IN THE HIGH COURT OF JUSTICE **Claim No: BL-2022-002117**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

BETWEEN:

(1) MR PETER MARPLES

(2) MRS SARAH MARPLES

(3) MR LEE MARPLES

(4) MR THOMAS MARPLES

Claimants

- and –

SECRETARY OF STATE FOR EDUCATION

Defendant

DEFENCE

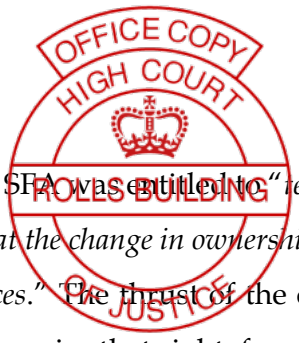
Introduction and Summary

1. Unless otherwise stated:

   1.1. this Defence adopts the definitions used in the Amended Particulars of Claim; and

   1.2. the allegations in the Amended Particulars of Claim are denied.

2. The claim concerns a decision by the Skills Funding Agency ("**the SFA**") in December 2016 that it would terminate the Funding Agreement between it and the Company if a proposed change of ownership of the Company took place ("**the Decision**").



3. Under Clause 5.10 of that Funding Agreement the SFA was entitled 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.*" The thrust of the claim is that the SFA was wrong to decide that it would exercise that right, for example because it "*applied the wrong contractual test*" (paragraph 75(b)), "*considered and relied upon factors that were not relevant to the clause 5.10 test*" (paragraph 75(c)), and "*failed to consider the factors that were relevant to the clause 5.10 [test]*" (paragraph 75(f)).

4. Despite the claim revolving around a disputed exercise of contractual rights, there is no claim for breach of contract; the Claimants were not parties to the relevant agreement; and in any event the agreement expressly excluded liability for indirect losses such as those claimed in these proceedings. Nor is there any public law claim (which, if brought, would be several years out of time and would not allow for recovery of damages). Instead, the Claimants plead claims in negligent misstatement, negligence, and misfeasance in public office. Those claims suffer from a series of fundamental flaws.

5. As for the negligence-related claims:

   5.1. **First**, there is no properly pleaded claim of negligent misstatement at all. It is nowhere alleged that the SFA, or anybody else, made a false statement of fact on which the Claimants relied. That is a necessary component of the tort without which there is no viable claim.

   5.2. **Second**, both the negligent misstatement claim and the negligence claim are premised on the idea that the SFA, in exercising a right under a contract, owed a duty of care to its contractual counterparty's parent company's shareholders. There is no room for any such duty of care, which would conflict with fundamental principles of privity of contract, the corporate veil and public policy.

5.3. **Third**, the Claimants' own case as to causation is that the consequence of the SFA's decision was that the proposed sale of shares by the Claimants did not take place. On the assumption that the proposed sale was an arm's length transaction at market value – and not at an inflated price – that represents no loss to the Claimants, because they retained the shares. The main reason why the Claimants subsequently suffered any loss is because the value of their shares fell for other reasons, in particular when the Company went into administration in October 2018. That loss is unrelated to the pleaded causes of action and is not recoverable.

6. As for the misfeasance claim, there is simply no proper basis for the plea; the primary facts pleaded are incapable of justifying an inference that the SFA acted maliciously or in bad faith with the intention of harming the Claimants. There is not even a properly pleaded case as to what harm was intended; as mentioned above, on the Claimants' own case the effect of the SFA's decision was that the Claimants retained their shareholding in the Company and the Funding Agreement between the SFA and the Company continued. Nor is there a consistent approach to the question of who had the necessary intention; the pleading refers amorphously to a "*hostile sentiment*" on the part of "*the senior leadership of the ESFA*", including (i) in a period many years before the relevant decision-maker was appointed to his role, and (ii) in a period before either the ESFA or the SFA existed.

7. In addition to those fundamental flaws, the claim is unsustainable in its details. It is denied for the reasons set out in more detail below that the SFA acted negligently, with malice, or in bad faith. In particular, the Decision was based principally on a concern that the business plan put forward by the prospective purchaser (TLP) was based on unrealistic expectations as to future growth that were incompatible with impending changes in the funding environment, such that the pursuit by a new buyer of that level of growth would undermine the stability of the Company and jeopardise the stable provision of services. That concern was reasonable, justified and held in good faith.

Preliminary matters

8. The Particulars of Claim refer to "*the ESFA*" and "*the ESFA leadership*" throughout, even though (i) there was no such organisation until April 2017, and (ii) the leadership of the SFA (the entity with which the claims are in fact concerned) changed during the period to which the pleading relates. Except where stated otherwise below, it is denied that allegations of that kind are capable of supporting a plea as to (i) the knowledge or motives of the SFA or of any particular individual, or (ii) the relationship between the SFA and the Claimants, at the time of the Decision in December 2016.

9. Paragraph 2 is admitted. As to paragraph 3, it is denied that the Defendant has failed to observe the Practice Direction on Pre-Action Conduct. The Claimant's Letter of Claim was sent on 1 December 2022, shortly before the six-year anniversary of the date of the SFA's decision, and proposed that the Defendant enter into a standstill agreement preserving the Claimants' right to sue notwithstanding the imminent expiry of the limitation period. The Defendant was not willing to enter into such an agreement, and the Practice Direction does not oblige it to do so. Given the lateness of the Claimant's letter it was not possible for any substantial dialogue to take place before the limitation period was due to expire.

Background and Parties

The Claimants

10. As to paragraphs 4-9:

    10.1. It is admitted that Peter Marples was a Senior Partner at KPMG earlier in his career, and that he was a shareholder in the Group Company at the time of the proposed sale.

10.2. It is denied that Peter Marples became well-known to the ESFA as a result of the matters alleged in paragraph 5. Mr Marples left KPMG in 2002, many years before the ESFA (or the SFA) existed.

10.3. It is admitted that Lee Marples was involved in liaising with the SFA (not the ESFA) in respect of the Company's funding contracts after 2011.

10.4. The remainder of paragraphs 4-9 are not admitted as they are outside the Defendant's knowledge.

The Defendant

11. As to paragraph 10:

11.1. The first sentence is denied. The SFA was created in 2010 following the closure of the Learning and Skills Council ("**the LSC**"). Section 81 of the Apprenticeships, Skills, Children and Learning Act 2009 created the statutory office of Chief Executive of Skills Funding, a corporation sole, appointed by the Secretary of State for Business, Innovation and Skills and supported by the SFA. The post of Chief Executive of Skills Funding was abolished by s.64 Deregulation Act 2015, with the relevant functions being transferred to the Secretary of State. On 31 March 2017 the functions of the SFA were transferred, along with those of the Education Funding Agency, to ESFA, which was created on 1 April 2017.

