

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Case No. QB-2021-003966

[2023] EWHC 1910 (KB)

Courtroom No. 70

The Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 16th June 2023

Before:

MASTER DAGNALL

B E T W E E N:

CCP GRADUATE SCHOOL LIMITED

and

THE SECRETARY OF STATE FOR EDUCATION

MR B COULTER appeared on behalf of the Claimant
MR B McGURK appeared on behalf of the Defendant

APPROVED JUDGMENT

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MASTER DAGNALL:

Introduction

1. This is my judgment in relation to the application of the defendant, whom I will call “the Secretary of State”, who appears by Mr McGurk of counsel, to strike out the Claim under Civil Procedure Rule 3.4, or to have reverse summary judgment granted in its favour under Civil Procedure Rule 24.2, so as to terminate this litigation against the Secretary of State.
2. Although, initially, the application was resisted altogether by the claimant, whom I will call “CCP”, and which appears by Mr Coulter of counsel; CCP has now responded by applying, by an application notice of 7 October 2022, to amend the particulars of claim into amended particulars of claim to rely, at least in the alternative, on a different contract to that at least primarily relied upon before.
3. I also have an application by CCP made by notice of application of 8 February 2023 to adduce a witness statement of Nawal Omar (“Mr Omar”) of 13 December 2022. In fact, after the first part of this hearing, which took place on 6 September 2022, and before the adjourned hearing on 19 April 2023, both sides sought to adduce further witness statement evidence. In view of the facts that, firstly, this is only an interim application and not a trial, and, secondly, of the effects of the evidence on the points which have been raised, and that, thirdly, I considered that each side have had time to react such that any lateness could not cause any real prejudice, I admitted and considered all of the witness statements. In fact, the time on 19 April 2023 was insufficient to hear all the submissions, and I heard further oral argument on 20 April 2023 (and subsequently on 16 June 2023 as I explain below).
4. The essence of the claim brought by CCP is that it provided education courses to students who received funding for their tuition fees from the Secretary of State via the Student Loans Company on the basis of loan contracts being entered into by the Secretary of State with the relevant students. The claimant claims that the Secretary of State wrongly ceased paying the loan monies for those loan students to CCP in relation to students enrolled by CCP in 2014 onwards. The CCP claims sums of over £450,000 in respect of monies which the claimant says should have been paid to it, CCP. CCP also claims that the result of non-payment has been such as to lead to the collapse of CCP’s business, and CCP claims some millions of pounds losses allegedly due to that.
5. CCP’s case in the particulars of claim was based on an allegation that the Secretary of State owed CCP a contractual obligation in a contract made between CCP and the Secretary of State, which I will call “the direct contract”. This it was said was a contract on the part of the Secretary of State with CCP that the Secretary of State would honour the promises that the Secretary of State had made to the students to pay their tuition fees to CCP; see, for example, paragraph three of the particulars of claim. Following intimations from me at the hearing on 6 September 2022 that I saw that claim as having no real prospects of success (for reasons which I set out below), CCP advanced its amended particulars of claim, which assert that CCP is entitled to the benefit of, and to enforce, alleged terms in the contracts between the individual students and the Secretary of State, which I will call “the student contracts”, being terms for the Secretary of State to make loans to the students by way of paying their tuition fees monies directly to CCP. CCP relies on the Contracts (Rights of Third Parties) Act 1999, which I will call “the 1999 Act”, as conferring such rights upon CCP (and which I will call “the student contracts 1999 Act argument”).
6. The Secretary of State says, firstly, that the direct contract argument has no real prospect of success. Secondly, that the student contracts 1999 Act argument also has no real prospect of success. Thirdly, that in any event much, if not all, of the claim is limitation barred. Fourthly, if any part of the claim which is sought to be introduced by amendment would not have been limitation barred at the date of issue of the claim form, but would be limitation barred now, the combined effect of section 35 of the Limitation Act 1980 and Civil Procedure Rule 17.4(2) means that the Court cannot permit the amendment on the

basis that the claim sought to be introduced is, “a new claim”, and does not arise out of the same, or substantially similar, facts to those already in issue. Fifthly, that, in any event, this claim is an abuse of process because it should have been raised and determined in earlier litigation which I will call “the first action”, being claim number QB-2019-002047. The first action resulted in a judgment of May J given on 2 September 2021, neutral citation number [2021] EWHC 2432, which I will call “the May J judgment”. The Secretary of State relies on the fact that Master Cook had refused in that litigation to allow what is essentially this claim to be raised by way of counterclaim on grounds of lateness.

The statutory framework

7. Many of the facts of the case are not in issue and are set out, and found, in the May, J, judgment. In this jurisdiction, being England and Wales, student finance is now, and at the relevant time was, dealt with by a combination of primary legislation, being the Teaching and Higher Education Act 1998, which I will call “the 1998 Act”, and regulations made under it, being the Education (Student Support) Regulations 2011, which I will call “the 2011 Regulations”.
8. Section 22 of the 1998 Act provided as follows:

“22 New arrangements for giving financial support to students.

(1) Regulations shall make provision authorising or requiring the Secretary of State to make grants or loans, for any prescribed purposes, to eligible students in connection with their undertaking—

- (a) higher education courses, or
- (b) further education courses, which are designated for the purposes of this section by or under the regulations.

