Neutral Citation Number: [2018] EWHC 2915 (Comm)

Claim No: D40LS284

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
CIRCUIT COMMERCIAL COURT (QBD)

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds, LS1 3BG.

Date: 08/11/2018

Before:

HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT

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Between:

UK LEARNING ACADEMY LIMITED	**Claimant**
- and -	
THE SECRETARY OF STATE FOR EDUCATION	**Defendant**

- -
- -

James Fryer-Spedding (instructed by **Avisons Law Ltd.**) for the **Claimant**
David Warner and **Kristina Lukacova** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 24-27 September, 1-5, 8, 10 October 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE KLEIN

HH Judge Klein:

1. The Learning and Skills Council ("LSC") was created by the Learning and Skills Act 2000 to secure the provision of education and training to people who had reached compulsory school leaving age. In 2006, it established a national training programme called Train to Gain ("TTG"), the principal aim of which was to improve the literacy and numeracy skills of those in employment in the UK by funding the education of participants (called "learners") to National Vocational Qualification ("NVQ") Level 2 or by funding their education on Skills for Life ("SFL") courses. TTG has been the subject of criticism. In 2009, the National Audit Office concluded that the programme had not provided good value for money.[1]

2. LSC ran two procurement exercises to identify private educational organisations (called "providers") which it could fund through TTG to provide SFL and NVQ courses. The second procurement exercise, which began in early 2008, was run because, initially, take up of TTG funding had been low. A significant amount of funding was available at the time of the second procurement exercise. Between April 2008 and March 2009, the budget for the Yorkshire and Humberside ("Yorkshire") region was £85 million, with some (perhaps a significant part) of the budget coming from the EU's European Social Fund.

3. The Claimant ("UKLA") is a private provider of education and training. UKLA's tender in the second procurement exercise was successful and it entered into a contract ("the 2008 Yorkshire Contract"), expressed to be made on 1 August 2008 (but which was signed on the parties' behalves in December 2008), with LSC for the provision of education and training in Yorkshire. Under the 2008 Yorkshire Contract, there was made available to UKLA TTG funding of £135,553.76 (described as the maximum contract value ("MCV")) for the 2008-2009 academic year, intended to fund the training of up to 200 people.

4. The Defendant has (indirectly) taken on LSC's liabilities.

5. The principal dispute between the parties relates to the 2008 Yorkshire Contract.[2] UKLA contends that (i) the Defendant is (and LSC was) liable to pay it £800,553.24 (in addition to £135,553.76 which has already been paid), as a result of an effective variation of the 2008 Yorkshire Contract, for learners who "started"[3] before 1 April 2009[4] [5] and (ii) if the Defendant contends that there has been no effective variation

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[1] In its report, the National Audit Office summarised TTG as follows: "The Train to Gain service was introduced in April 2006 to support employers in improving the skills of their employees and to contribute to improved business performance. It had cost £1.47 billion by March 2009 and has a budget of £925 million in 2009-10. It comprises a skills brokerage service to advise employers on identifying training needs and sourcing training; flexible training, for example delivered in the workplace and at a convenient time; and for public funding of training for eligible employees taking specified courses and qualifications, and contributions to some other training paid for by employers…Organisations such as further education colleges, private companies and voluntary organisations provide the training, costing £1.2 billion by March 2009. Most learners train with a college or a private provider…"

[2] I consider the parties' statements of case in more detail below.

[3] A "start" is a term of art in these proceedings (as are related phrases).

[4] It is not clear, from the Amended Particulars of Claim, that this is UKLA's case. As I shall explain, there is a claim in relation to what it contends was a contract for the Yorkshire region for the 2009-2010 academic year. A fair reading of paragraph 20 of the Amended Particulars of Claim (which relates to that later contract (or

because any necessary contractual formalities have not been complied with, he is estopped from doing so.[6] The Defendant disputes that; principally because, he contends that:

i) LSC's conduct (including its written statements), properly interpreted, did not amount to an offer to vary the 2008 Yorkshire Contract as UKLA contends. In fact, LSC, he contends, made no offer at all which could have contractual effect;

ii) any offer made had to be accepted and there was no acceptance at all or in accordance with the terms of any such offer;

iii) the contractual formalities for an effective variation were not complied with;

iv) there was no sufficient representation to give rise to any estoppel, in particular to overcome any failure to comply with the contractual formalities for an effective variation;

v) UKLA cannot prove that the learners for whom it claims payment had been taught (that is, on the Defendant's case, had started) before 1 April 2009, which, the Defendant contends, was a pre-condition for payment under any effective variation ("the 1 April pre-condition defence").

6. UKLA contends it had three further contracts with LSC:

i) for the Yorkshire region, for the 2009-2010 academic year;

ii) for the North East region, for the 2008-2009 academic year;

iii) for the North East region, for the 2009-2010 academic year;

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purported contract)) is that UKLA also claims £42,297 for all learners (whenever they started) for training from the beginning of the 2009-2010 academic year (in August 2009) (see also paragraphs 3.5, 6.10 of the skeleton argument of Mr Fryer-Spedding (who appeared, at trial, for UKLA); although I do note that paragraph 5.22 of the same skeleton argument does advance the case on this point as it was finally put by UKLA).

[5] During the trial, I understood it to be UKLA's position that a learner started (that is, a learner was, for the purposes of this claim, a "legitimate start" (one of the phrases to which I make further reference below)) on that learner's participation in a "structured learning programme" (see, for example, paragraph 5.16 of Mr Fryer-Spedding's skeleton argument) (see also paragraph 15 of Imran Bham's second witness statement). A "structured session" is, in effect, a lesson (even if self-guided). I understood UKLA to (i) accept that a learner started, for the purposes of these proceedings, when that learner had a lesson and (ii) contend that the learners in respect of whom the £800,553.24 claim is made all started (that is, had a lesson), on its case, before 1 April 2009. During the course of Mr Fryer-Spedding's closing submissions, UKLA's position seemed to me to be at least more equivocal. Mr Fryer-Spedding told me that all the learners in respect of whom that claim is made had had their first lesson before 1 April 2009 (although in the case of 15 NVQ learners, their only lessons before 1 April 2009 were on an SFL course and not an NVQ course). However, Mr Fryer-Spedding also drew my attention to, and relied on, paragraph 20 of Imran Bham's second witness statement, which suggests that about half of the learners in question did not have any lessons before 1 April 2009. In fairness, I should note that, in its Amended Reply and Defence to Counterclaim, UKLA does address the question about when a learner started. UKLA contends there that no learner was required to be taught in order for that learner to have started. It was enough that a learner had an induction.

[6] As pleaded, UKLA's estoppel claim is somewhat wider than this. At trial, Mr Fryer-Spedding advanced, properly, the more limited estoppel case I have summarised here.

("the further contracts").

7. UKLA contends that the Defendant is (and LSC was) liable to pay it £99,009.00 under the further contracts. The Defendant contends that the further contracts did not come into existence. In relation to the (purported) contract relating to the North East region for the 2008-2009 academic year, the Defendant also puts in issue whether UKLA taught any learners during that academic year.

8. The Defendant also defends the claim in relation to the 2008 Yorkshire Contract, in particular, and, more generally, raises a set off defence and brings a counterclaim; which Mr Warner, who appeared, with Miss Lukacova, for the Defendant, explained thus on the second morning of the trial. The defence is to the effect that, if UKLA is otherwise entitled to the sum it claims in relation to the 2008 Yorkshire Contract, it is not entitled to, or, by way of counterclaim, it is liable to repay 29.2% of that sum (and, by way of counterclaim, is liable, in any event, to repay 29.2% (£39,581.70) of the £135,533.76 which has been paid) because, in 2009, LSC auditors determined that there was an "error rate" of 29.2% in UKLA's records and, so, by clause 12.3 of the 2008 Yorkshire Contract, LSC was (and the Defendant is) entitled to "claw back" these sums ("the 2009 audit defence and counterclaim").[7]

9. UKLA responds to the counterclaim by contending that (i) in fact, LSC determined that there was no sum due which could form the basis of a counterclaim and (ii) any conclusion that there was an error rate of 29.2% was reached unreasonably and/or in bad faith, contrary to an implied contractual term.

10. This is the judgment following the trial of UKLA's claim and the Defendant's counterclaim.

The statements of case

11. The parties' statements of case are discursive, unstructured and, in places, difficult to follow.[8] Counsel who represented the parties at trial did not draft the initial statements of case and, although they may have had some input in the amendment of those documents, understandably, those documents were used as the framework for the amendments. As I reminded the parties at the pre-trial review and at trial, the statements of case ought, at the very least, to identify the issues to be determined. I recognise that a prevailing view may be that parties should not be held to their pleaded cases but it is unhelpful if parties proceed on the basis that the statements of case do not act as a limit on the issues to be tried. I was left with the clear impression, by the conclusion of the trial, that, in many significant respects in this case, both parties, more or less, were advancing cases which were unpleaded.[9] As it appeared to me that both parties encouraged me to determine the proceedings on the basis of the

[7] This reflects the note I made at the time Mr Warner explained this defence and counterclaim to me, which Mr Warner confirmed to me was accurate.
[8] I sought to overcome this problem by requiring the parties to agree a list of issues, which they apparently did. However, this led to further dispute between the parties when it became clear that they interpreted the agreed issues differently.
[9] Indeed, in closing, Mr Fryer-Spedding encouraged me to follow the evidence wherever it might lead, whatever UKLA's pleaded case. If that is the appropriate course, so far as UKLA's pleaded case is concerned, as a matter of logic it ought to be the appropriate course in relation to the Defendant's pleaded case.

cases they actually advanced at trial, that is what I propose to do. But for the very great assistance given to me by counsel, this would have been an even more difficult task that it has been.

12. It may be helpful, nevertheless, to summarise what I understand the parties' respective pleaded cases to be, because the parties' statements of case do set out some of their respective cases about various (alleged) meetings and discussions (and, substantially, their respective cases about the further contracts).

13. UKLA contends as follows.

14. LSC informed it, in about August 2008, by a letter of intent, that it would be offered a contract for TTG funding, for training in the Yorkshire region, up to an MCV of £135,533.76 and that:

> "…LSC was unable to commit to pay more because of budget constraints from pressures caused by colleges taking on too many learners but LSC would review progress under the contract and assess the MCV "in light of performance in terms of quality and volume and the level of funds available to us."[10] [11]

15. Prior to 19 September 2008,[12] the following events had occurred:

    i) LSC held a meeting, on 3 April 2008, at the Lancashire County Cricket Club ground at which the tendering process for the second procurement exercise was explained. Imran Bham was told that contracts would be "performance led: so that initial volumes would be given but if they were achieved then further volumes would be easily available";

    ii) LSC held a further meeting, on 3 April 2008, at its Bradford office at which Yusuf Bham[13] was given the same information;

    iii) Yusuf Bham met Shafqat Rahim at UKLA's Bradford office on 17 July 2008, when Mr Rahim said that LSC was "seeking training providers who would actively engage learners and deliver";

    iv) UKLA received LSC's "Clarification of Employer Responsive Funding and Payments 2008-09" document;

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[10] At trial, UKLA's case was that it did not know about the MCV before it received a copy of the 2008 Yorkshire Contract for signature in December 2008 and, as I understand UKLA's case, that that MCV was not otherwise drawn to their attention until March 2009.

[11] In fact, as I explain below, although there is a letter of intent in relation to the 2008 Yorkshire Contract ("the 2008 Yorkshire letter of intent"), it is dated 19 September 2008.

[12] UKLA accepted, at trial, it appeared to me, that the 2008 Yorkshire letter of intent was not sent before this date.

[13] Mr Bham's full name is Mohammed Yusuf Bham but, throughout the trial, all who knew him called him Yusuf. I shall call him Yusuf Bham in this judgment because I understand that is how he is known. I do not intend to cause any offence if I am mistaken.

v) Sarah Haigh told Imran Bham, Yusuf Bham and John Kinsella, at a meeting on 1 September 2008, that the "contract volumes" (that is, I understand, the number of learners who could be taught under the terms of the 2008 Yorkshire Contract) were "initial volumes";

vi) at a TTG provider induction session on 8 September 2008, Clive Howarth said that there was a need to recruit learners.

16. After 19 September 2008:

i) Mrs Haigh sent an email to UKLA on 24 September 2008 ("the 24 September email"), informing UKLA about the "initial volume" of learners allocated to UKLA (that is, 100 for SFL courses and 100 for NVQs) and continued:

> "As discussed at the contract clarification meeting, these amounts can be negotiated upwards when the initial volumes have been achieved";

ii) Mrs Haigh and Mr Rahim visited UKLA's Bradford office on 5 November 2008. They were given a list of 400 "learner files" (a number substantially in excess of the contract volumes). On that occasion, neither Ms Haigh nor Mr Rahim raised concerns about the number of learners UKLA had recruited.

17. After the 2008 Yorkshire Contract was signed:

i) LSC wrote to UKLA on 15 December 2008 saying that the maximum contract value was only an indication of potential earnings in any contract year and could be revised up or down, and that contractors would be paid on what they delivered;

ii) at an initial monitoring visit by LSC on 18 December 2008, LSC's auditors saw that UKLA had over 700 learners. The auditors did not complain about that;

iii) a meeting took place on 27 January 2009 at which LSC became aware that UKLA had 185 SFL learners;

iv) in a circular, dated 19 May 2009, from Geoff Russell (LSC's chief executive), the following was written:

> "I also want to reassure you that we will guarantee that there is funding available for you at the agreed rates to support learners who were legitimately in learning before 1 April 2009 through to completion.
>
> …I can assure you that all learners legitimately starting training before 1 April 2009 whether apprenticeship programmes or [TTG] courses will be funded to complete their training at agreed rates";

v) a further circular, dated 12 June 2009, said:

> "The start date is defined as the date on which the learner's learning programme begins";

vi) LSC wrote to UKLA, on 12 June 2009, saying:

> "As you will already be aware, the LSC has committed to funding all legitimate [TTG] and adult apprenticeships starts prior to 1 April 2009. A "legitimate start" in this context is one that meets our normal requirements. Funding is set out in the Funding Guidance 2008/9.
>
> For audit purposes, the provider must have evidence to demonstrate that the learner has actively participated in a structured programme as detailed in their individual learning plan prior to 1 April 2009";

vii) an LSC update of June 2009 said:

> "A one-off allowance to permit providers to upload potentially un-funded learners outside of MCVs enrolled prior to 1 April 2009 was announced in June 2009";

viii) on 16 June 2009, Mrs Haigh confirmed, during a telephone call, the LSC's commitment to pay UKLA for "everyone that was enrolled before April";

ix) Sarah Haigh emailed UKLA, on 1 July 2009, saying:

> "you will have noted from Geoff Russell's letter of 11 April 2009 *(sic)* that all legitimate starts prior to 1 April need to be recorded on the ILR by 30 June 2009. Obviously this date has now passed so any omissions will not be taken into account";

x) Mrs Haigh emailed UKLA on 8 July 2009, saying:

> "the LSC is only paying prior to 1 April 2009 as per Geoff Russell's letter of 11 June 2009";

xi) LSC published a newsletter, which was emailed to UKLA on 10 July 2009, which contained scenarios. By one of the scenarios, LSC indicated that it had committed to funding legitimate learners to whom a funding commitment had been made and that:

> "the provider's MCV would need to be increased in order to cover the full costs of these learners";

xii) Mrs Haigh emailed UKLA on 15 July 2009 instructing it to remove from the relevant computer records:

> "any learners that are not fundable as per the 1 April guidance";

xiii) Matt Findull (an LSC employee) sent a further email, on 17 July 2009, to UKLA about the removal, from the relevant computer records, of certain learners, adding:

> "we will not be able to consider removing any capping on payments for legitimate learners until this has been done";

xiv) Keith Woodcock (an LSC Programme Advisor) wrote to UKLA, on 20 July 2009, saying:

> "The first priority is to fund learners recruited prior to 1 April 2009…The [TTG] split is skewed because we have a commitment to fund the legitimate pre-1 April starts as a priority and many providers have exceeded 08/09 academic year budgets with legitimate starts";

xv) during a telephone call, on 27 July 2009 ("the 27 July telephone call"), Mrs Haigh said:

> "And you get paid for everything that, you know, you're overdue for the eligible learners prior to 1 April 2009";

xvi) a meeting, between LSC and UKLA representatives, took place on 4 August 2009 ("the 4 August meeting"), during which Margaret Cobb said:

> "…basically…I think there's 281 learners for NVQs that started prior to 1 April and 185 skills for life learners that started prior to 1 April, and they're the ones that obviously we have a commitment to pay…
>
> …If there's an assessment, an individual learning plan and those are in place and dated by the learner prior to 1 April 2009…and there's been some training delivered prior to 1 April then it will stand up to the auditors then we will make those…
>
> …My understanding and I hope I can make this clear, that the LSC will pay for all the learners that have a start date prior to 1 April…We have a commitment to that…
>
> …I think that what we're saying is that we are…if you've got 281 learners with start dates and 155 skills for life with a start date prior to 1 April then we will meet that commitment."

18. Knowing that UKLA had exceeded the MCV specified in the 2008 Yorkshire Contract, it was represented, on LSC's behalf, that LSC would pay for all legitimate learners who had started their courses before 1 April 2009.

19. There were, in fact, 143 SFL learners and 449 NVQ learners who had started their courses before 1 April 2009 (that is, who were legitimate starts or legitimate learners). Because of the representations made on LSC's behalf, by estoppel, (LSC was and) the

Defendant is liable to pay UKLA for those learners. Taking into account £135,533.76 already paid, by estoppel the Defendant remains liable to pay £800,553.24.

20. So far as the further contracts are concerned, UKLA's pleaded case is as follows.

21. LSC sent a letter of intent to UKLA on about 19 June 2009 ("the 2009 Yorkshire letter of intent") by which it offered a contract for the funding of TTG learning, in Yorkshire, for the 2009/10 academic year, with an MCV of £130,000. The 2009 Yorkshire letter of intent was countersigned by John Kinsella on 25 June 2009 and returned by post to LSC by 3 July 2009, as required. By a letter, dated 17 September 2009, LSC purported to "withdraw the contract" because the countersigned 2009 Yorkshire letter of intent had not been returned to it. UKLA is entitled, nevertheless, as a matter of contract, to be paid for the services it provided under the 2009 Yorkshire letter of intent from the beginning of the 2009-2010 academic year (1 August 2009) to its receipt of the 17 September 2009 letter. UKLA calculates that it is thereby entitled to £42,297 (which, subject to a minor mathematical error, is the full amount of funding, at the higher rate, for 23 NVQ learners).

22. There was a contract, between LSC and UKLA, for TTG funding, in the North East region, for the 2008-2009 academic year. The contractual documentation is limited to a Contract Clarification Form ("the 2008 North East Contract Clarification Form"), which provided that, from January to July 2009, the value of the contract was £50,000. In fact, UKLA trained 29 NVQ learners during this period and is entitled (presumably, contractually) to be paid £53,331.[14]

23. There was a contract, between LSC and UKLA, for TTG funding, in the North East region, for the 2009-2010 academic year. Under that contract, the MCV was expressed to be £3,381. In fact, UKLA trained, during this period, 7 NVQ learners and is thereby entitled, contractually, to that amount.

24. In his statement of case, the Defendant responds (principally), in effect, as follows, in relation to UKLA's case relating to the 2008 Yorkshire Contract.

25. It was possible to increase the MCV by a negotiated agreement (which had to be embodied in a document signed by both contracting parties). In any case where there has not been any agreed increase in the MCV, LSC was not, and the Defendant is not, obliged to pay more than the MCV. There was no written and signed variation in this case. In any event, LSC gave no assurance, in this case, that it would agree an increase in the MCV. Nor did it make any other promise which could amount to an offer to vary the 2008 Yorkshire Contract in that way. To the contrary, LSC warned UKLA on numerous occasions that it would not make any payments in excess of the MCV.

26. In any event:

    i) there was no meeting on 1 September 2008;

[14] There is no pleaded explanation for the claim being in excess of the contended for £50,000 MCV for this period.

ii) UKLA has only partially quoted Mrs Haigh's 16 June 2009 statement and has so taken it out of context.

27. As to the further contracts, the Defendant contends that "LSC did not enter into [them], as [UKLA] did not provide the LSC with a signed copy of the said contracts"[15] and, in the case of the 2009 Yorkshire letter of intent, any offer was withdrawn before it was accepted. In any event, in relation to the (purported) contract relating to the North East region for the 2008-2009 academic year:

i) UKLA is not entitled to payment because it has not uploaded onto LSC's computer system any data showing that any training was given;

ii) LSC reduced the MCV of this (purported) contract to £5,000.

28. As I have indicated, the Defendant also raises the 2009 audit defence and counterclaim.

29. By the Amended Reply and Defence to Counterclaim, UKLA contends, in relation to the further contracts, that:

> "the Defendant failed to supply the written contract but since both parties acknowledged that each was performing its obligations and was treating the other as performing its obligations there was a contract on known and understood terms".

30. In relation to the 2009 audit defence and counterclaim, UKLA also contends as follows. Implied into the 2008 Yorkshire Contract, in order to give that contract business efficacy, was a term that, in deciding the error rate (which involved considering the materiality of errors), LSC would not unreasonably conclude that an error was material. In this case, the decision to conclude that there were any material errors at all (and so, that there was any error rate) was unreasonable. UKLA also contends that the sample files LSC audited must have included those learners for whom the Defendant now contends UKLA is not entitled to payment and, so, such files should not have been audited.[16]

Contractual documentation

31. The 2008 Yorkshire Contract contained the following provisions:

i) By clause 1.1:

> ""Contract" means the Contract between [UKLA and LSC] consisting of these General Terms and Conditions, the

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[15] In relation to the (purported) contract relating to the North East region for the 2009-2010 academic year, according to the Defendant: "The North East Region did issue a contract to [UKLA] for 2009/10 for a maximum contract value of £3,381. The Claimant did recruit 8 learners, but it never returned a copy of this contract…". I do not understand the Defendant to contend, by the averment that a contract was "issued", that a contractual relationship between UKLA and LSC came into existence.