11.2. Notwithstanding the above, for the purposes of these proceedings (and so far as is relevant to the matters pleaded in the Amended Particulars of Claim) it is admitted that the Defendant is liable for the acts and omissions of the SFA and ESFA.

The Company

Background, Incorporation and Initial Development

12. Except that it is admitted that Peter Marples acquired an interest in Assa, paragraph 11 is not admitted as the matters alleged are outside the Defendant's knowledge.

13. As to paragraph 12:

    13.1. It is admitted that Mr Marples sold shares in Assa to Carter & Carter in 2005, that Carter & Carter was a public company, and that the fact of the transaction was reported publicly.

    13.2. It is denied that the sale of those shares was "*to the knowledge of the ESFA at the time*", or that the "*ESFA was aware that Mr Marples had exited a private education company by way of a lucrative share sale*". Neither the ESFA nor the SFA existed at the time.

    13.3. The remainder of the paragraph is not admitted as the matters alleged are outside the Defendant's knowledge.

14. As to paragraph 13:

    14.1. It is admitted that Phillip Carter died in May 2007 and that Mr Marples resigned as a director of Carter & Carter in June 2007.

    14.2. No admissions are made as to the remainder of the paragraph, as the matters alleged are outside the Defendant's knowledge.

    14.3. The intended relevance of those matters is not clear. To the extent that they are relied upon as evidencing Mr Marples's success in developing the business of a provider of training services, that is denied.

14.3.1. While the share price of Carter & Carter reached £12 in May 2007, it had fallen by over 75% by the beginning of July 2007 and its shares were suspended from trading in October 2007.

14.3.2. In November 2007 Carter & Carter issued a statement explaining that it would not be able to submit accounts for the year ended 31 July 2007 because its auditors were investigating irregularities, adding: "*The quality of some apprentice learner records has been insufficient to support funding claims made to the Learning and Skills Council (LSC). Work carried out on behalf of the board also reveals deficiencies in learner records at the group's skills division, including falsification of some supporting documentation. […] A full review of the company's procedures is underway to confirm the extent of the issues and to ensure they do not occur again*."

14.3.3. The company went into administration in March 2008.

14.4. The first sentence of paragraph 14 is admitted. The rest of the paragraph is not admitted as the matters alleged are outside the Defendant's knowledge.

15. Paragraph 15 is not admitted as the matters alleged are outside the Defendant's knowledge.

16. As to paragraph 16:

16.1. The allegation of a "*hostile sentiment*" or "*unjustified personal animus*" on the part of "*senior leadership of the ESFA*" is denied.

16.2. The allegation is too vague to respond to in any greater detail. It does not identify (i) the period to which it relates, or (ii) the person or persons in respect of whom the allegation is made. It is not even possible to tell whether the allegation, which refers to the senior leadership of the ESFA

(which did not exist at the time), should be construed as referring to the senior leadership of the LSC or the SFA.

16.3. The allegation in the second sentence is unparticularised and impossible to respond to.

16.4. It is denied that "*Mr Marples had demonstrated his competence in the sector over many years*". Paragraph 14.3 above is repeated. Further, Mr Marples had been a director of Silver Track Training Ltd, a provider of rail engineering apprenticeships, between February 2010 and June 2011, and had been a shareholder until November 2011; funding errors were subsequently identified in respect of the period during which he had been a director.

16.5. It is not admitted that the Company "*was successfully delivering education and training on behalf of its counterparties*". The period to which that allegation relates is unclear and the allegation is too vague to respond to.

Further Growth

17. Paragraph 17 is admitted.

18. As to paragraph 18:

18.1. It is admitted that the Company was successful in attracting SME employers who wished to enrol employed apprentices within the public education system making use of public funding.

18.2. No admissions are made as to whether that success was "*in large part due to Mr Marples' experience and contacts in the sector*".

18.3. The last sentence is admitted. The use of the term "*non-levy funding*" arose from the introduction of the Apprenticeship Levy in April 2017, which involved a fundamental change in the nature of apprenticeship funding.

18.3.1. Prior to April 2017, funding for employed apprentices was provided from general taxation.

18.3.2. From April 2017 onwards, that funding was instead primarily raised by way of a levy on employers with an annual pay bill of more than £3 million, equating to 0.5% of the total pay bill.

18.3.3. Under those arrangements, each levy-paying employer was able to access a digital account from which they could pay for apprenticeships up to a value of their levy contribution plus 10%. That spending, including the additional 10%, was funded from levy contributions. As a result, the funds available to the SFA to be allocated to providers were likely to, and indeed did, decrease significantly when the levy was introduced; those funds were limited to amounts which levy-paying employers did not spend on apprenticeships for their own benefit.

19. As to paragraph 19:

19.1. The Defendant repeats that the ESFA did not exist at this time, and came into existence in April 2017.

19.2. The allegation as to an "*investigation*" is unclear, in particular as to whether the investigation was into the Company or the (unidentified) "*college affiliates*". In the circumstances, the second, third, fourth and fifth sentences are not admitted. However, in 2011-2012 the Defendant investigated arrangements under which apprentices at five colleges were declared as being employed by the Company (such that the identity or existence of the ultimate employer was unclear), and that investigation resulted in the ending of such arrangements.

19.3. If the first sentence is intended to insinuate that the alleged investigation was a reaction to the Company's success, that is denied. The SFA

undertook investigations where it had reason to believe that there were matters requiring investigation.

19.4. It is admitted that the SFA entered into a direct funding arrangement with the Company under which the Company received £300,000 for the year 2012-13.

20. As to paragraph 20, it is admitted that the Company grew rapidly from 2013. The rest of the paragraph is not admitted.

Funding Agreement

21. Paragraph 21 is admitted, save that the SFA awarded the contracts.

22. Paragraph 22 is admitted. The fact that the Company had made arrangements involving costs that could not be met even after a substantial increase in its funding from the SFA is indicative of unsustainable activity.

23. As to paragraph 23:

23.1. It is admitted that the SFA entered into a "*Value for Money*" arrangement with the Company in 2015. There were in fact two such arrangements: the first, documented in a letter from Tony Allen of the SFA dated 9 April 2015, provided for a 5% reduction in the amount payable for IT Level 3 apprentices aged 16-18 starting in 2015/16; the second, documented in a letter from Karen Riley of the SFA dated 11 December 2015, provided for a 10% reduction in respect of IT Level 3 and Digital Trailblazer Level 3 and 4 apprentices aged 16-18 starting between 1 February 2016 and 31 July 2016, and a 15% reduction for those starting thereafter.

