Neutral Citation Number: [2025] EWHC 2794 (Ch)

Case No: BL-2022-002117

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION (ChD)

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 28 October 2025

Before :

MR JUSTICE RAJAH

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Between :

(1) MR PETER MARPLES	**Claimants**
(2) MRS SARAH MARPLES	
(3) MR LEE MARPLES	
(4) MR THOMAS MARPLES	
- and –	
SECRETARY OF STATE FOR EDUCATION	**Defendant**

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Adam Solomon K.C. and **Alexander Halban** (instructed by **DWF Law LLP**) for the **Claimants**
James Segan K.C., Tom Cleaver and **Zara McGlone** (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 17 to 27 June 2025, 9 to 10 July 2025

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APPROVED JUDGMENT

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Mr Justice Rajah :

A. Introduction

1. The Claimants are Peter Marples, his wife Sarah, his son Thomas, and his nephew Lee. In 2016 they were the holders of shares or share options in Aspire Achieve Advance Group Limited ("**the Parent Company**") which is the parent company of Aspire Achieve Advance Ltd ("**3AAA/the Company**"), an apprenticeship and vocational training provider. Together they bring a claim against the Defendant, the Secretary of State for Education, for negligence and misfeasance in public office, in relation to the actions of public officers at the Skills Funding Agency ("**SFA**"), for which the Defendant is responsible.

2. The Company had a contract with the SFA for the provision of apprenticeship training services. Clause 5.10 of that contract provided that the Company "*must notify the SFA if there is a change in its name and/or ownership. The SFA reserves the right to terminate the Contract if it considers in its absolute discretion that the change in ownership would prejudice the Contractor's ability to deliver the Services*".

3. In 2016 the Claimants (and the other shareholders of the Parent Company) had negotiated and were about to sign a share purchase agreement ("**the SPA**") in relation to the Parent Company with a private equity firm called Trilantic Capital Partners LLP ("**Trilantic**"). The Company notified the SFA of the proposed change in ultimate ownership of the Company and sought the SFA's prior approval. By a letter dated 23 December 2016 the SFA informed the Company that it did not approve the change of ownership ("**the Decision Letter**"). That decision was taken by Peter Lauener, who was then the Chief Executive of the SFA (by the time of the trial Peter Lauener had been made Sir Peter Lauener, and I shall refer to him in the rest of this judgment as Sir Peter). Shortly after the Decision Letter, Trilantic withdrew from the sale.

4. In October 2018 the Company was wound up, having lost its contract with the SFA amidst allegations of deliberate data manipulation by the Company. It is common ground that the Claimants' shares and share options were thereafter valueless.

5. The Claimants seek compensation in respect of the acts of the SFA which they allege prevented them from selling their shares to Trilantic for around £27 million in cash, plus a lost chance of converting around £10 million in rollover loan notes.

6. The claim is put in several ways. Firstly, the Claimants say that the SFA owed them a duty of care in taking its decisions which it breached by not approving the change of ownership. But for the Decision Letter, the Claimants say that the Trilantic SPA would have been signed on 23 December 2016, and further that the refusal of the change of control had the effect of making their shares unsaleable thereafter. Secondly, the Claimants say that Sir Peter Lauener made the decision in the Decision Letter with the malicious intention of causing the Claimants harm and so the Defendant is liable to pay damages for the tort of misfeasance in public office under the limb of that tort that is referred to as "targeted malice". Thirdly, the Claimants say that the tort of misfeasance in public office is also made out under the other limb of the tort - " non-targeted malice " - because Sir Peter and two of his staff at the SFA, Keith Smith and Sharon Forton, were subjectively reckless as to the risk that they were wrong as to their powers and went ahead regardless, knowing that there was a serious risk of the Claimants suffering loss.

7. The Defendant denies that the SFA owed the Claimants any duty of care in relation to the Decision Letter, or that any such duty was breached by sending the Decision Letter which she says was entirely appropriate. She also denies that the Decision Letter was the cause of any loss to the Claimants as they retained their shares in the Parent Company and she denies they were rendered unsaleable by the Decision Letter. In the alternative she disputes the valuation placed by the Claimants on their shares

before and after the aborted Trilantic deal and asserts that had it proceeded Trilantic would have had a substantial claim against the Claimants for breach of warranties in the SPA arising from the alleged data manipulation. The Defendant denies Sir Peter acted with malicious intent in reaching the decision in the Decision Letter and denies there is any basis for a claim for non-targeted malice which she also says is not adequately pleaded.

B. The witnesses

8. Both sides called a number of witnesses to give evidence of events in 2016 or earlier and were cross examined mainly by Mr Solomon KC and Mr Segan KC. I was pleased, however, to see each of the junior barristers cross examining particular witnesses, in accordance with the guidance from the senior judiciary in November 2023 for greater participation by junior barristers in suitable hearings.

9. As observed in the Civil Procedure Rules, human memory is not a "snapshot" which fades with time but is fluid and malleable and vulnerable to being altered by a range of influences; see CPR PD57AC. The process of civil litigation itself subjects the memories of witnesses, particularly witnesses who are parties, to powerful biases and influence, which may not be conscious; see *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 per Leggatt J (as he then was) at [19]. It is perfectly possible for an honest witness to have a firm memory of events which the witness believes to be true, but which in fact is not correct. The approach I take is to weigh each witness's evidence in the context of the reliably established facts (including those which can be safely distilled from contemporaneous documentation bearing in mind that the documentation itself may be unreliable or incomplete), the motives and biases in play, the possible unreliability or corruption of human memory and the inherent probabilities.

10. In section C below I set out the facts of this case as I find them from the evidence I have seen and heard, except on the issue of malice which I consider in section E. In this section I make some general observations about each of the witnesses of fact and their evidence.

11. The Claimants called Andrew Palmer, who was the managing director of the Company between September 2013 and October 2015. He is a good example of an honest witness whose recollection was shown from time to time, by reference to contemporaneous documentation, to not be accurate. His recollection of the change of control process being quick, simple and routine for the Inflexion acquisition (referred to further below) and another provider called Learndirect was not borne out by the contemporaneous documents. I considered his evidence to be reliable as to the bigger picture, including his evidence that the SFA regarded colleges more favourably than private training providers ("**PTPs**").

12. Mr Robert Kilpatrick was also called. He was a straightforward, honest witness, although I did not find his evidence (of the change of control process of a different company under a different contract with the SFA in 2018) of much assistance.

13. A more significant witness was Tony Allen who was head of the Large Contract Unit at the SFA dealing with the largest providers. I considered him to be an honest witness, although his recollection of events was often not in line with the contemporaneous documents, and I am conscious that he may be partisan. He appears to have been a supporter of Peter Marples and the Company in his time at the SFA, providing letters of intended support for growing the SFA funding by £10 million at the time of the Inflexion deal, and attending the Company's board meetings to indicate further support for increased funding of £45 million. After he left the SFA he worked for the Company as a consultant, and he remains friends with Peter Marples. I accept the tenor of his evidence that Sir Peter and others at the SFA looked less favourably on PTPs than colleges. His evidence of

being told by Sir Peter that he would not tolerate SFA staff sitting down to have tea and cake with PTPs was not likely to be either misremembered or concocted and I accept it.

14. Another important witness for the Claimants was Karim Khan of Private Acquisitions Ltd, who was the financier who brokered the Trilantic deal and whose view was that the Decision Letter rendered the Company unsaleable. He was a patently honest witness, doing his best to recollect, and with no agenda except perhaps a sense of grievance that the Trilantic deal had not gone through. However, on important issues, like the question of saleability of the Company his evidence was really his opinion or speculation, and I have had to consider carefully what the reality actually was.

15. Patrick Tucker, a consultant in the Further Education and Higher Education sector, was called by the Claimants to give evidence. He had been instructed by Peter Marples after the liquidation of the Company to prepare a report by way of an independent review of the SFA allegations of deliberate data manipulation. The report was sent to the Official Receiver and concluded, amongst other things that there appeared to have been a deliberate manipulation of data to improve QAR but there was no funding overclaim, and no sums due to the SFA as a consequence of such data manipulation. It is not clear what material he looked at to prepare his report, but he did not look at the underlying records. I considered him an honest witness, but he was partisan, defending Peter Marples at every turn during cross-examination by Mr Cleaver.

16. Peter Marples gave evidence. He was well prepared, had reviewed the documents in the case and had anticipated the areas on which he was likely to be questioned. Much of his evidence was reconstruction after reviewing the documents and mulling over this case over the last decade. It did not seem to me that Peter Marples would have volunteered or conceded any point which he thought undermined his case. For example, his evidence that Star Capital had only proposed a loan was self-serving and untrue – it was contradicted by the company's board minutes. Together with the evasion

and dishonesty in relation to his input into the expert report and joint experts' report (see below), I consider that I must treat his evidence with considerable caution.

17. Lee Marples gave evidence which dovetailed closely with Peter Marples's evidence. Like Peter Marples he had come carefully prepared and having anticipated many of the questions he would be asked. Like Peter Marples he was not willing to concede any point which undermined his case. There were times when it seemed he would argue that black was white if he thought it would assist his case, for example when he denied that the Inflexion and Trilantic acquisition documents showed the Company was making significant profit above the cost of delivery of training. His evidence in relation to data manipulation was often not credible. His explanation that systematic data manipulation at the Company was not possible without a host of people across the Company being involved fell apart on probing. All that was required was one individual with access to the return to make a manual change before the return was submitted. His attempt to attack the basis of the SFA conclusion (that it was statistically not feasible that the 97.5% of adjustments made to a sample of 3000 learners to the Company's advantage could all have had the same striking features), was based on a misreading of paragraph 11 of the relevant report. That both he and Peter Marples made exactly the same point suggests it was a response discussed and pre-agreed between them and reinforces my concerns about their evidence. I treat his evidence with caution.

18. Sir Peter was obviously the most important witness for the Defendant. He was well prepared and had reviewed the documents carefully. It gradually became apparent, however, that Sir Peter's evidence was not consistent with the contemporaneous documentation which he then resorted to reinterpreting. This happened repeatedly, and his answers sought to "spin" the documents to fit the case or the evidence that he was now seeking to advance. I give specific examples below as they arise in the findings on the facts. I treat his evidence too with caution.

19. Keith Smith was at the time the Funding and Programmes Director at the SFA. He was a poor witness whose principal concern was to distance himself from responsibility for the Decision Letter and the change of control process. His attempts to argue his lack of involvement were not credible given his contemporaneous emails throughout the process, his involvement in the drafting of the Decision Letter, and the fact that he was giving explicit directions to his subordinate who reported to him (Ms Forton) as to what to do. When faced with his clear emails at the time, he too resorted to implausible reinterpretion, finding ambiguity where none existed. However, on matters not concerned with the Decision Letter and change of control, I considered him more reliable. He denied making the statements about Peter Marples and the Company which Tony Allen attributed to him, and I preferred his evidence to Tony Allen on that issue.

20. Kirsty Evans, a senior official at the SFA in 2016, was an honest, careful witness. She had limited recollection of events beyond what was recorded in the contemporaneous documents but I was left satisfied that she would have been careful to be accurate in what she said in emails and conversations at the time about the proposed changes to the apprenticeship system.

21. David Smales and Keith Hunter were honest, straightforward witnesses who gave their evidence about the investigation of the allegations of data manipulation with care and to assist the court. The Claimants asserted that they were partisan and zealous in their investigation of the Company, but in reality they were simply doing their job.

C. Expert evidence of Vivian Cohen

C.1 The application to revoke permission to rely on Mr Cohen's evidence

22. This section addresses the Defendant's application to revoke the Claimants' permission to rely upon the expert evidence of Mr Vivian Cohen and the Defendant's alternative submission that no weight should be given to that forensic accountancy evidence. This application is made because it has

become clear that Peter Marples, himself a trained accountant, has had a significant secret involvement in the preparation of Mr Cohen's report and the experts' joint report.

23. On 25 September 2023 Master Clark gave the parties permission to rely upon the evidence of experts in the field of forensic accountancy as to the value of the Claimants' shareholding in the Company. The Claimants instructed Vivian Cohen, a consultant at Frenkels Forensics. The Defendant instructed Jeffrey Davidson of Honeycomb Forensic Accounting. Each expert provided a written report and written answers to questions put them by the parties. They also produced, as directed by Master Clark pursuant to CPR 35.12, a joint statement on the areas of agreement and disagreement between them.

24. The Defendant issued an application on 13 May 2025 to revoke the Claimants' permission to rely upon the expert evidence of Mr Cohen, having first written to DWF about the issue on 9 May 2025. The Claimants objected to the application being heard in advance of the trial. The parties agreed that Mr Cohen should give evidence and be cross examined, including as to matters relevant to this application, that the application should be heard as part of closing submissions and that the admissibility and weight to be given to Mr Cohen's evidence should be determined as part of this judgment.

25. The Defendant submits that this is a very clear case of a sufficiently serious breach of the rules attaching to the preparation of expert evidence that the proper response is to revoke the permission; alternatively, to attach no weight at all to Mr Cohen's evidence (which at this stage will in practice have the same effect).

C.2 The relevant principles

26. The principles to be applied are clear. The provision of expert evidence requires the permission of the Court (see CPR 35.4(1)) and such permission

presupposes compliance in all material respects with the rules. The expert's duty is to the Court, and this duty overrides any duty owed to the person instructing them or paying them; CPR 35.3. Expert evidence should be the independent product of the expert uninfluenced by the interests of the party instructing the expert in the litigation. The expert's role is to provide independent assistance to the Court by way of objective unbiased opinion on matters within their expertise.

27. Where a joint statement is prepared pursuant to CPR 35.12 it is prepared for the benefit of the Court, not as a means of advancing the case of one or other party, and is a statement of the independent, objective and unbiased views which the experts honestly hold. Neither the parties nor their instructing solicitors should be involved in discussions between the experts in relation to the preparation of the joint statement (CPR PD35 paragraph 9(4)) or in the negotiation and drafting of a joint statement; see *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC) at paragraph 77. The circumstances in which it is appropriate for parties or solicitors to intervene in relation to a joint statement are generally limited to circumstances where there is a serious risk that the Court may misunderstand or be misled by the terms of a joint statement; see *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC) at [18]. Any such intervention should be done openly, so that everyone, including the trial judge, can see what has happened; *BDW* at [18].

28. Experts are expected to be familiar with their duties. A failure to comply with the rules may result in sanctions. One such sanction is the revocation of the permission granted to rely on expert evidence; *Secretariat Consulting Pte Ltd v A Company* [2021] EWCA Civ 6; [2021] 4 WLR 20 at paragraph 106. That is what occurred in *Dana UK* and in *Andrews v Kronospan Ltd* [2022] EWHC 479 (QB).

