Neutral Citation Number: [2025] EWHC 1889 (Comm)

Case No: CC-2023-BRS- 000016

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
CIRCUIT COMMERCIAL COURT (KBD)

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 04/08/2025

Before :

HHJ RUSSEN KC

Sitting as a Judge of the High Court

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Between:

LEARNING CURVE (NE) GROUP LIMITED	**Claimant**
- and -	
(1) RICHARD HUW LEWIS	**Defendants**
(2) MELANIE PROBERT	

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Michael Booth KC and **Simon Adamyk** (instructed by **DWF Law LLP**) for the **Claimant**
Hugh Sims KC and **Jay Jagasia** (instructed by **Acuity Law Ltd**) for the **Defendants**

Hearing dates: 17th to 21st, 24th to 26th and 31st March and 1st April 2025
Draft judgment circulated to the parties on 21st July 2025

Approved Judgment

This judgment was handed down remotely at 10.00am on 4 August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ RUSSEN KC

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HHJ Russen KC:

INTRODUCTION

1. This is the judgment, following trial, in support of my decision that the defendants are liable to the claimant for damages for breach of warranty under the terms of a Share Purchase Agreement dated 29 October 2021 ("**the SPA**"). I have determined their liability for breach of warranty to be £5,211,625.

2. That figure is just over half of the claimant's pleaded claim for damages of £10,180,040 but significantly more than the "no recovery" scenario presented by the defendants. The defendants' position in that respect involved them counterclaiming for the return of £783,325 which they had paid under an indemnity provision in the SPA but from which they contended in these proceedings they were in fact released from liability on the true construction and proper application of the SPA. For the reasons explained below, I have not accepted their arguments in relation to the indemnity. It follows that they are also liable in that sum but the claimant (heeding the impact of a provision in the SPA which prevents "double claims" in respect of both a warranty claim and an indemnity claim that arise out of the same matter) recognises the need to elect between a judgment under the indemnity and one for the greater amount of damages.

3. My decision upon the level of damages payable by the defendants for breach of warranty is made under the one issue (being 'Issue 8' among the twelve others identified below) where the answer was not pre-determined by the terms of the SPA. The comprehensive terms of the SPA otherwise provide the answer to the many issues raised by their defence and counterclaim. Nevertheless, there has been extensive argument about what the key provisions of the agreement actually mean in the light of points taken in the defence. Its terms have been closely analysed (by reference to authorities on contractual interpretation, including some other share warranty cases, and sometimes with an eye to the impact of the factual evidence given at trial) with a view to raising doubts about its otherwise apparent meaning.

4. By the SPA, the parties only provided for a cap upon any liability in damages for breach of warranty which is fixed by reference to the amount of consideration under the SPA actually received by him or her. This means there is a limit upon the recovery against the second defendant in the amount of £840,650 but the entirety of the damages award falls under the sum of £15,972,257 received by the first defendant. The second defendant's liability under the indemnity is also capped, at one-half of the £840,650 received by her, but the total amount of the indemnity claim falls well below one-half of the £15,972,257 received by the first defendant.

5. At this introductory point, I express my gratitude to the solicitors and counsel for both parties for arranging a mass of evidence (documentation, witness statements and expert reports) into very well-ordered trial bundles, clearly explaining the complex funding rules which underpin the warranty/indemnity claims, and for presenting their rival arguments in a clear and constructive way. In hindsight, it was only the authorities bundle that was a bit excessive. In this judgment I have referred to thirty-five or so cases which is about one-third of those in that bundle. In advance of closing

submissions, I invited counsel to identify their "humdinger" authorities. I have addressed those cases cited by them which appear to bear most closely upon the issues under consideration.

6. The complexity of the funding rules relevant to the claims sometimes meant that the questions and answers about their effect in any given actual or hypothetical situation were not easy to express but Mr Booth KC, Mr Sims KC and the relevant witnesses rose to the challenge. I have also been assisted by the very comprehensive expert evidence of the experts (Mr Osborne for the claimant and Mr Pearson for the defendants) and I address their evidence below in my determination of Issue 8.

7. Issue 8 (and its corollary in Issue 9) logically falls to be addressed last. Addressing matters in the appropriate order has led to the structure of this judgment being as follows, with the identified paragraph numbers marking the start of the relevant section:

1. BACKGROUND

8. Under the terms of the SPA the claimant ("**LCG**") purchased from the defendants (respectively "**Mr Lewis**" and "**Ms Probert**") the entire issued share capital in a company called APCymru Limited ("**APC**" or "**the Company**"). LCG paid £16,813,008 for the shares. That was the 'Initial Consideration' under the SPA with no further 'Earn-Out Consideration' becoming payable because of the funding clawback mentioned below. The Initial Consideration was made up of £14.15m enterprise value (fixed by reference to an EBITDA of £2.571m and a multiplier of 5.5) and a net cash payment of £2.663m.

9. The EBITDA figure (i.e. the Company's earnings before interest, taxes, depreciation and amortisation) was a figure based upon the Company's performance over the previous 12 months. EBITDA is similar to, but slightly different from, **MEBITDA** (i.e. a company's *maintainable* EBITDA). It was derived from the Company's actual performance to 30 April 2021 and a three-month forecast to 31 July 2021. For that reason, it has been referred to the "**9+3 EBITDA**". The date of 31 July 2021 was also the year end of the Company's 2020/21 accounting year (("**FY21**") and coincided with the end of the academic year 2020/21 ("**AY20/21**"). The 9+3 EBITDA was set out in an appendix to Heads of Agreement dated 22 June 2021 and the £2.571m reflected a higher figure of £2.646m adjusted down to reflect a maintainable EBITDA.

10. The Company provided and continues to provide education and training for young people, in particular through military training and preparation through courses in England and Wales and running schools and apprenticeship courses. The present claim concerns a significant aspect of its English business.

11. The Company's business was formed in 1999 to support young men and women in their aspiration to join the British Armed Forces. The Company trades as '**MPCT**'. Before the SPA, this stood for Motivational Preparation College for Training and, after it, for Military Preparation College for Training.

12. LCG was incorporated in 2013. It also provides education and training and has acquired eight other business, aside from MPCT, since it was formed. By the time LCG acquired the Company in October 2021, LCG had four military academies of its own, each based in Yorkshire.

13. Mr Lewis was the founder of the Company in 1999 and its CEO at the time of the SPA. He goes by the name Huw and Ms Probert is his romantic partner. They live together. Although Ms Probert was a director of the Company prior to the SPA, she was not actively involved in its business. Mr Lewis was the sole director of the Company's two wholly owned subsidiaries: Military Preparation College Limited and MPCT Limited.

14. The Company's activities in England were substantially funded by the Education and Skills Funding Agency ("**ESFA**"). ESFA is an executive agency which is sponsored by the Department for Education and provides funding to providers for the supply of education and the teaching of skills to children, young people and adults. Although there is a substantial issue between the parties about how significant the funding issue mentioned next was to the value of the Company at the date of the SPA, ESFA funding was and remains at the heart of the Company's business.

15. Unlike the Welsh funding, which the Company receives through a sub-contract with a college in South Wales, the ESFA funding is direct funding. The Company's management accounts for FY21 indicate that the ESFA funding comprised about 50% of the Company's income. Mr Pearson, the defendants' expert, calculated that 38% of its profits derived from the academies in England funded by ESFA.

16. This litigation has arisen because, within a year after the SPA, ESFA found that, in AY20/21 which came to an end before the SPA, the Company had over-claimed funding from ESFA in the amount of £1,247,680 (the "**Over-Claimed Sum**") as a result of breaches of the applicable ESFA Funding Rules ("**the Funding Regulations**"). (Alongside equivalent regulations governing the Company's Welsh funding, the Funding Regulations fall within the definition of 'Funding Rules' in the SPA for the purposes of the principal warranty relied upon by LCG.) The Over-Claimed Sum was identified by ESFA during a post-year audit of AY20/21 which was carried out in February 2022 ("**the 2022 Audit**") by ESFA's auditor RSM UK Risk Assurances UK LLP ("**RSM**"). I mention below Mr Lewis's contention that the 2022 Audit was not a full audit but was a funding review.

17. In the event, the Company was not required to pay the full amount of the Over-Claimed Sum but instead the sum of £783,325. This was because it "over-performed" in terms of student hours provided (when compared with the hours for which it had received funding) in AY20/21 and it was able to claim a deduction in respect of that. The fact that the Company over-performed in that way is potentially of wider significance to some of the issues in this case, in particular the issues of knowledge (on the part of Mr Lewis as warrantor under the SPA) and quantum (in terms of the value of the Company at the date of the SPA).

18. The over-performance in AY20/21 had a value of £1.42m but the Funding Regulations permitted a maximum claim of £1m. However, LCG negotiated with ESFA the deduction of the circa £0.42m unclaimable over-performance from the Over-Claimed Sum, reducing the amount which the Company was required to repay to £783,325 ("**the Clawback**").

19. LCG says the breach of the Funding Regulations identified by the 2022 Audit has had a substantial adverse financial effect on the Company's business and been the cause of ongoing financial difficulties, with its effects extending far beyond the Clawback and the immediate financial impact for the following academic year of AY21/22. It has required substantial (and expensive) changes in the way the Company delivers its education provision, and (due to the way in which the Funding Regulations work) caused a substantial reduction in the funding provided to the Company by ESFA in subsequent funding years. The £16.8m it paid for the Company under the SPA (there was no further Earn-Out consideration payable to the defendants) was significantly more than the Company's true worth.

20. The defendants say this is all overblown. They say the outcome of the 2022 Audit does not show the Company was in October 2021 worth less than LCG paid for it. They point to a specific indemnity ("**the Funding Indemnity**") in the SPA covering the Clawback to reinforce their point. In fact, on 14 October 2022 they paid LCG the amount of the Clawback under the terms of the Funding Indemnity though, as explained below, their position now in this litigation is that they should not have done so because LCG's claim under the indemnity was time-barred (under the terms of the SPA) and deemed to have been withdrawn. It is the defendants' general position that LCG's redress in respect of the established breach of the Funding Regulations was to have its entitlement under the Funding Indemnity satisfied and no more. If LCG had not sued under certain warranties in the SPA, separate from that indemnity, it would have kept the sum paid by them under the indemnity (that sum currently being held in escrow) and they would not have counterclaimed for its return.

21. A claim which involves LCG saying the alleged breach(es) of warranty, revealed by the Company's receipt of the Over-Claimed Sum, and their impact on the value of the Company are both obvious (though one which recognises the quantification of its diminution in value is a matter for judicial determination) has been met with a defence and counterclaim which challenges it at every stage. The defence is not just that the Company's breach of the Funding Regulations was an innocent and technical one, having no financial consequence beyond what was anticipated by the indemnity in the SPA in respect of the Clawback, if indeed that. The defendants raise many other issues for determination. They start with the point that, like the indemnity claim, LCG's warranty is time barred (again under the terms of the SPA on the defendants' interpretation of it) and run through to the reliance upon the expert evidence in support of the contention that LCG did not in fact overpay for the Company.

22. The parties' entry into the SPA was preceded by a due diligence exercise undertaken by LCG. This involved LCG having access to documents in the 'Data Room' (as it is defined in the SPA) from 12 July 2021. One of the issues to be determined in these proceedings relates directly to what LCG might have or did discover in relation to the risk of the Clawback; and the defendants also say that LCG's attitude to certain matters noted during the due diligence exercise is also material to their position that it has not suffered the kind of loss alleged in the claim.

23. Before setting out the issues identified for determination it is necessary to set out the background to LCG's claim, which has prompted the counterclaim, in greater detail.

2. THE FUNDING REGIME

24. As noted above, the litigation has arisen because of the Over-Claimed Sum which led to the Clawback soon after LCG had acquired ownership of the Company. Mrs Brenda McLeish, the CEO of LCG, was notified the 2022 Audit would be taking place by a letter dated 31 January 2022.

The Funding Regulations

25. The Company was audited by reference to the Funding Regulations. They are complex in their content and application. This section of the judgment draws heavily from LCG's extremely informative and helpful note prepared in accordance with Section J8.6 of the Commercial Court Guide: 'Claimant's Overview of How 16-19 Funding Works'. The note was prepared by reference to documents and (uncontroversial) evidence in the case.

26. ESFA funds a number of different education and training programmes. Its funding is subject to detailed sets of rules with which providers must comply. Those rules regulate the amount of the funding, the conditions to be complied with in delivering their courses, the monitoring of the delivery of courses, and the circumstances in which the funding can be adjusted in-year or post-year (i.e. the relevant academic year). Different programmes are subject to different sets of rules.

27. The Funding Regulations relevant to this case are those for courses delivered in accordance with ESFA's '**16-19 Study Programme**'. They relate to funding of courses in England (as the Welsh funding provisions are different). The Funding Regulations include the following:

1) "Funding guidance for young people 2020 to 2021 – Funding regulations".

2) "Funding guidance for young people 2020 to 2021 –Funding rates and formula" ("**Funding Rates and Formula**").

3) "Funding guidance for young people 2020 to 2021 – ILR funding returns" ("**ILR Funding Returns**"). They relate to 'Individualised Learner Records' ("**ILRs**"). (ILR are sometimes referred to as Personal Learner Records, or "**PLRs**".)

4) "16 to 19 funding: planned hours in study programmes" ("**Planned Hours in Study Programmes**").

5) "16 to 19 funding: maths and English condition of funding" ("**the Condition of Funding rules**").

28. The relevant breaches of the Funding Regulations, which led to the Over-Claimed Sum, relate to AY20/21. The academic year runs from 1 August to 31 July. The Company's total ESFA funding for AY20/21 was £5,124,268. The greater part of this (save for the sum of £420,352 for Student Financial Support Funding which is not relevant to the issues in this case) was calculated by reference to Funding Rates and Formula ("**the Funding Formula**").

29. The Funding Formula is:

[Student numbers x Funding rate per student (dependent on band) x Retention factor x Programme cost weighting + Level 3 programme maths/English payment + Disadvantage funding + Large programme funding] x Area cost allowance

30. The last 5 components of this formula are not germane to this dispute. It is the second and third which are most material.

Funding Formula Component No. 1: Student Numbers

31. The first, student numbers, is a number based on two components:

(1) The actual student numbers for that provider as of 1 November in the previous academic year; and

(2) An estimated projection of the anticipated number of students at the conclusion of the previous academic year, calculated by reference to the number of students enrolled in the same period during the academic year before that (i.e. two academic years previously).

(In this judgment I use the terms "student" and "learner" interchangeably)

Funding Formula Component No. 2: Funding Rates

32. The second component, funding rates per student, are determined by ESFA nationally each year. A particular provider's funding rates may be fixed at a different rate to the national one and, in AY20/21, the Company's rates were higher than the national ones.

33. The planned hours for each student ("**Planned Hours**") are at the core of this second component of the Funding Formula. This can be seen from the following table which shows the Company's funding rates for AY20/21.

Funding band	Description (planned hours per academic year)	Funding rate per learner (£)
Band 1	Part-time learners aged 16 and 17 with planned hours of up to 279	1,394
Band 2	Part-time learners aged 16 and 17 with planned hours of 280 to 359	2,655
Band 3	Part-time learners aged 16 and 17 with planned hours of 360 to 449	3,360
Band 4b	Part-time learners aged 16 and 17 with planned hours of 450 to 539	4,106
Band 4a	Full-time learners aged 18 or over with planned hours of 450 or above[13]	4,106
Band 5	Full-time learners aged 16 and 17 with planned hours of 540 or above	4,977

An explanation of Planned Hours

34. Learners in the Company on a 16-19 Study Programme have an option to study towards one of the following:

(a) An "Award", which is the smallest size of qualification and requires on average a total of approximately 50 planned hours of tuition;

(b) A "Certificate", which is the next size of qualification and requires on average a total of approximately 150 planned hours of tuition; or

(c) A "Diploma", which is the longest of the three qualifications and requires on average a total of approximately 300 planned hours of tuition.

35. Those externally certified qualifications, alongside vocational programmes offered by the Company, are "**Core Aims**" under the 16-19 Study Programme. They are not necessarily to be regarded as wholly separate qualifications: a Diploma consists of a number of different units, and the same units can be taught as part of the two smaller qualifications too. This approach involves what are known as "nested" qualifications.

36. Planned Hours are not limited to those required to achieve a Core Aim. In addition to those qualification and vocational activities, the 16-19 Study Programme also requires students to complete a "non-qualification activity that supports the students' goals and is integrated into the study programme". This can include planned employability, enrichment and pastoral ("**EEP**") hours.

37. Each learner will therefore have a total number of Planned Hours comprising (a) the total number of hours of qualification activities dependent upon the qualification in question ("**Planned Learning Hours**") and (b) the total number of hours of non-qualification activities (including those counting as EEP hours). The Planned Hours in Study Programmes describe the first as "*hours of teaching and learning that count towards externally certified qualifications*" and the second as "*hours of fundable activity that are not used to take externally certified qualifications*".

38. Because Planned Hours (both categories) are added up to form the learner's total hours for a study programme ESFA imposes obligations of in-year monitoring. ESFA requires the provider to monitor the completion of qualification(s) by each learner during the academic year in order to ensure that this is in line with what was originally planned for that learner.

39. Each learner has their own detailed personal record (the "**ILR**") which is an ongoing collection of data supported by auditable evidence about that learner, the planned learning for that learner, and the learning which he/she has actually undertaken during the academic year. Any changes in planned hours are then submitted to ESFA via a series of returns made over the course of the year setting out up-to-date details of the ILRs of each of its learners. The ILR Funding Returns section of the Funding Regulations contains the rules for this. It identifies the relevant weeks for making fourteen returns (R01 to R14) over a period which begins with the first (in the first week in the September one month into the academic year) and ends with the fourteenth (in the first week of October after the end of that year). Five of these returns are mandatory and the remainder are elective.

40. The returns are checked by the provider before being submitted using a Provider Data Self-Assessment Toolkit ("**PDSAT**"). This is software developed by KPMG and made available by ESFA which analyses learner data and learning delivery data, interrogates ILR data and produces reports so that providers can identify and investigate potential anomalies.

41. Where the number of hours or qualifications which a learner completes deviates from the original estimate in any academic year as recorded on that learner's ILR, this is reflected in the ILR returns submitted by a provider. It may result in either:

(a) Under-delivery, where the number of hours or qualifications which students complete is lower than what was initially indicated in the ILRs, and reduced funding; or

(b) Over-delivery, where the number of hours or qualifications which students complete is higher than what was initially indicated in the ILRs, and increased funding (known as "**Additional Learner Value**").

42. Either of those can be accommodated by ESFA making in-year changes to funding.

43. For under-delivery, the reduction in funding to which this gives rise is achieved by either (a) an in-year downward adjustment to the initial allocation (pursuant to (i) a reconciliation which takes place mid-year based on the R06 data resulting in clawback if the sum is below 75% of the forecast amount by that stage of the year, and (ii) a further reconciliation which takes place at the end of the year), or (b) a post-year "clawback" whereby the ESFA claims repayment of the relevant part of the funding.

44. For over-delivery, the increase in funding is paid by ESFA pursuant to reconciliations at various points in the year but is subject to an in-year growth cap, which is the smaller of (i) 30% of the contract value, or (ii) £1m (changed to £½m from AY23/24), and a minimum value of £100,000. Any Additional Learner Value above this cap is not recoverable and is known as "**Unfunded Learner Value**". In AY20/21 the Unfunded Learner Value was the £0.42m mentioned above.

45. I have mentioned in paragraph 18 above how the amount of the Clawback reflected negotiation between the Company and ESFA by reference to these provisions even though AY20/21 was then closed.

46. If a student leaves the course without competing the Core Aim then the impact on funding, and whether there is an in-year funding adjustment or instead the impact is felt in the funding in a future academic year, turns upon when he or she leaves. It depends on whether that learner leaves their study programme without competing their Core Aim (a) within the first six weeks of a study programme (or two weeks in the case of a study programme lasting 2–24 weeks and having fewer than 450 hours) (the "**Qualifying Period**"), or (b) after that time. If they complete the Qualifying Period, they count as a "start" for funding purposes and they thereby become a qualifying "**Fundable Learner**" from ESFA's perspective.

47. This means that:

(a) If a learner leaves within the Qualifying Period without completing the Core Aim recorded on their ILR:

(i) this causes an in-year funding adjustment for that academic year, removing all of the funding for that learner, but

(ii) it has no impact on the Retention Factor (see next) and therefore does not affect the funding in future years.

(b) If a learner leaves after the Qualifying Period without completing the Core Aim recorded on their ILR:

(i) there is no in-year funding adjustment for that particular academic year, but

(ii) this reduces the retention rate, which in turn reduces the Retention Factor, which in turn reduces the funding allocated to the provider two academic years later (as explained next).

Funding Formula Component No. 3: Retention Factor

48. The third component of the Funding Formula is "**the Retention Factor**". The Retention Factor is based on (but not identical to) the proportion of Fundable Learners who have achieved their Core Aim in an academic year. It is used by ESFA for calculating the funding for certain subsequent academic years. As explained in the table above, it is used as a multiplier in the Funding Formula.

49. The Retention Factor is calculated as:

$$0.5 + (\text{Retention Rate} \div 2)$$

50. This calculation will produce a decimal number between 0.5 and 1. The '**Retention Rate**' is the percentage of Fundable Learners who complete their Core Aim. The Retention Factor (alongside the other factors in the Funding Formula) is applied to the number of students (component no. 1 of the formula) and their funding rates (component no. 2) for the purpose of determining funding for the upcoming academic year.

51. Under the Funding Regulations, the funding for any given academic year will be calculated using a Retention Factor fixed by reference to the academic year two years before. The Retention Factor for a particular academic year will therefore impact upon the funding received two academic years later; so that the Retention Factor for AY20/21 would be used to calculate the Company's ESFA funding for AY22/23.

52. A Retention Factor of 1 (which would reflect all learners having completed their Core Aim in the earlier year – i.e. a 100% Retention Rate) would mean that the provider would receive 100% of its funding in the later year. A Retention Factor of 0.8 (reflecting a 60% Retention Rate) would r mean that the provider would eceive 80% of the funding allocated in that later year.

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The Company's Funding Contract for AY20/21

53. The Company's funding for AY20/21 reflected a process by which, in around March each year, the Company receives an indicative offer from ESFA setting out ESFA's proposed level of funding for the following academic year starting on 1 August. The Company then has one month to submit a business case in support of a different contract value, if necessary. ESFA responds to that business case in May. The value of the funding contract is finalised in June or July and is set out in a Funding Allocation Statement for the upcoming academic year. Once the funding for the upcoming academic year is finalised, the Company and ESFA sign a funding contract for that academic year.

54. The Company signed its contract with ESFA for AY20/21 on 23 July 2021 ("**the AY20/21 Contract**"). The total funding was £5,124,268.

55. Excluding Student Financial Support Funding of £420,352, the application of the Funding Formula produced funding of £4,703,917 as follows:

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Student numbers for 2020/21		National funding rate per student[21]		Retention factor		Programme cost weighting		Level 3 programme maths/English payment		Disadvantage funding		Large programme funding		Area cost allowance
	x		x	0.953	x	1.000	+		+		+		x	1.020
1,161		£4,188		-£186,269		£0		£0		£841,875		£0		£90,198
		£3,958,112		£3,771,844		£3,771,844		£3,771,844		£4,613,718		£4,613,718		£4,703,917

[The figure of £3,958,112 reflects the fact that not all of the 1,161 students would have attracted the (national) full-time funding rate of £4,188 as some might be part-time.]

The Company's breaches of the Funding Regulations

56. In essence, the Over-Claimed Sum was attributable to the Company's practice, in years prior to AY20/21 and affecting a significant number of students, in relation to (1) the Planned Hours in Study Programmes and (2) the maths and English Condition

of Funding rules in the Funding Regulations. These are referred to respectively the "**Planned Hours Over-Claim**" and the "**Condition of Funding Over-Claim**".

57. The Company's practices impacted upon the calculation under the Funding Formula. Under the Funding Formula, the Planned Hours Over-Claim reflected the fact that the Company had received funding for more Planned Hours than were eligible for funding. This resulted in over-claimed funding of £758,367.

58. The Condition of Funding Over-Claim reflected the Company inaccurately recording some full-time students as part-time. This improved the Company's retention factor and resulted in over-claimed funding of £489,097.

59. The final report by RSM on the 2022 Audit is titled 'Funding assurance review' and dated 20 June 2022 ("**the 2022 Audit Report**"). It identified the resulting breaches of the Funding Regulations. It explained how testing of a relatively small sample of students had revealed an error rate of 18.15% and how the Company's consequential review of all learners affected by the Planned Hours Over-Claim and the Condition of Funding Over-Claim had led to their impact upon funding being quantified.

60. Mr Lewis said in evidence that the 2022 Audit Report did not reflect a full audit within the meaning of the Funding Rules, but was a review. Against that, on behalf of LCG Mrs McLeish and Daniel Dowson (LCG's Director of Management Information Services and Funding since November 2017 who said the two terms are synonymous) said that such reviews are widely understood within businesses reliant upon ESFA funding to be audits.

61. I note that in their letter dated 31 January 2022, informing Mrs McLeish that the Company had been selected for "*an assurance review of ESFA funded provision for the 2020 to 2021 funding year*", ESFA went on to say they had appointed RSM who would be in contact "*to agree the audit arrangements*". The letter used the terms "review" and "audit" interchangeably. By its end, the process justified the latter description. The 2022 Audit Report contained the Company's responses that it noted the need to have Core Aims recorded accurately in the PDSATs (and that the Company's audit team would be conducting regular audits to support future funding claims) and that it would not reduce funding claims for certain students so as to avoid any penalty under the Condition of Funding rules explained below.

Planned Hours Over-Claim

62. RSM identified that the Company had claimed funding on the basis of a plan for students to undertake the full Diploma course (the longest of the three qualifications, requiring approximately 300 Planned Learning Hours) with the correspondingly greater number of hours, irrespective of whether or not the learner progressed beyond the Award or Certificate stage. Where a learner did not progress beyond the Award or Certificate stage, the Company retained the greater funding for the Diploma, placed the learner on EEP hours (i.e. non-qualification hours) and thereby avoided any negative impact on the Retention Rate. This was a breach of the Funding Regulations which require that, when a learning provider plans to deliver a shorter qualification at the start of a study programme, the Planned Hours must only be recorded for that

shorter qualification. The Planned Hours can then be updated and increased if and when the learning provider is sure that the learner will progress onto the further qualification requiring more Planned Learning Hours.

63. The 2022 Audit Report summarised RSM's findings as follows:

> "**Planned hours**
>
> Our main sample and PDSAT testing identified a number of learners who were only enrolled onto one learning aim plus work experience which typically was planned for two months which they completed. However, their planned hours recorded in the ILR were full time. When discussed with the Provider we were informed that as the intention was that learners progress from one aim to the next all the planned hours for the year were included on the ILR when the learner first enrolled, although only the learning aim(s) they actually started learning on were added to the ILR. We confirmed with the ESFA that this approach is incorrect, and that in line with paragraph 119 of the Funding Rules which states that '*Institutions may plan programmes for students with the intention of starting the student on a small or nested qualification and progressing them onto a larger qualification when they are successful in the smaller one. In such cases, the planned hours for the programme must only include the hours for the smaller or nested qualification. When the institution is sure that the student will progress onto the larger qualification, they can update the planned hours to include the additional delivery'*. The Provider has reviewed all learners who completed in less than 27 weeks (considered to be the point at which learners are at risk of dropping from full time based on average hours delivered per week) and recalculated the planned hours based on what the learner would actually have been able to attend. This resulted in a total funding error of £758,367."

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<u>Condition of Funding Over-Claim</u>

64. Under the Funding Regulations, learners who (a) have a grade 3 GCSE in maths, or English or both, and (b) are enrolled on a full-time course, must study for the relevant GCSE(s) in order to receive funding (known as the "**Condition of Funding rules**"). For these purposes, a grade 3 GCSE means that; neither higher nor lower. Grade 3 is the equivalent to the old grade D. The Condition of Funding is therefore a requirement aimed at students who nearly but not quite passed their maths or English GCSE. [In my decision on Issue 8 below, I refer to the evidence of Mr Lewis and Ms Lisa Gill whose position at trial was that even the lowest grade 1 was technically a pass.] Students who fall outside the Condition of Funding rules (either because their grade in maths or (as appropriate) English is greater than or less than 3, or because they are not enrolled on a full-time course) are permitted to undertake a Functional Skills Programme instead of a GCSE. A Functional Skills Programme (sometimes known as a "*stepping stone qualification*") is a lower qualification than a GCSE and takes approximately 40 to 50 hours to complete. A GCSE takes approximately 100 hours to complete.

65. For the purpose of the Condition of Funding rules a full-time course means either:

(a) A course with at least 540 planned hours for 16 and 17 year olds (i.e. Band 5 in the table at paragraph 33 above); or

(b) A course with at least 450 planned hours for 18 year olds who are not recorded as students with high needs (i.e. Band 4a in that table).

66. The financial impact of non-compliance with the Condition of Funding rules depends upon the extent of it. A failure to provide the relevant GCSE course to a full-time student who is required to study that course under the Condition of Funding rules carries a penalty of 50% of the national funding rate for the relevant band for each non-compliant learner. This is subject to a 5% margin of tolerance. If that tolerance is exceeded, then the penalty is applied to the funding allocation two academic years later as explained below.

67. The Condition of Funding rules were introduced with effect from AY16/17. The Company had provided GCSE courses in maths and English, in order to comply with them, but in about March 2019 it decided to stop delivering GCSE courses from AY19/20. This was in part due to low exam pass rates (I mention below Mr Lewis's evidence that the Company's perception that its GCSE courses were not successful was, in hindsight, a mistaken one). Therefore, the Company did not provide any GCSE courses in AY20/21.

68. What it did instead was that it recorded students who were subject to the Condition of Funding rules (i.e. they were in full-time education and had a grade 3 in maths and/or English) as part-time students. In many cases, this meant the relevant students were recorded as having 538 Planned Hours (just under the 540 hours threshold for full-time learners identified in the table at paragraph 33 above). The Company enrolled those students onto a Functional Skills Programme instead of a GCSE. This meant it claimed a lower level of funding for the academic year (the learners in question fell in Band 4b rather than 5 for the purposes of the funding rates set out in that table) but it nevertheless avoided later having to pay the 50% penalty for breaching the Condition of Funding rules.

69. The 2022 Audit Report summarised RSM's findings as follows:

"**Condition of Funding**

Our main sample testing identified a number of learners for whom the timetable and programme plan suggested they were full time, but where the ILR recorded them as in a lower band. From discussions with the Provider, we identified that these learners had previously achieved a grade 3 in English and/or maths, but as the provider did not offer GCSEs had been enrolled to Functional Skills. In order to reflect that this did not therefore comply with the Condition of Funding rules for full time learners the Provider had reduced the planned hours within the ILR, whilst still delivering the expected full time hours to these learners. We queried this approach with the ESFA, who ruled that this was not compliant with the Funding Rules and that in order to fully reflect the impact on funding of not complying with the Condition of Funding the hours would need to be reduced to 50% of full time hours, being 270 hours for 16 and 17 year olds and 240 hours for

18 year olds. The Provider has reviewed all learners recorded as on 538 or 448 hours with a grade 3 and enrolled to Functional Skills and recalculated the funding for these learners. This resulted in a total funding error of £489,097."

70. If the value of the funding referable to those students who do not comply with the Condition of Funding is less than 5% of the overall ESFA contract value then that falls within ESFA's margin of tolerance. There will be no impact on the value of the provider's funding contract.

71. If, however, the value affected by the non-compliance is 5% or more of the contract value then the funding for each learner where the Condition of Funding rules are not met is reduced by 50%. The resulting overpayment of funding which the provider will have received for that learner is recoverable as a clawback. That is generally done as an adjustment to the value of the contract for a future academic year because the level of non-compliance cannot be accurately determined until after the end of the academic year in which the non-compliance has occurred. The learner may have been studying for a maths or English GCSE at any point during the academic year so the non-compliance will only be known at the end of it. By that time, however, the provider will have been awarded its contract for the following academic year and so the impact would be upon the value of the contract for the academic year after that one. A breach of the Condition of Funding rules in a particular year (above the 5% margin of tolerance) will therefore impact upon the funding for the academic year two years later.

Post-2022 Audit

72. Matters become more controversial between the parties when it comes to considering the true impact of the findings of the 2022 Audit and RSM's findings that the Company had over-claimed £1,247,680 of funding in AY20/21.

73. It is clear that, on behalf of the Company, Mr Lewis signed a letter of representation to ESFA dated 13 June 2022 acknowledging and accepting the errors with that value. It is also accepted that negotiations between LCG and ESFA, by reference to the Unfunded Learner Value in respect of the closed year AY20/21, reduced the Clawback to £783,325, though in evidence Mr Lewis said this was more of a calculation than a negotiation and "*it's not the deal of the century*". The Clawback was repaid by an offset against funding in the following months in 2022: August (£234,000), September (£195,000), October (£195,000), November (£78,000) and December (£78,000).

74. Although the defendants have in these proceedings since sought repayment of this amount, on 14 October 2022 they paid LCG £783,325 (the amount of the Clawback) under the Funding Indemnity. This was on the basis that they accepted that the indemnity claim had been properly notified by LCG. The correspondence relating to

this is best summarised in my determination of what is Issue 13 identified in the next section of this judgment.

75. The more controversial matters between the parties (such as the funding implications of the Company changing its practices so as to be compliant with the Funding Regulations and the cost of introducing GCSE provision to meet the Condition of Funding rules) are best addressed in the context of Issues 8, 9 and 12 identified below. Those issues relate to the quantum of LCG's breach of warranty claim.

A summary of LCG's position

76. LCG says that, as a result of the 2022 Audit, the ILRs and plans for students in AY21/22 had to be updated to record hours in compliance with the Planned Hours in Study Programmes section of the Funding Regulations.

77. The Company's practice in relation to Condition of Funding in AY20/21 had continued into AY21/22. This meant accurately recording those students whose planned hours had inaccurately been reduced to the level of part-time to avoid the Condition of Funding rules applicable to certain full-time learners. That correction identified an overpayment by ESFA which crystallised under return R14 for AY21/22. This resulted in the Company receiving lower funding than anticipated for AY21/22 as a result of the consequential in-year adjustments.

78. Those adjustments also meant that the Condition of Funding rules impacted upon the Company through reduced funding for AY23/24. There was no Condition of Funding base adjustment to AY22/23 because the overpayment for AY19/20 had been repaid through the offsets against funding (to make good the Clawback) between the months of August and December 2022 mentioned above. However, the overpayment in AY21/22 meant that there was a negative Condition of Funding adjustment of £392,962 for AY23/24.

79. LCG says that (as the 2022 Audit took place in-year during AY21/22) the Company had to reduce the claim for funding for learners who had already left during that year. For learners who were still part of the 16-19 Study Programme (and similar to learners in subsequent academic years) the Company enrolled them on to Diplomas from the beginning rather than adopting the nested approach. This enabled it to claim for the higher full-time funding though it carried with it an adverse effect on the Retention Factor because there is a lower rate of completion of that higher Core Aim.

80. LCG says the Company's Retention Factor fell as follows:

Academic Year	Retention Factor
2019/2020	0.955
2020/2021	0.953
2021/2022	0.95405
2022/2023	0.96568
2023/2024	0.81451

81. At the time of the SPA neither the Company nor LCG was teaching GCSEs. A system for offering full-time learner GCSE course was put in place for AY23/24. LCG put the cost of this at £390,000 as at September 2023. A budget prepared by LCG in January 2023 for the financial year 2024 included "*an investment (£0.3m) in English/Maths tutors in order to deliver the required GCSE qualifications to learners*".

82. The budget also included a *"£0.4m investment in sales team to drive future increases in revenue*". It is LCG's position that it made this investment in an academy-based sales team to counter the effect of the Company's loss of a data sharing arrangement with the outsourcer Capita (the "**ARG/Capita issue**" mentioned below) to which the defendants point in connection with a drop in learner numbers after the SPA. The sales team was set up with effect from January 2023 alongside a team within LCG's Durham call centre focussed upon academy recruitment.

83. LCG says this investment has enabled the Company to maintain a fairly steady level of learner numbers since the SPA and relies upon the following numbers[1]:

Year	2018	2019	2020	2021	2022	2023
Total number of learners	756	1140	1448	1287	1212	1295

84. The January 2023 budget also referred to a change in the Company's revenue recognition policy, as a result of the changes implemented following the 2022 Audit, which took effect from the start of the second half of FY23. The new policy resulted in revenue being significantly weighted towards the second half of the financial year. In a section headed 'Acquisition Performance', the budget provided for an increase in the Company's revenue from £12.1m at the time of the SPA to £13.2m in FY24 but a fall in EBITDA from £2.6m to £2.3m.

85. The budget identified the Clawback and the under-performance under the 16-19 Study Programme in AY20/21 as the basis for anticipating that the Company's overall "*contract value for AY23/24 is expected to reduce by £2m to £10m*." LCG contrasts

[1] These figures are based on calendar years not academic years and the high number in 2020 is said to be referable to Covid when the Company recruited on-line learners.

the value of the Company's contract for the 16-19 Study Programme for AY20/21 (£5,124,268) with that for AY23/24 (£4,333,519).

A summary of the defendants' position

86. Against this, the defendants say that the principal reason behind the reduction in funding was because the number of learners starting with the Company (in both England and Wales) had fallen by 22% in the 12-month period after the SPA. This had resulted in revenue falling by 9%. So far as the fall in learner "starts" in England was concerned, the "*main driver*" was the ARG/Capita issue ("ARG" denoting Army Recruitment Group).

87. The ARG/Capita issue arose out of the fact that the Company had an arrangement with the outsourcer Capita which itself had a data sharing arrangement with the armed forces. This enabled Capita to provide the Company with a list of names of individuals who had applied to join the armed forces but whose application had been unsuccessful. The study programmes offered by the Company might improve their prospects on any future application to join the forces. Before the SPA about one-third of the Company's learners came from lists provided by Capita. However, as a result of a data breach (not involving the Company) the data sharing arrangement between the military and Capita was switched off at around the date of the SPA. LCG was made aware shortly before the SPA of the risk that it would be switched off though it understood at that time that this would be a "pause" rather than a "stop". The defendants' Disclosure Letter (addressed in the context of Issues 5 and 7 below) had given specific disclosure in relation to the ARG issue, in qualifying a warranty addressing changes since the date of the Company's accounts, saying "*[t]he Company has since had confirmation from ARG that the learner numbers are expected to realign to those targeted by the end of December 2021*". In the event, the arrangement between the military and Capita was terminated.

88. The defendants point to the terms of LCG's letter dated 17 October 2022 to Mr Lewis informing him that no Earn-Out Consideration would be payable to him under the SPA because the target EBITDA (of £2,571,000) had not been met. LCG gave the following explanation in that letter for a lower EBITDA of £1,238,373 in the financial year ended 31 July 2022:

> "1. Learner volumes were significantly behind budget. This was partially due to the negative impact caused by the cessation of the data sharing agreement between the Company and the Army Recruiting Group.
>
> 2. The Company's business has a predominantly fixed cost base. As a result, the negative impact of lower revenues as a result of point 1 above had an immediate impact on the Company's EBITDA, and therefore on Maintainable EBITDA.
>
> 3. Huw Lewis was kept fully informed of these issues during the period from the Completion Date up to and including 31 July 2022, and was provided with monthly management accounts in each month during that period."

89. The defendants emphasise the first point in that letter. They recognise (and indeed rely upon) the fact that the Company's in-year (AY21/22) adjustments to ILRs, for those learners who were still part of the study programme and moved on to Diplomas, resulted in higher funding/revenue per learner. In this regard they point to a note in the Company's management accounts for October 2022

> "ESFA Contract —£4k less than forecast for the month and £26k behind for the YTD. The combined starts target for the last three months was 992, actual number achieved was 851. Part of the income missed by not achieving the target has been made back with a larger than forecast number of learners moving over to the diploma, therefore higher aver/£ per learner than forecast has been achieved."

90. So far as concerns the second point in the letter dated 17 October 2022 (about the Company's costs being predominantly fixed in their amount) the defendants refer to a staff reorganisation in the year after the SPA which impacted upon both teachers and support staff. In relation to this (and the above points about learner numbers and funding per learner) they rely upon the terms of a post-acquisition review prepared by LCG in February 2023: 'MPCT (Project Beacon) 12M Post Acquisition Review' (the "**Post Acquisition Review**").

91. The defendants say the 'Executive Summary' in the Post Acquisition Review painted an overwhelmingly positive outlook for the Company. Amongst other points, it noted:

> "**Historic trading**
>
> - Learner starts peaked at a round the time of the acquisition (Oct21), then fell (in part due to the loss of an external learner find source). FY22/23 starts of 1,753 were 22% lower than at acquisition but have remained stable around this level since Aug22.
>
> - A staff reorganisation was undertaken as part of the integration process (LCG group alignment) and to address lower learner starts. The reorganisation took place in Jul/Aug22, impacting delivery and support staff. Average headcount dropped by 20% and monthly staff costs by c.£72k per month for the last five months of FY22/23.
>
> - The FY22/23 adjusted EBITDA was £2.1m compared to £2.9m LTM[2] at acquisition.
>
> **Integration**
>
> - An external PFA audit post acquisition identified a significant historic funding overclaim. A claim has been made against the vendors which is ongoing. Corrective action was taken (KPMG did a funding audit on revised practice which concluded there were no observations deemed to have a funding implication).

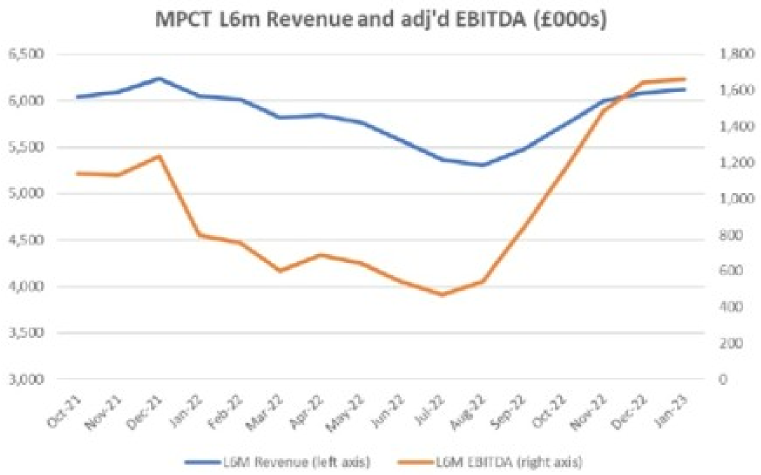
[2] This reference to an EBITDA of £2.9m in the 12 months prior to acquisition is higher than the EBITDA of £2.571m adopted for the purpose of the SPA: see paragraph 663 below.

- The LCG military academies in Yorkshire were integrated into MPCT in Jan22.

- Other integration successes and challenges are noted on subsequent slides

Next twelve months

- The FY23/24 Budget assumes a strong recovery in learner starts driven by multiple factors: a new internal sales structure, accessing wider funding (such as AEB[3]), and expanding the curriculum offer (new 13 qualification approved which will give 12 learners progression opportunities). Welsh apprenticeships has been moved into LCG Apprenticeships from 1Feb23.



Summary

- The rationale for acquiring MPCT was to acquire the market leader in the pre-uniform military training sector. This rationale remains intact and the FY23/24 Budget assumes four new academies opening to strengthen market presence further.

- Disappointing starts and correcting the PFA clawback matter has driven lower profitability, partly offset by addressing the cost base.

- Starts, revenue and profit growth is anticipated in FY23/24 as a result of action taken to focus on driving new sales through access to broader funding and curriculum."

3. THE ISSUES

[3] Adult Education Budget.

92. The parties' 'Agreed List of Common Ground and Issues' identifies 13 issues for determination ("**the Issues**" and each of them an "**Issue**"). Many of them turn on the true construction of the SPA where the parties do not agree upon its true meaning. Those whose determination rests upon evidential findings (including in relation to quantum, by reference to the expert valuation evidence adduced at trial) still fall to be tested against its terms; and on one of those (Issue 7 below) there remains disagreement about what the SPA provides.

93. The Issues identified by the parties are as follows (all but the last two definitional terms, which I have deployed, appear in the Defence):

1. Whether the Warranty and Indemnity Claims were served within the contractual time limit set out in paragraph 1.4 of Schedule 5 or whether (on the contrary) those claims are deemed to have been withdrawn as a result of not having been served within that time limit (the "**Deemed Withdrawal Issue**"). This in turn raises an issue as to the meaning of the word "*served*" in paragraph 1.4 of Schedule 5:

(a) Were the proceedings a "*notice or other communication*" within the meaning of clause 13.1 of the SPA and therefore served when delivered to the contractually-specified address for the defendants?

(b) Alternatively, does "*served*" in any event mean delivering the claim form to the contractually-specified address for the defendants?

(c) Alternatively, does "*served*" mean bringing the proceedings to the attention of the defendants? If so, was this done, either by delivering the proceedings to the defendants' address or by delivering the proceedings to the defendants' solicitors?

(d) Alternatively, does "*served*" mean served in accordance with the CPR? If so, did service take place when the proceedings were delivered to the defendant' address (CPR 7.5) or on the second business day after they were so delivered (CPR 6.14)?

(e) Alternatively, did the claim form constitute a fresh valid notice of the claim, as well as being the method by which these proceedings were commenced?

2. Whether the losses claimed for some or all of the Warranty Claims were notified to the defendants in accordance with paragraphs 1.1 and 1.2 of Schedule 5 (the "**Notification Issue**"). Even if they were not, whether the defendants are now estopped from contending that they were not.

3. Whether the existence of liability, or the ability to make a claim, under the Funding Indemnity precludes (as a matter of construction or as a matter of implication) any Warranty Claim (the "**Indemnity versus Warranties Construction Issue**").

4. For the Knowledge-Based Warranties, whether the defendants (as Vendors) had the requisite knowledge (the "**Vendors' Knowledge Issue**"). As part of this:

Whether the Company's process and methodology had been communicated to ESFA's own auditors in previous audits and deemed an acceptable practice and an appropriate application of the Funding Regulations. The previous audits relied upon by the defendants in this way include at least 2018.

5. For the Warranties which were subject to the matters Disclosed, whether the relevant matters were Disclosed (the "**Disclosure Issue**").

6. Whether the Warranties were, on their terms, breached (the "**Breach Issue**").

7. Whether LCG (as Purchaser under the SPA) had actual knowledge and awareness of the facts, matters or circumstances giving rise to the Warranty Claims and therefore whether the defendants are not liable for breach of those Warranties (paragraph 12 of Schedule 5) (the "**Purchaser's Knowledge Issue**"). As part of this:

(a) Whether the documents and information in the Disclosure Documents and the Data Room included information containing all of the relevant facts, matters or circumstances giving rise to the clawback, recovery or repayment to ESFA in relation to the Over-Claimed Sum.

(b) Whether the word "*and*" expressly used between paragraphs 12.1.1 and 12.1.2 of Schedule 5 should (as a matter of construction) read "*or*".

(c) If the word "*and*" expressly used between paragraphs 12.1.1 and 12.1.2 of Schedule 5 should not (as a matter of construction) read "*or*", whether the term should be rectified, on the basis of an alleged mutual mistake, so that it reads "*or*".

8. Whether the breaches of Warranty complained of resulted in any impairment to or reduction of the maintainable earnings of the Company and/or caused loss and if so in what amount (the "**No Loss/Amount of Loss Issue**").

9. Whether the value of any Warranty Claim is greater than the Indemnity Claim (that is to say, greater than the amount which was required to be repaid to ESFA, namely £783,325) (the "**Indemnity Claim Value Cap Issue**").