23.2. It is denied that any such arrangement involved "*a guaranteed growth of the funding contract*".

23.2.1. The letter from Tony Allen on 9 April 2015 said: "*Further to your discussions with myself and Paul Blott, I write to explain that although*

the Agency cannot amend your initial 16-18 allocation for 2015/16 which has been calculated using a national methodology, we (Paul and I) will support at the first opportunity a substantiated case for growth of £10 million, this will be subject to the standard Agency growth process and budget availability. The case for growth would be subject to our normal terms and conditions and is reliant upon continued strong performance, high quality delivery and financial assurance and probity." That plainly did not constitute a "*guarantee*"; it was an indication that Mr Allen and Mr Blott, who were not the relevant decision-makers, would support a "*substantiated case for growth*".

23.2.2. Further, the letter from Karen Riley on 11 December 2015 said: "*We understand that 3aaa have plans to realise significant growth over the next 12–18 months. As you are aware, the Agency is unable to provide any guarantee of allocation size and growth. However, your increased contract value this year will positively affect your allocation in 2016-17 and your focus on government priorities, quality and value for money to the public purse are key factors which will work in your favour for the prioritisation of any future growth cases.*" That expressly rejected the idea of a "*guarantee*" of growth.

23.3. It is admitted that the Funding Agreement and the "*Value for Money*" arrangement continued into 2017. It is also admitted that the SFA's decision to enter into them "*demonstrated […] confidence in the Company's ability to provide good-quality training and education*", in that the SFA at the time of entering into them believed that the Company would be able to discharge its obligations under them.

23.4. As to the last sentence, no admissions are made as to the Claimants' knowledge of other "*Value for Money*" arrangements, but the SFA had entered into such arrangements with some other providers, such as learndirect and PERA.

24. Paragraph 24 is admitted.

25. As to paragraph 25, it is admitted that the Company was given an 'Outstanding' grade following its inspection by Ofsted in October 2014, and that that grade was unchanged between then and October 2018 when the Company went into liquidation. The assertion that it "*maintained its status as an Outstanding provider*" is potentially misleading; its status as an Outstanding provider persisted by default until Ofsted carried out another inspection and reached a different view, and at the relevant time it would have been unusual for an 'Outstanding' provider to be inspected again for at least four years. Otherwise, paragraph 25 is admitted.

Proposed Acquisition by Inflexion

26. As to paragraph 26, it is admitted that Mr Marples began exploring a buyout by Inflexion Private Equity Partners in 2015. The allegations as to the Company's financial footing and future prospects are too imprecise to plead to.

27. As to paragraph 27:

    27.1. It is denied that "*the ESFA approved the Inflexion Acquisition*". The question for the SFA was whether, in the event that a change of ownership of a provider took place, it would exercise its contractual right to terminate its funding agreement with that provider.

    27.2. On 27 August 2015, Kirsty Evans (Deputy Director – Funding Policy Implementation) wrote to Mr Marples: "*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.*"

27.3. That decision was taken by reference to the circumstances relating to that proposed change of ownership. Having regard to those circumstances, the SFA did not consider that it was necessary to terminate the Funding Agreement upon the proposed change of ownership, albeit it reserved its position as to whether it might be necessary to do so subsequently.

27.4. It is unclear whether the second sentence of paragraph 27 is an allegation that the ESFA communicated or otherwise recorded the alleged understanding. However, for the reasons given above, the SFA's relevant power was a contractual right in certain circumstances to terminate its funding agreement with a provider following such an acquisition.

27.5. The third sentence is denied. The SFA's decision was taken by reference to the particular circumstances before it at the time, rather than as the consequence of an overriding principle of the kind alleged.

28. Paragraph 28 is not admitted as the matters alleged are outside the Defendant's knowledge.

29. Paragraph 29 is admitted. For the avoidance of doubt, no admissions are made as to the accuracy of the contents of the IM. In particular, it is denied that the Company had any "special relationship" with the SFA.

Nick Linford and the KPMG Investigation

30. As to paragraph 30:

30.1. It is admitted that Mr Linford at all material times ran the website 'FE Week' and that he was formerly Director of Planning and Funding at Lewisham and Southwark College.

30.2. The Defendant cannot plead to the motivations of Mr Linford but, insofar as it is alleged that through FE Week he "*purports to 'police' apprenticeship providers*" on behalf of the SFA or ESFA, that allegation is denied. FE Week is a journalistic website which publishes content relating to the

further education and skills sector. In doing so it regularly carries criticism of a range of individuals and organisations, including public sector providers, funding agencies, and government.

30.3. The allegations as to views expressed by Mr Linford, as set out in subparagraphs (a) to (c), are unclear, and in any event do not evidence a 'policing' of apprenticeship providers or a particular hostility to private sector involvement. If anything, the views alleged to have been expressed at (a) and (c), so far as the allegations can be understood, appear to constitute criticisms of the SFA.

31. As to paragraph 31, it is admitted that Mr Linford contacted the SFA expressing concerns about the Company. Otherwise, paragraph 31 is not admitted as it is outside the Defendant's knowledge.

32. As to paragraph 32:

32.1. It is admitted that, having been made aware of concerns about the accuracy of what the Company had reported to the SFA in order to obtain funding, the SFA commissioned KPMG to investigate that issue.

32.2. It is unclear whether paragraph 32 is intended to allege that it was inappropriate for the SFA to do so. If it is, that allegation is denied. It was obviously appropriate for the SFA to investigate an issue of that kind notwithstanding that the information raising the issue originated from documents prepared for the internal use of the Company or others.

32.3. As to the last sentence, there was no inconsistency as alleged. The SFA was alerted to the concerns by Mr Linford, a journalist, who had been given information by an undisclosed source. Mr Linford was obviously not the original source of the information, and (as the last sentence of paragraph 32 makes clear) the SFA was open about Mr Linford's involvement.

33. Paragraph 33 is admitted, except that, as the Defendant understands it, the matters in question were not "*Mr Linford's allegations*"; they were issues raised by Mr Linford's source.

34. As to paragraph 34:

    34.1. Except for the characterisation of the investigation as a "*dawn raid*" (which is too imprecise to plead to), the first two sentences are admitted. If the reference to the investigation being "*unannounced*" is intended to imply that it was inappropriate for the SFA to carry out an investigation in this way, that is denied.

    34.2. It is denied that "*the investigation was largely duplicative of*" the audit commissioned in July 2015. In particular, the audit did not correct or bring to the SFA's attention the overpayment of more than £300,000 attributable to the various issues with the Company's practices; but for the investigation that overpayment would not have been corrected.

    34.3. As to the last sentence, it is unclear to whom and when the Claimants allege they provided the terms of reference and report. Pending such clarification is not possible to plead further.

35. Paragraph 35 is admitted. The KPMG investigation found significant discrepancies in the evidence relied upon by the Company in support of funding claims, from which the SFA concluded that over £300,000 paid to the Company should be repaid.