(2) Regulations under this section may, in particular, make provision—

- (a) for determining whether a person is an eligible student in relation to any grant or loan available under this section;
- (aa) for the designation of a higher education course for the purposes of this section to be determined by reference to matters determined or published by the Office for Students or other persons (whether before or after the regulations are made);
- (b) prescribing, in relation to any such grant or loan and an academic year, the maximum amount available to any person for any prescribed purpose for that year;
- (c) where the amount of any such grant or loan may vary to any extent according to a person’s circumstances, for determining, or enabling the determination of, the amount required or authorised to be paid to him;
- (d) prescribing categories of attendance on higher education courses or further education courses which are to qualify for any purposes of the regulations;
- (e) for any grant under this section to be made available on such terms and conditions as may be prescribed by, or determined by the Secretary of State under, the regulations, including terms and conditions requiring repayments to be made in circumstances so prescribed or determined;
- (f) requiring the making of payments in respect of any such grant to be suspended or terminated in any such circumstances;
- (fa) in the case of a grant under this section in connection with a higher education course, where a payment has been so suspended, for the cancellation of any entitlement to the payment in such circumstances as may be prescribed by, or determined by the person making the regulations under, the regulations;
- (g) prescribing requirements or other provisions, whether as to repayment or otherwise, which are for the time being to apply in relation to loans under this section (including

requirements or other provisions taking effect during the currency of such loans so as to add to, or otherwise modify, those for the time being applying in relation to the loans);

(h) authorising grants in respect of fees payable in connection with attendance on courses to be paid directly to institutions charging the fees;

(i) requiring prescribed amounts payable to eligible students under loans under this section to be paid directly to institutions to whom those persons are liable to make payments;

(j) modifying any enactment or instrument (whenever passed or made) so as to provide for the treatment, in connection with any calculation with respect to the income (however defined) of persons to whom grants or loans are made under this section, of amounts due from or payable to such persons under such grants or loans;

(k) for appeals with respect to matters arising under the regulations (including provision for determining, or enabling the determination of, the procedure to be followed in connection with appeals).

(2A) The provision which may be made by virtue of subsection (2)(b) in respect of higher education courses includes provision prescribing the maximum amount by reference to matters determined or published by the Secretary of State or other persons (whether before or after the regulations are made)

(3) The provision which may be made by virtue of subsection (2)(g) in relation to loans under this section includes provision—

(a) for such loans to bear compound interest at such rates, and calculated in such manner, as may be prescribed from time to time;

(b) for such loans to be repaid in such manner, at such times, and to such person or body as may be prescribed from time to time;

(c) for the payment, in respect of amounts overpaid by borrowers, of interest at such rate, and calculated in such manner, as may be determined by the Secretary of State from time to time;

(d) for a borrower not to be liable to make any repayment in respect of such a loan—

(i) during such period as may be prescribed from time to time, or

(ii) in such circumstances as may be so prescribed, including provision for the cancellation of any further such liability of the borrower in any such circumstances;

(da) in the case of a loan under this section in connection with a higher education course, for the cancellation of the entitlement of a borrower to receive a sum under such a loan in such circumstances as may be prescribed by, or determined by the person making the regulations under, the regulations where the payment of the sum has been suspended;]

(e) with respect to sums which a borrower receives, or is entitled to receive, under such a loan after the commencement of his bankruptcy or the date of the sequestration of his estate.

(f) with respect to the effect of bankruptcy upon a borrower's liability to make repayments in respect of such a loan (whether the repayments relate to sums which the borrower receives, or is entitled to receive, before or after the commencement of the bankruptcy);

(g) with respect to sums which a borrower receives, or is entitled to receive, under such a loan before or after a voluntary arrangement under Part 8 of the Insolvency Act 1986 or Part 8 of the Insolvency (Northern Ireland) Order 1989 (individual voluntary arrangements) takes effect in respect of the borrower;

(h) excluding or modifying the application of Part 8 of that Act, or Part 8 of that Order, in relation to liability to make repayments in respect of such a loan (whether the repayments relate to sums which the borrower receives, or is entitled to receive, before or after a voluntary arrangement takes effect in respect of the borrower).]

(4) In relation to loans under this section—

(a) the rates prescribed by regulations made in pursuance of subsection (3)(a) must be—

