

IN THE HIGH COURT OF JUSTICE
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

PARTICULARS OF CLAIM

Introduction

1. By these proceedings the Claimants claim damages for negligent misstatement, negligence, and/or misfeasance in public office against the Defendant.
2. The claim arises out of the abortive sale of shares, by the Claimants, in Aspire Achieve Advance Group Limited (the "**Group Company**"), which was the holder of all of the shares in Aspire Achieve Advance Limited ("**the Company**").
3. The Defendant has failed to engage in any substantive pre-action correspondence, or to observe the Practice Direction on Pre-Action Conduct. The Claimants sent a detailed Letter of Claim to the Defendant on 1 December 2022. Rather than deal with the substance of the same, the Defendant invited the Claimants to issue proceedings.



Background and Parties

The Claimants

4. Peter Marples is a successful entrepreneur. Earlier in his career, he was a Senior Partner at KPMG, and ran its global education practice. His work involved consulting for education providers, and he developed the firm's practice to become the leading provider of audit and consultancy services to the further education and independent training sector.
5. During his time at KPMG Mr Marples created the "funding optimisation" service for education providers, which involved the digital audit of funding claim records. The product was well-received. As a result of this, and Mr Marples' other work for KPMG, he became well known in the sector, and to the ESFA.
6. Sarah Marples is a qualified teacher and has held a number of senior positions within the vocational training sector. She was appointed as a director of the Company in 2013 and, as the Company grew into a large private training provider (as detailed below), was involved with the project management of its key 'Train 2 Gain' contract before progressing into a senior quality control role. She later worked as a Special Projects Officer for the Company until her resignation in September 2018.
7. Lee Marples is a qualified chartered accountant who joined the Company in 2009 as its accountant. He then progressed into a number of roles as the Company whilst growing its apprenticeship provision and was appointed as the Company's Finance Director in 2011. As part of his role he was involved in liaising with ESFA in respect of the Company's funding contracts.
8. Thomas Marples joined the Company as an apprentice in 2009 and also trained as an accountant. He was involved in the facilities management side of the Company and was responsible for opening over 30 apprenticeship learning academies over a course of 2 years, thereafter leading the development of the Company's construction academy provision and, since leaving the Company, has helped build an industrial cleaning business.
9. All of the Claimants were shareholders in the Group Company at the time of the abortive sale, as set out more particularly below.

The Defendant

10. At all material times the Defendant was responsible for, and acted through, the Education Skills Funding Agency ("**the ESFA**") of the Department for Education ("**DfE**"), previously known as the "SFA". The Defendant is liable for the acts and omissions of the ESFA.



The Company

Background, Incorporation and Initial Development

11. After leaving KPMG Peter Marples moved into the training sector, and acquired the private sector training provider Assa Training and Learning Limited ("**Assa**") in 2003, by way of management buyout. Assa grew substantially and was awarded Ofsted Grade 1: Outstanding (Adult Learning Inspectorate). It delivered educational growth to young and adult learners across the country, and brought significant value to the sector. Assa also developed (in conjunction with Nissan) the Business Improvement Technique Qualification, a pioneer of the Train 2 Gain programme. Mr Marples was personally heavily involved in the development of the Sport Excellence Apprenticeship Programme, and ran this under contract on behalf of the Premier League.
12. To the knowledge of the ESFA at the time, Mr Marples sold the shares in Assa to Carter & Carter Group Plc ("**Carter & Carter**") in 2005, for approximately £27 million. Accordingly, the ESFA was aware that Mr Marples had exited a private education company by way of a lucrative share sale. Carter & Carter was a public company; the transaction was in the public domain, and of particular interest to those in the sector.
13. Following the share sale, and his exit from Assa, Mr Marples served as the director of strategy for Carter & Carter from 2005 – 2007. In this capacity he was involved in its acquisition of several private training providers. By 2007 Mr Marples had grown Carter & Carter into the largest provider of training in the sector. Its share price had grown from £3 to £12 in less than two years. However, its founder Mr Phillip Carter died in or around May 2007 and, due to a lack of faith in the senior management which would remain and operate without Mr Carter, Mr Marples left his role the following month.
14. Mr Marples incorporated the Company in 2009, alongside Ms Diane McEvoy-Robinson. The Company was conceived as a consultancy, but by 2011 it had transformed into a large private training provider focussing on Train 2 Gain, especially within the logistics sector.
15. The Company enrolled hundreds of adult learners as a subcontract partner, initially with Tamworth and Walsall Colleges.
16. It was during this early period that Mr Marples became aware that a hostile sentiment had developed, on the part of or within the senior leadership of the ESFA, toward him personally, and/or toward the Company. This manifested itself in telephone calls being made by the ESFA leadership to the directors of some of the Company's college partners, to "warn them off" working with the Company. There was no objective reason for such warnings to be given. As set out above, Mr Marples had demonstrated his competence in the sector over many years, and the Company was successfully delivering education and training on behalf of its counterparties. In



the circumstances, this behaviour evidenced an unjustified personal animus on the part of the ESFA's leadership toward Mr Marples and the Company.

Further Growth

17. In and around 2010, in the knowledge that the new Conservative government had indicated its desire for a significant increase in employed apprenticeships, Mr Marples on behalf of the Company developed a business strategy whereby the Company would:

- a. Work with colleges;
- b. Develop apprenticeship courses in the field of IT within those colleges; and
- c. Enrol employed learners on Level 3 apprenticeship courses.

