Claim No. BL-2022-002117

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

REPLY

Introduction and Summary

1. Except insofar as it consists of unqualified admission, the Claimants join issue with the Defendant on its Defence. Where the Claimants do not respond to an allegation in the Defence, the Defendants are required to prove such allegation.

2. References to numbered paragraphs are to those of the Defence. The Claimants adopt, where appropriate and without admission, the headings and abbreviations used in the Defence. Although the Particulars of Claim properly referred to "the ESFA", to avoid confusion, the Claimants will in this Reply adopt the term "the SFA" as employed in the Defence.

3. The Defendant's introductory remarks in paragraphs 3 to 7 and principal high-level responses to this claim are wrong and unsustainable for the following reasons:

    a. This is not a claim for pre-contractual misrepresentation, as seems to be suggested; it is a claim for negligent misstatement (and misfeasance in public office) and has been correctly pleaded. Contrary to the Defendant's pleaded position, there is a clear basis for the recognition of a duty of care. There is no principle of law that such a duty is not

owed to the shareholders of a company, by a contractual counterparty. Rather, such is to be determined on the facts as they existed at the material time;

b. The Defendant's bare denials ignore those facts. The SFA assumed a duty of care when it acted outside the scope of its contractual powers under clause 5.10 of the Funding Agreement and related annual Contract, and outside of the previous custom and practice it had adopted when dealing with requests for change of control;

c. Despite making it clear (to TLP as well as the Claimants) in the Refusal Letter that it was "not able to agree to the change in ownership" and also stating in its letter of 7 January sent to the Company, Peter Marples and to Joe Cohen of TLP that it had the "final decision" on the Company's change of control request, the Defendant has admitted in paragraph 55 of its Defence that it "did not have the power to approve a change of control". The Defendant has therefore admitted that, whereas it purported to be entitled to decide upon a change of control, it had no contractual basis on which to do so in two regards, firstly in the absolute contractual requirements of clause 5.10 to 'notify' and secondly and with regard to clause 5.10 in regard to 'delivery of services'. However, the refusal is based upon events some three years past the expiry of any contract. Its wrongful decision to interfere in the transaction caused the losses claimed in these proceedings.

   This is reflected by the Defendant's response to the following request by the Claimants under the Freedom of Information Act 2000: "For the following years, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022 please provide detail of the number of requests the ESFA and formerly SFA received from providers for approval of change of control under the terms of their contracts and for each of these, the number of requests which were approved by the ESFA / SFA and the number of requests refused..." where the Defendant stated "It is a contractual requirement to give notice of a proposed change of control but the decision to take this action is a commercial one between 2 parties and as such we have no remit to approve or refuse".

d. Further, the contention that no loss was suffered, by reason of the retention of shares, is specious. The Claimants lost the benefit of the bargain that they had, in principle, agreed. It is not pleaded in the Defence that there was an alternative, available market for the retained shares. Indeed, the effect of the Refusal Letter(s) was to deprive the Claimants not only of the intended sale to TLP, but also to any other interested purchaser, to whom that Refusal Letter would have been disclosable. The shares were rendered worthless by the Refusal Letter(s).

e. In summary, the SFA purported to act as gatekeeper to a deal beyond the contractual limitations of its powers in clause 5.10 of the Funding Agreement (and the SFA's own interpretation of the same recorded in the Defence), in circumstances where it was

reasonably foreseeable that its conduct would cause the abandonment of the TLP Acquisition, and therefore substantial loss to the Claimants.

4. Whereas the Defence is largely predicated on the notion that the SFA had reasonable concerns as to the financial health of the Company, it is plain from the SFA's own disclosure (and in particular the draft Refusal Letter) that the SFA had confirmed that the due diligence had been concluded to its satisfaction In any event, clause 5.10 of the Funding Agreement and subsequent related annual Contract only enabled the SFA 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" as defined in the annual Contract; i.e. the agreement between the SFA and the Company over a twelve month period (between 1 August and 31 July in any given year), as further dealt with in paragraph 50 below.