- (i) lower than those prevailing on the market, or
- (ii) no higher than those prevailing on the market, where the other terms on which such loans are provided are more favourable to borrowers than those prevailing on the market;] and
- (b) such regulations may make provision, for the purpose of calculating the interest to be borne by such loans, for repayments by borrowers to be treated as having been made or received on such date or dates as may be prescribed by the regulations.
- (5) Regulations under this section may also make such provision as the Secretary of State considers necessary or expedient in connection with the recovery of amounts due from borrowers under loans under this section, including provision for—
 - (a) imposing on employers, or (as the case may be) such other persons or bodies as may be prescribed, requirements with respect to—
 - (i) the making of deductions in respect of amounts so due (or, in any prescribed circumstances, amounts assessed in accordance with the regulations to be so due) from emoluments payable to borrowers,
 - (ii) the collection by other means of such amounts,
 - (iii) the transmission of amounts so deducted or collected to the Secretary of State in accordance with directions given by him;
 - (b) imposing on employers, or such other persons or bodies as may be prescribed, requirements with respect to the keeping and production of records for such purposes as may be prescribed;
 - (c) imposing on borrowers requirements with respect to—
 - (i) the provision of such information, and
 - (ii) the keeping and production of such documents and records, relating to their income as may be prescribed;
 - (d) requiring the payment, by persons or bodies to whom requirements imposed in pursuance of any of paragraphs (a) to (c) apply, of—
 - (i) penalties in cases of non-compliance with, or otherwise framed by reference to, such requirements, and
 - (ii) interest in respect of periods when such penalties are due but unpaid;
 - (e) requiring the payment by borrowers, in respect of periods when amounts due under their loans are unpaid, of—
 - (i) interest (applied to such amounts at a rate calculated otherwise than in accordance with subsection (4)(a)), or
 - (ii) both such interest and one or more surcharges (together with further interest in respect of periods when such surcharges are due but unpaid);
 - (f) enabling the Secretary of State to require the reimbursement by borrowers of costs or expenses of any prescribed description incurred by him in connection with the recovery of unpaid amounts;
 - (g) applying or extending with or without modification, for purposes connected with the recovery of amounts under regulations made by virtue of this subsection, any of the provisions of the Taxes Acts or of [F11PAYE regulations];
 - (h) determining the priority as between deductions falling to be made by virtue of paragraph (a)(i) and deductions falling to be made, from emoluments payable to borrowers, by virtue of other enactments (whenever passed).
- (6) In subsection (5)—
 - (a) “employers” means persons who make payments of, or on account of, income, and
 - (b) “the Taxes Acts” has the same meaning as in the M1 Taxes Management Act 1970...
- (8) For the purposes of subsection (4)(a) ... the Secretary of State shall have regard to such index of prices as may be specified in, or determined in accordance with, regulations under this section.]

(9) In subsection (4)(a) “the specified rate for low interest loans” means the rate for the time being specified [F16by article 60G(3)(d) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001]]

(10) Interest required to be paid, by virtue of subsection (5)(d), by regulations under this section shall be paid without any deduction of income tax and shall not be taken into account in computing any income, profits or losses for any tax purposes.”

9. I note that under section 22, the Secretary of State was required to make grants and loans to, “eligible students”. Regulation 4 of and part II of Schedule 1 to the Regulations define “eligible student”. Regulation 4(1) and (2) read:

“ 4.—(1) An eligible student qualifies for support in connection with a designated course subject to and in accordance with these Regulations.

(2) Subject to paragraph (3), a person is an eligible student in connection with a designated course if in assessing that person’s application for support the Secretary of State determines that the person falls within one of the categories set out in Part 2 of Schedule 1...”

10. Thus, a person who was an eligible student would qualify for support from the Secretary of State, being a grant or a loan, in connection with a, “designated course”. Regulation 5 defined what was a, “designated course”; and read:

“5.—(1) Subject to paragraphs (3), (4), (5) and (6) a course is a designated course for the purposes of section 22(1) of the 1998 Act and regulation 4 if it is—

(a) mentioned in Schedule 2;

(b) one of the following—

(i) subject to paragraph (3), a full-time course;

(ii) a sandwich course; or

(iii) a course for the initial training of teachers which—

(aa) begins before 1st September 2010; or

(bb) begins on or after 1st September 2010 where the student transfers to the current course pursuant to regulation 7 from a course for the initial training of teachers which began before 1st September 2010;

(c) of at least—

(i) one academic year’s duration; or

(ii) six weeks’ duration in the case of a flexible postgraduate course for the initial training of teachers;

(d) wholly provided by a publicly funded educational institution or institutions in the United Kingdom or provided by such an institution or institutions in conjunction with an institution or institutions outside the United Kingdom; and

(e) for a course beginning on or after 1st September 2012 which falls within paragraph 1, 2, 4, 6, 7 or 8 of Schedule 2, a course leading to an award granted or to be granted by a body falling within section 214(2)(a) or (b) of the Education Reform Act 1988(1).

(2) In paragraph (1)(e) “award” means any degree, diploma, certificate or other academic award or distinction....

(10) For the purposes of section 22 of the 1998 Act and regulation 4(1) the Secretary of State may designate courses of higher education which are not designated under paragraph (1).”

11. Under Regulation 5(1)(e), for a course or a relevant course on or after 1 September 2012 to be a designated course, it needed to be, firstly, a course, and secondly, one provided by a publicly funded institution and leading to an award to be granted by a body falling within the meaning of sections 214(2)(a) or (b) of the Education Reform Act 1988.