36. As to paragraph 36:

    36.1. It is admitted that the SFA bore the costs of the KPMG investigation. To the extent that it is alleged that it did so because the KPMG investigation uncovered no significant issues, that is denied. When commissioning investigations into providers, which was a rare step for the SFA to take, it would directly commission an investigation to ensure the objectivity

and independence of the process and did not routinely re-charge the provider.

36.2. As to the last three sentences of paragraph 36:

36.2.1. It is denied that the ESFA "*continued to increase funding to the Company by over 25 percent for 2016-17*". The Company's funding *allocation* – i.e. the maximum amount that might be payable to it, subject to its delivering the services so as to justify such payment – increased between 2015/16 and 2016/17. However, that was subject to delivery by the Company, and the amount actually paid to the Company fell between 2015/16 and 2016/17.

36.2.2. It is denied for the same reason that there was any increased "*commitment*" for 2017/18, or that the Company had "*secured over £45 million of funding for the following 24 months*". Any such funding was subject to delivery.

36.2.3. The last sentence is too imprecise to plead to: it is not clear what is meant by "*largest*".

37. As to paragraph 37, it is admitted that Mr Linford threatened to publish an article that was critical of the Company (and also of the SFA), that the Company sent him a 'cease and desist' letter, and that in the end he did not publish it. Otherwise, the paragraph is not admitted as the matters alleged are outside the Defendant's knowledge.

38. As to paragraph 38:

38.1. No admissions are made as to the Company's alleged "*concern*".

38.2. If the Company was concerned as alleged, that concern was unwarranted. Mr Linford and Mr Smith did not "*meet regularly*", and Mr Linford did not exert any influence over Mr Smith, Mr Lauener or the SFA.

38.3. Ms Sherry does not recall making the comment alleged in the last sentence. However, if it was made, it is not indicative of Mr Linford influencing the SFA to take an adverse view of the Company, if anything it indicates that he had no such influence.

39. As to paragraph 39:

39.1. It is admitted that the SFA suspended payments to the Company while it was under investigation by KPMG. This was normal and appropriate in circumstances where an investigation was underway which might result in money needing to be repaid (as the KPMG investigation in fact did). Clause 17.6 of the Funding Agreement provided: "*THE SFA reserves the right to suspend payments to THE CONTRACTOR under the Contract where data quality gives rise to concern about the accuracy of the data provided by THE CONTRACTOR*". Further, Clause 19.3 provided: "*Where THE SFA has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Contract […] it shall have the right to suspend payments and/or require THE CONTRACTOR to suspend recruitment of Learners under this Contract […]*".

39.2. It is also admitted that the Company was unable to start new learners while under investigation. Again, this was normal and appropriate, and provided for by Clause 19.3 of the Funding Agreement.

39.3. The first, third and fifth sentences are not admitted as the matters alleged are outside the Defendant's knowledge.

39.4. As to the last sentence:

39.4.1. The reference to February 2019 should be to February 2016.

39.4.2. The SFA did not "*fail to make payment*"; it suspended payments while an investigation was ongoing into, among other things, possible overpayments.

39.4.3. Mr Mapp's request to Mr Lauener was for special treatment, i.e., the making of payments to the Company notwithstanding the ongoing investigation. He made that request repeatedly and corresponded with Mr Lauener extensively about it.

39.4.4. It is admitted that on one such occasion Mr Lauener said that if the Company's cash flow position was critical Mr Marples should put more money into the Company. It was not unreasonable or inappropriate for the SFA to expect providers to manage their financial affairs so as not to be put at risk of collapse by a temporary suspension of payments pending the outcome of a perfectly proper and justified investigation.

40. As to paragraph 40:

40.1. The first sentence is admitted.

40.2. During March 2016 Mr Mapp and Mr Lauener corresponded extensively about the possibility of the SFA lifting the suspension of payments in advance of the conclusion of the KPMG investigation to assist the Company with its cash flow difficulties.

40.3. On 17 March 2016, Mr Mapp told Mr Lauener that the Company would have to enter administration on 23 March if payment had not been made by then. With the benefit of that information, Mr Lauener arranged for expedited consideration to be given to the question of whether the suspension could be lifted in part in view of the status of the KPMG investigation at that point. Once the SFA had satisfied itself to a sufficient degree of confidence that the KPMG investigation was unlikely to result in a reclaim of more than £308,269, Mr Lauener notified Mr Mapp that a substantial payment would be made. Mr Lauener also made special arrangements to bring the payment forward from the normal payment date of 6 April to 31 March, to assist the Company with its financial

difficulties. On 31 March 2016 the SFA paid the Company approximately £3.87 million on that basis.

40.4. As the foregoing demonstrates, the SFA, and Mr Lauener in particular, made extensive efforts to assist the Company with its financial difficulties, with the result that a payment of approximately £3.87 million was made and the Company was able to avoid administration.

40.5. Accordingly, as to the last two sentences:

40.5.1. It is denied that £3.5 million was 'owed' by the SFA; payments under the Funding Agreement had been suspended as the terms of the Funding Agreement permitted.

40.5.2. The sum ultimately released by the SFA was approximately £3.87 million, not £3.5 million.

40.5.3. The insinuation that Mr Lauener agreed to release that money as a result of being asked to do so by PwC is denied for the reasons given above.

41. The fact that the Company was unable to deal with a temporary suspension of payments without going into administration raised concerns as to the sustainability of its financial position, particularly in circumstances where it was at that stage clear that the funding environment was due to change fundamentally with the introduction of the Apprenticeship Levy in April 2017. Accordingly, in his letter of 1 April 2016 in which he explained the payment of £3.87m that had been made, Mr Lauener wrote to Mr Mapp:

> *"In terms of your 2016/17 allocation, I will consider and confirm this after our proposed meeting. For planning purposes you should consider the information we have recently published about the baselines we have used to calculate allocations, and growth factors applied. But I should make it clear at this point that I do not expect you to continue to plan for rapid growth in 2016/17. I would like us to discuss at our meeting your strategy for consolidating your current delivery position, and how you plan to make the transition to a levy funded environment from April 2017."*

Approach by TLP

42. Paragraphs 41 to 44 are not admitted as the matters alleged are outside the Defendants' knowledge.

43. As to paragraph 45, the allegation that an acquisition by TLP was *"an attractive proposition"* is too imprecise to plead to. As to the specific matters relied upon:

    43.1. It is admitted that the proposed acquisition involved a retention of existing management.

    43.2. It is denied that the existing management were particularly "*successful*" or that their retention signified particular "*stability*"; the Company had only recently (i) been the subject of an investigation which had highlighted irregularities resulting in a requirement to return over £300,000 of funding, and (ii) almost been put into administration as a result of cash flow problems.