[16] UKLA pleads a limitation defence to the counterclaim, which it abandoned.

specification and any other documents (or parts thereof) specified in the contract and any variations to the Contract agreed in writing and signed by both Parties";

ii) By clause 2.1:

"The Contract shall commence on the date on which the provision of Services under this contract commence as provided in Schedule 1 and shall finish on the date on which the Services provided under the Contract finish as provided for in Schedule 1 or as otherwise provided in the Contract";

iii) By clause 11.2:

"For monitoring and evaluation purposes, the Council [that is, LSC]…shall have the right to visit all or any site(s) and view operations relating to the provision and to inspect relevant documents and interview learners and the contractor's [that is, UKLA's] staff during these visits";

iv) By clause 11.3:

"The contractor shall, and shall ensure that subcontractors shall, permit access at any reasonable time to any of the representatives listed in clause 11.2 in order to examine, audit or take copies of any original or copy documentation, accounts, books and records of the contractor and its subcontractors that relate to the Contract [in order to] carry out examinations into the efficiency and effectiveness with which the contractor has used the Council's resources in the performance of the Contract";

v) By clause 11.7:

"The contractor shall in performing the Services comply fully with all relevant rules and regulations of the Council in force from time to time especially when on Council premises";

vi) By clause 12.1:

"In consideration of the Services to be provided by the contractor, the Council will make the payments to the contractor in accordance with Schedule 2";

vii) By clause 12.2:

"Payment by the Council shall be without prejudice to any claims or rights, which the Council may have against the contractor and shall not constitute any admission by the Council as to the performance by the contractor of its obligations hereunder. Prior to any such payment, the

> Council shall be entitled to make deductions or deferments in respect of any disputes or claims whatsoever with or against the contractor, arising from this Contract or any other Contract between the contractor and the Council";

viii) By clause 12.3:

> "Where the Council carries out a review or audit of a sample of the evidence which the contractor is required to provide under the Contract to support the payments made by the Council and identifies errors in that evidence which it deems are material, the Council reserves the right to recover from the contractor an amount based on the error rate identified and the total value of the Contract. Such amount may be recovered by making deductions from future payments due to the contractor under the Contract. In all such reviews the decision of the Council is final";

ix) By clause 15.2:

> "The contractor shall comply with the requirements and observe guidance, which may from time to time be issued by the Council…and of which the contractor was made aware";

x) By clause 15.3:

> "The contractor shall ensure that all activities carried out pursuant to this Contract shall be documented in accordance with the requirements of the Council and shall provide such documentation to the Council, as the Council shall request from time to time";

xi) By clause 15.4:

> "The contractor shall have in place a rigorous system of quality assurance based on the regular review and assessment of the quality of the Services delivered. The contractor shall comply with the requirements and observe guidance on the process of review and assessment, which is issued by the Council";

xii) By clause 15.6:

> "Where the Council assesses the quality and delivery of the Services during its business cycle through the annual provider and commissioning dialogue, the contractor will be informed of the outcome of that process. The Council may require the contractor to agree an action plan for the improvement of services following the provider and commissioning dialogue, analysis of performance against the Council's published minimum levels of performance,

> financial health and/or control check performed by the Council… Failure to agree an action plan or failure to comply with the agreed targets set out in the action plan will constitute a Serious Breach under clause 18 of the Contract";

xiii) By clause 30.1:

> "The Contract shall comprise the following: The General Terms and Conditions, Schedule 1…Schedule 2 [and] Schedule 3";

xiv) By clause 30.2:

> "This Contract constitutes the entire Contract between the parties and shall not be varied except by instrument in writing signed by the parties";

xv) By Schedule 1, paragraph 2.2:

> "The maximum value for each learning programme as shown in Appendix 1 above may not be exceeded for any reason except by an agreed variation in writing to the Contract. The Council will not be liable to make any payment in excess of the maximum values set out above or as varied in writing. Where the Contract period is longer than one year funding for subsequent years is subject to funds being made available to the Council…";

xvi) By Schedule 1, paragraph 2.4:

> "For the avoidance of doubt the overall maximum values for each learning programme at Appendix 1 above take precedence over the delivery profile and volumes in Appendix 2. Where the contractor considers that the combination of funding rates…and volumes would result in the overall maximum value being exceeded, the contractor must notify the Council and the parties will either agree a variation to the volumes, funding rates or to the maximum value for the learning program to ensure the contractor remains within the agreed maximum value";

xvii) By Schedule 2, paragraph 2.1:

> "The Council agrees to pay to the contractor the amounts set out in Schedule 1, Appendix 1…of this Contract on condition that the contractor delivers the Services in accordance with the terms and conditions of the Contract…";

xviii) By Schedule 2, paragraph 2.2:

> "Where the contractor delivers learner responsive provision, payments will be made in accordance with the Funding Agreement set out in the Supporting Documentation for the Learning Programmes which have been agreed at Schedule 1 Appendix 2 of this Contract";

xix) By Schedule 2, paragraph 2.3:

> "Where the contractor delivers Employer Responsive provision, payments will be made in arrears, in accordance with the actual delivery reported to the Council through the ILR submissions";

xx) By Schedule 2, paragraph 4.1:

> "Where the contractor receives profile payments from the Council payments will be reconciled to cash earned by actual delivery of the Services or the period to the timetable published in the Funding Requirements";

xxi) By Schedule 2, paragraph 4.2:

> "Where the contractor's actual delivery will result or has already resulted in an overpayment to the contractor by the Council, the Council will withhold from, or deduct the amount owed from, the payments due to the contractor under the Contract for current or subsequent months or years accordingly";

xxii) By Schedule 2, paragraph 4.3:

> "Where the contractor's actual delivery has resulted in an underpayment to the contractor by the Council, the Council will adjust the amount due to the contractor accordingly. This adjustment shall not exceed the overall maximum value set out in Schedule 1 of this Contract";

xxiii) By Schedule 2, paragraph 4.4:

> "Should there be an under…payment to the contractor, the Council's Contract Manager may at their absolute discretion require a contract variation";

xxiv) By Schedule 2, paragraph 7:

> "The evidence requirements in respect of each learning programme are set out in the Funding Requirements and the contractor must retain such evidence for inspection on demand";

xxv) Appendix 1, entitled "Summary of Programme Funding 2008/2009", contained the following information:

a) The Contract Start Date was expressed to be 1 August 2008;

b) The Contract End Date was expressed to be 31 July 2011;

c) The learning programme was expressed to be ER: Train to Gain, ER being a reference to "employer responsive";

d) The Maximum Value was expressed to be £135,553.76;

xxvi) Appendix 2 contained a "Funding Agreement" which contained a "Delivery Profile" which contemplated payments of (or of up to) the MCV in January, April and July 2009;

xxvii) A document entitled "Funding Allocation Detail", which appears to have been part of Appendix 2, indicated that, under the 2008 Yorkshire Contract:

a) The "total adult learners" were to number 200;

b) Of that number, 70 were to be SFL learners on a literacy course, 30 were to be SFL learners on a numeracy course and 100 were to be NVQ learners.

32. The evidence requirements referred to in Schedule 2, paragraph 7 included the following.[17] [18]

33. LSC Funding Guidance 2008/09: Principles, Rules and Regulations (version 4 – April 2008) provided as follows:

i) By paragraph 240, that:

> "The following notes apply to all listed and unlisted NVQs…LSC funding should not be claimed for learners on NVQ programmes who are not registered with an awarding body";

ii) By paragraph 343, that:

> "Colleges and providers should ensure that learners are enrolled on learning aims that are appropriate to their needs and are aiming to improve their skills to a level above their current attainment. For example, prior to enrolment onto basic skills learning aims, learners should have a demonstrable need for this provision, shown, for instance, by previous educational attainment or through initial guidance and assessment";

iii) By paragraphs 514-521, that:

[17] I did not understand it to be disputed that UKLA was provided with the Funding Requirements at the outset of its contractual dealings with LSC.

[18] The evidence requirements to which I refer are those which the Defendant relied on, at trial, to support the 2009 audit defence and counterclaim.

> "...The initial and diagnostic assessment of learners' literacy, language and numeracy needs will determine the appropriate level of qualification required to meet those needs and help the learner improve their skills. Improvement within the Skills for Life strategy is defined by, and measured as, a learner moving up a level of attainment from, for example, Entry 3 to Level 1. A learner assessed as already having a majority of skills at, for example, Level 1, has a need for provision at Level 2 in order to achieve measurable improvement…";

iv) By paragraph 529, that:

> "In order to claim the higher SLN value providers will need to be able to evidence to LSC-appointed auditors the following: a minimum of 15 hours of eligible support/learning/training consisting of underpinning knowledge and understanding as detailed in Table 7 below. This may also include provider staff feedback and instruction and evidence of provider input into assessing/reviewing distance learning materials by a suitably competent person but will always exclude Induction, IAG and Assessment. In principle, any activity that forms part of the standard LSC glh definition apart from assessment and observation (as defined in paragraph 110) counts towards the 15 hour definition."

34. LSC Funding Guidance 2008/09: ILR Funding Compliance Advice and Audit Guidance for Providers (June 2008) provided as follows:

i) By Annex B, paragraph 18, that:

> "The following evidence should be retained to support monthly NVQ on-programme payments: evidence that the learner is registered for the NVQ (although providers may want the learners to meet their SLN start criteria before incurring this cost)…";

ii) By Annex B, paragraphs 21-22, that:

> "Where basic skills funding is being claimed, the provider must retain written evidence of the learner's need. This evidence must be produced from an initial and/or full diagnostic assessment of a learner's literacy, English-language or numeracy need and the results recorded in the learner's ILP, confirming that the learner has a basic skills requirement in accordance with the document Principles, Rules and Regulations, Section 9, paragraphs 514-525. The LSC does not prescribe the use of a particular assessment tool; however, providers must use Skills for Life initial assessment tools that are based on literacy and numeracy

> standards. The provider must be able to demonstrate the learner is progressing towards an approved basic skills qualification as detailed in the paragraphs referred to above."

35. LSC Funding Guidance 2008/09: Funding Formula (April 2008) provided, by paragraph 54, that:

> "A learner is deemed to have started a learning aim once they have remained on the learning aim for [in the case of an NVQ, it appears not to be disputed] 6 weeks."

36. LSC Funding Guidance 2008/09: Learner Eligibility Guidance (April 2008) provided, by paragraph 86, that:

> "…It is normally expected that the provider itself will be registered with the awarding body for the qualification being studied and learners must be registered with the awarding body in order to be eligible for LSC funding…"

37. As I have indicated, UKLA relies on the 2009 Yorkshire letter of intent as the contractual document for what it contends is a contract for funding for the Yorkshire region for the 2009-2010 academic year. The 2009 Yorkshire letter of intent, which is dated 19 June 2009, provides as follows:

> "I am writing to confirm your Maximum Contract Value (MCV) for Train to Gain for 2009/10 – covering the period from August 2009 to July 2010…This final MCV constitutes the maximum level of funding [LSC] is providing to cover the commitments of both existing learners started in 2008/09 and new starts over the next year. It is on this basis that I am now in a position to provide your MCV for 2009/10…
>
> 2009/10 MCV £130,000
>
> Please note that the MCV is not guaranteed but we will pay for funding up to the MCV based on actual delivery…We cannot commit to pay for any delivery above the agreed MCV because of budgetary constraints or pressures incurred by colleges and providers recruiting more learners than the MCV provides for…
>
> This MCV confirms the intention of [LSC] to enter into a formal agreement for the provision of the Services as set out in this letter for 2009/10 as at 19 June 2009.
>
> In order for the services to continue prior to the parties entering into the formal signed variations to our agreement, the current terms and conditions will apply in the interim to this letter. The formal variation agreement will be issued following any discussions that need to take place to support the profiling of activity. The interim arrangements will operate from 1 August

> 2009 until 31 October 2009 or until the formal contractual variation is signed by both parties, whichever is the earliest.
>
> The Services shall be delivered in accordance with the following:
>
> - The terms and conditions set out in the Contractor's…agreement…
>
> - The Funding Guidance for and/or other general requirements which apply to the Services…
>
> Either party shall have the right to terminate the arrangements set out in this letter by one party giving one week's notice in writing to the other.
>
> By signature of this letter…LSC confirms its intention to enter into these arrangements and I would be grateful if you arrange for a copy of this letter to be signed on behalf of the contractor…to signify agreement to the terms set out above."

The 2009 Yorkshire letter of intent was signed, on behalf of LSC, by Mike Lowe (Director of Area, West Yorkshire).

38. As I have also indicated, the only contractual documentation which there is said, by UKLA, to be in relation to any contract in the North East region for the 2008-2009 academic year is the 2008 North East Contract Clarification Form. That document is a two-page document which merely recorded that UKLA had "accepted" £50,000 "provision", for the period from January 2009 to July 2009, in relation to TTG in the North East region. The document is signed by John Kinsella but is not signed by anyone on behalf of LSC.

39. There is a letter of intent in relation to the 2009-2010 academic year which, it is agreed, relates to the North East region. It is dated 19 June 2009 and is, substantively, in the same terms as the 2009 Yorkshire letter of intent, save that the MCV is expressed to be £3,381.

Chronology

40. Before turning to the witness evidence, it is helpful to consider, chronologically, some of the documentary evidence (including, in more detail, some of the documents to which I have already referred).[19]

41. LSC published a newsletter in February 2008 which recorded:

> "At present we have all the SFL qualifications and 28,000 of the NVQs under contract – with the remainder of places to be allocated from Regional Response Funding either to new

[19] I also refer, in brackets, to dates of some of the meetings (or alleged meetings) which are referred to in the agreed chronology.

> providers delivering specialist qualifications or as negotiated growth for existing providers who have fully utilised their current allocations. We will also retain the flexibility to move provision between under and over performing providers to ensure that no provider will run out of capacity during 2007/08. The money is there for you to earn if you can engage with the employers and find the learners…
>
> We have received some worrying feedback from providers in recent weeks. Some of you are telling us that you will have to stop recruiting learners next month [March 2008] because you won't have enough time for the learners to complete before the end of the 07/08 academic year. Please be reassured that there is absolutely no need to stop recruiting [TTG] learners – in fact doing so would mean you almost certainly wouldn't be able to deliver your contracted allocations for 2007/08.
>
> If we are to meet the extremely tough challenges laid down by Leitch we need providers to keep recruiting learners. If you haven't enough places available in your contract talk to your Contract Manager. If your performance is good on learner starts and achievements and you can recruit them we can fund them!"

42. (Imran Bham says he attended the meeting, on 3 April 2008, to which I have referred, at the Lancashire County Cricket Club ground. As I have also noted, Yusuf Bham says that he attended an equivalent meeting in Bradford on the same day.)

43. Mark Haysom (the then LSC Chief Executive) wrote to providers on 19 June 2008, as follows:

> "…Where training is addressing the needs of learners and employers, successful colleges and training providers will be able to increase their contracts both in their existing region and across the country, without the need to go through a further tendering exercise…
>
> There is still significant urgent work to be undertaken to clarify the policy, and operational issues (including systems and payments) arising from these changes. The funding and audit guidance for the 08/09 academic year will be reviewed and published…"

44. (As I have noted, there was a meeting, on 17 July 2008, between Imran Bham and Shafqat Rahim ("the 17 July meeting").)

45. LSC produced a document on 22 July 2008, entitled "Clarification of Employer Responsive Funding and Payments 2008-09", which recorded:

> "…It is necessary for planning and budgetary purposes to define what the overall indicative maximum contract value (MCV) is, building this from provider level to give regional

> and national figures and be able to give providers an indication of the value of contracts linked to specified volumes of learners…
>
> Within the Employer Responsive Model the provider factor is used for planning purposes only to calculate the initial maximum contract values for providers. It will not be used in the calculation of actual payments as had previously been indicated.
>
> The indicative MCV is for planning purposes only and is not a guarantee of income. Payments to providers will be made based on actual activity at an individual learner level…"[20]

46. By a letter, dated 20 July 2008, headed "subject to contract", LSC informed UKLA (in relation to its tender for TTG funding for the Yorkshire region) that its:

> "…tender has been successful and that it is the LSC's intention to award a contract to your organisation for this provision… Until the terms of the contract are agreed your organisation should not undertake any work and the LSC will not be liable to make any payments for any activity carried out before a contract is entered into."

47. (A meeting took place between UKLA representatives and Sarah Haigh on 26 August 2008 ("the 26 August meeting"). UKLA contends that one of the purposes of the meeting was to arrange a contract clarification meeting on 1 September 2008 ("the 1 September meeting"). The Defendant contends that the 26 August meeting was the contract clarification meeting. As I have noted, UKLA contends that there was a further meeting, on 1 September 2008, with Mrs Haigh, which the Defendant denies.)

48. An LSC induction meeting, attended by UKLA representatives, took place on 8 September 2008 ("the 8 September meeting").

49. A letter ("the North East 9 September letter") similar to 20 July 2008 letter, dated 9 September 2008, was sent to UKLA by LSC in relation to UKLA's tender for TTG funding for the North East region.

50. As I have noted, on 19 September 2008, LSC sent UKLA the 2008 Yorkshire letter of intent which said:

> "The arrangements set out in this letter shall operate from 1 August 2008 to 31 December 2008 or until [the 2008 Yorkshire Contract] is entered into, whichever is the earliest. When [the 2008 Yorkshire Contract] is entered into by the parties for the Services, the provisions of that agreement shall be operative from 1 August 2008.

[20] As I have noted, UKLA contends (and it was apparently not disputed) that it received this document.

> The Services shall be delivered in accordance with the following:
>
> - The Terms and Conditions set out in any draft agreement
>
> - The Funding Guidance for and/or other general requirements which apply to the Services…"

51. The 24 September email (from Mrs Haigh to UKLA) said as follows:

> "…Hopefully you will have received a letter informing you of your successful bid and forthcoming contract. The initial volumes are as follows:
>
> | | | |
> |---|---|---|
> | Retail and Commercial Enterprise | NVQ Level 2 | 30 |
> | Education and Training | NVQ Level 2 | 30 |
> | Leisure Travel and Tourism | NVQ Level 2 | 40 |
> | Skills for Life | | 100 |
>
> As discussed at the contract clarification meeting, these amounts can be negotiated upwards when the initial volumes have been achieved…"

52. Mrs Haigh emailed UKLA on 15 October 2008 as follows, in response to an enquiry about the consequences of a delay in the recruitment of the 200 learners referred to in, for example, the 24 September email:

> "As David discussed in the clarification meeting, low volumes have been given in the first instance and when they have been achieved then the possibility of further volumes being added will be considered regardless of timescales."

53. (As I have noted, UKLA contends that Mrs Haigh and Mr Rahim visited its premises on 5 and 26 November 2008. The Defendant denies this.)

54. I have already referred to the 2008 North East Contract Clarification Form, which was dated November 2008. The form was sent as an attachment to an email, dated 19 November 2008, from Chris Nicholls (the TTG partnership manager for the North East region) which said:

> "…If you can sign this document and return it to me at the address below, I can start the contracting process…"

55. The 2008 Yorkshire Contract was signed, on UKLA's behalf, by Yusuf Bham on 9 December 2008 and, on 18 December 2008, it was signed by Mr Lowe on LSC's behalf.

56. (UKLA contends that Yusuf Bham attended an LSC TTG event at Leeds United football stadium on 12 December 2008. The Defendant disputes that such an event took place.)

57. As I have noted, Mr Lowe wrote to all providers in the Yorkshire region on 15 December 2008, in a letter entitled "Yorkshire and the Humber Regional Commissioning Statement for 2009-10" ("the 15 December letter"), saying:

> "I am writing to ensure that all providers in Yorkshire and the Humber have access to the latest information about LSC priorities for 2009-10…
>
> Attached are three annexes which provide further information which you may find helpful…
>
> The second outlines the allocations methodology for 2009-10…
>
> Annex 2 – Allocations Methodology 2009/10 (Draft)
>
> This is a national process, which will be applied equally in all regions. At this stage, given the Annual Statement of Priorities has only recently been published, this process remains draft…
>
> 2009/10 Maximum Contract Values
>
> - MCV is only an indication of potential earnings in year subject to performance review in year and can be revised upwards or downwards within year. Providers will be paid on what they deliver.
>
> - 2009/10 negotiated maximum contract values will be notified to providers on…31 March 2009 in respect of…[TTG]...
>
> - It is important to stress that the employer responsive model is demand led. The LSC must be responsive to employers' needs; even more so at a time when the economy is facing a downturn."[21]

58. (An Initial Monitoring Visit took place on 18 December 2008.)

59. LSC published a newsletter in January 2009 which said:

> "Variations to contract and maximum contract values will continue to be driven by actual provider performance."

60. As I have noted, a meeting took place on 27 January 2009 ("the 27 January meeting") between Mrs Haigh and Asif Mohammed (on LSC's behalf) and Yusuf Bham and Mr

[21] There is no dispute that TTG was an "employer responsive model" (as the 2008 Yorkshire Contract recorded).

Kinsella (on UKLA's behalf). There is a note of the meeting (the accuracy of which is disputed) which reads:

> "…There are presently 180 Skills for Life learners in learning…UKLA were asked as a matter of priority to submit the 180 ILRs to the LSC, the deadline for submissions being 4 February. Mo asked about additional funding for the 80 over contracted learners and was advised that until at least 80% of the contract had been delivered/claimed a formal request could not be made…"[22]

61. UKLA obtained a Provider Funding Report ("PFR") from LSC's computer system on 4 February 2009 ("the February Yorkshire PFR"). A PFR is, in effect, substantially a record of data a contractor has transmitted to LSC (in this case, up to the same day). Based on the information UKLA had provided, the February PFR recorded that, in the Yorkshire region, 122 SFL learners had started; all in January 2009. The February PFR also recorded that UKLA had "earned" £47,075.38, in relation to those learners.

62. A meeting took place on 11 March 2009 ("the 11 March meeting") between LSC and UKLA representatives. There is a note of the meeting (the accuracy of which is not disputed) which reads:

> "Margaret Cobb opened the meeting by stating that its purpose was to review UKLA's contract in terms of the remaining periods and with a look ahead to 2010 and 2011, as all providers were currently being reviewed at this time…
>
> The importance of Initial Assessment and Skills Checks was emphasised in ensuring that candidates were placed on appropriate courses. In the event that IAs and Diagnostics were not available for Audit then all providers would be subjected to funding clawback.
>
> Margaret Cobb stated that negotiation of the Individual Learning Plan with each candidate was stressed as also the need for evidencing this for audit purposes. Furthermore, the ILP should be in resonance with the IA and Diagnostics and negotiated by a Level 4/5 tutor with the learner. Once again lack of robust evidence of this process or not being carried out by a L4 tutor would result in funding clawback for all providers…
>
> Ataul Ali stated that a rationale for determining the appropriate banding of each candidate would need to be evidenced. This would need to be placed in the ILP. Ataul Ali also added the previous experience needed to be considered would also be a

[22] As I understand it, UKLA disputes that there was any reference to "over contracted learners" and also disputes that there was a discussion about "additional funding"(that is, funding in excess of the 2008 Yorkshire Contract MCV).

> determinant of the banding rate. Furthermore, Margaret Cobb stated that the lack of a valid rationale for applying the higher banding would result in funding clawback for all providers…
>
> Commenting on UKLA's Funding situation, Margaret Cobb stated that this had been originally fixed at £135,000 to deliver 100 NVQs and 100 Skills for Life courses. UKLA was currently in a position to claim some £90,000 of this. UKLA would need to plan to stay within this budget. Margaret Cobb stated that the situation is no different for all other providers who were being constrained to stay within their preliminary budgets. Imran Bham pointed out that according to the initial volumes given to UKLA, the targets of 100 SFL and 100 NVQ courses would equate to £200,000 and not £135,000. Imran Bham stated that this should be looked at as the shortfall would be disadvantageous to UKLA's initial delivery plan.
>
> John Kinsella stated that at the launch of [TTG] the opening speech gave a strong indication that initial budgets would be increased for providers who can demonstrate that they could exceed their targets. Indications were that there was ample funding available for this to happen. In reply, Margaret Cobb stated that this was not so, that funding was tight as all providers were exceeding the targets. John Kinsella further clarified this point with Margaret Cobb that there was, in fact, a mismatch of funding as demand was outstripping supply. Margaret Cobb stated that all providers were in a similar position and would have to adhere to the original target set.
>
> Imran Bham stated that there was an additional 320 candidates ready to start at UKLA and that, altogether, about 700 candidates had completed IA and Diagnostics with UKLA. Each of these candidates UKLA had been the first choice of provider. Imran Bham asked advice as to what to do with such numbers. Sarah Haigh suggest that UKLA could signpost access to other providers. John Kinsella queried how this could be done when, as Margaret Cobb had just reported, they too were oversubscribed…"

63. Margaret Coleman (LSC's Regional Director) wrote to providers on 31 March 2009 ("the 31 March letter") as follows:

> "…left unchecked, [TTG] activity will exceed the budget allocations we have available for the 2009-10 financial year and create further pressures in the 2009/10 academic year and beyond. We must take action now and agree with you contracts that enable you to meet the needs of employers and learners, within the levels of investment we have available…
>
> In taking these actions our underpinning commissioning principle remains unchanged – we want to ensure the best

> performing colleges and training providers can continue to offer the highest quality service to learners and employers. These colleges and training providers should be able to continue to operate across the country and respond to demand within the national resources we have available and the contract limits we agree with them.
>
> In outline, the measures and actions we propose to take include:
>
> Train to Gain
>
> - We will work with you to ensure that we remain within budget from April and for the remainder of this academic year as well as for the 2009/10 academic year. You must manage within the overall maximum contract value agreed with us. We will also want you to ensure that sufficient levels of provision are available to employers and learners across the whole of the academic year...
>
> - We cannot "over contract" with colleges and training providers at either a regional or national level. Contract values cannot exceed the overall budgets we have available."

64. UKLA obtained a PFR on 7 April 2009 ("the April Yorkshire PFR"), which was based on information which UKLA had transmitted to LSC up to 5 April 2009. Based on that information, the April Yorkshire PFR recorded that, by 5 April 2009, in the Yorkshire region, 195 NVQ learners had started and 178 SFL learners had started.[23] The April Yorkshire PFR also recorded that, by 5 April 2009, UKLA had earned £178,078.19. The April Yorkshire PFR indicated that all the NVQ learners who had started had done so in March 2009 (except for one who, anomalously, was shown as having started on 23 April 2009). Many, if not all, the NVQ learners who were recorded as having started in March 2009, were recorded as having started in the last two weeks of that month.

65. Mr Lowe wrote to providers on 1 May 2009 ("the 1 May letter") as follows:

> "…Following on from the letter issued by Margaret Coleman recently, there are a number of factors that we must manage collectively in order to actively manage the delivery of [TTG] over the remainder of this year and the movement into the next academic year.
>
> The attached spreadsheet has been produced in order for the LSC and the provider network to actively manage both the commitment to learners in the system as of 1 April 09 and

[23] It will be recalled that, by the Amended Particulars of Claim, UKLA contends that 449 NVQ learners and 143 SFL learners had started before 1 April 2009.