12. However, the Secretary of State could designate other courses under Regulation 5(10) and it was that method by which, “private institution”, course providers such as CCP had their courses designated.
13. Regulation 11 provided for the Secretary of State’s support when provided by way of loan, to be provided by a contract to be made between the student and the Secretary of State; and read as follows:
 “11. To receive a loan a student must enter into a contract with the Secretary of State.”
14. Regulations 108 and 113 provided for how the support was to be paid.
15. Regulation 108 related to grants.
16. Regulation 113 related to loans; and read as follows:
 “113.—(1) The Secretary of State must pay the fee loan for which an eligible student qualifies to an institution to which the student is liable to make payment.
 (2) The Secretary of State may pay the fee loan in instalments.
 (3) The Secretary of State must not pay the fee loan or instalment of fee loan until the Secretary of State has received from the academic authority—
 (a) a request for payment; and
 (b) confirmation (in such form as may be required by the Secretary of State) of the student’s attendance on the course for the period to which the instalment relates.
 (4) In this regulation, “confirmation of the student’s attendance” means confirmation from the academic authority that the student-
 (a) has enrolled for the academic year and has begun to attend (or in the case of a distance learning course undertake) the course for that academic year, where the confirmation relates to payment of the fee loan or the first instalment of the fee loan for the academic year; or
 (b) remains enrolled and continues to attend (or in the case of a distance learning course undertake) the course, where the confirmation relates to payment of an instalment of the fee loan other than the first instalment.
 (5) The academic authority must inform the Secretary of State if a student ceases to attend or undertake the designated course during the academic year.”

I note that Regulation 113 provided for loans to be paid in three tranches following, firstly, the making of a request, and secondly, a relevant confirmation of student attendance.

The DTLLS course and the Claimant’s Designation

17. From 2011 onwards, CCP provided one year education courses known as a Diploma in Teaching in the Lifelong Learning Sector, but which had the acronym, which I use, of, “DTLLS”, and which course led to a DTLLS qualification. That course was designated by the Secretary of State under Regulation 5(10). In order to obtain that designation, CCP had had to apply to the Secretary of State for it and I have been provided in evidence with the form of the application which would be made by a course provider applying in April 2013. The application document is entitled, “Alternative provider specific course designation: Draft guidance for applicants, criteria and conditions”. It states that, “This document sets out how the new specific course designation system will work”. Later on, it has a section entitled, “Conditions of specific course designation”, and states that certain provisions would operate from 2014/2015 and that a sample terms and conditions document would be published on a relevant website when, “The specific course designation process is launched in June 2013”.

18. It goes on to have a section entitled, “Sanctions”, with the following paragraph:
“If providers of specifically designated courses do not continue to meet the terms and conditions of specific course designation and/or there are concerns raised during monitoring then the Department will consider whether the course(s) should continue to be specifically designated. Such cases will be considered on an individual basis taking into account the particular circumstances. Possible action could include the issuing of an improvement notice, a freeze or cut in student numbers and possible withdrawal of designation for the course or courses in question.”

I note that it would be a matter for the Secretary of State to consider what, if any, sanction to impose in any particular situation.

19. It then goes on to have a, “Chapter two; The application process and transition”. Within that is a section entitled, “Transition of existing specific course designations”, and which includes the following paragraphs:

“All existing specific course designations will be reviewed and providers will be expected to meet the requirements of the new specific designation process if they wish new students to access student support for their courses. We expect to review all existing providers during 2013/14 and the Department will write to providers in May or June this year confirming the transitional arrangements. Where providers meet the new requirements the designation will continue and where appropriate providers will be allocated with a student number control for 2014/15. Where providers do not meet the requirements new courses will not be approved and depending on the extent to which the new criteria are not met the Department will determine our approach on a case by case basis taking into account the particular circumstances.

Possible action could include the issuing of an improvement notice, issuing time-limited designation or in some cases revoking designation. It is our firm expectation that in all cases existing eligible students that are already in receipt of student support will be able to continue doing so until they complete the course - however we reserve our right to revoke designation in respect of existing students in exceptional circumstances for example where there is serious misconduct by a provider.”

20. It went on to provide, again, that the specific course designation application pack would be published in June 2013.
21. Later on in the document there was provided, “Annex C – Flowchart two: Specific course designation assessment process”. Within the relevant flowchart:

(1) there is a section reading,

“The department notifies provider of the outcome”, [that is of their designation request], “successful applicants will be issued with terms and conditions. Those that are rejected will be informed of reasons for the decision and a time limit on resubmission”

(2) The next box in the flowchart reads, “Provider returns signed terms and conditions to the department”.

22. That document relates to the procedure from 2013 onwards. The applicant, here potentially CCP, would firstly fill out the application for designation, which CCP must obtain, and which is entitled, “Proposal that a full-time course be designated for the purpose of student support”. Then, if the application was successful, the applicant would receive a letter from the Secretary of State containing terms and conditions in accordance with the flowchart.

23. I do not have material from 2013; what I do have before me is a letter of 4 April 2011 (“the 2011 Letter”) from the then relevant government department, then the Department for Business, Innovation and Skills, addressed to CCP and headed,

“Specific designation for student support in higher education – CCP Group – one-year full-time Diploma in Teaching in the Lifelong Learning Sector (DTLLS)”. It refers to an application which had been made for designation; and provides that CCP is designated to provide the DTLLS course from 4 April 2011, and sets out as to how and when monies would be paid in relation to students who were eligible for tuition fee support. It went on to say,

“Please note this letter of authority covers only the course listed in the title of this letter. If you wish to apply for any further courses, a separate application must be made for each one.”. [Then], “If the course detail, structure of the course and/or validating institution/organisation change in any way, you must contact”, [then an official is named], “before implementing these changes as they may have an adverse effect on the designation of the course. This could mean that the course may no longer meet the specific designation eligibility criteria and students may not be able to apply for support.”. [Then], “Specifically designated courses are subject to periodic review by Student Finance England; it is imperative that you respond to these requests in order to retain designation status for the course/s.”.