5. However, despite the Defendant not having the power to decide upon a change in ownership in any event, the Defendant's Refusal Letter was predicated on the delivery of the SFA's "contracts both now and in the future" in circumstances where the related annual Contract to which clause 5.10 of the Funding Agreement relates had only around 6 months of its term remaining. If the Defendant was truly concerned, then its options were to either terminate the Funding Agreement post-acquisition or simply not award a further annual Contract. The reality is that the SFA increased its funding to the Company the following year.

6. Paragraphs 2 and 3 are not admitted as a summary of the basis of the claim. The nature of the claim is set out in the Particulars of Claim, and concerns the SFA's negligence / negligent misstatement / misfeasance in responding to a request for approval of a proposed acquisition.

7. As to paragraph 4 it is admitted that the Claimants do not make claims for breach of contract or for public law remedies. It is denied that the claims are flawed.

8. As to paragraph 5:

    5.1 It is denied that the claim in negligent misstatement is defective. The Claimants' allegation is that the Defendant failed to exercise reasonable care in making the statements in the relevant letters. The Particulars of Claim are clear as to (a) the statements that were wrongly made in the letter, the manner in which they were wrong, and the overall meaning of the letter; (b) the absence of a true belief, on the part of the SFA, in the matters stated; and (c) the causal effect of TLP's reliance upon the statements, i.e. that it declined to complete the transaction;

    5.2 It is denied that "[t]here is no room for any such duty of care". The suggestion that a duty of care cannot exist in favour of shareholders is wrong. Nor is such a duty barred by the concepts of privity, "corporate veil", or public policy;

5.3 The contention that no loss was suffered, by reason of the retention of shares, is also wrong. The Claimants lost the benefit of the bargain that they had, in principle, agreed, and would have, but for the SFA's wrongs, have obtained. The Defendant does not allege that there was an alternative, available market for the retained shares. Indeed, the effect of the SFA's letter was to deprive the Claimants' not only of the intended sale to TLP, but also to any other interested purchaser, to whom that letter would have been disclosable.

9. Paragraph 6 is denied. The claim for misfeasance is properly constituted and the Claimants respond to the Defendant's more specific contentions below.

10. Paragraph 7 is denied for the reasons set out more particularly below.

Background and Parties

The Claimants

11. As to paragraph 10.2, it does not follow from the facts alleged that the SFA was not well aware of Mr Marples. To the contrary, those occupying senior roles in the SFA would have known of Mr Marples and his activities in the field and, the Defendant's admission in paragraph 39.4.4 that Mr Lauener had proposed that Mr Marples put more money into the Company suggests that he was aware of his success in the sector and elsewhere.

The Company

12. As to paragraph 13.2, the SFA was aware, through its leadership, servants and agents, that Mr Marples had exited by way of lucrative share sale, as set out in the Particulars of Claim.

13. As to paragraph 15, the matters in issue cannot be outside of the Defendant's knowledge, because the SFA received monthly updates in relation to the number of learners, and the level of sub-contracting across the business and the sector.

14. In relation to paragraph 16, it is denied that the allegation is too vague to enable proper response.

15. The final sentence of paragraph 18.3.3 is denied. There has never been a funding shortfall. To the contrary, in every year there has been a significant underspend of levy funding, with the result that several billion pounds have been returned to central funds. Prior to the introduction of the levy the total allocated (by direct treasury allocation) was around £1.5bn. After the introduction of the levy in May 2017, approximately £2bn was collected, which has subsequently increased. Nevertheless, significant underspends have been returned to the treasury every year since 2017.

16. In relation to paragraph 19.2, insofar as the Defendant alleges by "the ending of such arrangements" that the Company ceased working with the colleges in question, that is denied. It continued to work with those colleges until 2018.

17. As to paragraph 20, the Claimants note that Financial Health Calculations were required to be submitted by the Company annually as part of the contracting process for SFA funding, and therefore the Defendant should have in its possession the appropriate records for the period in question which will show the Company's financial health to be outstanding, by the SFA's own calculations, each year of the material period. On that basis it is inappropriate for the Defendant to fail to set out a positive case in this regard. Furthermore, the Company would have continued to achieve outstanding financial health in the three years subsequent to the TLP acquisition given the investment was in the form of equity. However, the SFA never asked for such calculations to be provided.

