in requiring students to mark their own mock examinations in some subjects. Yet the difficulty with this evidence even if it established that proposition (which it does not) is that it would not begin to show that such an approach was unreasonable in the *Bolam* sense.

66. In relying on the suggestion for improvement identified in the external report, the claimant reads far too much in the passages summarised and quoted in paragraphs [33] and [34] above. Nowhere is there any suggestion that the self-marking of mock examination is 'wrong' or in any way unreasonable. The thrust of the criticism was that there were inconsistencies in the approach to assessments which should be looked at. It is a mistake to suppose of any system that because it is changed or improved that it was unreasonable not to have done so earlier. Those running educational establishments will be bound to keep everything they do under review through constant internal evaluation and with the help of outside inspections and advice. Indeed, it is the hallmark of a well-run establishment. The observation on which the claimant relies does not show that the practice of self-marking was unreasonable. To make that argument good would require expert evidence directed towards the *Bolam* test. In making that observation I am not to be taken as suggesting any doubts about the reasons advanced in support of the practice by Miss Brannan. They are cogent and make sense. There was, furthermore, no challenge to her evidence that the practice is supported by academic research.

67. The central contention of the claimant that there was negligence in the marking the mock examinations fails.

68. Furthermore, I am unable to accept that the teaching in examination techniques was inadequate, still less negligent. I have accepted the evidence of Miss Brannan that the nature of the small group sessions was such as to instruct students in the essential differences between answering questions in the LPC examinations and an undergraduate degree course. There is no basis for suggesting that following the claimant's Business Accounts paper in October 2004 it was negligent not to have been alerted to deal with perceived problems. Similarly I do not accept the criticisms advanced by the claimant on the basis that she was not called in for a meeting with Ms Harrison, required to hand in her mock paper or required to attend a feedback session in January 2005. The students at OXILP were all adult graduates who were reasonably allowed to take responsibility for their own studies in the face of clear guidance set out on the course documents and reiterated by the Director at the beginning of the year. Neither was there any deficiency in the availability or quality of assistance following the claimant's first or second failing of the Property Law and Practice paper. She was advised to seek feedback in May 2005 and in due course Ms Harrison dealt appropriately with that feedback. It was clear from the evidence generally that the staff at OXILP were prepared to put themselves out to assist the claimant in circumstances where she had disadvantaged herself by cutting things fine. Thereafter, there was no shortcoming in the help that the claimant received from Ms Harrison following the second failure to pass the paper during three sessions designed to help the claimant appreciate her weaknesses and encourage her to put them right.

69. The success of the overwhelming majority of students at OXILP is itself testimony of the quality of the teaching, reflected also in the overall assessments of outside observers.

70. For all these reasons the claim fails. Counsel invited me to refrain from quantifying the claim, whatever my conclusion on liability, but I was invited to express a view about causation. The question formulated in argument was whether, had the claimant been taught as she suggests that she should have been, there was a realistic chance that she would have passed the course, or would it be no more than speculative that she might. In my judgment the answer is that there was no realistic chance of the claimant passing the course. For whatever reason, the claimant did not display the aptitude necessary to succeed on the LPC. The feedback given by Ms Harrison prior to her taking the examination in Property Law and Practice the second time was not sufficient to enable her to pass. Neither were the three sessions which followed the claimant's second failure before taking the examination for the third time. She had by then had the point made on numerous occasions and in the context of more than one paper that practical detail was required to achieve good marks. The claimant accepts as much, albeit maintaining her stance that the teachers were wrong to mark her papers down. The breadth of her difficulties in passing various of the papers suggests a fundamental problem which the lack of success in the New York Bar examinations confirms. Despite her academic ability, which is beyond doubt, the claimant's difficulties in achieving success in the LPC were profound, indeed fatal to that success.