10. Whether the value of the Warranty Claims is limited by reference to the value of the claim as notified to the defendants (namely, £6,862,240) (the "**Notification Claim Cap Issue**").

11. Whether the maximum liability of each of the defendants is greater than 50% of the Consideration actually received by each of them (paragraph 2.2 of Schedule 5) (the "**Limitation Cap Issue**").

12. Whether LCG has mitigated any loss in respect of the Warranty Claims (the "**Mitigation Issue**").

13. If LCG's claims are deemed to have been withdrawn (under the Deemed Withdrawal Issue), whether there has been a failure of basis and/or a total failure of consideration in respect of the sum paid by the defendants to LCG and, if so, whether the defendants are entitled to reclaim that sum on the ground of unjust enrichment (together with interest under s. 35A SCA 1981 and costs) (the "**Repayment Issue**").

94. In the remainder of this judgment I will refer to each of the Issues by the above numbering and/or by the relevant definitional term.

95. The Issues all fall to be determined by reference to the terms of the SPA (including for the purposes of Issue 8, which falls to be determined by reference to expert evidence, the price of £16,813,008 paid by LCG under it).

4. THE SPA

General Observations

96. The principal parties to the SPA were the defendants as "*the Vendors*" and LCG as "*the Purchaser*". LCG's parent company, Boyd Topco Limited ("**Boyd Topco**") was also a party, as "*the Guarantor*" of LCG, as was the Company.

97. The "*Initial Consideration*" payable under the SPA for the 100 ordinary shares in the Company was £16,813,008, payable as to £15,927,357.60 to Mr Lewis for his 95 shares and £840,650.40 to Ms Probert for her 5 shares. The calculation of that was set out in Part C of Schedule 7. Allowing for the inclusion and estimation of the Company's net cash at completion, and for the fact that the schedule does not in terms identify the Company's enterprise value (or its EBITDA or a multiplier thereof) it is common ground between the parties that the sum of £14,150,000 within that total initial consideration was based upon a MEBITDA figure of £2.571m multiplied by 5.5.

98. The SPA also provided for the defendants to be paid "*Earn-Out Consideration*", in accordance with a formula set out in Schedule 8. However, the threshold condition for applying that formula was the expectation that the Company should in FY22 have a MEBITDA in excess of £2,571,000. This further consideration was not earned.

99. I identify below the particular provisions of the SPA which have given rise to differing interpretations by the parties (to which some other provisions in its Section 1 – headed 'Interpretation' – are relevant) but at this stage I note that:

   i) clause 1.2.3 provided that, unless the context otherwise requires the headings in it are for convenience only and shall not affect the construction or interpretation of it;

   ii) clause 11.2 contained an entire agreement clause; and

   iii) clause 11.7 provided that, except where expressly stated to the contrary the warranties and any indemnity given by both Vendors are "*given on a joint and* *several basis with* [sic] *all Vendors, subject to the terms of the SPA*." That proviso enables each of Mr Lewis and Ms Probert to rely upon the terms of paragraph 2 of Schedule 5 which caps their respective liability for the breach of warranty claims at an amount of consideration actually received by him or her (so this is a relevant cap on Ms Probert's potential liability) and their respective liability under the Funding Indemnity at 50% of the consideration actually received by him or her.

100. I now turn to the warranties that are relevant to this case (including provisions of the SPA which elaborate upon them or qualify them) before setting out the Funding Indemnity.

101. The quotation of other provisions of the SPA is better left to be read in the context of the Issue to which they relate.

The Warranties relied upon by LCG

102. The warranties relied upon by LCG ('*General Warranties*', defined to exclude warranties as to title) were given by Mr Lewis and Ms Probert under clause 6.2 of the SPA:

> "The Vendors warrant to the Purchaser for itself and the Purchaser's successors in title and assigns) that as at the Completion Date each of the General Warranties is true."

103. Schedule 4 to the SPA contains 45 pages of warranties. The Funding Regulations fall within the definition of 'Funding Rules' for those warranties which use that term. The warranties in Part B of the schedule which are relied upon in the particulars of claim are set out below:

(1) **Warranty B1.4**:

"Filings

All resolutions, annual returns and other documents required to be delivered to the Registrar of Companies or to any other governmental or regulatory body or to any local authority have been prepared and filed and, so far as the Vendors are aware, the information contained in such documents was accurate in all material respects when filed or delivered."

(2) **Warranty B2.1.2:**

"**The Accounts of the Company**:

…

2.1.2 give a true and fair view of the assets and liabilities and state of affairs of the Company as at the Accounts Date and of the profit or loss of the Company for the financial year ended on the Accounts Date …"

The 'Accounts Date' is defined as 31 July 2021.

(3) **Warranty B2.1.3**:

"**The Accounts of the Company**:

2.1.3 The Accounts (a copy of which is contained in the Disclosure Documents):

(a) do not materially overstate the value of any asset or materially understate any liability of the Company as at the Accounts Date;

(b) have been prepared on a basis consistent with that used for the preparation of the Company's accounts for the last two financial periods; and

(c) have been filed in accordance with the requirements of the Companies Act."

(4) **Warranty B2.2.2**:

"**Management Accounts**

The Management Accounts:

…..

2.2.2 disclose with reasonable accuracy the assets and liabilities and the state of affairs, financial position and the profit/losses of the Company for the period in respect of which they were prepared and as at the date to which they were prepared.

(5) **Warranty B2.5.2**:

"**Since the Accounts Date**

Since the Accounts Date:

…

2.5.2 there has been no material adverse change in the financial or trading position or in the prospects of the Company and the Vendors are not aware of any fact, matter, event or circumstances which is likely to give rise to any such material adverse change …"

(6) **Warranty B3.6**:

"Grants

The Company has not applied for any grant, employment subsidy or other similar payment and, so far as the Vendors are aware, no such grant, subsidy or payment paid or due to be paid to the Company is liable to be refunded, withheld or refused (in whole or in part) in consequence of anything which the Company has done or omitted to do (or has agreed to do or omit to do) or for any other reason."

(7) **Warranty B5.2.1**:

"Compliance

5.2.1 The Company does and has at all times complied with and conducted the Business in accordance with all applicable laws and regulations, which are binding on the Company."

(8) **Warranty B5.2.2**:

"Compliance

5.2.2 The Company:

(a) during the last four years has complied, and continues to comply, in all material respects with the Funding Rules; and

(b) so far as the Vendors are aware, is entitled to receive all funding under contracts in place between the Company and ESFA, the Welsh Government and ACT, and/or any other provider of funding for training delivered to schools."

(9) **Warranty B7.2.7**:

"Contractual matters

…

7.2 Save as Disclosed, neither Contract:

…

7.2.7 involves, or is likely to involve, an aggregate outstanding or potential expenditure by the Company of more than £10,000 …"

[The reference to "neither Contract" was to the contracts identified in the preceding sub-clause: "the contracts between the Company and Education & Skills Funding Agency dated July 2021 and July 2020; and 7.1.2 the contracts between the Company and ACT Limited dated 10th June 2021, 22nd March 2021, 12th August 2020, which are the Company's material customer agreements for the carrying on of the Business ("Contracts").]

(10) **Warranty B7.4.3**:

"Validity and performance of contracts

In relation to each of the Contracts:

…

7.4.3 no party has made any material complaint regarding the performance or non-performance of such agreement, arrangement or obligation, and, so far as the Vendors are aware, there are no facts or circumstances which the Vendors consider are reasonably likely to give rise to any of the foregoing."

(11) **Warranty B8.2**:

"Litigation …

The Company has received no written notice of and so far as the Vendors are aware there are no circumstances which are reasonably likely to give rise to Proceedings or any such investigation, inquiry or enforcement proceedings as is referred to in paragraph 8.1.2."

[Paragraph 8.1.2 stated: "so far as the Vendors are aware, the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body.]

104. LCG's position is that the particulars of claim identify 12 separate warranties. This is on the basis that the warranty in B5.2.2 contains two separate warranties. However, the defendants say their true number is the eleven indicated above. The significance of this disagreement is that, as can be seen, some warranties are in absolute terms and some are knowledge-based. I address 'Vendors' Knowledge' next. LCG says B5.2.2(a) is an absolute warranty and B5.2.2(b) is knowledge-based. The defendants dispute this separation of the two limbs and contend that B5.22 as a whole is a knowledge-based warranty. The point is of central importance when LCG's position is that the detection of the Over-Claimed Sum points to an obvious breach of B5.2.2(a) ("**the Key Warranty**") and it only needs to establish breach of one warranty to recover the full amount claimed as damages for breach of warranty.

Vendors' Knowledge

105. Clause 6.8 of the SPA specifies that:

"Where any statement in the General Warranties is qualified by the expression 'so far as the Vendors are aware' or any similar expression, it shall be deemed to include an additional statement that it has been made after due and careful enquiry of:

6.8.1 each member of the Group, the Vendors and their respective Connected Persons; and

6.8.2 each member of the Senior Leadership Team"

106. Clause 1.1 of the SPA defined the Senior Leadership Team ("**SLT**") to mean each of Emma Lambert, Tim Williams, Steve Williams, Donna Briggs, Huw Moore, Dan Shooter and Brian Edwards.

107. These provisions give rise to Issue 4 above.

Disclosure/Purchaser's Knowledge

108. By clause 6.3 of the SPA, each of the warranties identified in paragraph 103 above was given:

> "subject to matters Disclosed and to the limitations set out in Schedule 5, provided that none of the provisions of Schedule 5 shall apply in the case of any fraud, dishonesty or wilful concealment by any Vendor."

109. The proviso to clause 6.3 is not relevant to this case as no such allegation is made by LCG.

110. Schedule 5 is headed 'Limitation of Claims'. That heading is not relevant to the interpretation of the schedule but the provisions within the schedule do provide for exclusions or limitations of liability: they give rise to the four issues (Issues 1, 2, 10 and 13 above) which logically fall to be determined first. The provision mentioned next gives rise to Issues 5 and 7 above.

111. Paragraph 12.1 of Schedule 5 (headed 'Purchaser's Knowledge') provides:

> "12.1 The Vendors shall not be liable in respect of any Warranty Claim to the extent that the facts, matters or circumstances giving rise to a Warranty Claim:
>
> 12.1.1 are Disclosed in the Disclosure Letter or Disclosure Documents; and
>
> 12.1.2 were within the actual (and not, for the avoidance of doubt, imputed, constructive, implied or deemed) knowledge of the Purchaser at the date of this Agreement."

112. Clause 1.1 of the SPA defines 'Disclosed' to mean:

> "fairly disclosed with sufficient detail to identify the nature and scope of the fact, matter or information concerned in the Disclosure Letter, the Disclosure Documents or the Additional Disclosure Documents."

113. For the purpose of that definition, '*Disclosure Letter*' means the letter from the defendants to LCG executed and delivered on the signing of the SPA, together with the '*Disclosure Documents*' and the '*Additional Disclosure Documents'*. '*Disclosure Documents*' means the documents which were made available to LCG and its advisers in the '*Data Room*', an index of which is annexed to the Disclosure Letter (its Annex 1); '*Additional Disclosure Documents*' means the documents which had been made available to LCG and its advisers in the additional disclosure documents bundle, an

index of which is annexed to the Disclosure Letter (its Annex 2); and '*Data Room*' means the data room relating to the transaction as at 25 October 2021.

114. The true meaning of paragraph 12.1 above is contentious and that has given rise to much of Issue 7.

The Funding Indemnity

115. The Funding Indemnity was one of number of indemnities given by Mr Lewis and Ms Probert under clause 7 of the SPA. It is found in clause 7 of the SPA which provides:

> "7.1 Without prejudice to any other rights or remedies available to the Purchaser, the Vendors undertake to indemnify, and to keep indemnified, the Purchaser and the Group against, and shall, subject to and in accordance with Schedule 5, pay to the Purchaser a sum equal to, all Losses suffered or incurred by the Purchaser and/or the Group which arise in connection with:
>
> …….
>
> 7.1.2 the clawback, recovery or repayment to ESFA, ACT or the Welsh Government of any sums paid to any Group company in the period from 1 March 2018 up to and including the Completion Date whether pursuant to an audit, investigation, inspection or otherwise…"

116. The "*Group*" for the purposes of the Indemnity is defined as the Company and its subsidiaries.

117. It is common ground between the parties that the Clawback led to the defendants being liable (on a timely claim) under the Funding Indemnity. Their liability under the Funding Indemnity has given rise to Issues 3 and 9. It also impacts upon Issue 8.

No Double Recovery

118. By the claim form and particulars of claim, LCG has expressly reserved the right to elect (as it sees fit) between its remedies for breach of warranty and its claim under the Indemnity. Entry of judgment on the one cause of action will constitute a final election between the two.

119. This position reflects the fact that paragraph 4 of Schedule 5 provides as follows:

> "**DOUBLE CLAIMS**
>
> "If the same fact, matter, event or circumstance gives rise to more than one claim for breach of any of the Warranties, or to a claim both under the Warranties, an Indemnity Claim and/or the Tax Covenant the Purchaser shall not be entitled to recover more than once in respect of such fact, matter, event or circumstance".

5. THE ISSUES: REASONING AND DETERMINATION

120. In this section of the judgment I address the Issues in what appears to me to be the most sensible order to take them.

121. I set out my decision in bold at the end of each section addressing the relevant Issue or Issues.

A. Issues 1, 2, 10 and 13: The Deemed Withdrawal Issue, the Notification Issue, the Notification Claim Cap Issue and the Reclaim Issue

122. Allowing for the fact that LCG advances other defences to the defendants' counterclaim based upon the "deemed withdrawal" of the indemnity claim, these issues (or the greater part of them) might have been suitable for determination as a preliminary issue, before a full trial. They are based upon contractual limitation periods which preclude either the claim as a whole or the pursuit of certain allegations within it and involve arguments about contractual interpretation by reference to uncontentious facts. The nature of these defences is such that, in this judgment following the full trial, logically they fall to be addressed first.

Relevant Provisions of the SPA

123. The SPA contains a time limit for the notification of warranty claims and indemnity claims.

124. Paragraph 1.1 of Schedule 5 to the SPA provides that:

"The Vendors shall not be liable for a Warranty Claim, claim for breach of any of the Title Warranties or Indemnity Claim unless the Vendors' Representative receives from the Purchaser a written notice of:

1.1.1 any Warranty Claim for breach of any of the Tax Warranties or claim for breach of any of the Title Warranties on or before the seventh anniversary of the Completion Date;

1.1.2 any Indemnity Claim for a breach of the Funding Indemnity on or before the third anniversary of the Completion Date; and

1.1.3 any other Warranty Claim … on or before the date falling 18 months after the Completion Date."

125. The Completion Date was the date of the SPA: 29 October 2021.

126. Paragraph 1.2 of Schedule 5 to the SPA provides as follows:

> "The written notice of any Warranty Claim … shall give details (in such detail as is reasonably available to the Purchaser at the time) of the nature of the claim, the facts and circumstances giving rise to it and the Purchaser's bona fide estimate of any alleged loss. In the situation where a liability is contingent or the outcome not capable of being quantified but which may give rise to a Warranty Claim … ('Contingent Warranty Claim'), the written notice shall contain these details so far as are known to the Purchaser."

127. The SPA also imposed a time limit for commencement of proceedings on a warranty claim.

128. As originally agreed, paragraph 1.4 of Schedule 5 of the SPA provided that:

> "Any Warranty Claim … or an Indemnity Claim notified under paragraph 1.1 shall be deemed to be withdrawn … unless legal proceedings in respect thereof have been commenced within six months of the giving of written notice of such Warranty Claim … or an Indemnity Claim, and for this purpose legal proceedings shall not be deemed to have commenced unless both issued and served …"

129. However, the parties subsequently agreed (twice) to a variation of this provision. Firstly, by a Variation Agreement dated 7 October 2022 they extended the relevant period from 6 months to 8 months. Later, by a second Variation Agreement dated 8 December 2022 they agreed, while retaining the 8 month deadline, that the whole of paragraph 1.4 should be subject to a new paragraph 1.4.1. This provided as follows:

> "Any Warranty Claim (other than a claim for breach of any of the Tax Warranties), claim for breach of any of the Title Warranties or an Indemnity Claim notified under paragraph 1.1 prior to 1 December 2022 shall be deemed to be withdrawn (if it has not been previously satisfied, settled or withdrawn) unless legal proceedings in respect thereof have been commenced by 14 February 2023, and for this purpose legal proceedings shall not be deemed to have commenced unless both issued and served …"

130. Therefore, for any claim (other than for breach of the Tax Warranties) which had been notified before 1 December 2022, proceedings had to be issued and served "by" 14 February 2023. For any such claim which had not been notified by that date, LCG had until 18 months after the Completion Date (ie. by 30 April 2023) to notify (under the original paragraph 1.1.3) and then another 8 months thereafter to issue and serve proceedings.

131. The defendants argue that LCG's Warranty Claims in these proceedings are not supported by a valid notice under paragraph 1.2 of Schedule 5 and that the proceedings in respect of those claims were not served by 14 February 2023 so that they (and also the Indemnity Claim) are "*deemed to be withdrawn*" in accordance with the paragraph 1.4.1).

132. The Deemed Withdrawal Issue depends upon clause 13.1 of the SPA. That clause (together with other 9 sub-paragraphs in clause 13) is headed '**NOTICES**' and provides as follows:

"13.1 Any notice or other communication to be given under this Agreement ("**Notice**") shall be:

13.1.1 in writing and in English;

13.1.2 signed by or on behalf of the party giving it;

13.1.3 delivered by hand or sent by prepaid first class post, Royal Mail signed for delivery or special delivery, to the relevant address in this Clause 13 or by air mail if posted to an address outside the UK; and

13.1.4 marked for the attention of the relevant party set out in this Clause 13 (or as otherwise notified from time to time under this Agreement).

13.2 No Notice may be given by fax.

13.3 Any Notice given by hand delivery or post shall be deemed to have been duly given, unless proved otherwise:

13.3.1 if hand delivered (including by way of delivery by commercial courier or sheriff officer), when delivered;

13.3.2 if sent by prepaid first class post, signed for delivery or special delivery in the same country as the country of address at 09:00 on the second Business Day after the date of posting;

13.3.3 if given by air mail posted to an address outside the UK, on the fifth Business Day after posting, provided that in each case where delivery by hand or post occurs after 17:30 on a Business Day or on a day which is not a Business Day, service shall be deemed to occur at 09:00 on the next following Business Day. References to time in this paragraph are to local time at the location of the addressee.

…………."

133. Subject to any later notification of a change to it (see clause 13.6), for present purposes "*the relevant address*" under clause 13.1.3, as given in clause 13.4, is:

"Richard Huw Lewis, Vendors' Representative

Address: Trederwen

Watery Lane

Monmouth

Monmouthshire

Wales

NP25 5AT

For the attention of: Richard Huw Lewis"

134. The defendants argue that clause 13.1 extends to the communication of legal proceedings by the service of them under paragraph 1.4.1.

135. The defendants' contentions fall to be tested by looking at the sequence of events after the 2022 Audit before addressing the legal principles.

Relevant Events

136. The 2022 Audit took place in February 2022.

137. LCG's then solicitors (Burness Paull, who drafted the SPA) gave written notice of the claims in their letter dated 8 April 2022 ("**Notice 1**"). Notice 1:

i) referred to a Funding Indemnity claim under clause 7.1.2 of the SPA;

ii) stated that LCG's enquiries into the matters which were the subject of the claim were ongoing (paragraph 7 of the letter);

iii) stated that LCG reserved the right to add to and amend the details of its claim in due course (paragraph 7);

iv) referred to a warranties claim and stated that the General Warranties "included, amongst others" certain specific warranties (namely, paragraphs 3.6, 5.2.1, 5.2.2, 7.2.7, 7.4.2, 7.4.3 and 8.2 of Part B of Schedule 4 (paragraph 9);

v) stated that LCG reserved the right "*to identify any further applicable warranties in due course*" as its understanding of the relevant issues developed (paragraph 10);

vi) stated that the claims were based on the over-claiming of funding from ESFA, setting out the key parts of the relevant background (paragraphs 11 to 16); and

vii) stated that LCG had insufficient information to provide a precise estimate of the quantum of its claim and would do so when this information became available.

138. Burness Paull then provided an updated notice (which the defendants accept is to be read together with the first notice) by their letter dated 14 June 2022 ("**Notice 2**"), which:

i) repeated reliance on the same warranties and indemnity provisions as stated in their letter of 8 April 2022;

ii) stated the estimate for the loss for breach of warranties as being £6,862,240 (based on an overstatement of EBITDA due to the Over-Claimed Sum multiplied by a multiplier of 5.5); and

iii) stated that "*Damages for breach of warranty aim to put the claimant in the position he would have been in had the warranties been true. As such, our client's claim for breach of warranty will encompass the amount by which the Initial Consideration paid by our client to the Vendors for the purchase of the Company was over-inflated as a result of the Company's over-claiming of funding*" (paragraph 12(b)).

139. Notice 1 therefore identified Warranties B3.6, B5.2.1, B5.2.2 (including the Key Warranty), B7.2.7, B7.4.2, B7.4.3 and B8.2; and LCG said it had insufficient information to provide an estimate of the quantum of its claim. Notice 2 identified the same warranties as Notice 1 and stated that LCG's estimate for the loss resulting from their breach was £6,862,240 (the same amount identified as claimed in the claim form issued 8 months later), which was based on an alleged overstatement of the Company's EBITDA by the amount of the Over-Claimed Sum multiplied by 5.5. In other words, the estimate was premised upon using the same EBITDA multiplier as in the SPA and only the EBITDA was adjusted downwards.

140. Eight months after Notice 2, on 14 February 2023, and as confirmed by the evidence of the respective process servers, the claim form (issued that same day) was hand-delivered in the following ways:

i) to Mr Lewis at 14:57 through the letterbox at his home address in Monmouth;

ii) to Ms Probert at 14:57 through the letterbox at that same address (they live together);

iii) to Acuity Law, the defendants' current solicitors, at 13:25 to the main reception desk at their offices; and

iv) to Capital Law (the defendants' solicitors at the time of the SPA) at 13:40 to the main reception desk at their offices.

The Rival Arguments

141. The defendants take two points in relation to Notice 1 and Notice 2 (read together). Firstly, they say that LCG's failure to give written notice of alleged breaches in relation to Warranties B1.4, B2.1.2, B2.1.3, B2.2.2 and B2.5.2 means that LCG is precluded from advancing such claims. They say identification by number of the warranties relied upon was required "*as a bare minimum*". Secondly, the defendants argue that LCG's failure to give written notice of the quantum claim as later advanced in the particulars of claim (namely a claim in the sum of £10,180,040, based on a reduced multiplier of 3 rather than 5.5) means LCG is precluded from advancing such a claim. They say that, as loss falls to be assessed as at 'Completion', there is no reason why LCG (which is a substantial organisation with internal and external accountants) could not have advanced in Notice 2 the estimate of loss later pleaded in the particulars of claim.

142. In other words, the defendants argue, but for the deemed withdrawal issue mentioned next, LCG's warranty claim (to which of course they have other lines of defence), is

limited to a claim for £6,862,240 based upon those warranties identified in the two notices. Nine authorities are relied upon in connection with this defence based upon a failure of proper notification in accordance with paragraph 1.2 of Schedule 5 to the SPA. I address the material ones within that number in my reasoning and decision below on Issues 2 and 10: the Notification Issue and the Notification Claim Cap Issue.

143. LCG counters by saying the two notices were fully compliant with paragraph 1.2 for the purposes of supporting the claim as now advanced. They gave details of "*the nature of the claim*" (a claim for breach of warranty and under the Indemnity arising out of the over-funding), "*the facts and circumstances giving rise to the claim*" (namely one arising out of the over-funding) and Notice 2 contained LCG's bona fide estimate of its loss (and the defendants had not challenged it as not being a bona fide estimate).

144. LCG's fallback position is that its claim form constituted a fresh notice under clause 1.2, identifying all the warranties relied upon, and also that (by reason of their solicitors' letter dated 16 June 2022) the defendants were estopped from denying the adequacy of the notices. By that letter Capital Law said that, if the notices were intended to be compliant with the CPR pre-action protocol, then they (i.e. the defendants) were "*entitled to understand the specific warranties which [LCG] asserts they have breached*" but, if not, "*then the issue falls away*." As LCG says, it could have served a further notice (if the claim form is not to be treated as such) within the then current 18-month period under paragraph 1.1.3 of Schedule 5, and therefore the defendants are said to be estopped (by convention and/or representation) from disputing the efficacy of Notices 1 and 2.

145. The defendants say LCG's fall-back contention that the claim form and particulars of claim can be treated as a fresh (and being before April 2023 under paragraph 1.1.3) timely notice under paragraph 1.4 of Schedule 5 is back to front when legal proceedings have to have been commenced within 8 months of the giving of such notice. The claim must therefore be commenced after the giving of notice not before. No fresh claim has been brought within 8 months of the suggested "notice" given by the proceedings. As to LCG's estoppel argument, they say that the assertion in correspondence that LCG should identify the warranties relied upon cannot be taken to be a representation that they were not relying on their rights under the SPA. They say the requisite elements of an estoppel are wholly absent and that is before one considers the difficulty created by clause 11.4 of the SPA which requires any variation or waiver of its provisions to be in writing, (and for any such variation to be expressed as such).

146. The defendants also argue that the hand-delivery of the claim form on 14 February 2023 (see paragraph 140 above) was not sufficient to meet the requirements of paragraph 1.4.1 of Schedule 5 as service (by 14 February 2023) – the language is "*both issued and served*" - means delivery which brings the contents of the document to the actual attention of the intended recipient.

147. On behalf of the defendants, five authorities were referred to by Mr Sims KC and Mr Jagasia which bear upon what they said were the alternatives of (1) service involving actual receipt/knowledge of the proceedings in accordance with the SPA and (2) service in accordance with the CPR where, they said, the only relevant provision governing the timing of such service is CPR 6.14 and its "deemed service" provisions.

148. They relied upon the provisions of clause 13 of the SPA in relation to the giving of notices to say service of legal proceedings is covered by that clause. The evidence shows that Mr Lewis and Ms Probert were on holiday in Cornwall until 15 February 2023 and that they did not receive actual notice of the proceedings until 15 February 2023. Accordingly, they say, service was not effected before that day (they rely upon the "*unless proved otherwise*" language of clause 13.3 to displace the conclusion that hand delivery to the Monmouth address on Tuesday 14 February 2023 constituted "notice" of the proceedings).

149. The first argument, therefore, is that "*served*" in paragraph 1.4.1 means brought to the actual attention of the intended recipient. The past tense of the word is emphasised in that it supports the concept of a completed act. Mr Sims KC and Mr Jagasia relied upon the decision of Green J in *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2013] EWHC 3261 (QB). The defendants did not have notice of the legal proceedings until 15 February 2023, which is too late. Service on the two firms of solicitors on 14 February was insufficient as neither was authorised to accept it. I should note here that clause 13.9 provided for copies of any "notices" to be given to Capital Law Limited but the clause said "*Failure to communicate such copies shall not invalidate such Notice*".

150. Indeed, the defendants' argument in relation to service "under the SPA" went even further in saying that hand delivery of the claim form on 14 February would have been too late even if Mr Lewis had been there to receive it (c.f. clause 13.3.1).

151. Counsel submitted that service "*by*" 14 February 2023 meant no later than 13 February 2023. They referred to clause 1.2.7 of the SPA which provides:

> "if a period of time is specified and dates from a given day or the day of an act or event, it shall be calculated exclusive of that day (unless otherwise agreed in this Agreement)"

152. Mr Sims KC and Mr Jagasia said that, although that provision did not refer to "*by*" a given day (as opposed to "*from*" one) it was a strong indicator that paragraph 1.4.1 of Schedule 5 should be read as excluding the day of 14 February 2023. If that is correct then it is a knock-out point which dispenses with the more convoluted argument involved in the others.

153. The defendants' alternative argument is that "served" under paragraph 1.4.1 means deemed service in accordance with CPR 6.14, so that they were not served until the second business day after the completion of the relevant step under CPR 7.5(1) (i.e. 16 February 2023). I return to it below having outlined LCG's rival argument that only CPR 7.5 is relevant to this issue.

154. Their defence, that under either argument the claim was accordingly served too late, is the basis on which they say that LCG's warranty and indemnity claims are deemed to be withdrawn and the counterclaim is made for the return of the sum paid under the Funding Indemnity.

155. On this aspect of the case the defendants say they cannot be estopped from reclaiming the £783,324 (with interest). They point to an exchange of solicitors' correspondence (a letter of 27 October 2022 on behalf of LCG and the defendants' reply of 29 November 2022) which shows the £783,325 paid by the defendants under the Funding Indemnity was accepted by LCG as a payment on account without any aspect of the claim being settled.

156. So far as the timing of service of the proceedings is concerned, LCG responded by saying the word "*served*" in paragraph 1.4.1 of Schedule 5 means (on its true construction) serving the proceedings in accordance with the requirements for service set out in the CPR – i.e. CPR 7.5 – and this is what was effected (and effective for the purposes of paragraph 1.4.1) on 14 February 2023. In support of this Mr Booth KC and Mr Adamyk relied upon one Court of Appeal decision in April 2019 (permission to the Supreme Court having been refused by that court) as to the meaning of service under the CPR. The authority is *Kennedy v National Trust for Scotland* [2019] EWCA Civ 648; [2020] QB 663. They say *Kennedy* was widely reported in 2020 and the SPA should be treated as having been drafted with knowledge of it.

157. The defendants' argument upon the CPR is significantly more intricate. In large part, this is a reflection of their reliance upon the decision of Andrew Baker J in *Brightside Group Ltd v RSM UK Audit LLP* [2017] EWHC 6 (Comm); [2017] 1 WLR 1943.

158. The defendants' second argument is that if "*served*" means service under the CPR, then this means it should be read as deemed service under CPR 6.14 rather than under CPR 7.5. Under CPR 6.14 deemed service took place on 16 February 2023, again too late. On this argument the defendants are less enthusiastic about what Green J said, obiter, in *Ageas* and, in preference to that decision, the decision of Flaux J (as he then was) in *T&L Sugars Ltd v Tate & Lyle Industries Ltd* [2014] EWHC 1066 (Comm) and the decision of Master McCloud in *Paxton Jones v Chichester Harbour Conservancy* [2017] EWHC 2270 (QB), they invite the court to prefer the analysis of Andrew Baker J in *Brightside* which, their counsel submitted, remains unaffected by the decision in *Kennedy*.

(1) <u>Analysis and Decision on Issue 1: the Deemed Withdrawal Issue</u>

<u>The Relevant Date</u>

159. It is sensible to start with the defendant's potential knock-out argument that, even if "*served*" does not mean received, or deemed to be served, the steps referred to in paragraph 140 above were all too late because they took place on (rather than before) 14 February 2023.

160. Just as this might have been raised for determination as a preliminary issue potentially dispositive of LCG's claim (if not the defendants' counterclaim) so too it might produce the same result after a reasonably lengthy trial. That said, as I observed at the hearing, even acceptance of the argument or the defendants' alternative ones on this Issue would not now obviate the need to address all the others in case an appeal court disagreed with my conclusion.

161. As I indicated in the course of submissions, when noting that the defence had not flagged this particular point as opposed to the contention that the proceedings were not served until *after* 14 February 2023, this argument requires the court to conclude that paragraph 1.4.1 of Schedule 5 should be read as if it says "*no later than 23:59:59 on 13 February 2023.*" Mr Sims KC accepted that must be so and the defendants' written closing submissions said "*by 14 February 2023*" does indeed mean no later than midnight on 13 February 2023.

162. To my mind, that reveals the fundamental flaw in the argument which requires a phrase referring only to something being done by a given day being interpreted as if it instead descends into specifics about hours and minutes in that (or another) day. Without such specificity being read into the contractual language the result would be inevitable temporal regression in that, without more being said, "*by*" 13 February (i.e. the whole of that day) would, on the defendants' interpretation, mean service actually had to be effected on the 12th, and so on. If it would be wrong to conclude that about the day of the 13th, because until midnight is allowed in the absence of any minute and/or hour in that day being specified, then the same must follow for the 14th.

163. The argument also runs up against the language of clause 1.2.7 of the SPA (see paragraph 151 above). That tells the contracting parties when they can start their stopwatch, albeit it is counting in days not seconds, but not when to stop it. It is not a provision (like CPR 2.8(2) in relation to "*clear days*") which excludes <u>both</u> days either side of the period in question.

164. In my judgment, therefore, the true meaning of "*by 14 February 2023*" is not "*before*" that day but, instead, no later than it. This conclusion is reinforced by the following propositions (supported by authority) in Lewison, *The Interpretation of Contracts* (8th ed), at paragraphs 15.20 and 15.31, upon which LCG's counsel relied:

> "7. Fractions of a Day
>
> In general, fractions of a day are ignored in construing contracts, although the particular context may indicate that regard is to be had to fractions of a day, particularly where questions of priority may depend upon a precise time at which an event occurs."
>
> "9. Action within a Certain Period
>
> Where a person is required to perform an act within a certain period the day of the date or event from which the period runs will not be included in the period; and the act may be performed at any time up to the last moment of the last day of the period."

165. I therefore turn to what had to be done by LCG no later than 14 February 2023.

<u>"*Served*"</u>

166. The defendants' written opening submissions steered clear of *Kennedy*. In their comprehensive closing submissions on this point, Mr Sims KC and Mr Jagasia said LCG had misinterpreted the decision and its application to this case. So far as concerns the earlier first instance decisions in support of their first and second arguments upon the date of service, respectively addressed below, they said none of the online sources (Westlaw etc) suggest *Kennedy* casts doubt on *Ageas* - i.e. the aspect of the decision the defendants favour rather than the other which they challenge – or *Brightside*. That may be so but, if they do not, perhaps those sources should do so in the light of what was said about *Ageas* (in connection with the defendants' first argument below) in *T&L Sugars*, when the decision of Flaux J was endorsed by the Court of Appeal in *Kennedy* albeit on the point on which it and *Ageas* speak with one voice, and when an obvious question arises, which I must address, as to whether anything said in *Brightside* remains compelling or even persuasive, for present purposes, in the light of the Court of Appeal's approval of *T&L Sugars*.

(1) Service under the SPA

167. So far as the defendants' reliance upon *Ageas* is concerned, to support their argument that service of the proceedings required them to have been brought to their actual attention no later 14 February 2023, in accordance with clause 13.1 of the SPA, it is important to recognise that the facts in *Ageas* were the converse of those in the present case.

168. In *Ageas*, the defendant did have actual notice of the proceedings before the relevant deadline date. Its argument was that that was not good enough, so that the breach of warranty claim was deemed to have been withdrawn, because "*serving legal process*" (the language of the SPA in that case, set out at [21]) was a concept to be judged by reference to the deemed date of service provisions under CPR 6.14. Under those provisions the deemed date of service was too late. So, whereas the defendants here say they did not by the relevant date have any actual notice of the proceedings, through LCG sending them and them receiving them, in *Ageas* the defendant argued that actual notice (by the claimant sending them and it receiving them) was not "*service*" of the proceedings, by the relevant date, at all.

169. Green J rejected that submission. Although the agreement did not specify any particular mechanism by which legal proceedings (as opposed to notices) were to be served on the defendant, the judge concluded that the defendant's actual receipt of the proceedings before the relevant date did constitute "*serving legal process*." His alternative, and therefore obiter, conclusion (see below) was that, if the relevant clause in relation to service of proceedings either imported or was to be construed by reference to the service requirements of the CPR, then CPR 7.5 prevailed over CPR 6.14.

170. In contrast to the language of paragraph 1.4.1 of Schedule 5 to the SPA ("*shall not be deemed to have commenced unless both issued and served*") Green J was concerned with the language of a clause which referred to "*legal proceedings ……. commenced by validly issuing and serving legal process*". In rejecting the argument based on CPR 6.14, through the exercise of contractual interpretation of that clause, the judge (at [52]-[54] and [58]-[61]) explained his reasons for concluding that the parties had

not "*carefully and deliberately chosen a very precise legal term of art which, according to consistent case law, should be accorded its technical meaning*" or linked "*service to the CPR, or any particular rule therein*." Although he recognised the word "*serving*" could bear "*a number of different and conflicting meanings covering points in time before, on, and after receipt*" his view was that normally the concept of "*service*" meant bringing the document to the actual attention of the recipient and that was what the clause before him was designed to achieve.

171. When that reasoning was directed to the defendant's competing argument relying upon the deemed service provisions under CPR 6.14, the question arises as to the impact of *Ageas* upon my interpretation of paragraph 1.4.1. That it was so directed is revealed by the judge's observation, at [62], about his conclusion upon CPR 7.5 bearing upon the process of interpretation; particularly when his conclusion on that (CPR) point is not consistent with his view as to what "*service*" (more generally) normally entails.

172. The SPA is obviously a different contract than the one in *Ageas* and it falls to be interpreted in its own right. Nevertheless, it can, I think, fairly be said by the defendants that a plainly different concept of service than the one adopted by Green J does not leap out at the reader comparing the phrases "*and served*" (this case) and "*and serving*" (*Ageas*).

173. In contrast to the language of paragraph 1.1 of Schedule 5 to the SPA in relation to the giving of notice ("*receives*") the equivalent clause in *Ageas* in relation to notices (set out at [22]) focussed upon acts of dispatch. The language was that of "*may be given by delivery or by being sent*", "*delivered*" and "*given*". It was by reference to that language that Green J concluded that the clause could apply to service of the proceedings and that the service of the claim, within time, was also validly effected under that clause.

174. However, the SPA does not contain the other provisions upon which he relied (at [61]) as part of the unitary exercise of interpreting the agreement before him to conclude that service meant delivery. Indeed, in the context of the provisions of clause 13 addressing the "*delivery*" of notices, clause 13.5 of the SPA provides: "*In proving service, it shall be sufficient to prove that personal delivery was made, or that such Notice was properly addressed, stamped and delivered into the custody of the postal authority as a signed for delivery or registered post*." When read alongside clause 13.3.3 quoted in paragraph 132 above (the part of clause 13 which addresses the deemed timing of the "*giving*" of notice out of office hours) this appears to me to be ambiguous on the point as to whether or not the SPA treats "*service*" as synonymous with delivery (in the sense, as I think Green J clearly meant, of actual receipt).

175. During counsel's opening submissions, without then having analysed the decision in *Ageas* (or *T&L Sugars*), I expressed the instinctive view that the phrase "*and served*" in relation to legal proceedings, in an SPA governed by English law, including English procedural law, and the jurisdiction of this court (see clause 14), clearly indicated that service was governed by the Civil Procedure Rules. The question as to which of those rules was applicable was, of course, a separate matter. Unsurprisingly, the parties had not attempted their own contractual departure from the CPR (which obviously could not work once any timely proceedings are "up and running" as the

parties are not the Rules Committee) and neither had they said anything more about when the proceedings should be regarded as up and running in terms of their issue and "*service*". As I observed, commercial contracts in this jurisdiction, especially ones which expressly contemplate litigation between the parties, are not made by them in a CPR-free zone.

176. That this is instead a matter to be regulated only by the CPR, and that a reasonable person having the knowledge of the prospect of a warranty claim would read paragraph 1.4.1 of Schedule 5 accordingly, seems to me to be obvious from the fact that clause 13 of the SPA makes no provision, at all, for a step that might constitute valid service on Ms Probert, so that if she was not served with the claim form in accordance with CPR 7.5 within 4 months of its issue it would lose its validity against her. I say that on the basis that it is difficult to read the language of clause 13 as a pre-issue, blanket authority from Ms Probert that Mr Lewis (as 'Vendors' Representative') is authorised to accept service of any legal proceedings on her behalf, during the (cumulative) period under Schedule 5. The defendants' submissions (which rather glossed over this point) did not suggest it amounted to such authority. As for the "service" of proceedings on Mr Lewis himself, clause 13 makes no provision for service by email or other electronic transmission and expressly proscribes service by fax. The last one is rarely used these days but these are methods expressly authorised by CPR 7.5 (assuming the requirements of paragraph 4 of Practice Direction 6A are observed) and they each carry their own deemed date of service under CPR 6.14. Again, as with Ms Probert's procedural rights as a defendant under the CPR, it is not easy to grasp how the SPA can be read as cutting down LCG's rights as a process-serving claimant under the CPR (or indeed the "right" of the defendant to be served by email if that is considered to be a convenient method of service).

177. Accordingly, and in contrast to the reasoning in *Ageas* at [62], my starting point would be to question why as a matter of the plain meaning of the words "*as served*", both as a matter of textual and contextual analysis of the SPA and commercial common sense, the parties should be taken to have intended that the concept of service means anything *other than* in accordance with the CPR: see the principles in *Arnold v Britton* addressed below. To say instead that the parties intended that service should be "in accordance with the SPA" either produces circularity, and begs that question, or makes little (certainly not complete) sense when the SPA says nothing expressly about the service of legal proceedings, as opposed to contractual notices.

178. Even without the benefit of further authority, I would not have been persuaded to follow the reasoning in *Ageas* in concluding that, as a matter of contractual interpretation, issue and service under paragraph 1.4.1 can somehow be considered in isolation from the CPR. As it is, there is the decision of Flaux J in *T&L Sugars*, which supports my conclusion on this particular aspect of the Deemed Withdrawal Issue. In my judgment, that decision confirms the correct analysis to adopt and it undermines the defendants' primary argument that this is purely a contractual concept to be defined solely by reference to what appears in the language of the SPA (i.e. reading paragraph 1.4.1, in the light of clause 13, as a stand-alone provision which is independent of the CPR).

179. In *T&L Sugars* the argument of the defendant, in support of the deemed withdrawal of the warranty claim, was in fact to the opposite effect. As in the SPA, the relevant phrase in that case was "*both issued and served*". The defendant in that case (who, like the defendant in *Ageas*, had through its solicitors actually been served before the deadline) positively argued that service of the proceedings was a CPR matter to be considered quite separately from the contractual provisions governing the service of notices: see paragraphs [7(2)] and [12] of the judgment. In that sense, the observations of Flaux J on this "contract versus CPR point" (as I summarise it) were strictly obiter. There is also the point made by the judge that the task of the court is to construe the contract before it "*not some other contract considered by another judge in another case*."

180. Nevertheless, Flaux J did not find the reasoning in *Ageas* compelling and did not follow it. I respectfully agree with his observations, at [15]-[16], that (especially when the words "*and served*" follow the reference to "*issued*" which plainly means issued in accordance with the CPR) this cannot mean anything other than service in accordance with the CPR.

(2) <u>Service under the CPR</u>

181. I turn to the defendants' alternative argument that *T&L Sugars* (and on this point *Ageas*) and *Paxton Jones* were wrong to conclude that it is CPR 7.5 which defines what constitutes "*service*" and that I should instead adopt the reasoning of Andrew Baker J in *Brightside* who said that question is instead to be answered by reference to CPR 6.14.

182. So far as the defendants' distinguishing of *Ageas* (and *T&L Sugars* and *Paxton Jones*) is concerned, they correctly note that *Kennedy* was a decision concerned with the concept of service for the purposes of the temporal validity of the claim form. It addressed what had to be done by the claimant, in terms of service, within the relevant period for which the claim form remained valid for service (6 months rather than 4 months from issue in that case as the defendant was in Scotland and so outside the jurisdiction) if the claim form was to remain valid thereafter. The Court of Appeal noted earlier decisions of that court (*Godwin* v *Swindon Borough Council* [2001] EWCA Civ 1478; [2002] 1 WLR 997 and *Anderton v Clwyd County Council (No. 2)* [2002] EWCA Civ 933; [2002] 1 WLR 3174) which were decided under the CPR in force before 2008. The rules at that earlier time required the deemed date of service to fall within the relevant period. The court in *Kennedy* observed that the change in 2008 reversed the effect of those decisions by requiring the claim form to be "*served*" within that period. A further change in 2011 to introduce the words "*within the United Kingdom*" (and the Court of Appeal held that included a defendant domiciled in Scotland) meant that the deemed date of service provisions in CPR 6.14 were only relevant, on this question over the temporal validity of the claim form, to service where the defendant was EEA domiciled outside the UK.

183. Likewise, *Brightside* concerned an equivalent point where a claim form issued but not yet served had to be served (if the claim was not discontinued) within the time specified in a notice served by the defendant in accordance with CPR 7.7.

184. Mr Sims KC and Mr Jagasia said LCG's argument overlooked the difference between the question as to what has to be done within the specified period for which the claim form remains valid for service, on the one hand, and, as they put it, "*the timing of service that has otherwise been effected*" on the other. In essence, the question for me is whether that is a distinction without a difference. The defendants say not.

185. In saying that, the defendants rely upon what Andrew Baker J said in *Brightside*, at [20]: "*CPR 6.14 fixes the date on which service of a claim form occurs, for all, not only for some, CPR purposes*." At [24(ii)], the judge said CPR 7.5(1) "*defines what must be done within four months by a claimant who serves within the jurisdiction for the resulting service of his claim form to be valid. It does not provide or imply that service of a claim form served within the jurisdiction occurs upon completion of that step.*". Addressing the fact that the claimants had hand delivered the claim form to the defendants on the last day specified by their CPR 7.7 notice, and in support of his conclusion that the deemed date of service under CPR 6.14 meant it was nevertheless served too late, he said, at [26], it is "*incorrect and unhelpful, in an analysis of the meaning and effect of these provisions of the CPR, to speak about when service 'actually occurs' as distinct from when the CPR say it occurs*."

186. At the start of this section of my judgment I noted the defendants' position that *Kennedy* does not undermine their reliance upon *Brightside.* By way of summary of counsel's very detailed exposition of the procedural law, as they analyse it, they ask me to look beyond the headnote of the law report of *Kennedy* ("Dicta of Andrew Baker in *Brightside Group Limited (formerly Brightside Group Ltd (formerly Brightside Group plc) v RSM Audit LLP* [2017] 1 WLR 1943, para. 18 not applied") which makes it clear that the Court of Appeal disapproved of *Brightside* on the question which was before it. The defendants' counsel say that is the position only to the extent that *Brightside* addressed (at paragraph [18]) what was required, by an act of service, to preserve that validity of a claim form at the very end of its 4 month life (assuming service within the jurisdiction), in other words, the completeness of the act required under CPR 7.5, or CPR 7.7, to preserve the temporal validity of the claim form. Counsel submitted that *Brightside* remained good law, and that I should adopt the reasoning of Andrew Baker J in preference to that in *Ageas*, *T&L Sugars* and *Paxton Jones*, on the issue I have to decide: the CPR 7.5 versus CPR 6.14 point and what constitutes the act of service of a claim form for the purposes of paragraph 1.4.1 of Schedule 5.

187. In *Kennedy*, having referred to *Brightside*, at [18], the Court of Appeal (Sharp and Asplin LJJ and Sir Rupert Jackson) said this:

> "124. A different analysis of the effect of the rules is to be found in para 31 of *T&L Sugars Ltd* [2014] EWHC 1066 (Comm) at [31]. There Flaux J said (emphasis added):
>
> > "In my judgment these two rules, CPR 7.5 and 6.14, taken together draw a clear distinction between the date when service is actually effected, which is when the relevant step under rule 7.5 has been completed and the date two business days later when service is deemed to take place under CPR r 6.14. If one asks oneself why that distinction is there, it is not as Mr Nicholls QC suggests because service does not actually occur until the deemed day, but because, whereas CPR r 7.5 is looking at when actual service takes place, so

that a Claimant who takes the requisite step, depending upon which method of service he employs, can be sure that he has served within the four months of validity of the claim form (thereby avoiding, if relevant, any limitation issues). *CPR 6.14 is looking at when service will be deemed to have taken place for the purpose of other steps in the proceedings thereafter, beginning with the filing of an acknowledgement of service*. In my judgment, that construction of the rules is supported not only by the reasoning of Green J. in the *Ageas UK Ltd* [2013] EWHC 3261 (QB) case at [63]-[80], with which on this point I entirely agree, but by the wording of the rules themselves and by the various commentaries on the CPR, not only *Blackstone's Civil Practice* on which Mr Mill relied but, on a proper analysis, the notes to the *White Book*."