    43.3. The SFA had no concerns as to Trilantic's financial health.

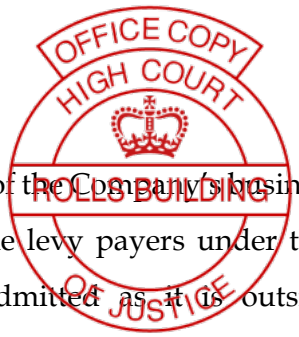
    43.4. Otherwise the matters alleged are not admitted as they are outside the Defendant's knowledge.

Non-Levy Cap

44. Paragraph 46 is admitted, except that:

    44.1. The alleged meeting may have taken place in April 2016 rather than May 2016. Mr Lauener and Ms Evans were concerned that the Company had not sufficiently appreciated the impact that the move to the Apprenticeship Levy system would have on its existing business model and was projecting rapid continued growth which would be unrealistic within the non-levy market.

    44.2. The last sentence refers to the "*levy market*" having "*represented […] 15% of the Company's business*". Since the levy did not yet exist at that stage this



is understood to be an allegation that 15% of the Company's business was with employers who were due to become levy payers under the new arrangements. That allegation is not admitted as it is outside the Defendant's knowledge.

45. Paragraph 47 is not admitted as the matters alleged are outside the Defendant's knowledge.

46. As to paragraphs 48-49, it is admitted that the Funding Agreement provided for substantial funding while it remained in place. There was, however, no "*guarantee*" that the Company would receive at least £45 million of funding, in particular because any payments would have been subject to the Company delivering what was required of it. The last sentence of paragraph 49 does not follow: the ability of a provider to thrive under the new levy-based arrangements depended on more than the financial value of its existing non-levy-based work.

47. As to paragraph 50, it is admitted that the Company had monthly meetings with Ms Sherry. This was at the instigation of the SFA, following the KPMG investigation and the issues it had raised. It is not admitted that the Company was "*entirely transparent about its levy-focussed business plans*", as this is outside the Defendant's knowledge. The rest of the paragraph is admitted.

48. Paragraph 51 is not admitted as the matters alleged are outside the Defendant's knowledge.

49. As to paragraph 52:

    49.1. It is denied that the Company had "*attracted approximately £20 million in levy funding*" by November 2016. The levy arrangements were not introduced until April 2017.

    49.2. The second sentence is not admitted as it is outside the Defendant's knowledge.

50. Paragraph 53 is denied. A meeting took place between Ms Evans and Di McEvoy-Robinson of the Company on 24 November 2016 (not 25 November as alleged). Ms Evans did not make any of the comments alleged. In particular, as pleaded above, Ms Evans was concerned that the Company had had insufficient regard to the impact of the impending funding changes on the viability of its existing business model. She would not have, and did not, say the Company "*should continue with its current plans*" or that it should "*not be concerned and nothing has really changed*".

51. Paragraph 54 is denied. Ms Evans' understanding of the rationale for the £5 million cap was that it was intended to mitigate against the risk of concentrating funding within a small number of providers who might then be unable to deliver their commitments and who might drive smaller providers out of the market thereby reducing employer choice. The second sentence is denied: the cap was not intended to, or anticipated to, cause any change in the balance between public and private sector providers.

52. As to paragraph 55:

    52.1. The first two sentences are admitted.

    52.2. It is denied that "*by December 2016 it was widely known within the ESFA that the cap would not be implemented*". At all times material to the Decision, the cap was current policy, and the intention and expectation was that it would be implemented. A procurement exercise was conducted in early 2017, which was due to conclude in March 2017, on the basis of the cap being a feature of the funding arrangements.

    52.3. As to the specific matters relied upon:

        52.3.1. The precise figures in subparagraph (a) are not admitted, but it is admitted that the effect of the cap would have been to limit larger providers. This was an intended effect. It was inevitable that funding for new non-levy learners would reduce overall

and the SFA wished to maintain a mix of providers operating within the non-levy apprenticeship market.

52.3.2. The "*statutory requirement*" alleged in subparagraph (b) is not particularised and the description is vague, but it appears to be a reference to s.83A Apprenticeships, Skills, Children and Learning Act 2009. It is denied, if alleged, that that (or any other) statutory provision prevented a "*reduction of non-levy funding*".

52.3.3. It is denied that it was "*widely accepted in the industry that the reduction of non-levy funding was inconceivable*"; such a reduction was an almost inevitable feature of the new funding arrangements.

52.3.4. As to subparagraph (c), it is denied (as set out above) that the relevant statements were made. In any event those statements do not support the allegation.

52.3.5. Subparagraph (d) is unparticularised and impossible to respond to.

Proposed change of control of the Company

Contractual background

53. Paragraph 56 is admitted.

54. Paragraph 57 is denied. It was not inevitable that proposed purchasers would seek assurances from the SFA before agreeing to a purchase, or that they would be unwilling to take a risk in the event that firm assurances were not provided. In the present case, according to the plea at paragraph 72, TLP as late as 22 December 2016 merely expressed a 'preference' to await a decision from the SFA before completing the purchase of the Claimants' shares. In practice, however, where a proposed purchaser did seek such an assurance and the SFA not only

declined to give such an assurance but expressed an intention to exercise its right to cancel, it would be unlikely that the purchaser would proceed.

55. As to paragraph 58:

55.1. As to subparagraph (a), whilst the SFA did not have the right to approve a change of control, it is admitted that it was commonplace for providers to seek the assurance of the SFA that it would not immediately exercise its right to terminate the Contract under clause 5.10 for the reasons set out in paragraph 54 above.

55.2. Subparagraph (b) is not admitted as the matters alleged are outside the Defendant's knowledge.

56. As to paragraph 59:

56.1. The allegation as to the knowledge of "*the ESFA and its leadership*" is too vague to plead to: see paragraph 8 above.

56.2. It is admitted that Mr Lauener, the Chief Executive of the SFA at the relevant time, was aware of the Company and Peter Marples. He had no real knowledge of the other Claimants or their interest in the Company.

57. Paragraph 60 is unclear. If it means that the ESFA and its leadership were aware that shareholders in a privately owned company might seek to sell their shares, it is admitted that Mr Lauener was aware of that fact. Otherwise, it is too imprecise to plead to.

58. Paragraph 61 is denied.

58.1. It was understood by Mr Lauener that, if a prospective purchaser had sought an assurance that the SFA would not terminate its funding agreement in the event of a change of ownership and the SFA communicated its intention that it *would* terminate the funding

agreement in that event (and could not be persuaded otherwise), that would likely result in the cancellation of the relevant acquisition.