Funding Agreement

18. As to paragraph 22:

    a. It is denied that the Company's activities were "unsustainable";

    b. The reason for the discussions was that the overall quantum funding awarded at the beginning of each year did not meet the full funding requirement of completing the apprenticeships of the relevant learners. The SFA was aware that the funding quantum was insufficient for the volume of learners, and that is why the quantum of funding was increased or 'rebased' by approximately 25% in May 2016;

    c. The vast majority of the learners were in the "guarantee" group, i.e. they were guaranteed funding to complete their mandatory education;

    d. The outcome of the discussions was that the SFA agreed to provide the funding required in respect of the relevant learners, and therefore plainly did not regard the activities as "unsustainable" which continued significantly beyond 2016/17. In fact, the level of 'non levy' funding and volumes of learners did not reduce after 1 January 2017 despite the SFA's apparent concerns.

19. In relation to paragraph 23.2.1, the Claimants will refer to the relevant letter for its true meaning and effect at the trial of this action. It is denied, if it be alleged, that the letter did not represent the position of the SFA, or was not written with its authority. The word "guarantee" is not used in the technical sense; nevertheless, subject to conditions, there was an understanding between the parties that funding would continue to increase to meet demand, subject to the Company's continued strong performance. The Claimants rely in particular upon the following passage in

this regard: "…as your provision is Graded One by Ofsted, is of high priority in terms of delivery cohort, qualification level and also sector, we feel it is important to reassure you that the Agency will work with you to continue to fund high quality apprenticeships."

20. As to paragraph 23.2.2, the said letter indicated that funding allocations would grow in proportion to the Company's own expanding operations, subject to continued strong performance. That is the notion that the words "positively affect" and "work in your favour" were intended to convey in this context. The fact is that funding did increase materially in line with these commitments from the SFA and with regard to the participation in the VFM programmes.

21. The admission in paragraph 23.3 is noted. It is plain from the correspondence cited by the Defendant that the SFA reposed significant confidence in the Company and its ability to continue to deliver high performance, which continued prior to and throughout 2017.

Proposed Acquisition by Inflexion

22. The admission in paragraph 26 is noted; otherwise the paragraph is denied. The SFA had sufficient financial information from the Company to enable the Defendant to plead a positive case in this regard because the Company provided it to the SFA in response to their requests for certain information.

23. As to paragraph 27:

    27.1. The SFA thanked Mr Marples for informing it of the proposed change of control, and confirmed that it had no intention to terminate the contract. It is admitted that the SFA had no contractual or other right to "approve" the transaction, and was free to say so;

    27.2. Paragraph 27.2 is admitted. The SFA was merely recording its rights under the contract;

    27.3. Paragraph 27.3 is admitted and averred;

    27.4. As to paragraph 27.4, the SFA's contractual right was to terminate the contract subject to the matters set out in clause 5.10. It was implicit in its response that it recognised that that was the extent of its power vis-à-vis the proposed change of control.

Nick Linford and the KPMG Investigation

24. As to paragraph 31, the Defendant ought to be in a position to confirm that the Company commissioned a mock funding audit report because the Company shared a draft version of the report with the SFA at the time which is recorded in meeting notes which the SFA should possess and which the Claimants will refer. The Defendant should therefore also be in a position to admit

or deny the allegation that Mr Linford made reports to the SFA based upon the content of the mock funding audit report.

25. As to paragraph 35, the characterisation of the discrepancies as "significant" is inappropriate, in the context of the overall sums involved, and the period over which the discrepancies arose. The Claimants note that the sum of £300,000 was arrived at by extrapolation. The Company had little commercial option but to agree to the figure, given its relationship with the SFA. The SFA's letter of 24 August 2016 confirmed that "there was **no evidence** found of deliberate circumvention of funding rules by 3aaa." (SFA's emphasis). The Claimants will refer to correspondence which indicates that the £300,000 payment / deduction was agreed on a commercial basis to enable the parties to move on, and there was no admission of errors having been made.