> determine individually with providers the opportunity to recruit learners between periods of 1 April 2009 to 31 July 2009. This activity will help us to determine the financial cost of carry in learners into the 2009/10 academic year which would also include starts recruited during this period subject to you having sufficient headroom within your existing…MCV…
>
> - With regard to the period April 09 to July 09 you should show your anticipated delivery taking into consideration delivery against your allocated MCV.
>
> - Where you have not yet reached your agreed MCV based on current in learning numbers, you can continue to recruit learners subject to this commitment not exceeding your maximum contract value for 08/09.
>
> - From 1 April 2009 where you have already or are likely to exceed your maximum contract value for 2008/09 you will need to postpone any further recruitment until August 2009 to ensure that you have sufficient funds to meet the requirements to learners in learning…"

66. A meeting of the LSC's External Advisory Group took place on 11 May 2009. The minutes of the meeting record that:

> "…the [TTG] programme had proven to be very successful, with significant uptake over the last 6 months in response to the stimulus in demand activated in the summer of 2008. It was therefore necessary to ensure there was no overspend, whilst continuing to fund the best performing providers to maintain quality. In response, Partnership Teams were considering the level of performance and number of learners enrolled up to the end of March to enable confirmation of the 2009/10 budget. It was important providers manage within formally agreed MCVs and managed the April to July offer accordingly. More funding would therefore be made available in this academic year by transferring resources from 2009/10 into 2008/09…It was confirmed the LSC would stand by its MCV contractual commitments where delivery quality was good and would ensure the LSC could fund all those learners who started before 1 April 2009. Anything beyond that would be funded based on availability. It was noted failure to meet MCVs could be legally challenged, whilst recognising the LSC and sector clearly could not allow funding to remain with poor quality provision. Regions and National Office were working together to ensure MCVs were issued by 31 May…"

67. Mohamed Dawoodji (UKLA's in-house lawyer) wrote to LSC on 19 May 2009. The letter was entitled "Anticipatory Breach of Agreement (Yorkshire and Humber Contract)". It said:

> "I write as the legal officer of [UKLA] with regard to recent communications from the LSC concerning the value of the contract the company has with the LSC. It is our company's understanding that, whereas it was a term of the contract between the LSC and our company that an initial contract value was set by the LSC, that the amount of training contracted with our company would be increased upon our company's achieving the initial contract value. However, the LSC, in its letter dated 16 April 2009 and telephone conversation on Friday, 15 May 2009 to our company appears to seek breach of its contractual obligation by refusing to pay for training over and above the initial contract value.
>
> We would be most grateful if you could clarify the LSC's position in the next seven days, and, if it is the case that the LSC does not wish to move beyond the initial contract value with our company, then, can you please stipulate the LSC's reasons for this…"[24]

68. Mrs Haigh emailed UKLA on 19 May 2009, as follows:

> "…you will need to resubmit in period 10 including the starts for period 10 plus all existing learners still on programme. It should however be noted that you must only submit volumes up to your contracted volumes as laid out in your summary statement of activity, and within your overall maximum contract value in order to avoid being capped…"

69. As I have noted, Geoff Russell (LSC's Chief Executive) wrote to UKLA on 19 May 2009 ("the 19 May letter"). The letter was entitled "2009/10 Update on Funding Allocations" and said:

> "…We are now coming to the end of the settlement process for 2009/10 funding….
>
> I know that some of you have been concerned about aspects of this year's process and I appreciate the difficulties it may have caused you…
>
> I want to be absolutely clear with you on a number of specific issues around future allocation that I know have caused some anxiety over the past few weeks. I am therefore setting out below the current position on funding allocations. I also want to reassure you that we will guarantee that there is funding available for you at the agreed rates to support learners who

[24] I was not taken to any letter dated 16 April 2009 and there was no reference, at trial, to any telephone conversation on 15 May 2009. It may be that the 16 April 2009 letter was one containing UKLA's "indicative contract value" for the 2009-2010 academic year which Geoff Russell refers, in the 19 May letter, to having been "issued" by 19 May 2009.

> were legitimately in learning before 1 April 2009 through to completion…
>
> Indicative contract values have been issued and we are currently in the process of revisiting allocations and, where possible, increasing them…
>
> As noted already, I can assure you that all learners legitimately starting training before 1 April 2009…will be funded to complete their training at the agreed rates.
>
> I do hope that this note reassures you that we are resolving some of the legitimate concerns many of you are expressing to me, and others."

70. Clive Howarth wrote an email on 21 May 2009, which said:

> "…Final allocation letters for 2009/10 will be sent in the next fortnight but you should be aware from your initial allocation letter of the scope you have for new starts from August…
>
> We are working hard to try to alleviate the problems we are all facing because of the pressures on the [TTG] budget and will let you know how things progress as soon as we have any viable solution. Unfortunately in the meantime the message is still the need for you to manage within your maximum contract value..."

71. UKLA obtained a PFR on 11 June 2009 ("the June Yorkshire PFR") on 11 June 2009, based on information which UKLA had transmitted to LSC up to 3 June 2009. Based on that information, the June Yorkshire PFR recorded that, in the Yorkshire region, during the 2008-2009 academic year (i) only NVQ learners had started, (ii) only 101 NVQ learners had started and (iii) all bar 9 had started on 1 April 2009, with the remainder starting thereafter.

72. As I have noted, Mr Russell sent a letter to training providers ("providers") on 12 June 2009 ("the 12 June letter"), which said as follows:

> "You will have been notified at the end of last week that, as a result of the discussions with Ministers on the current [TTG] funding position, we agreed to move the date to confirm…MCVs to 19 June. I am writing to you to provide specific details of the package of measures now in place to manage the ongoing success of these services to employers and provide early notification of other options we are currently exploring…
>
> Actions for 2008/09
>
> As you will already be aware, the LSC has committed to funding all legitimate [TTG] starts prior to 1 April 2009. A

> "legitimate start" in this context is one that meets our normal requirements for start funding, as set out in the Funding Guidance 2008/09.
>
> For audit purposes, the provider must have evidence to demonstrate that the learner has actively participated in a structured programme as detailed in their individual learning plan prior to the 1 April 2009. In line with our structured assurance approach, funding claims will be checked, during assurance visits to ensure that for any learners submitted as new starts dated before 1 April 2009 there is evidence that learning had taken place on or prior to 31 March 2009…
>
> To continue to ensure we remain within the budget available, we can only commit to funding within the overall MCV those learners that meet these conditions. All remaining new activity will be funded based on the specific agreements made with our local teams and will be subject overall affordability. As already notified, from April onwards you should only have been taking on new starts where they can be accommodated within your agreed MCV for this year…
>
> Through our Regional teams, we have been working with providers to ensure MCVs for 2008/09 reflect our commitment to existing learners…However, to ensure we are able to cover those commitments, we ask that all legitimate starts prior to 1 April are recorded on the ILR by 30 June 2009…"

73. As I have noted, a document, entitled "Clarification of a "legitimate start"", dated 12 June 2009 ("the June 2009 Clarification document"), was issued by LSC. It read:

> "Further to Geoff Russell's letter to all providers via Regional Directors on 19 May 2009, National Office has been asked to provide clarification as to what constitutes a "legitimate" start:
>
> "…I can assure you that all learners legitimately starting training before 1 April 2009…will be funded to complete their training at agreed rates."
>
> For clarification, the standard definition of a "start date" should be used to determine the learners to which this assurance applies.
>
> "The start date is defined as the date on which the learner's learning programme begins"…
>
> This…is the date on which learning for the learning aim began…

> Any learning programme for which the start date is on or before 31 March 2009 will therefore be included in this assurance.
>
> The provider must have evidence to demonstrate the learner has actively participated in a structured programme as detailed in their individual learning plan prior to 1 April 2009. This will be after all the pre-start activity has been completed and they have started learning…
>
> This assurance applies to all learners who meet the above criteria, including where providers have received prior authority to exceed their Maximum Contract Value and their contract has not formally been changed to reflect this agreed level of recruitment."

74. There is a transcript of the 16 June conversation,[25] which records Mrs Haigh saying to Imran Bham:

> "Everyone that was enrolled before April you've got a commitment to."[26]

75. There is a transcript of a conversation, on 17 June 2009, between Imran Bham and Chris Nicholls. The transcript records the following:

> "Chris Nicholls: …for the remainder of this year you'll still have an allocation in the North East…Is it 50 K you've got?
>
> Imran Bham: We had 50 K initial contract value then 500 K.
>
> Chris Nicholls: Yes. 50 K. That'll all be put in place for the North East.
>
> Imran Bham: So can we deliver to the initial contract value or the maximum contract value.
>
> Chris Nicholls: It's the 50 K value. The maximum contract value…
>
> Chris Nicholls: …what we decided to do in the North East is that all providers who were new to the North East and was successful to tender we offered them all…within a expectation that as time moved on we'd be able to increase that will stop

[25] UKLA audio recorded and, in relation to meetings at UKLA's premises, video recorded conversations its representatives had with LSC representatives and between LSC representatives. LSC representatives have explained they were not aware that their conversations were being recorded. It appears that there are or may be gaps in the transcriptions (or, perhaps, what was picked up by the recording equipment) and some inaccuracies in the transcriptions (at least in relation to the 4 August meeting). Save where I indicate otherwise, I have tried to copy verbatim, in this judgment, those parts of the transcripts to which I refer.

[26] The Defendant contends that, as partially quoted in the Amended Particulars of Claim, this statement by Mrs Haigh has been taken out of context.

> now obviously as you'll be aware things have changed significantly and we don't have as much money as we did have when we set up the initial contract. So I think, well, cut the long story short, as you know the money has run out….
>
> Imran Bham: …so we can deliver you're saying up to 50 K in the North East?
>
> Chris Nicholls: Yes."

76. UKLA contends that the 2009 Yorkshire letter of intent was received by it on about 19 June 2009.[27] That letter read:

> "I am writing to confirm your Maximum Contract Value (MCV) for [TTG] for 2009/10 – covering the period from August 2009 to July 2010…
>
> This final MCV constitutes the maximum level of funding [LSC] is providing to cover the commitments of both existing learners started in 2008/09 and new starts over the next year.
>
> Maximum Contract Value
>
> Your MCV in 2009/10 for [TTG] is shown below…
>
> 2009/10 MCV £130,000
>
> Please note that the MCV is not guaranteed but we will pay funding up to the MCV based on actual delivery…We cannot commit to pay for any delivery above the agreed MCV because of budgetary constraints or pressures incurred by colleges and providers recruiting more learners than the MCV provides for…
>
> This MCV confirms the intention of [LSC] to enter into a formal contract for the provision of the Services as set out in this letter for 2009/10 as at 19 June 2009.
>
> In order for the Services to continue prior to the parties entering into the formal signed variations to our agreement, the current terms and conditions will apply in the interim to this letter. The formal variation agreement will be issued following any discussions that need to take place to support profiling of activity. The interim arrangements will operate from 1 August 2009 until 31 October 2009 or until the formal contractual variation is signed by both parties, whichever is the earliest.
>
> The Services shall be delivered in accordance with the following:

---

[27] LSC disputes this.

> - The Terms and Conditions set out in [UKLA's] agreement
>
> - The Funding Guidance for and/or other general requirements which apply to the Services…
>
> Either party shall have the right to terminate the arrangement set out in this letter by one party giving one week's notice in writing to the other…
>
> By signature of this letter the LSC confirms its intention to enter into these arrangements and I would be grateful if you arrange for a copy of this letter to be signed on behalf of [UKLA] to signify agreement to the terms set out above…
>
> Please sign and return one copy of this letter by 3 July 2009…"

77. A letter of intent relating to the 2009-2010 academic year for TTG funding in the North East region ("the 2009 North East letter of intent") was received by UKLA on about 19 June 2009. It was countersigned by Mr Kinsella and dated by him 25 June 2009. Substantively, it is in the same terms as the 2009 Yorkshire letter of intent, save that the MCV was expressed to be £3,381.

78. Mrs Haigh emailed UKLA on 22 June 2009, as follows:

> "All "legitimate learners" must be submitted to us by 30 June 2009 to be able to claim for activity delivered…"

79. Mrs Haigh emailed UKLA again in June 2009, as follows:

> "Following on from my earlier emails of 19 May and 22 June regarding the data issues I thought it would be useful to confirm what is outstanding with regard to your [TTG] contract…
>
> With regard to the important issue of data, you must ensure that starts for each period plus all existing learners still on programme are submitted via batch. If only starts are submitted your payments will be affected as reduced volumes will be shown. It should however be noted that you must only submit volumes up to your contracted volumes as laid out in your summary statement of activity, and within your overall maximum contract value in order to avoid being capped…"

80. As I have noted, an "update" then apparently appeared on LSC's website ("the LSC website update"). It read:

> "Permission to upload pre-April 1 2009 learner starts potentially outside MCV

> A one-off allowance to permit providers to upload potentially un-funded learners outside of MCVs enrolled prior to 1 April 2009 was announced in June 2009…"

81. UKLA contends that Mr Kinsella countersigned the 2009 Yorkshire letter of intent on 25 June 2009 and that it was posted back to LSC on that date.

82. Mrs Haigh emailed UKLA on 1 July 2009, as follows:

> "…With regard to the data, you will have noted from Geoff Russell's letter of 11 April 2009 *(sic)* that all legitimate learner starts prior to 1 April need to be recorded on the ILR by 30 June 2009. Obviously this date has now passed so any omissions will not be taken into account."

83. As I have noted, Mrs Haigh emailed UKLA on 8 July 2009, as follows:

> "…as you are exceeding your MCV you will need to remove all starts from the system for April, May and June 2009 as the LSC is only paying prior to 1 April as per Geoff Russell's letter of 11 July 2009…"

84. Keith Woodcock emailed UKLA on 9 July 2009, as follows:

> "Please note that in order for the LSC to make all legitimate payments to which [TTG] providers are entitled to as part of their…MCVs for 2008/09, it is necessary to ensure that there are sufficient funds within individual providers contracts. The final opportunity for the LSC to make any changes to MCVs for the 08/09 contract year is 31 July 2009…"

85. As I have also noted, LSC published a newsletter on 10 July 2009 ("the July 2009 newsletter") which contained the following:

> "What happens if I exceed my MCV?
>
> The LSC has determined 3 scenarios whereby a provider might breach their MCV. These are outlined below along with LSC's policy line and how these scenarios will be dealt with.
>
> Scenario a) Where a provider breaches their MCV because of payments associated with "legitimate" learners, to whom the LSC has made a funding commitment
>
> Answer – The LSC has committed to funding these learners and so the provider's MCV would need to be increased in order to cover the full costs of these learners…"

86. The National Audit Office report was published on the same day. The report said:

> "…[TTG] has been subject to frequent policy and process changes as the Department has sought to address performance

> issues and act quickly to offer help in the recession…The LSC had to implement these changes but was not always able to communicate them in a way that enabled providers to respond swiftly and effectively. The LSC needed to develop policy and operational guidance within a tight timeframe, and did not always keep its regional staff, providers and brokers well informed. In particular, the main information sources were not consistently reliable or up-to-date: funding guidance for providers was not user-friendly – early versions were long and vague, leading to inconsistent interpretation by providers and LSC staff…"

87. Matt Findull emailed UKLA on 17 July 2009, as follows:

> "As you will see below we are contacting all providers who have exceeded the 2008/09 MCV and who have learners starting post 1 April to ask that these are removed from the P12 data submission as these are not fundable. Please note we will not be able to consider removing any capping on payment of a legitimate learners until this has been done…"

88. The Defendant contends that the 2009 Yorkshire letter of intent was hand-delivered to UKLA's premises in Bradford on 20 July 2009.

89. As I have noted, Mr Woodcock emailed UKLA on 20 July 2009, at 4:19 pm. In fact, it appears that he sent two emails then. One said as follows:

> "2009/10 Employer Responsive Allocation Letter
>
> Dear Colleague, Please find attached a PDF copy of your 2009/10 Allocation letter. A hardcopy will follow for signature."

Attached to the email was a PDF named "UK Learning Academy". The second email said:

> "Further to the 2009/10 Employer Responsive allocations confirmed with you earlier today, and Geoff Russell's letter of 11 June, the LSC are to agree a full Summary Statement of Activity (SSoA) and a funding profile with each provider…
>
> The Maximum Contract Value (MCV) you were allocated for Employer Responsive 2009/10 contract year (sent 19 June) has been…pre-populated within the relevant profiles in the attached Excel workbook…
>
> The [TTG] split is skewed because we have a commitment to fund legitimate pre-1 April starts as a priority and many providers have exceeded 08/09 academic year budgets with legitimate starts. Therefore funds have been brought forward from 09/10 academic year budget to fund this over performance

> resulting in less available for the months 1-8 of the academic year…"

90. The transcript of the 27 July telephone call records that Mrs Haigh said:

> "…Everybody's post-1 April, that together, it's really important you do that Imran because…you'll be able to get paid for your activity up to then, and that's kind of what's holding it back at the moment…
>
> …as soon as you take those learners off from April onwards, it'll release capping in a way, so you would get the delivery then…
>
> …we'll be able to pay from everything up to April, you know for those eligible learners that you had prior to 1 April…
>
> And you get paid for everything that you know, you're overdue for the eligible learners prior to 1 April…
>
> [Following Imran Bham saying: "So, does that mean to say that we're going to get paid for them, this is not the [SFL] because so far, I think what we've been paid for is the [SFL] learners", Mrs Haigh continued:] You'll get paid for any eligible learners prior…you know they're starting prior to 1 April…"

91. There is a transcript of 4 August 2009 meeting. The transcript records the following remarks (which, save where I indicate otherwise, are recorded as having been made by Margaret Cobb):

> "…basically Ann I think there's 281 learners for NVQs that started prior to 1 April and 185 [SFL] learners that started prior to 1 April, and they're the ones that obviously we have a commitment to pay…
>
> [Ann Craven (LSC's Economic Director):] We do.
>
> So basically what we need to understand is how much from 1 April to July they're going to cost us…because you've actually got a contract of 135,554 which you're going to go over…
>
> [Imran Bham:] …you see in relation to these additional learners, the 185 over and above the 281 which is 1 April, so, as I say you see these individuals had actually commenced with us…they have been enrolled for the RPVD as of post 1 April, but in the main 90% of them they had started with us as such on the programme…
>
> My understanding Ann is the answer's very clear, if there's an assessment, an individual learning plan and those are in place and dated by the learner prior to 1 April and there's been some

training delivered prior to 1 April and will stand up to the auditors, then we will make those…

[Ms Craven:] That's correct. That's absolutely correct…

…some training [must have been] delivered

[Imran Bham:] Training delivered as well?

Yes. So having said that, does that change that 281 and that 185?

[Imran Bham:] It will do in actual fact. Yes. But obviously I have to go back and…

[Ms Craven:] You'll have to have a look at that?

[Imran Bham:] Yes of course, physically at the files, yes…

[Ms Craven:] Because once the system comes right then we can look up what the contract value ???[28] be for 8/9 and release those funds…

[During a discussion about the contract or purported contract for the academic year 2008-2009 in relation to the North East region:] Well it's really important that we understand all this, because we're at a period now where all the money for 8/9 has to be found to pay for all the learners that are in the system…My understanding and I hope I can make this clear [is] that the LSC will pay for all the learners that have a start date prior to 1 April. We have a commitment to that, and if the auditable evidence is there that we've talked about then the LSC will fund that ???[29] whatever it be; the North East or Yorkshire and Humber. It's really important that we understand how many learners, and how much money that is. And the fact that we don't understand that, because you still got some April, May, June, July learners on the system makes it very difficult for us to come to an agreement in terms of the money that we owe you…

[Ms Craven:] That's correct. Until we are confident that the April to July learners have been taken off we'll be [un]able to pay you for the ones prior to 1 April and we'll be [un]able to look at how much those that are going to cost you if they're

[28] At this point in the transcription, the text is incomprehensible, so I have replaced the text with question marks.
[29] These question marks appear in the transcription.

> carrying on to 9/10 and whether or not you've got enough money in your 9/10 allocation…[30]
>
> So at the moment you've hit the maximum contract value. We can't pay you any more until we know how much we owe you…
>
> [Imran Bham:] Just touching on may be the first issue as such that we've put on our agenda which was about the 08/09 contract allocation. I believe you say you are going to give us an update with regards to your expectations to us to deliver 100 NVQs and 100 [SFL] based on 135k allocation. So I was just wanting to know what have you got an update for us as such.
>
> I think that what we're saying is that if you've got 281 learners with start dates and 155 [SFL] with a start date prior to 1 April, then we will meet that commitment…"

92. On the same day, UKLA obtained a PFR ("the August Yorkshire PFR"), based on information it had supplied up to that date (although, on instructions, Mr Warner accepted, in closing, that UKLA had transmitted information, in relation to the Yorkshire region, to LSC's computer system in July 2009). Based on that information, the August Yorkshire PFR showed that, during the 2008-2009 academic year, in the Yorkshire region, 487 (or 488) NVQ learners had started and 173 SFL learners had started.

93. Mrs Haigh re-sent the 12 June letter to UKLA on 5 August 2009.

94. Lucille Ingham (LSC's Regional Contracts Director) wrote to Yusuf Bham on 12 August 2009 saying:

> "The LSC recently issued you with a letter that set out your allocation for [TTG] provision 2009/10. We asked you to sign and return this letter by 3 July 2009. A signed and returned letter constitutes acceptance of the terms under which you will operate.
>
> As yet, we have not received a signed return from you. If you fail to accept our terms and conditions, we will withhold payments for this activity until we receive your signed return…"[31]

95. Mr Lowe wrote a letter to UKLA on 17 September 2009 ("the 17 September letter"), which was hand-delivered on 18 September 2009, in relation to the 2009 Yorkshire letter of intent, as follows:

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[30] The transcription suggests that Ms Craven used the word "able" twice but that makes no sense grammatically. She must have used the word "unable" twice.

[31] UKLA denies receiving this letter.

> "…As [LSC] has still not received a signed copy of this letter accepting the terms and conditions under which [UKLA] would operate [TTG] we have decided to withdraw the offer of a contract to [UKLA] to deliver [TTG] for the academic year 2009/2010.
>
> Please provide your LSC Contract Manager with information on all "legitimate learners" recruited prior to 1 April 2009. [LSC] is committed to funding these learners to successful achievement of their qualifications and [TTG] and this information is required so that [LSC] can transfer these learners to alternative providers to complete their training…
>
> Please note, as you have already received funding up to the Maximum Contract Value set out in your contract for 2008/09 you are not entitled to any further payments…"

96. In an LSC paper "issued" on 17 September 2009 (but apparently created on 18 September 2009), entitled "Dealing with Capped Training Providers", the following is said:

> "Where providers have exceeded their MCV by funding legitimate learners (i.e. those that started before April 1 2009), the appropriate adjustment should be made to their MCV so that it matches the value of the legitimate 2008/09 activity."

97. Mrs Cobb circulated, internally, a long email on 22 September 2009 (including to Kay Skidmore) ("Mrs Cobb's 22 September email"), which said:

> "UKLA has had a letter advising that we will not be contracting with them in 09/10. I hand-delivered a letter…[Yusuf Bham asked] on what grounds had we decided not to contract with them. I referred him to the relevant para in the letter re not returning the signed document re the allocation which in essence was the agreement to accept terms and conditions etc. He advised that this had been signed and had been returned. He advised it had been returned on 25 June. I have checked in the system in WY and we have no record of it being returned. In addition there is a complication that we did not send the letter to UKLA until 20 July as we were trying to ascertain from them their potential carry in which involves them removing post 1 April starts. In essence we needed the info to help us make a judgment re the allocation. In light of this the letter that was sent to all other providers on 19 June did not go to them until 20 July but by mistake the letter date had not been changed…I did point out we had sent a reminder letter but they state they have not received that…
>
> Re 08/9 we are still in a position where they have not removed the post 1 April starts and I have advised they need to do this as soon as possible. I have also reminded them re box 44 or 45

> and they again advised that this was really difficult. In my view we should leave this and wait for audit to pick up these issues. Kay is going in on the 5 7 8 October…"

98. UKLA obtained a PFR ("the October Yorkshire PFR") on 5 October 2009, based on information it had supplied up to that date for the Yorkshire region. The October Yorkshire PFR records that UKLA had earned nothing in the 2009-2010 academic year.[32]

99. UKLA also obtained a PFR ("the October North East PFR") on 5 October 2009, in relation to the North East region,[33] based on information UKLA had provided up to that date. The October North East PFR recorded that (i) 29 NVQ learners had started, (ii) all 29 NVQ learners started in the second half of July (including 19 who had started in the last 5 days in July) and (iii) UKLA had earned nothing in the 2009-2010 academic year.