C.3 The facts of this case

29. The truth in the present case has emerged in stages.

30. The Government Legal Department ("**GLD**") raised the issue of Mr Marples' involvement in the draft Joint Statement with DWF, the Claimants' solicitors, after the Defendant's expert (Mr Davidson) brought to GLD's attention that there was evidence that Mr Marples had been involved in the writing of Mr Cohen's contributions to the joint statement. DWF wrote an initial letter of response on 15 May 2025, which was followed by two factual witness statements from Mr Cohen and Peter Marples on 4 June 2025 but without any disclosure of the communications between Mr Cohen and Mr Marples. Then (after further correspondence from GLD) the Claimants disclosed certain communications between 17 April and 22 April 2025 on 13 June 2025. The details, which continued to emerge in oral evidence at trial, now appear to be as follows.

31. Mr Cohen knew Mr Marples through having done previous matrimonial valuation work as a Single Joint Expert instructed by Fair Result, a boutique divorce services business of which Peter and Sarah Marples are directors, and Mr Marples approached him to act as an expert in this case. Mr Cohen had Mr Marples' contact details, and it seems likely vice versa, allowing direct contact rather than through instructing solicitors. Despite Mr Cohen having been criticised by the High Court in 2014 for having failed to disclose a potential conflict of interest (*Rowley v Dunlop* [2014] EWHC 1995 (Ch) at paragraph 29), this prior, and potentially future, business connection was not disclosed until 13 June 2025. Even then it was denied that Mr Marples had been involved in Mr Cohen's instruction on behalf of Fair Result (although this was contradicted by both Mr Cohen and Peter Marples in their oral evidence when they said that this earlier instruction was how Mr Cohen came to have Peter Marples' mobile phone number). No mention of it was made in the 4 June 2025 witness statements of Mr Cohen or Mr Marples, despite its obvious relevance to the issues arising from Mr Marples' involvement in the Joint Statement.

32. On Thursday 17 April 2025 at 12:49pm, Mr Davidson sent a first draft of the Joint Statement to Mr Cohen. Mr Cohen confirmed that he was well aware that the Joint Statement is required to be uninfluenced by the wishes or interests of the instructing parties. Despite this, Mr Cohen chose to send the draft to Mr Marples at 3:09pm, without copying DWF. He then had a telephone discussion with Mr Marples about the substance of the draft. During that call, Mr Cohen says he explained that he would be off work for the whole bank holiday weekend, including Friday 18 April and Monday 21 April, and would be returning to work on Tuesday 22 April. Mr Marples offered to make track changes amendments, to which Mr Cohen agreed. At 3:23pm, Mr Cohen sent the draft again to Mr Marples referring to "*our telephone conversation just now*", and saying

> "*I am of the opinion that the basic structure of the draft is OK (although you might have some thoughts on this)*
> *The basic idea is to narrow the differences between the experts for the benefit of the Court and set out points of agreement wherever relevant as well as highlighting points of disagreement with brief reasoning. However a rehash of what is already in the report is generally not encouraged although a reference to a particular paragraph number is fine.*
> *Any changes we make should be tracked and will then become draft 2.*
> *It is important not to involve solicitors in this part of the process and experts get heavily criticised if it is found out that an expert was influenced by his instructing solicitor as to what he should say".*

33. This email is consistent with Mr Cohen regarding the drafting of the joint statement as a joint effort with Peter Marples. The last sentence appears to be a disguised instruction to Mr Marples to keep their discussions secret from DWF. DWF were not informed of these communications between Mr Cohen and Peter Marples. To cover up Peter Marples' involvement with the Joint Statement, Mr Cohen claimed in comments to Mr Davidson in later versions of the draft joint statement to having been given certain information by DWF. That was not true, as eventually conceded on 13 June 2025.

34. On Saturday 19 April 2025, Mr Marples sent two tracked changes drafts of the Joint Statement to Mr Cohen, under cover of emails timed at 11:32am and 4:26pm. In the latter email, Mr Marples noted that he had "*done some extensive work on it*". As Mr Marples accepted in oral evidence, the amendments he made ranged across all of the issues in the case. The extensive work included (i) instructions and suggestions as to things which were "*not agreed*", (ii) deletion of entire passages of text, and (iii) the insertion of entire new passages of text expressly presented as Mr Cohen's opinion (e.g *"It is VC's Opinion that…*"). Many of the additional passages inserted as "*VC's opinion*" involved strident advocacy on the underlying facts of the case. Mr Marples did not deny, when questioned, that the amendments were entirely one-sided.

35. During the mid-afternoon of Monday 21 April 2025, Mr Cohen and Mr Marples had an email exchange setting up a call for 11am the next day, when Mr Cohen was returning to work. Mr Cohen observed he would have to delete Peter Marples' comments on the side once they had discussed them, and before sending the draft to Mr Davidson.

36. At 11am the next morning, Mr Cohen and Mr Marples had a telephone discussion. After that call, Mr Marples then did further work on the draft Joint Statement, sending another draft to Mr Cohen at 12:53pm. Mr Marples knew that Mr Cohen would need to track the changes in his draft back to Mr Davidson. But he included the following instruction to Mr Cohen:

> "*On track changes, you will need to ensure my contribution is deleted (I think it is) but if you can ensure it is".*

37. Mr Marples accepted that he wanted to delete the fact that he had contributed to the changes, but could not explain why, other than that he thought it was "*appropriate*" for "*no particular reason, really*". Mr Cohen, by contrast,

accepted what is perfectly obvious, that the reason to delete records of Peter Marples contribution was to keep his involvement secret, because both knew that the joint statement is intended to be uninfluenced by the parties.

38. The draft Mr Cohen sent out contained around 150 amendments, all of which had been made by Mr Marples. Comparison with the last draft sent by Mr Marples shows that no amendments at all were made by Mr Cohen.

39. Mr Cohen and Mr Marples had further telephone discussions as the draft Joint Statement evolved, including Mr Marples going through the Company's bank statements at Mr Cohen's request. No disclosure has been given in relation to these discussions. There is no suggestion that DWF were involved in or aware of these discussions.

40. The final version of the Joint Statement signed by the two experts includes numerous passages which have been retained verbatim or almost verbatim from the parts originally written by Mr Marples. Mr Cohen said that the final Joint Statement was the 17th draft and by then he had considered it "*very, very carefully and [it] represents my opinion on the joint statement*". However, this did not stand up to much scrutiny.

41. In relation to Star Capital, for instance, the joint statement at 3.10 records Mr Cohen's understanding that Star Capital were interested only in making a loan and not in an equity transaction. Mr Cohen could not identify any disclosed documents, which supported his understanding and conceded that he had relied on Mr Marples for that part of the joint report. The assertion that the Star Capital transaction did not proceed because of issues related to the Decision Letter was also derived from Mr Marples, although the source was said at the time to be DWF.

42. In relation to the views expressed by Mr Cohen as to the saleability of the Company after the Decision Letter, Mr Cohen accepted that aside from the views of Mr Khan, all of the reasons he gave in the Joint Statement for concluding that the company became unsaleable had been written for him

by Mr Marples. When tested on the underlying facts, Mr Cohen rapidly retreated to a view that "*it's not for me to speculate*".

43. On 13 June 2025, DWF said that Peter Marples and Mr Cohen had both confirmed that Mr Cohen "*did not seek or obtain any similar input from Mr Marples or anyone else on his original report*". The Claimants' position in their Opening Skeleton was similarly that "*this issue is confined to the joint statement, nor Mr Cohen's report*". The oral evidence at trial showed this to be wrong. Both Mr Marples and Mr Cohen in fact admitted to having at least "*two or three*" or "*some*" discussions while the latter was doing his work leading up to his main report dated 13 March 2025, including on topics such as, which transactions might be regarded as comparable. As this emerged only at trial, there is no detail or disclosure in relation to such discussions.

C.4 Decision

44. I do not accept that I have been given the full story of the involvement of Peter Marples in the preparation of Mr Cohen's expert report and the joint statement. It seems to me likely that both have approached the work on expert evidence as a joint exercise, with Mr Cohen happy to defer to Mr Marples as the client. It seems likely that there has been regular and free flowing contact and communication between Peter Marples and Mr Cohen. Both have known that what they were doing was contrary to the rules relating to the preparation of expert evidence, but have colluded together to do so anyway. They have simply bungled their attempts to keep Peter Marples' involvement secret. Having been found out, they have dissembled to their lawyers, leading to the 13 June 2025 letter containing false statements, failed to make a clean breast of the extent of Peter Marples'involvement, for example in relation to the original report, in their factual witness statements, have made restricted disclosure of documents which would shed light on their involvement and have been evasive in their oral evidence to the court, so that each revelation has been drip fed to the

Defendant and the Court. Neither has apologised, although Mr Solomon attempted an apology on behalf of the Claimants in his closing submissions.

45. The following conclusions flow from this:

a. This is a deliberate, cynical, planned breach of the rules relating to the preparation of expert evidence. It is a very serious breach.

b. The product of Mr Cohen in the shape of his report and the joint report are not independent. They do not represent his objective and unbiased opinion. They represent advocacy on behalf of the claimants, using words put in Mr Cohen's mouth by Peter Marples. They represent what Mr Marples wants Mr Cohen to say and are not Mr Cohen's opinion at all. This includes contributions on matters on which the expert avowedly knows nothing (such as Star Capital).

c. I have no confidence in Mr Cohen's ability to act in accordance with his obligations as an expert witness.

46. I accordingly refuse the claimants permission to rely upon the evidence and reports of Mr Cohen.

47. This is now at least the third time that Mr Cohen has been criticised for his role as an expert by the Court. In addition to *Rowley v Dunlop* mentioned above, I was referred to *Pepe's Piri Piri Ltd v Aljunaid* [2019] EWHC 2097 (Ch) at paragraphs 90-91, where Mr Cohen was criticised by Deputy High Court Judge Gullick for having *"approached the exercise more as an advocate than as an expert complying with the requirements of CPR Part 35"* and for having expressed an *"understanding of his role as being to present the case of the party instructing him in the most favourable light"*. Remarkably, when asked about this case, Mr Cohen said that he had forgotten about it.

D. The facts

48. I set out below the facts, including my findings where the facts are disputed.

D.1 The SFA

49. Section 81 of the Apprenticeships, Skills, Children and Learning Act 2009 ("**the 2009 Act**") created the statutory office of Chief Executive of Skills Funding, who was appointed by and answerable to the Secretary of State for Business, Innovation and Skills. The Chief Executive had statutory responsibility for regulating apprenticeship training in England and in doing so was supported by the SFA, an executive agency which was established in 2010.

50. Section 100 of the 2009 Act, empowered the Chief Executive amongst other things, to secure the provision of financial resources to persons providing education or training by way of apprenticeships. About £1 billion of public money per year was administered by the SFA for this purpose.

51. The statutory office of Chief Executive was abolished on 26 May 2015, with the SFA continuing as an agency of the Department for Business, Innovation and Skills until July 2016, when it became an agency of the Department for Education. The SFA was abolished on 31 March 2017, its functions being transferred to the Education and Skills Funding Agency ("**ESFA**"), an executive agency within the Department of Education. The ESFA itself was abolished in April 2025.

52. Sir Peter was the Chief Executive, and head of the SFA and then the ESFA, between October 2014 and November 2017, when he was replaced by Eileen Milner. The Defendant has accepted that she is liable for the acts and omissions of the SFA and ESFA.

D.2 Carter & Carter

53. Peter Marples was formerly a Senior Partner at KPMG and led its education practice from 1999 to 2002. In November 2002, he resigned from KPMG to join a small regional training provider called ASSA Training and Learning

Ltd ("**ASSA**"). Peter Marples led a management buyout of the company and subsequently sold it on to Carter & Carter Group plc. In March 2008, Carter & Carter entered into administration, to much publicity. The business was the largest provider of apprenticeships in the sector. Its closure caused serious disruption and required the SFA's predecessor (the Learning Skills Council) to intervene to allocate learners to other providers. The Carter & Carter Chairman, Mr Rodney Westhead, made comments to the press blaming the business's demise on the acquired ASSA business and irregularities which had been discovered with its data and records.

54. The failure of Carter & Carter, and Mr Marples' association with the firm, were well known in the sector and at the SFA. The SFA was anxious that lessons should be learnt from the experience and the serious disruption caused should not be permitted to happen again.

D.3 The Company and the Funding Agreement

55. In October 2007, Peter Marples jointly founded a new business with Diane McEvoy-Robinson and incorporated it as the Company in December 2009. By 2011, the Company had developed into a large private training provider. The SFA awarded the Company its first direct contract in October 2012 in the sum of £300,000. From 2013, the Company developed its contract substantially and applied for quarterly growth to its funding contract through the SFA's funding process. On 27 June 2014, the SFA awarded the Company a 3-year funding agreement (from 1 August 2014 to 31 July 2017) (**the "Funding Agreement"**). The Funding Agreement represented a substantial increase in the Company's funding. By the end of the academic year 2014-2015, the Company's contract spend had risen to £15 million.

56. Under the Funding Agreement, the Company was obliged to deliver the "Services" defined in clauses 1.11 and 4.1 as "*the delivery of the Learning Programmes as set out in Appendix 1, the Summary of Programme Funding, and at Appendix 2"*. Clause 5.1 to 5.8 placed limits on the Company's ability

to subcontract the provision of those Services, and clause 5.9 prohibited the Company from assigning any rights, duties or obligations under the Funding Agreement without the SFA's consent.

57. Clause 5.10 of the Funding Agreement provided:

> "*THE CONTRACTOR must notify THE SFA if there is a change in its name and/or ownership. THE SFA reserves the right to terminate the Contract if it considers in its absolute discretion that the change in ownership would prejudice THE CONTRACTOR'S ability to deliver the Services.*"

58. That was a standard provision in the SFA's contracts for the provision of apprenticeship services. Clause 5.10 was in addition to other rights of termination conferred by the Funding Agreement on the parties, including the right of both parties to terminate it on 3 months' notice without the need to give a reason. Any person purchasing a provider of such services took the risk that the contract (which might be that company's main or only source of revenue) might be terminated if the purchase took place. Accordingly, it was common for the SFA to be given notice in advance of a proposed change of ownership, together with a request for an assurance that the right of termination in clause 5.10 would not be exercised if that change of ownership occurred.

59. It is common ground on the pleadings that the giving of notice and the requesting of such an assurance was sometimes described at the time, as a request for "approval" of the change of control and that such requests for "approval for change of control" had become commonplace. There appears not to have been an officially approved or published policy by which the SFA handled such requests. The provider would send a letter to the SFA notifying it of the proposed change of control and providing relevant documents. An SFA panel would carry out due diligence to ensure the new owners were financially fit to hold a contract with the SFA.

60. In addition to provisions regarding change of control, clause 4.1 of the Funding Agreement further explained that the detailed requirements in respect of each Learning Programme which the Company was to deliver were set out in the Funding Rules for 2015 to 2016 as amended from time to time by the SFA and that those Funding Rules formed part of the terms and conditions of the Funding Agreement. Funding Rule 64 stated:

> "*We [the SFA] will review whether the education and training you provide represents good value for money. If we consider that the funding we have provided is significantly more than the cost of the education and training, we may, after consulting you, reduce the amount of funding we pay you.*"

61. Mr Marples accepted without hesitation in cross-examination that the effect of this provision was that the profit margins being achieved by PTPs were a legitimate consideration for the SFA; and that a person who questioned the level of profit being made by such a provider was having regard to a consideration which lies in the contract itself.