125. *Paxton Jones* [2017 EWHC 2270 (QB) was a case, which concerned service within the jurisdiction under rule 7.5(1). The "relevant step" was the posting of the documents on 17 January 2017. The documents arrived on 18 January 2017. As the final date for service was 17 January 2017, a question arose as to whether the claim form was properly served within its period of validity. The defendant argued that by reason of rule 6.14, the latest day for the relevant step was 13 January 2017 (two business days prior to 17 January 2017).

126. In summary, the Master rejected the defendant's argument for three reasons: (1) in so far as Andrew Baker J in *Brightside* [2017] 1 WLR 1943 was purporting to lay down a general rule that an otherwise valid claim form could be invalid due to the operation of rule 6.14 that conclusion was obiter and incorrect; (2) the 2008 Rules had reversed the effect of Godwin by removing the snare of the deemed date of service provisions and it would be contrary to the purpose of those Rules to re-introduce a "dead" period at the end of the validity of the claim form; and (3) the only function of rule 6.14 was to ensure that it is clear to the parties what date is to be used for the purpose of calculating dates for subsequent steps in the litigation. See in particular paras [29], [37] and [38]."

188. On the issue before it, the Court of Appeal concluded, at [137], that the judge below was correct to follow the reasoning of Flaux J in *T&L Sugars Ltd* and Master McCloud in *Paxton Jones*. The contradictory dicta of Andrew Baker J in *Brightside* was not endorsed.

189. Mr Sims KC and Mr Jagasia are strictly correct to say that the Court of Appeal in *Kennedy* was deciding only what was required to preserve the validity of the claim form beyond the initial period for service allowed by CPR 7.5. However, the key question is whether that leaves any room for their argument which invokes CPR 6.14 on the application of paragraph 1.4.1 of Schedule 5. The question obviously arises when, in *Brightside* at [25]-[26] and [30], Andrew Baker J expressed the view that the reasoning of Flaux J in *T&L Sugars* (including at paragraph [31]) was incorrect but the Court of Appeal has since endorsed it.

190. As already noted, in *Brightside*, at [20], the judge said CPR 6.14 fixes the date on which service of a claim form occurs, for all, not only for some purposes. In the light of *Kennedy*, that unqualified statement cannot stand. If it is therefore wrong to suggest that CPR 6.14 fixes the date of service for all purposes of the CPR, the

question then is why should it fix the date for service under paragraph 1.4.1 of Schedule 5?

191. I cannot see any good reason why it should and, despite the encouragement and ingenuity in the defendants' written submissions, I cannot easily identify a principled basis for doing so that would not involve me wrongly ignoring *Kennedy* and the Court of Appeal's endorsement of *T&L Sugars* and *Paxton Jones*.

192. In any event, and assuming I have been insufficiently receptive to the point about CPR 6.14 which the defendants say survives *Kennedy* for the purposes of this judgment, I would nevertheless prefer the reasoning of Flaux J in *T&L Sugars* to that of Andrew Baker J in *Brightside*.

193. Of the two decisions *Brightside* is obviously the more recent and contains a critique of the earlier decision. Like that in *T&L Sugars*, the judgment of Andrew Baker J was a reserved judgment. As appears from paragraphs [9] and [21], the judgment addressed the issue of procedural law in circumstances where the judge at the hearing had already dismissed the defendant's application for dismissal of the claim under CPR 7.7(3) (stating his conclusions for exercising his discretion against that course without having called upon counsel for the defendant to address him) and by reference, therefore, only to the defendant's detailed skeleton argument on what I have summarised as the CPR 7.5 (in that case CPR 7.7) versus CPR 6.14 point.

194. The first point to make about *Brightside* is that, as the Court of Appeal noted in *Kennedy*, at [122], the case concerns CPR 7.7. This is illustrated clearly by what the judge said about that rule at [15], [17], [19] and [22]. In the first of those paragraphs, he noted that the absence of a rule change in 2008 for CPR 7.7 (unlike the change for CPR 7.5 later noted in *Kennedy*) meant that the Court of Appeal's decision in *Godwin* was binding on him. Had he not been bound by *Godwin* (by parity of reasoning) the judge could have seen, even on the old language of CPR 7.5, "*room to argue that …. compliance should be <u>tested by when the claimant had done what he was required to do to effect service</u> rather than by the deemed date of service resulting under CPR 6.14*" (my emphasis through underlining). It is now clear from *Kennedy* that the change to the language of CPR 7.5 in 2008 means *Godwin* is no longer of any effect in the interpretation of that provision. Andrew Baker J anticipated what the Court of Appeal would later say about that at [16].

195. The second point in relation to *Brightside* (which I believe the emphasised words in the quote above begin to reveal) is that Andrew Baker J expresses himself in places using language which encourages the thought that the initial part of initial reasoning might not be materially at odds with that of Green J in *Ageas* and Flaux J in *T&L Sugars*. So much so that, with respect to the judge, reading the decision leaves me a little puzzled as to why he reached the firm conclusion that the reasoning of Green J and Flaux J, in relation to CPR 7.5, was incorrect. In particular, Andrew Baker J also said (again my emphasis):

> "[17] It is to be noted that: there have always been two different questions: (i) <u>what must the claimant do to effect service</u>; and (ii) when do the CPR say that service, in consequence, takes place; the distinction between the two was not introduced by the amendment to CPR 7.5; moreover, that amendment did not touch question (ii); rather, it re-defined the temporal validity of a claim form for

service within the jurisdiction so that it referred to question (i) rather than question (ii). ……….”

“[18] … As the CPR now stand: for a claim for a claim form served within the jurisdiction, CPR r 7.5(i) requires that the step there required, for the method of service used by the claimant, as a result of which service will be effected to business days later (see CPR r 6.14) must be taken within four months of the claim form being issued ….”

“[19] … For claim forms served within the jurisdiction, CPR 7.7 still has reference to when service occurs, but CPR 7.5 does not ….”

“[25] … As with Green J’s obiter conclusion, to my mind this decision of Flaux J’s is to be explained on the basis that upon the proper construction of the contract before him, and bearing in mind the two different questions addressed by the CPR (see para 17 above), the contractual time bar operated by reference to the date when the claimant did that which was required of it by the CPR, so as to effect service, and not by the date when service occurred, according to the CPR. …”

196. The third and I think most important point I would make about the decision, which feeds into my puzzlement and the reasons why I would also follow the reasoning of Flaux J on the Deemed Withdrawal Issue, is that (in light of the distinction recognised in *Brightside* at [17]) I am unpersuaded by Andrew Baker J’s conclusion that CPR 6.14 provides the answer, for all purposes when applying the CPR, as to when service takes place. The judge, at [26], says it was “*incorrect and unhelpful to speak about when service “actually occurs” as distinct from when the CPR say it occurs*”. My own reading of paragraph [31] in *T&L Sugars* (quoted within the extract from *Kennedy* in paragraph 187 above) is that Flaux J was simply describing what service actually *is* (and describing how it is effected) and was therefore addressing the first of the questions identified in *Brightside*, at [17] in order to distinguish the second.

197. In *Paxton Jones*, Master McCloud said she found the judgment in *Brightside* “*challenging in some respects*”. The master identified tension between what was said in *Brightside* in paragraphs [20] and [24iii)]. Her analysis, at [29] of *Paxton Jones*, was that the true analysis of *Brightside* is that CPR 7.5 was recognised to be a special case and does not alter the role of “deemed date of service” for purposes outside that rule. If she was wrong about that then she disagreed with *Brightside*, saying Andrew Bakers J’s observations were incorrect if applied to CPR 7.5 (with which she was concerned) and favouring the reasoning of Flaux J in *T&L Sugars*. Her approach to CPR 7.5 was also endorsed by the Court of Appeal in *Kennedy*.

198. For the purposes of addressing the defendants’ argument, I adopt Master McCloud’s first analysis which leaves open their argument that *Brightside* can stand in the light of what was said in *Kennedy* about that special case (only). They rely upon the width of the obiter conclusion in *Brightside*, at [20], for all other purposes including the impact of CPR 6.14 upon what is meant by service under the SPA.

199. However, even on that adopted analysis, I remain unpersuaded that the otherwise wide-ranging observation in *Brightside*, at [20], provides the answer to that question.

Like Master McCloud, I prefer the reasoning in *T&L Sugars* for the purposes of determining the question under paragraph 1.4.1 of the SPA which I have to decide.

200. On my reading of CPR 6.14, which Andrew Baker J said fixes the date of service for all purposes outside CPR 7.5, the language of the rule itself supports the essential distinction drawn by Flaux J in *T&L Sugars*:

> "A claim form served within the United Kingdom in accordance with this Part is deemed to be served on the second business day after completion of the relevant step under rule 7.5(1)." (my emphasis)

201. The emphasised words must relate to an act of service under CPR 7.5 which results in the claim form being "s*erved*".

202. CPR 7.5 clearly identifies the "*step required*" for the various methods of service of a claim form set out in the table. In the case of mail and DX, they are "*posting, leaving with, delivering to or collection by the relevant service provider*." In the case of delivery, they are "*delivering to or leaving the document at the relevant place*." In the case of fax, it is "*completing the transmission of the fax"* and in the case of email it is *"sending the email*". Those are all acts of dispatch by the claimant and none of them is described in terms which encompass or extend to the actual or deemed receipt of the claim form by the defendant. Only where the method used is personal service under rule 6.5 (described in terms of "*leaving it with*") will the step of serving the claim form and its receipt be simultaneous. However, even in that situation, the actual receipt of the claim form defers to the deeming provision under CPR 6.14 so that service is deemed to take place on the second business day afterwards. In my judgment, therefore, these acts of dispatch or delivery were correctly described in *T&L Sugars* in terms of when service was "*actually effected*" (i.e. the first of the two questions identified in *Brightside*, at [17]).

203. In my judgment, the defendants' counsel in their detailed submissions have therefore overlooked the basic point that, on proper analysis, there is consonance rather than conflict between the two rules (despite me labelling the point as "the CPR 7.5 *versus* CPR 6.14" point).

204. Whatever the method of service used, the different concept (and date) of deemed receipt/service is irrelevant to the ongoing validity of the claim. This is so even if actual receipt occurs before the deemed date of receipt. The decision in *Kennedy* put that beyond any doubt for the purposes of CPR 7.5. In my judgment it is difficult to identify any rational basis for distinguishing the concept of service which operates to extend the validity of a claim form beyond 4 months under CPR 7.5 from one which extends its validity beyond the date of 14 February 2023 under paragraph 1.4.1 of Schedule 5 to the SPA. To the extent the decision in *Brightside* can be said to survive *Kennedy* on matters outside CPR 7.7, I do not regard it as persuasive in deciding the outcome of the issue under paragraph 1.4.1.

205. I note that in *Brightside*, at [22], Andrew Baker J expressly noted that *Ageas* and *T&L Sugars* were "*each concerned with the proper interpretation of a contractual time bar provision in a share purchase agreement" and that "[i]n both cases, it was held that legal proceedings had been served, within the meaning of the contractual term in question ... although for CPR purpose the date of service set by CPR 6.14*

was after the contractual deadline had expired." See also paragraph [25] quoted above. I believe the defendants' argument also loses sight of that point.

206. So far as the deeming provision of CPR 6.14 is concerned, as Andrew Baker J observed in *Brightside*, at [18], there is no "deemed date" rule where the service is overseas. In my judgment, that is another clear indication that the act of service – i.e. what constitutes service – cannot be defined by reference to its calendar-based consequences for the next procedural steps in the litigation. For such cases, the consequential timing point addressed by Flaux J in *T&L Sugars*, at [31], is of course addressed by section 6 of CPR PD6B. The logic of the defendants' argument is, I think, that if they had, under clause 13.6 of the SPA, notified LCG of a relevant address abroad then the deadline date of 14 February 2023 would be brought forward to an earlier date according to the relevant number of days for the country in question as specified in the Practice Direction. Their reasoning therefore produces uncertainty over the deadline (through the introduction of a corresponding "dead period" of the kind described by Master McCloud in *Paxton Jones* at [37]) which seems at odds with the parties' choice of a certain date in paragraph 1.4.1 of Schedule 5.

207. Although it has been necessary to address the defendants' argument distinguishing *Kennedy* and promoting *Brightside* at length, the clear answer to it is given by Flaux J in *T&L Sugars* at [31]. His reasoning in that paragraph was approved by the Court of Appeal and, to the extent I am justified in saying anything more about what constitutes service in the light of *Kennedy*, I also respectfully adopt it for the reasons explained. The decision in *Kennedy* confirms the claim form was served in time under paragraph 1.4.1 of Schedule 5.

Decision on Issue 1

208. **I reject the defence that LCG's warranty and indemnity claim is deemed to have been withdrawn on the basis that it was not served by 14 February 2023**.

(2) Analysis and Decision on Issues 2 and 10: the Notification Issue and the Notification Claim Cap Issue

209. That conclusion on Issue 1 does not obviate the need to address the defences that certain of the warranty claims in the claim form cannot be pursued and also that LCG cannot pursue the warranty claim in the sum of £10,180,040 identified in the particulars of claim because Notice 2 identified the sum of £6,862,240 (which, as noted, was based on a multiplier of 5.5 applied to an overstated EBITDA due to the Over-Claimed Sum). The claim form also identified the lower sum.

210. LCG's position (in part) is that the significance of the Notification Issue is heavily qualified by its ability to rely upon the Key Warranty in respect of which no point about lack of notification can be taken by the defendants.

Observations

211. Subject to that point by LCG, the issues here are whether some of the warranty claims set out the particulars of claim fall foul of the prior notification requirements in the SPA and whether the amount of LCG's claim is capped as the defendants contend.

212. The focus of the first – Issue 2 - is upon whether the claim under Warranties B1.4, B2.1.2, B2.1.3, B2.2.2 and B2.5.2 cannot be pursued because Notices 1 and 2 did not embrace those warranty claims by including (quoting from paragraph 1.2 of Schedule 5) in respect of them:

> "….. details (in such detail as is reasonably available to the Purchaser at the time) of the nature of the claim, the facts and circumstances giving rise to it. …."

213. The focus of the second – Issue 10 – relates to the continuing words in paragraph 1.2:

> "…. and the Purchaser's bona fide estimate of any alleged loss .."

214. The defendants relied upon numerous authorities in relation to these two issues. LCG's position is that many of them are unhelpful, as they concern notification provisions expressed in materially different wording to that set out above, or support LCG's case.

215. I agree with Mr Booth KC that little assistance is derived from extracting isolated dicta from earlier cases which were directed to different contractual wording applied to the facts of the case. In *RWE Nukem Ltd v AEA Technology plc* [2005] EWHC 78 (Comm), at [10]-[11], which was at the forefront of the defendants' submissions, Gloster J began the series of propositions to be applied in that case with the obvious point that "[e]very notification clause turns on its individual wording". In *Drax Smart Generation Holdco Ltd v Scottish Power Retail Holdings Ltd* [2024] EWCA Civ 477; [2024] 2 All ER (Comm) 1062, at [50], Males LJ made the same point:

> "Whether a notice is sufficient to satisfy the requirements of any given clause must depend primarily on the language of the clause. Commercial parties are free to impose whatever requirements they wish. However, where they use broad and general terms such as 'the nature of the claim' and 'in reasonable detail', those requirements should be interpreted in the light of the commercial purposes of such clauses, including those identified in *Dodika*. It is important that Notice of Claim clauses should not become a technical minefield to be navigated, divorced from the underlying merits of a buyer's claim. While a seller's interest will always be to knock the claim out if it can on the technical ground that the notice is insufficient, courts should not interpret such clauses as imposing requirements which serve no real commercial purpose unless compelled to do so by the language of the clause."

216. Males LJ, at [49], identified the initial purpose of such a clause as follows:

> "Taking a step back, the initial purpose of such clauses is to provide a contractual limitation period. If no notice is given by the specified deadline, the parties can close their books on the transaction. That promotes finality and certainty in

> commercial dealings. It is only if some kind of notice is given that the purposes identified in *Dodika* come into play. In that event, it will be obvious that the buyer is seeking to make a claim, so that the achievement of finality and certainty must be postponed."

217. The reference in the quoted passages to *Dodika* was to the judgment of Popplewell LJ in *Dodika Ltd v United Luck Group Holdings Ltd* [2021] EWCA Civ 638 where, at [46], he addressed the wider purpose of a notification clause, where a claim has been notified, as follows:

> "The purpose of a notice clause such as that in schedule 4 para 2(b) of the SPA is to enable the recipient to make such inquiries as it is able, and would wish, to make into the factual circumstances giving rise to the claim, with a view to gathering or preserving evidence; to assess so far as possible the merits of the claim; to participate in the tax investigation to the extent desirable or possible with a view to influencing the outcome; and to take into account the nature and scope of the claim in its future business dealings, whether by way of formal reserving or a more general assessment of the potential liability. As Mr Choo-Choy accepted, the additional detail available, if included in the 24 June letter, would not have advanced any of these purposes. I balk at a conclusion that the level of detail provided in a notice of this sort fell short of what was required as reasonable, that is to say was unreasonably deficient, when the additional level of detail said to have been required would not have furthered any of the commercial purposes for giving such a notice. What is reasonable takes its colour from the commercial purpose of the clause, and what businessmen in the position of the parties would treat as reasonable. Businessmen would not expect or require further detail which served no commercial purpose. That would be the antithesis of what was reasonable."

218. If a significant element of LCG's claim has become lost to LCG, through a failure to give timely notification of it, then the grounds for reaching that conclusion should be clear when Notices 1 and 2 are tested against that commercial purpose and the uncomplicated language used in paragraph 1.2 of Schedule 5.

219. That language is to be construed by the court using "*all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means*." That phrase is part of a quotation from the judgment of Briggs LJ in *Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128, at [18]-[19] with which Males LJ in *Drax*, at [51], agreed. This is the conventional approach to the objective interpretation of a commercial contract by reference to how a reasonable person with knowledge of the context would understand it.

220. In *Nobahar-Cookson*, Briggs LJ said (and this was also endorsed in *Drax*) that such exclusion clauses were not narrowly construed by reference to the *contra proferentem* rule but because they cut down or detract from an important obligation in the contract and "*parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations*."

221. The same objective approach to interpretation applies in discerning the meaning of Notice 1 and Notice 2 unilaterally served by LCG. In *Laminates Acquisition v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, concerning an issue of notification of a claim under a share purchase agreement, Cooke J referred, at [29], to the decision of the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at p. 767G (per Lord Steyn) and p. 775E (per Lord Hoffmann) before observing "*[t]he question is how this notice would be understood by a reasonable recipient with knowledge of the context in which it was sent*." Cooke J found the citation of other authority addressing a similar issue of limited help because "*each clause has to be construed for itself and in the light of the commercial context in which it is found and the commercial purpose it is intended to serve*."

222. More recent Supreme Court authority upon the interpretation of contracts such as *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, at [15-[20] confirms this approach.

223. In relation to the defendants' challenge to LCG's reliance upon each of the five warranties identified above (for the purposes of Issue 2), success for them must in essence rest upon a finding that the details given in Notices 1 and 2 about the "*nature of the claim*", later issued, and the "*facts and circumstances giving rise to it*", cannot support such reliance. That finding would be required in order to draw the conclusion that the defendants were not notified of the relevant warranty claim in time.

224. In relation to the challenged element of quantum in LCG's pleaded claim (Issue 10), this must involve also the estimate of loss of £6,862,240 in Notice 2 being impugned but with the consequence that *no greater loss* than that can now be pursued in this the claim. In other words, the defendants seek to knock out the claim for a value which has <u>not</u> been estimated (at all, in good faith or otherwise). More specifically, it involves the conclusion that I should not entertain any contention by LCG which is based on the use of an EBITDA multiplier below 5.5 (the damages figures of £10,180,040 and £6,862,240 being the result of applying multipliers of 3.3 and 5.5, respectively, to the EBITDA in the computation of the damages claim).

<u>Issue 2</u>

225. As noted, on Issue 2 - the Notification Issue - the defendants relied upon a number of decided cases concerning the efficacy of a claim notification under the chosen language of the particular share purchase agreement before the court.

226. Paragraph 1.2 is expressed in plain language with no obvious element of ambiguity or uncertainty. It is therefore important that the court should not become distracted by what was said in other cases, about different contractual language, into thinking it needs to delve deep into its interpretative toolbox when that may not be necessary in order to discern the clause's natural and ordinary meaning. I am not concerned with any technical minefields (per Males LJ in *Drax*) that may have been encountered in those other cases. That said, I need to address some of the authorities highlighted by the defendants in order to test the soundness of any initial impressions about the efficacy of Notices 1 and 2 when read against the language of the clause. Mr Booth

KC's competing submission was that the defendants' reliance upon these cases leads to their true effect for present purposes being bent out of all recognition.

227. In *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423 (a case upon which the defendants also rely in support of their position on Issue 8), at [91], Stuart-Smith LJ emphasised the need for certainty in the terms of the notification so that "*the vendor is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is to be based*." That statement is not materially different from what was later said in *Dodika*, with the obvious and essential rider that it is the language of the contract in question that will determine the level of information the vendor is entitled to receive. In *Senate Electrical*, the relevant clause required "*such particulars of the grounds on which such claim is based as are then known to the Purchaser* …." No particulars were given in the relevant letter which instead referred to some particulars given orally at two meetings between the parties. May J held the notice provision was satisfied. The Court of Appeal, noting that the minutes of one of those meetings recorded the parties' agreement that the matter of profits being misrepresented was "a grey area", disagreed.

228. In *Laminates*, as already noted above, Cooke J also found decisions about the effect of different contractual language to be of limited assistance. He was concerned with a clause which required "*written notice of such claim specifying (in reasonable detail, to the extent that such information is available at the time of the claim) the matter which gives rise to the claim, the nature of the claim and the amount claimed in respect thereof (detailing the Purchaser's calculation of the loss thereby alleged to have been suffered .....) ….*". The judge said that that clause was analogous to the clause in *Senate Electrical* (in that it required some information, if not "*particulars*" as such, relating to the claim) and, at [31], he set out what the requirements were in relation to a notice served under that clause. In fact, the purchaser's notification letters were sent under a different clause. Although it was accepted that a letter might serve the purpose of both clauses, the court concluded, at [37], that "*nowhere was the form of substance of the claim spelt out*."

229. In *Teoco UK Ltd v Aircom Jersey 4 Ltd* [2018] EWCA Civ 23; [2018] BCC 339 the Court of Appeal was concerned with a notification clause which required the purchaser to set out "*reasonable details of the claim (including the grounds on which it is based and the purchaser's good faith estimate of the amount of the claim (detailing the purchaser's calculation of loss, liability or damage alleged to have been suffered or incurred))*" The Court of Appeal agreed with the judge that the failure of the two letters in question to identify the particular warranties and other contractual provisions on which the claims were based meant that the clause had not been complied with.

230. It is important to note, however, that Newey LJ, at [19], agreed with the judge below that the provision within the agreement enabling the seller to avoid liability by remedying any matter capable of being remedied, within 60 days of the notice, "*suggests that the information to be provided in compliance with para. 4 must at least identify the particular Warranty breached so that the consequences which flow from it can be put right.*" The SPA (at paragraph 7 of Schedule 5: '*Remediable Breaches'*) also contains a significantly shorter five- day period for the defendants to put things right without any loss to LCG. In language similar but not identical to paragraph 1.2

the basis of this opportunity is that defendants should know "*the fact, matter, event or circumstances giving rise to such claim*." The SPA does not provide for the relevant warranty or warranties to be identified by number.

231. That last point in *Teoco* about the need for a notification letter to identify all warranties relied upon was one previously addressed by Gloster J in *RWE Nukem*. The defendants place heavy reliance upon what she said in that case, at [10]-[11], about the need for the notice to be informative and her expectation that "*a compliant notice would identify the particular warranty that was alleged to have been breached*" and "*would explain why it has been breached*". Those observations were expressly made by reference to what had to be notified in the case before her by reference to the nature of the claim made. Having regard to the judge's recognition (already noted above) that the answer in any particular case obviously turns on the actual language of the contract under consideration, it is important to note, therefore, that Gloster J was applying the terms of a clause which required "*written particulars of such claim (giving details of the specific matter as are available to the purchaser in respect of which such claim is made)*".

232. In *Teoco*, at [23]-[24] and [28], Newey LJ referred to Gloster J's expectation that a compliant notice would identify the particular warranty alleged to have been breached. Alongside the importance of certainty recognised in *Senate Electrical,* it was, he said, consistent with the conclusion he had reached applying the language of the clause before him. So far as the basis of the warranty claim is concerned (as opposed to the level of detail required to support the good faith estimate of its value) the contractual language in *Teoco* is closer to the language of paragraph 1.2 which I have to apply; though the SPA here does not contain any equivalent provision to support the point made in *Teoco* at [19]. It is obvious that the contractual language under consideration in *RWE Nukem* required a greater degree of precision and specificity than that justified by paragraph 1.2. It required particulars of the claim including details of the specific matter in respect of which the claim was made, as opposed to details about the nature of the claim and the facts and circumstances giving rise to it.

233. In the light of that more exacting language, it is unsurprising that it created an expectation on the part of the judge that the details of the specific matter in respect of which the claim was made would extend to identifying the relevant warranty whose breach was alleged. However, even applying that language, it is important to note, as Newey LJ did in *Teoco* at [24]:

> "On the facts, Gloster J concluded that some claims had not been properly notified. As regards certain other claims, however, she considered them to have been adequately notified even though the material letter had not referred to all the relevant warranties. She said (in paragraph 30):
>
>> "The absence of a reference to paragraphs 15.1 and 16.1 of Schedule 6 to the Agreement is not in my view fatal. The nature of the claim is, in my judgment, adequately summarised in paragraph 17 of the September Letter, although, it is fair to say, not in an entirely satisfactory fashion.""

234. That finding must indicate that, on its true construction, the clause in *RWE Nukem* did not, in the judge's view, strictly require each warranty to be identified by number,

which is presumably why she expressed matters in terms of an expectation rather than a mandatory requirement.

235. Having reviewed the authorities relied upon by the defendants, I have concluded that there is no basis for concluding that the claim under the five warranties in question is invalidated because they were not identified in Notices 1 and 2. In my judgment, the defendants are wrong to contend that paragraph 1.2 of Schedule 5 required each and every warranty to be identified in the notices if that particular warranty was to support (reading on to paragraph 1.4.1) later "*legal proceedings in respect thereof*".

236. On its natural and ordinary meaning the clause does not say that. This is despite the fact that it begins by introducing its subject matter (for present purposes) as a "*notice of any Warranty Claim*". A '*Warranty Claim*' is defined as "*any claim for breach of the General Warranties*". The '*General Warranties*' are defined as "*any of the Warranties other than the Title Warranties*". There was an obvious opportunity for the draftsmen to include provision that the notice should specify "*the warranty or warranties relied upon*" (or similar words to that effect) but the language adopted instead required LCG to give details of the nature of the claim and the facts and circumstances giving rise to it.

237. It is the giving of notice of those (warranty non-specific) facts and circumstances which supports the legal proceedings in respect thereof, if commenced by 14 February 2023 under paragraph 1.4.1.

238. Therefore, contrary to the expectation of Gloster J in *RWE Nukem* (where an element of disappointment in that regard did not invalidate some of the later claims) and of Newey LJ in *Teoco*, I see nothing in the language of paragraph 1.2, when read in its context, which required *any* warranty to be identified by number in the notice of claim. References to a general need for certainty in the mind of the recipient (which were plainly justified on facts such as those in *Senate Electrical*) cannot override the need to construe and apply the terms of the SPA. Otherwise, the court would be putting to one side the conventional tools of interpretation, described by Briggs LJ in *Nobahar-Cookson*, and the exercise becomes one of extrapolation not interpretation. Notably, such extrapolation would produce the opposite effect of what might be described as the interpretational restraint, encouraged by the Court of Appeal in *Nobahar-Cookson*, *Dodika* and *Drax*, to be applied when considering whether or not a remedy has been lost through non-notification.

239. In paragraph 137 above I have summarised what was said in Notice 1 including (in its paragraphs 11 to 16) about the nature of LCG's claim and the facts and matters giving rise to it. Of course, Notice 1 (in its paragraphs 9 and 10) did set out the numbered warranties, to which the defendants can take no exception on the present issue, and it reserved the right to identify any further applicable ones.

240. However, putting to one side what was touched upon in relation to the quantum of LCG's claim (as that is a matter for Issue 10 to be addressed in the light of Notice 2) I cannot identify any sound reason why the following paragraphs in Notice 1 did not satisfy the requirements of paragraph 1.2 so far as the nature of the claim and the facts and matters giving rise to it) are concerned:

> "13. Our client has reason to believe that the Company has breached the Funding Rules (insofar as they apply to the ESFA) which are applicable to the Company by over-claiming funding from the ESFA in the region of £1.2m in the academic year 2020/2021. It is understood that the over-claiming of funding relates to planned learning hours and Maths / English condition of funding delivery.
>
> 14. The Company's over-claiming of funding from the ESFA directly over-inflated the value of the Company at the time it was acquired by our client. The Initial Consideration for the purchase of the Company paid by our client to the Vendors in accordance with paragraph 3 of the SPA was based on a multiple of EBITDA. As such, had the Company not over-claimed funding from the ESFA the Initial Consideration figure in the SPA, paid by our client for the purchase of the Company, would have been lower by the amount of over-claimed funding multiplied by the applicable EBITDA figure."

241. It may be that the defendants' enthusiasm for Issue 2 has been encouraged by the enumeration within Notice 1 of some but not all of the warranties subsequently relied upon in these proceedings. It is not at all surprising that the notices did identify particular warranties and one would expect a carefully drafted notice to do so even if that was strictly not required.

242. Nevertheless, in my judgment it is misplaced enthusiasm. So much is clear from the fact that any breach of each of the warranties challenged by the defendants under Issue 2 can only be the consequence of the breach of the Funding Regulations identified in Notice 1 (and is therefore dependent upon establishing a breach of the Key Warranty whether or not it forms part of a single, composite Warranty B5.2.2) and leads to no different or greater measure of loss. (Strictly speaking, this last point, about the disputed warranties having no further impact on the value of LCG's claim, itself provides the answer to Issue 2 as formulated and set out in paragraph 93 above). In other words, for paragraph 1.2 purposes, they neither change the nature (or value) of the claim nor do they rest upon different facts and circumstances from those previously notified.

243. The present case is therefore quite unlike the situation which arose (in respect of one of the heads of claim) in *116 Cardamon Ltd v MacAlister* [2019] EWHC 1200 (Comm) upon which the defendants rely. In that case, Cockerill J, as she then was, considered a notification provision which required the purchaser to summarise "*the nature of the Claim (in so far as it is known to the Buyer) and, as far as reasonably practicable, the amount claimed".* She found that the warranty in relation to broker remuneration was barred by limitation under the share purchase agreement. That was because the only claim advanced at trial (under amended particulars of claim) in respect of that warranty was based upon the change in remuneration being an unusual and/or non-recurring item affecting the Accounts and Management Accounts. Yet the purchaser had only notified (and originally pleaded) the breach of warranty as resting upon it being an undisclosed change in accounting policy contrary to FRS 18. The new claim did not relate to the claim that had been notified.

244. Had I reached a different conclusion upon the interpretation of paragraph 1.2 and LCG's compliance with it by Notices 1 and 2, I would not have been persuaded by LCG's fall-back arguments.

245. I see no basis for reading Capital Law's letter of 16 June 2022 as a representation that the defendants would not take a point that a claim under five warranties that had yet to be identified (and were not identified until service of the particulars of claim) was not barred on limitation grounds. The letter was only directed to whether or not Notice 2, incorporating Notice 1, was intended to comply with the pre-action protocol; in which case the defendants were entitled to be informed at that stage about all warranties upon which LCG intended to rely. It said nothing either way about later identification of a specific warranty being compliant with the requirements of paragraph 1.2.

246. As for LCG's alternative argument that the claim form (identifying all the warranties) can be treated as a notice under paragraph 1.4, this strikes me as an entirely circular and therefore baseless (or "bootstraps") argument. The structure of Part 1 of Schedule 5, and the need for any proceedings under paragraph 1.4 to supported by a prior notice (see the phrase "*in respect thereof*"), clearly indicates that the claim form cannot both serve as the proceedings and the notice which is required to precede them. The argument also undermines the purpose of the notice provision as identified in *Dodika* (though obviously not the initial purpose identified in *Drax* as the defendants already knew from Notices 1 and 2 that proceedings in respect of some of the warranties were coming their way).

Issue 10

247. Turning to Issue 10 - the Notification Claim Cap Issue - the defendants urge me to rely upon the decision of HHJ Waksman QC, as he then was, in *Highwater Estates Ltd v Graybill* [2009] EWHC 1192 (QB) to support the conclusion that LCG's claim in these proceedings is capped at the £6.8m figure.

248. In *Highwater*, the vendor under the share purchase agreement was not liable on a warranty claim under it unless, by a certain date, the purchaser gave "*written notice of the Claim stating in reasonable detail the matter giving rise to the Claim and the nature and amount of the Claim*." The judge compared the claim before him with the one which had previously been notified. The claim as notified was based upon the loss of profit attributable to a shortfall in wedding bookings from the number warranted in the agreement (the company owned and operated a wedding venue) whereas the claim as pleaded also extended to an allegation of negligent or fraudulent misrepresentation which the claimant said had induced it to buy the company. The damages, as pleaded, were based upon a diminution in the value of the company at the time of purchase.

249. The judge found that the notice had not set out the "*nature*" of the claim as brought. He also found that the notice had not set out the "*amount of the Claim*". In the part of the judgment headed with those words, he said:

> "45. I also take the view that the discrepancy between the amount claimed in the Particulars of Claim (£2.06m) and that claimed in the Claim Letter (£387,000) is a further ground for non-compliance. The sums are vastly different and the vendor might obviously take a different view when he knows that he is facing a claim of those proportions in relation to one particular matter. It is no answer to say that the Court will decide damages in the round. The Court might dismiss the

claim altogether, but the vendor's need is to see what he is facing from the purchaser.

46. Mr Berragan says that the two amounts have the same starting point. I agree, but that is no answer when they end up at very different destinations. Moreover the type of damages claim is different. In the letter it is based on what profit Majorstage would have made if there were 150 bookings. In the Particulars of Claim it is the familiar "overpayment" claim based on an assertion that because of the matter complained of the true value of the company, as acquired by Highwater, is very much less than the price paid. That involves detailed explanations of how the price paid was arrived at and what the true value was, explanations in fact given in the letter of 22 April 2008 albeit that at that stage it was said that the claim was worth "at least" £800,000 and maybe up to £2m.

47. Where a clause expressly requires the amount of the claim to be given and in truth the amount of the claim pursued in the Particulars of Claim is simply missing from the Claim Letter to a very substantial extent, which cannot be described as a mere difference in detail, the clause has not been complied with."

250. In my judgment, those observations which were directed to a differently worded notification clause, do not assist the defendants. The same can be said about the contractual requirement in *Laminates* to specify the "*amount claimed*" which Cooke J said, at [31], "*specifically requires a calculation on the part of Laminates of the loss which is allegedly suffered*". *Teoco* did concern a clause which, like paragraph 1.2, required reasonable details of an "*estimate*" of the amount of the claim but, significantly, the clause in *Teoco* also required "*detailing the purchaser's calculation of the loss ....*".

251. Returning to the judgment in *Highwater*, I am prepared to accept that a differential of 2.2 in LCG's multiplier does produce a "*vastly different*" sum. However, the defendants knew that the lower sum was an *estimate* as at June 2022 (and, therefore, not necessarily the amount of the claim that would be made) and the higher sum sought in the pleading served nine months later does not reflect a different type of damages claim. Using the language in *Highwater*, it is instead reflective of a difference in detail (as to what is the appropriate multiplier to adopt on the "warranty false value") as the nature of the rival expert evidence adduced at trial only serves to highlight.

252. I believe the defendants' case on Issue 10 is missing both the substance and the requisite element of logical deduction required to knock out LCG's claim to the c. £3.3m additional damages that were not flagged by Notice 2 (when, in fact, as noted in the next paragraph, the more relevant figure may be c. £2m).

253. The lack of substance is revealed by the defendants not challenging the estimate £6,862,240 on the ground it was not a bona fide one. They contend that LCG could have done better in June 2022 (obviously worse from the defendants' perspective) in its estimation of loss but that does not equate to, nor has it resulted in, a challenge which says that LCG did not have genuine belief in the claim to the £6,862,240. (In fact, Notice 2 added the claim under the Funding Indemnity, when the terms of paragraph 4 of Schedule 5 against double-recovery prevented that, so that it concluded the section on quantum by saying "*our client currently expects that the*

quantum of its Claim will total c. £8,124,000".) However, allowing for the requirement that LCG was to provide such detail in support of it as was reasonably available to it at the time, the terms of paragraph 1.2 do not introduce any standard of competence in giving the estimate (compare the inclusion of an additional £1,247,680 contrary to the provision against double-claims) as opposed to a standard of commercial probity. The clause does not purport to regulate the reasonableness or accuracy of the estimate (save perhaps by reference to what plainly lies outside the more generous boundaries set by the concept of good faith).

254. The lack of logic in the challenge is highlighted by the incongruity between an exercise which required an *estimate* of loss to be given in good faith and the formulation of an issue (Issue 10) that is expressed in terms of it resulting in a *cap* on the damages that can later be claimed in respect of it.

255. The facts of *Drax*, summarised below, illustrate that there may of course be cases where the omission from a notification letter of a particular head or type of loss *may* preclude a later claim to recover it (though that was not the end result in that case). However, a clause which refers to an "*estimate*" of loss under an otherwise adequately notified claim (so far as the "*nature*" of it is concerned) is not a happy starting point for an argument that the notice served under it creates a ceiling, or cap, upon the value of any later pleaded claim. The defendant's suggestion that it does prompts the obvious question as to why the estimate should not just as well be regarded as creating a floor (or threshold, or base figure) for the purposes of any proceedings in respect of that notified claim. An estimate is just that: it does not bind the parties to the estimated figure in any later proceedings so that the court may only award damages in that figure (or, as the defendants accept and urge, a lesser figure).

256. In this case, Notice 1 said:

> "[o]ur client currently has insufficient information to provide a precise estimate of the quantum of its claim. It shall provide this information in due course once it becomes available."

257. Notice 2 said:

> "The Vendors are in breach of some or all of the General Warranties listed at paragraph 9 of the 8 April Notice. Damages for breach of warranty aim to put the claimant in the position he would have been in had the warranties been true. As such, our client's claim for breach of warranty will encompass the amount by which the Initial Consideration paid by our client to the Vendors for the purchase of the Company was over-inflated as a result of the Company's over-claiming of funding. The quantum of our client's claim for breach of warranty will therefore be £1,247,680 x 5.5 (being the applicable EBITDA multiplier), totalling £6,862,240."

258. The language of the notices, referring to a "*precise estimate"* (a phrase repeated at paragraph 6 of Notice 2) of the value of what "*will be*" (paragraph 12(b)) LCG's claim, indicated that LCG was perhaps holding itself to a more rigid process of (apparently fixed) quantification than that justified by the language of paragraph 1.2. However, Issue 10 has to be decided by reference to the language of the SPA, and a reading of the notices against that language, rather than as if Notice 2 was a

standalone promise that LCG's claim would never be valued higher than that. It is clear that paragraph 1.2 of Schedule 5 requires an estimate by reference to what was reasonably available to LCG "*at the time*". The focus is upon the nature, facts and circumstances of the claim known at the time of notification. Unlike the position in *Teoco*, LCG was not required to support the estimate with a calculation.

259. The defendants' argument on Issue 10 distorts the meaning of the clause and its commercial purpose (compare *Dodika*). It amounts to saying that LCG needed to know at the time it gave notice what its case at trial would be (thereby anticipating the expert valuation evidence and argument about that) and cannot now depart from a calculation which it gave in support of its then estimate even though the notice did not require a calculation.

260. In *Drax*, the defendant sought reverse summary judgment on the claim on the ground that "*the nature of the claim and the amount claimed*" had not been sufficiently notified in accordance with the terms of the share purchase agreement. The claimant (who had later sold on the company it had purchased from the defendant but before giving the defendant notice of a claim under the earlier agreement by which it had acquired the company) had notified a claim with two alternative calculations of loss put forward. Those reflected the fact that the company did not, at the time of the agreement between the parties, have a right to lay cables over a third party's land. This was said to amount to a breach of warranty (and to trigger an indemnity) given by the defendant under the agreement. The notified losses were said to be the cost of obtaining an alternative easement from the landowner or, if agreement over that could not be reached, the cost of a potential compulsory acquisition.

261. In the later proceedings, the judge at first instance concluded that a claim pleaded in draft amended particulars of claim (which deleted all references to the company having suffered loss and alleged the loss was the claimant's alone) had no prospect of success because that was based on a loss reflecting the diminution in the value of the company's shares and had not been identified in the notice of claim. However, in allowing the appeal against that decision, Males LJ (with whom Sir Geoffrey Vos MR and Birss LJ agreed) said, at [58]:

> "It is true that the draft Amended Particulars now put forward a different basis, ie difference in value, on which the damages calculation is based. However, so long as what is put forward in the Notice of Claim is a genuine estimate, it is as a matter of fact 'the Buyer's calculation of the Loss thereby alleged to have been suffered', which is all that the clause requires. There is nothing in the clause to set in stone the calculation of the loss which is stated in the Notice of Claim. If further reflection indicates that the calculation is legally unsound, or capable of improvement, there is nothing in the clause and no good reason to insist that the buyer should be held to the way in which the calculation was formulated in the Notice of Claim. On the contrary, the notice has served its purpose by preventing the claim from becoming barred, and the parties will move forward promptly (if they cannot resolve the matter) to litigation, with a claim form required to be properly issued and validly served on Scottish Power within six months beginning on the date of the Notice of Claim (para 3 of Sch 4). At that stage the formulation of the claim and the possibility of amendment will not be determined by the Agreement but by the Civil Procedure Rules."

262. That reasoning, addressing the language and commercial purpose of a notification clause which required the claimant to state "*in reasonable detail ... the amount claimed*", is in my judgment even more compelling when applied to the requirements of paragraph 1.2 of Schedule 5. What was required, and only required, was LCG's "*bona fide estimate of any alleged loss*". LCG gave its estimate (albeit using language in Notice 2 which perhaps conveyed to the defendants that there would be no upwards "amendment" of the quantum claim before or after the issue of proceedings).

263. In this case, the increase in LCG's claim from the £6.86m figure in Notice 2 and the claim form to the £10.18m in the particulars of claim reflects the application of a different EBITDA multiplier in LCG's calculation of loss (3.3x as opposed to 5.5x). In my judgment, there is no good reason, which can be said to be consistent with the proper interpretation of paragraph 1.2 and its commercial purpose, why LCG should be held to the lower figure as if it is set in stone.

Decision on Issues 2 and 10

264. **My decision on Issue 2 is therefore that all of the claims for breach of warranty pleaded in LCG's particulars of claim are supported by the notification given by Notices 1 and 2.**

265. **My decision on Issue 10 is that LCG is not confined to a claim capped at £6,862,240.**

(3) Analysis and Decision on Issue 13: the Repayment Issue

266. My decision on Issue 1 obviates the need for separate analysis of Issue 13. The conclusion that there was no deemed withdrawal of the claim under the Funding Indemnity, because of a failure to comply with paragraph 1.4.1 of Schedule 5, means that there is no basis for the defendants' counterclaim seeking the return of the sum of £783,324 (with interest for the period since) which they paid to LCG on 14 October 2022.

267. The language of the counterclaim confirms as much. The claim to recover that sum was expressed succinctly as follows:

> "61. …… The sum paid by the Defendants to the Claimant was in discharge of the Indemnity Claim and it has deemed to have been withdrawn. Accordingly there has been a failure of basis and/or a total failure of consideration and the Defendants are hereby entitled to reclaim the same sum of money on the grounds of unjust enrichment."

268. However, for completeness I should say that, even if the premise for the assertion of LCG's unjust enrichment had been sound, there were obvious difficulties with this part of the defendants' case. The true analysis is not that LCG has been unjustly enriched in respect of the Clawback but rather that it has been indemnified by the defendants in respect of it.

269. The sum of £783,324 was paid by the defendants to LCG *before* the period for issuing and serving proceedings under paragraph 1.4.1 had expired. The claim under the Funding Indemnity had been notified by Notice 1 and Notice 2. By a letter dated 14 October 2022, Capital Law on behalf of the defendants referred to the notices and their understanding that LCG was in the process of paying the Clawback to ESFA. The letter said:

> "Our clients accept that the indemnity claim as set out in your correspondence has been properly made and therefore that the clawback sum and your reasonable and proper costs in bringing the claim fall to be paid.
>
> Our clients will therefore make payment of £783,325 to your client today …."

270. A further letter dated 21 October 2022 from Capital Law stated their belief that the indemnity claim was settled subject to receipt of LCG's costs breakdown.

271. The argument by Mr Sims KC and Mr Jagasia that their client cannot be estopped from recovering that sum relied upon the letter dated 27 October 2022 written by Burness Paull on behalf of LCG. Like their later letter dated 22 November 2022 (which set out LCG's position that, by reference to the provision in paragraph 4 of Schedule 5 against double-recovery, the unilateral transfer of the £783,325 to LCG should not operate as a "*crude attempt to block our client from bringing its warranty claim*") Burness Paull were anxious to make plain their position that LCG was not prepared to reach any settlement of part of its claim - the indemnity claim - in isolation from the remainder (the warranty claim). They said LCG was prepared to accept the sum of £783,325 as a payment on account of the entire claim. The same point was made in the pre-action letter dated 25 November 2022 from Burness Paull which said that the sum should either be treated as a payment on account or returned to the defendants.

272. By their letter dated 29 November 2022, Acuity Law on behalf of the defendants said:

> "It is difficult to see how you can criticise our clients for transferring the full amount of your client's indemnity claim. That sum was transferred to your client in good faith and to avoid further unnecessary costs being incurred in respect of the indemnity claim."

273. A further letter dated 9 February 2023 from Acuity Law contained the defendants' substantive response to the pre-action letter which, in foreshadowing Issue 3 (the Indemnity v Warranties Construction Issue), said:

> "…. A clawback from ESFA should not lead to a breach of warranty claim. It should result in a claim made under the Funding Indemnity, which our clients

have agreed to satisfy in full."

274. In the light of their decision to satisfy the claim under the Funding Indemnity, once it had been notified, and this subsequent correspondence, I cannot see how the defendants could have succeeded on the Repayment Issue (even with the following wind of a favourable decision on Issue 1 which has not come about).

275. As a matter of strict analysis of LCG's defence to the counterclaim, its position was not that the defendants are estopped from making it. That said, bringing a counterclaim to recover a sum voluntarily paid prior to proceedings, and before any issue of deemed withdrawal of claims could have arisen, and the payment of which was then said and is still said to be the basis of a defence to LCG's warranty claim, strikes me as a clear case of impermissible approbation and reprobation on the part of the defendants.

276. Instead, and no doubt because the counterclaim is advanced as a claim in restitution rather than in contract, LCG's defence is simply that the claim in restitution cannot be successfully advanced when the relevant receipt of monies by LCG is one provided for by the SPA (i.e. the Funding Indemnity which the defendants have at all times "approbated" as a provision which justifies that receipt).