18. In large part due to Mr Marples' experience and contacts in the sector, the Company was highly successful in attracting SME employers who wished to enrol employed apprentices within the public education system, making use of the public funding that was available. (Later, in 2017, this type of funding became known as "**non-levy funding**".)

19. The Company's success brought further scrutiny by the ESFA. In 2012 the ESFA launched an investigation into the "employed relationship" of apprentices engaged with the Company through its college affiliates. No adverse findings were made. The Company was meeting the ESFA's three "priority areas": higher level Apprentices focussed in the 16-19 age group, performance, and quality. Indeed, almost immediately after the conclusion of the investigation, the ESFA offered to enter into a direct contractual relationship with the Company. The Company would thereafter have a direct funding arrangement (not through the learning centres or colleges). It received an initial £300,000 on this basis for the year 2012-13.

20. On receipt of that funding the Company entered a period of rapid growth, enhanced by the introduction in 2013 of accountancy courses alongside its IT offering. The Company opened approximately 30 high-quality academies over the following two years, using leased buildings. On this basis the Company was operationally independent and flexible, whilst having a full educational infrastructure in place. This made the Company unique in the sector. It continued to invest in its development, using the investments made by Mr Marples. The Company carried no debt, and always had a strong financial position, on the basis of the ESFA's own criteria.

Funding Agreement

21. On 27 June 2014, the ESFA awarded the Company:



- a. A 3-year funding agreement, for the period 1 August 2014 to 31 July 2017 (**"the Funding Agreement"**); and
- b. A 1-year funding contract.

22. Despite representing a substantial increase in the Company's funding, these arrangements were nevertheless insufficient to meet the costs of the Company's existing learners. This deficit became a source of continual discussion between the Company and the ESFA.

23. The award of the Funding Agreement demonstrated the ESFA's confidence in the Company's ability to provide good-quality training and education, as did the decision by the ESFA, in 2015, to enter into a "Value for Money" arrangement with the Company, whereby the Company agreed to a lower level of funding per learner, in exchange for a guaranteed growth of the funding contract. This agreement continued into 2017, and the Claimants are unaware of any similar arrangement between the ESFA and other providers.

24. The Company was subject to an Ofsted inspection in October 2014. The resulting report stated, among other things, the following:

"...resources and training equipment are excellent. Trainers and assessors are highly skilled and experienced and make teaching relevant to the workplace... performance management is very strong and, linked with communications and robust quality assurance, enables managers to pursue improvement relentlessly..."

25. The Company was awarded Ofsted Grade 1: Outstanding across all areas. Thereafter it maintained its status as an Outstanding provider throughout the duration of the Funding Agreement (and beyond). In 2015 the Company received 'Apprenticeship4England's' "Large Provider of the Year" award.

Proposed Acquisition by Inflexion

26. The Company having been put on a firm business and financial footing, and with its prospects looking bright, in 2015 Mr Marples looked to secure an exit by way of management buyout, with the involvement of Inflexion Private Equity Partners (**"the Inflexion Acquisition"**).

27. The ESFA approved the Inflexion Acquisition. Indeed, it recognised that it did not have the power not to do so. Presumably, the ESFA must also have recognised that it would have been contrary to its own objectives (and the public interest) to have stood in the way of the transaction, the public sector being so heavily reliant on private providers.

28. The total proceeds that were to be distributed to existing shareholders under the Inflexion Acquisition were approximately £50 million. However, Mr Marples did not consider that the



structure of the acquisition, so far as it related to the future management of the Company, would have suited the needs of the business. The acquisition was therefore aborted by Mr Marples.

29. Although the acquisition did not proceed, an information memorandum prepared during the sale process ("**the IM**") was leaked by an unknown person. This showed an anticipated growth of £30 million - £40 million, and stated that the Company had a "special relationship" with the ESFA.

Nick Linford and the KPMG Investigation

30. Mr Linford was formerly Director of Planning and Funding at Lewisham and Southward Colleges, and, at all material times, ran an online news website called 'FE Week', through which he purports to "police" apprenticeship providers. Mr Linford's hostility to private sector involvement in the public sector is apparent from the content of FE Week. Amongst other things, Mr Linford has expressed the following views:

- a. That the ESFA loses £20 million to private providers;
- b. That there are fears over asset-stripping of colleges by private providers; and
- c. That non-levy tenders are a "bureaucrat's dream" and a "mess" which "has kept the civil servants busy".

31. During the abortive Inflexion Acquisition the Company commissioned a mock funding audit. Again, an unknown person provided a copy of this document to Mr Linford, who in turn made reports to the ESFA about the Company, based on its contents.

32. Despite the obviously confidential nature of the audit report, and the breaches of confidence associated with its provision to Mr Linford, in February 2016 the ESFA nevertheless commissioned KPMG LLP to investigate the Company. The investigation was said to be based on reports from an anonymous whistleblower; in fact, the reports were made by Mr Linford as confirmed to be the case by the Chief Executive of the ESFA, Peter Lauener.

33. Mr Linford's allegations were that the Company had reported incorrect start dates for learners, had artificially inflated success rates by failing to report breaks in learning, and that there was insufficient evidence of apprentices making progress.