I note that those words say that relevant changes may (my emphasis), affect the designation because the course may, in such circumstances, no longer meet the relevant criteria.

24. I note that the 2013 guidance says, as I have recited, that a successful applicant would need to sign certain conditions, and that that they would be signed by a nominated accountable officer and would run from June 2013 onwards. However, no-one has provided me with any such terms and conditions and there is no mention of them in any witness statement, or in the particulars of claim, or the proposed amended particulars of claim. There is no reference to terms and conditions in the 2011 letter; indeed, there is nothing in evidence or pleaded regarding, firstly, any terms and conditions, or, secondly, any direct contract being formed, or alleged to have been formed, at any point following 2011.

The Claimant’s pleaded direct contract case

25. The essential pleading of the claimant’s direct contract case is in the particulars of claim. Paragraphs 18, 19 and 20 of the particulars of claim read as follows:
- “18. Students applied to the Claimant to attend courses and the student either agreed to pay for the course tuition fees privately or if they were eligible students under the 2011 Regulations, they applied through the SLC portal and following the SLC providing confirmation that the student was entitled to funding support (eligible students received a letter from the SLC confirming their entitlement to funding), the students were accepted onto the course by the Claimant. The vast majority of the students taught by the Claimant following its receipt of designation in 2011 were funded by way of tuition payments authorised in this way the SLC.
19. By the process of the Claimant applying for designation of its DTLLS course and the Defendant promising to pay the tuition fees on behalf of students who took up the DTLLS courses provided by the Claimant (reliance on the Defendant’s promise of payment), the Claimant and the Defendant had entered into an agreement with each party providing consideration, In the premises a contract had been made between the Claimant and the Defendant.
20. In particular the Claimant will say that it was a term of the contract that the Defendant would pay or cause to be paid each students tuition fees on the appropriate dates, following confirmation by the Claimant to the SLC of the attendance (or the continuing attendance for the second and third tranches) by the student on the DTLLS course.”

The particulars of claim do not further particularise how it is said that the Secretary of State promised to pay the tuition fees to CCP in respect of the DTLLS courses. The particulars of claim then, in paragraph 21 onwards, refer to, “Events subsequent to the contract”, starting in paragraph 21 with statements of events which took place in 2013.

26. It is thus clear that the direct contract relied on is said to have been created before 2013, that is to say that it arose from the events which took place in 2011 and, perhaps, 2012.

The replacement of the DTLLS qualification by the DET qualification

27. Paragraphs 21 and 22 of the particulars of claim refer to the fact that the Secretary of State decided to replace the DTLLS qualification with a new Diploma in Education and Training, (and which has been and which I will call “the DET” qualification); and that CCP applied to be a designated provider in relation to that qualification, but that CCP’s application failed.
28. The designation of a course and course provider only related to the teaching of that course. CCP had no ability to award a DTLLS qualification (or a DET qualification); rather, that was to be done by a validating institution, the relevant entity for these purposes being Pearson.
29. In paragraphs 23 to 26 of the May, J, judgment there is set out the facts that: CCP operated by, firstly, having a student sign up with CCP to take a particular course, here the DTLLS course. That was their “enrolment stage”. Secondly, the student then applied to the Secretary of State for the tuition fee funding; however, CCP would start the student on the DTLLS course while awaiting the outcome of that application. May J held that there was nothing wrong with an application being made for student finance support up to nine months from the starting of the student on the course. Thirdly, the Secretary of State would then approve the tuition fee application and remit the first tranche of fees to CCP in relation to the student. Fourthly, CCP would then register the student with Pearson for the DTLLS qualification, and which would involve a making of a payment of £165 per student to Pearson; that being termed the “registration stage”. In fact, CCP had adopted a practice of disregarding, apparently with Pearson’s apparent consent, a requirement stated by Pearson to register the student with Pearson on the student enrolling with the course provider, here CCP. However, in October 2013, Pearson was to issue new terms which set a specific limited time period for registration to take place.

The student contracts

30. As far as a student was concerned, they would apply for student support, being a student loan, to the Secretary of State by way of an application for student finance. I have before me the form of application which was made in 2013/2014 and which is entitled, “Application for student finance 2013/14”. In section four of that application form, the student has to give details of their university/college and also of the course in relation to which they are seeking the student support.
31. There is subsequently a section headed, “Loan request section”, and that provides, in relation to tuition fees loans, “Your tuition fee is set by the university or college you go to. Any tuition fee loan you borrow will be paid directly to your university or college”. The student then ticks a box next to a section, “I want to apply for a loan to pay the full tuition fee charged by my university or college”, although there is a facility for a student to apply for a loan for only part of the tuition fee.
32. There is, later on in the form, a section headed, “Student declaration”. It opens with a box which includes the words, “This declaration covers all of the student finance available to students for academic year 2013/14. By signing this declaration, you are confirming that you have read the specific terms and conditions about loans...”. The application is to be signed by the student.