277. I agree that the basic flaw in paragraph 61 of the counterclaim is the assumption that a claim in respect of a contractual liability, which is deemed to be withdrawn, means that the liability never existed; not even at the time when it was voluntarily discharged before there was any question of a claim to enforce the liability being withdrawn. The existence of the SPA (and the defendants' undertaking to pay under the Funding Indemnity) shows that the assertion that there has been a failure in the basis and/or consideration for the payment of £783,325 is entirely baseless. The SPA was and remains binding. There did not have to be "*legal proceedings in respect thereof*" (to quote from paragraph 1.4.1 of Schedule 5) and indeed the defendants voluntarily complied with their obligation in October 2022 in an attempt to avert such proceedings being brought within the contractual limitation period.

278. Mr Booth KC and Mr Adamyk relied upon the majority decision of the Supreme Court in *Barton v Morris* [2023] UKSC 3; [2023] AC 684, at [88]-[106], in highlighting the difficulty involved in pursuing a claim in restitution where the parties have entered into a contract which regulates the dealings between them that are said to give rise to it. In that case, the issue was whether the claimant had the right to an introduction fee where the buyer introduced by him to the defendant eventually paid a price less than the price identified in the contract as the trigger for the claimant's fixed fee. The majority held there was no basis for a claim in quantum meruit on the basis that the defendant would otherwise have been unjustly enriched by the claimant brokering the deal.

279. In *Barton v Morris* the contract was silent upon the claimant's remuneration in the circumstances as they had come about but a claim in restitution still did not lie as that would have been at odds with the contract between the parties. In the view of the minority in the Supreme Court (Lords Leggatt and Burrows) that silence did not preclude a claim for the value of the claimant's services based upon a term of the

contract implied in law, though only Lord Burrows would have upheld his claim based on unjust enrichment. Here the case for rejecting a claim in restitution is even stronger as the SPA (in the form of the Funding Indemnity) expressly provided for the defendants to pay and for LCG to receive the £783,325 and, on this aspect of it, both sides recognised and implemented their binding contractual obligations.

Decision on Issue 13

280. **Even if the defendants had succeeded on the Deemed Withdrawal Issue, I would therefore have found against them on the Repayment Issue.**

B. Issue 3: The Indemnity versus Warranties Construction Issue.

281. The issue here is whether LCG's ability to claim under the Funding Indemnity precludes (either as a matter of construction or as a result of an implied term of the SPA) any claim under the warranties set out in the particulars of claim.

282. In addressing Issue 13 above, I have already mentioned the concern expressed by Burness Paull in their letter dated 22 November 2022 that the defendants' satisfaction of the claim under the Funding Indemnity, by the unilateral transfer of the £783,325 to LCG, should not operate as a "*crude attempt to block our client from bringing its warranty claim*". This issue therefore began to surface in the pre-claim correspondence.

283. The defendants make the following points:

i) The Funding Indemnity was included in the SPA to protect LCG in relation to a risk specifically identified before the parties entered into it.

ii) The parties specifically agreed a maximum cap upon the liability of each of Mr Lewis and Ms Probert under the Funding Indemnity. Their individual liability under the Funding Indemnity was capped under paragraph 2.2 of Schedule 5 at 50% of the consideration actually received whereas the warranty claim cap for each of them was the full amount of the consideration actually received by each of them. They say "*as a matter of construction and/or necessary implication if a matter may be pursued as a Funding Indemnity claim it could not be pursued as a Warranty Claim as well as otherwise there would be no purpose in negotiating paragraph 2.2 at the lower rate of 50% of the Consideration*."

iii) More generally, it makes no commercial sense for the parties to agree a specific Funding Indemnity in relation to a specifically-identified risk for which the defendants are required to compensate LCG, yet also require the defendants to provide compensation to LCG for breach of warranty in relation to the same matters.

284. The last of those points, in particular, prompts the obvious question as to why, in the situation of the Clawback, it is the warranty claim (<u>if</u> the Clawback triggers liability

on the part of the defendants under a particular warranty and particularly where the potential liability could be greater than the cap under paragraph 2.2) which should yield to the indemnity claim.

Analysis on Issue 3

285. The decision of the Supreme Court in *Arnold v Britton*, at [15-[20] per Lord Neuberger, makes it clear that considerations of commercial common sense are only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in their position, as at the date of the SPA, and cannot be invoked in hindsight to relieve one party of what might be said (if only by that party) to be a bad bargain. They certainly cannot be permitted to override any provision of the contract where the court considers its natural and ordinary meaning to be clear from the words used. In the SPA the parties included a term against double-recovery (paragraph 4 of Schedule 5) which expressly contemplated "*the same fact, matter, event or circumstance*" might give rise not only to more than one allegation of breach of warranty but also to "*a claim both under the Warranties* [and] *an Indemnity Claim*."

286. Only the defendants' second point above steers towards a conclusion that the (presumed-to-be more valuable claim) should yield to the claim under the Funding Indemnity but that too appears to overlook the significance of the provision against double-recovery.

287. *Arnold v Britton*, at [15], identifies the core task for a court confronted with a question over the true meaning and effect of a contract and the need to identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*." In support of their first point above, the defendants place heavy emphasis upon what they say was, to LCG, a "*known risk*" of a funding clawback. It is the first of the headline points made in their written closing submissions.

288. There is potential for overlap between the evidence on this issue and that relation to Issue 7 – the Purchaser's Knowledge Issue – but it is necessary to address here the evidence given in relation to LCG's "background knowledge" of the risk of such a clawback.

289. The defendants point to the evidence about this given by Mr Gavin Higgins on behalf of LCG. Mr Higgins was the CFO of LCG between December 2016 and May 2024. In his witness statement he explained that, over the course of a professional career which began in 2000 and has involved positions as finance manager, accountant or CFO within a number of different companies, he has been involved in the buying and selling of about 50 companies. LCG's acquisition of the Company was similar in size to many of those other transactions (although it was a large acquisition for LCG) and he said it was a fairly standard acquisition from his perspective; though it is the only one that has led to a claim for breach of warranty and an indemnity claim.

290. In cross-examination, Mr Higgins said he had no particular recollection of the negotiations over the Funding Indemnity and that LCG would have been reliant upon the advice from lawyers in relation to the wording of the SPA and such matters as the provision against double-recovery. He accepted that the inclusion of the Funding Indemnity reflected LCG's awareness that there was a "*generic risk*" of funding clawback claim but not a "*specific, known risk*". That evidence was given by reference to an email dated 12 October 2021 from Burness Paull to Capital Law (with Mr Higgins and others copied in) in which LCG's solicitors said they had reinstated the "*on demand*" wording in the Funding Indemnity as it appeared in the draft of the SPA. This was said to fundamental from LCG's perspective because "*the purpose of an indemnity is to compensate for known risks*" and, without it, the indemnity was little more than a warranty.

291. The defendants say Mr Higgins's evidence confirms that the Clawback fell into the "*known risk*" category for which the only relevant protection was the Funding Indemnity. That went beyond protection for a mere theoretical risk, as LCG had said in its reply to the defence. The protection covered over 3 years, back to 1 March 2018, and under paragraph 2.2 of Schedule 5 it extended to a potential claim of over £7m. This was therefore very substantial protection. Mr Higgins's evidence confirmed it was an actual, known risk, irrespective of whether or not a specific eventuation of the risk was identified at the time of the SPA (as the former embraces the latter).

292. On my assessment of it, Mr Higgins's evidence does not support the degree of background knowledge (for *Arnold v Britton* purposes) that the defendants seek to attribute to the parties so far as anticipating the Clawback is concerned. That is before one gets to the question, assuming the evidence about that had been firmer, as to whether it would be correct, in the exercise of contractual interpretation, to conclude that the Funding Indemnity was to be the only source of redress for LCG in the event that the Clawback (or any other funding clawback) was later made. It should be noted, for example, that the Burness Paull email of 12 October 2021 itself went on to refer separately to a drafting point over what became Warranty B5.2.2: "*Warranty 5.2 – in line with our previous emails, we understand that a large proportion of the business relates to contracts with entities other than the ESFA. Reinstated on that basis*."

293. Mr Higgins confirmed that the inclusion of the Funding Indemnity did not reflect awareness of any particular issues or concerns about the Company's ESFA funding. He said the lawyers would have drafted it and "*we would have that in all our heads of terms agreements on previous deals as well* [meaning those where the company received such funding]. *We would try and introduce that … it is pretty standard*."

294. The evidence given by him on this point was entirely consistent with what Mrs McLeish said about it. She said: "If we are buying a business ... that has funding contracts with government, which could potentially be clawed back up to five years historically, it is an indemnity we put in all contracts to protect the business." She pointed out that the Funding Indemnity covered the Company's English and Welsh contracts and "we have had an indemnity on every single ESFA contract that we have bought." On the basis there was a risk of a clawback in relation to the preceding 5 years, Mrs McLeish said "the ESFA risk was a £30 million risk*",* that the starting

point was five years and *"*between the lawyers they negotiated it down to three years."

295. On behalf of the defendants, Mr Lewis's witness statement said he was aware of LCG's insistence during negotiations that a funding indemnity should be included, and that was reflected in Heads of Agreement dated 22 June 2021, but that he did not recall any mention of an inclusion of a funding warranty at that stage. He said: "*I understand this was added later during the negotiations, and I became aware of it just before signing the SPA in October 2021*."

296. In my judgment, this evidence on behalf of the parties does not assist much in determining the present Issue. Instead, it simply confirms that the Indemnity versus Warranties Construction Issue falls to be decided solely by reference to the carefully negotiated terms of the SPA.

297. By that I mean the express terms of the SPA. Those terms in my judgment are sufficiently comprehensive and clear, for the purpose of discerning their meaning and effect on this point, that I cannot see any basis for implying a term.

298. Both sides recognised that a term may only be implied into a contract if it is necessary to make the contract work and that, without it, the contract would lack commercial or practical coherence: see *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, at [21], per Lord Neuberger. The requirement of business necessity and/or obviousness in the term must not be watered down. The implication of a term cannot be justified simply by suggesting it would appear to be a reasonable and fair one which the parties might have expressly agreed upon (the fairness of the suggested term being an essential but not sufficient pre-condition for its inclusion) and, plainly, neither can it be permitted where it would contradict an express term of the contract. The last point is the "*cardinal rule*" which respects the parties' agreement upon how the contract is to work. The implied term must also be capable of clear expression (in a way that obviously does not undermine the cardinal rule). See *Marks & Spencer*, at [16]-[31] and *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, at [7], per Lord Hughes.

299. The defendants did suggest some wording for an implied term in a Part 18 response (suggesting it might appear in Schedule 5 or elsewhere in the SPA) but, aside from invoking commercial common sense, their argument essentially rests upon a rival interpretation of the '*Double Claims*' provision in paragraph 4 of Schedule 5 to that advanced by LCG.

300. Mr Sims KC and Mr Jagasia relied upon the decision of the Supreme Court in *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29; [2021] 1 AC 1148 in support of the defendants' position that the terms of the SPA (and, as I understood the argument, paragraph 4 of Schedule 5 – '*Double Claims*' - in particular) set out the parties' bargain as to how the risks arising from the Clawback were to be allocated between them. They referred to the judgment of Lord Leggatt, at [108], where he said the modern view adopted in the interpretation of exclusion clauses is that "commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation*"*.

301. That was said by Lord Leggatt in his judgment giving additional reasons in support of the majority decision given by Lady Arden. The decision was that a carve-out for "negligence" in a contractual cap upon liability included negligence in its sense of a breach of a contractual provision requiring the contractor to exercise skill and care in providing its services. The majority did not agree with the courts below. They had adopted a "*strained meaning*" of the term negligence (confining it to independent torts arising separately from the contractual duty of care) on the basis that, in a contract which was largely concerned with the provision of services, the cap on liability would be largely emasculated if the carve out applied to negligent performance of those services.

302. There is some similarity between that ultimately unsuccessful reasoning and the defendants' general argument on Issue 3 that LCG's pursuit of warranty claims based upon the Clawback should not be permitted to overcome the cap on liability under paragraph 2.2 of Schedule 5. However, the more acute problem for them is that the passage in Lord Leggatt's judgment on which they rely appears in the part of his judgment headed "*Clear words needed to restrict valuable rights*".

303. In *Triple Point* the predicated rights, contemplated by that heading, were what Lord Leggatt described, at [108], as "*normal rights and obligations*" (either under the law of tort or implied by contract so far as negligent performance was concerned). On the present Issue 3, the essential question is whether the defendants are right to say that paragraphs 2.2 and 4 of Schedule 5 (headed '*Limitation on Claims*') do clearly operate to cut down what would otherwise be LCG's contractual rights under the SPA. I say that on the basis that (subject of course to my decision on Issue 6: the Breach Issue) there is a warranty – Warranty B5.2.2 – which appears to be triggered by the Clawback.

304. In my judgment, the defendants have failed to establish that that is the effect of the SPA. Their attempt to do so only highlights the strain they must place upon the language of paragraph 4 of Schedule 5 (the '*Double Claims*' provision is set out in paragraph 119 above) in order to achieve the desired result. The true position, in my judgment, is that nothing in the SPA supports the Indemnity versus Warranties Construction Issue as a serious one. Any point the defendants have about the interconnection between the Funding Indemnity and Warranty B5.2.2 (in particular) really only goes to Issue 9: the Indemnity Claim Value Cap Issue.

305. The defendants suggest that paragraph 4 of Schedule 5 means that LCG cannot pursue both an indemnity claim and a warranty claim in respect of the Clawback. However, the paragraph not only does not say that but, instead, expressly contemplates that there might be a claim for both. It says that, if there is "*more than one claim*" for breach of any of the Warranties or "*a claim both under the Warranties* [and] *an Indemnity Claim*", then, if those claims are based on the same matter, there shall be no double-recovery under such compound claims. The most obvious reason for doing so is *because* the SPA provides different caps on the defendants' liability for each, thereby recognising that one may be greater than the other.

306. The phrase "*an Indemnity Claim*" is defined in the SPA as meaning *"a claim for breach of any of the indemnities in Clause 7*", of which the Funding Indemnity (singled out for the lower cap on liability under paragraph 2.2. of Schedule 5) is one. Paragraph 4 is headed '*Double Claims*' (<u>not</u> '*No Double Claims*', though I have noted

clause 1.2.3 of the SPA says the heading is immaterial to its interpretation) and is aimed only at preventing double (or multiple) *recovery* through reliance upon more than one contractual promise or assurance in respect of the same underlying subject matter. The stated premise is, therefore, that there could be a claim in respect of the same matter under more than one such provision in the SPA which might otherwise arguably lead to greater recovery. Just as the provision recognises that LCG might make a claim in respect of the Clawback by reference to more than one warranty (and, beyond Issue 2, the defendants have not suggested that is not permitted) so too it expressly recognises it might make a warranty claim alongside a claim under the Funding Indemnity.

307. This provision against double-recovery therefore anticipates and addresses any wider point about commercial fairness to be made by reference to the different caps on liability under the Funding Indemnity and the '*General Warranties*' given by clause 6.2 of the SPA. By the express terms of the SPA the parties have decided what is commercially fair in this respect. They have allocated to the defendants the risk that a warranty claim in respect of the Clawback *might* be greater than a claim under the Funding Indemnity (see Issue 9 below).

308. This is clear not only from the '*Double Claims*' provision but, as LCG's counsel highlighted, the language of the Funding Indemnity itself (set out in paragraph 115 above). Clause 7.1 begins with the phrase "*Without prejudice to any other rights or remedies available to the Purchaser*." This language directly undermines the defendants' argument that the Funding Indemnity *does* prejudice LCG's claim under Warranty B5.2.2. The defendants' counsel did not directly engage with that wording (or the wider point about the consequences of their argument upon the justification for including that particular warranty at all) and it is difficult to understand what could have been said by them that would not offend the cardinal rule in *Marks & Spencer*, at [28].

309. Moreover, as Mr Booth KC and Mr Adamyk also highlighted, the defendants' argument is further undermined by clause 6.7.2 of the SPA which (with their emphasis) provides that "*Each of the Warranties … shall not be limited or restricted by reference to or inference from the terms of any other Warranty <u>or any other term of this Agreement</u>*".

310. The defendants' argument on Issue 3, either as a matter of interpretation or implication, is therefore at odds with the clear language used in four distinct terms (if one includes the inclusion of Warranty B5.2.2 as one of them) of the SPA.

311. Other points made on behalf of LCG illustrate that liability under the Funding Indemnity is truly distinct from any parallel liability under a warranty, so that it would be surprising if establishing the first obliterated the second, or vice versa. A claim under the Funding Indemnity is not subject, as a warranty claim is (see Issues 5 and 7), to a potential defence based upon disclosure or LCG's actual knowledge of facts and matters giving rise to it: see clauses 7.3 and 7.5 of the SPA. Neither is LCG under an obligation to mitigate its loss in respect of the claim: see clause 7.4 (and compare paragraph 11 of Schedule 5: '*Duty to Mitigate*'). Those provisions reflect the characterisation of the indemnity as a promise to reimburse the relevant liability, should it arise, and on that basis it was given both to LCG and "*the Group*" (meaning

the Company and its subsidiaries). It also extended to payment of costs and expenses reasonably and properly incurred by LCG or any member of the Group.

312. I note that clauses 7.7 and 7.8 of the SPA expressly provided that certain claims under the Funding Indemnity would be reflected in the calculation of MEBITDA (under Schedule 8) for the purpose of calculating any Earn-Out Consideration payable to the defendants. The Clawback triggered those provisions so that the defendants received no further consideration beyond the Initial Consideration. That is potentially relevant to the defendants' wider argument under Issue 8 – the No Loss/Amount of Loss Issue – but, for the purpose of Issue 3, the defendants go much further and say that this shows the Funding Indemnity was to provide "complete compensation" in respect of the Clawback relied upon by LCG in their warranty claim.

313. However, the difficulty with that argument is that the SPA simply does not say that (when one might expect it to have done so if that was intended) and the submission begs the question. Instead, only the '*Double Claims*' provision in the SPA addresses the point about mutual (as opposed to exclusive) remedies and its focus is upon damages (an entitlement "*to recover*") in respect of whatever price was paid for the Company – with or without Earn-Out Consideration - in the first place.

Decision on Issue 3

314. **My decision in Issue 3, therefore, is that LCG's ability to claim under the Funding Indemnity does not preclude a warranty claim in respect of the Clawback.**

C. Issues 5 and 7: The Disclosure Issue and the Purchaser's Knowledge Issue.

315. Unlike the Issues addressed above, Issue 5 does not turn upon any great debate about what the SPA means. Instead, it requires an assessment of the factual evidence given at trial. Issue 7 does, however, require consideration of the true meaning of the contractual provision against which LCG's alleged knowledge falls to be tested.

316. The evidence on both issues is to be considered against the language of the definition of '*Disclosed*' and clause 6.3 (for Issue 5) and paragraph 12.1 of Schedule 5 (for Issue 7) of the SPA. Those provisions are set out in paragraphs 108 and 111 above. The defendants take a point on the true construction of paragraph 12.1 when read in the light of clause 6.3. Their counterclaim said the "*and*" between paragraph 12.1.1 and 12.1.2 should be read as "*or*" and, although the point was not pressed in argument, that, if necessary, the SPA should be rectified accordingly on the basis of mutual mistake.

317. Whereas a determination of Issue 5 in the defendants' favour would operate to pre-empt an adverse finding against them on Issue 6 (the Breach Issue), because it would result in a qualification to the warranty perhaps otherwise breached, the same cannot strictly be said about Issue 7. On the face of it (though see the arguments summarised below) the language of paragraph 12 of Schedule 5 is that the defendants "*shall not*

be liable" on the warranty claim if the grounds for it were disclosed and were the subject matter of paragraph 12.2 knowledge. As its place within Schedule 5 ('*Limitations on Claims*') confirms, that is the language of a *defence* to an otherwise established breach of warranty; at least "to the extent*"* that the facts and matters giving rise to it were disclosed and known. Nevertheless, Issues 5 and 7 are so clearly inter-related that it is sensible to deal with them together and before turning to issues of breach of warranty.

The Rival Arguments

Paragraph 12 of Schedule 5

318. I have noted above that the defendants did not press the counterclaim for rectification of paragraph 12 of Schedule 5 which was pleaded on the basis that the inclusion of "*and*" rather than "*or*" reflected a mutual mistake by both parties. The pleading did not elaborate upon that by alleging that it was their common intention, up to the time of signing the SPA, that it should have read "*or*" and in LCG's skeleton argument reference was made to a number of earlier drafts of the SPA which (by using the word "*and*") undermined the claim for rectification on that basis.

319. Instead, Mr Sims KC said this was instead a situation for "constructional rectification" (i.e. correction of the provision as a matter of construction) of the kind addressed by the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101. The defendants' argument requires me to conclude that this is such a case, requiring the correction of the word "*and*" to read "*or*" through the process of interpretation. In the absence of that conclusion, through the draftsman's use of the word "*and*", paragraphs 12.1.1 and 12.1.2 must be read as imposing two pre-conditions to the existence of a defence to liability, not just one of two alternative pre-conditions as the defendants contend.

320. The argument for the defendants, in support of such a correction, rests upon their contention that clause 6.3 and paragraph 12 of Schedule 5 to the SPA provide them with two separate defences (in circumstances where no fraud, dishonesty or wilful concealment is alleged, when Schedule 5 as a whole would be disapplied). As I have indicated in my more general observation, about addressing Issue 5 before Issue 6, I do not think it is strictly correct to describe clause 6.3 (i.e. that part of it which confirms that the giving of a warranty is qualified by any disclosure in relation to its subject matter) as giving rise to a "defence". If that part of clause 6.3 bites then there is no warranty for LCG to sue upon in the first place, as the disclosure has qualified the giving of it. However, the defendants would say that is not material to their analysis. Their starting point is that the language of clause 6.3 identifies two means by which they can escape liability under a warranty. The first is by establishing the relevant matter was "*Disclosed*". The second is by establishing what is described in the heading to paragraph 12 as "*Purchaser's Knowledge*".

321. The essence of their point is that, unless paragraph 12 is read as containing two alternative limbs ("*or*" rather than "*and*") then, despite clause 6.3 expressly referring also to a potential defence under that provision in Schedule 5 ("*subject to Disclosure and to the limitations set out in Schedule 5*"), paragraph 12 adds nothing to the

proviso to liability based on disclosure. That is because paragraph 12.1.1 refers again to disclosure ("*Disclosed in the Disclosure Letter or Disclosure Documents*"). If reliance upon paragraph 12 not only requires the defendants to establish they have made such disclosure but also ("*and*") that LCG had actual knowledge of the facts, matters or circumstances disclosed (see paragraphs 12.1 and 12.2) then the reference in clause 6.3 to Schedule 5, at least so far as paragraph 12 of it is concerned, is surplusage and meaningless. On that basis, the defendants say, disclosure ("*Disclosed*" for clause 6.3 purposes) gives them a complete defence without the parties needing to consider the impact of paragraph 12 of Schedule 5. Therefore, the correct interpretation, which properly reflects the twin-limbed proviso language of clause 6.3 (I ignore the inapplicable "proviso to the provisos" for cases of fraud etc.) is one that gives paragraph 12 some meaning. It can only have meaning, beyond a defence based on disclosure, if establishing LCG had actual knowledge is an *alternative* defence ("*or*") to a defence based on disclosure.

322. LCG's counsel responded by saying that the defendants' argument does not meet the *Chartbrook* test and ignores the bargain struck by the parties. Both sides were experienced commercial parties, well-advised and represented by transactional lawyers. There was no proper basis for the court to conclude that they intended "*or*" rather than "*and*" (there being no evidence to suggest that) or that LCG would have agreed to it. Instead, they agreed upon language whose plain purpose was to ensure that any relevant knowledge should be apparent from disclosure *and* that LCG actually had it.

323. Mr Booth KC said that, as '*Disclosure Documents*' in clause 1.1 of the SPA were defined to mean "the documents which have been made available in the Data Room" (and indexed in the annex to the '*Disclosure Letter*'), there was nothing absurd or non-sensical in a provision which protected LCG from being attributed with knowledge of a matter buried deep in the disclosure documents. For that reason, the parties had specifically agreed in paragraph 12.1.2 and 12.2 upon the need for actual knowledge (and awareness) on the part of named individuals, to be attributed to LCG, rather than constructive knowledge only. [I should remark that paragraph 12.2 appears to me to be curiously worded in the way it expresses the attribution of knowledge. However, it is reasonably clear in saying that LCG derives its knowledge from the named individuals, not the other way round and, although it could be read as saying that knowledge on behalf of *all* those named is required before LCG is to be attributed with it, it is accepted that the knowledge of any one of them would suffice.] This, counsel said, was also consistent with what was required for a matter to be '*Disclosed*' which meant "fairly disclosed with sufficient detail to identify the nature and scope of the fact, matter or information concerned …." Paragraph 12.1, read as a whole, also precluded any argument by the defendants that LCG had knowledge of a matter from another source.

324. Mr Booth KC said that the word "*and*" was one of the simplest words in the English language and it was the defendants' argument which resulted in redundant and meaningless language. As he summarised the defendants' position, the parties might have agreed that clause 6.3 should qualify the terms of each warranty simply by reference to "*matters Disclosed*", and ended there, but they did not. They agreed to say something more about what, from the disclosure perspective, would be required to qualify them. He made the irrefutable point that in that further language (of

paragraph 12) they had, both before and after the key "*and*", used the word "*or*" when that was appropriate. He likened the current issue to one which requires sticking to a recipe that requires "*salt and pepper*" rather than only one of those seasonings.

Disclosure and LCG's Knowledge: the Evidence

325. The defendants, who bear the initial evidential burden on this aspect of the case, contend that LCG had knowledge of the facts, matters and circumstances giving rise to the Clawback through Daniel Dowson (one of the individuals identified for that purpose by paragraph 12.2 of Schedule 5). Their case is that those facts, matters and circumstances became known to him through the due diligence undertaken by LCG and that his failure to remark upon them prior to the entry of the SPA reflected his own subjective view that they would not result in a claim and/or were minor matters that could be resolved after completion.

326. The defendants place heavy reliance upon an 'Executive Summary' prepared by Tim Williams (the Company's Director of Contracts) which explained the Company's Study Programme for 16-19 years olds (the "**SPD**"). Mr Williams, who gave evidence for LCG, explained that the SPD, as it evolved over the years, was submitted by the Company to ESFA each year to explain the Company's approach to planned hours and the "nesting" of qualifications. He said "*this is a document I put together each year, to document how and why we do what we do*." He discussed the 2020 version of the SPD with Mr Dowson, after completion of the SPA, in connection with the 2022 Audit.

327. Mr Lewis repeatedly referred to the significance of the 2018 version of the SPD during his cross-examination. Both he and Mr Williams said the SPD in 2018 was in substantially the same terms as the later version (discussed between Mr Williams and Mr Dowson in February 2022) and that the Company had received a clean audit in 2018 (it was subject to some "*internal control recommendations*" but for which the funding implications were "*zero*").

328. The defendants say the SPD spelled out the Company's approach in clear terms and, even though that was found in the 2022 Audit to have been incorrect, no further primary facts, matters or circumstances are or would have been necessary to establish that the Company was misapplying the Funding Rules in respect of Condition of Funding. It is not their case that the SPD was available to LCG in the Data Room for due diligence purposes. Instead, a significant part of their case on this aspect rests upon the court finding that, while LCG was conducting due diligence, Mr Dowson and Mr Williams had a discussion during which Mr Williams would have explained the Company's approach and thereby bought such facts and matters to LCG's attention.

329. The defendants' counsel submitted that the evidence supports the conclusion that it is more likely than not that the Company's approach to planned learning hours and Condition of Funding was discussed by Mr Williams and Mr Dowson at the due diligence stage. They said the terms of their later email exchanges on 2 February 2022, concerning the SPD, supported this conclusion, including the absence of any

obvious concern expressed by Mr Dowson and the absence of comment by him upon the "nesting" of qualifications.

330. They also relied upon the terms of an email which Mr Williams sent to Mr Dowson on 3 March 2022, in response to Mr Dowson's noting some "*audit challenges around GCSE & qual set up*". Mr Williams said:

> "Yes, like i said to the auditor it is always planned hours and condition of funding! Don't think there is an issue with the "nested" quals, just how you show the hours. But planned hours that are timetabled are planned hours that are timetabled, or have ESFA got a different definition they haven't shared?"

331. The defendants argued the likelihood is that Mr Williams would have previously explained to Mr Dowson during the due diligence process what the Company did and why it did it.

332. The defendants also rely upon the fact that information from the ILRs and PDSAT reports was available to LCG in the Data Room. That revealed a statistically significant amount of learners recorded as being on 538 planned hours and also those with planned learning hours which greatly exceeded that required for achieving the recorded aim of an Award. This information was available to Mr Dowson upon whom, as Mrs McLeish (another such named person under paragraph 12.2) confirmed in evidence, LCG relied upon in relation to the due diligence undertaken in relation to English funding.

333. The defendants point to the difference in approach adopted by LCG during due diligence in relation to the Welsh and English parts of the Company's business. In relation to Welsh funding, LCG engaged an external consultant (Collette Kelly) to undertake a funding audit but not the English funding. In his witness statement, Mr Dowson referred to the fact that he had with an assistant taken "*samples of files and effectively did a sort of mini-audit on those file samples*". Mr Higgins (Mr Dowson's immediate superior) said in evidence that he would have expected Mr Dowson to have done some sort of audit on the English funding.

334. However, in testimony Mr Dowson confirmed he did not undertake any sampling of learners' files. By an email dated 22 July 2021, noting that LCG had access to the Data Room for just over a week, Tony Davis of LCG informed colleagues (including Mr Higgins, Mrs McLeish and Mr Dowson) that, in relation to English funding, it was "agreed no need to audit English funding following PFA audit in 2018, which had zero error rate, but Burness Paull to capture protection from 2018 to date in the SPA.*"* Mr Dowson explained that Mr Davis (another individual named – with a misspelt surname – in paragraph 12.2) was responsible for managing the due diligence exercise overall.

335. The defendants say that LCG was content to adopt a very light touch approach on English funding matters, no doubt comforted by the proposed Funding Indemnity. They point to LCG's internal document 'Project Beacon: Summary of Key Points from Internal Due Diligence'. In relation to "*compliance*", this referred only to a "*significant volume of compliance issues raised by audit work with Colette*" (with an "amber' flag, to denote "*a matter of which the team should be aware but is not a major risk*") which referred to the Welsh funding. The suggested next steps in that

document were "*Audit implementation plan post acquisition, unredacted minutes for any evidence of compliance concerns, indemnities in case of clawback*."

336. LCG's position is that the evidence at trial clearly shows that it had no knowledge that a breach of the Funding Rules had taken place as opposed to awareness of the theoretical risk which justified the parties' agreement upon the Funding Indemnity. I have already considered the basis upon which LCG required the inclusion of the Funding Indemnity in the SPA in addressing Issue 3 above.

337. LCG's counsel submitted that the information in the Data Room did not provide LCG with knowledge of matters giving rise to a breach of the Funding Rules either in relation to planned hours or Condition of Funding.

338. Both on the present issue and Issue 4 (the Vendors' Knowledge Issue), during the trial Mr Booth KC illustrated the Company's approach to Condition of Funding by reference to the information given in the PDSAT report in relation to one particular learner (learner reference number ending "RJ9" and initials "**KB**"). I refer again below to the information in relation to KB and also that provided in the PDSAT report for another learner identified by LCG (learner reference ending "G51" and initial "**JH**"), in respect of the planned hours issue, in my assessment of the evidence on the Purchaser's Knowledge Issue.

339. The essential point made by LCG was that the information in the PDSAT report alone would not have alerted it to an issue with compliance with the Funding Regulations either over Planned Hours in Study Programmes or the Condition of Funding rules. Aa key component to understanding and identifying the Company's practices in relation to both was the Company's electronic record known as the 'Planned Hours Template'. The Planned Hours Template was available to RSM for the 2022 Audit but was not available to LCG in the Data Room.

340. The Planned Hours Template recorded what was planned for learners on enrolment. The number of hours planned for a learner should have been reflected in the PDSAT record. It was described in the SPD (which referred to it as the "*planned hours calculator*") as a document, compiled by reference to the ILR, as follows:

> "Once the ILR has been completed for planned learning activities, these are entered into the planned hours calculator by Head Office staff.
>
> This calculated the expected hours during the contract year (excluding planned leave dates) for the learner which is entered onto PICS to ensure accurate planned hours are claimed from ESFA. The calculator takes into account the average attendance based on the previous year's records."
>
> This will determine the appropriate funding rate for each learner based on planned attendance. If the learner leaves within the 6-week time frame the hours are reconciled and amended per the guidance."

341. The Planned Hours Template was not in the Data Room. Neither were the ILRs/PLRs upon which the Planned Hours Template was based. Without this critical piece of the jigsaw, LCG argued, the information held in the PDSATs did not give rise to any cause for concern. LCG's submissions in relation to JH and KB (addressed below in

the light of the evidence of Mr Dowson) highlight how it is only by comparing the PDSAT report with the Planned Hours Template that the funding issues emerge.

342. Even if the Planned Hours Template had been available, LCG said it would not have assisted in identifying the issues before the SPA. That is because the Planned Hours Template only contains learner names (and not learner reference numbers) whereas the PDSAT data was anonymised and only contained learner reference numbers. RSM were only able to join the dots as a result of a document identified as the '**Risk Spreadsheet**' The Risk Spreadsheet was an Excel workbook initially prepared by RSM but as a working document to which Mr Dowson added information during the course of discussions which LCG had with RSM and ESFA aimed at reducing the funding clawback. He attached it to an email dated 1 April 2022 to Mrs McLeish and Mr Higgins and at that stage it identified (as alternatives to the Clawback amount) the potential figures of £982,000 and £763,000. The Risk Spreadsheet obviously post-dated the SPA.

343. In relation to the planned hours issue, LCG picked up a reference in the defendants' written opening which demonstrates the obvious difficulties in their suggestion that LCG was aware of matters giving rise to a clawback. The defendants' opening identified one learner (learner reference ending "LW7", which Mr Sims KC recognised was an erroneous reference in his cross-examination of Mr Dowson) who was identified in a PDSAT spreadsheet entitled "*Learners with high planned hours in-year*" (tab '21Y-203'). The defendants pointed to total planned hours of 888 for that student (450 planned learning hours and 438 EEP hours and, therefore, recorded as within funding band 5) and yet the core learning aim was identified as an Award with 2 month learning period (3 August to 2 October 2020) identified for it. The defendants said this clearly showed an erroneous nesting approach and was therefore known to LCG.

344. LCG says there is a striking irony in the fact that this example used by the defendants to assert that it was easy for LCG to see the Company's error did not in fact involve any such error. Not all nested qualifications involved funding errors. LCG referred to the Risk Spreadsheet where learner "LW7" was not identified as part of the Planned Hours Over-Claim. I note that the other two rows in spreadsheet '21Y-203' for that learner reveal that, in addition to work experience/placement, a second Award was a further learning aim which (in view of the planned learning period for that Award going beyond the actual and planned leaving) may well have been completed.

Analysis and Conclusions on Issues 5 and 7

Paragraph 12 of Schedule 5

345. In *Chartbrook*, at [22]-[25], Lord Hoffmann explained that two conditions need to be satisfied if the literal meaning of a contractual term is to be corrected through the process of interpretation. First, it must be clear that there has been a mistake, and, secondly, it must be clear what correction ought to be made in order to cure the mistake. Lord Hoffmann said: "All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."

346. *Chartbook* was a case where the House of Lords concluded that something had gone wrong in the syntactical arrangement of words and the product was grammatical ambiguity. Lord Hoffmann recognised that a "*strong case*" is required to persuade the court that something must have gone wrong with the drafting. The case was made out there because the literal interpretation of the clause made "*no commercial sense*". It was clear from the wider terms of the contract, and also the subject matter of and definitional term used in the clause under consideration, that the clause provided for the possibility of a larger payment being made to the claimant depending upon a contingency as to the sale price of the properties built by the defendant. The interpretation of the clause in accordance with "*the ordinary rules of syntax*" meant there was virtually no element of contingency and that the payment would be triggered by sales at about a quarter of the price envisaged by the parties at the time of the agreement. The result was "*arbitrary and irrational*".

347. The decision of Nugee LJ in *Monsolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961; [2022] 2 P&CR 10, at [31]-[33], confirms that the test for correcting the words of a contract through the process of interpretation is quite a high one. He contrasted the language of a provision which is commercially unattractive or unreasonable for one side from one that produces "*irrational, arbitrary, nonsensical or absurd results*".

348. Applying the higher test is necessary to ensure that the court does not fall foul of the prohibition in *Arnold v Britton* against relying upon its (or one party's) perception of commercial common sense in order to relieve a party of "bad" or onerous aspects of the bargain which the ordinary and natural meaning of the contractual words shows they have reached. Instead, and consistent with parties sometimes using the term "constructional rectification", the court is required to consider the contractual language from the perspective of both parties to see whether it reveals a drafting mistake which, evidently, cannot be said to reflect their intentions at the time of the contract in the light of the commercial consequences which appear to flow from it.

349. In my judgment there are obvious problems with the defendants' reliance upon the *Chartbrook* principle which indicate that their interpretation of paragraph 12 cannot be correct.

350. The first problem, addressing their suggestion that on LCG's case the reference in clause 6.3 to Schedule 5 is unnecessary, is that this ignores the fact the reference is justified regardless of its implications for Issues 5 and 7. As I remarked in exchanges with counsel, it is a reference to Schedule 5 generally and not just to paragraph 12 of it in particular. Absent fraud etc., a claim upon a General Warranty is subject to *all* of the limitations in Schedule 5, including those which have resulted in Issues 1, 2 and 11. This means there is no real scope for invoking the presumption against redundant words. Even if that were not the case, the presumption (i.e. invoking a general requirement that the court should give meaning to the chosen words if it can) is not of great weight when authorities such as *Arnold v Britton* reflect the court's awareness that, in the real world, some contractual language may not only be inapt but unnecessary.

351. As for the defendants' suggestion that, when clause 6.3 is read as being subject to paragraph 12, in particular, LCG's interpretation is nonsensical, I do not agree. The natural and ordinary meaning of the respective provisions (with paragraph 12.1.2

being read as an "*and*" rather than "*or*") reveals them to be consistent with one another.

352. The key point is that the exercise of disclosure (and it is important to bear in mind that for present purposes the relevant disclosure is that identifying facts, matters and circumstances which relate to the General Warranties rather than about the Company's business and affairs falling outside their scope) *should* lead to actual knowledge on the part of LCG. To express it another way, given that the parties specifically agreed that LCG's knowledge (through any of the named individuals) had to be actual knowledge rather than constructive knowledge, the defendants should not be permitted to argue that disclosure which might only have resulted in constructive knowledge on the part of LCG should suffice. Subject to what I say below about the meaning of '*Disclosed*', the introduction of the "*or*" in place of "*and*" might provide the basis for such an argument. As Mr Booth KC observed, it would also provide the defendants with scope for argument that LCG had knowledge of a matter from another source even though they themselves did not disclose it.

353. I have suggested that the defendants' interpretation of paragraph 12 gives rise to the opportunity for them to argue that LCG had constructive knowledge of a relevant matter even if each of those named in paragraph 12.2 lacked actual knowledge of it. As I observed in exchanges with counsel, the exercise of disclosure can in very general terms (free from any particular contractual requirements or exactness) be said to be all about giving the party provided with the fruits of it the opportunity to find out things; or what a lawyer would describe as notice or constructive knowledge. Both sides referred to the Court of Appeal decision in *Infiniteland Ltd v Artisan Contracting Ltd* [2005] EWCA Civ 758; [2006] 1 BCLC 632 where Chadwick LJ, at [69], approached his decision upon the adequacy of the warrantor's disclosure in that case by noting the well-established distinction between actual knowledge, on the one hand, and such imputed or constructive knowledge on the other.

354. In *Infiniteland*, the seller warranted that "*the contents of the Disclosure Letter and of all accompanying documents…….fully, clearly and accurately disclosed every matter to which they related*". The seller's disclosure letter contained general disclosure which referred in quite general terms to "*all matters from the documents and written information supplied by us to your reporting accountants, Pridie Brewster*" and "*all matters contained or referred to in the following documents supplied by us to you in the green lever arch files…*". Chadwick LJ, said, at [70], with my underlining:

> "It would have been open to the Purchaser to refuse to accept disclosure made in general terms by reference to what had been supplied to its reporting accountants; and to insist that it would only accept disclosure which was specific to each individual warranty. But the Purchaser did not choose to take that course. It was content to rely on its reporting accountants to identify from the documents supplied to them – and to report on – the matters about which it needed to be informed. That is the effect of the terms in which disclosure was made under the disclosure letter; and, for whatever reason, those were the terms upon which the purchaser was content to accept disclosure. In those circumstances, as it seems to me, <u>the disclosure requirement was satisfied in relation to such matters as might fairly be expected to come to the knowledge of the reporting accountants from an examination</u> (in the ordinary course of carrying out the due diligence exercise for

which they were engaged) of the documents and written information supplied to them."

355. In the present case the defendants gave disclosure by the Disclosure Letter (as defined in the SPA) dated 29 October 2021. It included the following statements (with my underlining):

> "This letter is the Disclosure Letter defined and referred to in the SPA and constitutes formal disclosure to the Purchaser for the purposes of the SPA of the facts and circumstances which are or may be inconsistent with the General Warranties. Such facts and circumstances will, to the extent Disclosed, be deemed to qualify the General Warranties accordingly.
>
> …………
>
> By way of general disclosure, the following matters are, to the extent Disclosed, disclosed to the Purchaser:
>
> ………
>
> 2. All matters contained in the documents included in the Disclosure Documents, an index of which is appended to this Disclosure Letter at Annex 1
>
> ……….."

356. Annex 1 is a detailed 46-page list of documents identifying further folders containing many files.

357. The Disclosure Letter then went on to state (before setting out a table identifying certain warranties by number): "*The following specific disclosures are made in relation to the General Warranties*". Warranty B5.2.2 (including the Key Warranty) was not the subject of any specific disclosure.

358. Recognising that the Disclosure Letter uses the defined term '*Disclosed*', the underlined passages demonstrate the potential for the type of situation encountered in *Infiniteland* to arise, so that there might be scope for an argument that LCG's ability to find out from the Disclosure Documents that, for example, the Key Warranty was qualified by something revealed in those documents.

359. However, the reason why the SPA is to be read as precluding the scope for such an argument (because "*actual knowledge and awareness*" under paragraph 12.2 is required) emerges from the use of the defined term in the Disclosure Letter. 'Disclosed' means "*fairly disclosed with sufficient detail to identify the nature and scope of the fact, matter or information concerned ……*" The defendants' counsel recognise that this type of language imposes an obligation to bring a matter to LCG's attention, through a positive statements about the true position, rather than leaving LCG to work things out for itself: see *Triumph Controls UK Ltd v Primus International Holding Co* [2019] EWHC 565 (TCC), at [329]-[335], where O'Farrell J considered some of the authorities on this point.

360. It is because that kind of disclosure is required of the defendants, if any particular warranty is to be read as qualified by it, that paragraph 12 should be read without any alteration by substituting the word "*or*" for "*and*". Linking actual knowledge and awareness to such fair and detailed disclosure appears to make sense and, in my judgment, there is certainly no basis for second-guessing the drafting on *Chartbrook* grounds.

361. Whether a relevant matter (qualifying Warranty B5.2.2 in particular) was disclosed and LCG had knowledge of it turns on an assessment of the evidence.

Disclosure and LCG's Knowledge: the Evidence

362. As I remarked during Mr Booth KC's opening submissions, the defendants' position (see Issue 4: the Vendors' Knowledge Issue) is that, as at the date of the SPA, they were not aware that the Company was in breach of the Funding Regulations and that obviously highlights the need for careful interrogation of the basis for them saying LCG became aware of it through the process of due diligence. The defendants' position on Issue 4 is consistent with the Disclosure Letter (bearing the same date as the SPA) not making any specific disclosure in respect of Warranty B5.2.2.

363. On the face of it, the fact that the Company had a clean audit in 2018 (which is relied upon heavily by the defendants on Issue 4: the Vendors' Knowledge Issue) might be said to run against the general thrust of their case on Issue 7. Mr Dowson was also asked about the 2018 audit. He said he recalled looking at the 2018 audit report during due diligence. He took comfort from it. He agreed that it would have been conducted by ESFA on a random basis by reference to a sample of the Company's learners.

364. Clearly, making the representation in Warranty B5.2.2 but qualifying it by clause 6.3 and paragraph 12, shows that the parties expressly recognised that LCG might come to know (through a process of discovery by undertaking due diligence) what the Company then did not. The references above to the Company's Welsh funding illustrate that the defendants cannot therefore be accused of adopting two fundamental and inconsistent positions (although also not mentioned in the Disclosure Letter, there has been no need in these proceedings to investigate whether the Company was already aware of the amber warning compliance issues on Welsh funding mentioned in LCG's internal due diligence report).

365. In her evidence Mrs McLeish accepted that, after the outcome of the 2022 Audit, she did wonder in hindsight whether the breaches of the Funding Regulations should have been picked up during the due diligence exercise; though she did emphasise that it was "the last thing on my mind" in early meetings when her focus was on avoiding a potential maximum clawback of £2.9m which Mr Dowson had identified. However, she said "[i]n hindsight, we did look back and question our processes in the data room, this issue could not have been identified by the data." She contrasted the full audit of a sample of learners which RSM undertook in the 2022 Audit by reference to an attendance register and the actual hours of learner participation.

366. Mrs McLeish's comment upon what Mr Williams had said in his email to Mr Dowson of 3 March 2022, in connection with the 2022 Audit, was "a very broad statement that is very high-level overview of what was underneath the planned hours and the condition of funding issue and the extent to which it went."

367. Mr Dowson thought that, during the due diligence process, he had restricted himself to the funding section of the documents in the Data Room. Mr Dowson said there was "no learner specific paperwork" within it to enable a "mini-audit" to be carried out. He said he had access to the PDSAT reports but not the ILRs from which the PDSAT information was extracted. He said that the PDSAT information indicated about 30% of the students were shown as part-time.

368. Mr Dowson confirmed he looked at the PDSAT report as part of that process, which identified each student's learning aim, the start and end date of the programme and the number of hours allocated to the student (including many allocated with 538 learning hours and therefore just below the full-time funding band 5). He said that there are multiple rows for a particular student and that he probably did not scroll through one to see how the planned learning hours (distinct from EEP hours) were apportioned to each learning aim. He accepted that those rows revealed a nesting approach to qualifications for some learners. However, he said that the PDSAT report did not reveal the hours attributable to the individual qualification. I should note here that there are 5063 rows, relating to 1,508 students, in the relevant spreadsheet within the PDSAT report: "*All 16 to 19 funding model learners and learning aims*" (tab '21Y-101').

369. Therefore, Mr Dowson said, the very high proportion of students with the learning aim of an Award would not have alerted him to a breach of the Funding Regulations in terms of planned hours. As he said:

> "Yes, I mean there was crudely 1,500 learners on the PDSAT report and two diplomas, there was not 1,498 funding errors identified."

370. In rejecting the suggestion that the PDSAT information would have disclosed the planned hours issue, Mr Dowson said:

> "It wouldn't have directly shown that, no. To see that you would have needed to see the make up of the qualifications planned for that learner and what those planned hours were attributable to. So MPCT have a document called a planned hours calculator, which says the programme is made up of – or that student's programme is made up of those X number of qualifications, to realise those 863 hours included other qualifications I would have needed access to the planned hours calculator."