58.2. It does not follow that it was foreseeable that the SFA's response to a request for such an assurance would "*cause substantial loss and damage to the Claimants*". First, even if the SFA communicated its intention to terminate, it was open to the provider and the prospective buyer to address the relevant concern and ask again. Second, on the assumption that (i) the acquisition of the Company was due it to being an attractive going concern; and (ii) the terms of the transaction in question would involve the buyer paying the market value of the shares, the cancellation of that transaction would not in any event have any net adverse effect on the shareholders' economic position. They would not receive the sale price, but they would retain ownership of the shares.

58.3. It also does not follow that it was foreseeable that a lack of care in relation to the SFA's response to a request for assurances would cause such loss. First, the relevant contractual provision conferred on the SFA an "*absolute discretion*"; it did not suggest that the decision was one which was required to be exercised with due care by reference to the interests of shareholders or anyone else. Second, to the extent that the SFA exercised the relevant right (or gave an indication of an intention to exercise that right) in a manner that was outside the bounds of its "*absolute discretion*", it was open to the Company to challenge that decision under the contract.

59. Paragraph 62 is denied. There was no "*special and/or proximate relationship*" between the SFA and the Claimants.

59.1. The SFA had no relationship with the Second and Fourth Claimants at all, and a minimal relationship with the Third Claimant.

59.2. As regards the First Claimant:

59.2.1. The allegations based on "*the ESFA and its leadership*" are inappropriately vague: see paragraph 8 above.

59.2.2. It is denied, if alleged, that Mr Lauener had "*closely followed the career and conduct of Mr Marples*". Mr Lauener was aware of Mr Marples, but his main dealings with Mr Marples's businesses related to his dealings with the Company in his capacity as the Chief Executive of the SFA (not least those relating to the KPMG investigation and the Company's financial difficulties in March 2016).

59.2.3. The fourth sentence is admitted as set out above, but does not evidence a special or proximate relationship between the SFA and Mr Marples.

59.2.4. It is admitted that the Company's dealings with the SFA were a "*fundamental component*" of its business. That is true of any provider who relies on funding from the SFA. It does not give rise to a special or proximate relationship between the SFA and the Company, let alone the Company's parent's shareholders.

59.2.5. Similarly, it is admitted that the relationship between the SFA and the Company was "*developed […] by those behind the Company*", which included Mr Marples "*and those answerable to him*", but those matters do not evidence a special or proximate relationship between Mr Marples and the SFA.

59.2.6. The seventh sentence is denied. The SFA had no "*hostility to large private providers*", and it had no special "*confidence in the owners and managers of the Company*" beyond a normal expectation that the Company would discharge its obligations. In any event, even if established, that confidence would not give rise to a special and proximate relationship.

59.2.7. The last sentence is denied. Clause 5.10 was a standard provision included in funding agreements of this kind entered into by the SFA.

59.3. Paragraph 63 is denied.

59.3.1. Irrespective of the particular points relied upon, the existence of a duty of care owed by the SFA, when exercising contractual rights, to the shareholders of the parent company of its contractual counterparty would be contrary to established law. It would be inconsistent with the law of privity of contract and the principle of separate legal personality of companies.

59.3.2. It would be particularly inappropriate and contrary to public policy to recognise such a duty in circumstances where the party exercising the right is a public body making a decision in its "*absolute discretion*" as to the proper use of public funds.

59.3.3. As to the particular matters pleaded in paragraph 63:

59.3.3.1. Subparagraph (a) is admitted to the extent that the Company's business depended on its being allocated public funding. That is true of a large number of service providers, and does not justify the imposition of a duty of care on public authorities as regards the shareholders of the companies to whom they may or may not allocate funding.

59.3.3.2. Subparagraph (b) is denied for the reasons set out at paragraph 54 above. In any event the existence of a carefully-defined contractual right to terminate an agreement in the event of a change of control is not in itself a sufficient basis for recognising a duty of care, especially one owed to non-parties.

59.3.3.3. Subparagraph (c) is denied. The SFA considered changes of ownership on the facts of each case, as it was entitled to do. The allegation of 'legitimate expectation' is irrelevant to the private law claims being advanced.

59.3.3.4. Subparagraph (d) is denied as a matter of fact, as set out above. In any event, even if established, tacit approval of the Company's business plans and direct engagement with the Company would not support the existence of a duty of care owed to the Company's parent's shareholders.

59.3.3.5. Subparagraph (e) is admitted. The fact that a particular decision may have consequences for others is not a sufficient basis for finding a duty of care.

60. Paragraph 64 is denied.

60.1. The SFA did not assume any responsibility to the Claimants in relation to the exercise of its right under Clause 5.10. That right arose in the context of its relationship with the Company, not the Claimants.

60.2. The SFA did not assume any responsibility to the Company either. Clause 5.10 conferred a *right* on the SFA, exercisable in its absolute discretion. It did not task the SFA with performing a particular function for the Company's benefit.

Factors relevant to change of control

61. Paragraph 65 is denied. It places an unjustified gloss on the language of Clause 5.10. The matters relevant to a decision under Clause 5.10 are not limited to the three matters identified by the Claimants; they include anything capable of being relevant to whether "*the change in ownership would prejudice THE*

CONTRACTOR'S ability to deliver the Services". The SFA was entitled to take into account matters such as whether the change in ownership appeared to be premised on unrealistic expectations of growth on the part of the prospective buyer, such that the pursuit of those expectations would jeopardise the Company's stability.

62. Paragraph 66 is denied.

62.1. As explained in its letter dated 23 December 2016, the SFA's Decision followed discussions with the Company and with Joe Cohen of TLP, including at a meeting on 13 December 2016, and the provision of additional information following that meeting.

62.2. That additional information included a presentation entitled "*Trilantic Capital Partners – Follow-Up – Business Plan Details*", dated 14 December 2016. Page 2 of that presentation set out projections for year-on-year growth of 44% between 2016/17 and 2017/18, 19% between 2017/18 and 2018/19, and 10% between 2018/19 and 2019/20. A note attached to those projections stated that the projected revenues in respect of 2019/20 (£55.6m, as against a 2016/17 figure of £29.7m) were anticipated to consist of 30% from levy activities and 70% from the non-levy market.

62.3. The SFA directed its consideration explicitly at the question whether "*a change of control will prejudice delivery of our contracts both now and in the future*". It had regard to concerns about the viability of the "Business Plan", referring to the presentation circulated by TLP on 14 December 2016. It highlighted that "*the Business Plan appears to be premised on continued delivery, and growth of, non-levy activity*", and commented: "*There is no reference as to how this latter growth will be achieved – from an increase in market share through acquisition, whether it is commercial activity or an assumption that non-levy delivery will continue to be funded into the future. We are concerned that key assumptions made in the business plan may not be*

achieved and there was little information and no sensitivity analysis to give us assurance of the make-up of the financial projections."