34. On 3 February 2016 KPMG attended the Company's office, unannounced, with a letter from Mr Lauener of the ESFA, in what amounted to a "dawn raid". The Company cooperated with KPMG's investigation. Indeed, the investigation was largely duplicative of an external review commissioned by the Company in July 2015, as part of the Inflexion Acquisition, and pursuant



to which the mock audit had been produced. The terms of reference and final report, were shared with the ESFA and/or its contract managers (Messrs Smith and Blott)

35. By its letter to the Company of 24 August 2016, the ESFA confirmed that “there was **no evidence** found of deliberate circumvention of funding rules by 3aaa” (emphasis in original) pursuant to the KPMG investigation.
36. In those circumstances, the ESFA did not look to the Company to meet the costs of the investigation, which it covered itself (in the sum, it is understood, of around £250,000). To the contrary, the ESFA continued to increase funding to the Company, by over 25 percent for 2016-17, with a resulting increased commitment for 2017-18. This commitment meant the Company had secured over £45 million of funding for the following 24 months. The Company was the largest holder of a 16-19 year-old apprenticeship contract in the country, by a considerable margin.
37. Mr Linford was clearly dissatisfied with the turn of events that followed his disclosure of the mock audit report to the ESFA. In July 2016, upon being informed that the KPMG report did not corroborate his allegations, Mr Linford threatened to publish extremely negative articles concerning the Company. As a result, the Company sent a *cease and desist* letter to Mr Linford, who refrained from publishing the articles.
38. Nevertheless, the Company was increasingly concerned about the influence that Mr Linford seemed to exercise over the ESFA, and in particular over Mr Lauener and Mr Smith. It was known that Mr Linford and Mr Smith would meet regularly, although Mr Linford had no formal position in, or contractual relationship with, the ESFA. The Company was informed by the ESFA’s then deputy director, Ms Sherry, that Mr Linford’s scrutiny of the Company had reached an almost obsessive level.
39. The KPMG investigation caused significant harm to the Company. During its course, the ESFA had frozen funding. The Company’s management and resources were diverted away from delivery, towards dealing with the investigation. The Company was unable to recruit new learners in this period. The cashflow position was critical. When the ESFA failed to make payment of £1.5 million in February 2019, Mr Mapp on behalf of the Company contacted Mr Lauener of the ESFA to explain the desperate financial situation, to be told by Mr Lauener that Mr Marples should put more money into the Company.
40. Faced with cashflow problems identified above, the Company’s directors took the decision in March 2016 to place the Company into administration, and appointed PwC. The ESFA owed some £3.5 million to the Company. Within two hours of PwC’s making contact with Mr Lauener, the Company received written confirmation from Mr Lauener that £3.5 million would immediately be released to the Company by the ESFA.



Approach by TLP

41. Trilantic Capital Partners LLP ("**TLP**") approached the Company, via a broker, in May 2016 with a view to acquire the Group Company (and accordingly the Company) via an SPV company named Skills Bidco Limited ("**the TLP Acquisition**"). Any reference to the acquisition of the Company by TLP shall signify the acquisition of the Group Company by the said SPV on behalf of TLP.
42. The proposal was based on equity funding, and did not involve any debt. TLP had significant financial resources, and was in a position to ensure that any future financial and/or market difficulties could be weathered without undue difficulty.
43. The TLP Acquisition was to result in the Claimants selling the following shares:
 - a. Peter Marples: 6,460 A Ordinary, 3,732,464 B Ordinary and 15,600 E Ordinary
 - b. Sarah Marples: 300,000 Z and 7,500 E Ordinary
 - c. Lee Marples: 595 X Ordinary
 - d. Thomas Marples: 2,540 A Ordinary and 9,500 E Ordinary
44. Mr Marples and Mrs McEvoy-Robinson were to retain their management functions, as well as approximately 40 percent of the issued share capital, thereby providing for a period of incentivised management stability. Lord Baker – former Secretary of State for Education – held a senior non-executive position within TLP.
45. In the premises, an acquisition by TLP was an attractive proposition, as TLP enjoyed influence in the sector, a solid financial grounding, and was offering a debt-free purchase which retained existing (and successful) management and therefore stability.

Non-Levy Cap

46. Also in May 2016, following the introduction of the levy funding policy of the ESFA, the Company became aware of an apparent plan by the Department for Education ("**DfE**") to introduce a "non-levy cap", beginning in or around May 2017. The proposed cap would limit the amount of non-levy funding contract-holders could obtain (in relation to new starters) to £5 million. As a result of the planned cap, Mr Lauener on behalf of the ESFA informed Mr Mapp on behalf of the Company, at a meeting in May 2016, that the Company should refocus its business plan towards the levy market. At that time, the levy market represented only 15 percent of the Company's business, with the remainder being in the non-levy market.
47. Mr Marples was on a number of the levy working groups, and personally initiated and led the development of the Company's business strategy for the levy market. The Company was uniquely well-placed for the change, because it had 30 fully-equipped academies which, if required, could function as levy-based learning centres. It was in a position to (and did in fact)



target levy-funded employers, with its attractive offer and well-earned reputation, and was also expanding into the United States market.

48. Even with the proposed introduction of the cap, the Company's funding position remained positive:

- a. For the 2016-17 year the Company would retain its initial funding of over £31 million for non-levy apprentices; and
- b. Non-levy funding would remain available for "carry-over" learners (at least a further £15 million).