26. In relation to paragraph 36:

    36.1 The admission is noted. The supposed concern as to objectivity has no relevance to the matter in issue: the question is not who paid for the KPMG investigation in the first instance, but whether the SFA had a basis on which to recover such payment from the Company. Although the Defendant now disputes that no significant issues were found, in reality if such issues had been reported, the SFA would have required the Company to meet the cost of the investigation. The implied admission that it occasionally takes this step is noted;

    36.2 It is admitted and averred that the funding allocation increased in the said period. It is further admitted that the Company did not spend the entirety of its allocation for justifiable reasons set out in the claim. The supposed distinction between "allocation" and "commitment" is not understood. The Company delivered services in accordance with its contractual obligations, and the funding that it received materially increased in the said period which included the substantial element of funding for 'carry over' learners and new starts.

27. As to paragraph 38.2, the Claimants understand from the wording of the denial that the Defendant does not dispute that Mr Smith did meet Mr Linford.

28. In relation to paragraph 39.2, the Claimants note that it was the SFA's prevention of the Company's starting new learners that resulted in an underspend of allocated funds in 2016/17, and further note that, despite that, the SFA increased the Company's allocated funding was increased by some 25% for 2016/17.

29. The admission in paragraph 39.4.4 is noted. The justification offered is misconceived. Nevertheless, the Claimants note the implied admission that Mr Lauener was well aware of Mr Marples, and had particular beliefs about his circumstances and financial means. The unusual

personal interest Mr Lauener (and Mr Smith) paid with regard to the KPMG investigation, the Company, the Claimants, the change of control and subsequent events will be a matter for evidence.

30. The summary of events in paragraph 40.3 is denied. An initial meeting was held between the directors of the Company and PwC. PwC requested a contact number for Mr Lauener, and some 20 minutes later Mr Lauener telephoned the chairman of the Company to arrange a payment. He then suggested delaying the payment of the £3.87 million, on the basis that the Company could satisfy its bank with a letter, but upon that proposal being declined, the payment was made.

31. The denial in paragraph 40.5 is noted, but the Defendant does not dispute that that sum was agreed to be due. Accordingly, the Company was owed the sum in question.

32. In relation to paragraph 40.5.3, the Claimants note that, until PwC became involved, Mr Lauener declined to release the money, despite requests but agreed to do so within 20 minutes of being asked by PWC to do so

33. In relation to paragraph 41, the Defendant is put to strict proof that the SFA was concerned "as to the sustainability of [the Company's] financial position". In any event, it is denied that there was any proper basis for such concern. The Company's financial health assessments were always rated "Outstanding" and any sustainability concerns of the SFA could only have been isolated to the period in which the SFA was causing such issues by withholding funding. The SFA could not have expected any company in the field to have retained sufficient cash on hand to deal with an indefinite suspension of payments from its sole source of funding. The Company's payroll bill alone was in the region of £1.5m per month.

Approach by TLP

34. Paragraph 43.2 is denied. The Defendant is relying upon the SFA's own decision to withhold funding of almost £4m as against an alleged (but disputed) overpayment of just £300,000, in contending that the Company had "cash flow problems". Aside from that issue, the SFA plainly did regard the Company and its management as stable and successful, for the reasons set out at paragraphs 21 to 23 above.

35. Paragraph 43.3 is admitted and averred.

Non-Levy Cap

36. Paragraph 44.1 is denied. The meeting did not take place in April 2016 and the Claimants will refer to documentary records sent to the Defendant at the time in this regard. Mr Lauener and Ms Evans had no grounds for such concerns, if that be alleged.

37. The admission in paragraph 46 is noted. The Claimants admit that the Company had obligations under the Funding Agreement, which it continued to discharge. It is denied that there is any illogicality in the corresponding paragraph of the Particulars of Claim: the Company's success, and its baseline cash position from non-levy activities provided stability and enabled it to invest in the levy-based business model. On the basis of its standard of performance, the Company was able to assume a renewal of the Funding Agreement as did the SFA in referring to the future forecasts in the Refusal Letter despite the Contract expiring on the 31 July 2017. The level of funding for subsequent years was based on the performance in previous years by way of "carry over" of learners on programmes, and new learners in the "guarantee" group. There had been no indication that renewal would not take place: the Company was a Grade 1 provider, was focussed on the "guarantee" group, was delivering in priority sectors and the SFA had raised no concerns in monthly management meetings. Indeed, the SFA was in this period encouraging the Company to grow and it did so after the change of control was denied into 2017 and beyond.