D.4 2015: The proposed Inflexion acquisiton, Information Memorandum and Baker Tilly report

62. In mid-2013, a new senior management team was appointed to the Company, with a view to a subsequent management buy-out which would enable Peter Marples to exit the business. Quayle Munro were appointed in February 2015 as corporate finance advisors to support a management buyout process and by April 2015 an Information Memorandum had been produced.

63. That Information Memorandum described the Company as requiring "*Minimal capital investment*" and being "*highly cash generative*". It also showed that the Company's gross profit margin in the 2015 financial year was on track to be 60%, and that its actual gross profit margin in the previous financial year had stood at 49%.

64. In July 2015 the Company signed a memorandum of understanding with Inflexion Private Equity Partners LLP. The Claimants say that the proposed sale would have led to the shareholders of the Parent Company receiving £50 million. Due diligence led to the Company commissioning an external review, which in turn led to a mock SFA funding audit carried out by Baker Tilly. The report of that exercise ("**the Baker Tilly report**") identified what Baker Tilly considered were inaccurate data in the Company's records and flagged a risk that the Company was submitting inaccurate data to the SFA. At some point, the Company shared the Baker Tilly report with their regular contacts at the SFA.

65. On 19 August 2015, two to three weeks prior to the Inflexion deal closure, the Company consulted the SFA about the proposed change of control. On 21 August 2015 Ms Kirsty Evans replied by email quoting clause 5.10 and identifying the standard factors the SFA would consider in deciding whether to exercise is clause 5.10 right to terminate the funding agreement:

> "*Before deciding whether to exercise the right to terminate the SFA will consider certain factors including:*
> *• Confirmation that the legal entity will not change*
> *• Financial Health of 3AAA – latest financial statements – Profit and Loss Account, Balance Sheet, commentary and breakdowns, in year position (management accounts) and forecast for next year trading)*
> *• Any arrangements relating to the financing of the business – we need to be clear on the basis for the Inflexion investment and how it will work - for example are they investing the "money" in 3AAA as equity or will it appear as capital with loan documents to the financing house etc?*
> *• Change in Directors-names and dates of birth of any new directors*
> *• Continuity of staffing arrangements, particular senior management and capacity to deliver*
> *• Review of any information held by the Agency or in the public domain regarding the new owners that affect our decision".*

66. The Company responded on 24 August with information on each of the standard factors.

67. The SFA had a standard letter (and it was referred to internally as such) to be used during the change of control process which informed the provider that the change of control was noted, and which repeated the SFA's reservation of rights to terminate the contract in clause 5.10. Ms Evans sent the standard letter to the Company on 27 August 2015:

> '*I can confirm that, at this point, the SFA does not intend to exercise its right under clause 5.10 to terminate its contract with Aspire Achieve Advance. However the SFA reserves the right to do so in the future should it become clear that the change in ownership has prejudiced Aspire Achieve Advance's ability to deliver the services under the contract'.*

68. Ms Forton's email of 21 August gave an indicative timeline for a response of "*up to 14 days*" from receipt of the information it required. In fact she responded within three days.

69. The Claimants emphasise the standard process, and the approval given for the Inflexion transaction, by way of contradistinction to the change of control process for the Trilantic acquisition. They also point out that the SFA never raised any objections to any change of control notification other than the Trilantic Acquisition. In each case, the SFA conducted the checks it wished and then sent the standard letter reserving its rights. This occurred for 11 other provider changes of control between 2014 and 2018 (10 between 2016 and 2018).

70. Sir Peter Lauener did not know about the SFA's decision on the Inflexion deal at the time. Mr Mapp recorded on 6 April 2016 that he had showed Sir Peter the SFA's decision letter on the Inflexion deal and Sir Peter was visibly shocked. In oral evidence, Sir Peter disputed that this was the correct interpretation of Mr Mapp's email and claimed to have a different

recollection of this conversation, as relating to rumours of some other sale more recent than Inflexion. There was no other sale and no suggestion in the papers of rumours of another sale other than Inflexion. This was an example of Sir Peter seeking to reinterpret documents to say something which they did not.

71. In the event, however, the Company did not proceed with the Inflexion deal.

D.5 Appointment of Sir Peter Lauener

72. In October 2014, Sir Peter, who was already Chief Executive of the Education Funding Agency, was appointed as Chief Executive of the SFA.

73. Shortly after the 2015 General Election, Mr Marples emailed Nick Boles (the Minister of State for Skills) asking for a meeting to discuss SFA funding policy. Mr Boles' office forwarded the email to Sir Peter, who commented on the Company as follows:

> "*It is an organisation that has done very well recently and expanded rapidly and does seem to have a strong employer driven focus and has scored well with Ofsted. I have said that I will visit one of their centres later this year.*
> *Subject to looking at their data more, this might be the kind of organisation we would seek to expand in future because they do pull new employers in. One of the things I want the App Delivery Board to do is to take a targeted look at how we manage growth to focus on the game changers."*

74. On 24 July 2015, Sir Peter visited the Company at the invitation of Mr Marples and Ms McEvoy-Robinson and recorded in an email at the time that he was "*very impressed*".

D.6 Nick Linford and FE Week

75. Nick Linford was the founder and editor of a trade publication called "FE Week" and was well known in the apprenticeship provision sector. Mr Linford was not called as a witness and did not give evidence.

76. In October 2015, Mr Linford sent an email to Sir Peter, who he appeared to already know, informing him that he had heard that 3AAA's Investment Memorandum claimed that the Company would hit profit margins of 70% in the near future "*using high value apprenticeships and delivering nearly all the training in just the first few weeks*". He described Peter Marples as "*of Carter and Carter fame*" and said he had been trying to sell the company for six months. Sir Peter responded to Mr Linford reminding him of Funding Rule 64 and assuring him that his information would be acted on.

77. The SFA and the Company had only recently in April 2015 negotiated an arrangement under which there was to be a 5% reduction in the funding paid to the Company in respect of one cohort of apprenticeships to give better value for money. Mr Linford's email prompted the SFA to look again at the Company's funding rates and whether they offered the value for money required by Funding Rule 64. That process culminated in a further agreed reduction in December 2015 of 10%-15% in respect of several cohorts.

78. In January 2016 Mr Linford emailed Sir Peter again asking for a meeting with the SFA as he had documents which he did not wish to send by email. That meeting was organised by Keith Smith and he and Helen Knee met with Mr Linford. Mr Linford handed over a copy of the Baker Tilly report and followed up with an email to Mr Smith, identifying from it three topics for investigation. Mr Smith downplayed his role, perhaps to avoid questioning about receiving information which was probably obtained in breach of confidence, but this was an example of Mr Smith seeking to reinterpret the contemporaneous documents which suggest he took the lead in arranging and running this meeting, and obtaining the Baker Tilly report and the topics for investigation. The SFA failed to realise that it already had

the Baker Tilly Report (from 3AAA itself) and treated the report as highly confidential information provided to it by a whistleblower.

79. The SFA commissioned KPMG to carry out an investigation on the three issues identified by Mr Linford, and KPMG attended the Company's premises on 3 February 2016 without notice to take documents and begin its investigations. During the investigation, the SFA suspended payments to 3AAA and prevented it from recruiting new learners. This had a serious impact on 3AAA's cashflow and brought the Company to the brink of entering administration. Around £2.6 million had been extracted from the Company in previous months by way of director's loans and the Company had limited cash reserves. The Company's pleas for assistance were not heeded. Sir Peter readily accepted in cross-examination that he did not believe that the Company could have got into serious difficulty so quickly and he thought they were bluffing. On either 23 or 24 March 2016, the Company's Board voted unanimously to place the Company into administration. At this point, Sir Peter intervened and arranged for expedited payment of approximately £3.87 million, which enabled the Company to continue operating. That intervention by Sir Peter was voluntary and without obligation. The SFA was entitled to suspend payments during an investigation.

80. The KPMG Investigation report was released on 19 May 2016. It identified a significant number of errors, but it did not find any evidence of deliberate circumvention of funding rules. The SFA confirmed by an email dated 28 July 2016 that in its view the allegations made against 3AAA were unfounded.

81. The SFA confirmed this in its letter dated 24 August 2016, stating that there was no evidence found of deliberate circumvention of funding rules by 3AAA. However, the Investigation concluded that 3AAA should repay the

SFA around £300,000 and both parties agreed in correspondence that the deduction would be made without admission of error.

D.7 2016: The Apprenticeship Levy and proposed Non-Levy Cap

82. In July 2015, the government proposed to replace the existing system of funding apprenticeship training with an "Apprenticeship Levy" ("**the Levy**"), with effect from 1 April 2017. This meant that funding for employed apprentices would no longer be funded from general taxation, but rather by way of a levy of 0.5% of the pay bill of all employers with an annual pay bill of £3 million or more. The funding available for apprenticeships for non-levy-paying employers would be limited to whatever the levy-paying employers did not spend. Accordingly, it was anticipated that the amount of funding available to non-levy-paying employers would be constrained after 1 April 2017.

83. It was estimated by the relevant Minister, on the advice of the SFA, that £440m could safely be committed in the first instance for "non-levy new starts" for 2017/18 on the basis that at least that amount could safely be assumed would be unspent by levy-paying employers and available for carry over. The SFA later explained to the sector that the £440 million was also calculated as the amount required to maintain existing volumes for non-levy new starts. It was, however, impossible to predict in 2016 how levy-paying employers would react to the new system, and there was considerable uncertainty as to how much would be available for non-levy paying employers. Sir Peter's strategic concern was that the SFA should maintain stability in the transition to a very different new system. The levy represented a business opportunity because more funds were likely to be available for apprenticeships than there had been before, but it also represented a significant change in that the market for non-levy apprenticeships for SMEs was likely to contract.

84. From May 2016 3AAA had regular meetings with Karen Sherry of the SFA and shared its business plans. Ms Sherry was impressed with 3AAA's plans for growing the levy business. Following the KPMG investigation, the SFA increased 3AAA's funding allocation in 2016/17 from its 2015/16 level, by over 25 percent to £31.05 million. The parties agree that, even with the introduction of the Levy, the Funding Agreement provided for substantial funding after 1 April 2017. This was because there was a carry over for existing learners who would remain funded. Peter Marples placed a figure of £18 million on the carry-over from 2016-17.

85. To address various concerns about the impact of the new changes, the SFA devised a proposal to cap the initial funding allocation for each provider for non-levy-paying employers at £5 million, which was announced on 25 October 2016 (the '**Non-Levy Cap**'). There was the prospect for funds received from the levy funded apprenticeship budget to be recycled to non-levy apprenticeships in excess of this cap during the year, as and when it became available.

86. In November 2016 Kirsty Evans of the SFA spoke to a number of providers to provide comfort about the Non-Levy Cap and explained that the overarching SFA strategy was to get the right amount of money to the right providers by way of additional funding notwithstanding the cap. One of the providers she spoke to was Ms McEvoy-Robinson at 3AAA. Ms Evans encouraged 3AAA to grow its levy business as that was in Ms Evans' view the future of apprenticeships. Ms McEvoy Robinson's reporting of these conversations in relation to non-levy business to Trilantic was rosy, but Ms Evans was clear, and I accept, that while she was encouraging that there could well be as much money available to 3AAA in 2017-18 as in 2016-17 notwithstanding the cap, there were no guarantees and 3AAA should have plans in place for that not happening. Ms Evans expected the spending by levy payers to ratchet up quite quickly after the first year so that there would be progressively less money available for non-levy starts. Ms Evans was

clear, and I accept, that it was going to be anything but business as usual when the levy came into effect.

87. I also accept Peter Marples' evidence that the levy represented an opportunity for 3AAA and he was not concerned by the Non-Levy Cap. He had calculated that they had carry-over on 3AAA's existing contract from 2016-17 and income from subcontracting from colleges, over and above the £5 million cap giving it a start he calculated of £29 million non-levy funding starting 2017-18. He also believed that, notwithstanding the SFA's sector wide concerns for the non-levy market, 3AAA itself could grow its non-levy funding because 80% of 3AAA's provision was in the 16-18 year old market where there was a statutory entitlement to be funded for apprenticeships and, as an Ofsted Grade 1 provider, 3AAA would expect to receive funding for that area. In addition, it would have Levy funding, where 3AAA intended to significantly grow its business with Levy paying employers.

88. Ultimately, the Levy was introduced but the Non-Levy Cap was not.

D.8 Autumn/Winter 2016: The Trilantic Acquisition

89. On 27th May 2016, Trilantic approached 3AAA through Karim Khan. Trilantic proposed to acquire a majority interest in the Company via the acquisition of the Parent Company (the "Trilantic Acquisition"). Mr Joe Cohen, one of Trilantic's founding partners, was to join the Company's board as a director, together with Mr Romain Railhac. It was intended that the transaction would complete in late 2016.

90. The Trilantic Acquisition would have involved Trilantic acquiring around 75 percent of the shares of the Parent Company. At this point Peter Marples and Thomas Marples between them held 50% of the Class A Ordinary Shares (which carried 85% of the voting rights) in the Parent Company, the other 50% being held by Diane McEvoy-Robinson and Adam McEvoy-Robinson. Peter Marples, Thomas Marples, and Sarah Marples held various

shares in other classes. Lee Marples did not hold any shares but had an option to acquire certain Class X shares, along with Sarah Marples and various others. The Trilantic Acquisition would have involved Sarah and Lee Marples exercising their share options and Sarah, Lee and Thomas Marples selling all their shares. Peter Marples and Ms McEvoy-Robinson would sell approximately 60 percent of theirs, retaining the balance and retaining management functions in 3AAA for an incentivisation period. The Trilantic Acquisition was to be funded entirely by cash, not debt.

91. Trilantic carried out due diligence, including with Shoosmiths and Eversheds as solicitors, PwC for commercial and financial due diligence, and Westminster Advisers as political consultant.

92. Grant Thornton also prepared financial due diligence, officially instructed by the sellers, but provided to Trilantic. Trilantic and Grant Thornton were given full access to 3AAA's records and accounts. Grant Thornton's report included an analysis of the financial health of the business and its future financial and growth plans. This included the KPMG Investigation report, which was disclosed, and it, and its effect on 3AAA's performance in early 2016, were analysed by Trilantic. Trilantic's email of 16 September 2016 considered issues including 3AAA's financial health, the KPMG Investigation and the proposed Levy but concluded that there were no significant issues raised by the due diligence.

93. In September 2016, Peter Marples, Ms McEvoy-Robinson and Mr Mapp met for lunch with Joe Cohen of Trilantic. At that meeting, by which time discussions had been underway for approximately four months, a deal structure was presented by Trilantic, which proposed the acquisition of a majority stake in the Company's business.

94. In the very early hours of 23 September 2016, Nick Linford sent Sir Peter an email saying: "*Hearing these guys* [Trilantic] *buy 3aaa tomorrow –*

probably for over £100m. Guessing you'll happily novate their £30m allocation. Gutted.".