371. The Company's "*planned hours calculator*" (as it is also described in the SPD) referred to by Mr Dowson was the Planned Hours Template.

372. When asked about the information for a particular learner in the PDSAT report (learner reference number ending "H31" with planned learning hours of 437 and EEP hours of 426), Mr Dowson also made the point that the person was planned to be on

the programme for almost a year – 12 August to 31 July – even though the core learning aim was identified as an Award (column L) which was planned for just 2 months (columns M and N). He accepted that could have been a prompt for questioning why the person was proposed to be on the programme for a year but, looking at the end date and assuming about 40 teaching weeks in a year with about 20 hours per week as learning hours, it would be reasonable to assume that the planned hours of 863 was reasonable. He said: "the learner planned end date is very deceptive in this regard" and "if it was set correctly, it would have identified the issue and the learners would have appeared on one of the other exception reports which the ESFA monitor." (Mr Dowson's reference to an "*exception report*" - he also referred to it as an "*error report*" – was to a spreadsheet which is part of the PDSAT report which identifies any incorrect data iwhich requires corrective action to be taken.) The PDSAT report did not show the number of weekly learning hours.

373. Mr Dowson said that, for the purposes of the 2022 Audit, RSM made reference to a separate spreadsheet – namely, the Company's Planned Hours Template (as a third source of information alongside the ILR and PDSAT report) – in order to reach their conclusion on the Planned Hours Over-Claim.

374. With that further information available, ESFA did not determine that the Company's entire nesting approach was incorrect. Instead, they determined that the Company's approach to nesting for a proportion of the learners was incorrect. As RSM confirmed (see paragraph 63 above) the 2022 Audit identified "*a number of learners who were only enrolled onto one learning aim plus work experience which typically was planned for two months which they completed*."

375. In order to identify those learners, RSM looked at other information beyond the PDSAT report; namely the ILRs/PLRs and the Company's Planned Hours Template. As shown by the relevant information within it for KB (mentioned below in relation to Condition of Funding to which his case is directly relevant) the PDSAT does not itemise the number of planned hours for each of the individual qualifications the learner is undertaking. There are five rows in the PDSAT relating to KB. Each row reflects a different recorded learning aim but the number of specified planned hours is the same in each of the rows (as is the number of planned weeks in the year and the average weekly planned hours). As explained below, KB was shown as part-time (funding band 4b) in the PDSAT report when the Planned Hours Template showed him having planned hours of 888 (therefore full-time and funding band 5) comprised of 540 qualification hours, 349 non-qualification hours and 144 work experience hours.

376. The same point about the absence of a breakdown of hours between different learning aims applied to learners in respect of whom RSM identified a breach of paragraph 119 of the Funding Regulations. That breakdown of planned hours between each learning aim (which Mr Dowson indicated would be required if the total planned hours and planned end date was to be second guessed) was missing from the PDSAT report. In their closing submissions LCG's counsel identified JH, who formed part of the Planned Hours Over-Claim, to illustrate this.

377. JH was shown (at rows 1876 to 1881 of the spreadsheet) as having a start date of 16 November 2020 and a planned end date of 31 July 2021. However, the "learner actual end date" is recorded as 3 March 2021. Therefore, instead of staying with the

Company for the 8½ months indicated by the planned end date, he left after 3½ months. That early departure identified him in the 2022 Audit as a learner impacted by the planned hours issue. Only the Planned Hours Template showed a breakdown of the planned hours between his different learning aims (indicating a total of 795.5 hours). In the absence of a breakdown in the PDSAT report of the total planned hours (there recorded as 666) between the different learning aims in each row – (a) Functional Skills English Entry Level 2 (row 1876), (b) Functional Skills Maths Entry Level 2 (row 1877), (c) Work Experience (row 1878), (d) an Introductory Award in Employability Skills Level 2 (row 1879), (e) Functional Skills Maths Entry Level 3 (row 1880), and (f) Functional Skills English Entry Level 3 (row 1881) – there was no basis for LCG to question the planned end date as being inaccurate or unrealistic. As Mr Booth KC and Mr Adamyk submitted, on the assumption that the 8½ months would include 6 weeks' leave, the 666 hours indicated about 30 teaching weeks on the basis that the learner planned to attend for approximately 22 hours per week. That information alone would not have flagged up a breach of paragraph 119.

378. I therefore reject the defendants' argument in closing submissions that the information in the PDSAT was "*the only information needed to deduce an impermissible nesting approach contrary to para 119 FR*." The Planned Hours Over-Claim reflected the Company claiming learning hours for qualifications that were not included as learning aims in the relevant ILRs. The PDSAT report indicated the total number of hours planned for a learner but, without the ILR to identify the learning aim(s), LCG would not know whether this reflected a permitted nesting of qualifications or the breach of paragraph 119 of the Funding Regulations identified by RSM. The point is illustrated by the fact that not all nested qualifications were found in the 2022 Audit to involve funding errors.

379. In relation to the Condition of Funding Over-Claim, Mr Dowson also said he did not know that the Company was foregoing an element of funding in order to satisfy the Condition of Funding rules. Looking at the particular learner H31, for example, he said the PDSAT information did not contain the information as to whether or not the learner had previously obtained maths or English GCSE (or a grade 3 in either or both). Therefore, it could not be seen whether the Condition of Funding rules applied to that learner.

380. Asked about another learner (learner reference number ending "X62"), whose planned hours were 538, he said that this did not indicate that the hours had been reduced to below 540 in order for the learner not to be subject to the Condition of Funding rules. He said:

> "There is legitimate reasons for using 538 hours, that could be a genuine plan that you were intending to deliver. It is not an impossibility that those hours were just genuinely planned hours."
>
> "There is no indication of the reason why they would be on at 538 hours in this document."
>
> "….. to make that assumption, I would need to derive initially that the 530 hours -- 538 hours, has falsely input and make an assumption that the GCSE grades upon entry were grade 3, I think there is an incredible leap between those."

and

"To know if you would need to do GCSE, you would need to know the GCSE grades on entry, which is not on this report."

381. I note that when Mr Booth KC asked Mr Lewis about whether a PDSAT report showing 537 learning hours and 1 EPP could reflect a genuine learning plan, Mr Lewis answered "*not knowing what I now know, no*" before saying "*I don't know.*" Those answers, given in the light of the 2022 Audit, lend support to Mr Dowson's first answer above.

382. Mr Dowson was also asked by Mr Sims KC about the PDSAT information for KB who was recorded in the PDSAT reports as being within funding band 4b and shown as having total planned hours of 538 made up of 537 learning hours and 1 EEP hour. I have noted above that the Planned Hours Template shows that KB enrolled with the Company as a full-time learner. It was suggested by Mr Sims KC that the 538 hours was a pretty obvious pointer to someone carrying out due diligence that KB's hours had been reduced to comply with the Condition of Funding Rules. Referring to the fact that the 2022 Audit picked up that the Planned Hours Template actually showed KB's planned hours to be 888, Mr Dowson answered:

"*I don't think so. They wouldn't have -- the 888 hours doesn't exist anywhere on the PDSAT report either. The 538 would exist on the PDSAT but not the 888*."

383. On the basis that the ILRs and Planned Hours Template were not in the Data Room, Mr Dowson's evidence demonstrates why LCG did not have (or, even if it was the relevant test, could not properly be attributed with) knowledge of breach of the Condition of Funding rules prior to entering into the SPA. A reference to the PDSAT report containing KB's details supports his evidence. The five rows for KB (rows 533 to 538) each identify his '16 to 19 funding band' as "*450 to 539 hours (Band 4b)*" based upon total planned hours of 538. Reference to the details for the next learner (learner reference number ending "J27") – rows 539 to 541 – record total planned hours of 888 and the resulting funding band of "*540+ hours (Band 5)*". There was no reason for LCG to question the accuracy of KB's hours, alongside the recorded hours for other learners, especially when the PDSAT report contained no indication as to whether or not KB had previously achieved grade 3 maths or English GCSE.

384. As Mr Dowson said in relation to the Condition of Funding breach:

"……. The ILR should show the accurate planned hours in which you are intending to deliver for a learner. If you are intending to deliver higher planned hours, then you should declare it within the document."

and

"I didn't see anything wrong with learners being planned to do 538 hours. If I knew the reasons why they were doing that, I would have raised an issue."

385. Mr Dowson knew about the Condition of Funding rules in 2021. He confirmed that LCG was not delivering GCSE courses at the time of the SPA and offered part-time

courses to students who would have been affected by them.

386. I accept Mr Dowson's evidence that he could not have known that more than 538 planned hours were to be provided to a learner when he did not have access to the ILR or the Company's Planned Hours Calculator. I have referred above to the SPD which referred to the Company's Planned Hours Calculator being used "*to ensure accurate planned hours are claimed from ESFA*." I am satisfied by Mr Dowson's evidence that LCG did not have knowledge to the contrary.

387. Neither does the evidence support the conclusion that LCG acquired knowledge of the relevant matters through being told about them by Mr Williams at the due diligence stage.

388. In his witness statement, Mr Dowson referred to a conversation he had with Mr Williams during the due diligence exercise. He said they would have discussed planned timetables including in relation to the provision of maths and English. In his witness statement he said he could not recall if they specifically discussed the Company's approach to planned hours or Condition of Funding. In testimony, Mr Dowson said he did not recall having any conversation with Mr Williams during due diligence about the Company's approach to the nesting of qualifications. Mr Dowson said that, even if there had been such a discussion with Mr Williams explaining the Company's approach set out in the SPD, then it would have identified that the Company adopted the nesting approach to qualifications but "nesting as such is not against the funding rules."

389. Mr Sims KC suggested to Mr Dowson that communications with Mr Williams at the due diligence stage involved Mr Williams explaining (in much the same terms as later set out in the SPD sent to him on 2 February 2022) the Company's approach to the Condition of Funding rules so that full-time learners were recorded as being planned to do 538 hours. Mr Dowson responded:

> "That didn't happen ….. I am saying that didn't happen. I did not have that conversation."

390. That response was consistent with his response that (knowing about the Condition of Funding rules) he would have raised it as an issue if he knew that this was what the Company was doing.

391. Mr Williams said in his witness statement that he did not recall speaking to Mr Dowson during due diligence. In cross-examination, he confirmed this and said "I can't recall speaking to Daniel during due diligence about condition of funding." Mr Williams said if he and Mr Dowson had such a conversation then his response would have been as stated in the SPD.

392. I accept the evidence of Mr Dowson and Mr Williams on this point. That evidence, from the two parties to a "conversation" alleged by the defendants to have taken place on the balance of probabilities, undermines the suggestion that LCG acquired actual knowledge of matters giving rise to a breach of the Funding Regulations as a result of things said by Mr Williams during due diligence.

393. In any event, Mr Dowson said that the SPD which Mr Williams later sent him in February 2022 did not directly point to the conclusion that there had been a breach of the Funding Rules and "[y]ou would need to extract further information."

394. In my judgment, the terms of the SPD did not mean it was reasonable to assume that there would be an audit-based clawback.

395. In a section headed 'How is Condition of Funding for Maths and English Checked?', the SPD stated:

> "On analysis of starting points for the assessments, MPCT has made a decision not to set learners the unachievable task of attaining a qualification grade of 4/C or above. Therefore, we calculate the planned hours and forego a banding of funding, to ensure the learner meets the condition of funding, with the appropriate qualifications achievable being followed."

396. Mr Sims KC suggested to Mr Dowson that the document clearly indicated that the Company was providing additional hours for which it was not receiving funding and was foregoing a band of higher funding, to which it was otherwise entitled, in order not to fall foul of the Condition of Funding rules. Mr Dowson did not share that interpretation of the document. In addition to pointing out that the Company's decision to provide 539 hours of funded learning was mentioned in another section (not relating to Condition of Funding) he said he interpreted the statement as the Company saying it delivered a part-time programme on a part-time basis when it might have been a full-time programme delivered on a part-time basis; and that the change to a part-time programme required recalculation of the hours. He said: "I think if they just mindlessly put it to 538, that would not require a recalculation."

397. There is also force in Mr Dowson's observations that even the SPD, later brought to his attention by Mr Williams once the 2022 Audit was underway, did not clearly identify the facts, matters and circumstances giving rise to the Clawback. He said the document did not clearly state that the Company was not providing maths and English GCSEs (the reference to maths and English at "*relevant level*" could imply that this extended to GCSE as well as "*functional skills*" maths and English) or that, in order to meet the Condition of Funding rules, the Company would not receive full-time funding for learners whose planned hours were in fact in excess of 540 hours. As he said, the SPD indicated there was a question to ask about that.

398. That observation highlights the difficulty for the defendants. Even if Mr Dowson had been prompted by the documents in the Data Room to ask such a question *before* LCG entered into the SPA, the agreement is clear in putting the burden squarely upon the defendants to inform LCG about the relevant matters rather leave it to LCG to make appropriate inquiries once put on notice of a potential issue.

399. Their case that LCG had the requisite knowledge to qualify Warranty B5.2.2 falls to be tested against the meaning of the word '*Disclosed*' in the SPA and the fact that the Disclosure Letter gave no "*specific disclosure*" (to quote from it) in respect of that warranty. I have addressed above the impact of the meaning of '*Disclosed*'.

400. In *Triumph Controls*, at [335], the six principles which O'Farrell J derived from the authorities included the following:

> "……….
>
> iii) The adequacy of disclosure must be considered by careful analysis of the contents of the disclosure letter, including any references in the disclosure to other sources of information, against the contractual requirements,
>
> iv) A disclosure letter which purports to disclose specific matters merely by referring to other documents as a source of information will generally not be adequate to fairly disclose with sufficient detail the nature and scope of those matters. For that reason, disclosure by omission will rarely be adequate.
>
> v) However, it is open to the parties to agree the form and extent of any disclosure that will be deemed to be adequate against the warranty. That could include an agreement that disclosure may be given by reference to documents other than the disclosure letter, such as by list or in a data room."
>
> ………."

401. In my judgment, the defendants' argument does involve seeking to impute to LCG knowledge of the funding errors when, on my assessment of the evidence, LCG had no actual knowledge of them and (compare the concept of "*disclosure by omission*") the defendants did not speak up about them. That is not good enough to satisfy the terms of clause 6.3 and paragraph 12 of Schedule 5.

402. As LCG's counsel submitted, the defendants' case is to be considered against what the defendants might quite easily have done and what in my judgment was required, by '*Disclosure*', to be done. The defendants could have volunteered a brief explanation of their approach to planned hours and Condition of Funding, giving an indication of the approximate percentage(s) of affected learners over recent years, and indicated their belief that it was compliant with the Funding Regulations but that LCG should be aware of the risk that it might not be. Their explanation would probably have required a little more clarity on both points than the one bearing upon Condition of Funding that was later given in the SPD provided to Mr Dowson.

403. The defendants not having done that, there is no evidential basis for their suggestion that LCG the relevant matters were disclosed or that LCG had knowledge of them for the purpose of paragraph 12 of Schedule 5.

404. It is very significant, as LCG points out, that at no point during the 2022 Audit did Mr Lewis, who was still involved in the business at that time and aware of the discussions between LCG and RSM, suggest that LCG (even without such clear disclosure having been made) had been made aware of the planned hours or Condition of Funding issue before entering into the SPA.

Decision on Issues 5 and 7

405. **My decision on Issue 5 is that matters relevant to the warranty claims made by LCG were not disclosed by the defendants**.

406. **My decision on Issue 7 is that LCG did not have actual knowledge and awareness of the facts, matters or circumstances giving rise to those warranty claims such as to result in the defendants not being liable on them**.

D. Issues 6 and 4: The Breach Issue and the Vendors' Knowledge Issue

407. Like Issues 5 and 7, my determination of these two issues is fact-specific though Issue 6 does contain the point of contractual interpretation mentioned next. As explained above, logically they would fall to be determined before Issue 7 had those other two issues, relating to disclosure, not been so heavily intertwined.

408. The terms of Warranty B5.2.2 are set out in paragraph 103 above. The question of interpretation is whether it contains one single warranty or two separate ones.

409. I address Issue 6 before Issue 4 below because LCG is right to say that if Warranty B5.2.2 contains two separate warranties (which the defendants obviously challenge) then the result of the 2022 Audit clearly establishes a breach of the Key Warranty, which is:

> "during the last four years [the Company] has complied, and continues to comply, in all material respects with the Funding Rules."

410. If, however, the Key Warranty is only a part of a single, composite Warranty B5.2.2 then it is necessary to address the Vendors' Knowledge Issue by reference to the provisions of clause 6.8 of the SPA. This involves considering the defendants' awareness of the Company's entitlement to receive all funding under the contract in place between the Company and ESFA for AY20/21.

The Rival Arguments

411. LCG contends that Warranty B5.2.2(a) is an absolute warranty – a representation of fact that the Company had during the last 4 years complied and continued to comply with the Funding Regulations – which is not qualified by reference to the defendants' knowledge or awareness. As the 2022 Audit established a breach of the Funding Regulations, that representation was untrue and the defendants are liable for its falsity.

412. LCG points to the admission in the defence that the Company "*had previously misinterpreted and misapplied the Funding Rules, as alleged*" and that "*under the contracts which the Company signed with the ESFA it was required to comply with the Funding Rules and submit accurate data in respect of learners.*"

413. Mr Booth KC said that the inclusion of Warranty B5.2.2 (as a whole) as a knowledge-based warranty in the parties' Agreed List of Common Ground and Issues was simply for convenience. That document is a case management tool (see D.5.2(a) of the Commercial Court Guide – "*a neutral document*") and does not take precedence over the parties' statement of case. That is obviously right. As I observed during closing submissions, it is the language of the SPA (as construed by the court by reference to any competing statements of case) which matters.

414. So far as that contractual language is concerned, LCG says there is a clear distinction between the absolute nature of Warranty B5.2.2(a) and the knowledge/awareness-based nature of Warranty 5.2.2(b). The qualification "*so far as the Vendors are aware*" applies only to the second.

415. Even if the Key Warranty is an awareness/knowledge based one, LCG says that I should reject Mr Lewis's evidence that he was unaware of the breaches of the Funding Regulations. LCG does not doubt Mr Lewis's commitment to serving the best interests of the students on the Company's courses but I am invited to reject his evidence that he knew nothing about the financial consequences of the Company's decisions in relation to planned hours and Condition of Funding. Those decisions were hugely significant for the financial position and success of the business and for Mr Lewis, as the Company's CEO, to say he was oblivious to them is a starling assertion which beggared belief.

416. LCG says that the assertion is also undermined by the evidence of Mr Williams who rejected the suggestion that the decisions were his alone and said Mr Lewis was involved in them. Counsel for LCG pointed to the contrast between the defendants' opening submissions, which said Mr Williams's evidence on this aspect was materially helpful to them, and the conflicting evidence given by Mr Lewis. They referred to Mr Lewis's preparedness to make statements of truth that (for the purposes of Issue 7) LCG had knowledge of matters indicating a breach of the Funding Regulations; and they questioned where this led when testing Mr Lewis's awareness of such matters for the purpose of Issue 4.

417. LCG invited me to conclude that Mr Lewis's evidence on Issue 4 was deliberately false.

418. The defendants say the Key Warranty (like the remainder of Warranty B5.2.2) is awareness/knowledge based. In addition to pointing to the treatment of Warranty B5.2.2 in the List of Issues, they say LCG's argument is contrary to the way its case was pleaded and that splitting the warranty in two makes a mockery of the conjunctive word "*and*" between its two limbs. Mr Sims KC highlighted what he said was LCG's inconsistent approach to the use of the word "*and*" in paragraph 12 of Schedule 5 (on Issue 7) and its suggested insignificance on the present issue. The defendants argue that its use means that, in order to establish a breach of Warranty B5.2.2, including the Key Warranty, LCG must prove *both* (1) non-compliance with the Funding Regulations *and* (2) they (as Vendors) were aware the Company was not entitled to receive all funding under its contracts with ESFA.

419. The defendants say they were not aware at the date of the SPA that the Company had breached the Funding Regulations. So far as the "*due and careful inquiry*" obligation under clause 6.8 of the SPA is concerned, Mr Lewis says he relied upon the experience of Mr Williams (part of the Senior Leadership Team as defined in the SPA) and the clean audit in 2018 in believing that the Company had complied with them.

420. The defendants' counsel said the attack on Mr Lewis's credibility as a witness was completely unjustified and at odds with the general thrust of his and Mr Williams's evidence and the documentary record which showed, for example, that, Mr Williams signed the 2020 ESFA contract and completed the Company's internal control

questionnaires (required of it by ESFA as a provider of training). Mr Lewis had relied upon Mr Williams's twenty-three years of experience in such matters and Mr Williams's own evidence was that he had made innocent errors in fully comprehending the impact of the ESFA funding guidance. It is therefore entirely reasonable that Mr Lewis was unaware of the mistakes leading to the breaches of the Funding Rules. When Mr Lewis in testimony described Mr Williams's evidence as "*untruthful on a number of occasions*" it was in relation to the suggestion that he (Mr Lewis) was fully aware of what was going on in Mr Williams's department.

Analysis on Issue 6

421. I should note first that LCG's pleaded case is consistent with the argument that the Key Warranty is distinct from the remainder of Warranty B5.2.2. Addressing the warranty as a whole, paragraph 39 of the particulars of claim reads:

> "This warranty was false in that the Company had not complied with the Funding Rules in all material respects during the previous four years, in that it had claimed the Over-Claimed Sum in breach of the requirements of the Funding Rules. The warranty was also false in that (for equivalent reasons) the Company was not entitled to receive all funding under contracts in place between the Company and the ESFA."

422. The "*also false*" language is consistent with LCG's case that two separate representations in the warranty (linked by the conjunctive "*and*") were false.

423. In my judgment, the natural and ordinary meaning of the Warranty B5.2.2 is clear and supports the conclusion that the Key Warranty stands within it as a separate warranty.

424. The subject matter and scope of the two limbs of Warranty B5.2.2 is plainly different albeit heavily inter-connected, not least because of the way in which, as highlighted by the facts of this case, non-compliance with the Funding Regulations impacts upon funding for a later year. The fact that the Clawback related to the closed year AY20/21, though it was agreed to be repaid by way of an offset against the funding under the contract referred to in the second limb (i.e the contract for AY21/22) illustrates the different focus of the two limbs.

425. The first limb (the Key Warranty) addresses compliance with the Funding Rules over the last 4 years and currently ("*continues to comply*"). The "*last 4 years*" could be read either as a reference to academic years or to calendar years. If the former, then (on the basis that AY20/21 was the last of the four before the SPA) that would go back to AY16/17 (i.e. all of it). If the latter, then the Key Warranty covers the period back to 29 October 2017 which would not include almost all of the first 3 months of AY16/17. As compliance with Funding Rules is material to the Company's funding for any given academic year, I would think the Key Warranty should be read as referring to past (and complete) academic years.

426. Nothing turns on that particular point, about precisely how far back the Key Warranty goes, and no doubt for that reason the parties did not trouble me with it (compare the Funding Indemnity going back to the specific date of 1 March 2018). However, it does highlight that the second limb of Warranty B5.2.2 is instead addressing the Company's entitlement to funding under the contract with ESFA (and other funding contracts) in place as at the date of the SPA. That means the contract for AY21/22. Even recognising the two year time lag in the impact which any past non-compliance with the Funding Regulations might have upon the Retention Factor used to determine the Company's funding in a later academic year, this limb of Warranty B5.2.2 is not expressly directed or necessarily confined to compliance with the Funding Regulations. However, I say that recognising that it is not obvious to me how an entitlement to funding for AY21/22 might rest upon matters going beyond compliance with the Funding Regulations; though it should also be noted that the limb also refers to "*any other provider of funding for training delivered to schools*" (I was told there was in fact no other such provider) whose funding would not be under the '*Funding Rules*' as defined in the SPA.

427. To the extent the second limb can be said to indirectly address past compliance with the Funding Regulations, it is not obvious that it covers the period back to 2017. In addressing funding entitlement in AY21/22, neither does it extend to the Company's funding entitlement in future academic years. By contrast, the "*continues to comply*" language of the Key Warranty is (because of the time lag and, again, as highlighted by the facts of this case) potentially relevant to funding in later academic years.

428. In my judgment the use of the conjunctive "*and*" between the two limbs of the warranty does not carry great significance in the interpretation of Warranty B5.2.2. Given the different subject matter and scope of the two limbs, the use of "*and*" (rather than "*or*" which could perhaps encourage a thought that one might somehow be a substitute for the other) is not inappropriate in linking two cumulative and separate representations about the Company. Taking Mr Booth KC's salt and pepper analogy, the language signifies that the dish will be defective if either seasoning is missing (just as both were required for the purpose of testing the meaning of paragraph 12 of Schedule 5).

429. On the basis that Warranty B5.2.2 contains two distinct representations about the Company's state of affairs, in my judgment it is impossible to read the first as qualified by the knowledge/awareness requirement of the second. The parties expressly agreed to confine that requirement to the second limb rather than include it within the introductory words to both. The defendants did not advance a *Chartbrook* argument (see the two conditions for such an argument identified in paragraph 345 above) in relation to Warranty B5.2.2 and to read the provision as if both limbs were prefaced by "*so far as the Vendors are aware*" would be at odds with the principles laid down in *Arnold v Britton*, at [16] to [20].

430. This is not the only warranty where they agreed upon an unqualified representation as to a factual state of affairs followed by a further representation about the defendants' knowledge pertinent to the first: see Warranties B1.4, B2.5.2 and (more questionably when the wording of the knowledge element appears to cast doubt upon the apparently unqualified effect of the initial representation) B3.6. As it is, the parties have categorised those other three warranties (in their entirety) as knowledge-based warranties.

431. Accordingly, the Key Warranty is a separate warranty, the breach of which does not require LCG to establish that either defendant was aware that the Company had breached the Funding Regulations in the respects established by the 2022 Audit. The defendants warranted the truth of the statement about past and ongoing compliance with the Funding Rules, in all material respects, and assumed responsibility for that statement irrespective of their own awareness, knowledge or belief.

432. This interpretation of Warranty B5.2.2 avoids the *potential* (though see below for the parties' implicit position on this) for Ms Probert to be liable under it, through being held accountable by reference to the statement in clause 6.8 of the SPA, when Mr Lewis might escape such liability by showing he did make the due and careful inquiry required by that clause. That is the essence of his position on Issue 4 so far as his reliance upon Mr Williams is concerned. There is no indication that Ms Probert made any such inquiries of the SLT or discussed such matters with Mr Lewis. On the face of it, it would be an odd result for Ms Probert potentially to have greater exposure to liability when she had no involvement in the funding matters that fell within Mr Lewis's remit as the Company's CEO. As it is, for the purposes of the argument on Issue 4, no distinction has been drawn between the knowledge of Ms Probert and the knowledge of Mr Lewis.

433. The 2022 Audit established that the Company did breach the 'Funding Rules' in AY20/21. The defendants are in breach of the Key Warranty.

434. LCG's case is not confined to a breach of the Key Warranty. However, as Mr Booth KC correctly noted, LCG only needs to establish one breach of warranty, referable to the breach of the Funding Regulations, when (under the provision for '*Double Claims*') it cannot recover greater damages by pointing to a breach of others.

435. So far as some of the other warranties relied upon by LCG are concerned, in my judgment the findings of the 2022 Audit mean that other warranties were also breached. In the light of Issue 4, I need only focus at this stage upon the absolute (i.e. non-awareness-based) warranties pleaded by LCG. All of the pleaded warranties are relied upon as a consequence of the Company being exposed to repayment of the Over-Claimed Sum because of the matters underpinning the breach of the Key Warranty. If I am wrong in my interpretation of the SPA in finding that the Key Warranty is an absolute warranty, it is my decision on Issue 4 that will determine whether the defendants were in breach of the pleaded warranties which are awareness-based.

436. The other absolute warranties shown to be false are:

i) Warranty B7.2.7. The defendants warranted that neither of the Company's contracts with ESFA dated July 2021 and July 2020 "*involves, or is likely to involve, an aggregate outstanding or potential expenditure by the Company of more than £10,000*". The Company's breach of the Funding Regulations meant it was in breach of a number of provisions of the 2020 contract: (a) clause 11.2 (requiring compliance with Funding Regulations); (b) clause 30.1.3 (to the same effect); and (c) clause 23.1.2 (requiring submission of accurate learner data). The result was the Clawback. Clauses 30.1.7 and 30.1.8 of the contract made provision for such a clawback to be recovered, either by ESFA invoicing the Company or by deductions from future funding, and as at the date of the SPA the contract carried with it that potential expenditure.

ii) Warranty B2.1.2. The defendants warranted that "*the Accounts of the Company ... give a true and fair view of the assets and liabilities and state of affairs of the Company as at the Accounts Date and of the profit or loss of the Company for the financial year ended on the Accounts Date*". The SPA defined the "*Accounts*" of the Company as the unaudited financial statements of the Company for the accounting period ended 31 July 2021 and the "*Accounts Date*" as 31 July 2021. The warranty was false in that the information stated in the Accounts did not give a true and fair view of the assets and liabilities and profit and loss of the Company as at the Accounts Date. The Accounts materially understated the Company's liabilities (by failing to identify that the Company had a liability to repay the Over-Claimed Sum to ESFA) and materially overstated the profit of the Company. They therefore failed to give a true and fair view of liabilities and state of affairs of the Company. In his expert report, Mr Osborne noted that the Accounts were prepared in accordance with Financial Reporting Standard 102 ("**FRS 102**"). He said FRS 102 does not define the word "*accurate*" but the accuracy of the Accounts and the Management Accounts is a component of information being reliable. "*Reliability*" is defined as "[*t]he quality of information that makes it free from material error*." Neither does FRS 102 define "true and fair view" but he referred to the Financial Reporting Council's "True and Fair" statement, where it confirms that "*the whole essence of standards is to provide for recognition, measurement, presentation and disclosure for specific aspects of financial reporting in a way that reflects economic reality and hence that provides a true and fair view*." The Accounts also failed to comply with FRS 102, section 23, in relation to the Company's revenue in all material respects (namely its entitlement to ESFA funding) and, consequently, did not give a true and fair view.

iii) Warranty B2.1.3(a). The defendants warranted that "*The Accounts ... do not materially overstate the value of any asset or materially understate any liability of the Company as at the Accounts Date ...*". This was also false in relation to liabilities for the same reason as above. Under FRS 102, information is material "*if its omission or misstatement, individually or collectively, could influence the economic decisions of users taken on the basis of the financial statements*". The existence of Issue 8 as a serious issue in this case (and considered by the expert evidence on both sides) demonstrates the falsity of this warranty, and my decision below on that issue even more so.

iv) Warranty B2.2.2. The defendants warranted that "*The Management Accounts disclose with reasonable accuracy the assets and liabilities and the state of affairs, financial position and the profit/losses of the Company for the period in respect of which they were prepared and as at the date to which they were prepared*". The SPA defined the "*Management Accounts*" as the Company's unaudited management accounts, including the balance sheet as at 30 September 2021 and the unaudited profit and loss account to that date. Again, this was false in that the Management Accounts (by making no provision for the Over-Claimed Sum) materially understated the Company's liabilities and materially overstated the Company's profit for the relevant period. They were not reasonably accurate.

437. The other absolute warranty relied upon by LCG is Warranty B5.2.1. The defendants warranted that "*The Company does and has at all times complied with and conducted the Business in accordance with all applicable laws and regulations, which are binding on the Company*". LCG says this was false in that the Company had claimed the Over-Claimed Sum in breach of the requirements of the Funding Regulations. It points to the fact that ESFA allocated funding on behalf of the Secretary of State for Education (acting through ESFA) as was pointed out in a covering letter for the 2020-21 funding contract. The defendants say that the applicable laws and regulations related to statute law and regulation. Although my conclusion is of no significance to the outcome of the case, I am not persuaded that this warranty (when interpreted against the provisions of Warranty B7.2.7 which applies to contracts including the one which held the Company to compliance with the Funding Regulations) has also been shown to be false.

Decision on Issue 6

438. **LCG has established a breach of the Key Warranty. LCG has also established a breach of Warranties B2.1.2, B2.1.3(a), B2.2.2 and B7.2.7.**

Analysis on Issue 4

439. If I am wrong in my conclusion that the Key Warranty is a standalone warranty then it is necessary to consider whether treating it as a single, composite warranty would have led to a different conclusion about it having been breached. Approaching the warranty on that basis, LCG would need to establish that the defendants were aware of matters which rendered it untrue.

440. On this aspect, the focus of the evidence and argument at trial was upon the knowledge or awareness of Mr Lewis (as, on the defendants' case, he had no awareness that the warranty was untrue). Ms Probert confirmed in evidence that, although a director of the Company, she had no involvement in funding matters.

The Approach to Issue 4

441. The language within Warranty B5.2.2 is "*so far as the Vendors are aware*". Clause 1.2.4 of the SPA confirms that the reference to "*the Vendors*" (plural) includes each of them. Under clause 6.1 of the SPA, Mr Lewis and Ms Probert each gave the warranty "*in respect of themselves only*", though clause 11.7 states the warranties "*are given on a joint and several basis with all Vendors, subject to the terms of this Agreement*". It is not entirely clear to me how the joint promise under clause 11.7 - which I interpret as meaning that, up to the limit of her own liability under paragraph 2.1 of Schedule 5, Ms Probert takes responsibility for Mr Lewis's promise that he was not aware of

matters rendering the warranty untrue and vice versa – is to be reconciled with that language in clause 6.1.

442. Although Ms Probert was (by her own separate promise under each of those clauses) herself caught by the "*due and careful inquiry*" obligation under clause 6.8, which extended to inquiring of Mr Lewis and the SLT, and there is no evidence that she did consult them in relation to compliance with the Funding Regulations and funding entitlement, I understand it to be implicitly recognised by LCG that, if that cannot be established against Mr Lewis then (despite the absence of such evidence in relation to her own inquiries) it will not be made good against Ms Probert. Conversely, if he is liable under this warranty (or any other warranty) then, subject to the cap equal to the amount of consideration under the SPA actually received by her, so is she.

443. For present purposes, and against my conclusion that the true construction of the SPA leads to the conclusion that the Key Warranty stands independently of any question over lack of awareness, I should approach this issue on the basis that the whole of Warranty B5.2.2 is to be read as prefaced by the words "*so far as the Vendors are aware*". In short, for the defendants to be liable under the warranty, LCG needs to establish that Mr Lewis *was* aware (when Ms Probert was not) both (a) that there had been a past non-compliance with the Funding Regulations and (b) that the Company was not entitled to all the funding under the ESFA contract for AY21/22. As I see it, no other approach can be justified in approaching a determination of this knowledge issue which proceeds on the hypothesis that my interpretation of the Key Warranty (as not also being knowledge-based) is wrong.

444. It is important to note that the knowledge I now presume to be required to establish a breach of the Key Warranty is <u>not</u> that the Company was engaged in a deliberately fraudulent manipulation of the Funding Regulations, for the purpose of unjustified financial gain. I have referred in the Introduction above to the Company's "over-performance" in AY20/21, with a value of £1.42m, which came to be reflected in the settlement of the Clawback once the 2022 Audit had established that there had been non-compliance with the Funding Regulations. That is an indication that the Company may not have been driven by the motive of improper financial gain. LCG does not make any allegation of a fraudulent breach of warranty.

445. Instead, the question (on this alternative interpretation of Warranty B5.2.2) is whether or not Mr Lewis was aware that, during the last four years, the Company had not complied and, as at the date of the SPA, continued not to comply with the Funding Regulations in all material respects, so that the Key Warranty was untrue.

446. The (presumed) language of awareness of compliance with them "*in all material respects*", when read against the knowledge of LCG of "*facts, matters or circumstances giving rise to a Warranty Claim*", which would provide a defence under paragraph 12 of Schedule 5 if the defendants were otherwise liable on the warranty, indicates that the focus should be upon his awareness of the substantive requirement of the Funding Regulations. This approach to the Key Warranty, on the predicated assumption, is consistent with it being read together (for the purposes of Issue 4) with the terms of the second limb of Warranty B5.2.2. A failure to comply with the Funding Regulations in any material respect, in AY20/21 or any one or more of the four previous years, would impact upon the Company's entitlement under the ESFA contract in place at the date of the SPA.

447. As the Clawback showed them to be material provisions, in my judgment it is not necessary for LCG to establish that Mr Lewis knew that (as revealed by the 2022 Audit) it was paragraph 119 of the Funding Regulations, specifically, which governed the Planned Hours Over-Claim. Instead, it would be enough to show that Mr Lewis was aware that a student studying for an Award (with no other learning aim identified at enrolment) should only have had planned hours appropriate to that aim. Likewise, it would be sufficient to know that full-time students subject to the Condition of Funding Rules were being reported to ESFA as part-time students even if he did not know the precise number of hours shown in the PDSAT to support their purported part-time status.

448. As I have already noted above in addressing Issue 7 (the Purchaser's Knowledge Issue), there was evidently a degree of tension between the lack of such awareness asserted by the defendants and their position on Issue 7. Their position on Issue 7 also fed into Issue 3 (the Indemnity versus Warranties Construction Issue), so far as that rests upon the Funding Indemnity being included in the SPA to address a "*known risk*" of a funding clawback and, by reference to much the same point, Issue 8 (the No Loss/Amount of Loss Issue). However, such tensions can arise where alternative lines of defence are relied upon and, provided each is not harmed by a factually inconsistent case being advanced on the other, it is appropriate to address each defence in turn. My findings above on Issues 3 and 7 (broadly to the effect that LCG was not on notice of the risk that the Clawback would be made) ease some of the tension in reconciling a conclusion that LCG, as purchaser of the Company, had notice of the breach of the Funding Regulations when the defendants, as directors of the Company, say they themselves did not.

449. Although Mr Lewis in his evidence also referred to his reliance upon Emma Lambert (the Company's Director of Finance) for the provision of accurate information in relation to financial matters, the member of the SLT whose knowledge at the time is central to determining whether or not either Mr Lewis or Ms Probert had knowledge that the Key Warranty was untrue is Mr Williams.

450. LCG's closing submissions said that Mr Williams was a plainly honest witness though his evidence showed that, as the Company's Director of Contracts, he had been completely misguided about the Company's compliance with the Funding Regulations and what practices were justified under them. Mr Booth KC and Mr Adamyk said Mr Williams's comments about Mr Lewis's knowledge of those practices were critically important and should be accepted.

Mr Lewis's Evidence

451. In his testimony Mr Lewis repeatedly said that he relied upon Mr Williams, and his expertise as Director of Contracts, and they both believed the Company was operating within the Funding Rules. Mr Lewis said that Mr Williams had been a loyal servant of the business since 1999 and he had no reason to doubt his advice that the Company was complying with the Funding Regulations.

452. Mr Lewis's evidence was that, before signing the SPA, he asked Mr Williams to reflect upon the Company's compliance with the Funding Regulations. The following

day Mr Williams confirmed that nothing had changed since the 2018 audit which the Company had passed. Although the Company was delivering GCSEs at that time, it had not claimed funding for that because it was not happy with the results and, from a funding perspective, nothing had therefore changed. He said Mr Williams had no concerns over the funding warranties which Mr Lewis was being asked to give.

453. So far as the Planned Hours issue was concerned, Mr Lewis said he was not aware of paragraph 119 of the Funding Rules until the 2022 Audit. He said he relied upon Mr Williams to interpret the detail. He said he would not have looked at the ILRs.

454. Mr Lewis also gave the following answers which indicated a more general comment that paragraph 119 and RSM's reliance upon it (see paragraph 63 above) did not suit the Company's approach to study programmes:

> "No, it doesn't work like that. The -- you are talking about the learning aims. It is a holistic programme. It is not just about the core aim, that's just one small element about it, it is about building young people's self esteem, their ability to communicate, their ability to thrive in the communities, it's making better citizens. Every day two and a half hours is physical training. Whether you have five 1 students or 25 students, it doesn't matter, you still have a member of staff there. One part of the programme is adventure training, so you don't -- you cannot just magic capacity out of thin air. The fixed costs I agree, but fundamentally it is about delivering on that promise to those young people. ……..So you are not -- when they are not doing the core aim as you describe it, they are still with the students, they are still delivering PT or engagement activities or adventure training activities or supporting on the maths and English qualifications. So they are never away from those learners, it doesn't matter."

> "This is where the misunderstanding happened. If you look at Mr Williams's statement and his descriptive *[sic]* there for RSM's audit. We didn't see the award as a short course, we saw it as a stepping stone qualification, as part of the nested process, so there was a massive disconnect between our understanding and RSM's understanding and what it was. We never saw any of the qualifications as a short course."

> "The point -- the aim was always to have those students on full-time funding, for those learners, and the data bore out the fact that the majority of them there would be up to the 48 hours, 48 weeks. And, as we heard today, the full-time funding only goes up to 18 weeks, so therefore the remainder is unfunded learning, so it doesn't matter."

> "I think this is one of the problems we had with the ESFA. People don't understand the programme. So a member of staff is brought on as a role model for that cohort, so they take them through physical training, they take them through the core aims, whether the award, certificate or diploma and those programmes roll on to each other, because it is a modular programme, it is a roll-on-roll-off programme, unique and different to everybody else, because it is centred around the learner. So you are not -- when they are not doing the core aim as you describe it, they are still with the students, they are still delivering PT or engagement activities or adventure training activities or supporting on the maths

and English qualifications. So they are never away from those learners, it doesn't matter."

455. Mr Lewis also challenged the suggestion that the Company's approach in including an Award (with no higher qualification) as the learning aim was done to improve the Retention Rate. He accepted that an Award might be achieved within 10 weeks but said:

> "We never had a 100 per cent retention rate. The average length of stay, and I am reading the self-assessment post, was 48 weeks and then it dropped to 31 weeks at one point, but averaged out -- so the vast majority of the learners would still be way in advance of the full-time funding. So it wouldn't be a challenge."
>
> "I have carried out an exercise retrospectively and by carrying out that exercise, it still comes, as in my statement, it still comes out that the retention factor is still extremely high, 96 per cent. I believe you have seen that."

456. In relation to Condition of Funding, Mr Lewis accepted that he was aware before the 2022 Audit that some students had been put on the part-time funding band (though he did not know of the specific figure of 538 hours) but he understood that to be in accordance with the Condition of Funding rules. He said he never accessed the ILRs or the PDSAT records and again said he relied upon Mr Williams to ensure that each learner was allocated to the correct funding band.

457. It is clear from some of Mr Lewis's answers in cross-examination that he knew that certain students shown as part-time should have been in funding band 5. His answers included the following:

> "My Lord, I was aware that we actually changed the funding band to part time, believing that we were working within the guidelines and I think it has been discussed for the reasons why we changed it for that. The fact that it was 538, I wasn't aware of that specific number. I wouldn't be aware of that specific number."
>
> …
>
> "…. I didn't know the detail. I relied on Mr Williams to understand the interpretation of the detail, but my understanding at the time was six weeks was an important date in the calendar for the student to be recognised as full-time funding. 540 was an important period, and we always went over 540 as and when we had to."
>
> …
>
> "In fact, we believed that we were achieving underfunding by going down the funding, what are they, band."
>
> …
>
> "Q. Yes, yes. So the point is that again that was, and similar to other matters, discussed at those meetings"- [i.e. SLT meetings] - so you were kept fully informed so that you were in a position to make the relevant decisions.

A. Exactly. As it says, to forego the funding in order to meet the condition of funding rules."

458. In his first witness statement, Mr Lewis had said that the allocation of 538 hours was a new approach from AY 20/21 but his second statement (responding to Mr Williams's evidence) said that it was adopted from AY17/18 and that this was done to comply with the Funding Regulations. I note that this evidence at trial (including Mr Williams's evidence) is at odds with what LCG said in a Part 18 response dated 27 September 2023 which said AY19/20 was the first year when learners were allocated 538 planned hours of tuition.

459. Mr Lewis's key point, therefore, was that the Company's approach was not adopted for financial gain. He referred to the Company's over-performance in AY20/21 (the £1.42m over-performance and the deduction of the £0.42m Unfunded Learner Value from the Over-Claimed Sum) which he was aware of at the time. In addition to some of the statements quoted above, he said:

> "I just believed that we were running the programme as efficiently as possible for -- with the right purpose. We were never running it as efficiently as possible, otherwise, as you say, to create capacity, we would finish out young people at the 540 hours. That then would create capacity and we wouldn't be funded anymore, but we never did that. If you look at the RSM report, I think it cited over 1,000 hours for the average learner, so it wasn't driven by a monetary desire as you are suggesting."

> "As CEO, my primary purpose was to drive the business forward in terms of quality of teaching and learning. It was the quality of teaching first and everything else came after it, so we were not driven by growth, we were not driven by profit, we were not driven by anything other than providing the very, very, very best quality of training for young people and I think that has been recognised with all the accolades and awards. That was my priority, for 23 years that was my priority."

> "In the real world, we funded the students after 540 hours, so it was one and the same thing. I don't see any differentiation with that. The fact that we weren't being funded for it wasn't unusual for us as an organisation whatsoever. Back to 2011, you see the Ofsted report there, we weren't funded for of two days week *[sic]* but we still delivered it. So there is no differentiation. In my mind, the mind of Tim Williams, in mind of the SLT is the way we'd always been worked and always been audited and always been inspected upon, so there's no change."

> "We always overdelivered, as I referenced before. The 2011, which is evidence and is in the bundle, we have always overdelivered. I did calculations for the ESFA meeting, the final meeting I had with the ESFA, where we detailed forensically examined how many extra hours did we do a year, free funding, for ESFA and it is £2 million."

460. In support of his position that, until the 2022 Audit, he believed the Company was complying with the Funding Regulations, Mr Lewis made reference to the 2017/2018 version of the SPD. I have referred to the 2020 version of the SPD in addressing Issues 5 and 7 above. He said the earlier version of the SPD was shared with ESFA.

It set out the Company's approach to working within the Funding Regulations and the Company received a clean audit in 2018.

461. Mr Lewis also said this in cross-examination:

> "…. we believed we were presenting correct information …. we never ever thought we were presenting incorrect information."
>
> "I believed Mr Williams had been putting the correct data within the funding guidelines. 100 per cent. No more, no less."

462. Before turning to the evidence of Mr Williams, it is necessary to test those last answers against some of his others quoted above, particularly in relation to Condition of Funding. Those other answers indicate that Mr Lewis was aware at the time that some students who were funded as part-time were in fact full-time students. Whilst making the point that part-time students with a grade 3 GCSE could undertake a Functional Skills Programme as a stepping-stone towards achieving a GCSE grade 4 to 9, Mr Lewis said this in cross-examination:

> "Q. Just to therefore look at it, do you agree that if a student is a full-time student with a grade 3, that is what paragraph 5 says, then they must study an eligible GCSE qualification. Pausing there, just to be clear, that means if it is grade 3 in maths, maths GCSE, and if it is grade 3 in English, English GCSE, you realise that, yes?
>
> A. Yes."
>
> …
>
> "Q. You have made clear on a number of occasions, Mr Lewis, that you didn't think you were doing anything wrong. You don't need to say that every time you answer a question. What I would like you to do is just focus on what the question was. I will come to that subparagraph, but do you agree that you always knew that for a student who was on grade 3 in maths or English, if they were a full-time student, then they had to study for the GCSE to meet the condition of funding. You knew that, didn't you?
>
> A. Yes, that is why we treated them as part-time students."

463. Both answers show that Mr Lewis was aware that, once the Company ceased to provide GSCEs in around March 2019, students who would otherwise have been caught by it were instead treated as part-time students (who instead could undertake a stepping-stone qualification towards GCSE) in order to avoid the requirement to study for the relevant GCSE(s) under the Condition of Funding rules.