100. LSC auditors (Ian Stafford and Miss Skidmore) carried out an "audit" of UKLA in October 2009 ("the 2009 audit").

101. There is a transcript of conversations, during the 2009 audit, between Mr Stafford and Miss Skidmore. The transcript records the following statements:

> "Kay Skidmore or Ian Stafford: Foreign doctor came over and first thing he did was give someone an overdose. It was on the news.[34]
>
> Kay Skidmore or Ian Stafford: Stains on the walls of toilet (UKLA) [and, later, on commenting about a sign on the toilet:] Well put a normal lock on then. It is a bit dodgy isn't it…
>
> Kay Skidmore or Ian Stafford: [After a lunch break:] Speaking about toilets in mosque in Cairo, so bad that…You have to take your shoes off for the mosque, looked at carpet and was filthy…[35]
>
> Kay Skidmore: I'd already typed some feedback…I typed it up last week.
>
> Ian Stafford: What. Before we'd even gone here?
>
> Kay Skidmore: It was about those two duplicate learners.

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[32] There is a dispute about whether nil entries were generated because LSC's computer system prevented any other entry, in the light of the 17 September letter, or because UKLA had, in fact, in effect, provided no lessons to learners in the 2009-2010 academic year.

[33] This is the only PFR, in the trial bundle, relating to the North East region.

[34] Mr Fryer-Spedding put to Miss Skidmore, in cross-examination, that she had made this remark. In his witness statement, Imran Bham contends that Mr Stafford made this remark. It is not possible to establish in all cases, from the transcript, who the speaker was. It was not clear to me that Miss Skidmore accepted, in cross-examination, that she made this remark.

[35] It is not clear to me, from the transcription, who made these remarks. Imran Bham says that Mr Stafford did so but Miss Skidmore appeared to accept, in cross-examination, that she did so.

> Ian Stafford: Started the report as well. Ha ha…
>
> Kay Skidmore: …here's your report thank you very much. I put this has resulted in a recovery in funds but can we class it as a recovery of funds when we haven't paid them. I'm really confused.
>
> Ian Stafford: Does this start after --
>
> Kay Skidmore: After 1 April…
>
> Ian Stafford: I suppose if they haven't been paid for it you can hardly take their money back for it can you.
>
> Kay Skidmore: No. So I can't put in this has resulted in a recovery of funds so what am I going to put in? …Could I put this has resulted in data collecting? Has a certain ring to it…
>
> Ian Stafford: Why have they got a shower thing next to the loo?
>
> Kay Skidmore: Because it's an Asian toilet.
>
> Ian Stafford: Yes. I was thinking that because in Libya there was quite a few of them.
>
> Kay Skidmore: They still use toilet paper…I be taking my boots off at the door. We had one of those in hotel room in Egypt…"

102. A Final Feedback to Provider document ("the Final Feedback document") was provided to UKLA on 24 December 2009, following the 2009 audit. The following was noted in that document:

> "As the…MCV has already been paid, no further amounts will be paid other than for viable learning aim starts which took place and were registered prior to 1 April 2009, or those included within the MCV starts. Further information regarding this matter can be obtained from the partnership team."

That document had, at Annex A, information showing what appeared to be "potential funding errors…on a learner-by-learner basis." The first page of Annex A contained computations, including an error rate of 29.2%. The second page of Annex A ("the Errors List") identified 15 learners and, in each case, what were described as the "error description", which substantively comprised the following categories of "error":

i) A full level increase from the initially assessed level to the SFL level being undertaken had not been evidenced;

ii) The learner had withdrawn from the SFL programme prior to achievement, but no actual end date or an incorrect date had been entered on LSC's system;

iii) On-programme payments had been made when the learner had not been registered with an awarding body for an SFL qualification;[36]

iv) The learner was not registered with an NVQ awarding body.

As part of the audit process, Testing Working Papers were produced. Those documents identified a number of questions which the Defendant contended (and which, it appeared to me, was not to be disputed) the auditors were required to answer and which gave rise to the first three categories of error I have identified (which, in turn, contributed to the 29.2% error rate calculation).[37] The relevant questions were said to be these:

v) Does the learner have an Initial Assessment which identifies their needs? Is there evidence that the learner has had their Numeracy need assessed?

vi) If the learner has not achieved, is there evidence to confirm that the learner is making progress towards their funded learning aims?

vii) If the learner has left, was the correct date of withdrawal recorded on the ILR? Is there evidence of a written notice of termination?

103. Mr Lowe wrote to UKLA on 18 January 2010 as follows:

> "…I can confirm that your [MCV] for the 2008/9 year was £135,533.76 and the full amount has been claimed.
>
> After reviewing the LSC's database and the results of the recent audit we conclude that all of the NVQ learners pre and post 1 April were not eligible for payment over and above the [MCV]. These eligibility decisions are in accordance with the LSC Funding Guidance 2008/09: ILR Funding Compliance Advice and Audit Guidance for Providers Annex B, paragraph 18.
>
> I can therefore confirm that there are no further payments due to [UKLA] in respect of your contract in 2008/9."

104. The Yorkshire and Humber Regional Audit Team published a final audit report ("the final audit report"), following the 2009 audit, on 9 February 2010, which recorded as follows:

> "Executive Summary
>
> Use of Funds Opinion: Qualified (Unsatisfactory)
>
> Recovery amount: £Nil…

[36] An entry in Annex A to the final audit report, which I quote below, suggests that, by the time of the final audit report, this category of error may have been "cleared" (a word used by Miss Skidmore in cross-examination) even on the Defendant's case.
[37] Miss Skidmore confirmed this in re-examination.

> The LSC is obliged to safeguard public funds. Therefore, we seek to recover any monies paid which have not been spent in accordance with our contractual conditions, or where it has been used for purposes other than those for which it was intended.
>
> The provider has been paid up to their [MCV] of £135,533.76.
>
> Due to the high error rate identified in respect of the potentially payable amounts listed on the LSC database for this provider, 29.2%, we have concluded that there will be no further funds payable to the provider.
>
> This is due to all of the NVQ learners being ineligible for on programme payments until period 11 (June 2009), at which time they were registered with the awarding body, EDI. Further explanation of this issue was provided in Mike Lowe's letter to you, dated 18 January 2010."

The final audit report was accompanied by an annex, Annex A, which related to recommendations which had been made following the initial monitoring visit by LSC's auditors in December 2008 and which had not, according to the auditors who conducted the 2009 audit, then been adequately addressed. Nevertheless, the following was said in Annex A:

> "…At the time of the substantive testing visit, we found that there was no evidence of registration with the awarding body held on the learner files, for both the NVQ and [SFL]. It is a requirement of funding that the learner is registered and that evidence of this is retained to support any funding claimed…Further testing has been performed with regard to this issue and several learners do not appear to have been registered with the awarding body and are therefore ineligible for funding. All the learners registered for [SFL] are eligible for funding, provided they started before 1 April 2009. Learners who have been registered for the NVQ with the awarding body are eligible for payments following the date of registration which in all cases was in June 2009…
>
> At the time of the substantive testing visit, we found that there was a lack of initial assessment for the NVQ, resulting in a lack of individualisation of the programme, and no units being assessed as ready for observation/assessment and immediate entry into the learner's portfolio of evidence (accredited prior learning). We also noted that, in most cases, the same optional units were delivered which further suggests that there is little or no individualisation of the programme. The statement to support the need for high band rate funding, held on the Individual Learning Plan (ILP) for all learners checked, was not adequate to support the band rate – the need to undertake the technical certificate is not justification for a requirement of

> over 15 Guided Learning Hours (GLH). On some of the learner files, more than the two optional units had been claimed within the GLH. We note the provider's comments regarding this issue, and, although we find the delivery method does not adhere to the principle of [TTG] funding, due to the late registration of learners and the maximum contract value having been reached, we have not represented these as errors…[38]
>
> At the time of the substantive testing visit, we found that there were a number of learners who were undertaking the Adult Numeracy qualification at the level at which they had been assessed…We note the provider's comments regarding the assessment of learners, but, as the regional skills team consider a majority to be anything above 66%, the threshold applied of 75% is unacceptable. This has resulted in a recovery of funds…"

105. The claim was begun on 17 June 2014.

106. I now consider the witness evidence.

UKLA's witnesses

Imran Bham

107. Imran Bham is UKLA's director. He, together principally with Yusuf Bham (his brother) and John Kinsella, has developed UKLA's business. Although UKLA had other employees during the period with which I am concerned, Imran Bham, Yusuf Bham and Mr Kinsella appear to have been its driving forces.

108. Mr Bham[39] said that UKLA became interested in the TTG programme in about early 2008. He said that he attended an LSC meeting at the Lancashire County Cricket Club ground on 3 April 2008 at which he was told that contracts would contain "initial volumes" but that "if these had been achieved by training providers then further volumes would easily be available."[40]

109. Mr Bham said that, following a notification, on 28 July 2008, that UKLA's tender for TTG funding for the Yorkshire region had been successful, he had a meeting with Shafqat Rahim on 18 August 2008, during which Mr Rahim said that LSC "would be happy if we were able to reach the projected figures that UKLA had put forward to him at the meeting."

110. He said that the 26 August meeting was an introductory meeting at which Sarah Haigh made arrangements for a contract clarification meeting on 1 September 2008.

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[38] The final sentence has been carried forward from the Final Feedback document where it appears in an action plan relating not to funding errors but to internal control weaknesses.
[39] In this part of the judgment, references to Mr Bham are to Imran Bham.
[40] He accepted, in cross-examination, that the first time he mentioned this meeting (and the first time he mentioned a meeting with Mr Rahim on 17 July 2008) was in June 2018.

111. He said that Mrs Haigh informed him, at the 1 September meeting, that UKLA's "initial volumes" were 100 SFL learners and 100 NVQ learners. Nevertheless, in cross-examination, whilst he initially accepted that he understood that these numbers "could" be increased, he later contended that, from an early stage, he understood that UKLA could recruit as many learners as it wanted so long as it kept LSC informed after those learners had been recruited.

112. On being shown the 24 September email in cross-examination (an email he accepted he saw at about the time that it was sent), he said that he understood from it that there would only be a negotiation about increasing the number of learners whom LSC would fund when the "initial volumes" had been achieved. He accepted that, at least in relation to the early stages of the 2008 Yorkshire Contract, the message UKLA was being given was that it had to achieve those initial volumes (in other words, effectively, it had to teach (or at least recruit) 200 learners) before there could be a discussion about the possibility of increasing learner numbers.

113. He also accepted that, as a businessman, he understood the importance of contractual documents. He said that the 2008 Yorkshire Contract would regulate how UKLA would be paid.

114. He said that UKLA recruited 400 learners early in the 2008-2009 academic year because there was demand for the courses being offered.

115. He said that, on 5 November 2008, Mr Rahim and Mrs Haigh visited UKLA's premises and were told that UKLA had recruited 400 learners, to which neither Mr Rahim nor Mrs Haigh objected. In cross-examination, he was taken to a printout of Mrs Haigh's electronic diary which recorded that she had a "non-working day" on 5 November 2008. He said that that entry was false, and that, possibly, it had been created in order to deny that the meeting took place.

116. He added, later in his cross-examination, that UKLA knew that it had a limit on recruitment of 200 people and that LSC knew that it had recruited more than 200 people but that no LSC representative said that UKLA would not be paid for those recruited in excess of 200. Nor, he said, did any LSC representative tell UKLA to stop further recruitment. So UKLA took it that it would be paid for all those who had been recruited.

117. He said that Mrs Haigh and Mr Rahim visited UKLA's premises again on 26 November 2008 when they saw a list of 700 learners (to which they made no objection) and when they carried out a review of a random sample of files.

118. Mr Bham described the note of the 27 January meeting as "false". In cross-examination, he went as far as to suggest that the note was probably not written contemporaneously.

119. In cross-examination, Mr Bham accepted that, following the 11 March meeting, he understood that UKLA could not exceed the MCV. He said that, nevertheless, UKLA exceeded the MCV because what was said at the 11 March meeting was contrary to what UKLA had previously been told. He said that, at least in about March 2009, he had a feeling that there was no limit on the number of learners who could be recruited because LSC had seen so many learner files in November and December 2008. He

added that UKLA continued to train learners after 11 March 2009 because it hoped that LSC would have a change of heart as result of a judicial review brought by UKLA.

120. In cross-examination, Mr Bham said that, following the receipt of the 31 March letter, UKLA knew it had to stay within budget. He added that that point was reinforced by Mrs Haigh's email sent on 19 May 2009. He also said that, at this time, LSC's position as to funding was not consistent and that the position was very confusing.

121. Mr Bham said that he recalled posting the 2009 Yorkshire letter of intent, countersigned by Mr Kinsella, on 25 June 2009. He denied UKLA received Lucille Ingham's 12 August 2009 letter before 18 September 2009.

122. Mr Bham exhibited some schedules to his second witness statement. Those schedules were compiled by Mr Bham in 2011 from UKLA's internal records. They have a column showing a learner's "agreed start date". Of that date, Mr Bham said as follows:

> "11. By way of an explanation I can confirm that the Agreed Start Date field is the date that we have entered on UKLA's Management Information System once the learner had enrolled with UKLA…
>
> 15. By way of further explanation of how UKLA treated a learner's "start date" I would add as follows. UKLA had a process in place when we enrolled learners. Once a learner had chosen UKLA as a training provider, we would first conduct an Initial Assessment, a Diagnostic and would devise an Initial Learning Plan. Once this was concluded an induction would take place and we would agree with a learner as to what modules they would be enrolled on. Once some initial training had been provided, the actual training would commence based on an agreed start date which would be the date of the first unit that they would attend…
>
> 18. When learners had completed their Initial Learning Plan we would then register them onto the system and provide them with a number of options as to when they would like to commence the training that had been planned for them…
>
> 20. [On the schedules] there are…a number of learners who have an agreed date post 1 April, however [they] still form part of this claim. The reason they still form part of this claim is because all these learners came to [UKLA] and enrolled prior to 1 April 2009. They all had an Initial Assessment, Diagnostic test and an Initial Learning Plan created prior to 1 April 2009. However, because the situation with [Leeds City Council] was making learners nervous, these were the

> learners who asked us to put matters on hold as they did not wish to have to pay for training out of their own pockets in the event that qualifications obtained at UKLA were not recognised.
>
> 21. Although we had conducted a fair amount of work with these learners, we as a company took the decision that we would not register them or give them a start date as we did not wish to put these learners in a situation where they had to pay for their training with another provider in the event that [Leeds City Council] succeeded against us in the judicial review that we were in the process of commencing against them…These learners had stated that they wished to wait and see how the situation developed. It was therefore only fair that we did not jeopardise their chance of going to another provider in the event that they chose to do so."

123. In re-examination, Mr Bham explained that he understood that a learner's learning plan began at the initial induction stage and that their "start date" was their initial assessment date.

Yusuf Bham

124. Yusuf Bham has been involved in the education field for 25 years. Since 1995, he has been a qualified NVQ assessor and, more generally, he has been involved in the delivery of vocational and academic teaching in non-school settings. As I have indicated, he has been heavily involved in the development of UKLA's business.

125. Mr Bham said that he was at a Yorkshire region LSC meeting, at LSC's Bradford premises, on 3 April 2008 at which it was said that "contracts were performance led".[41]

126. Mr Bham said that, at the 17 July meeting, Shafqat Rahim said that LSC was "seeking training providers who could actively engage learners and deliver". Mr Bham said that he had a second meeting, on 18 August 2008, with Mr Rahim at which "Mr Rahim reiterated…that [LSC] would be happy if we were able to reach the projected figures that UKLA had put forward to him at the meeting as per our tender documents" (which were significantly higher than the 200 learners contemplated by the 2008 Yorkshire Contract). Mr Bham's recollection of the 26 August meeting is the same as Imran Bham's recollection. Of the 1 September meeting, Mr Bham said that Sarah Haigh actively encouraged UKLA to recruit learners in excess of "the initial 100 learner figure" because "there was funding available to remunerate UKLA for doing so". He also said that Mrs Haigh continued:

> "…our recruitment trends would dictate the level of the contract and increase in value accordingly as a result of the

[41] In this part of the judgment, references to Mr Bham are to Mr Yusuf Bham.

> underspend in previous years and if there were employees who wanted to achieve an NVQ then there should be no problem with the funding as the funding was employer responsive led and would meet the demand."

127. He particularly remembered that there was a meeting on 1 September 2008 because it was the first day of Ramadan and he was fasting.

128. Mr Bham said that, at the 8 September meeting:

> "Providers were being encouraged to recruit in excess of the stated value in their contract and I specifically recall Mr Howarth saying "recruit, recruit, recruit"."

In cross-examination, Mr Bham said he understood, from what was said on 8 September, that the Yorkshire region LSC wanted to spend the budget which had been allocated to it. Mr Bham also acknowledged that the 24 September email stipulated that there was a requirement for negotiation in order for learner numbers to be increased but, he said, he was not sure what such a negotiation was.

129. In cross-examination, Mr Bham said that it was UKLA's intention to teach the number of learners (200) stipulated in the 2008 Yorkshire Contract. He said that UKLA understood that it would be paid for up to 200 learners but that, once it had been given "the green light" by LSC staff, it could recruit more learners. He added that once "initial volumes" had been "achieved", further volumes would be discussed.

130. Mr Bham also recalled meeting with Mr Rahim and Mrs Haigh on 5 November 2008. He suggested that Mrs Haigh carried out an audit of files on that occasion. He said that Mrs Haigh and Mr Rahim knew that UKLA had "exceeded our allocated learner numbers" but raised no objection to this. Instead, he said, they congratulated him on UKLA's recruitment success.

131. He also said that he was "subsequently advised that the LSC would agree to any…increase [in the 2008 Yorkshire Contract] based on our learner numbers". (It is not clear to me, from Mr Bham's witness statement, whether or not he contends that Mr Rahim made that statement).

132. Mr Bham's evidence of a visit to UKLA's premises by Mrs Haigh and Mr Rahim on 26 November 2008 was consistent with Imran Bham's evidence. He said that, on 12 December 2008, he attended an LSC event at the Leeds United football stadium, when Mr Howarth said, in effect, that providers "should continue to recruit more learners".

133. In his witness statement, Mr Bham contended that there was no discussion, at the 27 January meeting, of MCVs and that the note of the 27 January meeting is not accurate. In cross-examination, he said that he remembered that, at the 27 January meeting, there was a discussion about a learner but, apart from that, he could not remember anything about the 27 January meeting.

134. The following exchange, in relation to the 12 June letter, took place in cross-examination:

> "Q. …The final paragraph on page 96: "To continue to ensure we remain within the budget available, we can only commit to funding within the overall MCV those learners that meet these conditions", and that condition is that they had legitimately started before 1 April 2009. That is in the paragraph above.
>
> A. Yes.
>
> Q. You saw this letter, I presume?
>
> A. I must have seen it at the time, yes.
>
> Q. …What did you understand Mr Russell to be saying when he said, "We can only commit to funding within the overall MCV those learners that meet these conditions"?…
>
> A. Well, there's two things in this letter. The first is that the learners who were enrolled prior to 1 April -- and to be in your budget.
>
> Q. …You had to be within your budget, didn't you?
>
> A. …In one of the paragraphs it says that as long as the learner – it is evident that the learner had started before 1 April."

John Kinsella

135. Mr Kinsella has been involved in education since 1974, initially as a maths and English secondary school teacher and more recently as a further education lecturer. Since early 2008, he has been actively involved in the development of UKLA's business and, from July 2008 until March 2011, he was a director of UKLA.

136. Mr Kinsella said that he met with Sarah Haigh on 26 August 2008. He described the meeting as "introductory in nature" and said that there was a discussion about "how we intended to deliver our services in accordance with the contract". He said that the impression he was left with, after the 26 August meeting, was that "LSC were encouraging providers to aim and recruit large volumes of learners". He accepted, in cross-examination, that it would be an over-statement to say that he was told, at the 26 August meeting, that UKLA could recruit as many learners as it wished. He said that UKLA was encouraged to recruit. He said, in cross-examination, that he understood that the "volume" of learners was initial and that that meant that there could be more to come. He accepted that the operative word was "could" and not "would".

137. Mr Kinsella said, in his witness statement, that he had a further meeting with Mrs Haigh on 1 September 2008, which was the contract clarification meeting, at which Mrs Haigh "discussed what was expected from UKLA and commented upon how the contract would run and operate". In cross-examination, he indicated that he could not remember if there was a meeting on 1 September 2008.

138. Mr Kinsella said that, at the contract clarification meeting, Mrs Haigh said that UKLA would have "initial volumes" of 100 SFL learners and 100 NVQ learners. He said, in

his witness statement, that "she further stated that in the event that UKLA needed to increase the initial figures there would be no problems as funding was available".

139. Mr Kinsella said that, at the 8 September meeting, Clive Howarth left him with the impression that "providers were being encouraged to recruit beyond the stated value of the contract". He added that, at the time, LSC's slogan was "recruit, recruit, recruit".

140. Mr Kinsella said, in cross-examination, that he understood, from the 24 September email, that once UKLA had delivered its contracted "volume" of 100 SFL learners and 100 NVQ learners, LSC would consider increasing that volume. He added that UKLA did not have funding to train learners in excess of the "initial volume" of 200 but, because the talk was of recruitment, UKLA thought it could help LSC. He said that, "side-by-side" with the stated number of learners, there was an "undertone" of recruitment.

141. Mr Kinsella said that Shafqat Rahim and Mrs Haigh visited UKLA's premises on 5 November 2008 to conduct "a mini-audit." He said that Mrs Haigh would have been aware that UKLA had 700 learners enrolled, but she did not tell UKLA to stop enrolling learners. He said that Mr Rahim left him in no doubt that LSC would agree any increase in the MCV. In cross-examination, he said that he presumed that, if LSC had concluded that UKLA had recruited too many learners, LSC would have informed UKLA but that, by November 2008, LSC had not said that. He added that, at this time, no one at LSC had expressly said "go out and recruit any number of learners" but, on the other hand, LSC did not tell UKLA to stop and he would have expected LSC to say that had UKLA done anything wrong.

142. Mr Kinsella said that Mr Rahim and Mrs Haigh visited UKLA's premises again, on 26 November 2008, to carry out a second "mini-audit". He said that, on that occasion, Mrs Haigh did not tell UKLA to stop enrolling learners.

143. Mr Kinsella said, in cross-examination, that by December 2008, LSC did not have an obligation to pay more than £135,000.

144. Mr Kinsella said, in cross-examination, that the note of the 27 January meeting appeared to be accurate. He added that he had a vague memory that Yusuf Bham asked about 80 learners who were "over-contracted" at the meeting.

145. Mr Kinsella said, in cross-examination, that, by early 2009, none of UKLA's SFL learners was receiving distinct literacy teaching because there was not much funding left at that point.

146. Mr Kinsella recalled, in cross-examination, that at the 11 March meeting, Margaret Cobb stated "adamantly" that UKLA had to stay within its budget. He added that, following the meeting, UKLA understood that it would not receive more than £135,000 funding but that it was in a quandary because of LSC's previous encouragement.

147. Mr Kinsella said, in answer to a question from me, that, if Mrs Cobb has said, during the 4 August meeting, that LSC would not fund learners who had started before 1

April 2009, UKLA would, he believed, have delivered their NVQ training in any event.

148. Mr Kinsella said the following, in his witness statement, about the 2009 Yorkshire letter of intent:

> "I remember that UKLA received the letter of intent for [the Yorkshire region] 09/10 around the same time that we received the North East 09/10 letter of intent…I certainly recall signing both letters of intent, for both regions, at the same time and handing them back to Imran to send back together.
>
> I signed the letters on the afternoon of 25 June 2009, after I, Imran and Mohammed Dawoodji had met and discussed the contents of the same. I specifically remember it being the afternoon because we had to wait until Mohammed Dawoodji arrived at the office and he usually only arrived after lunchtime.
>
> My recollection is further assisted by the fact that the following morning I contacted Imran around 7:30 a.m. I was already at the office and heard the news about Michael Jackson's sad passing. I called Imran and had a discussion regarding a number of matters including whether he had posted the letters that I had signed the previous day. Imran confirmed that he had. He then ended the conversation discussing Michael Jackson…
>
> I can strongly confirm that the letter of intent was both signed by myself and was posted back to the LSC by Imran…"

149. Mr Kinsella suggested, in his witness statement, that UKLA received a letter of intent in relation to the North East region for the 2008-2009 academic year, which he signed, by which UKLA was able to "start delivering the course".