95. Mr Linford's email caused consternation at the SFA for reasons which have never been explained. Sir Peter saw it when he opened his emails the next morning and forwarded the email to several colleagues asking whether the SFA had "*given permission*". Mr Smith replied '*Karen/Sam – are you aware? If this is correct we need to make urgent contact and remind them that this is not an automatic or guaranteed process/outcome'*. As a result, Ms Sherry spoke to Ms McEvoy-Robinson, who was evasive as to Trilantic's interest and said that there had been no firm approach. Ms Sherry reported back to Mr Smith and Sir Peter that she had reminded Ms McEvoy Robinson of '*the rules around sale of companies and potential contract novations and that due process would need to be followed. I also reminded her that novating a contract is not an automatic or guaranteed process'*. Mr Smith replied, '*They know the rules too well not to proceed without our agreement. We need to watch this one carefully'*.

96. Sir Peter exchanged emails with Mr Linford to find out the source of his information and forwarded these communications on to Mr Smith and Ms Sherry. Mr Linford said that he had received anonymous tip offs. Sir Peter observed to his colleagues that it was difficult to know who to believe in this situation. Mr Smith responded that if Ms McEvoy-Robinson was misrepresenting the position, *'their contract will not transfer'*. He asked Ms Sherry to tell Ms McEvoy-Robinson that, '*we must approve any sale'* and '*we will not consider any retrospective application'*. Mr Smith wanted a '*full due diligence on anything related to this one in a similar way to learndirect'*. Sir Peter agreed. (Sir Peter's assertion in oral evidence that there was never any question of disbelieving Ms McEvoy-Robinson was not compatible with these emails).

97. Sir Peter then spoke to Mr Mapp of 3AAA. Sir Peter reported '*He (Derek) absolutely understood that they would need our agreement to going ahead with anything'*. This was evidently what Sir Peter had told Mr Mapp was the position. Sir Peter's explanation in cross-examination that it was what Mr Mapp proposed to him is another example of Sir Peter now reinterpreting the documents to mean something different. Sir Peter asked Mr Smith and Ms Sherry, '*would 3aaa need our permission to take an equity stake? […] I know they do if there is a sale but what do our rules say about taking an investment'*. Mr Smith replied that it depended on whether it changed the legal ownership of the business. Mr Smith told Ms Sherry '*Its clear these guys* [Peter Marples and Ms McEvoy-Robinson] *want out and we need to make sure we keep maximum over sight*."

98. The Claimants say, and I accept, that notwithstanding their denials in evidence, these emails show that at this stage Sir Peter and Mr Smith believed that (1) the SFA had the power to approve or prevent a sale and (2) 3AAA had to seek its permission before the sale. Neither point was correct under the terms of the Funding Agreement.

99. Mr Smith was, however, quickly disabused of that misconception. On 26 September Ms Sherry reported to him that the only relevant provision in the Funding Agreement and the Funding Rules was clause 5.10 of the Funding Rules and quoted its terms in her email. She recommended tightening up the contract (and the SFA did go on to tighten up its contract for 2017 to 2018 to make a change of ownership only possible with its prior written consent and requiring at least 12 weeks notice of any such plans).

100. Ms Sherry's email was not sent to Sir Peter who continued for a time to believe that the SFA's permission for the sale was required. On 20 October 2016, when Mr Mapp notified Sir Peter that the Trilantic Acquisition would likely go ahead, Sir Peter confirmed their discussion by email and that Mr Mapp '*understood that SFA agreement would be required*'.

101. Sir Peter had never before been involved in a change of control decision or process. He decided to depart from the SFA's usual processes. On 21 October 2016, Sir Peter appointed Ms Forton to lead for the SFA on the Trilantic Acquisition. He asked her to involve the Transactions Unit, headed by Mr Atkinson, for due diligence. He continued, '*This is an important test case for us and it will inevitably attract a lot of media publicity. I make no presumption that we should agree to the transfer'*.

102. On 27 October 2016, the Company wrote to the SFA to request its approval for a change of control. That letter (written on Company headed paper) set out the proposed terms of the acquisition, explaining that they involved Trilantic acquiring 75% of the shares, and the existing directors and management team staying in place. It referred to (and reproduced the text of) clause 5.10 of the Funding Agreement and said: "*We look forward to receiving your approval for a change of control at your earliest convenience.*"

103. Ms Forton prepared a draft briefing note and consulted on it with her colleagues at the SFA. Mr Atkinson checked Trilantic's financial status and received further information from Peter Marples, concluding to Ms Forton that '*this looks like a strong company buying into a strong company'*: and '*they are well resourced and we have limited reasons to object to any of this'*.

104. On 9 November 2016, Ms Forton emailed Sir Peter with the final briefing note, stating in her covering email that this was a straightforward request and that *"the recommendation is that the change of ownership would not prejudice the delivery of our contract"*. Mr Smith had confirmed he was comfortable with that recommendation. The briefing note itself:

a. set out the correct position that the SFA had the right to terminate a funding agreement with a provider "*if it considers in its absolute discretion that the change in ownership would prejudice the provider's ability to deliver the Services*", and that "*It is not uncommon for the SFA to be approached by Providers prior to proposed changes to their business including change of ownership or proposed sale*";

b. expressed the view that "*on the information available to us and in the public domain there is nothing to suggest that this change of ownership should not be agreed*"; and

c. recommended a meeting with Mr Marples, Ms McEvoy-Robinson, Mr Mapp, Mr Cohen and Mr Railhac "*to validate the ongoing leadership and management of the business in the changing world of education reform*", and enclosed a suggested agenda and list of questions. The proposed questions for Trilantic included:

"*The education and training sector is in the throes of massive reform — an employer led system in essence from development of products through to employer selection of providers to deliver their apprenticeship needs. How are you ensuring that there is business continuity in a changing world and that your investment is protected*?
In addition Aspire Achieve Advance will be entering to deliver to SMEs through the procurement round that closes on the 25th November. What are the contingency plans if the application is unsuccessful?

What happens if the plans for growth do not materialise, will you call your investment in?"

105. Sir Peter was not happy with this advice. He responded to Ms Forton saying that he expected her advice to cover:

"• *What is the investment being made*

• *How much is going into the business and how much to buy out existing shareholders*

• *What are current stakes of shareholders*

> • *What will be future stakes*
> • *What due diligence has been done on 3aaa by Trilantic and what their aspirations are*."

106. The information was already in Ms Forton's advice note, as Sir Peter accepted in cross-examination, and the email suggests that Sir Peter had not digested and understood the briefing note. In any event, it was clearly important to Sir Peter that he understood what value was being extracted from the Company for the benefit of the existing shareholders, and what the investment objectives of the new shareholders were going to be after the acquisition.

107. Ms Forton put these questions to Peter Marples, who answered them the same day. He said that Trilantic would pay shareholders £42 million, of which shareholders would re-invest £18 million into 3AAA and £8 million would be used for working capital. He also made clear the due diligence which Trilantic had undertaken, that their intentions were '*investing for the long term'* to support 3AAA develop its levy business, and 3AAA's management team would remain in the business for at least three years. Ms Forton updated her advice with these answers and the sellers' shareholdings. She maintained her recommendation that the SFA agree the change of control.

108. Sir Peter continued to ask Ms Forton questions to understand how much cash the existing shareholders were "*taking… out of the deal*" and how much was remaining invested by them. He questioned what this meant for the financial operation of the new business and whether that was not something the SFA should be assessing. He wanted to see Trilantic's due diligence. Ms Forton tried to answer his questions with the assistance of her colleagues. She complained to Ms Sherry: '*Having to be a flippin investment banker here!!! We are going into so much detail – we have never gone to this granularity'*.

109. Sir Peter also asked '*And what do our rules say about this kind of transaction? What scope do we have for discretion?*'. Ms Forton's reply on 10 November 2016 quoted clauses 5.9 and 5.10 but then misstated slightly their effect. '*In terms of discretion we can refuse the change of ownership if we choose to do so should we believe this prejudices the new owners ability to deliver our contract'*. In fact, the SFA did not have a power to refuse the change of ownership, only a power to terminate the contract. Ms Forton drew attention to the fact that the Funding Agreement terminated on 31 July 2017 in any event.

110. Around this time, Trilantic learnt of the proposed Non-Levy Cap from the SFA. Although it had been announced on 25 October 2016, Peter Marples and Ms McEvoy-Robinson had agreed not to tell Mr Cohen of Trilantic about it until it was "*resolved*". On 14 November 2016 Mr Cohen emailed them saying that it was unfortunate that Trilantic had learnt about the cap from the SFA and not from the Company, and that the business plan was "*centred on a core assumption that the non-levy business [would] not simply stay stable but actually grow*". Without more clarity, he said, the deal could not proceed further.

111. The Trilantic Acquisition briefly stalled but revived with a revised proposal from Trilantic, including less cash upfront. The revised offer included Trilantic's understanding of the SFA's position.

"*There is a concern within the SFA around three topics: (i) the ability of private providers to what was described as "excessive profiteers"[sic] from tax payers investment, (ii) providers getting too big within the non-levy market and all the associated risks to learners if something goes wrong (e.g. they continue to site [sic] Carter & Carter) and (iii) allowing the FE Colleges to survive given their heavier cost structure and asset base. We have no doubt that the wish of the SFA to see Trilantic's internal memos is driven by their wish to understand profitability*."

112. Mr Marples duly emailed the SFA on 8 December 2016, asking to "*reinstate the change of control process*". In that email he said: "*The aim is to conclude the transaction by the 21/12 and whilst the timescale is tight we would appreciate your continued support to work to this timetable*". He envisaged that the process would involve a meeting between the SFA and Trilantic, with either Ms McEvoy-Robinson or Mr Mapp in attendance.

113. Ms Forton emailed Sir Peter to update him. In her email she correctly described the SFA's clause 5.10 rights as follows:

"*The SFA requires providers that it holds direct contracts with to notify us if there is a change in its name and/or ownership. We reserve the right to terminate the Contract if we consider in our absolute discretion that the change in ownership would prejudice the provider's ability to deliver the Services".*

D.9 December 2016: The 'blood pressure' email

114. On 9 December 2016, Mike Keoghan (Deputy CEO of the Institute for Apprenticeships, of which Sir Peter was CEO) emailed Sir Peter with the subject '*how's yer blood pressure?*' informing him of six-figure sums which Peter Marples and Ms McEvoy-Robinson had taken out of 3AAA, other profit they had made on separate business deals, profit 3AAA had made, and that 3AAA described itself as '*highly cash generative'*. Mr Keoghan ended his message sarcastically ; '*Which is lovely for them*'. Sir Peter replied '*My blood pressure is much higher now. Trilantic have renewed their interest in 3AAA. Not surprising when it is so cash generative'*.

115. Sir Peter's evidence on this issue was unsatisfactory. In cross-examination he claimed to have no idea why Mr Keoghan was interested in 3AAA's accounts or why he was telling Sir Peter about them and no memory of having told Mr Keoghan anything about 3AAA. He also denied that he had been agitated at seeing the profit made by Peter Marples and Ms McEvoy-

Robinson and dismissed the references to his blood pressure as "*banter*". He claimed to recall his concern being that he might have been misled at the time of the KPMG investigation, regarding Peter Marples' inability to put more money into the business to tide it over while the SFA payments were suspended. I do not accept any of those explanations. It is clear from the emails that Mr Keoghan and Sir Peter have had conversations such that Mr Keoghan knew that the information about large profits being made by the owners of 3AAA would agitate Sir Peter, and coupled with the revived interest of Trilantic, it clearly did agitate Sir Peter.

116. Sir Peter then repeated the content of this message to Ms Forton, asking for her thoughts without forwarding the email or its source. Ms Forton researched the answers and replied to Sir Peter, '*As you know it is common practice for shareholders to take dividends. To the best of my knowledge dividends taken by 3a directors have not affected the viability of the business and their financial health position has already met our FHA*'.

117. Ms Forton asked these questions of Mr Simm in the SFA Flexible Resourcing Team, who replied, '*there were no dividends paid in any of the 3 years you asked me about […] and for each year the resulting grade in a normal assessment would have been "Outstanding"*'. Ms Forton passed this onto Sir Peter on 12 December 2016 and repeated her recommendation, '*there is nothing to suggest that this change of ownership request should not be agreed'*. She said that the case had been reviewed by colleagues in various units of the SFA in reaching this recommendation.

D.10 The 13 December 2016 meeting

118. On 13 December 2016, the anticipated meeting took place between Sir Peter and Ms Forton (SFA), Mr Mapp (3AAA) and Mr Cohen (Trilantic). There is no note of the meeting but it is clear that Sir Peter painted a bleak picture to Trilantic. Joe Cohen told Peter Marples after the meeting that Sir Peter

had '*spent most of the meeting trying to put off Mr Cohen from making the investment'*, with words to the effect of '*Why would you want to invest in this sector'*. Mr Cohen left the meeting very concerned at the SFA's lack of encouragement and support for institutional capital to enter the market. On 14 December 2016 he drafted an email to be sent to Sir Peter in which he pointed out the sector's need for investment and he recorded the discouraging things he had been told by Sir Peter. In it Mr Cohen recorded Sir Peter as emphasising the uncertainty and risks, including that:

a. there was a strong likelihood that there would be no money or at least substantially less money in the SME market which represented 100% of 3AAA's current business over the next few years:
b. the SFA would be concerned by substantial growth of a quality provider like 3AAA as creating a systemic risk
c. there was a £5 million cap on non-levy new starts (the Non-Levy Cap).

119. The draft email is the most contemporaneous record of what was said at the meeting and I accept it as a fair record, except that I accept Sir Peter's evidence that he is sure he would not have said that there would be "*no money*". The suggestion that there was a strong likelihood of substantially less money for such business, and a reference to the Non-Levy Cap of £5 million but not the expectation that additional funding would be available, were at odds with the comfort which Kirsty Evans had been providing to 3AAA and other providers that the SFA was looking to maintain existing volumes on non-levy new starts notwithstanding the cap in 2017-18 (although there were no guarantees) and that the £440 million figure allocated was driven by that purpose. Ms Evans' comments were only in relation to the first year after the introduction of the levy, but Sir Peter's comments were not. Nor were his comments about what money would be available to 3AAA, but what money would be available for the market. In respect of future years there was real uncertainty as to the funds which would be available for the SME market, and the SFA's expectation was that the SME market would contract. Nevertheless it is clear, if only by Sir Peter

not referring to the lack of anticipated disruption in the short term, that Sir Peter was painting a deliberately pessimistic scenario.

120. The draft email indicates that Mr Cohen thought the SFA was discouraging private capital from entering the market, and he was concerned that it would be difficult for Trilantic and others to risk investing in the sector in such circumstances. Mr Cohen was eventually dissuaded from sending the draft email to Sir Peter by Peter Marples.