49. Accordingly, the Company was guaranteed at least £45 million (and did not have any debt), without taking account of any levy funding. The Company was therefore well placed for the gradual move to a levy-based business model.

50. The Company continued to hold monthly discussions with Ms Sherry, in the course of which it was entirely transparent about its levy-focussed business plans. Ms Sherry attended the launch of the Company's levy plans in October 2016, alongside the local MP, who gave a presentation. The Company opened a construction academy on the same day.

51. The Company was entirely open with TLP as to the proposed non-levy cap. Mr Jo Cohen, TLP's Senior Partner, was introduced to Ms Sherry at the launch of the Company's levy plans in October 2016, referred to above. Ms Sherry spoke in highly positive terms about the Company's plans, and stated that the Company was significantly ahead of other providers at that juncture.

52. By November 2016 the Company had attracted approximately £20 million in levy funding and this was shared openly with the ESFA. TLP considered that, with only £5 million in non-levy funding, together with the 2016-17 contract and the carry over contract for 2017-18, the Company would have the financial resources to transition to the new funding regime.

53. At a meeting on 25 November 2016 between Kirsty Evans (director of ESFA), the Company, and TLP, Ms Evans stated on behalf of the ESFA that:

- a. There would be no shortage of ESFA funding in the initial years during the refocus towards levy funding;
- b. The Company should continue with its current plans;
- c. The ESFA would sub-contract rather than give money to levy providers that do not have a track record; and



d. The Company should "not be concerned and nothing has really changed."

54. Ms Evans also stated that the rationale behind the proposed cap was the prevention of sub-contracting in the volumes seen previously. It can therefore be seen as a political decision whereby the ESFA / DfE sought to avoid further criticism about the extent of private sector involvement in education and training, of the sort being made by Mr Linford and FE Week.

55. However, the cap was ultimately never adopted. The proposal was formally withdrawn in May 2017. In fact, the Claimants now understand that, by December 2016, it was widely known within the ESFA that the cap would not be implemented. The Claimants rely upon the following facts and matters in that regard:

- a. The introduction of the cap would have limited around 15 providers which were delivering approximately 70 percent of apprenticeship starts. It would have resulted in demand for apprenticeships exceeding supply;
- b. There was a statutory requirement for there to be adequate provision for 16-18 year olds, and it was widely accepted in the industry that the reduction of non-levy funding was inconceivable;
- c. The statements made to the Company and TLP at the 25 November 2016 meeting, as set out above;
- d. Representatives of the ESFA informed other providers, during later 2016, that the ESFA understood that the proposed cap was unworkable, that it was being reconsidered, and that business would carry on as usual.

Proposed Change of Control of the Company

Contractual Background

56. By clause 5.8 of the Funding Agreement:

"THE CONTRACTOR must notify THE CHIEF EXECUTIVE if there is a change in its name and/or ownership. THE CHIEF EXECUTIVE reserves the right to terminate the Contract if they consider in their absolute discretion that the change in ownership would prejudice THE CONTRACTOR'S ability to deliver the Services."

57. Accordingly, the ESFA exercised an effective veto over any change of control, because no reasonable intending purchaser of the Company's shares would agree to such purchase, absent assurances that the Funding Agreement would not be terminated under clause 5.8.



58. On that basis:

- a. the seeking of approval for change of control had become common practice within the industry; and
- b. Approval by the ESFA to the proposed change of control was agreed to be a condition precedent to the TLP Acquisition.

The Duties of the ESFA

59. For the reasons set out above, by 2016, both the Company, and its shareholders (in particular Peter Marples), were well known to the ESFA and its leadership.

60. Furthermore, the ESFA, and its leadership, were aware of and sensitive to the mechanisms by which the shareholders of privately-held companies in the sector typically sought to exit and/or sell their shares in such companies.

61. In the premises, it was understood by the ESFA and its leadership that its response (or lack thereof) to any request for approval to change of control would have a significant effect upon the shareholders of the Company, and in particular upon the Claimants. Furthermore, it was entirely foreseeable that a lack of care in and about the ESFA's response to such request would cause substantial loss and damage to the Claimants, because an unjustified refusal would result in the cancellation of the TLP Acquisition, ESFA approval being a condition precedent thereof.

62. There was a special and/or proximate relationship between the ESFA and its leadership and the Claimants. The parties were well-known to one another. It is apparent from the background set out above that the ESFA and its leadership had closely followed the career and conduct of Mr Marples in particular. It had undertaken (or procured) investigations into the Company, and when alerted to cashflow difficulties caused by a freeze on payments by the ESFA, Mr Lauener stated that Mr Marples should put more money into the Company. Indeed, its relationship and dealings with the ESFA were a fundamental component, and *sine qua non*, of the Company's business. That relationship was developed, over a period of years, by those behind the Company, and in particular by Mr Marples and those answerable to him as a controlling shareholder. Equally, the ESFA, despite its apparent hostility to large private providers, plainly retained confidence in the owners and managers of the Company, on the basis of historic dealings, and the reports and investigations referred to above. The special and proximate relationship between the ESFA and the shareholders of the Company was recognised and fortified by the inclusion of clause 5.8 in the Funding Agreement: as set out more fully above, that provision gave the ESFA the right to terminate the Funding Agreement upon a change of control.