150. It is convenient to say something, at this point, about Mr Kinsella as a witness.

151. I found Mr Kinsella to be an engaging witness who gave his oral evidence moderately, thoughtfully and fairly. The clear impression I formed was that, during his oral evidence, he was trying to do his best to assist the court. Based on my observation and impression of him giving oral evidence, it is clear to me that he is not someone who would consciously falsify a document; in particular by mis-dating it.

152. It is right to record that, from my observation, Mr Kinsella felt strongly about the merits of UKLA's case.

153. It also seems to me, having regard, for example, to the detailed commentary, in his witness statement, about teaching methods (which he uses to support UKLA's case), that, understandably, Mr Kinsella has spent the very many years that the present proceedings have been ongoing reflecting on UKLA's case.

154. Understandably too, it seems to me that it is likely that Mr Kinsella has discussed UKLA's case with Imran Bham and Yusuf Bham. As I have said, Mr Kinsella was actively involved in the development of UKLA's business, the present proceedings have been ongoing for very many years and Mr Kinsella feels strongly about the merits of UKLA's case. In the light of the conclusions I have reached about Mr Howarth as a witness, I believe that it is unlikely that Mr Howarth ever said "recruit, recruit, recruit". It is notable, in these circumstances, that Yusuf Bham attributes such a statement to Mr Howarth, as, on a careful reading of Mr Kinsella's witness statement, it seems to me likely that Mr Kinsella does. It is notable too that, although Mr Kinsella contended, in his witness statement, that the 1 September meeting took place, he was much more equivocal about that in cross-examination.

155. Mr Kinsella was wrong, I have concluded on the evidence before me, when he said that UKLA received a letter of intent in relation to the North East region for the 2008-2009 academic year, which he signed. There is no such letter of intent in the trial bundle. UKLA relies on the letters of intent which are in the trial bundle, and to which I have already referred, as contractual documents. It is improbable that, if the letter of intent contended for by Mr Kinsella had been sent by LSC and returned by UKLA, it would not be relied on by UKLA in support of its case. UKLA's case is that the only contractual document relating to the North East region for the 2008-2009 academic year is the 2008 North East Contract Clarification Form. As I have said, there is a "subject to contract" North East 9 September letter informing UKLA that LSC intended to award it TTG funding for the North East region. That letter did not require any countersignature by UKLA and expressly stated that, until contractual terms were agreed, no work was to be undertaken. I have concluded that Mr Kinsella's innocent error is likely to have arisen from the inevitable discussions that are likely to have taken place about UKLA's case over the course of these proceedings.

Taxi drivers

156. UKLA called the following taxi drivers, who it said were learners who had started before 1 April 2009, in support of its case: Sajid Ghulam Rasul, Naveed Quereshi, Mohammed Maskeen, Majid Hamid, Zaheer Ahmed, Waseem Zaroof, Tahir Mahmood, Ahsan Ulhaq and Naveed Ahmed.

157. Mr Gulam Rasul (who had his NVQ induction on 17 March 2009), Mr Zaheer Ahmed (who had his NVQ induction on 24 March 2009), Mr Mahmood (who had his NVQ induction on 16 March 2009) and Mr Ulhaq (who had his NVQ induction on 23 March 2009) said that they could not remember when, following their NVQ induction, they had their first lesson (their first structured session).

158. Mr Quereshi thought, in cross-examination, that he had his first NVQ lesson after March 2009 but, in re-examination, he said he "started" on 18 March 2009 and that he had his first lesson on the same day as his induction on 18 March 2009.

159. Mr Maskeen said that he had his first lesson in the week following Sunday 29 March 2009.

160. Mr Hamid said that he began studying for an NVQ in January 2009 (even though his NVQ induction date was 30 March 2009), although a document which records that he completed his SFL course on 9 April 2009 also recorded that his NVQ was to be

arranged. He added, in cross-examination, effectively, that he began an NVQ after taking a maths test (which must be an SFL test, it seems to me).

161. Mr Zaroof believed that he had his first NVQ lesson in April or May 2009.

162. Mr Naveed Ahmed thought he had his first NVQ about 1 or 2 weeks after his NVQ induction which was on 23 March 2009.

163. Of the 9 taxi drivers UKLA called:

i) 4 were uncertain about when they had their first lesson;

ii) 1 (Mr Quereshi) gave what seemed to me to be contradictory evidence in cross-examination and re-examination and I do not place any more than the most limited weight on his evidence;

iii) In relation to 2 (Mr Maskeen and Mr Naveed Ahmed), the picture is unclear about whether they had an NVQ lesson before 1 April 2009;

iv) In relation to 1 (Mr Hamid), I am satisfied that he had his first NVQ lesson after 1 April 2009. He did not have his NVQ induction until 30 March 2009 and, on 9 April 2009, it appears that his NVQ was still to be arranged;

v) 1 (Mr Zaroof) believed he had his first NVQ lesson in April or May 2009.

164. It may be said, at the very least, that there was no clear evidence that any of these taxi drivers had their first NVQ lesson before 1 April 2009.

The Defendant's witnesses

Clive Howarth

165. Clive Howarth was the Yorkshire region director of the TTG programme at LSC during the period relating to these proceedings; principally 2008-2010.

166. Mr Howarth could not recall the meeting on 3 April 2008, at LSC's Bradford premises, contended for by Yusuf Bham. Mr Howarth suggested that any such meeting, which Mr Bham described as an "open supplier meeting", is unlikely to have related to the TTG programme because he could not recall such meetings taking place in relation to the programme; although such meetings did take place, he said, in relation to other funding opportunities (such as from the European Social Fund).

167. Mr Howarth said that, at the 8 September meeting (at which the Funding Requirements documents were distributed as part of an induction pack), he gave a presentation during which he reminded providers about the need to operate within the funding rules and he recalled explaining, at the 8 September meeting, a procedure which the Yorkshire region LSC operated, which he described thus:

> "…providers were told that, to obtain an increase in MCV, they should discuss this with their contract managers as soon as they had reached the point where 80% of their existing MCV had been delivered. We also asked providers to supply information

> on the exact number of learners for which an increase in MCV was sought, and to demonstrate that they had additional activity to deliver and capacity to deliver this activity. We then required approval from two different members of the area team, including the budget holder (i.e. me), before issuing a written contract variation."

He explained that the 8 September meeting was one of 3 similar events held about the same time at which what he said did not vary. In a second witness statement, he said:

> "…I certainly never suggested that training providers had carte blanche to recruit as many learners as they liked, irrespective of contract value, as UKLA later did. The LSC had to have control over its spending. It could not afford the providers to take as much funding as they liked, and the tool that we used to achieve this was the MCV…I do not recall ever using, and I am certain I would not have used, the phrase "recruit, recruit, recruit." Nor is it the case that the LSC would have encouraged UKLA to recruit learners in excess of its contract value… "

168. He suggested that it was unlikely that LSC held a TTG event at Leeds United's football stadium on 12 December 2008 because LSC tended to use the football stadium for larger events, at which more than 100 organisations attended.

169. Mr Howarth was taken, in cross-examination, to the 31 March letter. He said he understood, from that letter, that LSC would not pay for "learner starts" before 1 April 2009 in excess of a provider's MCV but that an MCV could be increased. He then said that he understood that MCVs would be increased to account for "legitimate" learners. However, he continued that providers had to approach LSC when they had delivered 80% of their MCV in order to obtain an increase in the MCV, adding that LSC could then agree an increased MCV.

170. Mr Howarth was referred to the 1 May letter. In cross-examination, he explained how he interpreted the commitment referred to in the 1 May letter:

> "…before guidance came out in May or June what was being communicated to providers was that there was a commitment to fund learners who started before 1 April who were defined as legitimate starts within the funding guidance, even if it happened that they were recruited in excess of maximum contract value."

He explained that he interpreted the "commitment" in this way, because there was no reference, in the 1 May letter, to MCVs. He was taken, again, to the 1 May letter in re-examination. It was drawn to his attention that Geoff Russell's first "commitment" on behalf LSC was contained in the 19 May letter. In the light of that, he said that the "commitment" contained in the 1 May letter (and any "commitment" before that date) was undefined.

171. Mr Howarth believed that he sent the email he wrote on 21 May 2009 to all TTG providers in the Yorkshire region. He pointed out that he recalled communicating with providers at that time. He acknowledged, in his witness statement that:

> "Looking back now, I can see the decisions that were taken within the LSC as to funding pre- and post-1 April learners starts were not communicated as clearly as they might have been. As I understood our approach, providers were always required to work within the MCVs – hence my 21 May email reiterated this point. However, there was also an assurance in Geoff Russell's letter of 19 May that legitimate starts prior to 1 April 2009 would be funded."

172. Mr Howarth was referred, in cross-examination, to the LSC paper entitled "Dealing with Capped Training Providers" issued in September 2009. He said that the course of action proposed in that paper should have been taken by LSC in relation to UKLA, so that, to the extent UKLA had legitimate starts before 1 April 2009, its MCV should have been increased.

173. It is convenient to say something, at this point, about Mr Howarth as a witness. Mr Howarth struck me as someone not driven to hyperbolic statements. He gave his evidence in a calm, measured and fair way.[42] His oral evidence leads me to conclude that he is someone who, if he has a practice, is likely to invariably adopt that practice. As is to be expected from an LSC TTG regional director, he struck me as being very familiar with the funding (and other) arrangements for the TTG programme. I must add that it seemed to me that, at times during his oral evidence, Mr Howarth was somewhat confused about the chronological order in which certain events occurred.[43]

Sarah Haigh

174. Sarah Haigh was a partnership advisor for Kirklees at LSC during the period relating to these proceedings. She was LSC's day-to-day point of contact with UKLA.

175. Mrs Haigh was cross-examined, as follows, at some length about LSC's February 2008 newsletter, although it was published many months before UKLA tendered for TTG funding:

> "Q. …"We would also retain the flexibility to move provision between under and over performing providers to ensure that no provider will run out of capacity during 2007/08. The money is there for you to earn if you can engage with employers and find the learners." That is the message, isn't it?
>
> A. Yes.
>
> Q. "The money is there for you to earn"?
>
> A. Yes.

[42] See, for example, the evidence I note in the two immediately preceding paragraphs.
[43] See, for example, his cross-examination and re-examination in relation to the 1 May letter.

Q. Is what you would tell providers?

A. I've said there was additional funding available, yes, definitely.

Q. Yes. Can you please turn the page and look under the heading, "Learner start dates", "We have received some worrying feedback from providers in recent weeks. Some of you are telling us that you will have to stop recruiting learners next month because you won't have enough time for the learners to complete before the end of the 2007/08 academic year. Please be reassured there is absolutely no need to stop recruiting Train to Gain learners. In fact doing so would mean you almost certainly would not be able to deliver your contractual allocation for 2007/08." So far from reining in the providers, you are spurring them on, are you not, to continue recruiting?

A. Yes.

Q. "If we are to meet the extremely tough challenges laid down by Leitch, we need providers to keep recruiting learners." What were the challenges laid by Leitch so far as you understood them?

A. I can't remember.

Q. It was to recruit more learners in a nutshell, wasn't it?

A. Yes.

Q. "If you haven't enough places available in your contract, talk to your contract manager." So you knew about this?

A. I will have received the newsletter, yeah.

Q. You knew you would get approaches from providers saying, "I'd like some more allocation"?

A. Yes, yeah.

Q. And your message was this: if your performance is good on learner starts and achievements and you can recruit them, we can fund them. That was the messaging, wasn't it?

A. Yes.

Q. Did you give out that message?

A. I don't recall having a meaningful discussion about increasing the contract value, but to other providers I would have done, yes.

> Q. What, UKLA is the only one you didn't have that conversation with?
>
> A. No, no, not at all. I mean what I'm saying is I don't specifically remember in this instance having a discussion about increasing the contract value.
>
> Q. But the message you were giving out was consistent with this, wasn't it?
>
> A. Yes, yes.
>
> Q. So I suggest to you the message you were giving out to UKLA is consistent with this, wasn't it?
>
> A. Yes.
>
> Q. You were telling them if their performance was good on learner starts and achievements and they could recruit them, you would fund them?
>
> A. I think I would have said, we could negotiate the volumes upwards.
>
> Q. Well, this is with the benefit of hindsight and knowing what's happened, isn't it? At the time you were saying, "If you can recruit them, we will fund them"?
>
> A. Yes, but I don't think that means giving people free rein to deliver because we still had regional budgets. So I'd be very conscious of that in any messaging to a provider for any funding stream.
>
> Q. But that's the benefit of hindsight, Mrs Haigh, isn't it?
>
> A. No, I think I'm always conscious about the contract value."

176. Mrs Haigh said that the contract clarification meeting in relation to the 2008 Yorkshire Contract took place on 26 August 2008. She said, in her witness statement, that the MCV for the 2008-2009 academic year (£135,553.76) was probably discussed. She said, in cross-examination, that she cannot recall mentioning the MCV but she thought she did. She accepted that there was no mention of the MCV in her note of the 26 August meeting. She could not say how UKLA might have discovered the amount of the MCV if she did not mention that amount at the 26 August meeting. Much later in her cross-examination, having been asked questions about the 11 March meeting, she said that she does not remember ever having mentioned an MCV to UKLA. She added that, at the 26 August meeting, UKLA's representatives asked about the possibility of increasing the number of its learners who might be funded. She could not recall how she responded.

177. In a second witness statement, Mrs Haigh said effectively that she did not have a meeting with UKLA on 1 September 2008 and she exhibited a copy of her electronic

diary that showed she was annual leave that day. She explained, in re-examination, that she was on annual leave then because it was her son's first week at primary school. She recalled, in her early dealings with UKLA, being asked whether LSC would fund UKLA for more than 200 learners. In her second witness statement, she said:

> "…I also recall developing something of a "stock" answer – which was that a request for an increase could be discussed when 80% of the initial volumes had been delivered. What I meant by this was that 80% of the initial volumes had been recorded on our data systems, following an upload of the individual learner records by UKLA in the usual way. I think it unlikely that I would have said that there would be "no problems" with an increase, as I did not have the authority to increase the MCV, nor would I have known if there was financial capacity to do so."

In cross-examination, she said that she encouraged providers to increase delivery and she said: "there's money". However, she added that the "messaging" was that, if contracts got to "80%", there would have to be a "conversation" about additional "volumes".

178. Mrs Haigh said that she never carried out any audit. Instead, she said, audits were always carried out by the Provider Financial Assurance team at LSC. She repeated, in cross-examination, that she would not have carried out an audit because that was for the audit team.

179. Mrs Haigh added that, so far as she could recall, she never visited UKLA's premises; in particular, on 5 November 2008 or 26 November 2008. Exhibited to her second witness statement is her electronic diary for 26 November 2008 which does not show her as having any appointments. She accepted, in cross-examination, that it is possible that she visited UKLA's premises on 26 November 2008 but that she has forgotten about that visit. Nevertheless, she then reiterated that she would not have carried out an audit and she said that she doubted she would have learned, in November 2008, that UKLA was providing training, because she called the 27 January meeting because no information about training had been uploaded, by UKLA, onto LSC's computer system.

180. Mrs Haigh said, in cross-examination, that, at the time of the 15 December letter, she was saying, when asked, that an MCV could be altered upwards by negotiation.

181. Mrs Haigh said that, at the 27 January meeting, UKLA's representatives told her that it already had 180 SFL learners in training. She said that Yusuf Bham then asked her about additional funding in excess of the 2008 Yorkshire Contract MCV. She said:

> "We told him that until at least 80% of the contract had been delivered and claimed, a formal request for an increase in MCV could not be made…"

182. Mrs Haigh was asked, in cross-examination, about scenario (a) in the July 2009 newsletter. She said:

> "I think the maximum contract value could be increased but not without a conversation and not without limits, because we have got a regional budget to work within."

183. Mrs Haigh remembered that LSC delayed the delivery, to UKLA, of the 2009 Yorkshire letter of intent. She said, in cross-examination, that UKLA's apparent failure to return the countersigned letter was not mentioned at the 4 August meeting because LSC hoped that it would not be returned. She said that LSC wanted to stall because there were reservations about UKLA as a provider.

184. LSC was a large organisation with a complex structure.[44] Mrs Haigh has worked in LSC or similar organisations for many years. It would be unsurprising, perhaps, if Mrs Haigh was someone who was particularly concerned that LSC's correct processes and procedures were followed, as I found her to be. This conclusion is supported, I believe, by her 19 May 2009 email and by her 2 June 2009 email to which I have already referred. By way of further example, this is part of how Mrs Haigh described the 4 August meeting, in her witness statement:

> "As UKLA had not submitted the correct data on fields A44/45 in its ILRs, we reminded its representatives that this amounted to a breach of contract and it was therefore at risk of the funding it received being recovered at audit. UKLA was also instructed to remove all ineligible post-April 1 learners still recorded on its ILRs and reconcile its data by the end of August. We made it clear that the LSC needed this information to establish the number of learners that UKLA would carry over to its 2009/10 allocation. I recall that the aim was learners who had started post-1 April needed to be carried over into the following academic year, 2009/10, because the LSC had gone over budget for 2008/09. UKLA was also advised that it would only be paid for pre-April 1 learners if they met the eligibility criteria."

Kay Skidmore

185. Kay Skidmore was a senior auditor at LSC in 2009 and 2010. In that capacity, she was a member of the Provider Financial Assurance team which, she explained, was responsible for auditing the evidence providers retained to support the funding they had claimed.

186. Miss Skidmore explained, in her witness statement, thus how an "error rate" was calculated:

> "The error rate was the ratio between the financial value of the [funding] errors identified in the payment period being reviewed [during the audit] and the value of all the payments

[44] Mr Fryer-Spedding cross-examined a number of the Defendant's witnesses at length about LSC's structure. It is not necessary to set out that structure in this judgment. It is enough to say that, by the end of the trial, LSC's structure and internal management system remained something of a mystery to me, because, as Mr Fryer-Spedding was able to establish, LSC's structure was extremely complex.

> made in respect of the learners within the sample during that period."

187. Miss Skidmore gave the following evidence in cross-examination.

188. Miss Skidmore was referred to Mrs Cobb's 22 September email. She explained to me, in response to a question I asked her, that it is likely she would have read the reference in Mrs Cobb's 22 September email to "post-1 April starts" and the reference to "box 44 [and] 45" as references to matters which were to be addressed in the action plan which followed an audit. However, she confirmed that those matters would not have led to "funding errors" (that is, "errors" by which the 29.2% error rate was calculated). She said that she recalled being informed, by the "commercial side", in advance of the 2009 audit, of matters to look out for. She said that, before an audit report was finalised, normally its content was discussed with "commercial colleagues". She said that the preparation of an audit report was a collaborative one and that "commercial colleagues" had "meaningful input" into a report; in particular into Annex A (the action plan). She said that, in this case, the "partnership team" requested that certain parts of Annex A (the action plan) were included in that document.

189. Miss Skidmore explained that, before the 2009 audit, she had carried out some data analysis. She confirmed that, prior to the 2009 audit, she had typed up some of the feedback. She explained that she had a reputation for completing her audits quickly because she prepared ahead of time. She said that feedback recommendations were often "recycled" and that, if her preparatory work gave rise to matters that ought to be mentioned in an audit report, she would record (type up) those matters before the audit. She gave an example in connection with the 2009 audit. She said that a "duplicate learner" was recorded. That was inevitably an error, she said, and so that could have been recorded in the audit report in advance of the 2009 audit.

190. Miss Skidmore was cross-examined about conversations she and Mr Stafford had during the course of the 2009 audit. Because those conversations formed a significant part of UKLA's response to the 2009 audit defence and counterclaim,[45] it is appropriate for me to set out that cross-examination:

> "Q. …Do you know that it records you making certain disparaging remarks about the toilets at UKLA's premises?
>
> A. Yes, that was pointed out to me.
>
> Q. I see. Can we start earlier on with a remark you made about a foreign doctor killing someone. Ms Skidmore, can you please read at the top of the page, "A foreign doctor came over and the first thing he did was give someone an overdose, was on the news." What brought that on?
>
> A. I believe it was a news story at the time.

[45] It is also appropriate for me to set out, in detail, this part of Miss Skidmore's cross-examination to further explain my comments at footnotes 34 and 35 above.

Q. Why did it come up in the course of you carrying out an audit at UKLA?

A. I have no idea.

Q. Why are you remarking on what foreign doctors have been getting up to?

A. I've no idea except it was a news story at the time.

Q. What significance lay in the fact that this doctor was foreign?

A. None, I don't think.

Q. Then why mention it?

A. It was a conversation that was nothing to do with the audit.

Q. I see, because going down the page you say – I take this to be you. Do you see the entry 12.26 to 13.41? "Speaking about toilets in a mosque in Cairo, so bad that you have to take your shoes off for the mosque, look at the carpet", and someone else says, "Was filthy". "Took socks off too and had to wet my feet on the way out." Have you been to Cairo?

A. I have, yes.

Q. And did you visit a mosque in Cairo?

A. Several.

Q. Did you consider that the toilets were worthy of remark?

A. Obviously.

Q. And did you find the carpet there filthy?

A. It would appear so, yes.

Q. So that you had to wash your feet on the way out?

A. It would appear so.

Q. When you say "it would appear so", do you remember saying those things?

A. I remember a vague conversation. I don't remember the specifics of this.

Q. Right. Now, you were at UKLA's premises in Bradford, weren't you?

A. Yes.

Q. You were surrounded by Muslim people?

A. Yes.

Q. Is that what brought on your remarks about a mosque's toilets?

A. No, I don't think so.

Q. It just happened to come up?

A. I think that it was the holiday that I did just before this audit.

Q. Because there are several other occasions on which you remark about the particular toilets at UKLA that you found unpleasant, evidently.

A. Yes.

Q. Is that connected with what you are saying here?

A. I believe it's related to a comment that I possibly made about the toilets being like a Third World country…I believe actually I said I'd seen better.

Q. You'd seen better toilets in a Third World country than at UKLA?

A. Yes.

Q. And you connected that with a remark about a mosque you visited in Cairo?

A. Well, about some toilets at a mosque in Cairo.

Q. Yes, so the common denominator between a mosque and the toilets at UKLA is the fact that UKLA was run by Muslims, isn't it?

A. No. It just happens to have been a place that I'd been.

Q. Of all the toilets you could remark on in the world, you remark on dirty Muslim toilets?

A. No, dirty toilets in Cairo.

Q. In a mosque?

A. Yes.

Q. I see. Can you please look at page 1181? Could you look round about the bottom hole punch against the time marked 2.52? Mr Stafford is asking, "Why have they got a shower thing next to the loo?", and you replied, "Because it's an Asian toilet". "Yeah, I was thinking that because in Libya there was quite a few of them". You reassure Mr Stafford they still use toilet paper. "So, that's the sort of – It's portable. I'd be taking my boots off at the door" – "It's portable". Then I think that must be, "I'll be taking my boots off at the door. We had one of those in the hotel room in Egypt". "Yeah, I'm surprised they haven't got a proper loo there." And then you move back to you auditing. Why are you remarking on this being an Asian toilet?

A. Because the hose attachment is something that you generally only find in Asian toilets.

Q. Or in Libyan ones?

A. It was Ian that had been to Libya. I haven't been to Libya.

Q. …why are you saying you'd be taking your boots off at the door?

A. Because the floor was filthy.

Q. Was this in UKLA or when you get home?

A. When I got home.

Q. Yes, so you found…this was a filthy Asian toilet and you'd be taking off your boots when you got home?

A. That's not what I said.

Q. You observed it was an Asian toilet?

A. Yes.

Q. And you observed that you felt it was so dirty that you would take your boots off before going into your house?

A. Yes.

Q. So, you found the premises disgusting, did you?

A. I found them insanitary.

Q. Did you mention that to anybody at UKLA at the time?

A. No, it would have been rude.

Q. Why?

A. It's not within the social mores.

Q. If you had known that you were being recorded, would you have said these things?

A. As I said earlier, I wouldn't have said anything at all.

Q. Why not?

A. Because I would have known that every word was going to be picked apart.

Q. You wouldn't have said it because it would have exposed your attitude towards the premises, wouldn't it?

A. It would have exposed everything that was said.

Q. …you would have been embarrassed about making disparaging remarks about the toilets at UKLA wouldn't you?

A. Yes, I wouldn't have said it to their face.

Q. …On reflection, do you think this is a proper discussion for auditors to have had during conduct of an audit?

A. No, but it's a discussion that two friends would have had who enjoy travelling.

Q. You were there not in the capacity of making conversation with Mr Stafford. You were there to do a professional job, weren't you?