464. I note, however, that Mr Lewis said he was unaware before the 2022 Audit that (subject to ESFA's 5% margin of tolerance) non-compliance with that requirement carried a penalty of 50% of the national funding rate for each non-compliant learner. He said:

> "Q. But you knew that in fact you were enrolling them and they were going to stay with you as full-time students.

A. Yes.

Q. Yes? And so, therefore, you knew that once that had happened if you -- if they were recorded for the purposes of the ILRs as full-time students, you'd be in breach of condition of funding and there would be consequences in relation to 50% of that funding at some point?

A. No, I didn't know that. I didn't know the consequences of condition of funding. Like I said, the advice I was given was to put them on to part-time funding. That meant that we were working within the guidelines of -- of ESFA guidelines."

Q. Right.

A. That's what we did previously with the ESFA report audit, and it wasn't picked up at all."

…

"Q. You see I'll suggest to you, Mr Lewis, you couldn't possibly have been running that business and having discussions about all of this over all those years without knowing that in fact if they were put as full-time students there would be a condition of funding problem in terms of monies being eventually clawed back?

A. I believed that we were being underfunded. I believe that we were -- I didn't understand that there was a 50% clawback as a result of putting them on full-time. I just believed that we were doing the right thing and actually claiming less money than we were entitled to, so no."

Mr Williams's Evidence

465. Mr Williams had primary responsibility within the Company for managing the 16-19 Study Programme and working out the level of funding it was likely to receive in the next academic year so that it could plan its training accordingly. His evidence, which was not challenged on this point, was that when Mr Lewis was running the Company there were monthly SLT meetings. Their subject matter extended to the ongoing management of the Company's funding contracts and whether there had been any changes in the published funding guidance and whether changes had to be made for the Company to hit its goals and comply with funding requirements. He said Mr Lewis had the final say over any such changes.

466. In relation to the planned hours and nesting of qualifications, Mr Williams explained by reference to the SPD (the 2020 version of it which he provided to Mr Dowson for the purposes of the 2022 Audit) how the Company's "roll on/roll off" approach to students' learning aims was based upon a 39-week academic timetable. He explained that the Company's plan was for every learner to achieve a Diploma (so that band 5 full-time funding was received) but the ILR at enrolment would show the Core Aim as an Award. He said the reason for this was that the Company wanted the most advantageous qualification for the particular student and to provide "bite-size" qualifications (i.e. nested qualifications). Once the Award had been achieved the ILR

would be updated to show the next Core Aim of a Certificate, and so on upwards to the Diploma stage assumed at the outset.

467. Mr Williams made the point that (having received band 5 funding) the Company obviously did not receive any further funding if a student progressed beyond the Award and that there might even be Unfunded Learner Value if a significant number of students stayed with the Company for longer than the 39 weeks. In relation to such irrecoverable value, he talked about the Company "delivering the extra stages of the programme for free." He explained that students leaving within the Qualifying Period would lead to an in-year funding adjustment. He recognised that, otherwise, there was no need to reconcile the planned hours with the hours of actual attendance and that, if the student had achieved the Core Aim of an Award but left part way through "*the qualification ladder*" there would be no impact upon the Retention Rate. Although those were matters picked up by RSM in the adverse finding in relation to their paragraph 119 of the Funding Regulations, Mr Williams's evidence was that he did not consider the Company's approach to be a breach of the Funding Regulations.

468. In relation to Condition of Funding, Mr Williams said that in AY17/18 the Company continued to claim full-time funding for some students subject to the Condition of Funding requirement to study for GCSE maths or English but in respect of whom the Company was not meeting that requirement. The non-compliance at that time fell within the 5% tolerance level. It was when the number of learners affected by that requirement started to increase that the Company decided to claim only part-time funding for them. Mr Williams said only a limited number of learners were reduced to 538 hours in AY17/18 but that, once the Company stopped delivering GCSE maths and English in AY19/20 the number of learners whose planned hours were reduced to 538 went up dramatically. The Part 18 response mentioned above says that this involved 278 students in AY19/20 and 348 in AY20/21 (also suggesting, at odds with this evidence, that there were no such students in AY16/17, AY17/18 and AY18/19).

469. So far as the position before the Company stopped delivering GCSEs is concerned, Mr Williams said:

> "2016, 2017, 2018, when the audit took place, we made the decision then to sort of do functional skills alongside those GCSEs were going on, but GCSEs were never put on the ILR return."
>
> …
>
> "They are not on the ILR, so they are not recorded to the ESFA, but there was still GCSE work being conducted, yes."

470. After the Company stopped delivering GCSEs the decision was made to "*forego a banding of funding*" (as it was expressed in the SPD prepared by him) for those learners. Mr Williams was clear in his evidence that he considered this to be in accordance with the Condition of Funding rules.

471. Mr Sims KC suggested to Mr Williams in cross-examination that he was directly in control of how the Company was operating under the Funding Rules and that was not a matter Mr Lewis was required to oversee. Mr Williams responded:

> "All the decisions made were decisions made together. It wasn't -- the assumption in his statement was that it was me who made the decisions on my own, and that was not the case."

472. Mr Williams was not challenged further on that general point. Instead, the defendants' overall position is that Mr Lewis shared Mr Williams's belief that the Company was complying with the Funding Rules.

Conclusions on the Evidence

473. The 2017/2018 version of the SPD (relied upon by Mr Lewis) was in materially the same terms as the later version about which Mr Dowson was asked questions on Issues 5 and 7. In my judgment, that document does not justify the conclusion, considered against the clean 2018 audit (in the sense of confirming that zero public funds were at risk), that ESFA could be taken to have approved of the Company's practices in relation to planned hours and Condition of Funding.

474. In relation to planned hours (though not using that label) the earlier version, like the later one, did contain the following statement (under the heading '*How does MPCT promote individualised learning and capture this on the Individual Learning Plan?*'):

> "MPCT's study programme is a planned & timetabled programme, spanning over a 39-week academic timetable. MPCT has made the conscious decision to maintain its roll off/ roll on provision over this time period, although participation for longer than 539 hours does not attract further funding. MPCT maintains its moral compass in ensuring the learner is centric to its aims and does not curtail a learner's training at 539 hours, unless it is in the learner's interests to do so, and historical data for positive destinations of the learners supports this decision. This has been embraced by MPCT directly from the guide, "Implementing Study Programmes" 2013, produced by AELP with support from Department for Education."

475. However, the earlier SPD also stated (the later one referred to two types of Award and did not refer to the NCFE Diploma):

> "The Core Aim of each of the Qualification Plans will be the most substantial qualification being followed at the time.
>
> Each learner must complete the following qualifications in the exact order of unit completions:
>
> • Introductory Award
>
> • Award
>
> • Certificate
>
> • Extended Certificate

• Diploma

• NCFE Diploma (retained for those learners who require additional time to achieve their progression route)."

476. On the face of it (whether ESFA would have read it as such in 2018 is another question) that statement, following a series of tables identifying the relevant qualification plan selected for the learner at interview and approved on enrolment, could be read as consistent with the rule-compliant approach to nested qualifications identified by RSM on the 2022 Audit.

477. In relation to Condition of Funding, the 2017/2018 version of the SPD (like the 2020 version which referred to "*grade 4/C or above*"), under the heading 'How is Condition of Funding for Maths and English Checked?', said:

> "On analysis of starting points of the assessments, MPCT has made a decision not to set the learners an unachievable task of attaining a qualification grade of C or above (based on assessment levels mainly at Entry level). Therefore, we recalculate the planned hours, and forgo a banding of funding, to ensure the learner meets the condition of funding, with the appropriate qualifications achievable being followed."

478. That does not state in terms that a student who is actually a full-time student and required to study for the relevant GCSE under the Condition of Funding rules will instead be recorded for funding purposes as a part-time student in order to avoid that requirement. The statement "*we recalculate the planned hours*" might indicate that the student actually becomes a part-time one. As Mr Dowson said, when asked about the equivalent language in the later version, it prompts a question about the Company's approach to the Condition of Funding rules.

479. Neither version of the document spelled out that the Company would claim band 5 funding for a learner who was enrolled with the learning aim of an Award (only) or that some full-time learners, who should have been in band 5, would be included within funding band 4b in order to avoid the GCSE requirement.

480. ESFA said the 2018 audit was carried out through detailed testing using a random sample of funded students on the Company's roll at the R06 data return and that, due to limited number of students on roll, "*we carried out detailed testing of all funded students.*" In relation to ILRs, the report noted 9 instances where the data captured on the ILR was not accurate when tested against "*student files, PDSAT testing and the English and Maths reports.*" This was a medium risk matter requiring improvement to the Company's internal control mechanisms within 3 months. The report noted two instances where planned hours were not proportioned appropriately where the study programme crossed two funding years and, in relation to Condition of Funding, it noted that students who are capable of undertaking stepping-stone qualifications should be enrolled on an appropriate qualification in order to meet Condition of Funding rules.

481. I have referred above to Mr Lewis's and Mr Williams's evidence that the Company's approach to the Condition of Funding rules in AY17/18 involved a limited number of learners (and, as I understood Mr Williams's evidence it did not necessarily involve a

reduction of learning hours to part-time for those shown on the PDSAT return as undertaking a Functional Skills Programme) and only came to involve a significant number of learners, above the 5% tolerance threshold, from AY19/20. That evidence does not suggest that a PDSAT return in respect of a limited number of students in the first week of February 2018 (R06) would necessarily have revealed the issue over Condition of Funding as later identified by the 2022 Audit. Having in mind Mr Dowson's evidence (in relation to Issue 7) that the later PDSAT returns gave no indication as to whether a student had already attained GCSE grade 3, so as to indicate whether he or she should be studying for a GCSE, the suggestion that ESFA would in 2018 have noticed that there were students who should have been on a GCSE course rather than a Functional Skills Programme is based on assumption rather than fact. Indeed, Mr Williams's evidence that some students were then undertaking GCSEs (even though that was not recorded in the PDSAT) goes against the assumption.

482. The earlier SPD was not referenced in the March 2018 Audit Report and there is nothing within the findings in the 2018 audit which indicates that the testing of student data on which it was based revealed the issues identified by RSM in 2022. In my judgment, Mr Lewis's reliance upon the audit outcome and the apparent absence of questions by ESFA about the SPD in 2018 does not provide evidential support for his belief that the Company's practices, leading to those issues, were in accordance with the Funding Regulations.

483. On my assessment of the evidence, Mr Lewis was aware at the date of the SPA that the Company was not complying with the Condition of Funding rules and that some students had wrongly been recorded as part-time in the PDSAT to give the appearance of compliance. Although Mr Williams considered this approach complied with the rules, he was also aware that hours were being inaccurately recorded. That is implicit in his reference to the Company foregoing a band of funding for those students: they should have been on band 5 and would have been but for the requirement to study for GCSE. I accept Mr Williams's evidence that Mr Lewis was involved in the decision to adopt this approach and Mr Lewis's evidence, overall, supports that.

484. Both of them were aware that those who should have been studying for maths or English GCSE, but who could not do so once the Company discontinued GCSE provision, were in fact full-time students and that, for them, studying for a stepping-stone qualification (under a Functional Skills Programme) was not in compliance with the rules. Mr Lewis may not have known that a particular learner's hours had been recorded in the PDSAT as being 538 but the Condition of Funding requirement was, as he put it, "why we treated them as part-time students."

485. Even if my decision on Issue 6 had been otherwise, this conclusion is sufficient to establish LCG's case on Issue 4. In that respect, Mr Lewis was aware of matters which showed the Key Warranty to be untrue. It is irrelevant that, because the Company received reduced band 4b funding for the student concerned, Mr Lewis did not consider this was to the Company's overall financial advantage. That is a different question (and a complex one given that savings in cost through the Company not delivering GCSEs would have to be factored into the analysis) which goes in part to the awareness involved in establishing a breach of the second limb of Warranty B5.2.2.

486. Mrs McLeish could not give direct evidence on this issue. However, the following observations during her testimony support the conclusion I have reached about Mr Lewis's awareness that the Key Warranty was untrue. Addressing the suggestion that Mr Williams did not believe the Company was breaching the Funding Regulations, she said:

> "Mr Williams knew that learners on full-time programmes should be studying a GCSE. Mr Williams knew that just reducing their hours on the ILR and still studying a full-time programme would not circumvent the rule around GCSE."
>
> "He might think that, but he and Mr Lewis knew that full-time students, as a matter of rule in the funding rules, had to do GCSE. Indeed they had been delivering GCSE previously, they then reduced those learners to part time but continued to deliver a full-time programme. So therefore, they must have known the funding rule was being breached."
>
> "… I can only deal with the facts. The facts are, everybody, everybody, knows that if a student is on a full-time programme, they have to do a GCSE. MPCT previously was delivering GCSEs to full-time learners. They then changed their policy and moved learners to a part-time study programme to circumvent the GCSE rule, but still continued to deliver full-time programmes. Therefore, they must have been aware of the funding rule."

487. However, although it does not undermine my conclusion on Issue 4 by reference to the Condition of Funding rules, I am not persuaded that the evidence shows that (in relatiob to Planned Hours) Mr Lewis was aware of the matters which gave rise to a breach of paragraph 119 of the Funding Regulations. Mr Williams did not think the Company was in breach of them. I accept Mr Lewis's evidence that he was not aware of the implications of that rule at the date of the SPA.

488. Whereas a decision was taken to claim part-time funding for full-time students, because the Company was no longer providing GCSEs, the Company's mistaken approach to nested qualifications was not motivated by concerns about the Retention Rate. Mr Lewis did not consider learner retention to be an issue and his evidence in this respect is supported by the Unfunded Learner Value for AY20/21.

489. Although he recognised its impact in cross-examination, in terms of the student's achievement of an Award (only) securing a better Retention Rate, the evidence supports the conclusion that neither he nor Mr Williams appreciated at the time that the Company's approach to nested qualifications was wrong and involved a breach of the Funding Regulations.

Decision on Issue 4

490. **Mr Lewis was aware of the Company's non-compliance with the Key Warranty so far as its breach of the Condition of Funding rules (by treating full-time students as part-time) was concerned**.

E. Issues 12, 8, and 9: The Mitigation Issue, the No Loss/Amount of Loss Issue and the Indemnity Claim Value Cap Issue.

491. These three issues all go to the level of damages recoverable by LCG in respect of the established breaches of warranty. I think it is sensible to address Issue 12 first given the defendants' case that LCG sought to "build a warranty claim" once the Company was subject to the 2022 Audit.

492. I say that because that case is to the effect that LCG has advanced inflated figures (and, therefore, using the language of mitigation, not ones which reflect losses which either have or could reasonably have been avoided) in its approach to the calculation of loss which is central to Issue 8. I do so recognising that, as explained below in addressing Issue 8, damages for breach of warranty are assessed as at the date of the SPA and the defendants' case that there has been a failure to mitigate the financial consequences of the 2022 Audit necessarily relates to matters occurring *after* that date.

493. As I indicated at the beginning of this judgment, Issue 8 concerning the value of the warranty claim is the one issue which the parties have not comprehensively addressed by the terms of SPA. They have only done so in agreeing limits upon the amount of damages recoverable through paragraph 2.1 (the cap upon the liability of each defendant by reference to the consideration actually received by him/her) and paragraph 4 (the Double Claims provision) of Schedule 5.

494. Issue 9 falls to be addressed alongside Issue 8 as it is the defendants' case that the value of the warranty claim is no greater than LCG's claim under the Funding Indemnity.

(1) Analysis on Issue 12: the Mitigation Issue

495. Paragraph 11 of Schedule 5 to the SPA addresses LCG's duty to mitigate in the following terms:

> "**Duty to Mitigate**
>
> The Purchaser shall (and shall procure that the Company and each of the Subsidiaries shall) take all reasonable steps to avoid or mitigate any loss or liability that may give rise to a Warranty Claim."

496. In *Equitix EEEF Biomass 2 Ltd v Fox* [2021] EWHC 2531 (TCC), 198 Con LR 224, at [396]-[441], Kerr J was required to consider an equivalent provision in a share sale agreement. The language of the clause in that case was that the buyer should take or procure the taking by the company of "*all reasonable action to mitigate any loss suffered by it or the Company…*". He considered that the clause might in that case be of significance to the amount of damages recoverable by the buyer when the common law "duty" to mitigate (i.e. the rule that avoidable losses are irrecoverable if a

claimant acts unreasonably by not avoiding them) could have no application because the loss arising out of breaches of warranty (as to the quality of the company's plant and equipment) had crystallised at the point of purchase.

497. Kerr J concluded that the language of the clause mirrored the common law standard, rather than setting a higher standard of conduct than the threshold at common law, and that (as at common law) the onus was on the defendant to show an unreasonable failure to mitigate. He said, at [441], "*I think the words 'all reasonable action' mean action it would be unreasonable* not *to take*." I respectfully adopt the same approach to paragraph 11 of Schedule 5.

498. In the present case, there is clearly scope for the duty under paragraph 11 of Schedule 5 to apply when the untruth of the statements made in the warranties identified in my findings on Issues 4 and 6 crystallised a claim under which the alleged loss only came to be quantified by negotiation *after* the date of the SPA. Whether or not the duty to "*avoid or mitigate any loss*" could apply to other particular types of warranty contained in Schedule 4 to the SPA, the chronology of events in 2022 outlined in Section 2 of this judgment shows that the duty is in principle capable of applying to LCG's and the Company's conduct in those later negotiations.

499. The issue is whether LCG did mitigate its loss in respect of the warranty claims and the focus is upon the negotiation by the Company (under the direction of LCG) of the Clawback by ESFA. The amount of the Clawback informs the parties' approach to the assessment of damages (as at the date of the SPA) on Issue 8.

500. However, it is important in my judgment to segregate from Issue 12 other matters, such as the cost to the Company of reinstating GCSE provision after the 2022 Audit in order to comply with the Condition of Funding rules applicable to certain full-time learners, which properly belong to that other issue. Although I did not understand the defendants to suggest the concept of mitigation went so far, it would not be logical to suggest that LCG failed to mitigate its loss by not introducing GCSE provision sooner and/or at less cost than it did when the Company was not providing GCSEs at the time LCG acquired it. It was not the absence of GCSE provision which "*gave rise to a Warranty Claim*" but, instead, the Company's treatment of some full-time learners as part-time *because* it was not providing GCSEs. Accordingly, the argument between the parties about the speed and cost at which GCSEs might be reinstated after the SPA (which was the means by which LCG and the Company chose to avoid further non-compliance with the Condition of Funding rules) belongs to Issue 8. The rival expert evidence addresses that aspect of the dispute accordingly.

501. Similarly, the defendants' heavy reliance upon the ARG/Capita issue and staff redundancies as the greater cause of post-SPA funding issues cannot be and was not, I think, suggested to be of any relevance to the mitigation issue. Those also had nothing to do with "*any loss or liability that may give rise to a Warranty Claim*". Whether it properly features as a factor in deciding Issue 8 is a separate question which I address below.

502. I have already noted that Mr Lewis did not regard the negotiation of the Clawback as "*the deal of the century*". However, without more, that observation does not mean the negotiation of the sum of £783,325 (net of the Unfunded Learner Value for AY20/21 and repayable by offsets against funding in AY22/23) reflected a failure by LCG to

mitigate its loss. Indeed, the fact that Mr Lewis's comment was based upon his view that the Clawback was simply the product of a fairly straightforward mathematical calculation could equally point to the negotiated figure being a perfectly reasonable one.

503. Although paragraph 11 of Schedule 5 contemplates scope for an argument that LCG has not mitigated its loss, the defendants' suggestion that LCG's response to the 2022 Audit was one focussed upon making a warranty claim against them *rather than* minimising the loss under it (their counsel described it as an exercise in "*building a warranty claim*") raises an immediate question as to whether those are true alternatives. Mrs McLeish said LCG had not previously made a warranty claim in respect of any of its other acquisitions. However, even assuming LCG was not fully alive in 2022 to the uncertainties and hazards of litigation (as now illustrated by all of the other defences advanced and the dozen issues in this case) it would be odd and counterintuitive to business common-sense for the new owner of the Company to be indifferent about establishing the true extent of the Company's liability to ESFA. It involves attributing to LCG not just disregard of the duty to mitigate under the SPA but, I think, also a business decision based on a belief that an asserted but perhaps questionable liability might be passed on to the defendants without quibble from them.

504. In support of the suggestion that LCG in early 2022 was focussing upon a warranty claim against Mr Lewis the defendants' counsel referred to emails passing between Mr Higgins and Mrs McLeish. In an email to Mrs McLeish dated 14 February 2022, Mr Higgins said "*As it stands we've bought a dead duck. Annualised EBITDA currently at £1.6m*". That was said in response to Ms Lambert (the Finance Director) noting that the Company's management accounts for January 2022 showed EBITDA and profit to be down and "*The reasons for not achieving budget are the same as last month…Recruitment continues to be a challenge and the impact of the marketing campaign and other changes made is slower progress than we had hoped*". Then, after RSM had provided their initial feedback and findings on 4 March, there was a further exchange of emails between them on 19 March 2022. Mr Higgins said "*Not good, its been a horrible start under our ownership*" to which Mrs McLeish responded "*Absolutely terrible!!!! Numbers are nowhere near and now this ! ! !". If the profit has been overstated because of this can we bring claim on Huw?*". Mr Higgins replied: "*We would definitely be moving into the realms of building a case for a claim. However the onus is on us to prove it. There must be a lot of squeaky bums in that MPCT senior team right now*."

505. The defendants' closing submission did not develop further the suggestion that the focus upon bringing a warranty claim had come at the expense of such matters of proof in the sense of LCG disregarding its duty to mitigate its loss. I regard that as a reflection of the difficulty in maintaining that argument in the light of the evidence given at trial.

506. In my judgment there is no evidence to support the conclusion that LCG failed to mitigate its loss. Indeed, so far as the effect of the 2022 Audit on the business going forward was concerned, the defendants' closing submissions said that the in-year adjustments which needed to be made in AY21/22 as a result of the audit findings revealed an overall picture of successful mitigation by LCG.

507. The evidence given by Mrs McLeish, Mr Dowson and Mr Williams was clear in showing that (as was to be expected given that Mr Higgins had observed that the onus was on LCG to prove any consequential warranty claim against Mr Lewis) LCG did its best to reduce the Company's exposure arising out of the 2022 Audit. I accept their evidence on this point.

508. Mrs McLeish credited Mr Dowson with reducing the Company's exposure to clawback from a potential £2.9m down to £1.2m (before the deduction of the Unfunded Learner Value). Her figure of £2.9m was based on funding of £2.178m in respect of learners affected by the planned hours issue and £932,000 in respect of those affected by the Condition of Funding requirement.

509. Mrs McLeish explained her concern that, if the £1.2m figure was not agreed, it had been indicated (at a meeting in July 2022 at which Mr Lewis was present) that ESFA would be likely to audit the Company's funding in years prior to AY20/21. In cross-examination, she said:

> "Q. You advised Mr Lewis not to seek to challenge the ESFA's decision, didn't you?
>
> A. We had a meeting with the ESFA, Mr Lewis was present at that meeting, Mr -- we had managed at this point to get the clawback amount down to 1.2 million, and they had stated on several occasions that if we could close this down, they wouldn't go back into previous years. I advised Mr Lewis that if we pushed it any further, they had told us, and the notes from the meeting that we had jointly with the ESFA would tell us this, that they could open up previous years. That was my concern for the business, that the amount that we had got it down to was 1.2 million and if we kept pushing and pushing them, that they would open it up to the previous years, as they stated in the meeting.
>
> Q. Mrs McLeish, I think you are talking about a meeting in July now, are you not? Is that right, July 2022?
>
> A. On several occasions they stated that."

510. Mrs McLeish's view was that ESFA showed a degree of goodwill towards LCG because LCG had a good record of compliance and the Company's breach of the Funding Rules had not happened "*on our watch*".

511. The absence of any serious issue over LCG's mitigation of loss is revealed by the following passage in Mr Dowson's cross-examination by Mr Sims KC:

> "Q. As a headline point, Mr Dowson, what I am going to suggest to you is that there are potentially three different things going on in relation to the RSM audit process -- I will use the word "audit" because you use it in your evidence. In relation to that, the first question was dealing with the clawback issues in relation to the year 2021. That is point number 1, correct? Point number 2 is dealing with the position in relation to your in-year adjustments for 2021/2022. Then point number 3 is looking ahead, how you are going to deal with matters going forward in relation to the future. Correct?

A. They were the processes we went through. I am not sure the second and third were directly sort of part of the audit, but they were a consequence of the audit.

…

Q. In relation to the sort of headline proposition I am going to put to you, Mr Dowson, is that I have read all of the documents very carefully emanating to and from you. The impression I get from all of the documents I read is that your assessment in relation to the position in relation to a clawback was:

Well, do what you can to try and reduce the figures on the clawback to a figure which can be reasonably forward on behalf of LCG, point number 1.

Point number 2, doing the best you can for LCG in relation to adjusting the position as at the period for the second limb of the exercise in relation to the in-year period 2021/2022.

I am going to put to you actually you on the face of it appear to have been very successful in terms of what you did during that period in order to mitigate the impact of the adverse impacts that may have arisen in relation to the revenue figures. Was that your feeling at the time, that you actually did do a successful mitigation in relation to the in-year periods I am talking about, so the 2021/2022 period?

A. Yes, I did my absolute best in all three periods."

512. For the reason explained above, I consider Mr Sims KC's point 3 belongs to Issue 8 rather than the present issue concerning mitigation. His question anticipated what would later be said in his closing submission about the success of in-year adjustments in AY21/22 (his point 2). Mr Dowson's answer (also covering Mr Sims KC's point 1) is a convincing one when considered in the light of the contemporaneous documents, including his exchanges with Mr Williams about their response to the audit, and the evidence of other witnesses.

513. In relation to Mr Sim KC's point 2, Mr Williams's third witness statement (made during the course of the trial) explained the steps the Company took in AY21/22 to address the planned hours and Condition of Funding issues. They were as summarised in its responses set out in the 2022 Audit Report. Mr Williams explained that the remedial steps were decided upon by Brian Edwards (the Company's Director of Military Academies), Gary West (LCG's Head of Quality), Mr Dowson and himself. In my judgment, the *required* remedial steps described in Mr Williams's third witness statement undermine the defendants' case (which it is for them to make good) that LCG failed to mitigate its loss. As Mrs McLeish said, they were "*in-year adjustments we had to make whilst the audit was ongoing*." It is difficult to understand what the Company could or should otherwise have done.

514. In that statement, Mr Williams explained that nothing could be done about those learners who had by then left the Company in AY21/22 and whose funding band needed to be changed from band 5 to band 1, 2 or 3. If they had left before achieving

their revised Core Aim then there was an adverse impact on the Retention Rate. In cross-examination, Mr Williams said that the number of leavers was consistent with other years. He described the downward adjustment for funding for those learners as "*a bit of a half-way house*" given the need to make in-year adjustments. In his evidence, Mr Dowson said that the adjustment meant that approximately £1m of the funding for AY21/22 was unspent and, as the adjustments were made late in AY21/22, there was no opportunity for LCG to attract new learners to utilise the underspend.

515. Although Mr Williams, in cross-examination, recognised that staff redundancies in June or July 2022 could have been a factor in students leaving, I am not persuaded of that. Mrs McLeish said in cross-examination that the reduction in staff costs noted in the Post Acquisition Review related to 14 redundancies and the remainder of staff departures were "*natural attrition*". In any event, to the extent that the redundancies are linked to the ARG/Capita issue, I regard them as irrelevant to the present issue for the reason explained above. That issue relates to how many students might have enrolled with the Company in AY21/22, not with how many left it during that year. So far as replacing those who had left is concerned, I accept Mr Dowson's evidence to the effect that the problem was one of timing not teaching capacity.

516. LCG's success in deducting the Unfunded Learner Value for AY20/21 from the Over-Claimed Sum is, in my judgment, a further illustration of the efforts to minimise the impact of the 2022 Audit. Mr Williams suggested to Mr Dowson that it might be offset in an email of 21 March 2022. Mr Dowson responded "*Yes I would hope it would offset against it, I've never been in a position in which that has been the case for audit, so unsure. It's certainly something we should push for once we get closer to resolution*." Once the £1.2m odd figure was agreed, LCG and the Company did succeed in obtaining ESFA's agreement to its deduction even though AY20/21 was a closed year.

Decision on Issue 12

517. **LCG complied with its duty under paragraph 11 of Schedule 5 to the SPA in mitigating the loss it seeks to recover on the warranty claim. The defendants have not established that LCG (or the Company) failed to take a step that might reasonably have been taken in avoiding or mitigating loss.**

(2) Issues 8 and 9: the No Loss/Amount of Loss Issue and the Indemnity Claim Value Cap Issue

518. Issue 8 is the least straightforward of all the issues to determine. That is because it is the one issue to which the parties have not provided a complete answer in the comprehensive language of the SPA. They only agreed upon the cap upon the respective liability of the defendants when they could not then know what the precise details and circumstances of the warranty claim might be.

519. The outcome under Issue 9 will necessarily be determined by my finding on Issue 8, assuming it involves a decision that LCG has suffered some loss as a result of the breaches of warranty identified in my decisions on Issues 4 and 6.

520. The defendants argue that, if LCG has established any recoverable loss, the damages should be no greater than the value of the claim under the Funding Indemnity in the sum of £783,325.

521. There is no reason why that should be so as a matter of principle when, as highlighted by the reasons in support of my decision on Issue 3, the warranty claims and the indemnity claim are quite distinct. They each have different caps upon liability: see paragraphs 2.1 and 2.2 of Schedule 5 to the SPA. For those reasons, although the outcome is not inconceivable, one would not expect the findings of fact on Issue 8 to produce a result where the defendants' liability under the warranties exactly matched the value of the claim under the Funding Indemnity: compare the "Warranty True versus Warranty False" approach to damages addressed below.

The Approach to Issue 8

522. The parties and the experts largely agree upon the principles to be applied in addressing LCG's pleaded case:

(1) The measure of damages for breach of a warranty of quality of shares under the SPA is the monetary sum which is required to put LCG in the position it would have been in had the warranty concerned been true. This is the difference between (i) the value of the shares in the Company as at the Completion Date as warranted (ie. as if the warranties had been true) (the "**Warranty True Value**"), and (b) the actual value of those shares as at that date (the "**Warranty False Value**"). See, for example, the decision of the Privy Council in *Lion Nathan Ltd v CC Botlers Ltd* [1996] 1 WLR 1438, at 1442A-C; the judgment of Blair J in *The Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 (QB), at [180] and that of Popplewell J in *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2014] EWHC 2178 (QB) (which is a different decision to that of Green J addressed in relation to Issue 1 above).

(2) The most appropriate way to value the Company was (and remains) a multiple-based approach, that is to say, on the basis of the Company's MEBITDA multiplied by an appropriate multiplier. The resulting enterprise value is based upon a perception of the Company's future cash flows.

(3) The Warranty True Value is determined by valuing those shares as if the warranties were true on the date of execution of the SPA. Although the point was initially not admitted in the defence, the parties (and experts) agree that the Warranty True Value is the same as the price which LCG paid under the SPA: i.e. the Initial Consideration of £16,813,008. That price was based on a MEBITDA of £2,571,000 and a multiplier of 5.5 (producing an enterprise value of £14.15m) and included the net cash value of £2.663m.

(4) To ascertain the Warranty False Value, the court will approach this from the perspective of the hypothetical reasonable seller and the hypothetical reasonable buyer, each with knowledge of the falsity, in order to determine what a "hypothetical open market purchaser with no special interest or characteristic affecting the amount it would be willing to pay, knowing that … the warranties were false, would have been willing to pay for [the Company]" as at the relevant date (per Kerr J in *Equitix* at [345]). The "*no special interest or characteristic*" assumption is potentially qualified by the next point.

(5) In this case, LCG's expert (Mr Osborne) adopted the 'Equitable Value' approach to the exercise. That requires an assessment of what is fair between two specific identified parties considering the respective advantages or disadvantages each will gain from the transaction. The defendants' expert (Mr Pearson) adopted the 'Market Value' approach which requires any such advantages or disadvantages that would not be available to other market participants to be disregarded. See the International Valuation Standards (the **IVS**, effective 31 January 2020) at paragraphs 50.2 and 50.3. The experts recognised that in many cases the two approaches will produce the same valuation (though the absence of such "disregards" in determining Equitable Value mean that it is a broader concept) and they left it to the court to decide which was the appropriate one to adopt. They were agreed that the Warranty True Value of £16,813,008 is the same on both the Equitable Value and Market Value bases.

(6) The IVS at paragraphs 30.1 and 30.2(h) (addressing Market Value) identifies the attributes of the hypothetical willing seller and buyer by stating they have "*each acted knowledgeably, prudently and without compulsion*" and "*are reasonably informed about the nature and characteristics of the asset, its actual and potential uses, and the state of the market as of the valuation date, not with the benefit of hindsight at some later date*." The information available to them obviously includes the knowledge of the relevant breaches of warranty which is attributed to them.

(7) Damages for breach of warranty are assessed at the date of breach (in this case the date of the SPA when the warranties were given). "*The Court does not normally ascertain the consequences of the breach of warranty by looking at subsequent events*": *Equitix*, at [391]. See also *Ageas* [2014] EWHC 2178 (QB), at [37]-[38]); *The Hut Group,* at [184]; *Bir Holdings Ltd v Mehta* [2014] EWHC 3903 (Ch), at [81; *MDW Holdings Ltd v Norvill* [2022] EWCA Civ 883; [2023] 4 WLR 33, at [48]-[49]; and the IVS at paragraph 30.2(h). Hindsight is generally not to be relied upon. However, known events after the date of the SPA may in some circumstances be relevant in any transaction-date assessment of the outcome as to what then was a future contingency accepted to be relevant to the Warranty True Value and/or as a cross-check for consistency with the claim later made by reference to the value placed upon that contingency: see *Ageas* [2014] EWHC 2178 (QB) at [35]-[36]. Subsequent events or later conduct may also be material if either assists in assessing how the hypothetical buyer might be expected to have approached matters at that date or the extent to which the parties could have known about or anticipated the relevant matters at that date. In *Arani v Cordic Group Ltd* [2023] EWHC 95 (Comm), at [122]-[123], Bright J said that, if and so far as the parties to the transaction can be taken to be reasonable commercial

people, "*their assessment of the relevant commercial risks and opportunities may shed light on how the hypothetical reasonable willing buyer might be expected to have approached matters*".

523. As highlighted by some of the arguments addressed below, there is potential tension between the exclusion of consideration of actual events which become known to the parties only after the date of the share sale (subject to the qualifications identified in *Ageas* and *Arani*) and the court's preference to act upon known facts when assessing damages for breach of contract in the interests of serving the overriding compensatory principle of damages. In each of *Ageas*, *The Hut Group* and *MDW* the court addressed the decisions of the House of Lords in *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co*. [1903] AC 426) and *The Golden Victory* [2007] UKHL 12; [2007] 2 AC 353, which confirm the general position on the quantification of damages for breach of contract. In his judgment in *MDW*, Newey LJ also considered the decision of the Supreme Court in *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] Bus LR 987 (post-dating the judgments in *Ageas* and T*he Hut Group*) where the principle in *The Golden Victory* was applied.

524. Newey LJ commented that *The Golden Victory* and *Bunge* were concerned with the assessment of damages for an anticipatory breach by renunciation (and the value of the goods or services that would otherwise have thereafter been delivered by the contract-breaker) whereas, and quoting from the judgment of Lord Sumption in Bunge, "… a share sale relates to an existing asset which is recognised as "an article of commerce in itself"". Newey LJ said, at [49], that there was a strong case for saying, in general at least, that the position in relation to warranties given on a share sale should be the same as in a claim for deceit: that a defendant cannot reduce his liability by showing that a contingency which served to reduce the value of the asset at the date of assessment did not eventuate. He said cases where account can be taken of what happened subsequently, as regards such a contingency, in the assessment of damages for breach of warranty "must be rare".

525. For the reasons developed below, the court should not include within that rare category a case where the hindsight sought to be applied involves the defendants attempting to revisit the contractual allocation between of risk and reward between the parties or suggesting that the claimant will otherwise benefit from a damages "*windfall*" when the proper analysis is that the later recovery in the value of the shares is (to use Newey LJ's phrase) "*attributable to steps the purchaser had itself taken since the transaction*."

The Rival Arguments

526. In the next part of the judgment, I summarise the parties' main points about the quantum of the claim but not their respective cases based upon the expert evidence. I summarise those in the section below addressing the expert evidence.

LCG

527. The first element of LCG's pleaded case is:

> "If the Over-Claimed Sum had been known about prior to entering into the SPA this would have led to a reduction in the Company's forecast FY2021 revenue of £1,247,680, and consequently a reduction in the maintainable EBITDA of the same amount" (per paragraph 52(d) of the particulars of claim).

528. The other key part of that case (see paragraph 52(e)) involves adopting a "Warranty False" MEBITDA multiplier of 3 instead of the multiplier of 5.5 which was used to determine the price paid under the SPA. This is said to be justified because:

> "…. if the Over-Claimed Sum had been known about before entering into the transaction, the multiplier used to calculate the enterprise value would have been reduced for the following reasons: (i) the profitability of the Company would have been lower, (ii) there would have been known issues with the Company's funding from the ESFA, (iii) there would have been perceived to be an increased possibility of further issues with the Company's funding coming to light, and (iv) the overall view of the 'quality' of the Company's business would have been negatively impacted as a result of these uncertainties, leading to a more cautious view being taken of the ability of the Company to continue to generate a given level of revenue in the future."

529. The particulars of claim calculate the damages of £10,180,040 by reference to a Warranty False Value of £3,969,960 which is based on a reduced MEBITDA of £1,323,320 (i.e. £2,571,000 reduced by £1,247,680) and multiplier of 3. When served the particulars of claim referred to LCG's intention to adduce factual and expert evidence to support those matters and reserved the right to amend the calculation of loss. No such later amendment was made though, recognising the claim was limited by the pleaded figure, LCG's counsel said in closing submissions that higher damages might have been sought by reference to an even lower Warranty False Value.

530. Mr Booth KC and Mr Adamyk recognised that the pleaded claim of £10,180,040 necessarily rests upon an imprecise exercise which is permeated with supposition, in that the court is being asked to make findings about a hypothetical transaction which did not take place. Where the court is satisfied on the balance of probabilities that substantial loss has been caused by the breach of warranty but the evidence available does not allow the loss to be precisely quantified, then it assesses the damages as best it can on that evidence: see *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486;[2011] QB 477, at [22]–[23], per Toulson LJ (cited with approval by Lord Reed in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649, at [37]–[38]) and *116 Cardamon Ltd v MacAlister* [2019] EWHC 1200 (Comm), at [78], per Cockerill J. As noted in connection with Issue 2 above, *116 Cardamon Ltd* concerned a claim for damages for breach of warranty under a share purchase agreement.

531. Counsel focussed upon what they said would have been the widespread and substantial uncertainty faced by the parties in the hypothetical situation where they are to be taken to have known the Company was in breach of the Funding Rules. They pointed to the following:

i) Neither the hypothetical reasonable purchaser nor the hypothetical reasonable vendor knew at the date of the SPA what the true extent of the funding clawback would be. In particular, there was considerable exposure for the Company in the event that ESFA decided (as it was fully entitled to do) to carry out an audit of the entire preceding six-year period. As the exposure was confined to that arising out of the 2022 Audit, even now the true extent of this potential clawback remains unclear. It could have been well in excess of the protection given by the Funding Indemnity (which was limited to the previous three years and involved the defendants' liability being capped under paragraph 2.2 of Schedule 5).

ii) The corresponding risk that ESFA might have terminated the Company's funding contract for AY21/22. ESFA had the right to terminate the contract with immediate effect if the Company received a "qualified" rating in two consecutive full funding audits. Even in the absence of that right, it would still have been open to ESFA not to renew the contract for AY22/23, bearing in mind that the contracts were agreed for each academic year. Termination of ESFA's funding would have obliterated the Company's business model. Although LCG says it managed the 2022 Audit well, and thereby curbed the potential for further audits of earlier funding years, there would have been great uncertainty at the date of the SPA about the severity of ESFA's reaction.

iii) Even without an ESFA audit or audits of current or past years, it would have been apparent to the hypothetical negotiating parties that the Company's business model (so far as its compliance with the Funding Rules was concerned) and profits were not as had been portrayed. But they would not then have known the extent of the flaws or how the Company would fare once the systemic flaws were rectified. The cost of reinstating GCSE provision, in order to comply with the Condition of Funding rules, would also have been uncertain.

532. In summary, therefore, LCG says the breaches of warranty would have been perceived as having a substantial and ongoing adverse impact on the Company's finances. As things turned out, the financial impact was not confined to the Clawback. The Company received lower funding for AY21/22 (as a result of the consequential in-year adjustments) and suffered the negative Condition of Funding adjustment of £392,962 for AY23/24. The reduction in MEBITDA in the hypothetical negotiation would not have been limited to the Clawback amount.

533. Mr Booth KC and Mr Adamyk submitted that it defied common sense and logic for the defendants to say that a significant reduction in the Company's EBITDA and a consequent need to make substantial changes to the business would have made no difference to the hypothetical reasonable purchaser. By their nature the breaches impacted adversely upon the perceived quality of the Company's business. That includes not only questions about the Company's "true" levels of past and future profitability but also ones about the likely impact on the Company's Retention Factor in future years (the actual details of which are summarised in paragraph 80 above). This would have led to the hypothetical negotiating parties adopting a significantly reduced multiplier.

534. In her evidence Mrs McLeish referred to two other business acquisitions made by LCG either side of its acquisition of the Company. The first was of Acorn Training Consultants Limited ("**Acorn**") in August 2020 and the second was of White Rose School of Beauty and Complementary Therapies ("**White Rose**") in August 2022. Both businesses offered a 16 to 19 study programme in their respective sectors (though White Rose did not have its own funding contract and LCG sub-contracted part of its own contract value to the company) and Mrs McLeish said their businesses were therefore broadly comparable to the Company's business.

535. Mrs McLeish said that, on a Warranty False Value, LCG would have looked to adopt a similar multiplier under the SPA as that used in relation to Acorn and White Rose. She said the multipliers adopted for those other transactions were 3 for Acorn (on an EBITDA of £0.5m) and 3.9 for White Rose (on an EBITDA of £1.6m). Mrs McLeish said the reduction in the Company's EBITDA, by reference to the Over-Claimed Sum, together with the reduced contract value and the knock-on effect on future funding brought the position closer to those other transactions. She said that, once adjusted, the Company's EBITDA was similar to White Rose which was also the largest business of its type (the provision of hair and beauty training) and also had an OFSTED rating of 'outstanding".

536. Addressing LCG's appetite for acquiring the Company, Mrs McLeish recognised the "*cultural bond*" between the two organisations, where LCG was already operating its four military academies in Yorkshire, also staffed by military veterans, and accepted the Company was a "*real attraction*" for LCG. She said LCG was motivated by the prospect of growing the business (including by adding the funding under the Adult Education Budget which was later noted in the Post Acquisition Review) rather than cost-saving synergies. In cross-examination, she said there were very few cost-saving implications because of the fixed overheads within each of the academies.

537. Mrs McLeish accepted in cross-examination that the clean 2018 audit and the belief that there were no funding issues with ESFA was not material to LCG's decision to agree upon multiplier of 5.5. However, she said that, once discovered, the funding issues affected both the MEBITDA and the multiplier. Her position is summed up by the following answers:

> "A. I think the two things are the same. We bought a business based on a 2.5 million maintainable EBITDA that, because of funding irregularities, was not 2.5 million EBITDA.
>
> Q. Ms McLeish, you know that the EBITDA is separate from the question of the multiplier, don't you?
>
> A. Okay, well then the funding value for the contract that we were buying, which was at the time of purchase £6 million, and subsequently reduced as a result of the audit, would have an impact on the multiplier and the reputation of the business because of the audit. So yes, it would impact the EBITDA and the multiple."
>
> …

> [Addressing the potential clawback of £2.9m mentioned in connection with Issue 12 above] "The ESFA would have the right to reclaim all funds if they thought that necessary -- that is what they hold the right for and to go back five years, as we have discussed previously."
>
> .....
>
> "So what I am referring to there is that there is a historical EBITDA overstating and that there is an ongoing impact of the funding per learner that we would be able to draw down because of this impact moving forward."
>
> ….
>
> "I am saying that we have got an EBITDA that is overstated and therefore we have overpaid for a business because the EBITDA was affected by about 1.2 million."
>
> …
>
> "…the quality of earnings was naturally affected because the contract value was going to be reduced."
>
> ….
>
> "A. I believe that we bought a quality education business for an overstated EBITDA."

538. Mr Higgins accepted in evidence that LCG was enthusiastic about the acquisition of the Company. He said (as the contemporaneous documents show) that, having offered a multiplier of 5, LCG's decision to accept the counter-proposal of 5.5 was quickly made. He said that, in the warranty false scenario, LCG would have "*dealt with the issues*" in the negotiation rather than simply rely upon the Funding Indemnity. He said:

> "I mean if we had found an issue in due diligence, we would have dealt with that issue and, depending what the issue was, would depend on how that would be dealt with through the SPA or whatever, or whether we would continue with the acquisition and we had -- we did due diligence on a couple of businesses where we found things we didn't like and we didn't go ahead with the acquisition. So hypothetically, it depends what you find, doesn't it."

539. Mr Higgins said that, when he left LCG in May 2024, his perception of the Company was that it was still a good business.

The Defendants

540. The defendants (in addition to raising Issue 9 to the effect that any loss cannot exceed the value of the Funding Indemnity) maintain that the breaches of warranty did not result in any impairment or reduction of the Company's MEBITDA. Their position is

that there is no proper justification for using either a reduced MEBITDA figure or a lower multiplier.

541. They say those breaches would not have caused the hypothetical reasonable and prudent purchaser to have reduced its assessment of MEBITDA because (to quote from the defence) the purchaser "would have recognised that they could adjust delivery and funding claims so as to avoid any allegations of over-funding, and indeed to secure additional funding per learner, as it is believed the Company has been able to achieve following completion of the SPA" (per paragraph 54(b)). In circumstances, therefore, where they were not likely to cause a recurring reduction in MEBITDA the purchaser would have recognised that its position would be adequately protected by the Funding Indemnity.

542. The defendants point to the Over-Claimed Sum relating to only one funding year - AY20/21 and LCG not relying upon any breaches of the Funding Rules in prior years to support the case of loss. They said the Over-Claimed Sum should be taken to relate to an isolated event and a one-off payment in the lesser amount of the Clawback (£783,325); and, if LCG had wanted to rely upon breaches of the Funding Rules in earlier years, then those should have been pleaded and relevant evidence adduced.

543. The defendants also say that LCG's pleaded case adopted the erroneous approach of calculating loss by reference to what was only later established by RSM in their report of 20 June 2022. The RSM report was also some 8 months after the relevant date for determining the Warranty False Value. However, they said the analysis of the adjustments undertaken by the Company in AY21/22, including in April 2022 in anticipation of the report, showed the overall picture to be one of successful mitigation of loss, as Mr Dowson said in evidence relating to Issue 12 and as I have found (at least in concluding the Clawback did not reflect any failure to mitigate).

544. They contend that the greater part of the £1.034m identified by Mr Dowson as under-delivery by the Company on its funding of £6.3m under the contract for AY21/22 was in fact attributable to a fall in the number of learners (by 149) caused by the ARG/Capita issue. By reference to an average figure of £4,175 per learner they attributed approximately £622,000 of the under-delivery to the ARG/Capita issue. The defendants' closing submissions set out a series of calculations in support of their case that the balance of approximately £400,000 reflected financially positive aspects of the changes to planned hours and Condition of Funding explained by Mr Williams.