63. In light of all the circumstances, it is fair, just and reasonable to impose and/or recognise a duty of care on the part of the ESFA and/or its servants and agents, in favour of the Claimants, in



relation to any consideration of and/or response to a request for approval in relation to clause 5.8:

- a. The ESFA and its leadership were in a position to influence and, to a large degree determine, the future prosperity of the Company, and therefore the remuneration that would be received by the Claimants resulting from Mr Marples' long-standing endeavours in the sector;
- b. The ESFA and its leadership were in a position to effectively veto the sale of the Claimants' shares in the Company;
- c. Although strictly the ESFA did not have the absolute right to reject changes of control, its established practice was to respond to (and approve) requests for approval. The Claimants had a legitimate expectation that the request relating to the TLP Acquisition would be dealt with fairly;
- d. The ESFA and its leadership had engaged with the Company as to its future business plans, and had given tacit approval to the same, as set out above. In so doing it went beyond the strict requirements of the Funding Agreement, and engaged directly with the Company; and
- e. The ESFA and its leadership knew, or ought reasonably to have known, that its response to the request for approval would be acted upon, and would be determinative of whether the TLP Acquisition could proceed.

64. Further or in the alternative, in the circumstances described above, the ESFA and/or its leadership assumed responsibility to the Claimants for the careful consideration of and response to the request for approval for change of control:

- a. The Company and its shareholders, against the background of the proximate relationship identified above, requested the ESFA to provide an assurance that the contingent right of termination under clause 5.8 would not be exercised;
- b. In light of that relationship, and of the importance of the request to the Company and its shareholders, in considering and responding to the request, the ESFA and its servants and agents assumed responsibility to the Claimants to exercise reasonable skill and care in and about their consideration of and response to the same.



Factors Relevant to Change of Control

65. The principal factors which ought to have been considered by the Chief Executive of the ESFA, when considering whether a change of control would so prejudice the delivery of the defined Services that the Funding Agreement should be terminated, were the following:

- a. Whether there would be a decrease in the quality of management of the Company;
- b. Whether there would be a decrease in the quality of the Company's facilities;
- c. Whether there would be a degradation in the financial standing of the Company.

66. In fact, there was no proper basis on which the Chief Executive of the ESFA could have terminated the Funding Agreement, following the intended TLP Acquisition. Nor was there any proper basis on which the ESFA could disapprove the proposed change of control:

- a. The Company had a good and long-standing reputation in the sector, including having an Ofsted Outstanding rating;
- b. The Company had shown itself to be well-prepared (both financially and otherwise) to deal with changes to the funding and overall business environment, as had been confirmed by Ms Sherry in October 2016;
- c. TLP was a reputable and financially sound undertaking, which had undertaken (and been seen by the ESFA) to have undertaken proper due diligence as to the Company and its ability to continue to prosper in a somewhat uncertain funding environment;
- d. There was no basis to conclude that the change of control would result in any change in the management, facilities, or financial standing of the Company;
- e. The structure of deal would result in the introduction of additional funding, and was not reliant on debt.

67. In short, there was no basis on which the Chief Executive could have formed the view that the proposed change of control would prejudice the Company's ability to deliver the Services under the Funding Agreement.

Request for Approval

68. The TLP Acquisition was intended to complete in late 2016.



69. By a letter dated 27 October 2016 the Company requested the approval of the ESFA for a change in ownership, with a view to discharging the condition precedent in the TLP Acquisition.
70. Thereafter throughout November and December 2016 the Company complied with all of the information and documentation requests made by Ms Sharon Forton ("**Ms Forton**") on behalf of the ESFA.
71. No concerns over the proposed change of control were expressed during the course of the meeting on 25 November 2016 between the ESFA, the Company, and TLP (as set out above). Nor were any such concerns expressed by or on behalf of the ESFA at a further meeting between the ESFA, the Company, and TLP, on 14 December 2016. Ms Forton did request, on the same day, further information from TLP in relation to its financial forecasts. This was supplied the following day.
72. On 22 December 2016 (i.e. the day before the proposed completion of the TLP Acquisition), TLP sent an email to Peter Marples, stating:

"...we should and will keep advancing the docs so that we have a finalized suite of agreements by tonight or tomorrow, ready to be signed. However we would prefer to await the SFA letter before proceeding with signature given the relevance of this item..."

73. Following receipt of that email, Mr Marples telephoned Ms Forton to enquire as to the status of the approval. Ms Forton informed Mr Marples that she had placed a letter on the desk of Mr Lauener, which confirmed that the ESFA would consent to the change in control.

ESFA's Decision

74. Despite the indication received from Ms Forton, the letter of approval was never received. Instead, on 23 December 2016, the ESFA wrote to the Company, with a copy direct to Mr Cohen of TLP ("**the Refusal Letter**"), stating that:

"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":

"The Business Plan appears to be premised on continued delivery, and growth of, non-levy activity. Slide 2 of the pack provided on 15th December references an expectation that by 2019/20 3aaa will generate approximately 30% of its projected revenue (£55.6m) from levy business with the remaining 70% of revenues from the non-levy market";



"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 available and no sensitivity analysis to give us assurance of the makeup of the financial projections."

[...]

"There is an expectation that providers who rely heavily on SME business will look to grow their delivery to levy payers – the introduction of the levy means those employers are likely to make up a higher proportion of apprenticeships."

[...]