62.4. The letter went on to explain that (i) in view of the introduction of the levy arrangements, "*there is no guarantee that the current aggregate level of public funding going into SMEs will continue to be available*", (ii) "*there is also no guarantee of long term central funding of apprenticeships for non-levy paying employers*", and (iii) in view of the £5m cap which was then planned to be introduced, "*no provider will be given more than an initial allocation of £5m*".

62.5. The letter concluded: "*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.*"

62.6. The concerns identified by the SFA were reasonable, and the decision reached was a reasonable one. In any event it was within the bounds of the SFA's "*absolute discretion*" under Clause 5.10.

62.7. None of the points identified in subparagraphs (a) to (e) is relevant to, or provided an answer to, the concerns identified and relied upon by the SFA. In addition:

62.7.1. While it is admitted that the Company had an Ofsted Outstanding rating, it is denied that it had a "*good and long-standing reputation in the sector*", in view of the matters revealed by the KPMG investigation and its financial difficulties in March 2016.

62.7.2. Subparagraph (b) is denied; the Company had faced serious cash flow difficulties as recently as March 2016, and did not appear to the SFA to have acknowledged the impact of the impending changes to the funding arrangements on its business model, as pleaded above.

62.7.3. It is admitted that TLP was reputable and financially sound, but no admissions are made as to the quality of its due diligence, and as set out above the SFA was legitimately concerned about the viability of the financial projections that had been produced.

62.7.4. Subparagraph (d) is denied for the reasons set out above.

62.7.5. Subparagraph (e) is admitted, but did not answer the SFA's concerns.

63. Paragraph 67 is denied for the reasons set out above.

Request for Approval

64. Paragraphs 68 and 69 are admitted (except that no admissions are made as to the existence of a condition precedent, as above).

65. Paragraph 70 is admitted, in that the Company did not refuse to comply with requests for information and documentation. However, as the SFA explained in the letter of 23 December 2016, the information provided was insufficient to assuage the SFA's concerns in relation to Clause 5.10.

66. As to paragraph 71:

66.1. The meeting pleaded to have taken place on 14 December 2016 in fact took place on 13 December 2016.

66.2. It is not admitted that no concerns were expressed during the course of the meetings in November and December 2016. If no such concerns were expressed, that would in any event be consistent with the SFA considering the request with an open mind and without pre-judgement.

66.3. Mr Lauener (not Ms Forton) requested information from TLP about its financial forecasts on 13 December 2016, as set out above, and this was provided on 14 December 2016.

67. Paragraph 72 is not admitted as the matters alleged are outside the Defendant's knowledge.

68. As to the first sentence of paragraph 73, the Claimants are required to prove the telephone call and contents pleaded. The letter refusing consent was drafted by Ms Forton on 22 December 2016 and at no time before that letter was drafted did Mr Lauener indicate to Ms Forton, or any other person, that he intended to respond to the Company in a way that was inconsistent with the contents of the letter.

ESFA's Decision

69. It is admitted that the SFA sent the letter pleaded at paragraph 74. The Defendant will rely on the whole letter.

Negligent Misstatement / Negligence

70. Paragraph 75 is denied.

    70.1. The plea of negligent misstatement is defective. It does not identify any false statement of fact on which the Claimants, or anyone else, relied and as a result of which they suffered loss. The particulars that are pleaded are fundamentally incompatible with a plea of negligent misstatement.

    70.2. Subparagraph (a) is denied. The letter explicitly set out the correct contractual question and proceeded to answer it.

    70.3. As to subparagraph (b), it is admitted that the letter referred to "*a risk that a change of control will prejudice delivery of our contracts*". The difference between that and the contractual language is immaterial, particularly in the context of an absolute discretion. The SFA correctly identified that the focus of the analysis was on the impact of the change of ownership.

    70.4. Subparagraph (c) is denied. The Business Plan was put forward by TLP. The SFA was concerned that that Business Plan was premised on

unrealistic growth, and that if a buyer acquired the business with the expectation of achieving that level of growth it might not have sufficient regard to the need for stable provision of services in the new funding environment. The last two sentences are denied for the reasons given above.

70.5. Subparagraph (d) is denied. The letter did not say or suggest that there would be "*little or no funding available for SME funding*". It said that there was "*no guarantee that the current aggregate level of public funding going into SMEs will continue to be available*". That was a legitimate and reasonable concern in the context of the Business Plan put forward by TLP.

70.6. Subparagraph (e) is denied. The letter made no such suggestion. On the contrary, it referred to the cap as operating at "*the initial allocation stage*".

70.7. Subparagraph (f) is denied. Even assuming that the matters pleaded in subparagraphs (i) to (vi) were factually correct – as to which see above – the SFA did not fail to give sufficient consideration to any material factor in the context of its discretionary decision.

70.8. Subparagraph (g) is denied. Each request for an assurance as to whether the right under Clause 5.10 would be exercised was considered by reference to the facts and circumstances relevant to the case in question.

70.9. As to subparagraph (h), the Defendant joins issue with the words "*The ESFA [SFA] consented…*" for the reasons set out herein, it was not the role of the SFA to *consent* to changes of control of providers. The relevance of the funding model in respect of the pleaded acquisitions is unclear. In each case, the SFA exercised its contractual discretion under the terms of the respective funding agreements and indicated it did not intend to terminate the contracts. It is admitted that the companies particularised in paragraph 75(h)(i) to (xi) were acquired on those dates, save that RJD Partners aquired Babington, and not the other way around, as pleaded.

71. Paragraph 76 is denied for the same reasons. Further and in any event, even if a duty of care had been owed to the Claimants (which is denied for the reasons pleaded above), the standard of care owed to the Claimants in tort could not properly or logically have been more exacting than the contractual provision made between the SFA and the Company, i.e. to reach a decision in the SFA's "*absolute discretion*". It is denied, if it be alleged, that the Decision failed to accord with any relevant constraint on the exercise of that discretion.

72. As to paragraph 77, it is admitted that the SFA sent a further letter on 7 January 2017 stating that it had considered the further information provided but that it remained of the same view. To the extent that it is impliedly alleged that the SFA did not give adequate consideration to that further information because it replied "*a few days later*", that is denied; the SFA was keen to act without delay so as to avoid any prolonged period of uncertainty, but in doing so gave proper consideration to the material provided. The last sentence is denied for the same reasons as given above.

73. The allegations repeated by paragraph 78 are likewise denied.

Misfeasance in public office

74. The plea of misfeasance in public office falls short of the requirements of such a plea. In particular:

    74.1. it does not identify with proper precision the individuals who are alleged to have acted with deliberate malice or bad faith towards the Claimants;

    74.2. it does not properly identify the harm which it is alleged those individuals intended to cause the Claimants, or on what basis; and,

    74.3. it does not plead primary facts from which deliberate malice or bad faith is the most likely inference.