545. As I have summarised in connection with Issue 12, Mr Williams explained that, for learners who had not already left the Company by the time those in-year changes were made, some who had completed their learning aim were enrolled on the next one (to reflect the proper approach to nested qualifications) and others who had been on part-time funding, to by-pass the Condition of Funding rules, were moved to higher full-time funding (and thereby became subject to the Condition of Funding penalty suffered in the next-but-one academic year). So far as AY21/22 was concerned, while the effect of that penalty would not be felt until later, the defendants said the figure of £400,000 (derived from their analysis of the separate impact of the ARG/Capita issue) reflected "*net positives*" of approximately £300,000 in relation to planned hours and approximately £300,000 in relation to the changes made as a result of the Condition of Funding breach. In other words, the under-delivery on funding in AY21/22 was mitigated down to £400,000.

546. As the changes in AY21/22 described by Mr Williams had been made some 6 or 7 months into AY21/22 (by which time some students had left and the Company had changed their funding from band 5 to the reduced funding under band 1, 2 or 3 without the ability to adopt a proper approach to nesting for them) the defendants said the Company's position would have been viewed even more favourably by the hypothetical seller and purchaser in October 2021. In their closing submissions, counsel said:

> "… if the process was carried out prospectively, which is in effect what the position would have been as at October 2021, the net positive of £300k would be much higher and £1m would be much lower (because the problem of learners having left before completion of the aim would not arise). Based on this information the prospective assessment of the PLH and CoF issues is that they are likely to be significant net contributors to positive maintainable earnings. This is because they saved LCG from a drop they would otherwise have suffered due to the drop in learner numbers and the further adverse effects caused by the changes made by LCG in year (which resulted in retention factor being adversely affected)."

547. The changes which the defendants say adversely affected the Retention Factor were staff redundancies in June and July 2022 (because of the decline in numbers due to the ARG/Capita issue) and identifying the learning aim of those students moved to funding band 5 as a Diploma when that was often not achieved before the student left. They said the redundancy programme was carried out in an ill-thought-out way, without proper consideration of the resources required for delivering GCSEs. Mr Lewis's evidence was that the redundancies caused a significant loss of motivation amongst students which led many to drop out of courses without achieving their Core Aim; and that had an adverse impact on the Retention Factor. His counsel said LCG should have adduced evidence from "*an independent expert in ESFA Funding*" (conducting an audit of the ILRs of learners enrolled in October 2021) to support the Company's revised approach to learning aims rather than leaving this to the factual evidence of Mr Dowson and the accountancy evidence of Mr Osborne.

548. Mr Lewis's evidence was that the reintroduction of GCSEs, in order to comply with the Condition of Funding rules, could have been achieved at an increased cost of £50,000. Mr Pearson had regard to this evidence when providing his own estimate of the GCSE costs. Mr Lewis's position was that this expenditure would have produced an extra £293,000 in annual revenue (as noted below, the experts agreed upon a slightly higher figure). He said the Company should have put GCSEs back in place soon after the Condition of Funding breach came to light. He said he had not suggested this at the time because he had been ousted from management decisions and told that communications should be between solicitors.

549. In support of their case that GCSEs could have been reinstated at relatively modest cost, the defendants called Ms Lisa Gill as a witness. Ms Gill was the Company's Head of Skills (maths and English) between 2016 and the date of the SPA (though she had been absent on sick leave between December 2020 and October 2021). After the SPA she became Head of Growth for the Company's Welsh business and left that employment in May 2024.

550. Ms Gill has worked in adult education for over 20 years, though after October 2021 she was not concerned with any GCSE provision. Ms Gill did not accept that the Company's teaching of GCSEs up until 2019 had been unsuccessful. Like Mr Lewis in his evidence, she said the Company had been measuring success incorrectly. A grade 1 GCSE was technically a pass – and a huge incremental step for many of the Company's students – but the Company had been measuring success by reference to grade 4. Even by that standard, she did not accept that the Company's view was that, until it ended, the GCSE provision was failing and, in hindsight and treating a grade 1 as a pass, she said the results up to 2019 were in fact "fantastic". She was not part of the SLT who decided to curtail GCSE provision. The thrust of Ms Gill's evidence was that, up to the point she went on sick leave, the Company had resources readily available for deployment in reinstating GCSEs if required. She did not envisage it would involve any additional costs. She accepted there was no question of reinstating GCSEs between 2019 and the date of the SPA.

551. Therefore, looking at the overall position of the Company as at the date of the SPA, the defendants presented the consequences of the 2022 Audit as positive contributors to an MEBITDA that would otherwise have suffered a significant reduction in revenue because of the ARG/Capital issue. Mr Lewis pointed to the funding that the Company had since been able to achieve through a proper approach to nested qualifications (the Additional Learner Value for AY20/21 being an indication of its capacity to do this without increased risk to the Retention Factor) and through the provision of GCSEs, at modest cost, to secure band 5 funding.

552. The defendants submitted that, if justified at all, any reduction in the Company's MEBITDA figure should be no greater than the amount of the Clawback, rather than the Over-Claimed Sum, especially having regard to the Company's history of providing Additional Learner Value through over-delivery.

553. They also said an adjustment of the 5.5x multiplier for determining a Warranty False Value was unjustified, and effectively amounts to double-counting of damages. The point was made that a downward adjustment of the multiplier by 0.1 (applied to the EBITDA of £2.571m) equated to £257,000 and counsel said that "*soft hands*" on the part of the court were required even if there was a case for making one. They repeated the point, made in connection with Issue 2, that Notices 1 and 2 did not suggest an adjustment to the multiplier. A reduction in the multiplier to 3 was only suggested for the first time in the particulars of claim.

554. The defendants suggested there is recognised judicial and accounting hostility to a reduction in both the multiplicand and the multiplier because of the risk of double-counting. They referred to the decision of Blair J in *Hut Group Lid v Nobahar-Cookson* [2014] EWHC 3842 (QB), at [159]-[173], where the judge was not persuaded to revisit the multiple in addition to a reduction in the EBITDA.

555. Mr Sims KC and Mr Jagasia (who also acted for the defendants in that case) accepted that in *MDW Holdings Ltd v Norvill* [2021] EWHC 1135 (Ch), at [288]-[290], HHJ Judge Keyser QC discounted the multiplier from 4.2 to 4. His decision was upheld on appeal: see [2022] EWCA Civ 883; [2023] 4 WLR 33 Counsel referred to the judge's observation that "[t]here is obvious reason to be cautious before discounting the multiplier at all" because an adjustment to the multiplier would "present a risk of double-counting." They submitted that this was not an *MDW* type of case where the

matters giving rise to the breaches of warranty had resulted in reputational damage to the company.

556. More generally and engaging with LCG's reliance upon the decision in *Parabola*, counsel referred to the decision of Leggatt J, as he then was, in *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm). That case concerned a claim against former employees for breaches of contract through them copying confidential documents which they had either not subsequently made use of or where the claimant did not allege that their use had caused it any financial loss. Leggatt J was not persuaded to award so-called *Wrotham Park* damages, when the defendants' activity could not reasonably be expected to be treated as the subject matter of a hypothetical negotiation between the parties, and he awarded nominal damages. He recognised that there are principles which may assist a claimant who has difficulty in proving loss, including the court's preparedness to do its best to quantify loss where precise calculation is impossible, but went on to say, at [165]:

> "These principles can help a claimant to overcome evidential difficulties in proving damages. There is a limit, however, to how far they can be taken. They may assist in resolving uncertainties where evidence is not reasonably available but they do not enable the court to conjure facts out of the air and they have little role to play where evidence could reasonably have been obtained, or has in fact been adduced. They may give the claimant a fair wind, but not a free ride."

557. Counsel said LCG was in the same position as the plaintiff in *Senate Electrical* (also relied upon by them on Issue 2 above) where, addressing the issue of notification of the claim, the Court of Appeal said: "*The plaintiff cannot complain if, through opening his mouth too wide, he fails to prosecute a more modest claim and the judge does not deal with the matter as sympathetically as he might otherwise have done*."

558. In *Senate Electrical* the trial judge rejected the evidence relied upon by the plaintiff to support a damages award in excess of £25m, which was based upon them saying they had applied a price/earnings ratio in their valuation of the business bought from the defendants, but he awarded damages of £5m on the basis that the price would have been negotiated at a lower level if the breaches of warranty had been known to both parties. The Court of Appeal noted that the judge's approach was not covered by the pleading, and that it was not put forward by the plaintiff or considered by the defendants and said that the judge should not have attempted to rescue the plaintiff's case as he did without giving the defendant an opportunity to object.

559. Counsel's reliance on this aspect of the decision in *Senate Electrical* went in particular to what they said was the unfairness of LCG seeking to present the case on damages by reference to the prospect that an audit of the Company in respect of years prior to AY20/21 would have revealed further breaches of the Funding Regulations beyond those which produced the Clawback. They said the true extent of the risk of adverse findings on any such audits had not been explored at trial and it was contrary to LCG's case to rely upon one when it had been contained by agreement with ESFA over the Clawback.

560. They also relied upon the recent decision of Fancourt J on the appeal in *Jacobs v Chalcot Crescent Management Company Ltd* [2024] EWHC 259 (Ch). In that case the trial judge had found for the defendant on a basis which had not been pleaded nor

fairly raised at trial. Fancourt J allowed the appeal by reference to the decision of the Court of Appeal in *Al-Medenni v Mars UK Ltd* [2005] EWCA 1041 which emphasised the importance of the court confining its decisions to the issues identified and addressed by the parties.

561. Mr Sims KC and Mr Jagasia relied upon both *Senate Electrical* and *Jacobs v Chalcot* to say that LCG's position in relation to the Warranty False Value MEBITDA had changed from the straightforward pleading of a deduction of the Over-Claimed Sum from the Warranty True Value MEBITDA to the one advanced by Mr Osborne. Mr Osborne adopted a quite different approach based on a reduction in the Retention Factor by reference to the Planned Hours Over-Claim and Condition of Funding Over-Claim. The defendants said this exercise involved the impermissible use of hindsight through the use of a Retention Factor relevant to funding for AY23/24 and by reference to the costs later incurred by the Company in providing GCSEs.

The Expert Evidence

562. Both experts made it clear that their expertise did not extend to the Funding Regulations and that their respective views (in relation to the Warranty False Value MEBITDA) were subject to any particulars findings the court may make about the impact of the breach of warranty upon matters such as the Company's Retention Factor or other financial consequences. This was illustrated by the tables within Appendix 5a to their joint statement and the alternative figures reflecting the variables behind them.

563. Mr Pearson did not consider it appropriate to undertake the type of calculations that Mr Osborne had when such variables - such as the length of the delay in implementing a GCSE curriculum, the relevant Retention Factor (if calculable as at the date of the SPA) and the level of costs expected to be incurred in delivering GCSEs – remained to be determined by the court. He indicated his willingness to provide further assistance to the court in working with Mr Osborne to quantify the damages (if any) following such determination. Mr Osborne said the same.

564. The expert evidence is detailed and voluminous. With the appendices to the reports and the experts' joint statement it runs to over 1600 pages. What follows is therefore a summary of the key aspects of it.

Mr Osborne

565. Mr Christopher Osborne FCA is a partner and head of the forensic services practice of FRP Advisory Trading Limited. He has over 25 years of experience as a forensic accountant in a number of areas which include analysis of warranty claims.

566. I have already mentioned that Mr Osborne's report addressed the meaning and effect of some of the warranties relevant to Issue 6. He was taken to task for this by Mr Sims KC in cross-examination on the basis that he had it compromised his independence as an expert by considering matters which went beyond issues of loss

and included his views on breach. In my judgment this criticism was misplaced. Mr Osborne was expressly instructed to give his professional views on breach of the accounts-related warranties In doing so he gave his views by reference to the requirements of FRS 102, as explained by him when the language of the warranties called for such an explanation, but expressly stated that it was for the court to decide whether a breach of warranty had occurred. As he said in cross-examination, "I've tried to assist the court in regard to any relevant or *[sic]* accounting or financial matters."

567. On Issue 8, Mr Osborne's evidence on behalf of LCG adopted the 'Equitable Value' basis in the hypothetical negotiation that informs the Warranty False Value. The estimated price of the Company is therefore one agreed between identified knowledgeable and willing parties that reflects the respective interests of those parties.

568. LCG said that in the circumstances of this case, where any available synergies resulting from the acquisition of the Company's business would have been potentially attractive to any 'trade' purchaser (as opposed to private equity investor), there was unlikely to be any material difference between Equitable Value and Market Value. By closing submissions, the defendants were in broad agreement. They said there does not appear to be much between the experts as to the factors which are relevant to take into account whichever basis is adopted. Indeed, the defendants inclined towards Equitable Value being the appropriate basis by reference to the reliance by them and Mr Pearson upon factors particular to LCG (such as the ability to pull on spare capacity from other contracts) that were pertinent to the measures taken in response to the 2022 Audit.

569. In his approach to both the Warranty True Value and the Warranty False Value Mr Osborne did not consider the use of hindsight to be appropriate (i.e. to resort to information that post-dated the SPA and therefore would not have been available to the parties). On that basis, the actual financial impact on the Company of the breaches established by the 2022 Audit was not relevant to his analysis. However, he did use hindsight as a proxy for what the parties may have contemporaneously estimated in two instances.

570. The first concerned the need for a party who knew the breaches had taken place to estimate a revised Retention Factor. He considered it reasonable to adopt the actual Retention Factor for AY21/22, as a proxy, rather than estimating one by reference to the parties' expectation as at the SPA. He adopted the actual Retention Factor calculated by ESFA of 0.81451 from AY21/22, used in the Company's funding allocation for AY23/24, as it reflected the impact of the issues underlying the Planned Hours Over-Claim.

571. The second involved the use, as a proxy, of the actual costs incurred by the Company to deliver GCSEs, for the purposes of analysing the costs which would need to be incurred to comply with the Condition of Funding rules, rather than estimating those costs. The defendants said this involved the impermissible use of hindsight; and that the 2024 costings relied upon by Mr Pearson appeared to be a forecast rather than costs perhaps actually incurred; though in re-examination Mr Osborne said that the costs for the relevant months in 2024 (as opposed to later months) were actual costs.

572. Because of his approach that the use of hindsight was generally inappropriate Mr Osborne did not support LCG's pleaded approach of arriving at a Warranty False MEBITDA by deducting the Over-Claimed Sum from the Warranty True Value MEBTIDA. Neither did he support the defendants' (last resort) alternative suggestion of deducting the Clawback.

573. As already explained, the Over-Claimed Sum was made up of the Planned Hours Over-Claim of £758,367 and the Condition of Funding Over-Claim of £489,097. Mr Osborne's equivalent figures were £709,660 and (a net) £292,921.

574. His report explained how the first figure in relation to the planned hours breach was based upon his adoption of a Retention Factor of 0.81451 (taking the one used in AY21/22 as a proxy) instead of the actual Retention Factor of 0.95300 used in the funding allocation statement for AY20/21. He recognised the first figure would not have been known until March 2022. The difference of 0.13849 applied to funding of £5,124,268 (the funding shown in the allocation statement for AY20/21 which would therefore be known to the parties when negotiating the SPA) produces £758,367. He did not add to that sum (and thereby lower the Warranty False Value further) any estimate of the cost of providing Core Aims that would enable the Company to remedy the planned hours issue. He did not have the underlying evidence to support the inclusion of such additional costs or have sufficient detail to say whether they would instead be attributable to LCG's plans for the expansion of the Company's business.

575. The calculation of Mr Osborne's second figure for the breach of the Condition of Funding rules is more complicated. It was based upon 263 students affected by the Condition of Funding breach in AY20/21 receiving higher band 5 funding of £223,968 but with recognition that having a GCSE course in the curriculum may impact on the Company's Retention Factor as a result of some students withdrawing from their Core Aim. Using the Retention Factor for those who were on the Company's GCSE's course in 2017 as a proxy, Mr Osborne in his report had applied a Retention Factor of 0.79361 (a difference of 0.0209 from the actual one used in the funding allocation for AY20/21) to produce an offset of £107,073 against that additional funding. The third component of his calculation, which, in his report accounted for net additional funding of £116,895 becoming an overall reduction in MEBITDA, involves the inclusion of annualised GCSE-related costs. His figure of £409,816 for those costs was based upon a breakdown of actual monthly costs of delivering GCSEs between February and September 2024 with some downward adjustment to reflect the fact that those actual costs included provision of functional skills in another business. Mr Osborne said that the existence in October 2024 of 30 vacancies for GCSE teaching staff might mean he had underestimated the level of GCSE-related costs.

576. In contrast to LCG's pleaded claim of a Warranty False Value MEBITDA of £1,323,320, the figure in Mr Osborne's report was £1,568,419. However, this figure was revised in the experts' joint statement. In the joint statement, Mr Osborne identified an alternative figure of £1,726,820. This was based upon his adoption of different Retention Factors for the planned hours and Condition of Funding breaches (leading to a lower funding impact for the former and a greater impact for the latter) and recognition that there would be an increase in funding (of £297,608) from delivering GCSEs. He made it clear that his use of specific Retention Factors –

combined to produce a weighted average for a "*counterfactual retention factor*" - was dependent upon the court accepting the factual evidence on such points as the knock-on effect upon the Retention Factor of putting learners on the Core Aim of a Diploma. He accepted in cross-examination (by reference to Mr Williams's third witness statement) that if the court were to find, in relation to the in-year adjustments made in AY21/22, that the main reason for a reduction in the Retention Factor was students leaving early without completing their Core Aim then that would affect his analysis.

577. Mr Osborne's estimation of the cost of delivering GCSEs remained the same in the joint statement.

578. Mr Osborne's conclusions on the Warranty False Value MEBITDA were shown in the following table in the joint statement.

Adjusted maintainable EBITDA

Description	Amount, £
Maintainable EBITDA	2,571,000
Adjustments to Maintainable EBITDA:	
Planned Hours Over-Claim	
Impact on funding	(586,533)
Incremental costs and savings	0
Condition of Funding Over-Claim	
Impact on funding	152,169
Incremental costs and savings	(409,816)
Total adjustments	(844,180)
Adjusted Maintainable EBITDA	**1,726,820**

579. In his approach to the MEBITDA multiplier Mr Osborne said in his report that LCG's pleaded case was consistent with the multiples adopted in relation to the acquisitions of White Rose and Acorn "*and that these appear, on their face, to be comparable companies*."

580. He acknowledged that there would have been an element of negotiation over a reduced multiplier (I refer below to what was described in one case as "*the haggle factor*") but observed that he had seen no evidence of the defendants' likely attitude to this.

581. The impact of Mr Osborne's Warranty False Value MEBITDA upon the Company's enterprise value (to which an appropriate figure for net cash would be added to reach the Warranty False Value), according to the multiplier applied to it, was illustrated by the following table in the joint statement.

Enterprise value of the company

Description	Amount,£	Amount,£	Amount,£	Amount,£	Amount,£	Amount, £
Maintainable EBITDA	1,726,820	1,726,820	1,726,820	1,726,820	1,726,820	1,726,820
EV/EBITDA multiple	3.0x	3.5x	4.0x	4.5x	5.0x	5.5x
Enterprise Value	**5,180,459**	**6,043,869**	**6,907,279**	**7,770,689**	**8,634,099**	**9,497,509**

582. Another aspect of Mr Osborne's general rejection of the use of hindsight (and, with it, him not adopting the approach in the particulars of claim of deducting the Over-Claimed Sum from the EBITDA) was reflected in his inclusion of a third component in his Warranty False Value. This was by reference to the one-off adjustments that the Company would have needed to have made in AY20/21 if the planned hours and

Condition of Funding issues had been known about at the date of the SPA. As these were one-off, he did not include them in a revised MEBITDA but instead said their non-recurring nature would mean that they would have impacted the net cash element of the Warranty True Value.

583. In fact, because he did not know how a purchaser would have contemporaneously sought to estimate the financial impact of the adjustments, he adopted the amounts later fixed for the Planned Hours Over-Claim and the Condition of Funding Over-Claim. What he did not include, however, was the Unfunded Learner Value, the setting-off of which accounts for the difference between the Over-Claimed Sum and the amount of the Clawback. He said it could not be foreseen that a "*non-standard agreement*" would have been reached with ESFA, which permitted its deduction, when the Funding Rules did not provide for that. In his report, his one-off adjustment to the net cash element of the Warranty True Value was of the same amount as the Over-Claimed Sum. This produced an adjusted net cash sum of £1,415,544 (i.e. the sum of £2,663,008 less £1,247,464).

584. With the adjustment to the net cash sum, the revised figures in the joint statement showed Mr Osborne's view upon the difference between the Warranty True Value and the Warranty False Value to be in the range £6,596,003 and £10,913,053, depending upon the relevant enterprise value indicated by the table at paragraph 581 above. This resulted in a damages claim of between £5,899,955 and £10,217,005 when compared with the Warranty True Value. The higher figure was just in excess of LCG's pleaded figure.

Mr Pearson

585. Mr Gavin Pearson FCA is Head of the Disputes, Investigations and Valuations Team at Quantum Advisory Limited.

586. On behalf of the defendants Mr Pearson gave evidence to the effect that LCG's approach to the quantification of damages was flawed. He said, even if a reduction to the Warranty False Value MEBITDA was justified, there was no basis for a further adjustment to the multiplier. Any such adjustment amounted to double-counting of a reduction in profitability when there was no basis for concluding the issues resulting from the 2022 Audit would persist in future years. LCG's pleaded deduction of the Over-Claimed Sum from the Warranty True Value MEBITDA already accounted for the worst-case scenario recurring on a perpetual basis. If any deduction was appropriate, it should be the amount of the Clawback. As regards the multiplier, to apply a discount to the multiple of nearly 50%, as LCG suggested, involved the suggestion that either the ESFA income stream had little if any value (he said that a multiple of 3 applied only to the ESFA funding equated in reality to a multiple of 0.25) or that the whole of the business (including its Welsh funding to which the breaches of warranty were irrelevant) was significantly impaired. He had not seen any evidence to support either proposition.

587. Mr Pearson identified four "*somewhat comparable*" transactions where EBITDA multipliers ranging from 4.5 to 7.6 had been adopted. He considered them to be somewhat comparable because they received funding from ESFA, had military links

and, like the Company's, their primary educational programmes would not necessarily be considered to be traditional academia.

588. Mr Pearson's view was that there would be no perception between the parties to the hypothetical negotiation of a heightened risk in relation to future earnings after FY21.

589. Indeed, not only was there no reason to assume a fundamental worsening in the Company's prospects but the Company's practices which led to the Planned Hours Over-Claim and the Condition of Funding Over-Claim were such that a reasonable seller and a reasonable purchaser might have considered the 9+3 EBITDA to have been greater than £2.571m. He based this view on the funding that the Company might have received under a proper approach to nested qualifications (as illustrated by the recognition of Unfunded Learner Value in the calculation of the Clawback) and by students affected by Condition of Funding being put on band 5 funding. So far as those students were concerned, this was based upon a calculation of the provision of GCSEs of £629 per student (by reference to the costs implied by the Company's management accounts for FY18) and an estimated additional profit of £103,000 p.a.. LCG, adopting Mr Osborne's view, said that the FY18 cost of providing GCSEs did not accurately reflect the likely cost of reinstating GCSE provision after the SPA.

590. This approach led Mr Pearson to calculate a Warranty False Value MEBITDA of £2,663,437 in his report. That figure was revised by Mr Pearson in the experts' joint statement to £2,664,608 to reflect his agreement with Mr Osborne upon increased funding of £297,608 through delivering GCSEs.

591. Mr Pearson therefore said that it would instead be reasonable for the court to conclude that the breaches of warranty had resulted in no loss because the fundamental strengths of the Company's business did not require the MEBITDA to be re-visited. The value of the Warranty False Value MEBITDA was equal to or even greater than the Warranty True Value MEBITDA. He relied upon the fact that its acquisition gave LCG access to a new source of revenues through Welsh funding and to new recruitment streams, led to revenue and cost synergies and, with the addition of the Company's numerous military academies to LCG's existing four, put LCG in the position of being the largest military training provider in England and Wales. He relied upon the factual evidence which indicated that LCG had recognised that the price under the SPA was lower than what would have to have been paid in an auction.

592. It was by reference to such matters, specific to LCG, that I infer the defendants inclined towards Mr Osborne's Equitable Value approach to the hypothetical negotiation between the parties.

593. Part of Mr Pearson's reasoning was that, with knowledge of the breaches of warranty, the parties could have broadened the scope of the Funding Indemnity to cover a 6-year period rather than the 3 years to which it in fact applied.

594. In support of his view that LCG had suffered no loss Mr Pearson also relied upon the accounts of Boyd Topco (LCG's parent company) for the years ended 31 January 2022, 31 January 2023 and 31 January 2024. He did so to highlight that Boyd Topco recognised goodwill of £15.153m (and net assets of £3.597) on LCG's acquisition of the Company. He referred to the accounts for the later years to show that no material impairment charge had been made against the investment in the Company over and

above the ordinary and expected amortisation of goodwill. FRS 102 requires goodwill to be recognised at cost less accumulated amortisation and accumulated impairment losses. As impairment losses are defined as including those where "*the carrying amount of an asset exceeds .... its recoverable amount*", Mr Pearson said the accounting treatment appeared to show that LCG's parent company considers that the Company will generate future economic benefits at least equal to the Warranty True Value.

595. Mr Pearson recognised that Boyd Topco's accounts for the year ended 31 January 2023 state, at disclosure note 27, as follows:

> "Contingent asset
>
> There is an outstanding warranty claim in relation to a previous acquisition. This creates a contingent assets [sic] but it is not currently possible to accurately estimate the outcome or quantum of the claim."

596. The definition of a 'contingent asset' in FRS 102 ("*A possible asset that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity*") led Mr Pearson to conclude, on the assumption that note 27 relates to the present claim, that Boyd Topco (and therefore LCG) apparently consider this claim to be a contingent asset that represents an addition to the (unimpaired) value of the investment in the Company. He said: "This would mean that they consider the warranty claim not to be an amount to recover a loss on their investment, but rather, an additional asset/source of income entirely."

597. Mr Pearson recognised that, as an alternative to the no loss scenario, the court might conclude that there had been a small increase in the risk factors affecting the Company. A table in his report illustrated the impact of applying a Warranty False Value multiplier of 5 (as well as the same 5.5 multiplier used for the Warranty True Value) to his own MEBITDA of £2.663m. This produced an enterprise value of £13,317,184. When applied to the lower Warranty True Value MEBITDA, a multiplier of 5 produced an enterprise value of £12.855m. In the joint statement addressed next, Mr Pearson said "the minimum acceptable EV/EBITDA multiple in a Warranty False Scenario would have been 5.0x".

598. His summary of the alternative position was:

> "Applying this methodology, I calculate that the Warranty False Value should be in the **range of £12.855m to £14.150m**, rather than the **£3.971m** set out in the Particulars of Claim. This would reduce the Claim value from **£10.180m** as per the Particulars of Claim, to **between £nil and £1.295m**."

<u>Agreement between the experts</u>

599. The experts agreed that, when considering the MEBITDA as at the date of the SPA, it is necessary to consider the future impact that LCG (or the hypothetical reasonable

purchaser) and the defendants (or the hypothetical reasonable seller) would have anticipated at the point of purchase, that ensuring future compliance with the Funding Rules would have been likely to have on the Company's income, costs and profit in future years.

600. They agreed the additional funding the Company could have claimed in relation to GCSE provision (and 348 students affected by the Condition of Funding Over-Claim) was £297,608. As noted above, they did not agree upon the cost that would be involved in securing it. Mr Pearson said Mr Osborne's reliance upon the actual Retention Factor and GCSE costs in academic years after AY20/21 fell foul of the general prohibition upon the use of hindsight. Mr Osborne said Mr Pearson's reliance upon historic GCSE costs was not appropriate when those costs would not necessarily be representative of the costs of contemporaneously reinstating a GCSE provision at a later date.

601. The experts also agreed that, so far as any adjustment to the EBITDA multiplier was concerned, the general approach to quantifying the Warranty False Value involved consideration of any foreseeable changes referable to the perceived future prospects and risks of the Company that LCG (or a hypothetical reasonable purchaser) and the defendants (or a hypothetical reasonable seller) would have considered beyond any increased revenue and/or costs relevant to any adjustment of the EBITDA figure. They agreed that it may be appropriate to decrease the multiplier to reflect some degree of uncertainty over future ESFA funding and general uncertainty in regard to the business.

602. Mr Osborne and Mr Pearson agreed that neither had identified any *directly* comparable company for the purpose of identifying the appropriate Warranty False Value multiple. This agreement extends to White Rose and Acorn, though Mr Osborne said they were comparable to the extent their businesses provide vocational training and are fully funded by the Government. It also includes the four companies identified by Mr Pearson.

603. The experts agreed that the factual evidence of the "*synergistic values*" of the transaction and the Company's prominent position within the market might mean that (on the Equitable Value approach) it could command more than the 3 to 4 multiple suggested by Mrs McLeish's comparison with White Rose and Acorn.

604. They pointed to the Company being the seventh largest ESFA-funded independent training provider, being the UK's largest military preparation college, having memoranda of understanding with the three branches of the UK's armed forces and the costs savings achieved through serving soldiers being seconded to it as relevant synergies as strengths. Their joint statement said:

> "The Experts agree that the above factors would reasonably have been viewed positively by a hypothetical reasonable purchaser (and specifically [LCG]) as at the Transaction Date with [the Company] being well established and a leader in the military preparation college sector, with the close links to the military likely being viewed as a significant intangible asset of [the Company], which could aid in setting [the Company] apart from its competitors."

They also agreed that the proportion of the Company's revenue derived from ESFA funding, compared with other sources, could be relevant to an adjustment of the multiplier.

Analysis and Conclusions on Issue 8

The Pleaded Case

605. I address first the points made on behalf of the defendants in relation to LCG's pleaded case and the defendants' approach to the exercise summarised in *Equitix*.

606. Firstly, I should note my conclusion that the present case is not close to the situation in *Senate Electrical* upon which they rely. In that case the plaintiff failed in its claim to recover damages calculated by reference to a price/earnings ratio when the purchase price (from which the plaintiff's suggested starting ratio was derived) was in fact made up of a valuation of the company's net assets and goodwill. The net assets element made up over 75% of the purchase price of £90m and the plaintiff's claim, made by reference to an overstatement of profit by £1.7m (or 17%) in breach of warranty, would have resulted in what Stuart-Smith LJ described as an "*absurd conclusion*" where the suggested damages would equate to 80% of the goodwill figure of £20m. In the present case, by contrast, LCG's calculation of damages by reference to the company's enterprise value is entirely consistent with how the Company was valued under the SPA.

607. Neither is the present case close to *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 to which Mr Booth KC referred to illustrate the kind of situation where the court may properly conclude that the damages for which the claimant seeks judgment has not been adequately formulated in its pleaded case. The reason why the buyer of goods failed in its claim for the purchase price in that case was because it had alleged that the goods were valueless when it only succeeded at trial in showing that they were slightly defective. Devlin J held that that was an alternative claim, which should have been pleaded in the alternative, because the basis of that claim was different.

608. In my judgment the defendants' interpretation of LCG's pleaded case (summarised in their written closing as "*Headline 8 – the ambit of C's pleaded case – 20/21 errors only*") is a strained and unjustified one. I have quoted the relevant parts of the pleading in paragraphs 527 and 528 above. In suggesting that LCG's case on damages is confined to the Over-Claimed Sum and the funding breaches in AY20/21, with them correctly observing there are no pleaded allegations of breach in earlier academic years, the defendants overlook two material points.

609. The first is that the case for an adjustment of the multiplicand (i.e. a downward adjustment of the EBITDA figure) is necessarily based upon a forward-looking assessment of the Company's *maintainable* earnings: the 'M' in 'MEBITDA'. The defendants are correct to say that LCG does not alleged breaches of the Funding Rules prior to AY20/21. However, in my judgment LCG's case is not deficient in impugning the "maintainability" of the Warranty True Value EBITDA only by

reference to the Over-Claimed Sum arising out of breaches in AY20/21. Whether that precise sum is the correct deduction is obviously a separate question.

610. To quote from the Company's counter-offer to LCG of 8 June 2021, which was the basis of the price agreed under the SPA, "..... *as regards the initial consideration payable at completion, the minimum value acceptable is 5.5x the FY21 MEBITDA of £2.571m i.e. £14.15 million*." The FY21 ended on 31 July 2021, hence the use of the 9+3 EBITDA down to that date. That counter-offer also said "[*t]he forecast FY22 maintainable EBITDA of LCG* [sic] *is £2.804 million*." LCG's pleaded case does involve an element of hindsight in relying upon the Over-Claimed Sum which only came to be quantified after the date of the SPA. However, the subject matter of the quantification is breaches of the Funding Regulations which occurred in the one academic year (AY20/21) that corresponded to the only financial year (FY21) to which the 9+3 EBITDA related. There is a direct correlation between the Over-Claimed Sum and the Warranty True Value MEBITDA which, LCG says, has become heavily qualified by it.

611. Although the Over-Claimed Sum only came to be quantified in FY22, the forecasted EBITDA for that next financial year was not used as the basis for the Warranty True Value. Neither does LCG need to impugn the 9+3 EBITDA by reference to alleged or suspected breaches of the Funding Regulations which took place prior to AY20/21 (and FY21). Indeed, because of the direct correlation, I think there would be conceptual difficulties in seeking to impugn the Warranty True Value by reference to breaches which occurred earlier than FY21. In my judgment, it is therefore logical to approach the question of whether the adopted 9+3 EBITDA was a maintainable one by focussing upon the impact of the subsequently quantified Over-Claimed Sum.

612. The second point to be made about the defendants' response to LCG's pleaded case is that (save perhaps on one unduly literal reading of paragraph 52(e) of the particulars of claim) it is incorrect to say that the suggested change to the multiplier is based solely upon the breaches in AY20/21 and the Over-Claimed Sum. In addition to the impact of the Over-Claimed Sum on the Company's present profitability, the sub-paragraph identifies the known issues with the ESFA funding, the increased possibility of further funding issues coming to light and the overall view of the 'quality' of the Company, in the eyes of the hypothetical purchaser, as all "*leading to a more cautious view being taken of the ability of the Company to continue to generate a given level of revenue in the future*."

613. LCG's pleaded reliance upon the parties' perception of "*the increased possibility of further funding issues coming to light*" must relate to potential issues which pre-date the SPA and (given the knowledge of the breaches in AY20/21 which is separately attributed to the defendants) which pre-date AY20/21. It is a matter which was addressed in the evidence of Mrs McLeish when, addressing the later discussions with RSM and ESFA, she explained her concern that the Company's exposure should be confined to the financial implications of the 2022 Audit and not go back further in time.

614. The decisions in *Senate Electrical* and *Jacobs v Chalcot* confirm that it would be wrong and unfair for me to decide that the MEBITDA figure for the purposes of the Warranty False Value should be qualified by a specific amount which reflects presumed breach of the Funding Rules prior to AY20/21. LCG has not pleaded any

prior breaches and not sought to put a value on them. However, the hypothetical perception of wider funding issues is invoked in relation to the qualitative element of that value (paragraph 52(e) of the particulars of claim) and not the quantitative one (paragraph 52(d)). Those decisions do not preclude consideration of LCG's case in relation to a revised multiplier.

615. LCG's pleaded case in support of the suggested adjustments to the multiplicand and the multiplier, respectively, is reflected in Mr Osborne's and Mr Pearson's agreement upon the general approach to quantifying the Warranty False Value. In their joint statement dated 7 February 2025 they said:

> "The experts agree that the general approach to quantifying the Warranty False Value in this matter, is to adjust the Warranty True Value for:
>
> (i) any incremental revenue and/or costs that the Claimant (or a hypothetical reasonable purchaser) and the Defendants (or a hypothetical reasonable seller) would have considered that the Company would have generated (or lost) and/or incurred (or saved) in ensuring future compliance with ESFA rules (had they known of the ESFA Breaches at the Valuation Date), which would alter Maintainable EBITDA; and
>
> (ii) any other foreseeable changes with regards to the perceived future prospects and risks of the Company, that the Claimant (or a hypothetical reasonable purchaser) and the Defendants (or a hypothetical reasonable seller) would have considered, had the Parties been aware of the ESFA Breaches at the Valuation Date, which may affect the EV/EBITDA multiple."

616. In his testimony Mr Osborne said that, whereas an alteration to the EBITDA was "a more mechanical calculation", any potential adjustment to the multiplier would reflect "non-financial aspects" which might feature as negotiating tools between the parties. Mr Pearson said "….the multiplier effectively sums up the expected rewards and risks from owning the company. So obviously a higher multiple represents often high growth prospects. A lower one might be lower growth or higher risks." Again, this evidence shows that (whether or not made out on the evidence) LCG's pleaded case of a purchaser taking a more cautious view of the Company's ability to maintain revenue at a certain level is clear, comprehensible and not as rigidly confined as the defendants suggest.

617. As already noted, the particulars of claim held out the prospect that they might be amended in the light of the factual and expert evidence later relied upon by LCG ("*to support these matters*") and no such amendment has been made. It is the case that the "*matters*" pleaded include the quantification of a Warranty False Value MEBITDA by reference to the deduction of the Over-Claimed Sum and that Mr Osborne has adopted a different approach to the figures. Nevertheless, when LCG's approach to damages has throughout remained the pleaded one directed to the maintainable EBITDA and a revised multiplier, it is in my judgment unrealistic for the defendants to suggest that the pleaded figure must at all times track the expert evidence (specifically the expert evidence of Mr Osborne) if the court is to be able to act on it.

618. That suggestion, which involves the unconventional approach of a pleading being necessary to support the expert evidence, rather than vice versa, might well require

amendment in the light of various stages of the expert evidence (or the pleading party's side of it): service of the report, the experts' joint statement and then the expert giving evidence at trial. As Mr Booth KC observed, it cannot be right in principle that if an expert were to accept in cross-examination that a modest element of the claimant's substantial claim was not properly claimable then, absent a (presumably contentious) application to amend in the light of that evidence, none of the claim would be recoverable. That would be to impose an expectation of "minute accuracy" in the pleaded case which Devlin J said in *Anglo Cyprian*, at 875f-h, was not a requirement over and above the need to plead "what measure of damage is being relied upon".

619. The present case is much closer to Mr Booth's extreme example than the situation addressed in *Senate Electrical* and *Anglo Cyprian*. This is obvious from the defendants' own pleaded case that, if the Warranty False Value MEBITDA is to be adjusted, then it should be reference to the Clawback rather than the Over-Claimed Sum. The defendants have engaged through their own expert evidence, cross-examination of the expert and their closing submissions with Mr Osborne's alternative approach to the revised MEBITDA.

620. In those circumstances the more realistic argument for the defendants is to say that LCG's case has not been made good rather than it has not been made at all. It is one thing to submit that the court should not act on his evidence (which is their submission in relation to the revised multiplier where there is no scope for such a pleading point) but I reject a submission which amounts to saying his evidence on that point cannot properly be considered at all. The fact that Mr Osborne applies different figures to the same methodology as that adopted in the pleaded case (and has been challenged on his figures) shows that the present case does not come close to the situation in *Senate Electrical* or *Jacobs v Chalcot*.

Negotiation Dynamics

621. In the light of the position adopted by both parties at the conclusion of the trial I have decided it is appropriate to adopt the Equitable Value basis in the determination of the Warranty False Value. The evidence of Mr Osborne and Mr Pearson in fact revealed there to be not much between them concerning the factors to be taken into account as to whether that or the Market Value basis was to be adopted.

622. Nevertheless, it is clear from Mrs McLeish's and Mr Higgins's evidence that LCG recognised the growth synergies in the transaction (if not any significant cost synergies) and the experts were agreed that LCG, in particular, would have had regard to the "synergistic values" that the particular strengths of the Company's business brought to the transaction. LCG's indicative offer to buy dated 2 June 2021 (contained in Mr Higgins's email) said "*we are confident that* [the] *joining of the two business will create great opportunities* [for] *the strong MPCT management team*." In my judgment, adopting the Equitable Value approach pays proper regard to the overriding compensatory principle recognised in *The Golden Victory*.

623. The exercise of assessing the outcome of a hypothetical negotiation obviously does not involve any second-guessing of the Warranty True Value which the experts

agreed reflected both an Equitable Value and Market Value based assessment of the Company's presumed enterprise value. The parties and the experts agree that the £16,813,008 paid under the SPA is the Warranty True Value.

624. I say that because many of the points made by the defendants, though presented with a much greater degree of sophistication, might be said to smack of an argument that LCG had acquired the Company at a good price and that the strengths of its business outweighed the weaknesses later revealed by the 2022 Audit. This was the broad thrust of Mr Pearson's evidence, as is highlighted by his suggestion that Boyd Topco's accounts indicated the present claim (made under warranties "purchased" by LCG at that price) constituted an asset additional to one whose value was not impaired.

625. The defendants' counsel in their submissions said that, irrespective of any alleged breach of warranty, LCG got a very good deal and made a substantial profit from the acquisition. Picking up on a turn of phrase used by me during the trial, they said the Company was a honey pot not a hornets' nest. Some of the questions put by Mr Sims KC to Mrs McLeish, Mr Higgins and Mr Osborne focused upon the possibility that (if the Company had been offered for sale in a private equity auction in late 2021) another purchaser might have agreed to pay a price fixed by a higher MEBITDA multiple than 5.5. Mrs McLeish responded by saying that (as a trade purchaser) LCG would not have competed in a private equity auction. Mr Higgins acknowledged there was a risk the Company might be sold to a third party, so that it was important LCG benefited from a period of exclusivity once terms had been agreed in principle. Mr Osborne said: "I don't know contemporaneously what a potential purchaser would or would not have paid for the business, especially in the light of the ESFA breaches."

626. Irrespective of the price which another purchaser might have paid by reference to a Warranty False Value, the perceived strengths of the Company's business, which underpinned those submissions, were obviously reflected in the parties' agreement upon the price paid by LCG. In particular, the greater part of that price (£14,150,000) reflected the Company's enterprise value based on a Warranty True Value. Obviously, it is the price actually paid by LCG, rather than some higher price that might have been paid by another purchaser, against which the claim for loss and damage is to be tested by comparison with the Warranty False Value.

627. Points about the attractiveness of the Company to a buyer such as LCG highlight the importance of the court's focus being upon the difference, if any, between the given Warranty True Value and the to-be-determined Warranty False Value.

628. This an important point to bear in mind when considering Mr Pearson's approach which involves his calculation of a Warranty False Value MEBITDA that is *higher* than the Warranty True Value MEBITDA. In his report, he also addressed Mr Lewis's suggested MEBITDA which was higher again. This approach must also be tested by considering what LCG acquired in return for the price paid under the SPA, which I address under the topic of hindsight below. At first sight, it seems counterintuitive to think that a company is more valuable despite the fact that certain warranties, given in support of its suggested value, are unjustified. That is because the suggestion implicitly questions the reliability of the Warranty True Value. There appears to me to be little if any difference between saying, on the one hand, that the

Warranty False Value is higher than the Warranty True Value and, on the other, that the price paid by LCG under the SPA was too low.

629. I make this point about the Warranty True Value being immutable when, in my judgment, most of the strengths of the Company's business highlighted by the defendants cannot be said to have emerged solely as a consequence of the audit-revealed weaknesses triggering the inquiry into the Warranty False Value. With one exception, they are not the flip-side of a coin that would have remained unturned but for the breaches of warranty. Instead, they were upsides of the transaction which LCG acquired at the price of the Warranty True Value and upon which the falsity of the warranties have no bearing. This basic point is also relevant to the question over the use of hindsight which I address below. The three authorities mentioned below on the hindsight question also make it clear that informed allocations of risk and reward already agreed under the terms of the SPA, and not covered by the warranties, cannot be disregarded when it comes to assessing damages. The observations of Newey LJ in *MDW* below, about the numerous contingencies that affect the value of a shareholding over time, are particularly pertinent.

630. Subject to any later deployment of it in effectively mitigating the actual loss caused by the downside created by the breach of warranty, the value of an "asset" (using the term loosely and in a non-accounting sense) or a particular strength of the Company's business, for which LCG has already paid the Warranty True Value price, should not therefore feature in the calculation of damages. They are qualities reflected in the price paid under the SPA and, on that basis, their value belongs to LCG. They are to be credited not debited to LCG in the assessment of any remaining loss as the defendants have already received payment for them. The proviso is that the business's resilience to the financial consequences of the warranty being untrue could be relevant to the Warranty False Value MEBITDA where actual mitigation of lost earnings is relevant.

631. If, however, their value is otherwise introduced into a comparison between the Warranty False Value and the Warranty True Value equation then the result, in my judgment, is an indirect and impermissible second-guessing of the qualitative-based multiplier of 5.5 agreed by the parties to support that price. The general thrust of the defendants' points and perhaps their logical end was that a 5.5 multiplier was favourable to LCG in the calculation of the price under the SPA. But damages cannot be reduced by reference to "credits" that already belong to LCG under the agreed price. The defendants have already received full value for the revenue-generating potential of these other qualities and should not receive it again in the shape of a reduction in damages otherwise payable.

632. As I see it, the exception to the Company's known qualities acquired by LCG is the Unfunded Learner Value in respect of AY20/21 to which I return below in addressing the Warranty False Value (specifically the quantitative adjustment of the Warranty True Value MEBITDA which was based upon the corresponding financial year).

633. In the cases cited to me, only the decision of the Court of Appeal in *Senate Electrical* appears to have involved a situation where the court recognised the case for an appropriate credit against the damages claim. As noted below in relation to hindsight, the court in *Ageas* and *MDW* noted that the outcome in *Senate Electrical* on that point did not involve a projection forward from the transaction date and, therefore, did not

involve any application of hindsight. Instead, it was a case of recognising that the company's overstatement of a rebate reserve in 1989, leading to an understatement of profits, should be set against the overstatement of profits in the later 1990 management accounts which formed the basis of the warranty claim.

634. To the extent that the defendants' wider "honey pot" submissions are said to support the conclusion that there was a Warranty False Value below which the defendants would not have gone in agreeing a price then that too would be at odds with the valuation premise. Whether the basis is Equitable Value (involving two specific and identified parties) or Market Value (involving generic, unidentified market participants) the parties to the hypothetical negotiation are each taken to be "willing": see the IVS, paragraphs 50.1 and 50.2, and *The Hut Group*, at [180], per Blair J.

635. In *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch), at [464], Mann J referred to the "*haggle factor*" to which the court must have regard when assessing what would have happened in a hypothetical negotiation. In a passage which emphasised that the assessment does not therefore simply rest upon the technical approach of experts, he said "[w]hat one has to imagine is a price that a willing buyer would pay to a willing seller." Mann J had regard to likely haggling during the negotiation of price. In an earlier passage, at [405], he said "the purpose of the valuation is to find what a willing purchaser would pay to a willing seller" but observed that "the views of the actual purchaser and of another potential purchaser are not irrelevant" when considering the haggle factor.

636. Nevertheless, I accept LCG's submission that this notional haggling over price cannot be taken to the point where it undermines the concept of treating the hypothetical seller as a *willing* party to the negotiations. As Mr Booth KC submitted, the focus is upon willing parties, not reluctant or petulant ones.

637. Mr Booth KC and Mr Adamyk drew my attention to the decision of the Privy Council in *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 WLR 2370. The case concerned damages assessed by reference to a hypothetical negotiation for the release of a contractual obligation. Lord Walker summed up the position when he said, at [49]:

> "… It is a negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation. Both parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored …"

<u>Hindsight</u>

638. There was a large element of hindsight in most if not all of the points made by the defendants about the Company's strengths and weaknesses in the approach to the Warranty False Value. LCG's witnesses were questioned and submissions were made about how the Company's business had fared *after* the SPA to say the breaches of warranty did not lead to any substantial loss. The ARG/Capita issue and related staff redundancies, unrelated to any breach of warranty, were analysed in some depth and

suggested to present greater problems for the Company in the period after the SPA than any breach of the Key Warranty.