38. As to paragraph 47, whilst it is admitted that the original concept of such meetings was at the suggestion of the SFA, in reality it was the Company that ensured that they happened, by producing the agendas and insisting that they took place. It is noted in any event that the meeting minutes do not form part of the Defendant's Initial Disclosure, and the Claimants understand that the SFA did not ever take such minutes. Ms Sherry was in attendance at the launch of the Company's levy event in October 2016 (and subsequent monthly recorded discussions with Ms Sherry about the levy) where the local MP was a key note speaker.

39. As to paragraph 49, it is denied this is outside the Defendant's knowledge because at its request a list of the relevant clients was produced during the due diligence process in October 2016 and discussed at the monthly management meetings both before and subsequent to December 2016

40. The admissions and denials in paragraph 52 are noted. As to the said "procurement exercise", this did not conclude in March 2017. The process was delayed and ultimately awarded in December 2017. During this time, existing providers were given funding to support existing learners and new starts. The Company also was relicensed in early 2017 through the 'ROATP Refresh' exercise which included extensive review of the financial health of the business.

Proposed Change of Control of the Company

41. The second sentence of paragraph 54 is denied. As to the reference to paragraph 72 of the Particulars of Claim, the clear effect and true construction of the relevant passage is that TLP would not proceed unless and until it had received the appropriate assurances. That interpretation was further confirmed by the events that transpired. The final sentence is admitted and averred.

42. As to paragraph 55, the admission that the SFA "did not have the right to approve a change of control" is noted. It follows that it did not have the right to reject such a proposal.

43. The most the SFA could properly have said was that it reserved the right to exercise its discretion under clause 5.10 in the event of a change of control. Had it done so, the acquisition would have been completed. The SFA impliedly recognised that this was the extent of its power under the Funding Agreement, because it introduced a revised provision in the 2018 edition of that form of agreement, which gave it a pre-emptive right to prevent a change of control occurring. The SFA still had the opportunity to not renew the contract at the end of the then current term, being 1 August 2017 if it so wished; something which TLP were aware of as part of the acquisition when agreeing the consideration for the Company.

44. In relation to paragraph 58:

58.1 The admission in paragraph 58.1 is noted;

58.2 Paragraph 58.2 is denied. The Defendant misconstrues the corresponding paragraph of the Particulars of Claim by selectively quoting from the same. The Claimants did not allege that *any* response would cause substantial loss and damage, but rather that "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" (emphasis added). The remainder of the paragraph is largely irrelevant because it proceeds from an incorrect premise, as set out above. The shareholders and intending purchaser cannot be expected to "address the relevant concern" if such purported concern arises from a lack of care in responding to the request for assurance. Further and in any event, it is specifically denied that "the cancellation of that transaction would not in any event have any net adverse effect on the shareholders' economic position". Self-evidently, the cancellation (or non-agreement) of a lucrative contract would have an adverse effect on shareholders wishing to exit the Company, *a fortiori* where the cancellation results from a lasting impediment to any future attempted sale, such as a statement by the SFA that it would not approve the same;

58.3 Paragraph 58.3 is denied. The existence of a discretion, even one described as "absolute", did not entitle the SFA to act negligently. Whether or not it was open to the Company to challenge an exercise of discretion is beside the point; the Company's interest was not the same as the Claimants' interest. In any event, the SFA did not have a discretion in relation to approval of change of control. It had a contractual discretion as to the termination of the Funding Agreement.

45. Paragraph 59.2.1 is denied.

46. As to paragraph 59.3:

a. It is denied that the existence or recognition of a duty of care in favour of the Claimants would be "contrary to established law". The Claimants will make submissions at the appropriate time, but note that it is no part of their claim that the SFA ought to have breached or ignored its contractual obligations, or to have otherwise incurred a liability to the Company or any other party. The fact that the Claimants were shareholders in the SFA's counterparty is no bar to the existence of a duty of care in their favour and the material facts show that the SFA assumed a duty of care when purporting to have the right to approve or deny a change of control request, noted as being the SFA's "final decision" in its letter of 7 January 2017. Ultimately, the SFA purported to act as gatekeeper to a deal where it was reasonably foreseeable that its conduct would cause the abandonment of the TLP Acquisition, and therefore cause the Claimants' loss;

b. It is further denied that the SFA's status as a public body is relevant to the question of whether a duty of care was owed in the circumstances of this case.