A. Yes.

Q. Do you regard this as being a professional attitude to bring towards the audit?

A. Probably not.

Q. You accept that you behaved in an unprofessional way during the audit by what you said?

A. No…I don't take the view that I behaved unprofessionally towards the provider.

Q. …you accept that you behaved unprofessionally in at least one respect?

A. In that I had non-audit-related conversations, yes.

> Q. Which were disparaging towards the premises of the company that you were auditing? That is the case, isn't it?
>
> A. I wouldn't put it quite so vigorously but yes.
>
> Q. In what sense were you not being disparaging towards UKLA's premises? You said they were so filthy you'd take your shoes off when you got home. Is that not --
>
> A. Yes, I made a comment that I would be taking my shoes off when I got home because I felt that the premises were dirty.
>
> Q. Isn't that being disparaging towards the premises?
>
> A. I could just as easily have said it about a hotel room that I stayed in.
>
> Q. …you should audit the premises of a company which are dirty the same way you'd audit a company whose premises were clean, shouldn't you?
>
> A. And I did.
>
> Q. …A reasonable person listening to your conversation might believe that you are bringing your attitude of disgust towards your audit work as well as your remarks on toilets, mightn't they?
>
> A. They might.
>
> Q. …while you were at the premises, you found them so unpleasant you were avoiding going to the toilet. Is that right?
>
> A. Yes.
>
> Q. And you didn't feel able to draw that to UKLA's attention? You'd rather exchange jokes with Mr Stafford about it?
>
> A. It wasn't jokes."

In answer to questions from me, Miss Skidmore accepted that the remarks in question made during the 2009 audit were inappropriate, but, she said, she would have commented on the state of UKLA's premises whether or not UKLA was owned by someone who is Muslim.

191. Miss Skidmore also told me that auditors did have some discretion, at least, about whether to trigger a "funding error".

192. It seemed to me that, in part, Mr Fryer-Spedding's cross-examination of Miss Skidmore was directed to establishing that she had acted in bad faith in her conduct of the 2009 audit and/or in her contribution to the conclusions reached during the 2009 audit, (i) because she had typed up some feedback prior to the audit and/or (ii)

because of an alleged pre-disposition against UKLA (revealed, it seems, by the discussion about the doctor from overseas and the discussion in connection with the alleged state of UKLA's premises). I have considered all of Miss Skidmore's evidence (including the transcript of her oral evidence) with care. She said effectively that the part of the feedback she had completed prior to the 2009 audit related to an inevitable error. It has not been established that she was wrong to reach that conclusion. Nor, in my view, has it been established that (i) any of the conclusions recorded on the Errors List was in fact wrong, (ii) faced with similar errors as those recorded on the Errors List in a different audit, Miss Skidmore reached any different conclusion or (iii) any exercise, by Miss Skidmore, of a discretion was contrary to UKLA's interests. Miss Skidmore effectively said, in cross-examination, that her view about the state of UKLA's premises did not affect how she conducted the 2009 audit or any conclusions she reached in relation to it. Having considered Miss Skidmore's oral evidence in particular, I found this response convincing. For all these reasons, I have concluded that Miss Skidmore did not act in bad faith in her conduct of the 2009 audit or in any contribution she made to the conclusions reached during it.

Keith Hunter

193. Keith Hunter was LSC's Yorkshire region TTG manager during the period relating to these proceedings, which, he explained, gave him the day-to-day management responsibility for the TTG programme in the Yorkshire region.

194. Mr Hunter explained how payments to providers were calculated thus, in his witness statement:

> "The provider would receive monthly payments during the learner's planned period of study. 25% of the overall payment for the qualification would be retained until the learner obtained the qualification. As for the remaining 75%, this would be paid in monthly instalments, with a double payment made in the first month to reflect the costs incurred during recruitment and the initial assessment. Accordingly, the monthly payments were calculated using the following formula, where R equals the overall payment rate for the qualification (x 75) and n equals the projected number of months of learning + 1 (to allow for the double payment in the first month):
>
> $$\frac{(0.75 \times R)}{(n + 1)}$$"

195. In cross-examination, Mr Hunter explained that his interpretation of Geoff Russell's "commitment" is that it was a commitment to pay for all pre-1 April legitimate starts irrespective of a provider's MCV. He added, however, that the "commitment" was never meant to be an "open cheque-book" and that, before a provider could "unilaterally" upload data to LSC's computer system, "there would have been a conversation". In answer to a question from me about whether he understood the "commitment" to require a "conversation" before a provider was entitled to funding in excess of its MCV, Mr Hunter said that there was an "expectation that information would flow two ways".

Margaret Cobb

196. Margaret Cobb was LSC's partnership director for Kirklees during the period relating to these proceedings. She was Sarah Haigh's manager.

197. Mrs Cobb said this, in her witness statement, about the 2009 Yorkshire letter of intent:

> "On or around 19 June 2009, the LSC issued letters of intent to most [TTG] providers in the Yorkshire…region, confirming the LSC's intention to enter into a contract with the provider for the academic year 2009/2010 and specifying the MCV that had been allocated to the provider for that new academic year.
>
> However, by this point, we had experienced several issues with the way UKLA had been uploading data in order to claim funding for its learners…
>
> Given our lack of confidence in UKLA's data and its processes, I made a recommendation during discussions with my line manager, Director Mike Lowe, that the LSC delay sending its letter of intent to UKLA…Following further discussions with Mr Lowe, Ms Lucille Ingham (the LSC's Contracts Director for Yorkshire…) and members of the TTG team, my recommendation was followed. I recall that no letter of intent was therefore sent out to UKLA with the other letters of intent on or around 19 June 2009…
>
> However, as time went by and the issues with UKLA's data remained unresolved, I became concerned that our decision to delay sending out a letter of intent to UKLA might make it difficult for UKLA to plan ahead for the following academic year and might expose us to claims that we were not following our own processes or not dealing fairly with one of our providers. I discussed this again with Mr Lowe and Ms Ingham and other members of the [TTG] team. At some point…we decided to deliver the letter of intent to UKLA. My recollection is that I hand delivered the letter to UKLA on or around 20 July 2009 although I cannot now be sure of this and I have been unable to find documentation from July 2009 to support it…Unfortunately, as a result of an administrative oversight, the date of the letter, 19 June 2009, was not amended to reflect its later date of delivery, nor was the deadline for UKLA to sign and return a copy of the letter amended – this was stated to be 3 July 2009."

198. The following exchange, about the 2009 Yorkshire letter of intent, took place between me and Mrs Cobb:

> "Q. [Referring to Mrs Cobb's 22 September email] Halfway down, just in between the two hole punches, there is a paragraph which begins: "His main question was on what

grounds had we decided not to contract with them"…[and] then a couple of lines further on you record: "He advised that this had been signed [this is the 2009 letter of intent] and had been returned. He advised it had been returned on 25 June." "I have checked in the system in WY [which I take to be West Yorkshire] -- …and we have no record of it being returned." Did the LSC have a practice of recording the date when letters of intent were returned…?

A. Yes. So, we had, I think it was mentioned earlier, we would have a post book so that would stamp the letter and then actually record it in the post book.

Q. I have a vision of the post book being a little book that somebody wrote in…I take it, it is not that?

A. No, it's a much bigger book. It's an A4 book that literally has the date and then records, I think at that stage it would be manually, but records every letter that has come in.

Q. …So, are you saying…that you…looked in that book and that book did not show the letter coming back?

A. I am saying that what my checking would be is I would ring the contracts team and check whether or not anything had been entered into the book and I would also check with Mike Lowe because Mike Lowe sent the letter and there was nothing in either of those two books.

Q. …You have explained to Mr Fryer-Spedding that in relation to letters that were posted out they would also be recorded in the post book.

A. Yes, yes.

Q. Was there any procedure to stop letters going out to one contractor when they would otherwise have gone out? Was there some standard practice?

A. It would rely on the quality assurance within the team. So, if we were sending a big bundle out we would have a list of who they needed to go to and we would actually do the cross-referencing in terms of the letter and the list. It wouldn't actually be at the sealed envelope postal stage. It would be before it got to that. So, usually a team of people would work on things.

Q. So, there would be people stuffing envelopes?

A. Yes, people printing, people stuffing, people checking against the list.

> Q. And if the letter was not to go to one person, that would depend on whoever was stuffing the envelopes at the time ensuring that a letter did not go to that address?
>
> A. Yes, you would get the bundle of letters and then you would do the cross-check against the list.
>
> Q. Was that your team?
>
> A. That would be the contracts team.
>
> Q. It would have been the contracts team which would have sent out the [2009 Yorkshire] letters [of intent]?
>
> A. Yes.
>
> Q. And there were a number of people in that team?
>
> A. Yes.
>
> Q. They would have had a pile of letters and their job was to cross-refer the addressees on the letters to a list showing who those letters should go to?
>
> A. Yes.
>
> Q. If there was a letter that should not go out as shown on the list, they were supposed to take it out of the pile and not post it?
>
> A. Yes. The list would be annotated that it should not go to this provider.
>
> Q. …[Lucille Ingham's 12 August 2009 letter] is a letter, as I understand it, that you say was the chaser letter because the letter of intent had not been returned…[Was] there any…standard procedure in place within the LSC which would have alerted Lucille Ingham on or about 12 August that the 2009 letter of intent had not been returned which would then cause her to write this letter? How come she wrote this letter?
>
> A. Right, the process would be we have a list of providers, we have a list of letters that have gone out and these are the ones that we still actually haven't had returned. So, what we actually now need to do is to chase those providers up and check that they -- well, they are aware that they have got it and that they need to return it."

Earlier, in cross-examination, Mrs Cobb had said that Ms Ingham's 12 August 2009 letter was a standard letter which was sent out to all providers who had not returned, countersigned, the 2009 Yorkshire letter of intent.

199. Mrs Cobb explained, in cross-examination, that, in her view, LSC said that it would fund learners who had been recruited by 31 March 2009, by inference so long as they were "eligible learners" (for example, by being registered with an awarding body). She later said that a learner could be a "qualified learner" even if a provider had exceeded its MCV and so long as "everything stood up" to an audit. However, she added that there would have to be "a discussion between the contractor and LSC". She said there could not be an automatic increase in an MCV because a provider's contract would need to be varied. Then explaining how she understood the guidance contained in the LSC paper "issued" on 17 September 2009 was intended to operate, she said that LSC would work out, "from the data", who was a "legitimate learner" and what that learner "cost" and then the MCV would be increased.

200. Mrs Cobb was asked, by Mr Fryer-Spedding, to interpret the 15 December letter. She interpreted it as saying: "if you outperform, we will increase your MCV".

Shafqat Rahim

201. In 2008, Shafqat Rahim was an LSC Yorkshire region advisor on learners with learning difficulties and disabilities. He also had a role in promoting the TTG programme to black and minority ethnic ("BME") employers.

202. Mr Rahim explained that, in 2008, he was trying to increase the take-up of TTG funding by BME learners and BME-owned providers.

203. Mr Rahim said, in his witness statement, that he remembers one meeting with UKLA which he had, to see if UKLA was willing to share, with other providers, details of its success in recruiting BME learners and to see if UKLA might be interested in being involved in a BME provider network. He recalled that the meeting took place on 17 July 2008 and, contrary to Sarah Haigh's evidence, he recalled that she went to the meeting at UKLA's premises. During cross-examination, Mr Rahim thought that Mrs Haigh would have accompanied him to the meeting on 17 July 2008 because she was UKLA's contract manager. Later, in cross-examination, he said that the meeting with UKLA that he and Mrs Haigh attended could have been after July, at a time when she was, in fact, UKLA's contract manager.

204. Mr Rahim said that, at 17 July meeting, he did not carry out any "due diligence" as UKLA contends, because that was not part of his job. He recalled that he said, at the meeting, that LSC would like BME learners to be recruited. He said, in cross-examination, that, at the meeting, he did not go into policies or procedures. Rather, he just asked UKLA what their "secret formula" was and they talked about the networks they had set up and of the fact that, according to them, they were "getting quite a few BME taxi driver learners". He added that he would not have said that he was happy with UKLA's practices and procedures but he accepted that he did say that LSC was seeking to recruit providers who could deliver.

205. Mr Rahim recalls meeting with UKLA representatives again but cannot recall any details or where such meetings took place. He suggested that he may have met with UKLA representatives at an LSC event.

206. Mr Rahim said that he could not have discussed "contractual volumes" with UKLA because he did not know anything about UKLA's contract. He added, in his witness statement:

> "…I am certain that I never said to UKLA's representatives, or indeed to any provider, that the LSC would fund any increase in learning delivered irrespective of the provider's contract. Even though managing providers and their contracts was not part of my responsibilities, having worked at the LSC for some time, I did have some understanding of the workings of provider contracts. In particular, I knew that it would not have been for me (in my role) to discuss or promise anything in relation to levels of funding or contracted volumes.
>
> …my discussions with UKLA centred on their role as a BME provider and the possibility of UKLA providing us with case studies and sharing their experiences of learner recruitment so that we could use these elsewhere."

207. In relation to the contention that he visited UKLA's premises on 26 November 2008, Mr Rahim exhibited a copy of his electronic diary for that day, which does not show that he had any meetings. He said that it was:

> "…unlike me not to have diarized such a meeting (though in fairness, it's not impossible that I omitted to do so)."

Whilst he acknowledged that someone could remove an entry from his electronic diary, Mr Rahim said that that would not have happened in practice. He added that he had nothing in his electronic diary for 5 November 2008.

208. More generally, Mr Rahim said that he cannot recall ever having been aware of the number of learners UKLA had recruited. He said his focus was "solely on their BME credentials".

Meetings

209. Because some disputed meetings may be relevant to the issues in these proceedings, it is appropriate for me to set out some of my conclusions in relation to those disputes.[46]

210. If there are points of dispute between Yusuf Bham and Clive Howarth about what happened at the meeting on 3 April 2008 at LSC's Bradford office, I prefer Mr Howarth's evidence to that of Mr Bham, because Mr Howarth is, as I have explained, someone who is likely to have been familiar with standard TTG-related arrangements (as any 3 April 2008 meeting was), because Mr Howarth gave his evidence fairly and

[46] I do not expressly consider, in this judgment, all the evidence which I heard or to which I was taken. Nor do I expressly consider all the submissions made on the parties' behalves. Nevertheless, I have had in mind all that evidence and all those submissions in reaching the conclusions I set out in this judgment.

because, as I shall explain, I have rejected other evidence from Mr Bham in relation to other meetings.[47]

211. I had the clear impression that, in his dealings with UKLA, Shafqat Rahim, in particular at the 17 July meeting, was singularly focused on his work to improve BME participation in the TTG programme. I found Mr Rahim's oral evidence in this respect to be convincing and his evidence is supported by the conclusion which I have reached, in any event, that LSC was a bureaucratic organisation in which staff in one team or field tended not to stray into other fields of work.

212. It is improbable, in my view, that there was a meeting on 18 August 2008 attended by Mr Rahim. Mr Rahim's particular interest in improving BME participation in the TTG programme would not have required him to have a meeting with UKLA representatives only a month after his previous meeting and, as I have said, he was singularly focused on that interest.

213. There is no dispute that the 26 August meeting took place. In light of the conclusions I have reached about whether a meeting took place on 1 September 2008, I have concluded that the contract clarification meeting in relation to the 2008 Yorkshire Contract took place on 26 August 2008.

214. I have concluded that there was no meeting on 1 September 2008. I am conscious that Yusuf Bham said that he particularly recalled that there was a meeting on 1 September 2008, because it was the first day of Ramadan and he was fasting. However, as I have said, I have rejected Mr Bham's evidence in relation to other meetings,[48] and, because I have concluded, in relation to the 8 September meeting, that Mr Bham has probably reconstructed rather than recalled events, I think it is probable that he has done so in this context too. In any event, in my view, the weight of the evidence very much favours the Defendant's case on this issue. It is improbable that there was a meeting on 26 August 2008 (a Tuesday) at which Sarah Haigh arranged a meeting for 1 September 2008 (the following Monday) to discuss matters which no-one suggests could not have been discussed on 26 August. Further, Mrs Haigh's electronic diary shows that she was on annual leave that day (and she recalls being on annual leave that week). Whilst I do not rule out entirely the possibility that her electronic diary may not be accurate, I do not think it is probable that she would not have recorded a meeting on that day in her diary, because that is inconsistent with her nature, and, whilst I do not rule out entirely the possibility that an entry has been removed from her diary, having in mind how LSC operated, I do not think that that is probable.[49] Further, in cross-examination, John Kinsella was equivocal about whether a meeting took place on 1 September.

215. I prefer the evidence of Mr Howarth (who, as I have indicated, I found to be a good witness) about the 8 September meeting to Yusuf Bham's and Mr Kinsella's evidence. In particular, as I have already noted, I have concluded that Mr Howarth did not say "recruit, recruit, recruit". I have reached this conclusion principally because

[47] I have reached the same conclusion in relation to the meeting on 12 December 2008.
[48] Including the alleged visits on 5 and 26 November 2008.
[49] For the same reasons, I have reached similar conclusions about the absence of further diary entries in Mrs Haigh's and in Mr Rahim's electronic diaries.

such a statement is not in Mr Howarth's nature and it is not wholly consistent with his recollection of what was, in effect, very much a standard presentation by him which he is likely to have made or with LSC's standard procedures with which he is familiar. Because of this conclusion and because of the similarity between Mr Bham's and Mr Kinsella's evidence in this respect, I have concluded that their evidence is likely to have been based on their reconstruction rather than their recollection of the meeting.

216. I am satisfied that, if there were visits in November 2008, by Mrs Haigh and/or Mr Rahim, to UKLA's premises they would not have been for the purpose of a "mini-audit" or, more generally, for either (or both) of Mrs Haigh and Mr Rahim to review or comment on UKLA's procedures. As I have said, the evidence shows that LSC was a bureaucratic organisation. Neither Mrs Haigh nor, in particular, Mr Rahim were responsible for reviewing providers' procedures. That responsibility fell to the Provider Financial Assurance team, which, it is to be noted, did effectively carry out a "mini-audit", its initial monitoring visit, on 18 December 2008. Further, as I have explained, Mrs Haigh struck me as someone who was herself concerned that LSC's own procedures were correctly followed. It is improbable, in any event, therefore, that she carried out any review of files. Mr Rahim's focus on improving BME participation in the TTG programme leads me to conclude that it is improbable that he carried out any review of files.

217. In any event, I have come to the conclusion that there was no visit on 26 November 2008. There are no relevant diary entries for either Mrs Haigh or Mr Rahim for those dates.

218. Before reaching these conclusions about the events of November 2008, I have borne in mind that the evidence of Imran Bham, Yusuf Bham and Mr Kinsella is to the contrary. However, I have rejected their evidence in respect of other meetings and, in my view, the Defendant's evidence, including contemporaneous documentary evidence, is more weighty.

219. I am also not satisfied that Mrs Haigh and/or Mr Rahim visited UKLA's premises on 5 November 2008. There is no entry for such a visit in Mr Rahim's electronic diary and Mrs Haigh cannot recall such a meeting. In reaching this conclusion, I have taken into account that I have rejected UKLA's contention that Mrs Haigh and/or Mr Rahim carried out a review of files and that they visited its premises on 26 November 2008.

220. I have concluded that the note of the 27 January meeting is an accurate note, although, because it was written a little after the meeting, it is unlikely to be a verbatim note. The note was prepared, I understand, by Mrs Haigh. As I have explained, I have concluded that she is concerned with proper processes and procedures and so is likely to have drafted an accurate note. Yusuf Bham was, effectively, equivocal in cross-examination about the accuracy of the note, having, notably, been much more positive in his witness statement about its inaccuracy. Mr Kinsella said (contrary to UKLA's interest) that the note appeared accurate.

Documentary interpretation

221. In the light of counsels' submissions, I believe that the following principles of documentary interpretation are not in dispute and are applicable in this case.

222. When interpreting a document, the court's aim is to determine how a reasonable person, with the background knowledge of the parties, would understand the document. So, as Lord Bingham explained in *BCCI v. Ali* [2002] 1 AC 251, at [8]:

> "In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 WLR 896, 912-913 apply in a case such as this."[50]

223. An important point to have in mind in this case is that a document, in particular a contract, must be interpreted as a whole. A contract clause, or part of that clause, should not be interpreted in isolation. So, for example, in *Re Sigma Finance Corpn.* [2010] BCC 40, Lord Collins said, at [35]:

> "In complex documents of the kind in issue there are bound to be ambiguities, infelicities and inconsistencies. An over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose. This is one of those too frequent cases where a document has been subjected to the type of textual analysis more appropriate to the interpretation of tax legislation which has been the subject of detailed scrutiny at all committee stages than to an instrument securing commercial obligations."

224. The conduct of the parties in purporting to perform a written contract is no guide to the proper interpretation of that contract. As Lord Reid explained, in *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.* [1970] AC 583, 603:

> "…I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."

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[50] See also, for example, *Arnold v. Britton* [2015] AC 1619, particularly at [14]-[22] and *Wood v. Capita Insurance Services Ltd.* [2017] AC 1173, particularly at [9]-[15].

225. It is convenient for me to set out now some further principles which, I believe, are not controversial and are also applicable in this case.

226. Only certain pre-contractual proposals are capable of amounting to offers. To amount to an offer, a pre-contractual proposal must convey to the reasonable person (having the knowledge of the recipient of the proposal) that the maker of the proposal intended to be immediately bound by the proposal if the recipient accepted it. In *Crest Nicholson (Londinium) Ltd. v. Akaria Investments Ltd.* [2010] EWCA Civ 1331, Sir John Chadwick explained, at [25]:

> "…the court's task when seeking to determine whether or not a contract has been made at all [requires it to ask] the questions…(i) "was there a proposal (or "offer") made by one party which was capable of being accepted by the other" and, if so, (ii) "was that proposal accepted by the party to whom it was made". In determining the first of those questions – was there a proposal made by one party (A) which was capable of being accepted by the other (B) – the correct approach is to ask whether a person in the position of B (having the knowledge of the relevant circumstances which B had), acting reasonably, would understand that A was making a proposal to which he intended to be bound in the event of an unequivocal acceptance."

227. Not every positive response to an offer amounts to a communication of the acceptance of it. Cartwright: Formation and Variation of Contract (2nd ed) explains the position thus, at paragraphs 3-34 – 3-35:

> "Acceptance is the unequivocal assent on the part of the offeree to the terms proposed by the offeror in his offer. The subjective decision on the part of the offeree to accept an offer is not in itself sufficient, but the offeree must respond to the offer overtly, demonstrating objectively to the offeror his intention to accept…
>
> Before a communication can constitute an acceptance, it must be made in response to an offer…"

228. Where it applies, the "postal rule" of acceptance has the effect of deeming an offeree to have accepted an offer when the offeree posts its acceptance to the offeror, not when the offeror receives the posted acceptance.[51] Cartwright explains the rule thus, at paragraph 3-42:

> "…if the offeror, by the terms of the offer and the circumstances in which it was made, has led the offeree reasonably to believe that there is an offer to be accepted and that the dispatch of his acceptance by the postal service is the

[51] Mr Warner accepted, properly in my view, that the postal rule is capable of applying to the dispute relating to the 2009 Yorkshire letter of intent.

> way (or, at least, a way) in which the contract can be concluded, then the posting of the acceptance is the form (and the time and place) of acceptance."