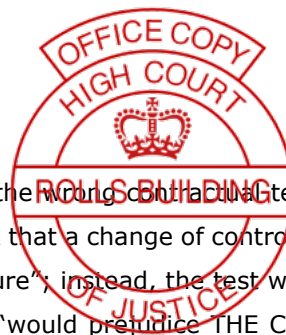
"I should reinforce the points made previously that no provider will be given more than an initial allocation of £5m – we would be subject to legal challenge if we were to award more at the initial allocation stage. We do have the facility to extend contracts in line with the timescales for non-levy employers to start using digital accounts. We are therefore highly unlikely to retender on any significant basis as we can use our right to extend contracts and timescales for a further 2 years, subject to the usual caveats of the availability of funds, which, as indicated above, will depend more than anything on the take up by levy paying employers. So the more successful providers like 3aaa are in stimulating that take up, the less will be the availability of funds to extend contracts for apprenticeships in non-levy paying employers".

Negligent Misstatement / Negligence

75. The Refusal Letter was a negligent misstatement, or alternatively contained negligent misstatements.

PARTICULARS OF NEGLIGENT MISSTATEMENT

- a. By the Refusal Letter the ESFA approached the question that it had been asked to answer in the wrong way. It failed to give any or any proper consideration to the ESFA's contractual rights and obligations. Rather than considering whether the Chief Executive was satisfied that a change of control would so prejudice delivery of the defined Services as to justify termination of the Funding Agreement, the ESFA proceeded as if it was entitled to prevent a change of control absolutely;



- b. The Refusal Letter shows that the ESFA applied the wrong contractual test. It was not sufficient, under clause 5.8, for there to be “a risk that a change of control will prejudice delivery of our contracts both now and in the future”; instead, the test was whether, in the view of the Chief Executive, such a change “would prejudice THE CONTRACTOR’S ability to deliver the Services”;
- c. The terms of the Refusal Letter indicate that the ESFA considered and relied upon factors that were not relevant to the clause 5.8 test. Whereas the Refusal Letter cited the business plans that had been disclosed to it, and suggested that these were inadequate to meet the introduction of the non-levy cap, that was irrelevant to the test, for the following reasons. Firstly, the plans were those of the Company, and the Company did not have an alternative plan, that was to be adopted absent a change of control. Put another way, the business plan with which the ESFA was apparently dissatisfied had no causal connection with a change of control. To the contrary, the equity injection proposed by TLP would have ameliorated the Company’s position. Secondly, it is now apparent that, at the time of the Refusal Letter, the ESFA cannot reasonably have believed that the non-levy cap was going to be implemented, for the reasons set out above. Accordingly, it ought to have played no part in the ESFA’s decision;
- d. The Refusal Letter wrongly suggested that the successful usage of levy funding would leave little or no funding available for SME funding. In fact, there was no prospect that SME’s would have been deprived of levy funding and specifically given the vast majority of the Company’s activity was in the ‘protected funding range’ of 16 -18 year olds;
- e. The Refusal Letter wrongly suggested that the proposed cap of £5 million would not substantially increase in subsequent years. There was no basis for this assumption;
- f. In preparing the Refusal Letter the ESFA failed to consider the factors that were relevant to the clause 5.8. It failed to consider:
 - i. The Company’s reputation and standing in the industry, as an Ofsted Outstanding provider, and proven track record;
 - ii. The pedigree of TLP and its management and advisors;
 - iii. The nature of the TLP Acquisition, in particular the incentivised management continuity, and the debt-free nature of the transaction;
 - iv. The fact that, even if the cap had been introduced, the level of funding in future years was likely to exceed £5 million (and the Company secured around a further £45 million in non-levy funding);



- v. The indications previously given to the Company and BUL that the Company was well-positioned to prosper in the non-levy cap environment;
 - vi. The equity injection by TLP which would have enhanced the Company's financial standing and ability to deal with a changing funding environment;
- g. The Refusal Letter was inconsistent with the previous decision making and approvals given by the ESFA both in relation to the Inflexion Acquisition (referred to above) and other requests for change of control by other providers at this time, referred to below; most of which, unlike the TLP Acquisition, involved a significant amounts of leveraged debt. Although a large number of private providers were subject to changes of control in the period 2013 - 2016, often involving private equity, and although (as set out above) it was common practice for approval to be sought in advance from ESFA, the Claimants' diligent enquiries have not revealed any other instance in which approval was not granted. Indeed, in response to a Freedom of Information Request, the DfE stated on 30 November 2022 that "... the ESFA (and formally [sic] SFA do not approve or refuse change of control requests from the Independent Training Providers (ITP's) that we contract with... the decision to take this action is a commercial one between 2 parties and as such we have no remit to approve or refuse";
- h. The ESFA consented to the following changes of control (with "PE" signifying a private equity transaction) all of which the Claimants knew to have been funded through significant levels of leveraged debt:
- i. Woodspeen Training – acquired by Progility in December 2014;
 - ii. Jenical Training and B2B Engage – acquired by GP Strategies in March 2016;
 - iii. RJD Partners – acquired by Babington in April 2016 (PE);
 - iv. Lifetime – acquired by Silverfleet in June 2016 (PE)
 - v. GEN 2 – acquired by City and Guilds in May 2017;
 - vi. QA – acquired by CVC in June 2017 (PE);
 - vii. Ixion Holdings – acquired by ShawTrust in June 2017;
 - viii. YouTrain – acquired by GP Strategies in September 2017 (PE);
 - ix. LearnDirect – acquired by People Plus in 2017;



- x. Profound training – acquired by Learning Curve in October 2018 (PE); and
- xi. Geason Training – acquired by Speedy in December 2018.