47. Paragraph 60 fails to respond to the allegation in the corresponding paragraph of the Particulars of Claim, which does not concern "the exercise of [a] right", but rather the requirement for "careful consideration of and response to the request for approval for change of control". The right referred to by the Defendant had not at that time arisen.

48. As to paragraph 61 it is denied that there was any "unjustified gloss" in the corresponding paragraph of the Particulars of Claim. It is admitted that the SFA would have been entitled to consider the prospective buyer's plans for the Company, but it is denied that any such rational consideration was given in any event and, if it had been, then such could only be by reference to the related annual Contract which was due to expire in around 6 months' time, on the basis of clause 5.10 of the Funding Agreement. To the extent that the Defendant alleges that the SFA was entitled to consider "the stability" of the Company in any broader context than the remaining duration of the Funding Agreement, that is denied. In any event, such stability was considered by the SFA when awarding the Company with its re – registration (ROATP) as a provider in March 2017 where the Company's financial health was considered by the SFA to be outstanding. The Defendant cannot reasonably have considered the financial status of the Company as being any less than outstanding in December 2016 or January 2017 when it was "not able to agree to the change in ownership".

49. Paragraph 62 is admitted insofar as it accurately recites the terms of the said letter. It is denied that the matters alleged, regarding the Business Plan, could reasonably have been considered to give rise to any concern as to the Company's ability to deliver the services, for the reasons set out in the Particulars of Claim. The acquisition would have enhanced the Company's financial position. It is denied that the fact of, or conclusions arising out of, the KPMG investigation, had any substantial effect on the Company's good and long-standing reputation in the sector, for the reasons set out above and in the Particulars of Claim. As to the "financial difficulties", as the SFA well knew, those arose directly from the SFA's own decision to suspend funding to a degree that

was shown not to have been justified. The Claimants further note that it is apparent from sub-paragraph 62.7.2 that, insofar as the SFA did hold real concerns as to the Business Plan (which is denied), those concerns were irrelevant to the proposed change of control: the allegation being that "the Company" (rather than the proposed buyer or its management) had not acknowledged "the impact of the impending changes". On that basis, an acquisition involving increased funding, and no debt, could only be assumed to lessen the supposed impact of any such oversight.

50. Further, clause 5.10 of the Funding Agreement and subsequent related annual Contract enables the SFA 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"; "Services" being the services specified in the "Contract"; i.e. the agreement between the SFA and the Company over a twelve month period (between 1 August and 31 July in any given year). If, which is not admitted, 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'" (paragraph 62.3), such consideration was outside of the scope of its contractual powers.

51. Paragraph 66.1 is denied.

52. Paragraph 68 alleges that the Refusal Letter was prepared on 22 December 2016, and suggests that it did not change in substance before being sent the next day. The Defence does not acknowledge that there existed a draft version of the letter which differed substantially from the Refusal Letter which was sent to Peter Marples, the Company and TLP and which was presumably signed off by Peter Lauener. The Defendant has not explained how such amendments were finalised:

> ~~At this point, based on~~ We have now considered your request given the further information you provided~~,~~ at our meeting on 13th December and the ~~SFA~~additional financial data provided by Joe Cohen following the meeting.
>
> 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.
>
> ~~We are comfortable with the outcome of the due diligence undertaken on both 3AAA and Trilantic.~~
>
> ~~In terms of the Business Plan details provided on~~ Our concerns arise from the ~~15th December, there are a number of~~following points which we ~~would seek further clarification before we are assured~~conclude result in a risk that ~~the~~ a change of control will ~~not~~ prejudice ~~your ability to deliver~~delivery of our contracts both now and in the future~~.~~

53. In relation to paragraph 70:

    70.1 It is denied that the particulars are incompatible with a plea of negligent misstatement as alleged. The particulars set out the manner in which the SFA breached its duty of care (as reiterated above);