33. There is then a general declaration concerning various matters, and there is then a section headed, “Loan contract”, which contains provisions numbered from “a” to “n” as follows:
- a I confirm I have read and understood ‘Student Loans: A guide to term and conditions’ available online at www.directgov.uk/studentfinance
 - b I acknowledge and agree that any loan(s) made to me by the Secretary of State for Business Innovation and Skills, ‘the lender’ which includes any persons exercising functions on behalf of the Secretary of State pursuant to section 23(4) of the Teaching and Higher Education Act 1998... will be on the terms set out in these declarations and in Regulations which are made under section 22 of the Act as amended from time to time.
 - c I undertake to repay the lender any loan(s) made to me together with all in any interest, penalties and charges which apply.
 - d I agree that any loan(s) made to me as a consequence of the acceptance of my application by the lender is a/are contract(s) between me and the lender which binds me from the payment to me of the first loan advance and that the repayment of any such loan(s) together with all and any interest, penalties and charges which apply, will be due to buy me to the lender as a debt.
 - e I agree that I shall be obliged to make repayment of my loans...
 - f I agree that any action for repayment and/or in respect of or in connection with my loans... will be brought before the ordinary civil courts and shall be governed by the general rules of civil procedure
 - g [governing law is that of place of student’s home address if in UK or otherwise English law]
 - h [jurisdiction clause in favour of place of student’s home address if in UK or otherwise UK courts]
 - i [obligation of student to notify changes in personal details]
 - j [obligation of student to notify if leaves UK]
 - k I agree to take all future action requested by the lender and provide the lender with all information required to ensure repayments in accordance with the regulations referred to in paragraph b.
 - l If I breach any of the terms under which any loan(s) will be made I agree that I will be obliged to pay any charges and penalties which may apply...
 - m [student accepts that checks may be carried out]
 - n [data sharing provision]”
34. Together with the document is provided a further document entitled, “Student loans – A guide to terms and conditions 2013/2014”, and that is the document which is referred to in paragraph “a” of the loan contract. It contains, in its section two, a set of paragraphs which explain that the tuition fee loans will be paid in three tranches to the university or college and the timing and amounts of such payments.
35. There is also before me what is entitled a, “Student finance declaration form”, also to be signed by the student. It contains the same provisions as to the loan contract as I have already recited from the application for student finance.
36. The money which is paid to the college, and which discharges the student’s obligation to pay equivalent monies to the college, are in this circumstance a loan rather than a grant, so that the student becomes liable to repay the monies, potentially together with interest, and potentially, or at least mainly, by way of deductions from earnings as is set out in relevant legislation (including elements of the 2011 Regulations made under section 22 of the 1998 Act).

The position in and from 2011

37. Thus, from 2011 onwards, CCP was enrolling students on the DTLLS course, it being a designated course as far as CCP was concerned. Each student was then applying for tuition fee finance from the Secretary of State, albeit through the SLC as the Secretary of State’s

agent, and entering into a contract with the Secretary of State, such that the Secretary of State would pay the tuition fees in three instalments over the year to CCP and the student would be liable under the terms of the student finance scheme to repay the loan with interest to the Secretary of State. Following the entry into that contract between the student and the Secretary of State, CCP would then register the student with Pearson for the DTLLS qualification.

38. Mr McGurk for the Secretary of State has referred to the fact that for various other classes of student, for example, apprentices and 16 to 19-year-olds, CCP would enter, with regards to various courses, into lengthy detailed contracts with government bodies such as the Skills Funding Agency and the Education Funding Agency, whereby CCP would contract with those agencies to provide courses and training for students and the agencies would contract to pay CCP money for doing so. I will call these “the SFA/EFA contracts.”

The 2013/2014 changes

39. In 2013/2014, the Secretary of State decided to replace the DTLLS qualification with the DET qualification and, as stated in the particulars of claim, CCP failed in an application to become a designated course provider for the DET qualification. As part of this change, the Secretary of State sent CCP a letter dated 5 June 2014.
40. That letter was entitled, “Lapsing of specific designation for student support in higher education”. It then referred to the DTLLS courses, whether one year or two years in length. It stated that, as a result of a particular governmental review:

“Courses leading to DTLLS... qualifications will no longer be considered as eligible... courses for the purpose of student support. The Secretary of State is therefore revoking the designation of the above courses with effect from 1 September 2014. Should you choose to continue offering the above courses, new students starting these courses on or after 1 September 2014 will not be eligible to apply for... student support”.

It then went on, though, to say:

“Legacy courses – Annex A provides a list of... courses that CCP currently has promoted on the Student Loans Company HEI portal for academic year 2013/14”. Those courses were the DTLLS courses.

It continued,

“Any existing eligible students who commenced one of these courses in the academic year 2013/14 and who are already in receipt of student support will be able to continue receiving it until they complete or withdraw from their current course.¹”.

Foot note 1 read:

“It is the Department’s firm expectation that in all cases existing eligible students who are already in receipt of student support will be able to continue doing so until they complete the course - however, we reserve our right to revoke designation in respect of existing students in exceptional circumstances, for example, where there is serious misconduct by the provider.”.