76. Further or alternatively, in stating to the Claimant and to TLP that it did not approve the TLP Acquisition, the ESFA was negligent. The Particulars of Negligent Misstatement above are repeated herein.

77. Following the receipt of the Refusal Letter, the Claimants and the Company sought to engage with the ESFA so as to persuade it to revisit the decision not to provide approval to the proposed change of control. In this regard, by a letter dated 2 January 2017 the Claimants wrote to the ESFA to take issue with the refusal. Despite the length and specificity of the further letter, the ESFA responded a few days later on 7 January 2017, reiterating its refusal to approve the change of control. The further letter provided some additional reasons for that refusal, but those reasons did not relate to the change of control *per se*, and were not in any event proper reasons which justified the refusal.

78. As regards the further letter – which was also sent directly to TLP as well as to the Company – the Claimants repeat the Particulars of Negligent Misstatement herein, *mutatis mutandis*.

Misfeasance in Public Office

79. The conduct of the ESFA, acting through its leadership and staff, constituted misfeasance in public office, as set out more fully below.

Persons Involved

80. The ESFA and/or its staff are public officers.

81. The power under clause 5.8 to terminate the Funding Agreement, following a change of control, was a power to be exercised by the ESFA (through its Chief Executive) in its capacity as a public officer. Similarly, in considering a request for approval of change of control, i.e. a request for conformation that the clause 5.8 power would not be exercised, the ESFA was exercising a power as a public officer.

82. During the process of reviewing the Company's request for approval in relation to the change of control, the ESFA acted through (at least) the following persons:

- a. Peter Lauener (Chief Executive);
- b. Keith Smith;

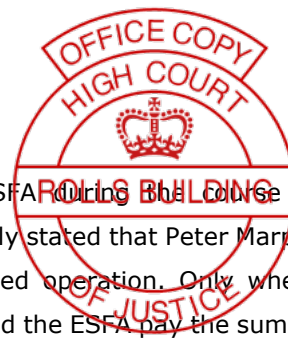


- c. Kirsty Evans;
- d. Karen Sherry; and
- e. Sharon Forton (Deputy Director).

83. Through the above persons, the ESFA acted with malice and/or in bad faith as regards the Claimants.

PARTICULARS OF MISFEASANCE IN PUBLIC OFFICE

- a. At the material time, there was a degree of hostility on the part of the senior staff and leadership of the ESFA towards private providers, and in particular towards the Company and Mr Marples. They were considered by the ESFA to be a "necessary evil";
- b. Mr Marples was subject to a particular animosity within the ESFA, partly due to his historic association with Carter & Carter (as set out above), and partly because of a widely-held view that those behind large private providers were making excessive profits at the expense of the public;
- c. Mr Lauener held significant disdain and distrust for large private providers such as the Company and, presumably, those behind such companies;
- d. Senior leaders at the ESFA held regular meetings with Mr Linford of FE Week. As set out above, Mr Linford's stance on private provision was well known, and he undoubtedly used his access to the ESFA's staff to promote and foster such views within the ESFA. The fact that these meetings took place clearly demonstrates that the ESFA, inter alia, shared these views and/or had an interest in seeking to consider and action these views;
- e. Whereas the Company was achieving growth, and increasing the number of opportunities for prospective apprentices, and whereas additional funding from the ESFA would have enabled such growth to continue and increase, the ESFA's staff (and in particular Mr Smith) were transparently reluctant to support (or even discuss) the Company's plans. In late 2015 Mr Smith informed Mr Tony Allen, then the Head of the ESFA's large companies unit, that support should not be offered to the Company's growth plans, and that, instead, the ESFA should be watching the Company very carefully. Mr Smith also insisted that a meeting between representatives of the Company, and himself, be held at a coffee shop rather than at the ESFA's offices, presumably to avoid being seen by other staff to be meeting the Company or its representatives / shareholders;



- f. The Company's funding was frozen by the ESFA during the course of the KPMG investigation. As set out above, Mr Lauener initially stated that Peter Marples should put money into the Company to ensure its continued operation. Only when the lack of funding drove the Company into administration did the ESFA pay the sums that it owed;
- g. The Company and its shareholders were unique, according to the Claimants' diligent enquiries, in not being granted approval to a proposed change of control. That is despite the Company being in a very strong position, vis-à-vis the non-levy cap, and it having been confirmed by the ESFA's Ms Sherry that the Company was better placed than other providers for the supposed change in the funding regime;
- h. The request for approval of change of control was made to the ESFA, in relation to the contractual power existing under clause 5.8 of the Funding Agreement. Having regard to that clause, Mr Lauener, Mr Smith and Ms Forton – those involved in the decision and the Refusal Letter – acted unlawfully, in that they:
- i. Failed to apply the proper contractual test, as set out more fully above;
 - ii. Failed to communicate the decision of the Chief Executive in relation to request for approval, and the test under clause 5.8;
 - iii. Purported to exercise authority over the proposed change of control itself, rather than indicating whether the clause 5.8 power would be exercised on proper grounds;
 - iv. Offered supposed justifications for the non-approval which cannot reasonably have been understood by (at least) Mr Lauener and/or Ms Forton to have justified termination, and which had no causal connection with the proposed change of control;
 - v. Relied, without qualification, upon the introduction of the non-levy cap when it was known to Mr Lauener that that cap was unlikely to be introduced in the manner suggested in the Refusal Letter;
 - vi. In acting as set out above Mr Lauener and/or Ms Forton and/or others on behalf of the ESFA behalf were subjectively reckless as to the lawfulness of their acts.
- i. On 22 December 2016, during the course of a telephone initiated by Mr Marples to enquire as to the status of the request for approval, Ms Forton stated to Mr Marples that she had placed a letter on Mr Lauener's desk confirming that the ESFA would approve the proposed change in control. As set out above, the Refusal Letter, sent the following



day, was to opposite effect. There can be no explanation for this change in position other than malice and/or bad faith;