70.2 It is noted that the Defendant does not specifically address the allegation that the Business Plan was that of the Company, and the SFA had no basis to consider that the Company would adopt a different plan, if the proposed acquisition did not take place;

70.3 It is unclear whether the denial in sub-paragraph 70.8 is intended to apply only to the allegation of inconsistency, or also to the remainder of the corresponding paragraph, which concerns details of previous approvals;

70.4 Whilst the Defendant now denies that the SFA "consented" to any proposed transaction, the fact remains that the SFA did not have any discretion capable of being exercised unless and until a transaction had completed. Whereas it could properly have declined to comment on any proposed transaction in advance of such discretion arising, its practice was to indicate its approval, or consent, to such proposals in advance.

54. The denial in paragraph 71 is noted. Whereas the Defendant seeks to equate the standard of care in responding to the request with the relevant contractual provision, as set out above the SFA was not able to exercise any discretion unless and until a change of control had occurred. The SFA was bound to exercise reasonable care and skill in responding to the request and, if it decided to give an indication as to how its discretion would be exercised in the future, it was bound to take care to examine all factors relevant to the exercise of that discretion. It is noted in any event that the Refusal Letter did not apply the contractual test, but instead stated that the SFA was "not able to agree to this change in ownership".

Misfeasance in Public Office

55. Paragraph 74 is denied. The components of the cause of action are set out in the Particulars of Claim. The Claimants reserve the right to offer further particulars of malice and/or those harbouring the same upon disclosure, by the Defendant, of the records relevant to the consideration and creation of the Refusal Letter.

56. Paragraph 76 is denied.

57. It is denied that the matters set out at paragraph evidence anything other than Mr Lauener's familiarity with the Company as a strong and reputable provider in the sector. For the reasons set out above, the release of the sums due to the Company following the KPMG investigation is readily explicable by the fact that those sums were due, and could not justifiably be withheld.

58. The Defendant is put to strict proof of the matters alleged in paragraph 78 and the sub-paragraphs thereto. The Defendant is further required to prove that the alleged termination of contract (sub-paragraph 78.7) occurred in the same period and pursuant to the same contractual provisions as governed in the Funding Agreement. It is denied that the change of position (sub-

paragraph 78.9) is capable of any innocent explanation, for the reasons set out in the Particulars of Claim.

Causation

59. The first sentence of paragraph 81 is denied, and its inconsistency with paragraph 54 is noted.

60. Paragraph 82.2 is denied. To the contrary, taken in its proper context, the email merely reflects the commercial reality that the transaction could not proceed in the face of opposition from the SFA. It quotes the SFA's view that the Business Plan is "excessively optimistic", without endorsing the same. It expresses TLP's regret that the SFA's stance did not tend to "encourage private capital into the sector".

61. As to paragraph 82.3:

    a. It is admitted that the Claimants retained, at the relevant time, their shares in the Company;

    b. The negligence and/or negligent misstatement and/or misfeasance of the SFA deprived the Claimants of the substantial realisable value of those shares, because no reasonable purchaser would seek to acquire the Company in circumstances where the SFA had shown itself to be opposed to a sale, and the Refusal Letter (and further correspondence) would have been disclosable to any such proposed purchaser.

Loss and Damage

62. As to paragraph 84, the Claimants repeat paragraph 61 above.

Interest

63. As to paragraph 85, the claim for interest is validly made and it is denied that the Defendant has any basis on which to resist the same.

MARK HARPER KC
JONATHAN WARD

Statement of Truth

I believe that the facts stated in this Reply 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: DocuSigned by: 057E013044AA46B...
Name: **Peter Marples**

Dated: 09 May 2023

Signed: DocuSigned by: F9A26CC68F124BD...
Name: **Sarah Marples**

Dated: 09 May 2023

Signed: DocuSigned by: Lee Marples E258615AB2AE432...
Name: **Lee Marples**

Dated: 09 May 2023

Signed: DocuSigned by: Thomas Marples 8A26BDD4278745D...
Name: **Thomas Marples**

Dated: 09 May 2023

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

REPLY

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