D.11 December 2016 – January 2017: The Decision Letter and aftermath

121. On 14 December 2016, Trilantic sent to the SFA a business plan for 3AAA. There has been a degree of controversy as to whether it was Trilantic's business plan or the Company's business plan and whether Sir Peter had failed to realise that the plan would be implemented whether there was a change of control or not. Whoever was responsible for drafting it, (i) it was a document provided to Sir Peter in response to his request for a document setting out Trilantic's plan; and (ii) it is headed "*Trilantic Capital Partners – Follow-up – Business Plan Details*", has a cover page featuring Trilantic's logo, features Trilantic's logo on the footer of every page, and contained a page of disclaimers stressing that it was confidential to Trilantic and was based on "*current expectations, estimates, projections, opinions and beliefs of Trilantic*". Sir Peter was entitled to treat it as Trilantic's plan for the business if the acquisition went ahead. Nor is there any evidence that 3AAA expected to be able to implement the plan if the Trilantic Acquisition did not go ahead and there was no injection of substantial further capital. Indeed the evidence from the period when the Trilantic Acquisition stalled, was that severe cost cutting was expected if the Trilantic Acquisition fell through because costs had been increased in expectation of it going ahead.

122. The plan was a short document with little detail. It did however make clear that the growth projections in the plan were premised on an assumption of continued growth in the non-levy market and more specifically that the

Company's non-levy contract would have grown to approximately £39 million by 2019-20 from £31 million in 2016-17.

123. On 16 December 2016, Ms Forton reported to Sir Peter that (a) 3AAA's projections were '*challenging but not unreasonable and acknowledge the changing market place and the business changes that need to be made to positively respond'*; (b) 3AAA would focus on building up its levy business; (c) its EBITDA predictions were '*pragmatic'*; but (d) she could not assess what Trilantic expected from its investment and when.

124. Peter Marples had a conversation with Ms Forton on 19 December 2016 and she assured him that the recommendation for approval on the same terms as the Inflexion deal was with Sir Peter for his approval. Mr Marples made a contemporaneous note in which he referred to a "*letter*" being on Sir Peter's desk for him to "*sign*" but there was no such draft approval letter; none has been disclosed and no one remembers one. It is likely that this was a misunderstanding, and what was "*sitting on Sir Peter's desk*", or more likely on his computer, was Ms Forton's recommendations in the shape of her briefing note and email advice.

125. Pausing there, at this stage everyone at the SFA involved in the change of control process, apart from Sir Peter, had concluded that there was no reason for the SFA not to agree the change of control. The recommendation after internal consultation and research was that the SFA's standard change of control letter should be written.

126. Sir Peter arranged a call with Ms Forton and Keith Smith at 10am on 22 December 2016. Neither Sir Peter nor Mr Smith recalled the discussion on that call, but it is likely that Sir Peter's decision was discussed or reached on this call. Sir Peter was clear in his evidence that he was the sole decision maker and I accept that evidence. At, or before this meeting, Keith Smith gave Sir Peter his assessment of the business plan and that it underestimated the disruption that was coming to the small business market. Later the same

day, Ms Forton prepared a draft decision letter for the SFA declining to give the assurance sought. The letter said: "*at this point, based on the information provided, the SFA is not able to agree to this change in ownership in the context of current and future contracts*". It asked a number of questions about the business plan and specifically the growth projections for non-levy business and expressed concern that these were not achievable.

127. Mr Smith and Sir Peter both made some amendments to the letter, which was sent on 23 December 2016. The amendments made by Sir Peter enlarged on the concerns about the projections of non-levy income emphasising the uncertainty of future funding for this area and describing the assumptions made in the business plan as optimistic.

128. Pausing there, it does appear that the business plan, which may have been the business plan prepared before the announcement of the Non-Levy Cap, was aspirational and optimistic in relation to non-levy business. Trilantic had recalibrated their offer on the basis that the non-levy case had been too ambitious, and their investment thesis could no longer be predicated on continued high growth in the non-levy market. Mr Smith reviewed the business plan and advised Sir Peter that it did not fully address the changes that were coming. Mr Davidson expert evidence is that the growth prospects presented in the business plan were unrealistic.

129. In his covering email, Sir Peter said '*Then we stand back and wait for the fireworks […] my private expectation is that Trilantic will ditch 3aaa at this point because they will feel they have been misled by them*'. The expectation that Trilantic would walk away was one he was to express internally to Ms Forton and Mr Smith several times in the next month. He added a drafting note to Ms Forton to include reference to the relevant part of the Funding Agreement.

130. The Decision Letter was sent on 23 December 2016. It referred to Clauses 5.9 and 5.10 (without setting them out). It said:

> '*Based on the information provided, the Skills Funding Agency is not able to agree to this change in ownership in the context of current and future contracts… Our concerns arise from the following points which we conclude result in a risk that a change of control will prejudice delivery of our contracts both now and in the future'.*

131. The concerns expressed were in relation to the optimistic assumptions underpinning the business plan in relation to the projected growth of 3AAA's business in the non-levy market. They reiterated the points made at the 13 December meeting about the disruption that would be caused to the SME market from the introduction of the levy and the uncertainty of future funding of apprenticeships in the non-levy market. It emphasised the £5 million Non-Levy Cap and made no reference to the fact that the SFA had been reassuring the sector that it was looking to maintain existing volumes on non-levy new starts notwithstanding the cap in 2017-18. After outlining those concerns it ended:

> "*We would be prepared to reconsider our decision in the New Year if you can provide further detail which would provide assurance that a change of ownership would not prejudice your ability to deliver our contract."*

132. Initially the Decision Letter was not thought to be fatal. Mr Khan's analysis was that "*Joe is confident that we can ultimately get approval for CofC but only by providing assurance that we have planned for the worst in terms of non-levy funding" […] if we want CofC approval, we need to show PL in particular that we can guarantee contract delivery even in the doomsday-ish scenario that he is tenaciously presenting as being a real possibility and that the envisaged investment from TCP enhances this security of contract performance".*

133. However, Mr Cohen was not prepared to present a case along those lines, as it was not in line with Trilantic's investment thesis, and if Sir Peter's scenario came to pass it was possible that the Company would not be able to survive.

134. In the event, the Company (through Peter Marples) provided a response on 2 January 2017. In it, Peter Marples sought to address the SFA concerns but acknowledged that in the worst case scenario there would be losses which would need to be funded somehow, or the business restructured. Sir Peter, Mr Smith and Ms Forton considered that response internally and all expressed the view that the response did not address the concerns expressed in the Decision Letter.

135. The SFA accordingly wrote again on 7 January 2017 explaining that it had considered the further information but remained of the same view. In the SFA's reply, Ms Forton added new allegations (later shown to be incorrect) that 3AAA had not met SFA minimum standards and that this would be relevant to the change of control decision. Sir Peter amended the letter to make it '*tougher'* and said '*My bet is that the MPL [minimum standards] position will be news to Trilantic and they will now drop out'*. He accepted in evidence that, notwithstanding what was said in the letter, the minimum standards position was not relevant to the change of control decision but he wanted to pass on the information, presumably for Trilantic's benefit, as it was '*highly relevant to the competence and the capacity of 3aaa as an organisation*'.

136. Again this response was not thought to be fatal. A record of a call between Di McEvoy-Robinson and Kirsty Evans on 12 January 2017 says: "*In a nutshell – it is as simple as PL wanting to see that we had planned for a £5m only allocation for new starts and that we had contingency plans in place for this possibility and that TCP were aware of what a £5M only allocation might mean and still wanted to invest and not walk away and leave a*

potential issue with apprentices on programme and their completion, which other investors had done with other companies in the past."

137. At this point Trilantic could have continued with the acquisition regardless - there was no requirement for SFA consent to the acquisition. Alternatively, it could have sought to provide the SFA with a business plan catering for the pessimistic scenario painted by Sir Peter and assuring him that Trilantic would not walk away leaving a disorderly cessation of business. Trilantic chose not to do either.

138. Trilantic decided to withdraw from the process, and communicated this to the SFA by way of an email of 11 January 2017. Mr Joe Cohen did not give evidence and there is therefore no direct evidence of why Trilantic withdrew. In a carefully worded email, Mr Cohen explained that the reason for termination was that the SFA viewed Trilantic's basic funding assumption of continued funding of non-levy apprenticeships at the same level as "*excessively optimistic*". It suggested that if the SFA wanted to encourage private capital into the sector to invest in needed infrastructure it needed to provide greater SME funding certainty, at which point Trilantic's business plan assumptions would hopefully appear reasonable. The email suggests that Trilantic did not believe the doomsday scenario painted by Sir Peter was likely, but was not willing to take the risk. It also hints that it is Mr Cohen's view that Sir Peter was trying to discourage Trilantic and other private equity players from entering the sector.

139. Peter Marples' evidence in cross-examination was to similar effect that "*Mr Lauener had clearly spooked Mr Cohen*" by "*informing him that in essence non−levy funding would come to an abrupt end*", and that "*They believed that there was risk to the business based upon what Mr Lauener had told them. Quite clearly, Mr Lauener spooked them, and that's ultimately why we're here today*"

140. Ms Forton forwarded notification of Trilantic's withdrawal to Sir Peter and Mr Smith stating, in light of Sir Peter's earlier prediction that this would happen, that *'[t]his won't come as a surprise to you both'*.

D.12 Further attempts to sell the business

141. On 9 March 2017, Mr Mapp emailed Peter Marples to suggest an introduction to his friend Tony Mallin, the principal of Star Capital Partnerships LLP ("**Star Capital**"). This led to an exchange between Mr Mallin and Mr Mapp and then to a meeting planned for early May 2017.

142. Prior to any such meeting, the Company reviewed various information requests from Star Capital, and in an email of 23 April 2017, Mr Marples set out his progress on those requests to date. In his covering email he expressed the view that the business had an enterprise value of £115 million, involving "*cash on the nose of not less than £85m with a £30m earnout"*. In cross-examination, Mr Marples confirmed that this was indeed his view as to the enterprise value of the business at the time.

143. A proposal seems to have been rejected by 19 May 2017. But by 7 July 2017, and as recorded in the Company's minutes of a board meeting of that date, the potential deal had been refined, with "*an offer of £5m of working capital for 12% of the business with a put and call for the remainder of the business under certain criteria*".

144. Discussions between the parties then ceased for a period, but in mid-October 2017, Star Capital reached out to Mr Mapp to propose an update session, and although Mr Mapp suggested postponing any such session until January or February 2018 (referring to how well the business had grown), Star Capital indicated that it was "*happy to re-engage when* [the Company] [felt] *the time* [was] *right*".

145. The Defendant says that this episode is incompatible with the idea that the Claimants were completely unable to sell their shares. Peter Marples said that these discussions with Star Capital represented a mezzanine debt proposal but Mr Davidson was adamant that the documents referred to an investment in the company and were not consistent with a proposal for mezzanine finance, and I agree - a proposal for mezzanine finance is not consistent with the board minutes recording a proposed acquisition of 12% with a put and call option "*for the remainder of the business*".

D.13 2017-2018: Emergence of irregularities in 3AAA's records

146. Data analysed by the ESFA in January 2017 indicated that more than 40% of the Company's frameworks had a 'Qualification Achievement Rate' ("QAR") of below the minimum standard of a 62% success rate, meaning that the Company had failed the SFA's minimum standard requirement.

147. On 23 January 2017, Mr Hunter of the ESFA spoke to Lee Marples, who performed a reconciliation, showing that it had passed minimum standards and this explanation was accepted at that time by Mr Hunter. His evidence was that in light of his subsequent discoveries he would not now accept that explanation.

148. The ESFA was then approached by five whistleblowers over the period January to October 2018. All of those whistleblowers were former employees of 3AAA, and they alleged that the Company had been manipulating its data submissions to the SFA.

149. Mr Hunter's suspicions of 3AAA's QAR rates was reignited by an Ofsted provisional grade of "Outstanding" in May 2018 which usually required a QAR of over 70%. This prompted him to review and analyse the company's data. He, Mr Smales and Mr Babcock (from the internal fraud team)

discussed this and other data and believed they had worked out that 3AAA was manipulating its QAR rates and how it was doing it.

150. On 20 June 2018, the ESFA wrote to 3AAA to advise that it had carried out a review of ILR submissions from 2016-17 onwards and had identified "a number of anomalies" with the Company's data submissions.

151. On 13 July 2018, the ESFA published an interim report on its findings on 3AAA, explaining that its preliminary conclusion was that data had been *"deliberately manipulated to avoid AAA being subject to minimum standards (2015/16) and to falsely inflate the QAR rate in 2016/17"*. In particular, it found that of the 160 records that had been amended to change the date of a withdrawal that had previously been logged with a different date, in 97.5% of cases the effect of the new date was to reduce the length of the apprenticeship to less than 42 days. That had the effect of excluding those learners from negatively affecting the QAR figures. The investigation team also found that dates had been changed in a "mechanical way" and, later, that a significant number of withdrawals had been recorded as taking place at weekends. This was essentially a statistical analysis of data anomalies which were of such number and had such common or unusual features that they were in the view of the investigators deliberate data manipulation. The report identified that further work was required to "prove" the allegations. An explanation had been provided on behalf of 3AAA by Ms McEvoy-Robinson (and according to the 3AAA's 3 October 2018 letter) Peter Marples and Lee Marples, which was regarded as not statistically feasible by Mr Smales but the only way to corroborate, or conclusively disprove 3AAA's explanations in the email was to look at the underlying hard-copy files.

152. In parallel with the data manipulation issues, the ESFA investigated the Company's treatment of AGE Grants, which were payments of £1,500 per learner provided to employers to incentivise them to take on apprentices. Employers became entitled to the grant if a learner remained in learning for

13 weeks. When 3AAA moved to a direct contract basis with the SFA, those sums were paid to the Company so that it could pass them on to employers, which it was contractually required to do within 30 days. However, 3AAA had a backlog of more than £1m of AGE Grant money that had been received but not paid onward to employers.

153. On 10 September 2018, the SFA suspended 3AAA taking on new apprentices. On 13 September 2018, Ms McEvoy-Robinson and Peter Marples resigned, against a threat of suspension from the Board of 3AAA, and had their access to buildings and systems codes access removed. Lee Marples was suspended on or around 20 September 2018. 3AAA commissioned an independent review by BDO which was presented to the ESFA on 27 September 2018. The Company's new management had reviewed the hard copy files which the SFA had not and this report sets out their findings and BDO's review and conclusions on such findings. BDO's review confirmed the new management's findings that the previous explanations given by Ms McEvoy Robinson were wrong. On 3 October 2018 3AAA informed the ESFA that similar anomalies had existed well before 2016/17 and that "*new management do not accept the explanations given currently to the ESFA that all changes were correct and there was no awareness around manual repayment mechanisms*."

154. On 8 October 2018 Eileen Milner, the ESFA's then CEO, decided in consultation with senior staff and lawyers to give notice to terminate 3AAA's three contracts with the Company. That decision was communicated to 3AAA at a meeting on 10 October 2018 in which the significant manipulation of QAR data and the retention of AGE Grant funding was said to "*appear to be two instances of serious malpractice designed to give material gains to the company to which it was not entitled*." At that meeting, the ESFA also explained that its investigations would continue, that while the notice period continued the suspension on new starts was extended and there was a suspension of all future payments to 3AAA.

On the morning of 11 October 2018, Mr Mapp informed the ESFA that 3AAA was closing with immediate effect.