75. Paragraph 81 is admitted.

76. Paragraph 82 is denied. It is impermissible to aggregate the mental states of different natural persons for the purposes of alleged misfeasance in public office. The relevant individual who made the Decision was Peter Lauener. Allegations as to the other individuals listed in the paragraph are irrelevant to the claim and in any event (like the allegations against Mr Lauener) improperly and insufficiently particularised.

77. Mr Lauener was the Chief Executive of the SFA at the relevant time, having been appointed to that role in October 2014. He was at all times receptive to the role of independent providers in providing work-based learning. He was also receptive in principle to the role of the Company in that regard; in particular:

    77.1. He accepted a personal invitation from Mr Marples and Ms McEvoy-Robinson to visit the Company in July 2015.

    77.2. Shortly before that visit he sent the Minister for Skills (Nick Boles MP), through his Private Secretary, a note explaining that he knew the First Claimant from past work and that the Company was a *"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."* He also said, *"Subject to looking at their data more, this might be the kind of organisation we would seek to expland in the future because they do pull new employers in…"*.

    77.3. As pleaded at paragraph 40.3 above, he had gone out of his way to assist the Company in relation to its cash flow difficulties in March/April 2016 by expediting the consideration of whether sums suspended during the KPMG investigation could be released in advance of the conclusion of that investigation, arranging for the release of such sums, and then arranging for them to be paid in advance of the normal payment run.

78. Paragraph 83 is denied.

    78.1. Subparagraph (a) is not a proper particular of the allegation of malice or bad faith. It is unacceptably vague and does not relate to any identifiable

person. Subject to that, it is denied that there was any such "*degree of hostility*" towards private providers, the Company, or Mr Marples, or that they were considered a "*necessary evil*".

78.2. Subparagraph (b) is denied. There was no such animosity. On the contrary, the SFA awarded several contracts to the Company while Mr Marples was its principal ultimate shareholder.

78.3. Subparagraph (c) is denied. Paragraph 77 above is repeated.

78.4. Subparagraph (d) is denied. There were no "*regular meetings*" with Mr Linford, Mr Linford had no special "*access*" to the ESFA's staff, and his alleged "*views*" were not 'promoted' or 'fostered' within the SFA.

78.5. The first sentence of subparagraph (e) is denied. The SFA had no reason not to support successful providers, but it was legitimately concerned that the Company's growth projections were unsustainable and premised on a high level of future funding that had not been guaranteed and would likely not be available. The remainder of subparagraph (e) is not admitted as the matters alleged are outside the Defendant's knowledge.

78.6. The first two sentences of subparagraph (f) are admitted, as pleaded above. The suspension of payments during an investigation of this kind was normal and appropriate. To the extent that the third sentence is intended to imply that the SFA waited until the Company went into administration before paying, that is denied for the reasons set out above.

78.7. The first sentence of subparagraph (g) is denied. The Defendant has terminated the contract of another provider upon a proposed change of control. In any event, that is irrelevant; each case was considered by reference to its own facts. The second sentence is denied for the reasons set out in more detail above.

78.8. Subparagraph (h) appears to rephrase the allegations made in paragraph 75. They are denied for the same reasons. The allegation that the decision-makers were "*subjectively reckless as to the lawfulness of their acts*" is entirely unsupported by any particulars, should not have been pleaded, and is denied.

78.9. The factual premise of subparagraph (i) is denied, as set out above. The final sentence is in any event denied; since the ultimate decision-maker was Mr Lauener, the change of position (had there been one) would be capable of being explained by Mr Lauener taking a different view from Ms Forton.

78.10. Subparagraphs (j) and (k) appear to be no more than summaries or restatements of other allegations made previously. They are denied for the same reasons.

79. The allegations repeated by paragraph 84 are likewise denied.

Vicarious Liability

80. As to paragraphs 85-86, it is admitted for the purposes of the issues in these proceedings that the SFA was vicariously liable for the acts of its employees in the course of their employment.

Causation

81. As to paragraph 87, it is denied that the SFA knew or ought reasonably to have known that the letter would result in the abandonment of the acquisition. The letter expressly left open the possibility that further information might persuade the SFA to reconsider. The second and third sentences are admitted.

82. Paragraphs 88 to 90 are denied. The circumstances of the SFA and Mr Lauener's involvement in the TLP Acquisition and the reasons for the SFA's Decision are set out in detail in paragraph 62 of this Defence.

82.1. In an email dated 11 January 2017, Joe Cohen of TLP wrote to Mr Lauener thanking him for meeting with him in December 2016 and stated: "*Regrettably, in light of the market outlook that is explicitly detailed in your correspondence, it has become clear that our basic funding assumption for the SME apprentice market, at minimum, being maintained for the length of this Parliament is viewed by your Department as "excessively optimistic". As you can appreciate, given the market that 3aaa operates in coupled with the views expressed by your Department around the Trilantic Business Plan, we are left with no alternative but to terminate our discussions with the Company.*"

82.2. It is clear from this email that the market conditions and deficiencies in the funding assumptions made by it, presumably on the basis of information given to it by the Company, were the cause of TLP withdrawing from the TLP Acquisition.

82.3. Following the withdrawal of TLP, the Claimants were left with a valuable shareholding in the Company, which continued to be a going concern.

83. The Defendant denies the Refusal Letter was causative of the loss allegedly suffered by the Claimants.

Loss and damage

84. As to paragraphs 91 and 92, it is denied that the Claimants have suffered loss and damage as alleged.

84.1. The particular matters in subparagraphs (a) and (b), and Schedule 1, are not admitted as the matters alleged are outside the Defendant's knowledge.

84.2. However, the plea is not a proper plea of loss and damage, because it does not acknowledge that the Net Cash Consideration was the consideration for the Claimants transferring their shares, which they were not in the event required to do. On the assumption that the price

agreed in the TLP Acquisition represented the market value of the shares, rather than an inflated price, the Claimants suffered no net financial loss by reason of not being able to complete the sale.

Interest

85. It is denied that the Claimants (a) are entitled to any sum on which interest should accrue, and/or (b) should be awarded any interest, and/or (c) should receive interest at the claimed rate of 8%.

JAMES SEGAN KC

MICHAEL WALSH

TOM CLEAVER

STATEMENT OF TRUTH

The Defendant believes that the facts stated in this Defence are true.

The Defendant understands that proceedings for contempt of court may be brought against anyone who makes, or causes to be made a false statement in a document verified by a Statement of Truth without an honest belief in its truth.

Signed:

KIRSTY EVANS

Regions and Providers Director, Department for Education

Dated this 3rd day of April 2023

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