229. There are circumstances where the requirement for a written or oral communication of the acceptance of an offer is waived.[52] However, it is exceptional for mere silence to be a sufficient acceptance of an offer. Cartwright explains the position thus, at paragraph 3-39:

> "…There are two situations, however, in which it may be claimed that an offer has been accepted by silence: where the offeree's silence is said to have been sufficient in itself to show that he accepted the offer; and where the offeror in his offer prescribed silence as a form of acceptance. Both present difficulties for the reason that silence in itself presents a difficulty in the formation of a contract.
>
> The refusal generally to accept that silence and inactivity can constitute acceptance follows from, or at least is closely connected to, the general objective approach in English law. Mere mental assent is insufficient to constitute acceptance; and it is not even sufficient that there may be evidence of the offeree's decision to accept which has not been communicated to the offeror, since in principle the offeror is entitled to know whether the contract has been concluded. It has also been said that the principal problem with silence as a means of acceptance is that it does not constitute a sufficiently unequivocal communication of the offeree's assent: "silence and inaction are of their nature equivocal, for the simple reason that there can be more than one reason why the person concerned has been silent and inactive". However, this does not exclude all possibility of "silence and inaction" constituting communication of a person's intention if, in the circumstances, the silence is not in fact unequivocal. Such a case does not involve the waiver of the requirement of communication of acceptance; rather, the silence itself communicates acceptance – acceptance by silence. It is evident that this will be very rare, for the very reason that we have already noted: a person's failure to respond may be attributed to a range of reasons, and the offeror is not generally entitled to assume that the silence does in fact indicate assent. Even if the offer appears to be very favourable to the offeree, that is not in itself sufficient to entitle the offeror to assume that silence indicates assent…"

230. Generally, to effect a contractual variation, there must be mutual agreement by the contracting parties,[53] so that, on the offer/acceptance model of contractual

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[52] See Chitty on Contracts (32nd ed), paragraph 2-046, to which Mr Fryer-Spedding took me. When the postal rule applies, the requirement that an acceptance is communicated is waived.
[53] See Chitty, at paragraph 22-032.

formation,[54] to find such a variation requires the court to be satisfied that one party has offered to vary the contract and that the other party has accepted that offer. However, a contract may contain a term allowing one party to unliterally vary that contract.[55]

The 2008 Yorkshire Contract – requirements for a variation

231. Mr Fryer-Spedding contended that, by Schedule 2, paragraph 4.4 of the 2008 Yorkshire Contract ("Paragraph 4.4"), LSC could, and did, in this case, unilaterally vary the 2008 Yorkshire Contract to remove any limit on payments (disapplying the MCV) for learners who had started before 1 April 2009.[56] I disagree.

232. Paragraph 4.4 contemplates that there is an "underpayment" before (most favourably to UKLA) there can be a unilateral variation. UKLA could only be underpaid against a particular measure. The measure, in my view, is not the number of learners actually taught by UKLA (without limit). If that was the measure, the MCV, which was a significant limit, in the 2008 Yorkshire Contract, on uncontrolled expenditure, would serve a much narrower purpose than other contractual provisions expressly contemplated (see, for example, Schedule 1, paragraph 2.4 to the 2008 Yorkshire Contract). Further, if the measure was the number of learners actually taught by UKLA, so that LSC could unilaterally raise (and, in effect, completely disapply) the MCV, Schedule 1, paragraph 2.2 to the 2008 Yorkshire Contract (which contemplated an agreed variation in writing before the MCV could be exceeded) would serve little purpose. Rather, I have concluded, Paragraph 4.4 operated in circumstances contemplated by Schedule 2, paragraphs 4.1-4.3 to the 2008 Yorkshire Contract; namely, where "profile payments" had been made and those payments required adjustment to bring them in line (within the MCV) with the payments a provider of a learner responsive programme was entitled to by reference to the amount of training such a provider actually provided.

233. As appears from Schedule 2, paragraphs 2.2-2.3 to the 2008 Yorkshire Contract, there were broadly two types of programme intended to be covered; namely, learner responsive programmes and employer responsive programmes. As I have indicated, TTG was an employer responsive programme. Providers offering employer responsive programmes were to be paid, in arrears, based on the information they uploaded to LSC's computer system, by reference to the amount of training actually provided, up to the MCV.[57] However, providers offering learner responsive programmes were to be paid in accordance with a Funding Agreement, which, in this case, by way of example, contained a "Delivery Profile" contemplating payments 3 times a year (not by reference to the amount of training actually provided but only by reference to the MCV). Such regular payments were, I understand, "profile payments"[58] and, as I have said, were not made by reference to the amount of training actually provided. However, there had to be an adjustment, in due course, to bring

[54] A model which is uncontroversial in this case.
[55] See Chitty, at paragraph 22-039.
[56] Mr Fryer-Spedding encapsulates UKLA's case in relation to such learners in this way, in paragraph 5.22 of his skeleton argument: "The upshot of [UKLA's] case is that it is entitled to recover the sum for which it sues because the contract was varied so as to disapply the…MCV first included in the agreement…"
[57] See, for example, Schedule 2, paragraph 2.3 to the 2008 Yorkshire Contract.
[58] I did not understand this to be disputed.

profile payments in line with the amount of training actually provided on a learner responsive programme so that a provider was not, ultimately, overpaid or underpaid by way of profile payments when compared to that amount of training.[59] Put another way, there was an underpayment when, "measured" against the profile payments actually paid to a provider of a learner responsive programme, more should have been paid to that provider because of the amount of training it had actually provided. Paragraph 4.4 was part of the mechanism, along with Schedule 2, paragraphs 4.1-4.3 to the 2008 Yorkshire Contract, for balancing profile payments with the amount of learner responsive training actually provided. As I have indicated, in this case, because TTG was an employer responsive programme, UKLA did not get any profile payments. It follows that UKLA cannot rely on Paragraph 4.4 in this case.[60]

234. I am satisfied that, otherwise than under Paragraph 4.4, any variation of the MCV in the 2008 Yorkshire Contract was required, by the contract, to be in writing. Further, I am satisfied that any such written variation was required, by the contract, to be signed by LSC and UKLA.[61] That a variation was required to be in writing is clear, in my view, from clauses 1.1[62] and 30.2 of and Schedule 1, paragraph 2.2 to the 2008 Yorkshire Contract. That the written variation was required to be signed by LSC and UKLA is clear from clauses 1.1 and 30.2 of the 2008 Yorkshire Contract.

235. I am conscious that Schedule 1, paragraph 2.4 to the 2008 Yorkshire Contract makes no reference to a written (or signed) variation. However, the purpose of this provision was not to stipulate how a variation was to be effected. Rather its purpose was (i) to give priority to the MCV and (ii) to set out the procedure a provider had to adopt if "the combination of funding rate…and volumes would result in the [MCV] being exceeded".

236. I am conscious too that Schedule 1, paragraph 2.2 to the Yorkshire Contract does not require a written variation to be signed. However, as I have explained, I have to interpret the contract as a whole not (as I was, in fact, invited to do) by reference to individual clauses. Schedule 1, paragraph 2.2 to the 2008 Yorkshire Contract is not inconsistent with clauses 1.1 or 30.2 of the contract. In my view, looking at the 2008 Yorkshire Contract as a whole, it was unnecessary to specify, in Schedule 1, paragraph 2.2, how the written variation was to be effected because the other clauses I have identified set that out.

237. I should add that I understood Mr Fryer-Spedding to seek to bolster (or possibly seek to bolster) his submission that, in this case, there could be a unilateral variation by LSC by pointing out that the second reference, in Schedule 1, paragraph 2.2 to the 2008 Yorkshire Contract, to a written variation did not, in terms, refer to an "agreed" written variation as the first reference in that paragraph did. That contention has no merit in my view. To my mind, it is just the sort of contention which Lord Collins

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[59] As I have said, see Schedule 2, paragraphs 4.1-4.3 to the 2008 Yorkshire Contract.

[60] In the light of this conclusion, I do not need to consider Mr Warner's further submissions that (i) on its proper interpretation, Paragraph 4.4 does not permit unilateral variations but only mutually agreed variations which had also to be in writing and (ii) in any event, the Contract Manager (Sarah Haigh) had not actually required a variation.

[61] These conclusions address Mr Fryer-Spedding's alternative submission that, under the 2008 Yorkshire Contract, all that was required was some written (unsigned) evidence of an otherwise orally agreed variation.

[62] Which defines the "Contract" as including only written variations signed by LSC and UKLA.

cautioned against in *Re Sigma Finance Corpn.* Just as the whole of the paragraph needs to be read together with the other provisions I have identified (namely, clauses 1.1 and 30.2 of the 2008 Yorkshire Contract), so the second sentence of the paragraph has to be read together with the first sentence of that paragraph and those other provisions. Taken as a whole, they establish, in my view, as I have said, that, under the 2008 Yorkshire Contract, the MCV could only be increased by a signed written variation.

Offers to vary the 2008 Yorkshire Contract

238. In the light of the conclusions I have already reached, for an effective variation under the 2008 Yorkshire Contract there had to be an offer to vary the contract by one party which the other party had to accept. Mr Fryer-Spedding identified the following as LSC's offers to vary the 2008 Yorkshire Contract:

    i) The 1 May letter;

    ii) The 19 May letter;

    iii) The 12 June letter;

    iv) The LSC website update;

    v) The July 2009 newsletter.

239. Before 1 May 2009, a reasonable person, having LSC's and UKLA's background knowledge, would know the following key facts:

    i) The 2008 Yorkshire Contract was for a 3 year period;

    ii) The MCV specified in the 2008 Yorkshire Contract was £135,553.76;

    iii) That MCV was apparently intended, and understood, by the contracting parties to be the funding available, according to the 2008 Yorkshire Contract, for the 2008-2009 academic year;

    iv) In the case of employer responsive programmes, by the 2008 Yorkshire Contract, further funding (or, to put it another way, an increase in the MCV), in particular for the 2009-2010 academic year, required a contractual variation which had to be mutually agreed, in writing and signed by the contracting parties;

    v) In the 15 December letter, Mike Lowe had made clear that providers would be informed about the MCV for the 2009-2010 academic year (that is, the further funding for that academic year) on 31 March 2009;

    vi) Margaret Cobb made clear, at the 11 March meeting, that LSC was then considering the funding available for all providers for the 2009-2010 and 2010-2011 academic year, that funding was "tight" and that UKLA would not receive funding for the 2008-2009 academic year in excess of the MCV;

vii) Providers were not apparently informed about the MCV for the 2009-2010 academic year on 31 March 2009. Instead, they received the 31 March letter;

viii) By the 31 March letter, Margaret Coleman made clear, in my view, that:

a) the TTG budget for the 2009-2010 academic year was a matter of concern;

b) something had to be done to meet this concern;

c) effectively, MCVs would need to be set to take into account the available budget;

d) LSC was very much focused on the 2009-2010 academic year;

e) LSC was also concerned to ensure that, for the remainder of the 2008-2009 academic year (April – July 2009), it stayed within its TTG budget; and,

f) to that end, providers had to ensure that they did not claim funding in excess of their 2008-2009 academic year MCV.

240. The 1 May letter was a letter which expressly took, as its starting point, the 31 March letter. It referred to a "commitment to learners in the system as of 1 April 2009" but gave no explanation about what that commitment was, in circumstances where no commitment had previously been expressly referred to. The principal purpose of the 1 May letter was to ask providers to complete a spreadsheet, in large part in order to help LSC plan for the funding required, in the 2009-2010 academic year, for those learners who had started in the 2008-2009 academic year but who would still be in training. The three bulleted points I have quoted from the 1 May letter tended to indicate, at least, that providers should not claim funding, for the 2008-2009 academic year, in excess of the MCV, in my view. So, I have concluded, there was nothing in the 1 May letter which suggested that any cap on funding for the 2008-2009 academic year was being lifted or dispensed with.

241. I cannot discern any offer at all, in the 1 May letter, to vary the 2008 Yorkshire Contract; in particular, to increase or dispense with the MCV for the 2008-2009 academic year. Indeed, very much to the contrary, as the 31 March letter made clear, I am satisfied that a reasonable reader of the 1 May letter, with the background knowledge of LSC and UKLA, would have understood the letter as tending to indicate that MCVs could not be exceeded.

242. By 19 May 2009, a reasonable person, having LSC's and UKLA's background knowledge, would know the following additional key facts:

i) What the 1 May letter, as I have interpreted it, said;

ii) By 19 May 2009, as Mohamed Dawoodji confirmed in his letter of that date, LSC had apparently made clear that it would not fund any training in excess of the MCV (although, perhaps, that related to funding for the 2009-2010 academic year and an MCV, for that year, of £130,000);

iii) Sarah Haigh had emailed UKLA, on 19 May 2009, that information UKLA uploaded to LSC's computer system had to be "within your overall [MCV] in order to avoid being capped…"

243. The 19 May letter was expressed, in its heading and in the body of the letter, to be an update about funding for the 2009-2010 academic year. The letter recorded that the process of settling the funding for the 2009-2010 academic year had caused concern to providers. In my view, that concern is likely to have stemmed from the budgetary constraints mentioned in the 31 March letter and the 1 May letter. By the 19 May letter, Geoff Russell sought to allay providers' concerns about "future allocations". I am satisfied that the "future allocations" he referred to were those for the 2009-2010 academic year because it was about that year that, the 19 May letter suggested, providers were concerned.

244. Mr Russell added, in the 19 May letter, as I have noted:

> "…I also want to reassure you that we will guarantee that there is funding available to you at the agreed rates to support learners who were legitimately in learning from 1 April 2009 through to completion…
>
> …I can assure you that all learners legitimately starting training before 1 April 2009…will be funded to complete their training at the agreed rates."

I am satisfied that, by these statements, Mr Russell was dealing with the funding of learners, who had started before 1 April 2009, during the 2009-2010 academic year. He was not dealing with their funding during the 2008-2009 academic year. There was no need for him to do so. LSC's position, that funding for the 2008-2009 academic year could not exceed the MCV (at least, without a mutually agreed written and signed variation), was made clear in the 2008 Yorkshire Contract, at the 11 March meeting, in the 31 March letter and, to a degree at least, in the 1 May letter.

245. I cannot discern any offer, in the 19 May letter, to vary the 2008 Yorkshire Contract, in connection with the amount of funding available (that is, in connection with the MCV), in relation to the 2009-2010 academic year.[63] The reasonable person by reference to whom I must interpret the 19 May letter would know that the 2008 Yorkshire Contract required any such variation to be in writing and to be signed. In any event, the 19 May letter made clear (by its reference to the "coming to an end of the settlement process" and the "revisiting" of "allocations") that LSC was not intending to make an immediately binding promise in relation to funding for the 2009-2010 academic year.

246. By 12 June 2009, a reasonable person, having LSC's and UKLA's background knowledge, would know the following additional key facts:

i) What the 19 May letter, as I have interpreted it, said;

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[63] Or in relation to the 2008-2009 academic year.

ii) On 21 May 2009, Clive Howarth had sent his email of that date to UKLA reminding it that it needed to "manage within [its MCV]…" Although it was not agreed that UKLA had received this email, I am satisfied that it did. The email was apparently written to providers in the Yorkshire region. Mr Howarth did not strike me as someone who would write such an email and then not send it to providers and it is inherently probable that UKLA received it.

247. The purpose of the 12 June letter was to inform providers:

i) that the confirmation of providers' MCVs for the 2009-2010 academic year had been delayed;

ii) what LSC meant by "a legitimate start" or, to put it another way, which learners qualified as being "legitimately in learning before 1 April 2009";

iii) in my view (taking into account, in particular, the heading "Actions for 2008/09"), that even for learners who had started before 1 April 2009, LSC would only fund their training up to the MCV but that, by agreement with "Regional teams", MCVs could be increased to take into account the funding requirements for such learners which would cause the existing MCV to be exceeded.

It is right that, in the 12 June letter, Mr Russell refers to an existing commitment to fund all "legitimate [TTG] starts prior to 1 April 2009" but I do not believe that, by the 12 June letter, LSC was making an offer to vary the 2008 Yorkshire Contract. The commitment Mr Russell had in mind was one which had been previously made. It was not a commitment which was being given by the 12 June letter. In any event, the 12 June letter sufficiently clearly indicated, in my view, that any alteration in the level of funding for the 2008-2009 academic year required the agreement of LSC's "Regional teams", so that the letter made no offer to vary that funding in particular.[64] [65]

248. By 10 July 2009, a reasonable person, having LSC's and UKLA's background knowledge, would, on UKLA's case, know the following additional key facts (from the 2009 Yorkshire letter of intent):

i) The MCV, for the 2009-2010 academic year, for all of UKLA's TTG learners (whenever they started), was limited to £130,000, on the proper interpretation of the 2009 Yorkshire letter of intent;

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[64] To be clear, I am also satisfied that the 12 June letter contained no offer to disapply any funding cap, for learners who had started before 1 April 2009, for the 2009-2010 academic year. The final section of the letter, headed "Timetable and Process", makes it clear that the funding for those learners for the 2009-2010 academic year would be agreed by adopting the procedure set out there.

[65] Also, to be clear, in my view the June 2009 Clarification document contains no offer to vary the 2008 Yorkshire Contract. The purpose of the document was to clarify when a learner started for the purpose of the "assurance" given in the 19 May letter. A reasonable reader of the document, with LSC's and UKLA's background knowledge, would not have understood it to be making any offer at all which had not previously been made, except, perhaps, by extending any such offer to those cases where "providers [had] received prior authority to exceed their [MCV] and their contract [had] not formally been changed to reflect this agreed level of recruitment". Because I have concluded that, by 12 June 2009, no offer had been made, there can have been no extension to that offer.

ii) LSC continued to require formality in the fixing of the MCV for the 2009-2010 academic year;

iii) UKLA had accepted that limited increase in funding by countersigning and posting back the 2009 Yorkshire letter of intent on 25 June 2009, so that it is to be taken (objectively) to have agreed that funding for learners who had started before 1 April 2009 was not unlimited.

Such a reasonable person would also have known that:

iv) by then, LSC had not made an offer to vary the 2008 Yorkshire Contract;

v) Mrs Haigh had reminded UKLA, in her second June 2009 email, that UKLA had to remain within the MCV "in order to avoid being capped";

vi) LSC's position, as explained in Keith Woodcock's email of 9 July 2009, was, in my view, that, if a provider was to receive funding, for the 2008-2009 academic year, in excess of its existing MCV, that MCV would have to be specifically increased by LSC.

249. The update to LSC's website deals merely with an alteration to what information could be properly uploaded onto LSC's computer system. It contains no promise by LSC, in my view, to fund, in excess of a provider's MCV, those whose information had been uploaded.

250. I can discern no offer, in the July 2009 newsletter, to vary the 2008 Yorkshire Contract. The newsletter refers to an existing "commitment" and explains what LSC's approach would be to that existing commitment. Even that approach is not obviously consistent with the proposition (that is, with UKLA's case) that LSC had offered to disapply, in effect, any cap on funding for learners who had started before 1 April 2009. LSC's stated approach contemplated a specific increase being made to a provider's MCV.

251. UKLA's case is that, otherwise than by the 2009 Yorkshire letter of intent, the 2008 Yorkshire Contract was varied to effectively disapply the MCV, for the 2008-2009 and 2009-2010 academic years, so that LSC was liable to fund all learners who had started before 1 April 2009 to completion of their training.[66] For the reasons I have explained, such a variation would have been required to be mutually agreed. UKLA contends that such a mutual agreement came about because of offers LSC made to it, which it accepted. As set out above, I have concluded that none of the documents relied on by UKLA amounts to an offer to vary the 2008 Yorkshire Contract.

Acceptance

252. If, contrary to the conclusion I have already reached, LSC offered to vary the 2008 Yorkshire Contract (by, effectively, dispensing with the MCV for learners who had started before 1 April 2009), for the reasons I have explained such an offer would need to be accepted by UKLA.

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[66] See footnote 56.

253. Mr Warner suggested that, if the 12 June letter contained an offer, it had to be accepted by uploading the details of pre-1 April 2009 legitimate starts to LSC's computer system by 30 June 2009. If Mr Warner meant that any offer in the 12 June letter could only be accepted by uploading information, which might already have been uploaded, between 12 June and 30 June 2009, I do not agree. UKLA had already uploaded relevant information by 3 June 2009 (which was reflected in the June Yorkshire PFR). Bearing in mind that LSC was apparently concerned to have all the information it needed about learners who had started before 1 April 2009 as a matter of some urgency, in my view what was being requested, by the 12 June letter, was that any information which might form the basis of a claim for payment by a provider for training the learners in question up to 30 June 2009 had to be uploaded by that date, if that had not already been done.

254. Mr Fryer-Spedding contended that the requirement for communication of an acceptance of any offer to vary the 2008 Yorkshire Contract was waived by LSC. He did not explain how this might have come about. There is no difference between the waiver apparently contemplated by Mr Fryer-Spedding and the proposition that LSC, by any offer, permitted UKLA to accept by silence. For the reasons Cartwright explains, a case where a party is permitted to accept by silence is exceptional. There is nothing in the documents to which I have referred which leads me to conclude that LSC permitted UKLA to accept any offer by silence (or, to put it another way, there is nothing in those documents which leads me to conclude that LSC waived the requirement for the communication, by UKLA, of an acceptance).

255. Mr Fryer-Spedding identified, alternatively, two acts which he said amounted, in this context, to UKLA's acceptance of any offer by LSC; namely:

    i) The uploading of information to LSC's computer system after any offer was made;

    ii) The statements of UKLA's representatives at the 4 August meeting.

256. As I have explained, an act which is said to be the communication of the acceptance of an offer must be, objectively, an "unequivocal assent".

257. I am not satisfied that the uploading of information to LSC's computer system after any offer was made amounts to an unequivocal assent. As the April Yorkshire PFR shows, UKLA was uploading equivalent information before any offer was made.

258. It is not clear to me that, at the 4 August meeting, any UKLA representative accepted any proposal from the LSC, but, if he did, I can discern nothing from the transcript from which it can be deduced that any acceptance was to one of the offers contended for by UKLA (rather than, say, a statement or proposal made at the meeting).

259. If, therefore, LSC did make an offer to vary the 2008 Yorkshire Contract by any of the documents UKLA relies on, I am not satisfied that UKLA communicated its acceptance of such an offer or that LSC waived the requirement for any acceptance to be communicated.

Contractual formalities

260. I have concluded that, by the 2008 Yorkshire Contract, any contractual variation in this case had to be effected by writing signed by LSC and UKLA (because the 2008 Yorkshire Contract contained what are known as No Oral Modification clauses). It is not disputed that these formalities have not been complied with in this case but, UKLA contends, (LSC was and) the Defendant is estopped from relying on these formalities.

261. Both parties referred me to and relied on *MWB Business Exchange Centres Ltd. v. Rock Advertising Ltd.* [2018] 2 WLR 1603. In that case, Lord Sumption, with whom Lade Hale, Lord Wilson and Lord Lloyd-Jones agreed, made the following points:

i) At [10], English law gives effect to No Oral Modification clauses;

ii) At [16]:

> "The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it…In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation…I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see *Actionstrength Ltd. v. International Glass Engineering INGLEN SpA* [2003] 2 AC 541, paras 9, 51, per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe."[67]

Lord Briggs, in that case, whilst reaching the same conclusion about the outcome of the appeal as the other Supreme Court Justices, but for different reasons, expressed the view (particularly at [31]), effectively, that the court ought only to find that a contracting party is estopped from relying on a No Oral Modification clause if that party must necessarily have had the clause in mind when it indicated (or purportedly indicated) that it intended not to rely on it.

262. I have carefully considered all the evidence to which I was referred. There is nothing, in my view, which amounts to an unequivocal statement or other representation by LSC that it would not rely on the 2008 Yorkshire Contract formalities in this case (that is, that it would not rely on the No Oral Modification clauses). All that UKLA can point to are, <u>on its case</u>, repeated promises, not satisfying those formalities, by

[67] Lord Walker's emphasis in *Actionstrength*, at [51], was on the need for an "unambiguous representation".

LSC that it would not rely on the MCV in relation to learners who started before 1 April 2009. The fact that any such promises were repeated does not establish the "something more" than those promises themselves that Lord Sumption made clear would be required for an estoppel.

263. It follows therefore that, if LSC offered to vary the 2008 Yorkshire Contract in relation to learners who started before 1 April 2009, which offer UKLA accepted, no such agreement would be enforceable by UKLA because it would not satisfy the necessary contractual formalities.

The meaning of a "learner start"

264. If the 2008 Yorkshire Contract was varied so as, in effect, to disapply the MCV for learners who started before 1 April 2009, contrary to the conclusions I have already reached, it is not disputed that the variation would only cover those who had "started" before 1 April 2009. There appears to be a dispute between the parties about when a learner "started" for the purpose of such a variation.[68] This is a matter to which I now turn (and, in so doing, deal with the 1 April pre-condition defence). In the light of the conclusions I have already reached, I propose to deal with this dispute only briefly.