There is then a section entitled, “Next steps”, which includes a paragraph:

“You are also responsible for ensuring that new students understand that any previously designated courses are no longer designated for student support purposes and they should therefore not submit applications to SLC for those courses. SLC will be monitoring applications to “legacy”, courses on a regular basis and any applications from new students will be made in eligible.”.

41. There was thus provision in relation to legacy courses for student support still to be provided to, “existing eligible students who commenced one of these courses in the academic year 2013/14 and who are already in receipt of student support.”. That process of operating a legacy course has been referred to before May J and me as, “teaching out”.

What happened following the 5 June 2014 changes

42. In paragraphs 30 to 43 of the May, J, judgment it is held that: firstly, although if CCP had taught a DET course it would not have been designated for the purposes of the Regulations, in theory CCP would have been able to register such students with Pearson for a DET qualification. However, as CCP was not a designated provider for a DET course, any application by a student for finance on that basis, that is to say enrolled for a DET course and registered for a DET course, would fail. In consequence, the CCP did not enrol students for the DET course.
43. Secondly, Pearson imposed a cut-off date of 31 August 2014 for registering students for the DTLLS qualification and CCP knew that.
44. Thirdly, CCP decided that it would not register students with Pearson for a DTLLS qualification, being students whom it had enrolled for the DTLLS course, but who had not yet obtained student finance. CCP took that decision because effecting such registrations would not fit its then business model, which involved using the tuition fees paid by the Secretary of State in order to pay for the registrations with Pearson, and those fees had not been paid by Pearson’s cut-off date of 31 August 2014.
45. Fourthly, those students who were in the position that they had been enrolled by CCP for the DTLLS course but had not yet been registered with Pearson either for the DTLLS qualification or for the DET qualification, would apply for student finance to the Secretary of State on the basis that they would be studying the DTLLS course.
46. Fifthly, once the Secretary of State had processed such applications and entered into its loan contract with the student to provide that tuition fee finance by way of payments to CCP, and the 31 August 2014 Pearson cut-off date having passed:
 - a. CCP would not appeal to Pearson for a late registration for a DTLLS qualification; that being something which CCP could have done but which would have involved CCP paying an extra fee which CCP was not prepared to pay, but rather
 - b. CCP would register the student with Pearson for the DET qualification and which CCP did, at least up to December 2014.
47. Sixthly, CCP would teach out the student not only the DTLLS course material, but would also teach sufficient extra material to result in Pearson accepting that the student had been taught such material, and achieved such results, that Pearson could, and should, grant the student the DET qualification.
48. Seventhly, CCP did not, however, tell Pearson that CCP was not a designated provider of DET courses. In fact, that matter was not relevant to Pearson, which was only concerned with what material the student had been taught and what results the student had achieved and work the student had done and produced.
49. Eighthly, CCP did not tell the Secretary of State that CCP had enrolled students on the DTLLS course and that those students had obtained finance on that basis, but that CCP had actually registered students for the DET qualification.
50. CCP’s case is that a large number of students had been enrolled prior to the cut-off date in the 5 June 2014 letter of 1 September 2014, and where the claimant had, as I have already explained, taught out the DTLLS course with extra material, but with the students being registered for, and so that they received, the DET qualification. Tuition fees were paid by the Secretary of State to CCP for some of these students both before and after the May J judgment, in circumstances to which I will come.

The 2014 investigations

51. In 2014, the Secretary of State started to investigate CCP in relation to various allegations which had been raised by whistleblowers and others against CCP. That resulted in the Secretary of State suspending tuition fee payments to CCP in January 2015, and an investigation process taking place which subsequently exonerated CCP, at least to a sufficient extent such that the Secretary of State reinstated such payments in July 2016.
52. It was only subsequently that the Secretary of State discovered what had happened with regard to CCP registering students for the DET qualifications while teaching them on an extended DTLLS course.

The first action

53. In 2019, the present defendant, the Secretary of State, as then claimant, brought the first action against CCP for the sum of £196,862.50 in payments which had been made by the Secretary of State to CCP in relation to students who had been enrolled and obtained finance in relation to the DTLLS course. The Secretary of State asserted that CCP had had no right to receive such money and that it should be repaid by CCP. That claim was to be the subject matter of the May J judgment and was defended on various bases by CCP, including, firstly, that there was no legal route by which the Secretary of State could claim such monies against CCP, and secondly, that in any event, whatever rules in the 2013 guidance, or which otherwise existed, had been breached, those breaches would not entitle the Secretary of State to have the money returned.
54. The history of the first claim is set out in a witness statement of Cristiana De Faveri, dated 19 March 2022, adduced on behalf of the Secretary of State and is essentially common ground.
55. The claim form was issued and served in June 2019. Mr Dan Pathirana, a director of CCP, then filed, with CCP thus effectively being a litigant in person, on 27 June 2019, a defence document which raised various matters and which, amongst other things, asserted that the Secretary of State had underpaid CCP the total sum of £379,745. The defence document according to its terms, reserved the right to recover those monies in different proceedings, but also asserted that CCP claimed all withheld fees.
56. The reply from the Secretary of State stated that there was no contract between the Secretary of State and CCP.
57. CCP then instructed lawyers and, at a hearing on 30 October 2020, obtained a conditional order for permission to serve an amended defence with provision for the Secretary of State to object to such amendments, and permission for CCP to reply if the Secretary of State did so object. There was no reference in the relevant order for there to be any potential for a counterclaim to be made by CCP.
58. On 24 November 2020, CCP served on the Secretary of State a document entitled, "Amended defence", but which included a counterclaim for £379,745 and for damages, being essentially what is now the claim before me being made in relation to the alleged direct contract. Paragraphs 4 and 33 of that document read as follows:
 - “4. The Defendant provided such designated courses to students on agreement that the Defendants fees would be paid, the agreed payment mechanism was that the students applied for loans to cover their tuition fees the loans to be paid directly by the SLC to the Defendants in consideration of the Defendant providing the tuition. The SLC made the payments on confirmation by the Defendant that the student had commenced the relevant course. The Defendant will say that this was a contract made between itself, the students and the Claimant acting through the SLC.
 33. The defendant repeats paragraphs 2 to 29 herein. The Defendant was entitled to be paid tuition fees by the Claimant for all students enrolled on the DTLLS course prior to the 1st September 2014. The system was that payments would be made in three tranches.