155. 3AAA was wound up by its own petition on 24 October 2018. The Parent Company entered liquidation on 21 August 2019, following the presentation of a petition by HMRC.

156. The ESFA continued its investigations after the Company's entry into liquidation through to April 2020, when it finalised its closure report, which concluded, amongst other things, that the Company had "*manipulated data to enhance their Qualification and Achievement Rate…and subsequent funding implications were ignored*". Although it stated that "*The data is indisputable and the timing of the changes, as well as the mechanical nature of the changes, all point to deliberate manipulation of data*" Mr Hunter accepted in cross-examination that the liquidation of 3AAA meant that the investigation had gone as far as it could and never reached the stage where there was a review of the hard copy files. Mr Smales also accepted that the investigation was inconclusive as to who was responsible for the data manipulation.

157. The matter was referred to Derbyshire Police by Action Fraud and investigated by the Insolvency Service in August 2021. Ultimately no further action was taken.

E. Misfeasance in public office

E.1 The constituent elements of the tort

158. The tort of misfeasance in public office has as its essence a deliberate and dishonest abuse of his or her powers by a public officer. The rationale of the tort is that in a legal system based on the rule of law executive or administrative power must be exercised only for the public good and not for

ulterior and improper purposes; *Three Rivers DC v Bank of England (No.3)* (HL(E)) [2003] 2 AC 190H per Lord Steyn, with whose judgment Lords Hope and Millett agreed. Policy and principle require the tort to be confined to the abuse of power in subjective bad faith and not to negligent acts or unintended or unforeseen consequences. Bad faith in this context includes dishonesty and acting with an improper or corrupt motive.

159. The constituent elements of the tort can be distilled from Lord Steyn's speech.

a. The defendant must be a public officer. In this case it is common ground that Sir Peter, Mr Smith and Ms Forton were public officers and the Defendant accepts vicarious liability for their actions.
b. The conduct complained of must be a purported exercise of power by the public officer. This ingredient is also not in issue in this case.
c. The public officer must have the requisite bad faith when exercising his or her powers, namely:
    i. a specific intent to thereby injure a person or persons (targeted malice); or
    ii. knowledge that the public officer has no power to do the act, or reckless indifference whether there was such power, and knowledge that the act will probably injure the claimant or reckless indifference about the consequences of the act (non-targeted malice).
d. The exercise of power must have caused the claimant loss.

160. Lord Millett expressed the view that targeted and non-targeted malice were merely different ways in which the necessary element of intention is established. In targeted malice it is established by evidence. In non-targeted malice an improper intention is established by inference from a combination of knowledge that the public officer is acting in excess of his or her powers and knowledge that harm is likely to be caused to the claimant. This view of the tort has been endorsed by the Supreme Court of Canada; see *Odhavji*

Estate v Wodehouse [2003] 3 SCR 263. Neither side suggested that Lord Millett's analysis had any practical impact on this case.

E.2 The pleaded claim

161. The Claimants submit that Sir Peter, Mr Smith and Ms Forton committed misfeasance in relation to the Decision Letter having confirmed during the trial that they no longer asserted misfeasance by Kirsty Evans and Karen Sherry. Misfeasance in public office is a serious allegation of bad faith and dishonesty and it must be pleaded with clarity and particularity. The pleaded case however discloses only a plea of targeted malice on the part of Sir Peter. No allegation is pleaded that Mr Smith had the relevant state of mind for either limb of the tort, and while it is asserted that both Sir Peter and Ms Forton were subjectively reckless as to the lawfulness of their actions, there is no plea that either knew or was reckless as to whether the Claimants would suffer harm. For that reason alone, the claims made against Mr Smith and Ms Forton must fail, and the only claim which can be pursued is against Sir Peter for targeted malice. In any event, Sir Peter's evidence, which was not challenged, was that he was the decision maker and therefore the relevant public officer exercising the power which is complained of.

E.3 Targeted malice - a specific intent to injure

162. When bringing a claim for targeted malice, the Claimants must prove a specific intent to injure them. An awareness on the part of the public officer that the Claimants will suffer harm from the officer's actions is not sufficient. In *Weir v Secretary of State for Transport* [2005] EWHC 2192 (Ch) ("Railtrack"), Lindsay J noted at paragraph 20 that;

"O*ne of the ways in which intent is commonly proved is not open in this tort. […] The required 'targeted malice' cannot be proved by reference only to the knowledge or obviousness of consequences; a specific intent to harm the Claimants or the class to which they belong has to be proved*."

163. It has been assumed (without being formally decided) that it was sufficient that the desire to injure the claimant was a purpose of the defendant, as opposed to the purpose or the predominant purpose: *Weir v Secretary of State for Transport (No. 2)* [2005] EWHC 2192 at paragraph 23; *Romantiek BVBA v Simms* [2008] EWHC 3099 (QB) at paragraph 84. However, in both of those cases the claim failed for other reasons. It was possible to assume that a mixed purpose was sufficient because it was unnecessary to decide the point. Since the parties filed skeleton arguments, judgment was given in *Wilson v Department of Transport* [2025] EWHC 1387 (KB) at paragraphs 224-230 holding that, in the context of a malicious prosecution claim, a predominant improper motive needs to be established. However the concept of malice in a malicious prosecution is a much more diffuse concept (e.g "*any motive other than a desire to bring a criminal to justice*"; see *Wilson* at 215 and 216) and there are different policy considerations in play; see *Wilson* at 230.

164. The rationale for the tort of misfeasance in public office is that administrative powers must be exercised only for the public good and not for ulterior and improper purposes. In the context of targeted malice, it must be proved that "*the official does the act intentionally with the* purpose *of causing loss to the plaintiff*"; per Lord Hobhouse at 230 G-h (original emphasis). Lord Millett explained (at p.235):

> "*The rationale underlying the first limb is straightforward. Every power granted to a public official is granted for a public purpose. For him to exercise it for his own private purposes, whether out of spite, malice, revenge, or merely self-advancement, is an abuse of the power. It is immaterial in such a case whether the official exceeds his powers or acts according to the letter of the power: see Jones v Swansea City Council [1990] 1 WLR 1453. His deliberate use of the power of his office to injure the plaintiff takes his conduct outside the power, constitutes an abuse of the power, and satisfies any possible requirements of proximity and causation*."

165. It is proof of that purpose to cause harm which distinguishes the first and second limb of the tort, where an act may be done for a different, or unknown, purpose but with the knowledge of likely harm to the plaintiff. So for targeted malice establishing "*the purpose of causing harm*" is central to that limb of the tort. The question is whether the purpose of causing harm, even if mixed with other considerations, makes an otherwise lawful act, unlawful. If it does then the tort is satisfied. It seems to me that the prohibited purpose must be a cause of the act complained of. If the public officer would have acted in exactly the same way without the improper motive I do not see how the purpose of causing harm can have had any operative effect on the decision. On the other hand, if it had an operative effect on the decision, the decision was unlawful.

E.4 Discussion – targeted malice

166. The Claimants asserted that the SFA, and Sir Peter, had a grudge against Peter Marples and were obsessed with his wealth. They say that the Decision Letter was written with the intention of discouraging Trilantic from continuing with the acquisition so that the Claimants would not receive the cash due on the sale.

167. The Claimants relied on Tony Allen's evidence that people at the SFA, including Sir Peter and Keith Smith associated Peter Marples with the failure of Carter & Carter and felt that the SFA had been "*let down*". I accept that the failure of Carter & Carter, and Mr Marples' involvement with that business, was well known in the sector and at the SFA. I also accept that the SFA was concerned that lessons should be learnt from the failure of Carter & Carter and providers should not be allowed to become too big because of the risk of serious disruption if they failed. The revised Trilantic offer referred to above at paragraph 111 recited this concern. I do not accept that there was any animosity on the part of Sir Peter or Mr Smith to Peter Marples because of his involvement with Carter & Carter. Such animosity

would have been an irrational and disproportionate response to the failure of Carter & Carter. Both of them denied it and I accept their evidence on this issue. As noted above at paragraphs 73 and 74, Sir Peter's first reaction to the Company after his appointment was a positive one.

168. The existence of a grudge or personal animosity of the strength required to generate a malicious intention to harm Peter Marples or the Company is also not consistent with Sir Peter's actions in saving 3AAA from administration - see paragraph 79 above. His intervention was voluntary – he would have been perfectly within his rights to have done nothing.

169. Tony Allen's evidence was also that Sir Peter and others at the SFA were concerned by profit levels and regarded PTPs as a necessary evil in delivering the policy objective. There was, he says, a perception that the chief executives of PTPs all "*drove around in Aston Martins*" and made excessive profits. Sir Peter readily accepted in cross-examination that he was against excessive profits being made by PTPs. Both Sir Peter and Mr Smith were clear that their responsibilities at the SFA included delivering value for money for taxpayers. Mr Smith said there were strategic discussions at a senior level about taking steps to prevent excessive profits in the market. I accept the evidence of Sir Peter and Mr Smith that there was a concern about excessive profits being made by PTPs from public funds. There seems to have been no secret about this. The revised Trilantic offer referred to above at paragraph 111 recited this legitimate SFA concern.

170. I reject the allegation that Sir Peter and others at the SFA held a grudge or held any significant personal animosity against Peter Marples. I accept Sir Peter's evidence, and that of Mr Smith, that they did not.

171. There is more force, in my judgment, in the contention that Sir Peter intended the Decision Letter to discourage Trilantic from proceeding with the acquisition.

172. Sir Peter's evidence was that Decision Letter was written in the terms it was written for the reasons set out in it. I am satisfied, however, that the Decision Letter was written with the real purpose of discouraging Trilantic from proceeding with the acquisition. My reasons are as follows:

a. There was clearly a tension between the PTPs' profit making objective and the SFA's strategic desire to prevent excessive profit being made from public funds. The Trilantic Acquisition represented a move by private equity into the sector in anticipation of the potential for very significant new growth and profits from the introduction of the levy. The business plan envisaged significant future profits and the value being paid for the business reflected that. Sir Peter was at pains to understand what value the sellers were taking out of the deal. It is likely that Sir Peter was concerned that the value being placed on 3AAA and the amounts that would be generated for the sellers on a sale were, in his view, excessive. It is likely that he was concerned with the huge anticipated growth in profits after the acquisition under the business plan. The "*blood pressure*" emails show his agitation at 3AAA being so "*cash generative*" and the interest it was attracting from Trilantic as a consequence.

b. Sir Peter then intervened in the SFA's usual process for reviewing a change of control and took personal charge. That intervention was unique and unprecedented. Sir Peter referred to the request for approval as an "*important test case for us*" and anticipated a lot of media publicity. No satisfactory explanation was provided for Sir Peter acting in this way or why this was a test case for the SFA. The most plausible explanation is that Sir Peter was referring to the entry of private equity into the sector in search of profit, in light of the further significant funding that the new levy would bring. The anticipated publicity presumably related to the very large sums being paid for the Company and the significant profit that would be made by the shareholders.

c. Until Sir Peter's decision, nobody else in the SFA involved in Sir Peter's bespoke change of control process had any concern about the acquisition

or that the standard letter should be sent. The clear recommendation made to Sir Peter was to send the standard letter. This was thought to be a strong company buying into a strong company.

d. The SFA's concern about Trilantic's business plan appears to have materialised for the first time in the call between Mr Smith, Ms Forton and Sir Peter on 22 December when Sir Peter made his decision. The over ambitious business plan appears to have provided Sir Peter with an excuse, which he latched on to, to not write the standard letter. That any actual concern was overblown is consistent with the fact that neither Sir Peter or the SFA intended to terminate the Funding Agreement if Trilantic went ahead with the transaction or if 3AAA continued with the same business plan. Mr Smith said he had no knowledge of any plans to terminate 3AAA's Funding Agreement. Sir Peter seemed perplexed when asked whether there were any plans to terminate 3AAA's Funding Agreement, saying that a termination of 3AAA's Funding Agreement would have been '*disruptive, or potentially disruptive'* and would have involved a crash team to manage the process, organising other providers to take over the learners, administration to close the books and so forth. That amount of work and the impact on learners was something, he said, which the SFA would wish to avoid.

e. The Decision Letter roamed much further than it needed to. The contract to which clause 5.10 related terminated in July 2017. Sir Peter accepted that the Trilantic Acquisition would have no impact on that contract, not least because of the significant carry over of pre-levy funding. The concerns expressed in the Decision Letter were, he said, really in relation to future years and 3AAA's ability to deliver on future contracts. Clause 5.10 had no bearing on those future contracts, and any concerns as to delivery on future contracts were matters which would arise on a decision to grant a future contract.

f. Sir Peter's concerns as expressed in the Decision Letter presented a pessimistic scenario, and this seems to have been deliberate. The Decision Letter was understood by Joe Cohen as discouraging private capital from entering the sector. Joe Cohen had also understood Sir Peter

was trying to discourage him from making the acquisition when they had met in December 2016.

g. Sir Peter repeatedly referred internally to his expectation that Trilantic would abandon the acquisition as a consequence of the SFA correspondence. When Peter Marples sought to address the SFA concerns, Sir Peter felt the need to make the SFA response "*tougher*" and included information (about 3AAA's failure to meet minimum standards) which was irrelevant to the change of control decision but "*will be news to Trilantic and they will now drop out*".

h. That Sir Peter was trying to discourage private capital from entering the sector explains part of his "*fireworks*" email which ended by saying to Mr Smith that "*we need to take stock and develop a plan for…what kind of market we want – and how should we regulate it in future."* (emphasis added).

173. An intention to discourage Trilantic from continuing with the acquisition is not, however, sufficient to establish targeted malice. There must be a specific intent to injure the Claimants. A desire to prevent excessive profits being made from public funds, or to discourage private capital from entering the sector in search of profits, is not a specific intent to injure anyone, even if that may be a consequence of the action. Sir Peter's intention appears to have been to protect the sector and public funds, not to injure the Claimants.

174. I conclude, therefore, that the claim based on targeted malice fails.

E.5 Discussion - untargeted malice

175. Although there is no valid plea of untargeted malice, I observe that a claim for untargeted malice against Sir Peter would also have failed. Untargeted malice requires the act complained of to be in excess of the powers available to the public officer. If the other elements of this limb are present (knowledge or recklessness as to unlawfulness of the act and the likelihood of consequent harm to the claimants) it is no answer that the act is done for

noble reasons or for the benefit of other members of the public; see *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, *Three Rivers* per Lord Millett at 236B. The cases suggest that this limb is usually engaged when the public officer has knowingly done an act which is not within the letter of the power. In principle, if the act is within the letter of the power, but it is proved that it is done for an improper purpose, it is unlawful. There are at least two reasons why the claim against Sir Peter in untargeted malice would have failed.

176. Firstly, it was quite clear that all of Sir Peter, Mr Smith and Ms Forton believed they had the power to send the Decision Letter. Sir Peter had checked what the relevant powers were and been provided with the wording of clauses 5.9 and 5.10 in November 2016. When Ms Forton brought the matter back to him on 8 December 2016 she did so expressly by reference to the correct contractual question in clause 5.10. The Decision Letter then expressly referred to clauses 5.9 and 5.10. So there was no knowledge on the part of Sir Peter that he had no power to act and no reckless indifference as to whether he did or did not have power.