265. The 1 May letter referred to "learners in the system as of 1 April 2009". The 19 May letter referred to "learners who were legitimately in learning before 1 April 2009" and "learners who legitimately [started] training before 1 April 2009". By 12 June 2009, LSC had made clear (in the 12 June letter and the June 2009 Clarification document) that, to have started before 1 April 2009, a learner must "have actively participated in a structured programme".[69]

266. I am satisfied that, from 12 June 2009 at the latest, the position was clear. A learner started when that learner had his first lesson. That learner cannot, in the ordinary way, be said to have started training before having had his first lesson, simply by having an induction (the stage, it was not disputed, which preceded the first lesson). Nor, in my view, in the ordinary way, could such a learner have "actively participated" in a "structured programme" before his first lesson. The parties took me to a number of LSC Funding Guidance documents in this context. I did not find those documents very helpful in the resolution of this dispute. To my mind, the other documents to which I have referred (that is, the 1 May letter, the 19 May letter and the 12 June 2009 documents) are sufficiently clear on their face so that their proper interpretation is not affected by the LSC Funding Guidance documents.

267. It follows that, if the 2008 Yorkshire Contract was varied so as, in effect, to disapply the MCV to learners who started before 1 April 2009, that variation would only apply to learners who had had their first lesson before 1 April 2009.[70]

268. In closing, Mr Fryer-Spedding suggested that an NVQ learner who had earlier started an SFL course, started, for the purpose of such a contractual variation, when he

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[68] See footnote 5.

[69] As it happens, by 4 August 2009, LSC representatives were saying explicitly that a learner started only when he had had some training.

[70] As I have explained, a lesson could be self-guided (and so could include the completion of a workbook, for example).

started the SFL course, not when he started the NVQ course. I agree with Mr Warner that this is not the correct interpretation of when a learner started for that purpose. As the June 2009 Clarification document makes clear, a learner's start date is determined, in part, by reference to a learner's "learning aim". The aim of an SFL course, to obtain an SFL qualification, is different, as a matter of ordinary language, to the aim of an NVQ course, which is to obtain an NVQ qualification.[71]

269. The April Yorkshire PFR showed that all the NVQ learners, who had started before 1 April 2009, had started in March 2009, and mainly in the last two weeks of that month.[72] Imran Bham did not apparently appreciate, at the beginning of the 4 August meeting, that a learner only started when he had had his first lesson (and that he had not started by having an induction). As the transcript of the 4 August meeting tends to show, records provided, by that time, by UKLA appear to have assumed that a learner started before his first lesson. In his second witness statement, on my reading, Imran Bham suggested that:

i) at paragraph 11, a learner's start date was recorded by UKLA as the date that learner enrolled with UKLA;

ii) at paragraph 15, a learner's start date was when that leaner had his first lesson;

iii) at paragraph 18, a learner was "registered on the system" when that learner completed his Initial Learning Plan, which preceded his induction. It is not clear, from this paragraph, if Mr Bham intended to suggest that a learner was registered as having started on the date the Initial Learning Plan was completed;

iv) at paragraphs 20-21, that a learner's start date was not recorded by UKLA as the date the learner enrolled with UKLA.

The date UKLA took as a learner's start date and the date UKLA recorded as that learner's start date is unclear from Mr Bham's second witness statement. Mr Bham said, in re-examination, that a learner's start date was the date that learner had his initial assessment (so before his first lesson). The evidence of the taxi drivers does not establish sufficiently clearly that UKLA had a practice of giving learners their first lesson on the same date as their induction.

270. Because what UKLA recorded is confused, or at least unclear, and because all the NVQ learners are shown, on the April Yorkshire PFR, as having started no earlier than March 2009 (and, mainly, as having started in the last two weeks of that month), I am not satisfied, on the present evidence, that any NVQ learners started, for the purpose of any contractual variation, before 1 April 2009.

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[71] It seems to me that there is some support for this conclusion from LSC Funding Guidance 2008/09: Principles, Rules and Regulations. Paragraph 126 defines a "learning aim" as: "…a single element of learning that attracts a funding at either a listed SLN value or has an unlisted SLN value that is based on a delivered glh". NVQ courses received funding separately from SFL courses.

[72] A random sample of entries on the April Yorkshire PFR and the relevant schedule to Imran Bham's second witness statement suggest that the "agreed start dates" shown for learners on both documents are the same.

271. However, taking into account, in particular, the taxi drivers' evidence, I have concluded that the start date recorded on the PFRs was the date when learners had their inductions.

272. In all fairness to UKLA, it contended (with some force) that LSC had not raised the 1 April pre-condition defence until shortly before the trial, so that Mr Bham's second witness statement was the best he could do in the circumstances, (i) given the short notice of the defence and (ii) bearing in mind that it was not to either party's benefit for the trial date to be vacated. Had I otherwise found in UKLA's favour on this part of its case, I would have had to consider whether I should determine that this part of its case (at least in relation to NVQ learners) failed nevertheless, because it could not prove, on the present evidence, that any NVQ learners had started before 1 April 2009, or whether, for example, I should have directed an inquiry into the issue of which NVQ learners, if any, started before 1 April 2009.

273. I have already noted that UKLA's claim in relation to learners who started in the 2008-2009 academic year was ultimately pursued, at trial, only on the basis that there was a contractual variation which had the effect of disapplying any MCV to those learners. As I have also already noted, Mr Fryer-Spedding said:

> "The upshot of [UKLA's] case is that it is entitled to recover the sum for which it sues because the contract was varied so as to disapply the…MCV first included in the agreement…"

UKLA did not pursue any claim, at trial (or, at least, by the time of Mr Fryer-Spedding's closing), that UKLA was funded, and entitled to be paid, for those learners because (i) they received training in the 2009-2010 academic year and (ii) by virtue of the countersigned and posted 2009 Yorkshire letter of intent, the 2008 Yorkshire Contract was varied to fix the MCV, for the 2009-2010 academic year, at £130,000, so that under the 2008 Yorkshire Contract, LSC had an obligation, in any event, to fund the 2009-2010 training for such learners up to (the otherwise unallocated part of) that MCV.

274. It is not difficult to deduce how UKLA might have come to make its claim for learners who started in the 2008-2009 academic year. What was said at the 4 August meeting, for example, is likely to have been reassuring[73] and, as Clive Howarth admitted, LSC's proposals were not communicated as clearly as they might have been. It is also very easy to be sympathetic to UKLA's complaint that many NVQ learners have been trained and, if its claim fails, they will have been trained solely at UKLA's cost. However, I must decide UKLA's claim, as it was put, on evidence before me, and by applying the law. In the light of all I have said, it must follow that UKLA's claim for payment for training for learners who started in the 2008-2009 academic year (and, in particular, its claim for £800,553.24) fails.

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[73] It is against just such "loose talk" that a No Oral Modifications clause guards (see per Lord Sumption in *Rock Advertising* at [12]: "…There are at least three reasons for including such clauses. The first is that it prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms. Thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them…").

Contract for the Yorkshire region for the 2009-2010 academic year

275. As I have shown, UKLA's pleaded claim is that, by John Kinsella's countersignature of the 2009 Yorkshire letter of intent and by its postal return, a (separate) contract for the 2009-2010 academic year came about. As ought already to be clear, in that factual scenario, no separate contract came about (or was intended to come about), in my view. Rather, there would be an effective variation of the (3 year) 2008 Yorkshire Contract to provide for an MCV of £130,000 for the 2009-2010 academic year.[74]

276. Although I hope that I have made the point sufficiently clearly already, it is worth recalling how UKLA's claim which I am now considering is limited. The claim is for £42,297. That sum is, subject to a minor mathematical error, the full amount of funding, at the higher rate, for 23 NVQ learners. It is UKLA's case that 23 NVQ learners started from August 2009 (and, I understand, completed their courses in the 2009-2010 academic year). The claim is limited to those learners.

277. I have come to the conclusion that (i) Mr Kinsella did countersign the 2009 Yorkshire letter of intent on 25 June 2009 and (ii) the countersigned letter was posted to LSC on the same date, so that (iii) in consequence, the 2008 Yorkshire Contract was varied to provide for an MCV of £130,000 for the 2009-2010 academic year.

278. LSC contends that UKLA's case is wrong, and, in particular, that Mr Kinsella cannot have countersigned the 2009 Yorkshire letter of intent on 25 June 2009, because UKLA did not receive it until a number of weeks later. Effectively, LSC contends that Mr Kinsella consciously mis-dated the countersigned letter (although I do not recall this contention being put in those terms, in cross-examination, to Mr Kinsella).

279. It is inherently improbable, in my view, that someone would consciously mis-date (that is, falsify) the countersigned 2009 Yorkshire letter of intent. In any event, as I have already said, I have come to the clear conclusion that, in fact, Mr Kinsella would not (and, so, did not) mis-date the countersigned letter.

280. Much more probable, in my view, particularly in the light of Margaret Cobb's evidence, is that, although the LSC staff member who was given the responsibility of posting out letters of intent in June 2009 was instructed not to post out, but to put aside, the letter intended for UKLA, that staff member did post out the 2009 Yorkshire letter of intent as a result of an innocent error.

281. Having reached these conclusions, I have also concluded that it is probable that Imran Bham posted back the countersigned 2009 Yorkshire letter of intent on 25 June 2009, because there was no reason for him not to have done so and he confirmed to Mr Kinsella, at the time, as Mr Kinsella explained (and as I accept), that he had posted back the letter on 25 June 2009.

282. Bearing this in mind and bearing in mind too that I have concluded that there was a failure in LSC's procedures which allowed the 2009 Yorkshire letter of intent to be sent out in June 2009, in my view it is probable that, although the countersigned 2009 Yorkshire letter of intent was posted back to LSC on 25 June 2009, it was not

[74] As Mr Fryer-Spedding properly recognised in paragraph 6.2 of his skeleton argument.

delivered to LSC or was not recorded, by an innocent error, as having been received by LSC.

283. I am conscious that, as Mr Warner pointed out, UKLA did not apparently respond to Lucille Ingham's chasing letter, dated 12 August 2009. It is UKLA's case, as I have noted, that it did not receive that letter but, whether it did or did not, I remain satisfied that (i) Mr Kinsella did not mis-date the countersigned 2009 Yorkshire letter of intent and (ii) on the balance of probabilities, the letter was received by UKLA on about 19 June 2009 and posted back to LSC on 25 June 2009.

284. Mr Warner, properly, did not dispute that the postal rule applies, so that, because of the conclusions I have already reached, I have concluded, as I have said, that the 2008 Yorkshire Contract was varied to provide for an MCV of £130,000 for the 2009-2010 academic year.

285. As Mr Warner correctly pointed out, UKLA does not make a claim for damages for a repudiatory breach of the 2008 Yorkshire Contract by LSC (by the 17 September letter). Instead, UKLA makes a debt claim for the funding it is entitled to for the period from 1 August 2009 to 18 September 2009.[75]

286. My review of the October Yorkshire PFR suggests that, by 5 October 2009, UKLA had recorded that 21 NVQ learners had started in the 2009-2010 academic year. This is a slightly lower number than UKLA now claims and I prefer to calculate the value of UKLA's claim on that lower number because it is improbable, in my view, bearing in mind all that had gone on beforehand, that UKLA would not have recorded, by October 2009, NVQ learners who had already started in the 2009-2010 academic year. It is UKLA's case that about half the NVQ learners started in the first two weeks of August 2009 and the remainder started in the first two weeks of September 2009. I have already explained that what UKLA recorded as a learner's start date is uncertain and, therefore, I am not satisfied that the start dates given by UKLA are the dates when those learners had their first lesson (which, in this context too, I am satisfied was when UKLA was entitled to a payment from LSC).[76] I am also not satisfied, because of the conclusions I have already reached, that any of the 21 (or 23) learners had a first lesson on the day of their induction. Because the picture is uncertain, to calculate the value of UKLA's claim, it is appropriate for me to do the best I can.

287. Taking into account what I have already said, I am satisfied, on the balance of probabilities, only that 21 learners had their first lesson before 18 September 2009.[77] [78]

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[75] See paragraph 20 of the Amended Particulars of Claim.
[76] See LSC Funding Guidance 2008/2009: Funding Formula (April 2008), paragraph 54, for example.
[77] It is inherently probable that a learner who had his induction by 8 September 2009 (which is the latest recorded start date according to UKLA's evidence) had his first lesson before 18 September 2009.
[78] To be clear, I did not understand the Defendant to contend that the 21 learners shown on the October Yorkshire PFR (i) were not given an induction, contrary to what I have already concluded the PFR shows or (ii) were not trained. If the Defendant did so contend, I reject his points. Mr Kinsella was very involved in the provision of training and in the development of UKLA's business. I am satisfied that Mr Kinsella would not have countenanced the recording of induction dates which were false or claims for learners who were given an induction but no training.

288. Keith Hunter explained how funding payments were calculated. Bearing in mind all that I have said, I have concluded that UKLA is entitled to a principal amount equivalent to the "double payment in the first month" ("the start payment") for 21 NVQ learners. Because UKLA has brought a debt claim for the funding it was actually entitled to between August 2009 and 18 September 2009 for learners who started during this period, it is not entitled to the full amount of funding to the completion of such learner's courses.

289. I have already pointed out that there were two rates of payment (the higher rate and the lower rate) for NVQ learners and that LSC's models assumed that 70% of NVQ learners would be funded at the higher rate and 30% of NVQ learners would be funded at the lower rate. UKLA contends that 100% of the NVQ learners in question were entitled to funding at the higher rate. I was taken to no contemporaneous evidence to support that contention. Doing the best I can, the principal amount due to UKLA needs to be calculated on the assumption that 70% of 21 NVQ learners were eligible for funding at the higher rate and 30% of 21 NVQ learners were eligible for funding at the lower rate.[79]

290. The parties will need to agree the principal sum due to UKLA on the approach I have set out. If they are not able to do so, I will hear further submissions about how the sum ought to be determined.[80]

Contract for the North East region for the 2008-2009 academic year and the 2009-2010 academic year

291. UKLA's claim relating to the 2008-2009 academic year with respect to the North East region depends on establishing that, by John Kinsella's signing and the returning of the 2008 North East Contract Clarification Form, a contract between LSC and UKLA came about. As Mr Fryer-Spedding explains, in paragraph 7.4 of his skeleton argument:

> "For its part [UKLA] says that it was entitled to, and did, supply services between January and July 2009 on the strength of the Contract Clarification Form…"[81]

292. As I have recorded, the 2008 North East Contract Clarification Form contains no express terms at all and it was sent as an attachment to an email which asked for its signature and return in order that LSC could "start the contracting process".

293. In *BJ Aviation Ltd. v. Pool Aviation Ltd.* [2002] P & CR 25, Chadwick LJ said, at [18]-[24]:

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[79] I recognise that this is a somewhat arbitrary approach because 70% of 21 learners amounts to 14.7 learners; a practical impossibility.

[80] I hope that the parties can reach agreement. It would be unfortunate if I was compelled to order an inquiry into the amount due. On the assumption that all the 21 NVQ learners in question were eligible for funding at the higher rate, by my rough and ready calculation the principal sum due to UKLA might be about £8,275.50.

[81] This is something of a departure from UKLA's pleaded case which is that there was no written contract for funding for the North East region for the 2008-2009 academic year (see the Amended Reply and Defence to Counterclaim).

"The problems which arise in law in a case where parties have entered into an agreement which, although it has the appearance of a bargain, leaves something to be agreed, are the subject of numerous authoritative decisions…

It is unnecessary, and would be superfluous, to review those authorities again in this judgment. It is I think sufficient to identify five propositions which, as it seems to me, are not capable of dispute.

First, each case must be decided on its own facts and on the construction of the words used in the particular agreement. Decisions on other words, in other agreements, construed against the background of other facts, are not determinative and may not be of any real assistance.

Secondly, if on the true construction of the words which they have used in the circumstances in which they have used them, the parties must be taken to have intended to leave some essential matter, such as price or rent, to be agreed between them in the future – on the basis that either will remain free to agree or disagree about that matter – there is no bargain which the courts can enforce.

Thirdly, in such a case, there is no obligation on the parties to negotiate in good faith about the matter which remains to be agreed between them…

Fourthly, where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the words which they have used in a way which does not leave the matter to be agreed in the future incapable of being determined in the absence of future agreement. In order to achieve that result the court may feel able to imply a term in the original bargain that the price or rent, or other matter to be agreed, shall be a "fair" price, or a "market" price, or a "reasonable" price; or by quantifying whatever matter it is that has to be agreed by some equivalent epithet. In a contract for sale of goods such a term may be implied by section 8 of the Sale of Goods Act 1979. But the court cannot imply a term which is inconsistent with what the parties have actually agreed. So if, on the true construction of the words which they have used, the court is driven to the conclusion that they must be taken to have intended that the matter should be left to their future agreement on the basis that either is to remain free to agree or disagree about that matter as his own perceived interest dictates there is no place for an implied term that, in the absence of agreement, the matter shall be determined by some objective criteria of fairness or reasonableness.

> Fifthly, if the court concludes that the true intention of the parties was that the matter to be agreed in the future is capable of being determined, in the absence of future agreement, by some objective criteria of fairness or reasonableness, then the bargain does not fail because the parties have provided no machinery for such determination, or because the machinery which they have provided breaks down. In those circumstances the court will provide its own machinery for determining what needs to be determined—where appropriate by ordering an inquiry…"

294. By the North East 9 September letter, LSC made clear that the terms of a contract for the North East region were yet to be agreed and that, until they were agreed, LSC was not liable to pay for any training in that region. As I have said, the 2008 North East Contract Clarification Form contains no express terms and it was made clear, by the email to which it was attached, that the signing of it would allow the contracting process to begin. Whilst it may be said, in support of UKLA's case, that, by 19 November 2008, it had received the 2008 Yorkshire letter of intent (which, it seems to me it was not disputed, was capable of being a contractual document and which it might have been supposed would inform LSC's approach in the North East region), taking into account the other matters I have just mentioned, I have concluded that the signing and return of the 2008 North East Contract Clarification Form did not bring about a contract between LSC and UKLA. I am not satisfied, objectively, that LSC and UKLA intended that, thereby, any bargain between them would be enforceable or, following the approach of Sir John Chadwick in *Crest Nicholson*, that a reasonable person, receiving the 2008 North East Contract Clarification Form in the circumstances I have summarised, would have understood that LSC intended to be immediately bound by the signing and return to it of the form.[82]

295. In any event, it is tolerably clear that whether or not UKLA taught any learners in the North East region in the 2008-2009 academic year has been in issue. The only contemporaneous evidence to which UKLA took me to support UKLA's case that any such learners were taught is the October North East PFR. It is true that that PFR related to the 2009-2010 academic year. It is also true that it shows that UKLA had earned nothing in that academic year (although, as Mr Fryer-Spedding explained to me in closing, that might be because LSC's computer system did not allow any earnings to be shown following the decision to send the 17 September letter). For present purposes, it must be noted that the PFR showed that all the learners (29 NVQ learners) had started in the second half of July 2009 (including 19 who had started in the last 5 days of July). In the light of the conclusions I have already reached about (i) the unreliability of UKLA's recording of a start date as a guide to when a learner had his first lesson and (ii) the absence of sufficient evidence to establish how soon after a learner's induction he had his first lesson, I am not satisfied, on the balance of probabilities, that any learners in the North East region had a lesson in the 2008-2009 academic year; so that, if there was a contract for funding for those learners on terms similar to the 2008 Yorkshire Contract, I am not satisfied that UKLA is entitled to any payment under such a contract.

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[82] For the reasons I have already explained, the conversation between Imran Bham and Chris Nicholls, on 17 June 2009, is not relevant to whether the 2008 North East Contract Clarification Form is a contract.

296. The 2009 North East letter of intent was not intended, objectively, to be an offer of a contract where, as I have found, none had previously existed. To the contrary, the letter made clear that, pending a more formal agreement, "services [were] to continue [on] the current terms and conditions…in accordance with [UKLA's] agreement (for services set out in this letter)…".

297. The parties' cases in relation to funding in the North East region for the 2009-2010 academic year were hardly addressed at trial, so it is not clear to me what UKLA contends were the terms, express or implied, of any contract for the 2009-2010 academic year. Indeed, UKLA put forward no case that any terms are to be implied into the 2009 North East letter of intent. Because there were no "current terms and conditions" nor an existing "agreement", what the obligations of LSC and UKLA were under any proposed variation (or, indeed, any purported contract) is uncertain, in my view. It is impossible to deduce, from the 2009 North East letter of intent, in my view, what sort of TTG training UKLA was promising to provide. The provision of TTG training by UKLA was its principal obligation under any contract with LSC. In these circumstances, I am not satisfied that the 2009 North East letter of intent gave rise to a contract.[83]

298. For all these reasons, UKLA's claims in relation to the North East region fail.

The 2009 audit defence and counterclaim

299. I received a considerable amount of evidence in relation to and heard (and read) detailed submissions about the parties' rival cases on the 2009 audit defence and counterclaim. I have set out, above, what I regard as the relevant evidence and I have already summarised the parties' respective cases. However, in the light of the conclusion which I have reached (below), I do not need to address most of the rival cases in this judgment.

300. Without objection from Mr Warner (in my view, quite properly), Mr Fryer-Spedding contended, in closing, that there is nothing due to the Defendant on the counterclaim (or by way of set-off),[84] because LSC determined that there was no sum owing to it from UKLA. I agree.

301. By clause 12.3 of the 2008 Yorkshire Contract ("clause 12.3"), LSC could recover "an amount" if LSC identified "errors [in the provider's] evidence which it deems are material". The whole of clause 12.3 is qualified by its final sentence that "the decision of [LSC] is final".[85]

302. Mr Warner contended, in the course of his closing submissions on the 2009 audit defence and counterclaim, that it was not appropriate to consider the decision or determination of a person or team within LSC. Instead, he contended, what the court

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[83] It appears that UKLA's claim for payment under the 2009 North East letter of intent is only for training 7 NVQ learners who it contends started in the 2009-2010 academic year. Although the Defendant does not take the point, it is right that I note that there is no contemporaneous evidence that any of those learners were trained by UKLA.

[84] The balance of the defence having fallen away in the light of the conclusions I have already reached.

[85] Mr Warner did not suggest otherwise.

should strive to do is to determine what LSC itself decided. I agree. Mr Warner's contention is most consistent with the language of clause 12.3.

303. In this case, the Final Feedback document calculated, at Annex A, an error rate of 29.2% for "potential" funding errors. A potential error which contributed to the calculation of the error rate was, in one case, that a learner had not been registered, at the appropriate time, with an SFL qualification awarding body. However, by the time of the final audit report, that potential error had been cleared. Annex A to the final audit report records, as I have noted: "All learners registered for [SFL] are eligible for funding, provided they started before 1 April 2009". I am not satisfied, therefore, that Annex A to the Final Feedback document is an accurate guide to those errors which LSC deemed to be material errors by the end of the 2009 audit process.

304. It is right that the final audit report makes reference to a 29.2% error rate. However, it is reasonable to suppose that the error rate was carried over from the Final Feedback document. Further, having noted the error rate, the final audit report concluded that UKLA was entitled to no further payment (not that UKLA is liable to make any payment). On the proper interpretation of the final audit report, I am not satisfied that it reveals any decision by LSC that there were material errors for the purpose of clause 12.3.

305. The final audit report (i) made the point that LSC "seek to recover any monies paid which have not been spent in accordance with…contractual conditions…" but (ii) recorded that the "recovery amount" was £nil.[86] By clause 12.3, it was for LSC to decide the amount recoverable (based on the error rate and the MCV). LSC did decide the amount recoverable. As I have said, it decided that the amount recoverable was £nil. As clause 12.3 makes clear, that decision is final. How LSC was (and the Defendant is) entitled to resile from that decision was not explained to me and I am not aware of any basis on which (on the facts of this case) that would be permitted.

306. It follows, therefore, that the 2009 audit defence and counterclaim fails.

Disposal

307. In summary, therefore:

i) UKLA's claim for payment for learners who started in the 2009-2010 academic year in the Yorkshire region succeeds, to a limited extent;

ii) Otherwise, UKLA's claim is dismissed;

iii) The Defendant's counterclaim is dismissed.

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[86] Clive Howarth explained, in his witness statement, why, nevertheless, the 2009 audit defence and counterclaim was brought. He said: "I recall discussing this internally at the LSC in early 2010 and at the time a view was taken that it would be better simply to try to move on, rather than incur further public money in pursuing a claim against UKLA. When UKLA issued these proceedings however, we decided to seek to recover the funds that the LSC had paid out."