639. Mr Pearson's instructions included a request that he "*consider the events that occurred after the SPA including LCG's financial performance in the 2-3 years following acquisition, the impact (if any) of the overclaimed funding on LCG's maintainable EBITDA in the period post-acquisition and any actions taken by LCG to mitigate their losses*."

640. As noted above, the defendants also said LCG and Mr Osborne had invoked impermissible hindsight when applying the cost of GCSE provision to a revised MEBITDA figure.

641. When considered in the light of the general restriction upon applying hindsight to matters not known about at the transaction date, the decisions in *Ageas*, *The Hut Group* and *MDW* present a significant hurdle to the defendants' general approach. The decisions confirm that, in its assessment of damages, the court should not give credit to the defendants for matters which LCG can be seen to have already paid under the SPA and the financial benefits of which, as explained above, should therefore accrue to LCG in any event.

642. The decision of the Court of Appeal in *MDW* is also clear in stating that, of the many contingencies that operate upon a proper determination of the value of the Company's shares from time-to-time, a post-SPA rise in value which is referable to steps taken by LCG certainly cannot be regarded as a windfall to be offset against the damages assessed as at the date of the SPA.

643. In my judgment, that is consistent with an approach to damages which requires the court to focus instead upon any less positive post-transaction conduct by a buyer (perhaps most obviously a failure to act) that can be said to fall foul of its duty to mitigate. It would be a windfall for the buyer to recover damages for a loss referable to the breach of warranty that could reasonably have been avoided. By the limitation in paragraph 11 of Schedule 5 ('*Duty to Mitigate*') the parties in this case have provided that any such loss should be for LCG's account. On Issue 12, I have found there was no failure by LCG or the Company to mitigate loss. It is otherwise implicit in their overall bargain, and the court can presume it was LCG's motivation for entering into the SPA, that the value of the Company might grow after the date of the SPA through LCG deploying what it has already paid for (see above) to good effect.

644. In *Ageas*, at [38], Popplewell J rejected the seller's argument that, in assessing damages for a breach of a warranty about the fairness and accuracy of the company's accounts, the court should take account of the fact that the incidence of bad debts was better than had been anticipated at the date of acquisition (and better still than what would have been shown in properly prepared accounts). The judge said it was inherent in the bargain between the parties, and the allocation of risk between them, that the buyer should receive the benefit of the actual position as it turned out to be.

645. In *The Hut Group*, Blair J followed *Ageas* in addressing the point that the later recovery of the value of the shares sold in breach of warranty should not have any effect on quantum assessed as at the date of breach. He said, at [185], "*the buyer is entitled to the benefit of the upside, having taken the benefit of the downside*."

646. In *MDW*, at [36]-[43], Newey LJ referred on this point to *Ageas*, *The Hut Group* and two decisions of the Court of Appeal which did not concern share sales but instead claims in deceit. The damages for deceit were to be determined as at the date the claimant acquired the property which was the subject matter of the misrepresentation and for which, as a result of the fraudulent misrepresentation as to its quality, it had overpaid. The fact that the risks attached to the property in its true state (as at acquisition) did not later materialise was not a reason to discount or deny the damages claim by reference to the overriding compensatory principle of damages recognised in *The Golden Victory*. It was by reference to those Court of Appeal decisions that Newey LJ said there was a strong case for saying that similar arguments in the share sale context ought to be not just "*rare*" but perhaps impermissible.

647. The decisions in *Ageas, The Hut Group* and *MDW* therefore reinforce the clear limitations upon bringing hindsight to the comparison of the Warranty True Value and the Warranty False Value as at the transaction date.

648. The experts agree that the Warranty True Value is the £16,831,008 paid by LCG. Mr Osborne's answer quoted in paragraph 625 above illustrates why consideration of the attractions which the Company offered to the wider market can only be relevant to the Warranty False Value. That value must be viewed through the lens of the hypothetical willing seller and buyer who, as at that date, are reasonably informed about the nature and characteristics of the Company.

649. I have mentioned above in general terms some of the Company's attributes and strengths (highlighted by the defendants) that should not influence the Warranty True Value and which, applying those three decisions, also should not influence the Warranty False Value. Reliance upon them involves using "hindsight" to re-adjust the bargain made by the parties in terms of their allocation of risks and benefits of aspects of the Company's business lying outside the scope of the warranties.

650. In my judgment, the Company's ability to reintroduce maths and English GCSE provision (albeit at the financial cost of reinstating them) was an attribute of its business which falls on the *Ageas/MDW* side of the line rather than the *Senate Electrical* one. Whether or not the Company would have done so but for the finding behind the Condition of Funding Over-Claim, it could have re-introduced GCSEs after the SPA irrespective of the Condition of Funding breach identified by the 2022 Audit. Similarly, with each academic year involving a separate funding contract and a new cohort of learners (and assuming no material regulatory changes in relation to planned hours or Condition of Funding) the Company's ability to benefit from future ESFA funding, through proper compliance with the Funding Rules in relation to each learner on its books, was one which arose year-on-year. Its ongoing (and Funding Rules-compliant) revenue-generating capacity is no different than what the defendants, by Warranty B5.2.2, verified the Company had deployed in the past; though, because that was untrue, its existing revenue was misstated.

651. Alongside business strengths, the same applies in my judgment to any known *weaknesses* in the Company's business as at the date of the SPA. Any that were known about are to be taken to have been priced into the Warranty True Value and, as they were known about and therefore are not the subject of a warranty claim, neither should they impact upon the Warranty False Value.

652. If the defendants are right to say that LCG has suffered no loss, or no loss beyond the value of the Funding Indemnity, then that must be on the basis that there is no difference between the Warranty False Value and the Warranty True Value despite the emergence of the warranty-related weaknesses. Submissions which imply either that the price paid by LCG might have been less than the Warranty True Value (c.f. reliance upon the profitable "honey pot" acquired by LCG) or, alternatively, that the Warranty True Value should somehow be taken to be lower and closer to the Warranty False Value (c.f. the heavy reliance on the ARG/Capita issue and learner numbers after AY20/21) do not in my judgment assist in making a proper comparison between the two values.

653. The ARG/Capita issue went to the number of learners likely to be on the Company's books in the next and subsequent academic years after AY20/21. The issue was known to LCG the time of the SPA, even though it was then understood to be a "pause" rather than a "stop" upon learner recruitment through Capita. It was not an issue that fell to be dealt with, to use Mr Higgins's phrase, through a re-negotiation of the price (i.e. the Warranty True Value). Mrs McLeish denied that the ARG/Capita issue had a significant effect on learner recruitment because of the new sales and marketing strategy for which plans had been put in place before the date of the SPA.

654. Although it is obviously important to ensure that no part of the cost of implementing this strategy is sought to be included in any recovery under a false warranty (compare the £0.4m noted in the budget prepared later in January 2023) I regard the ARG/Capita Issue to be as irrelevant to the Warranty False Value as it is to the Warranty True Value. The present Issue 8 is instead directed to quantifying the risk under the relevant warranties. That risk concerns the inherent weaknesses in the Company's business which LCG *did not know about* and which, under those warranties, are for the defendants' account.

655. Under the SPA, and its allocation of risk and reward, LCG therefore acquired a Company whose business had attributes and weaknesses to which the warranties identified in Issue 6 above are irrelevant. On the basis of Mr Higgins's answer mentioned above, it could be said that the defendants have already received proper value for the known "weakness" which was the ARG/Capita issue. LCG took on the risk of it and did not seek to re-negotiate a lower price by reference to it. It would therefore be illogical and wrong for the defendant to benefit from that issue again though an adjustment of the "price", in the form of damages. for weaknesses (underwritten by the defendants under Warranty B5.2.2) which LCG was unable to negotiate because it did not know about them at the time. That would be the consequence of accepting the defendants' argument which, if it does not imply a retrospective lowering of the Warranty True Value, must in essence be that the Warranty False Value should somehow be taken to be higher because of the presence the ARG/Capita issue. Yet the ARG/Capita issue falls completely outside the scope of the Warranty False Value. It is extraneous to any false warranty.

656. I have summarised only in broad terms above the defendants' complex argument that some £622,000 of the £1.034m by which the Company under-delivered on its funding of £6.3m for AY21/22 was in fact attributable to the ARG/Capital issue and related redundancies. Their approach involves heavy qualification of the impact of the breach of warranty upon the Warranty False Value by reference to other factors that are said to be underlying causes of the Company's later funding issues. Their in-depth

analysis of the suggested financial impact of decisions and measures later adopted by the Company in AY21/22 runs up against the general rule that hindsight is not a legitimate tool in the assessment of damages as at the date of the SPA. Their argument could be said to chime with application of the first limb of the rule in *Hadley v Baxendale* when the proper approach to the assessment of damages is instead as set out in paragraph 522 above.

657. It is one thing for the court to proceed on the basis that the hypothetical seller and purchaser are reasonably informed about that issue and that they also know about the breach of Warranty B5.2.2. However, to approach the assessment of the Warranty False Value by reference to the kind of detailed *ex post facto* calculation suggested by the defendants is in my judgment misconceived. It is one which has been clearly rejected by the courts.

658. I have already noted what was said in *The Hut Group* about reliance upon a later recovery of the share value through the business prospering being "*insupportable*" (per Blair J). In *MDW*, at [289], HHJ Keyser QC at first instance said: "The argument of Mr Sims and Mr Jagasia (written submissions, paragraph 148) that no discount is appropriate because it is known that no risks to the business have been realised since the SPA is to be rejected, as it relies impermissibly on hindsight." On appeal, the Court of Appeal rejected the renewed argument - based essentially upon the principles of *Bwllfa* and *The Golden Victory* – and said, at [53], "… the fact that, as matters turned out, GDE did not experience reputational damage does not mean that the value of the company was not reduced in the way the Judge found as at the date of the SPA."

659. The argument of Mr Sims KC and Mr Jagasia in the present case is to the effect that the falsity of Warranty B5.2.2 (and the related warranties identified in my finding on Issue 6) presented no risk to the Company's business beyond that identified by the Funding Indemnity and, materially for present purposes, less of a risk than that created by the ARG/Capita issue. Their argument to the effect that the risk under the warranty has been shown to have been marginalised (albeit, perhaps, not completely confounded) by later events is in my judgment no different, at the level of principle, than their argument which was firmly rejected in *MDW*. Indeed, because it introduces into the post-transaction quantification of lost earnings matters which are unrelated to the breach of warranty I regard their argument in this case as even more problematic.

660. In my judgment, the decisions in *Ageas*, *The Hut Group* and *MDW* establish as a matter of principle (and informed contractual allocation of risk and benefit) that the ARG/Capita issue should not be debited to LCG in the calculation of damages. In contrast to the approach under *Hadley v Baxendale*, hindsight is generally too "remote" for a damages award of the present type.

The Warranty False Value MEBITDA

661. I have decided that the Warranty False Value MEBITDA is to be calculated by deducting the amount of the Clawback from the Warranty True Value MEBITDA. This decision rests essentially upon me bringing to the hypothetical negotiation the parties' recognition of the direct correlation between the Clawback and the 9+3

EBITDA, which I have noted above in the section addressing the defendants' pleading points, and their acceptance of its impact upon the Warranty True Value MEBITDA.

662. In my judgment, both steps are justified on the Equitable Value approach, the evidence showing how the Warranty True Value MEBITDA was calculated and the qualification to the hindsight principle explained below.

663. In terms of the evidence, the defendants' counter-offer dated 9 June 2021, to which I have referred in that section, began by noting that LCG's offer of 2 June "*values the Company at an EBITDA multiple of 5.0 times the FY21 maintainable EBITDA of £2.571m as per the financial analysis provided to LCG on 27 May 2021*." That financial analysis explained how, alongside its Welsh funding and the revenue of its subsidiaries, the Company's ESFA funding of £5,937,242 was part of the top-line figure (revenue of £12,227,284 for FY21) from which the MEBITDA of £2.571m was calculated. It also said "*the current average funding per learner for ESFA contract is £4,300*." If the amount of the Clawback had been known to the parties at the date of the SPA then it would have fed directly into the MEBITDA calculation.

664. I consider the deduction of the Clawback (reflecting a known outcome of the warranty breaches) should be preferred over Mr Osborne's approach. Most of his analysis reflects an inability to invoke *any* hindsight in assessing the financial impact of issues known to the hypothetical negotiating parties but where their precise financial impact was unclear as at the date of the SPA. His approach to the revised MEBITDA figure and his separate treatment of the one-off adjustments (to the Net Cash element of the Warranty True Value) perhaps reflect an understanding that the court's approach to such matters is more rigid than the case law supports. It is illustrated by his reliance upon the Risk Spreadsheet for the purposes of his own recalculation of MEBITDA but not the Clawback which, in broad terms, can be said to be the product of that spreadsheet. I refer below to *MDW* again on this particular point about permissible hindsight.

665. However, in my judgment, the Company's ability to deduct the Unfunded Learner Value for AY20/21 against the Over-Claimed Sum should be recognised when fixing the relevant EBITDA figure for the Warranty False Value.

666. Mr Osborne's position is that, because of the cap on in-year recovery for unfunded learning, the parties to the hypothetical negotiation in October 2021 would have put no value by the Unfunded Learner Value. In my judgment, Mr Osborne's approach is too rigid an application of a "no-hindsight" rule. As explained below, it is permissible to consider the actual outcome of events which had occurred prior to the date of the SPA. As explained above, the Unfunded Learner Value arose out of matters in AY20/21, not subsequently, and can be said to reflect a flip-side of the breach of Warranty B5.2.2.

667. I have also reflected upon Mr Osborne's position that the Unfunded Learner Value is part of a one-off calculation which, he says, does not go to the Company's enterprise value (through an adjustment to its maintainable earnings) but, instead, impacts upon the Net Cash element of the Warranty True Value. This is linked to his point about the uncertainty over ESFA recognising it in the calculation of the Clawback.

668. I am mindful that recognising the positive value of £0.42m in the calculation of the Warranty False MEBITDA could be said to involve giving the defendants undue credit for something that only related to AY20/21 and was not "maintainable". Against that, Mr Pearson's point was that both the Over-Claimed Amount and the lesser amount of the Clawback were, by their nature, non-recurring amounts and it would be wrong to award LCG damages by reference to a reduction in earnings relating to AY20/21 which cannot necessarily be assumed to be representative of the Company's future earnings (i.e. the true level of its *maintainable* earnings). He said that any uncertainty over the MEBITDA as a result of such matters would be relevant to the Warranty False Value multiplier.

669. A proper balance between these competing considerations is reached by recognising the direct impact of the known Clawback upon the 9+3 EBITDA that was used as a proxy for Company's maintainable earnings and separately considering future uncertainties when addressing the Warranty False Value multiplier. Uncertainties that were not resolved by agreement upon the Clawback - such as the knock-on effect upon the Retention Factor, the cost of reinstating GCSEs in years after AY20/21 and whether the Unfunded Learner Value for AY20/21 reflected a longer term 'positive' - go to the Warranty False Value multiplier rather than a revised MEBITDA.

670. In my judgment, deducting the Clawback to reach the Warranty False Value MEBITDA does not fall foul of the hindsight principle addressed above. It is known that the Unfunded Learner Value for AY20/21 operated to reduce the Clawback to £783,325. It was only quantified after the date of the SPA and paid by way of funding offsets in AY22/23 but the basis of it was over-delivery in an academic year which matched the period of the 9+3 EBITDA. It was directly related to the Planned Hours Over-Claim (as ESFA recognised by agreeing to its deduction) and was the basis on which Mr Lewis said he believed the Company was being underfunded for the student hours provided. The position is therefore similar to that in *Senate Electrical* so far as proper recognition of what might be described as an accrued credit against the warranty claim is concerned.

671. The quantitative adjustment to the Warranty False Value MEBITDA by reference to the amount of the Clawback, rather than the Over-Claimed Sum, is in my judgment consistent with the decisions in *Ageas*, *The Hut Group*, *Arani* and *MDW*.

672. I say that even though Mr Osborne is strictly correct in observing that the Company's ability to negotiate the lower Clawback by reference to the Unfunded Learner Value cannot be described as a known contingency as at the date of the SPA. Applying *Arani*, the hypothetical buyer would be taken to have been aware of the relevant cap under the Funding Regulations, by reference to which the recovery of Unfunded Learner Value above that cap is generally precluded. On that basis, it could be said the hypothetical negotiating parties would not have approached matters with anything less than a deduction of the higher Over-Claimed Sum in mind.

673. Nevertheless, a cross-check for consistency with the claim later made by LCG points to an adjustment of the MEBITDA by reference to the lower Clawback as being the correct one. On this aspect of the Warranty False Value that result is consistent with the principle in *The Golden Victory*. Importantly, it is also consistent with my decision on Issue 12. It is in large part *because* the Company's post-SPA efforts reduced the Over-Claimed Sum by what was otherwise £0.42m of Unfunded Learner

Value that LCG has succeeded on Issue 12. To put it another way, it would be odd and, I think, unprincipled for the court to conclude that loss has been successfully mitigated, by reference to matters which occurred within the relevant financial year adopted for fixing the Warranty True Value, but to then ignore that mitigation when calculating damages because it is hidebound by the need to assess them as at the date of SPA.

674. In *MDW*, at [49(vi)], Newey LJ said there is no bar on using events subsequent to the date of assessment to cast light on events which had happened by that date. He went on to say:

> "… there was, as I see it, no inconsistency between the Judge's use of post-SPA evidence when determining the multiplicand and his refusal to take into account post-SPA events when considering whether the multiplier should be discounted. The former involved using matters subsequent to the date of assessment to cast light on events which had happened earlier, which is legitimate."

675. The events which gave rise to the Company's over-delivery (and the Unfunded Learner Value which was part of it) had happened earlier than the SPA. They gave rise to an accrued credit, though the extent to which it could be deployed in negotiations with ESFA, in mitigating the funding clawback, remained to be determined. The authorities show it is appropriate to act upon their actual impact, as later agreed with ESFA, when considering LCG's suggested revision of the MEBITDA multiple.

676. That is the approach adopted in *Senate Electrical* in relation to the accrued credit arising out of the previous understatement of profits. I have briefly explained above the wider aspects of the claim in that case which led the Court of Appeal to observe that "*the assessment of damages is subjective in the sense that the loss is loss sustained by the actual plaintiff not some hypothetical plaintiff*." As noted in *Ageas* and *MDW*, the decision in that case did not involve the need to "*take into account hindsight to arrive at the actual figures*." However, the application of hindsight in the quantification of the Clawback, levied by reference to the breaches of warranty assumed to have been known about, is shown by *MDW* to be legitimate.

677. For those reasons, I find that the Warranty False Value MEBITDA is £1,787,675 (i.e. £2,571,000 reduced by £783,325)

The Warranty False Value Multiplier

678. LCG's pleaded case contends for a reduction in the multiplier from 5.5 to 3 in determining the Warranty False Value.

679. When considering this element of the valuation it is important to note that the court is focussing only upon the different price that the hypothetical parties might have agreed under the SPA. In my judgment it is not legitimate to address the financial risk to the Company's business created by the breaches of warranty through a notional change to

other terms of the SPA. I mention that because I do not accept Mr Pearson's point that the (presumed to be known) risk could have been accommodated through a Funding Indemnity of increased temporal scope which would undermine the case for concluding the Company's earning potential had been damaged. On that approach, the court would probably have to treat the only non-variable aspects of the transaction as being its date, subject matter, the price paid (unless influenced by the giving of a more extensive indemnity) and the warranties which are relevant to Issue 6. That is not the correct approach when Issue 8 is directed to establishing the difference in price, if any, that would have been paid if those warranties were known to be false but the terms of the SPA otherwise stayed the same.

680. I am mindful of the leverage which any adjustment to the multiplier brings to the quantification of a damages claim. As Blair J said in *The Hut Group*, at [167], the multiple is important on quantum because "*it invests relatively small adjustments with value.*" However, because the defendants' reference to the risk of "double-counting" begs the question to which it is held out as a preclusive response, I think it is probably better to say that the lever should not be used or used beyond the point where the result would offend the overriding compensatory principle of damages and monetise for LCG a suggested loss in the value of an asset (the Company) which has not been suffered.

681. In *The Hut Group* the court preferred the evidence of the defendant's expert and found that the evidence of the claimant's expert (who had initially suggested a reduction of the multiplier of 19.7 down to 8, later revised to 9.89) was premised upon an assumption of a stable gross margin with a sustained high growth in revenues when "this was little more than assertion, and the reference to "stable gross margin" was unexplained." Blair J had noted (at [57]) that the admitted breaches of warranty arose out of what the defendants said were "*relatively small adjustments*" to the company's management accounts when compared with the breaches of warranty alleged on the counterclaim (in respect of the consideration shares in the purchaser company where damages were calculated on a discounted cash flow method) which arose out of an accounting fraud.

682. In *MDW* the purchase price of the company of £3.8m odd comprised a valuation of its goodwill (calculated by applying a multiplier to post-tax profits) and its net assets, apportioned 65% and 35% respectively: see [128] and [283]. The value of the company's assets was unaffected by the breaches of warranty which went to the proper cost (and therefore profitability) of its operations. This appears to have been a significant factor in the court's decision to reduce the multiplier by less than 5% (which resulted in damages equivalent to 11.5% of the purchase price paid) when the "grossly overstated" 25% reduction in the multiplier that the claimant proposed would have impacted upon the 35% of value attributed to the company's assets.

683. The adjustment of the multiplier in *MDW* was said by the judge, at [288], to be "appropriate to reflect the reputational damage (or, as it has been put, "the fragility of the goodwill") that the breaches were liable to cause to the company and the jeopardy they occasioned to the future of the business". That was a reference to the fact that part of the company's waste disposal business had been conducted in breach of consents or permits granted by the environmental regulators. The wrongful practices did not extend to the whole of the company's business but instead related to the

leachate element of its "wet waste" business, as opposed to any of part its "dry waste" business.

684. On appeal, the Court of Appeal, at [53]-[54], said the judge was fully justified in lowering the multiplier as well as the multiplicand, for the purpose of determining the warranty false value, even though the company did not suffer the damage that a well-informed purchaser might have feared at the date of the SPA. Purchasers would not only have factored in the impact of the company's practices on its true profit figure but would have brought down what they were prepared to pay to take account of the misconduct. Newey LJ said:

> "That the Judge considered a downward adjustment to the multiplier as well as the multiplicand appropriate is entirely unsurprising. In fact, as Mr Ayres observed, it would have been remarkable if GDE's misbehaviour had not had such a consequence. As a matter of common sense, a willing purchaser would not have been likely to pay as much for the company. On top of that, there is good reason to think that the fact that GDE did not in the event suffer the reputational damage to which its misconduct might have been expected to give rise is attributable to efforts which MDW made to put matters right after it had acquired GDE. In all the circumstances, the approach which the Judge adopted cannot fairly be said to give MDW a "windfall".

685. Those observations have real resonance on the facts of the present case. The Company's earnings based on ESFA funding (which was a significant part of its past and continuing business) reflected the breaches giving rise to the Planned Hours Over-Claim and the Condition of Funding Over-Claim. Those breaches had reputational as well as financially calculable implications. The Company, under the ownership of LCG, responded to the findings of the 2022 Audit by making the changes to ILRs summarised in connection with Issue 12 above and in later reintroducing GCSEs. As I have noted in connection with Issue 12, LCG was anxious in its negotiation of the Clawback to avoid the potential reputational damage to the Company by being exposed to an audit of years prior to AY20/21.

686. Whether or not a downward adjustment to the multiplier is appropriate and, if so, the amount of it, obviously rests upon an assessment of the evidence in this case – factual and expert – rather than the decision on the evidence in some other case. The essential question is whether the evidence in this case establishes a claim for a qualitative adjustment through the multiplier which, on proper analysis, is truly distinct from the quantitative adjustment through the EBITDA.

687. I say that recognising that an adjustment to the multiplier by reference to "reputational damage" might have been considered to be particularly appropriate in *MDW* where goodwill formed a significant element of the purchase price and that price had not been fixed on the enterprise value/EBITDA basis. Goodwill is all about reputation and, before it is ascribed a value in any financial accounts or transaction, probably better described as qualitative than quantitative in nature. I also recognise that there was a parallel claim in deceit in that case. However, the damages for breach of warranty were addressed separately in *MDW* and, to do so, it was obviously necessary for the court to adopt by reference to the expert evidence a comparator for the purposes of analysing the warranty true value. The court therefore approached the

issue of damages on the same enterprise value basis that applies to this case, though it tested its conclusion on those damages by reference to the price paid and its basis.

688. In my judgment, the present case is not dissimilar to *MDW* so far as the perception of reputational damage to the business is concerned. The Company's earnings were inflated through non-compliance with relevant regulations governing the conduct of its business which related directly (rather than indirectly as in *MDW*) to its turnover.

689. The financial analysis of the Company provided by the defendants to LCG on 27 May 2021 showed that, in FY21, ESFA funding accounted for £5,937,242 out of a total revenue of £12,227,284. Their counter-offer of 9 June 2021 said the deliverability of the forecast EBITDA of £2.804m was "*extremely high*" because the contract with ESFA was already in place. The evidence of Mrs McLeish confirmed that LCG's acquisition of the ESFA-funded business (and the addition of the Company's academies in England to LCG's own) was just as important as gaining access to Welsh funding, if not more so. Mr Williams's evidence was that because the Company did not have direct dealings with the Welsh funding agency, and received Welsh funding under a sub-contract, alongside other sub-contractors, it was less easy to grow that side of the business (and there appears to have been no equivalent in the Welsh funding rules for recognising Additional Learner Value).

690. As at the date of the SPA, the Company's ESFA funding was therefore a critical part of its business and a core element of its enterprise value. Yet the parties to the hypothetical negotiation would have faced considerable uncertainty over the extent of the damage to the Company's ESFA funding source and whether it was largely confined to AY20/21 or extended further. The nature of the non-compliance meant that it would have been known to the negotiating parties that there was likely to be an adverse impact on the Retention Factor that could affect the funding in the next-but-one academic year. The risk presented by the breaches revealed on the 2022 Audit could have involved an audit of years prior to AY21, with any further failure by the Company being a contractual ground (i.e. two successive failed audits) under which ESFA might have curtailed all further funding.

691. The consequential impact (if any) upon the Warranty False Value multiplier of their assessment of the risks falls to be addressed not by any attempt to justify a precise figure (to be applied to the Warranty False Value MEBITDA) as if it was a head of special damage but, instead, by adopting the approach in *Parabola Investments*, *One Step* and *116 Cardamon Ltd*. The uncertainties inherent in a *perception* that a significant element of the Company's business was adversely affected by flawed implementation of the Funding Regulations mean that the court must do the best it can to reach an accurate determination of the Warranty False Value multiplier on all the evidence available. For risks not quantified in the form of the Clawback, it is the qualitative rather than quantitative factor in the calculation of loss. Essentially, the issue over the appropriate multiplier is to be decided by reference to the parties' perception of the quality of the Company's business (as a whole) knowing that the warranties in relation to the ESFA funding were untrue.

692. Mr Osborne observed that his wide range of potential Warranty False Value multipliers was a reflection of it being "a highly subjective element of valuations". He readily recognised that lots of factors would have gone into the negotiation of the Warranty False Value and "I don't know contemporaneously what a potential

purchaser would or would not have paid for the business, especially in light of the ESFA breaches." In cross-examination he said that even a 5% reduction in MEBITDA in the warranty false scenario might be a reason to adopt a lower multiplier and that would depend upon how the potential buyer would perceive that change and its relevance to its view of the business.

693. Mr Pearson also said that the multiplier sums up the expected rewards and risks from owing the Company: "So obviously a higher multiple represents often high growth prospects. A lower one might be lower growth or higher risks." In response to a question from me that it was therefore a reflection of the likelihood that the EBITDA would be "maintained" and grown, he said the multiplier can in simple terms be equated with the goodwill element of the valuation. I have already referred to his evidence that uncertainty over the cost of providing GCSEs or an adverse impact upon the Retention Factor might feed into the Warranty False Value multiplier and, in addressing the Warranty False Value MEBITDA above, I have explained why I prefer that approach to Mr Osborne's reflection of them in the MEBITDA figure. The "haggle factor" would have been over their potential impact upon the multiplier rather than the 9+3 EBITDA.

694. So far as lower growth is concerned, Mr Pearson highlighted that an adjustment to the multiplier (alongside an adjustment to the MEBITDA) could involve the risk of double-counting. He adopted a significantly more cautious approach than Mr Osborne towards the trigger for any such adjustment. Separately from his position that the MEBITDA could be regarded as higher under the Warranty False Value, he gave the example of a breach of warranty which impacted upon 80% of a company's turnover. He said that would be so significant that the multiplier *could* be impacted.

695. So far as concerns higher risks within the business, including any arising out of reputational harm or (per MDW) the "*fragility of the goodwill*", Mr Pearson's approach was again more conservative than Mr Osborne's. He said: "if there had been reputational issues, there could be a slight reduction in the multiple to account for that." In cross-examination, he accepted that the Warranty True Value reflected the parties' perception that the Company was well run and had an 'outstanding' OFSTED rating but he was reluctant to accept that anything which detracted from its reputation would necessarily have been regarded as material for the purposes of justifying a reduction.

696. Some of Mr Pearson's answers assumed that, in the hypothetical negotiation, the parties would have taken appropriate professional advice from an expert in operation of the Funding Regulations. They would therefore have been able to assess the impact of the breaches upon both the MEBITDA and the multiplier with precision. In an answer which was linked to his assumption that the due diligence process (unearthing the matters relevant to breach) would have involved quantification of the immediate financial and potential ongoing consequences, Mr Pearson said:

> " … I would expect the parties, as I say, to take professional advice from people with an understanding of how ESFA might react and whether there would be a quantitative impact as well as a potential qualitative impact."

697. The willingness expressed by the experts in their joint statement to assist the court further in the light of any decisions by me upon such matters as the appropriate post-

AY20/21 Retention Factor and the timing and cost of reintroducing GCSE provision could be said to come to much the same thing. I have already noted the defendants' argument that LCG's case on loss is deficient in not being supported by an expert in ESFA funding.

698. In my judgment, that line of evidence and argument departs from the correct approach to be adopted in determining the Warranty False Value and, in particular, the Warranty False Value multiplier. Even if ESFA funding is a recognised area of expertise, Mr Pearson's use of the words "*might*" and "*potential*" in his answer highlight that it instead involves an evaluation of imponderables. He said the hypothetical negotiating parties would seek to minimise the uncertainty over past academic years but himself recognised that there would be more uncertainty over the future. Both experts agree that the multiplier reflects the Company's *prospects*.

699. The correct approach to the Warranty False Value multiplier therefore involves the court making that evaluation by looking at imponderables (such as a potentially worsening Retention Factor, as yet unquantifiable GCSE costs, and ESFA's appetite for further auditing) through the eyes of negotiating parties. It does not involve an exercise which perhaps comes close to saying that, instead of haggling over their likely effect, the hypothetical parties are to be treated as having bound themselves to an expert determination upon the "value" of such imponderables.

700. As noted above, the position adopted by the parties indicates that my decision to adopt the Equitable Value approach to the hypothetical negotiation may not be of great significance in determining the Warranty False Value multiplier. On that approach, the negotiating parties are to be taken (per the IVS, paragraphs 30.1 and 30.2(h)) to be acting "*knowledgeably*" and to be "*reasonably informed*" about the consequences of their breach upon the nature and characteristics of the Company's business and its business potential but the court should not attribute to them "*the benefit of hindsight at some later date*." This language of the IVS also lends itself to the approach in *Parabola Investments* and the other cases mentioned above.

701. A judicial determination of the likely outcome of a hypothetical negotiation by reference to a *perception* of risks and prospects, with the general fetter upon the use of hindsight, involves something quite different from one which attributes to the parties agreement upon precise figures as if they were supported by a mathematical calculation and/or set out in a profit and loss account. The difference is illustrated by the competing factual evidence, expert evidence and submissions about the costs that would have been incurred by the Company in providing GCSEs in order to secure the additional £297,608 of funding which the experts agree would have resulted from putting the 348 learners affected by the Condition of Funding Over-Claim on band 5 funding.

702. In my judgment, the hypothetical reasonable seller and purchaser would have recognised that the FY18 costs were historic and probably not an accurate indication of the costs likely to be incurred in reinstating GCSE provision after AY20/21. They would have sought to put some kind of estimate on the costs involved. But their estimation of those costs necessarily could not have been informed by knowledge of actual costs that were only incurred two years or so later. It is obvious that the defendants would have argued the costs would be lower and LCG would have predicted them to be higher. The experts, with commendable diligence, have

identified their respective GCSE cost figures but it does not follow that damages should be assessed on the basis that the parties are to be taken to have decided upon one over the other. Damages assessed on that basis would involve treating them as omniscient (and armed with a crystal ball for the purposes of Mr Osborne's figures) rather than reasonably informed about the nature and characteristics of the breaches of the Funding Regulations. It also leaves no room for the court's assessment of that haggle factor.

703. It is therefore important in this counterfactual exercise to recognise the substantial uncertainty they would have faced by reference to the factors highlighted in LCG's submissions. They would have understood their potential impact beyond AY20/21 but at the stage of the hypothetical negotiation their impact could not be quantified in the way that the Clawback can now properly be taken to have qualified the Warranty True Value MEBITDA.

704. The uncertainty the parties would have faced, in October 2021, is illustrated at a more general level by the later negotiation between LCG/the Company and RSM/ESFA over the Clawback and their agreement upon an outcome that did not involve audits of other years. It is evidenced by Mrs McLeish's references to the Funding Indemnity having been negotiated by reference to an ESFA risk which was "*a £30 million risk*", on the one hand, and her acceptance and her belief, expressed in hindsight, that "*we bought a quality education business for an overstated EBITDA*", on the other. As at the date of the SPA, the parties would not have known how bad the financial implications of the breaches of warranty might be.

705. Mr Booth KC was correct to highlight the Company's contractual obligation to bring any breach of the Funding Regulations to the prompt attention of ESFA and the particular risk of further ESFA auditing which this carried with it. Mr Pearson said the hypothetical purchaser would have been able to quantify the financial implications of any breaches in years prior to AY20/21 (in the way the Clawback was quantified) but he accepted there would be uncertainty until ESFA conducted its own review. He also recognised that the extent of the issue (if any) over historic funding would reveal whether there was a need to adjust the multiplier.

706. To adopt Newey LJ's language in *MDW*, it is in my judgment a matter of common sense that the hypothetical reasonable purchaser (or LCG) would not have been likely to pay as much for the Company in the light of the risks thrown up by its breaches of the Funding Regulations. The expert evidence in this case confirms that an adjustment to the multiplier reflects what Mr Osborne described as "*the potential impact of the breaches upon the business and the potential risks associated with the business*".

707. However, I have not been persuaded that the reduction in the multiplier should be as great as LCG has pleaded. Acorn and White Rose are not reliable comparable transactions for this purpose. In cross-examination, Mr Osborne referred to them as "*indicators*" in a highly subjective area. I should add that neither do I find Mr Pearson's four suggested comparable transactions to be of any assistance in arriving at the correct multiple because of their distinguishing features identified by Mr Osborne in the joint statement. Mr Osborne recognised that the lower multiples used in the acquisitions of Acorn and White Rose reflected the lack of infrastructure and back-office provision (e.g. White Rose's 16-19 study provision was sub-contracted) and the

limited ability to sell to any other buyer apart from LCG. He acknowledged that these factors would need to be considered when deciding upon the Warranty False Value multiplier. There appears to be force in Mr Pearson's point that LCG had a greater level of bargaining power in those other transactions.

708. Instead, I conclude that LCG would have recognised the strengths of the Company's business identified by the defendants and the experts (see paragraphs 603 and 604 above) and as Mrs McLeish recognised by the second of her responses quoted in paragraph 704. However, both sides would have recognised not only that the 9+3 EBITDA had been overstated, as she said, but that the quality of the business was also impaired by a significant risk of a more extensive ESFA auditing (with potentially very serious financial consequences), the negative consequences of the breaches upon the Retention Factor, and uncertainty over the overall financial implications of providing GCSEs for those moved to band 5 in order to comply with Condition of Funding.

709. The uncertainty over the impact upon the Retention Factor is illustrated by the concluding answer by Mr Osborne to a long question he was asked about Mr Williams's third witness statement and Mr Williams's testimony about the in-year adjustments made following the 2022 Audit. He said:

> "So, yeah, as I previously set out, if the assumptions I've ultimately used based on witness statements available to me at that particular point in time the court finds that those assumptions are not correct not partly correct, then obviously that will have an impact on the numbers. I suppose the one thing to kind of contextualise is I don't know exactly what the seller would have done at the point of the transaction point having known about these issues what they would have done to then assess that and the potential quantum impact of that had been."

710. In my judgment, Mr Osborne's caveat is an appropriate reminder of the proper approach to the assessment of damages outlined above (specifically at paragraph 522(7)).

711. So far as GCSE costs are concerned, I do not accept the evidence of Mr Lewis and Ms Gill which was aimed at marginalising the financial downsides of the Condition of Funding breach (both in terms of cost of providing GCSEs and the impact upon the Retention Factor of students dropping out of the GCSE course) and, therefore, how in the hypothetical negotiation it would have been given no real weight. As Mr Booth KC submitted, the Company did not have a GCSE department ready to spring into action (and in fact the Company is still short on GCSE teaching staff) and this would not have been regarded as an easy fix, particularly when ESFA would have been likely to have been scrutinising the adequacy of the reinstated GCSE provision.

712. I did not find Mr Lewis's and Ms Gill's evidence on this point to be at all convincing. It included their revised view, adopted in these proceedings, that students had in fact been succeeding in GCSEs by achieving a grade 1 (which was technically a pass) when in 2018 the Company had wrongly (they now said) been treating a grade 4 as the benchmark of success. As I have explained above, the assumption that it is grade 4 which represents a pass is the basis on which the Condition of Funding requirement

applies to those students who previously "nearly passed" by achieving a grade 3. To the extent their evidence may have assumed the Company's post-2021 provision of GCSEs would have been aimed at the revised, lower benchmark of success, that is perhaps a further indication that they have underestimated both its financial cost and the scrutiny that ESFA was likely to give to it.

713. It follows, in my judgment, that LCG or the reasonable hypothetical purchaser would not have been persuaded by their position. It is even possible that the haggling between the negotiating parties over the likely cost of providing GCSEs would have led to the conclusion that no net funding gain could be predicted to result from future compliance with the Condition of Funding rules. That said, my assessment of the evidence, including the experts' figure of £297,608 for increased funding through providing GCSEs, leads me to conclude that the parties would have considered the future provision of GCSEs to be financially worthwhile overall.

714. In reaching that conclusion, I do not consider it correct to bring to the hypothetical negotiation knowledge and reliance upon Mr Osborne's costing of GCSE provision. His reliance upon 2024 costs falls foul of the general prohibition upon the use of hindsight and, as Mr Pearson observed, involves reliance upon figures affected by significant inflation between 2021 and 2024. Mr Pearson indicated an inflation figure of about 15% in the service industry over that period. Likewise, I am not persuaded that Mr Pearson's costings from 2018 can be taken as a reliable guide to what the parties in October 2021 would have been perceived to be the likely price of securing band 5 funding for students affected by the Condition of Funding requirement. Even if the inflation rate over the earlier period was lower, the Company would have had to reinstate a teaching provision which (at the time it was discontinued) had been considered to have become academically unsuccessful.

715. As with the future Retention Factor, the hypothetical negotiation would have taken place against a background of real uncertainty about the overall financial impact of the breaches in academic years after AY21/22.

716. My assessment of all the evidence in this case leads me to conclude that, instead of a multiplier of 5.5, their negotiations would have led the parties to agree upon a multiplier of 5.0.

717. In my judgment, a multiplier of 5.0 properly reflects what, in the hypothetical scenario, would have been real concern about the impact of the warranty breaches upon the overall "quality" of the Company, the level of future ESFA funding and the risk of funding in years prior to AY20/21 being revisited. To be set against those risks are the wider strengths of the Company recognised by the experts.

718. I do not consider a lower multiplier than 5.0 to be appropriate when those strengths are borne in mind and when the breaches of warranty did not impact upon the Company's Welsh funding. I note that when that second point was put to Mr Osborne in cross-examination he responded by saying "*I give a range of potential loss numbers and that range is quite wide, depending on exactly what criteria one applies*." Further, the parties' reflection upon the nature of the breaches of the Funding Regulations would have led them to conclude that, allowing for the potential impact on the Retention Factor, there were aspects of the Company's past funding practices that could be turned to its advantage. What would otherwise be Unfunded

Learner Value could in future years be absorbed within ILRs that recorded a proper approach to nested qualifications and (at the cost of providing them with GCSE provision) a significant number of students would in the future benefit from full-time rather than part-time funding. All of these matters would have fed into the parties' respective bargaining power on the Equitable Value basis.

719. Mr Pearson's position was that the parties would not have gone lower than a multiple of 5 in the hypothetical negotiation. The hefty leverage which a reduction of 0.5 in the multiplier brings to the Warranty False Value MEBITDA of £1,787,675 (when Mr Pearson obviously was not contemplating any reduction from the Warranty True Value MEBITDA) means that an enterprise value of £14,150,000 is reduced to £8,938,375.

720. The court should conduct a sense-check to see whether its reasoning in support of a price reduction of some £5.2m (out of total £16.8m) produces a sound result. In my judgment, a revised multiplier of 5.0 properly reflects a situation which was summed up by Mrs McLeish's observation about buying a quality education business for an overstated EBITDA. I note that, by its offer dated 2 June 2021, LCG was prepared to agree a multiplier of 5.0 to the Warranty True Value MEBITDA as it was then understood to be. The strength of the Company's ESFA funding position was one of the key points made in the defendants' counter-offer of 9 June which persuaded LCG to agree the extra 0.5.

721. The Warranty False Value multiplier is therefore 5.0.

722. Even if his analysis had not been afflicted by invoking impermissible hindsight, I would not have been persuaded by Mr Pearson's reliance upon the treatment of LCG's acquisition of the Company in Boyd Topco's financial accounts. In my judgment, the flaw in the analysis is revealed by his treatment of the contingent asset (which is this claim and the value put upon it by my judgment) as being, in effect, a further acquisition of value when it is of course one that only arises out of a defect in the initial asset. The only basis for an award of damages which crystallises the previously uncertain outcome and value of the contingent asset is a *compensatory* one which necessarily recognises that LCG suffered loss in paying the price it did for the Company.

723. As Mr Osborne said in response to a question from me (in the context of one put to him about the protection given to LCG by the Funding Indemnity), a valuer of a company is not greatly influenced by legal provisions in the transaction when assessing what its subject matter is worth. In my judgment, Mr Pearson's approach (in identifying a separate value for the warranty by reference to Boyd Topco's accounts) muddles the two.

724. Even without the existence of this claim being expressly noted, in general terms, in the parent company's accounts, there is clearly a danger in the court placing much reliance upon the accounting methodology (the silence in the accounts in relation to the concept of impaired goodwill and provision for its "recoverable amount" from time to time) to reach a judicial decision upon the level of damages fixed by reference to a comparison of the Company's enterprise value (according to whether a particular warranty was true or false). The same danger would exist if the value of the warranty

claim had instead been "talked up" in the relevant accounts with a reference to an impairment of goodwill (or indeed for the contingent asset) in an ambitious sum.

725. I note (as LCG's counsel highlighted) that in *Equitix*, at [372], Kerr J found the accounts relied upon by the defendants (as showing no loss) to be of no assistance in deciding the value of a shareholding. From what he said, it appears that the accounts made no reference to the claim he had to decide. He said:

> "I do not find the entries in Equitix's and Gaia's accounts of assistance. The experts, including Mr MacGregor, attached little importance to them. They may have been wrong; they may have been based on an incomplete understanding of the true state of Gaia, its assets and trading position; they may have allowed for recovery of loss through this case, as Mr Cashin thought. I do not know. They are not a reliable guide to the true value of Gaia's shares."

726. I take the same approach.

Decision on Issues 8 and 9

727. **The defendants are liable to LCG for breach of warranty in the sum of £5,211,625. This reflects the difference between the Warranty True Value of £16,813,008 (comprising an enterprise value of £14,150,000 and net cash value of £2,663,008) and a Warranty False Value of £11,601,383 (comprising a reduced enterprise value of £8,938,375 and the same net cash value of £2,663,008). The reduced enterprise value of £8,938,375 is the product of a Warranty False Value EBITDA of £1,787,675 and a Warranty False Value multiplier of 5.0.**

728. **On Issue 9, the damages for breach of warranty are therefore greater than the sum of £783,325 due under the Funding Indemnity**.

F. Issue 11: The Limitation Cap Issue

729. Issue 11 is answered by my decisions on Issues 3, 10 and 8.

730. Although LCG's counsel's skeleton argument reserved the right to contend that the consideration of £16,813.008 was split between Mr Lewis and Ms Probert otherwise than as stated in Schedule 1 to the SPA, LCG did not so contend. There has therefore been no need for the court to address arguments based upon a contractual estoppel, or the like.

731. It follows that, leaving aside any claim to interest on the damages and to the extent the liability is not satisfied by the other, Mr Lewis's maximum liability in damages is £5,211,625 and Ms Probert's maximum liability is £840,650.

Decision on Issues 11

732. **The respective liability of the defendants (identified in the previous paragraph) is greater than the cap upon liability under paragraph 2.2 of Schedule 5 to the SPA.**

6. DISPOSAL

733. At its election, LCG is therefore entitled to judgment in the principal sum of £783,325 under the Funding Indemnity or £5,211,625 as damages for breach of warranty (the liability to be apportioned between Mr Lewis and Ms Probert as appropriate and, in relation to the damages liability, subject to the cap of £840,650 for Ms Probert under paragraph 2.1 of Schedule 5 of the SPA).

734. This judgment has been handed down remotely by email to the parties' legal representatives and its uploading to The National Archives. When sending it earlier in draft to the parties, I indicated that the handing down would be adjourned for the purpose of preserving the time for filing any appellant's notice under CPR 52.12 (only). I invited the parties to reach agreement upon any other consequential matters arising out of it. They have not managed to do so.

735. In solicitors' correspondence, LCG has confirmed its election to recover damages for breach of warranty and invited me to make an order today which provides for judgment for the principal sum, interest and costs (in its favour) so that only the defendants' contemplated application for permission to appeal would remain to be determined by me. LCG relies upon the terms of a Part 36 offer dated 7 February 2024 which, I now know, offered to accept the sum of £5,211,625 (the exact same amount as I have found to be recoverable in damages, which was expressed to be inclusive of interest up to the date of a timely acceptance) in settlement of the claim and counterclaim, together with its costs on the standard basis to the date of the defendants' acceptance of the offer. LCG seeks orders in relation to interest, indemnity costs and an additional amount of £75,000 by reference to the provisions of CPR 31.17.

736. The defendants' solicitors have signalled an intention to contest the effect of the Part 36 offer and to make applications for permission to appeal and a stay of execution of the judgment. The defendants have invited me to make an order today which addresses only the extension of time under CPR 52.12 pending a further hearing.

737. For the brief reasons separately given in support of it, I have decided the correct order to be made (pending a determination of consequential matters to be made on the papers in the absence of a further hearing being directed by me) is one that recognises LCG's entitlement to judgment for £5,211,625, sets a date for payment which will enable the defendants to make any application for a stay in the meantime and which also addresses the timing of any application for permission to appeal.