- j. Particularly in light of the facts and matters set out above, the ESFA's refusal to grant approval and/or assurance in respect of the proposed change of control cannot be explained by mere negligence, carelessness, and/or indifference;
- k. Alternatively, the conduct set out above, and in particular the sending of the Refusal Letter to the Company and directly to TLP, is indicative of targeted malice against the Claimants and the Company, in that, in directing Ms Forton to prepare the Refusal Letter in the terms in which it was prepared, and in sending the letter directly to TLP, Mr Lauener and/or other senior members of the ESFA's leadership were acting upon a long-standing disdain for Mr Marples, the Company, and by association the other Claimants (as members of the class of shareholders), intending to cause damage to those persons, rather than to reach a fair conclusion on the question arising under clause 5.8.

84. The Claimants repeat the above Particulars, *mutatis mutandis*, in respect of the ESFA's letter of 7 January 2017, by which it (and in particular Mr Lauener and Ms Forton) failed to give proper consideration, in good faith, to the question arising under clause 5.8, and the available evidence, but instead sought to justify the Refusal Letter on improper and irrelevant grounds.

Vicarious Liability

85. At all material times the persons identified above, i.e. Mr Lauener, Ms Forton, Mr Smith, Ms Sherry, Ms Evans and the ESFA's other leadership and staff, were acting or purporting to act in the course of their employment with the ESFA.

86. In the premises, to the extent that the ESFA is not primarily liable in negligence, negligent misstatement, and/or misfeasance in public office, it is vicariously liable for the wrongful, unlawful and/or tortious actions of those employees, servants, or agents.

Causation

87. As set out above, the ESFA knew, or ought reasonably to have known, that the Refusal Letter would result in the abandonment of the TLP Acquisition. Indeed, following the ESFA's further letter on 7 January 2017, on 9 January 2017, TLP informed Mr Marples that the TLP Acquisition would not proceed. The Company informed the ESFA of that decision by letter dated 10 January 2017.

88. But for the Refusal Letter, and had the ESFA and its leadership exercised reasonable care and skill in and about the consideration and production of the same, the TLP Acquisition would have



completed within days of approval (and was due to complete by 23 December 2016), such approval being the final step remaining before the relevant transfer documents could be signed.

89. In the premises, the abandonment of the TLP Acquisition, and the Claimants' loss of the sale proceeds of their shares, was caused by the negligent misstatement, alternatively the negligence of the ESFA.

90. Alternatively, the abandonment of the TLP Acquisition was caused by the misfeasance in public office of the ESFA and/or its senior leadership.

Loss and Damage

91. By reason of the negligence, negligent misstatement, and/or misfeasance in public office of the ESFA, the Claimants have suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

- a. The TLP Acquisition was intended to complete on the basis of a Share Purchase Agreement ("**the SPA**"), the terms of which had been negotiated and agreed between the Claimants and TLP. Had the TLP Acquisition completed, the Claimants would have immediately received the sum of £26,752,979 (being the Net Cash Consideration pursuant to clause 4.1.1.1 and Schedule 2 of the SPA);
- b. Further, the Claimants would have received "Deferred Consideration" under the SPA, in the form of roll over loan notes to the value of £10,271,389. Accordingly, the Claimants have lost the chance of converting such notes, post-completion.

92. Further details of the Claimants' losses are set out in Schedule 1 to these Particulars of Claim.

Interest

93. The Claimants claim interest pursuant to section 35A of the Senior Courts Act 1981 at the rate of 8 percent per year on the above sums, as calculated in accordance with Schedule 1; alternatively interest at such rate and for such period as the Court thinks just.

AND the Claimants claim:

- (1) Damages for negligent misstatement / negligence.
- (2) Damages for misfeasance in public office.
- (3) Further or other relief.
- (4) Interest.
- (5) Costs.



MARK HARPER KC
JONATHAN WARD

Statement of Truth

I believe that the facts stated in these Particulars of Claim are true.

I understand 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: 057E013044AA46B...

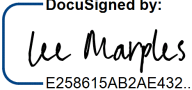
Name: Peter Marples

Dated: 03 February 2023

Signed: 057E013044AA46B...

Name: Sarah Marples

Dated: 03 February 2023

Signed: E258615AB2AE432...

Name: Lee Marples

Dated: 03 February 2023

Signed: 8A26BDD4278745D...

Name: Thomas Marples

Dated: 03 February 2023

SCHEDULE 1





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

Claim No. BL-2022-002117

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

PARTICULARS OF CLAIM

**DWF Law LLP
1 Scott Place
2 Hardman Street
Manchester
M3 3AA**

Ref: DYW/JBS/2040157-1