177. The second point is that the Decision Letter is not unlawful. It is not in excess of the SFA's powers. There is no contractual obligation on the SFA to provide a response to a request for approval, and no contractual duties owed by the SFA to the Company if it does. The SFA's consent to the sale was not required and Trilantic could have continued with the acquisition if it wished. The Decision Letter is simply correspondence from the SFA expressing the views of the SFA, primarily in relation to future contracts which the Company may acquire. The sending of correspondence is clearly within the power of the SFA. The predominant purpose behind the Decision Letter, which caused it to be sent rather than the standard letter, was probably to discourage Trilantic and other private investors from entering the market, but the Claimants have not established that that was an improper purpose, and one which made the Decision Letter unlawful.

F. The claim in negligence

178. The Claimants plead a claim in negligence. Their pleadings also assert a claim for "*negligent misstatement*" but the same particulars are relied upon in support of both and they do not suggest in their submissions that any different principles apply. I treat it as a single claim for negligence.

F.1 A duty of care

179. The tort of negligence is constituted by establishing a legal duty of care owed by the defendant to the claimant to protect the claimant from damage of the kind which has been suffered by the claimant as a foreseeable consequence of a breach of that duty.

180. It is common ground that the fact that the defendant is a public authority is irrelevant in this case to the question of whether or not there is a claim in negligence. Public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles; *N v Poole BC* [2019] UKSC 25, [2020] AC 352 at [64]. The Defendant does not contend that there is legislation that requires such a departure in this case.

181. The categories of negligence are not closed but there are now established situations in which a duty of care is recognised and there are established principles for determining liability.

182. If case law has established that a particular situation gives rise (or does not give rise) to a duty of care, that is dispositive; Lord Reed in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 at [26]. As Lord Browne – Wilkinson explained in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 559-560*: "Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those*

proposing to invest in the company… that decision will apply to all future cases of the same kind".

183. The same point applies to established principles for determining liability; Lord Reed in *Robinson* at [26]. If there are established principles for determining liability, the application of those principles is dispositive, and there is no room to depart from that by reference to some vaguer concept of justice and fairness.

184. It is only in a novel case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised; Lord Reed in *Robinson* at [27]. Faced with a novel situation:

> "*the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is "fair, just and reasonable*".

185. In other words (at [29]):

> *"In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide*

whether the existence of a duty of care would be just and reasonable."

F.2 Pure economic loss

186. One of the established principles of the law of negligence is that there is in general no duty of care to prevent pure economic loss (i.e. financial loss which is not consequent upon physical damage to property or person). Equally established is that the Hedley Byrne principle provides an exception to this general rule. The Hedley Byrne principle, derived from the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, and developed incrementally subsequently, is that a defendant will owe a claimant a duty of care where there has been an assumption of responsibility by the defendant toward the claimant in relation to the performance of a task, and the claimant has reasonably relied on the defendant's proper performance of that task. There are many decisions at the highest level discussing the Hedley Byrne principle: e.g. *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, *NRAM Ltd (formerly NRAM plc) v Steel* [2018] 1 WLR 1190, *Playboy Club London Ltd v Banca Nazionale del Lavaoro SpA* [2018] 1 WLR 4041, *N v Poole BC* [2019] UKSC 25, [2020] AC 780 and *RBS International Ltd v JP SPC4* [2023] AC 461.

187. If the principle applies to a case, it is dispositive of the question of whether a duty of care is to be recognised. In *Henderson* at 181C, Lord Goff said that:

"*the concept [of assumption of responsibility] provides its own explanation why there is no problem in cases of this kind about liability for pure economic loss; for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the Hedley Byrne principle, there*

should be no need to embark upon any further enquiry whether it is "fair, just and reasonable" to impose liability for economic loss…"

188. The principle is capable of incremental development in the manner suggested by Lord Reed in Robinson, while recognising the importance to the principle of the "*legally significant feature*" of an assumption of responsibility. In *NRAM* Lord Wilson, giving the only judgment observed of the Hedley Byrne principle and the concept of an assumption of responsibility:

"*It has therefore become clear that, although it may require cautious incremental development in order to fit cases to which it does not readily apply, this concept remains the foundation of the liability*."

189. The same point was made in *Playboy Club* by Lord Sumption who started his analysis with the Hedley Byrne principle and observed:

"The principle thus established is capable of development. Indeed it has undergone considerable development since 1964, for example to cover omissions and the negligent performance of services. But these have been incremental changes within a consistent framework of principle. One area in which the courts have resisted expanding the scope of liability concerns the person or category of persons to whom the duty is owed. The defendant's voluntary assumption of responsibility remains the foundation of this area of law, as this court recently confirmed after a full review of the later authorities in NRAM Ltd (formerly NRAM plc) v Steel [2018] 1 WLR 1190 , paras 18–24 (Lord Wilson JSC)."

190. The approach I must take, therefore, is to apply the Hedley Byrne principle to this case and determine whether under this established principle there is a duty of care owed by the SFA to the Claimants in the circumstances of this case bearing in mind that the principle may require cautious incremental development to fit a case to which it does not readily apply. The concept of

an assumption of responsibility, however, remains the foundation of any liability.

F.3 Assumption of responsibility

191. In *N v Poole*, Lord Reed DPSC (with whom Baroness Hale PSC, Lord Wilson, Lord Hodge and Lady Black JJSC agreed) summarised the principle of assumption of responsibility.

> *"67. Although the concept of an assumption of responsibility first came to prominence in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 in the context of liability for negligent misstatements causing pure economic loss, the principle which underlay that decision was older and of wider significance (see, for example, Wilkinson v Coverdale (1793) 1Esp 75). Some indication of its width is provided by the speech of Lord Morris of Borth-y-Gest in Hedley Byrne, with which Lord Hodson agreed, at pp 502—503: "My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise. It is also apparent from well-known passages in the speech of Lord Devlin, at pp 528—530: 'I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in Norton v*

Lord Ashburton [1914] AC 932, 972 are "equivalent to contract", that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract . . . I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care . . . Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.'

68. Since Hedley Byrne, the principle has been applied in a variety of situations in which the defendant provided information or advice to the claimant with an undertaking that reasonable care would be taken as to its reliability (either express or implied, usually from the reasonable foreseeability of the claimant's reliance upon the exercise of such care), as for example in Smith v Eric S Bush [1990] 1 AC 831, or undertook the performance of some other task or service for the claimant with an undertaking (express or implied) that reasonable care would be taken, as in Henderson v Merrett Syndicates Ltd and Spring v Guardian Assurance plc [1995] 2AC 296. In the latter case, Lord Goff of Chieveley observed, at p 318: 'All the members of the Appellate Committee in [Hedley Byrne] spoke in terms of the principle resting upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill. Lord Devlin, in particular, stressed that the principle rested upon an assumption of responsibility when he said, at p 531, that "the essence of the matter in the present case and in others of the same type is the acceptance of responsibility" . . . Furthermore, although Hedley Byrne itself was concerned with the provision of information and advice, it is clear that the principle in the case is not so limited and extends to include the performance of other services, as for example the professional services rendered by a solicitor to his client: see, in particular, Lord Devlin, at pp 529—530. Accordingly where the plaintiff entrusts the defendant with

> *the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct.'"*

192. In *RBS International,* the judgment of the Privy Council was given by Lord Hamblen and Lord Burrows JJSC with whom Lord Briggs, Lord Kitchin and Lady Rose JJSC agreed. The judgment having referred to the above summary in *N v Poole* considers the test for determining whether there has been an assumption of responsibility. The test for determining whether responsibility has been assumed by a defendant to a claimant is an objective one; *RBS International* [62]. An objective test means that the primary focus is on exchanges which "*cross the line*" between the defendant and the claimant (or the group of persons of which the claimant is an identifiable member); *RBS International* [63]. At paragraph 64, the Privy Council identified three factors of particular, but not exclusive, relevance to the exercise:

> *"An examination of the case law indicates (see Clerk and Lindsell on Torts, 23rd ed (2021), paras 7-113 to 7-137) that the factors which have been of particular relevance in determining whether there is an assumption of responsibility in relation to a task or service undertaken include: (i) the purpose of the task or service and whether it is for the benefit of the claimant; (ii) the defendant's knowledge and whether it is or ought to be known that the claimant will be relying on the defendant's performance of the task or service with reasonable care; and (iii) the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care."*

F.4 Communications crossing the line

193. As appears from *RBS International* at paragraphs 65 and 68, the absence of communications crossing the line is usually fatal.

194. The Claimants say that there was an assumption of responsibility to them and the other sellers of the parent company by the SFA. There are 13 sellers under the SPA. The Claimants are not the majority in value of the shares which were to be sold. There were no communications that crossed the line between the SFA and that group of 13 sellers, or with anyone expressly authorised to act on their behalf as shareholders.

195. Mr Solomon relied on the following communications with Peter Marples;

a. Ms Forton's emails and conversations with Peter Marples asking for information about the sale. From these exchanges, Ms Forton and the SFA knew the basic terms of the proposed SPA including the valuation placed on the business by Trilantic and in broad terms the sums to be invested by Trilantic and the sums to be reinvested and to be extracted by the sellers.
b. Her emails and calls in November and December 2016 notifying him that a letter approving the change of control was on Sir Peter's desk.
c. Peter Marples informing her that the change of control letter was the final step required before the share sale proceeded, and giving the deadline of 23 December 2022 for a response, and the SFA's acceptance of that position.

196. These are not communications crossing the line between the SFA and the sellers under the SPA. They are communications between the SFA and the Company. The SFA had been asked by the Company to consider whether or not it would exercise a right of termination under a contract between the SFA and the Company. Peter Marples accepted that the change of control request had been made by him on behalf of the Company. These follow up discussions were between the SFA and the Company. The response when it came was addressed to the Company.

197. I observe that, in any event, Ms Forton's request for factual information for the purposes of the SFA's consideration of the request which had been made, and the subsequent communications as to the timing of a response

provide no objective basis for concluding that the SFA had assumed any responsibility to anyone, except at best to provide a response to the Company by 23 December 2016, which it did.

F.5 The task

198. The Company and the SFA were parties to a commercial contract. The contract was for the delivery of a service *by* the Company *to* the SFA. The contract did not involve the SFA being engaged to provide a professional service (as has been the case in most Hedley Byrne cases). On the contrary, the SFA was the Company's customer: it agreed to pay sums of money to the Company in return for the delivery of apprenticeship services.

199. The provision of that contract to which the task ostensibly related, clause 5.10, was a provision conferring an "*absolute discretion*" to terminate the agreement if, in the event of a change of ownership, the SFA considered that "*the change in ownership would prejudice the Contractor's ability to deliver the Services.*" It is inherent in the right of termination that the exercise of the right is capable of being adverse to the interests of the counterparty. That is a feature of the rights and obligations the parties have agreed.

200. The right was never exercised. Instead, the SFA was asked to give an assurance that the right would not be exercised upon the occurrence a particular future event, namely a change of control to Trilantic. There was no provision under clause 5.10 or the commercial contract for such a request to be made and no provision requiring a response.

201. In other words, the task was to decide whether or not to provide a response to the request of the counterparty, and if so whether or not to waive, prospectively, a right enjoyed under a commercial contract with the counterparty. The SFA was under no contractual obligation to the Company to perform the task and owed the Company no contractual duties in respect of the task. Nevertheless, it is said that there was a duty on the part of the

SFA owed to the Claimants, as the indirect owners of the Company, to act with reasonable care in the performance of the task.

202. The SFA was not deploying special skill or knowledge and it was not deploying it for the benefit of the Claimants. In dealings with a counterparty to a commercial contract, the other counterparty is entitled to have regard to its own interests alone. As Hobhouse LJ has observed, "*in a competitive economic society the conduct of one person is always liable to have economic consequences for another and, in principle, economic activity does not have to have regard to the interests of others and is justifiable by the actor having regard to his own interests alone*"; *Perrett v Collins* [1999] PNLR 77 at 84. The SFA's interests include delivering education and skills in accordance with the policies and priorities of the government and providing value for public money. Those interests are in conflict with the commercial and economic interests of the counterparty to the contract and the persons who are directly or indirectly its owners, whose interests are ordinarily to maximise profit. The existence of that conflict of interest is not consistent with an assumption of responsibility by the SFA to the Claimants to take reasonable care in its dealings with the Company.

203. The Claimants were not relying on the SFA for advice as to the meaning of the contract or clause 5.10. They had their own legal advisors. They were perfectly capable of forming their own view as to whether or not a future termination of the contract by the SFA would be a breach of clause 5.10 and what their remedies might be pre-emptively or after the event. The Claimants submit that "*the SFA*" knew that the Claimants were "*relying on its answer to the change of control request in order to proceed with the sale and so were relying on the SFA to provide its answer with reasonable care*". But that goes no further than saying that it was foreseeable that there would be an impact on the Claimants if the decision went against them. That is obviously not enough in itself to give rise to a duty of care.

204. Mr Solomon sought to escape these conclusions by describing the task

which the SFA undertook as the task of making a decision as to whether or not it should approve or refuse the proposed change of control to Trilantic. There is no dispute that there is no power in the contract with the Company for the SFA to refuse and thereby block a change of control. If this is what the SFA was doing, the purported decision had no legal effect. All the parties to the SPA will have known that with the benefit of the expert advice they had and the due diligence they had undertaken. If the parties wished to proceed with the SPA there was nothing to stop them. It was not reasonable to rely on the SFA taking care in relation to that ineffective decision. Moreover, the points made that the SFA's entitlement to act in its own perceived interests and the conflict of interest which exists with the interests of the sellers under the SPA, continue to apply. The Claimants' real complaint is that anything other than approval was likely to spook a buyer in circumstances where the SFA was almost the only source of the Company's funding. But that only highlights the conflict of interest.

F.6 A White v Jones lacuna

205. Mr Solomon relied heavily on *White v Jones* [1995] UKHL 5, [1995] 2 AC 207 and what he described as the "*lacuna*" in this case if there was no duty of care imposed on the SFA. The contract was between the Company and the SFA but it is the Claimants who have suffered loss.

206. In *White v Jones* a solicitor had negligently delayed in drawing up a testator's will until after the testator had died. The House of Lords held that the solicitor owed a duty of care to the beneficiaries in respect of the loss they suffered by reason of not being able to benefit from the will. The duty of care was required by practical justice because of the lacuna that would otherwise arise given that the estate which had a cause of action had suffered no loss, whereas the intended beneficiaries who had suffered the loss had no cause of action. To fill this lacuna, the law should treat the assumption of responsibility owed by a solicitor to its client as extending to the intended beneficiary.

207. The principle has been applied in analogous situations. For example, in *Gorham v British Telecommunications plc* [2000] 1 WLR 2129, a person had received negligent financial advice which had had an adverse impact on the financial position of his wife and children after his death. The rationale was essentially the same as in *White v Jones*, except the defendant was a financial adviser rather than a solicitor. As Pill LJ held at p2141H, "*It is fundamental to the giving and receiving of advice upon a scheme for pension provision and life insurance that the interests of the customer's dependants will arise for consideration. […] Advice was expected and was directed not only to the interests of Mr. Gorham but to the interests of his dependants should he predecease them. The advice was given on the assumption that their interests were involved.*"

208. What created the lacuna in these cases was that A had assumed a contractual responsibility to B but it was C who had suffered the loss. There is no lacuna here. The SFA (A) owed no contractual duties to the Company (B) in respect of the task. It is not in breach of any duties to the Company. If the Claimants (C) have suffered loss, it is not because of a breach of a duty owed to someone else (B) who has not. The mere fact that A has caused C loss does not mean that a remedy must be fashioned to find A liable. As Lord Wright explained *Grant v Australian Knitting Mills* [1936] AC 85 at 103:

> *"It is essential in English law that the duty [of care] should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: …if the act involves a lack of due care .. no case of actionable negligence will arise unless the duty to be careful exists.*"

209. Further, it is a hallmark of the *White v Jones* line of cases that the services A undertook to provide B, was for the benefit of C. That is also not the case here; see paragraph 202- 203 above.

F.7 Conclusion on duty of care

210. I conclude that there was no duty of care owed by the SFA to the Claimants in relation to the Decision Letter. In the absence of a finding as to the

existence of a duty of care and its scope, it is pointless to attempt to consider whether such a duty has been breached.

G. Loss

211. If the Claimants had succeeded in establishing liability, they would have been entitled to a sum that would put them in the position they would have been if there had been no breach. Assuming that that means the transaction would have completed, the comparison is between (i) the consideration they would have received if they had sold the shares, and (ii) the value of the shares that they in fact retained.

212. Mr Davidson says, and the Claimants do not dispute, that the liquidation of the Company rendered the value of the Claimants' shares in its parent valueless. The liquidation was caused by the ESFA terminating its contract with the Company (thereby ending its main source of revenue), and there is no suggestion in these proceedings that it was not entitled to do so.

213. The Claimants' case is that their shares had already been devalued before then by the Decision Letter. They say the Decision Letter had a sudden and catastrophic impact on the value of their shares because they were thereafter unsaleable. This is premised on Mr Khan's evidence that the Decision Letter would have had to be disclosed to any future buyer of 3AAA and would have put them off risking time and money into developing an alternative proposal. In cross-examination he explained that his view was that the reasons given in the Decision Letter were not Sir Peter's real reasons for not approving the change of control, that there was "*something else going on*", and that knowing these circumstances he personally would not have got involved in trying to find another purchaser.

214. This case is flawed.

215. Firstly, the Decision Letter did not prevent a sale of the shares. The SFA's blessing of the sale was not required. Anyone who wished to buy the Company could not be prevented by the SFA from buying the Company. There was therefore a market for the shares.

216. Secondly, the Decision Letter was not at the time regarded as either a bar to obtaining the SFA's blessing or as having made the company unsaleable. Trilantic were not initially put off from proceeding with the sale, and Mr Khan, Mr Cohen and Ms McEvoy-Robinson could see clearly that what seemed to be required to get the SFA's blessing was a business plan to meet Sir Peter's pessimistic scenario and a commitment on the part of Trilantic not to walk away in a disorderly exit if it came to pass. It was for Trilantic to assess how likely that pessimistic scenario was, and whether it wished to provide those commitments. It did not, but another purchaser might have. It is apparent from the documents relating to Star Capital that Mr Marples himself did not think that the business had been rendered permanently unsaleable and in April 2017 had placed an enterprise value on the business of £115 million (greater than Trilantic had agreed to pay) and between March and October 2017 was engaging with Star Capital's potential interest.

217. Thirdly, I accept Mr Davidson's expert evidence that the Decision Letter had "*no effect on the value of the business*" because "*the marketplace for the sale of the Company was unchanged from before to after the refusal letter*". I accept his expert evidence that the value of the company was the same before and after the Decision Letter. That is an opinion which accords with common sense. The business was as profitable the day before the Decision Letter as it was the day after. The market was unchanged. Trilantic's perception of the risks may have been changed, but the risks facing the business before the Decision Letter were the same as those it faced after the Decision Letter.

218. Fourthly, a key element of the pessimistic scenario in the Decision Letter had disappeared by December 2017 when the Non-Levy Cap was dropped. A prospective purchaser who was shown the Decision Letter in due diligence would have reasoned that the outlook had changed since the letter had been written and there was more certainty as to the availability of non-levy funding. Mr Khan's personal reluctance to get involved in another sale because there was "*something else going on*" with Sir Peter would not have held back other middle men who had no such personal knowledge, but in any event it was public knowledge by the Spring of 2017 that Sir Peter was

retiring in November 2017. Any special factor because of Sir Peter's leadership of the SFA ceased to have effect on the value of the Company's shares after his retirement.

219. If the Claimants had succeeded in establishing liability, I would have found that they had not established that the Decision Letter rendered their shares unsaleable and had not established an entitlement to damages calculated on that basis.

H. Comments on Quantum

220. Quantification of damages does not therefore arise, but for completeness I set out my observations on three areas on which there was argument.

H.1 "Net Cash Consideration"

221. The Claimants' pleaded case seeks the sale proceeds that they would have received had the Trilantic Acquisition completed, said to comprise (i) £26,752,979 being the "*Net Cash Consideration*" as defined in the SPA which would have been immediately received on completion, and (ii) a *"lost … chance of converting"* £10,271,389 in *"roll over loan notes"*:

222. There are discrepancies between the cash sums pleaded and particularised and the sums the Claimants say in a table in their Closing Submissions are disclosed by the SPA. The most significant discrepancy is in respect of Peter Marples where instead of the pleaded sum of £6,379,962.07 being payable on completion, there was Net Cash Consideration of £16,942 with the remaining sums being used to discharge director's loans or debts agreed as part of the transaction, as well as sums being held on escrow pending audited accounts and in respect of tax liabilities. The terms of these escrow accounts are not clear because the relevant documentation, such as the Tax Covenant, is not available. There is no pleaded claim for these elements of deferred cash consideration and, in circumstances where the company became insolvent in 2018, there is uncertainty as to whether these elements would have benefitted Peter Marples and what value should be placed upon them.

There were further significant sums alleged to form part of the cash consideration for Sarah Marples and Lee Marples which have not been pleaded.

223. In respect of the pleaded claim for the Net Cash Consideration in respect of Peter Marples, the Claimants have only proved on the balance of probabilities that he was expected to receive £16,942 immediately on completion. Of the pleaded claim for Net Cash Consideration of £26,652,979, the Claimants have therefore only proved on the balance of probabilities that the amounts immediately payable on completion would have been £20,289,958.93.

224. As for the rollover notes the position is even less clear. No rollover loan note documentation is available so as to be able to assess its terms as to what was payable and when. The Trilantic '*revised offer*' appears to suggest that the total contingent amount payable to the shareholders was to be £12m, and that it was to be subject to a variable contingency based on the Company achieving revenue from non-levy activities of at least £85m in 2017/18 and 2018/19. That target was aggressive, significantly in excess of the non-levy projections in the Trilantic business plan which Trilantic had said were too ambitious and highly unlikely to be achievable. The management team acknowledged the target would be a "*significant challenge to meet*". The Company's actual non-levy revenue was in the event far lower (approximately £21.6m in 2017/18). In their written closing submissions the Claimants tried to extrapolate from a draft fund flow document which had been prepared at the end of November 2016 that the Marples family (excluding Lee Marples) were intended to receive some £9,319,379 in "*owners rollover notes*" in addition to their share of contingent rollover loan notes with Lee Marples receiving "*management roll over*" loan notes. The Claimants acknowledge that none of these figures match or reconcile with the SPA, or perhaps more pertinently, the pleaded claim for £10,274,539. While they say the pleaded claim is for these owner or management rollover notes, they continue to face the insurmountable obstacle that there is no evidence at all of the terms of the owners and management roll over notes and in what circumstances they would have paid out. Peter and Lee Marples

gave no evidence about them. There is no evidence, for example, that the loan notes would have been paid before the company became insolvent.

225. The Claimants have failed to prove the pleaded claim to a lost chance to realise loan notes.

H.2 Value of Claimants' shares in December 2016

226. Mr Davidson's expert opinion is that the company was worth £2 million in December 2016. I do not accept that opinion.

227. The starting point is the Trilantic enterprise valuation of £67 million, although by the time of the revised proposal it had effectively been reduced by £12 million being taken off the table and converted into contingent loan notes which were highly unlikely to achieve the conditions. Arguably, even £55 million is potentially too high as Trilantic had qualms and concluded that it was not willing to go ahead with the transaction at that price and because the deal as structured included the roll over into owners and management loan notes of a significant part of the headline enterprise value, the terms of which are not known, and it is impossible to place a value of any discount for deferral and uncertainty. Nevertheless the Trilantic proposal provides a ball park for the value of the company.

228. Mr Davidson is critical of Trilantic's valuation and of Trilantic's apparent willingness to accept 3AAA's projections for growth which Mr Davidson says were unrealistic. However Trilantic was a large and successful private equity fund which had done considerable due diligence. It had moved during the process from an opening offer of £100 million to £67 million, no doubt because it was better informed. I do not accept Mr Davidson's assessment that Trilantic became a special purchaser when the levy-cap was announced because it had become so invested in the proposed transaction that it could not walk away. Mr Davidson confirmed that he was referring to Trilantic acting illogically and uncommercially because of emotional and psychological drivers. I do not accept that is at all likely of a significant private equity fund. In fact Trilantic reassessed the deal with its Investment Committee because the investment thesis had changed and the revised offer

it reverted with effectively took £12 million off the enterprise value. And, it then did walk away. There is no evidence at all of Trilantic acting uncommercially.

229. Mr Davidson placed a figure of £2 million for the true value of 3AAA "*based on actual performance*" before and after the Decision Letter. He sought to reinforce that conclusion by pointing to errors in the accounts which he calculated would have led to an account restatement claim under the SPA, which would have led to the repayment to Trilantic of some £24.45m. In cross-examination, he accepted making a simple mathematical error in thinking this would have left the shareholders with £2-3m and accepted that it would have left them with £17.5m in cash and loan notes. This analysis did not support his valuation and I do not accept his opinion as to the value of 3AAA.

H.3 The significance of data manipulation

230. The Defence pleads at paragraph 82.3.3:

*"On 10 September 2018, the ESFA wrote to the Company to inform it that the ESFA was suspending all contracts with the Company. This decision followed an investigation by the ESFA into the Company's affairs, which had revealed substantial grounds for believing that the Company had (i) manipulated the ILR data it submitted to ESFA in a way which artificially inflated the Company's QAR and led to the Company obtaining funding to which it was not entitled and/or accessing funding before it was entitled to the same ("**the Data Manipulation**"); and (ii) retained funding which it should have paid onwards to employers ("**the Wrongful Retention**")".*

231. At paragraph 82.3.5 it pleads that the ESFA terminated the Company's contracts because of the findings of Data Manipulation and Wrongful Retention.

232. Then at 83.2 the plea of its relevance to this case is as follows:

"83.2. Even had the TLP Acquisition completed in late 2016 or early 2017,

the purchaser would have been entitled to redress from the Claimants (a) upon discovery of the Data Manipulation and Wrongful Retention and/or upon the ESFA's decision to terminate in contracts with the Company on the basis of the same."

233. The Claimants objected to this in their Reply as wholly unparticularised and maintained those submissions at trial. I accept those submissions.

234. In relation to '*data manipulation'* there is no pleading of: (a) any facts to show that the '*data manipulation*' actually took place, as opposed to the SFA's opinion that there were substantial grounds for believing that it had; (b) any of the underlying facts which the investigation or SFA relied on to reach its view; (c) any facts or particulars to found the allegations of manipulation or that the QAR was artificially inflated.

235. In relation to '*wrongful retention*', there is no pleading of: (a) what sums were allegedly retained; (b) on what basis it is said they were wrongfully retained; or (c) what type of '*wrongful'* conduct is alleged.

236. Nor is it pleaded: (a) what *'redress'* Trilantic is alleged to have been entitled to; (b) what facts those claims would have been based on; (c) whether Trilantic would have brought that claim; (d) whether that claim would have succeeded, or would have had a chance of success (and, if so, what chance); (e) the amount (if any) which Trilantic would have been entitled to recover from that claim, or (f) the effect (if any) that would have had on the Claimants' loss.

237. The Defendant explained for the first time what *'redress'* she said Trilantic could have sought for data manipulation in her skeleton argument for trial, alleging for the first time that Trilantic could have claimed for breaches of two warranties given by the sellers, including the Claimants, in the Trilantic SPA: (a) warranty 12.2.8 that 3AAA '*is not, and has not been, in material breach of*' any contract with the SFA [A/45/1253]; (b) warranty 23.1.1 that 3AAA has conducted its business '*in accordance with the requirements of all laws, regulations and funding rules applicable to the Business and the Group'*. In my judgment it is in the circumstances of this case simply too

late to attempt to particularise a complex argument on loss in the skeleton argument. There has been no opportunity for the Claimants to consider and plead what defences they might have to such a claim, or whether they might have had a contribution or indemnity claim against other Sellers or third parties.

238. I should say that the Defendant submitted that it was not necessary for the court to decide if data manipulation had taken place and what is relevant is that the ESFA would have terminated the contracts. This is plainly wrong: the Defendant must establish that Trilantic would have claimed for alleged breaches of warranty caused by data manipulation and what its prospects of success against the Claimants (and other Sellers) were. To do that the Court has to consider what the evidence of alleged data manipulation was. It was open to the Sellers to dispute that there was a breach of the warranty in the SPA whether or not ESFA's termination had been challenged by the Company or not.

239. Finally, I observe that it is not possible on the evidence before the Court to reach a conclusion on the allegations of Data Manipulation and Wrongful Retention, without making the mistake of relying on the opinion and hearsay evidence in reports prepared or contributed to by people at the SFA and BDO not all of whom were available for cross-examination, on underlying information and data which was not available to the Court or the parties and which had not been examined by court appointed experts.

240. In paragraph 84.3 there is a further plea as follows:

"84.3. Alternatively, if the price agreed in the TLP Acquisition was higher than the true value of the Claimants' shares, the Defendant will say that any valuation of the Company, the Group Company's shares [3AAA Group] in the Company and/or the Claimants' shares in the Group Company as at December 2016 which did not take into account the Data Manipulation and Wrongful Retention would have been flawed. Paragraph 83.2 above is repeated."

241. In addition to the points made above as to the failure to particularise Data

Manipulation and Wrongful retention, there is no plea as to whether and if so why the TLP Acquisition was for higher than the true value of the shares, or particulars of what Data Manipulation or Wrongful Retention prior to the TLP Acquisition was not, but should have been, taken into account and what impact that was said to have.

242. In closing submissions (paragraphs 335.1-3), the Defendant appeared to accept that this plea added nothing to the breach of warranty plea if the data manipulation had arisen before the TLP Acquisition, and was irrelevant if the data manipulation arose after. I disregard it.

I. Conclusion

243. The claim is dismissed.