In the event the claimant failed to pay all tuition fees for the 2014 enrolled students the Defendant seeks the sum of £379,745 in unpaid tuition fees.”

59. On 8 December and then on 23 December 2020, the Secretary of State objected to the introduction of the counterclaim.
60. On 16 April 2021, CCP applied for permission to bring the counterclaim, saying that without such permission, CCP would issue separate proceedings. That application was heard on 10 April 2021 and Master Cook made an order striking out the counterclaim. I have no transcript of Master Cook’s judgment, although there was at least some common ground between the parties that Master Cook accepted a submission on behalf of the Secretary of State that the application was simply made too late. There is also a suggestion from Mr McGurk, who did appear then for the Secretary of State, that Master Cook had also said that the counterclaim would require some expert evidence from an expert in education law, although at first sight I do not see why such expert evidence would be required, or that it would have been likely for Master Cook to have said that. However, I do have Mr McGurk’s recollection to that effect. There was no appeal against Master Cook’s order.
61. The trial before May J took place on, and presumably was throughout listed to take place on 21 to 23 June 2021. The May J judgment was delivered on 2 September 2021; its conclusions are at paragraphs 57 to 69 of that judgment.
62. Paragraphs 60 and 61 held that the relevant students were entitled to receive student finance in the form of a payment to CCP of tuition fees as they had been enrolled prior to 1 September 2014 on what was then a CCP-designated course, being the DTLLS course, and that they had then attended and been taught it. It was held that they thus came within the teach out requirements of the 5 June 2014 letter.
63. Paragraph 62 held that CCP had acted contrary to the 2013 guidance, and the Secretary of State’s expectations, and, “had broken the rules in this respect.”
64. Paragraphs 62 and 63 held that the sanction for this would potentially have been suspension or removal of the designation of CCP for the DTLLS course, but such had already occurred, albeit only to take effect subsequently, and for a subsequent period, by virtue of the 5 June 2014 letter.
65. Paragraphs 64 and 65 held that the Regulations did not give the Secretary of State any right to recover monies paid from CCP in circumstances where the students had actually been taught on, and in accordance with, the course on which they had been enrolled.
66. Paragraph 66 reads:

“66. I bear in mind that although tuition fees are paid direct to the college, they are a loan made by the SLC to the student to enable them to attend a course. The DfE has carefully examined the attendance records and accepts that the students in question did in fact attend on the DTLLS course provided by CCP. In my view Mr McGurk’s lack of equivalence does not remove the eligible student’s entitlement to be funded for his or her attendance on a course which has been designated for that purpose. Requiring CCP to repay to SLC fees in respect of tuition that was given to students would be to cast the burden of paying for that teaching back onto the students, in circumstances where the students had no control over what qualification CCP registered them for.”
67. I note that May J’s view was that the students had been taught the DTLLS course for which they had applied and received finance, had received the DET teaching, being the DTLLS course and more, had received the DET qualification and were content with that.
68. Paragraph 66 effectively notes that if fees were not paid by the Secretary of State through the tuition fee loan to CCP, the student would, in principle, be liable for the fees to CCP. Of course, the student might be able to rely on some breach of contract which had taken place by CCP in relation to the contract between the student and CCP; and May J does not seem to have considered the situation of whether the student could have refused to pay CCP

because CCP had acted in a way such that the Secretary of State might not be required to provide relevant funding. That scenario and situation does not seem to have been explored before May J and she simply seems to have considered that the student could require the Secretary of State to provide the relevant funding.

69. Paragraphs 67 and 68 of May J's judgment read:

“67. There is a distinction between a student's entitlement to receive fee support for attendance on a designated course, and the evidence which a college is required to produce in order to make good its claim to be paid the tuition element of that financial support.

After the introduction of the new requirement in sub-paragraph (3A) of Regulation 113, alternative providers were required to register the student with the awarding body before the first tranche of fees could be claimed or received. I accept Mr Coulter's point that the introduction of this new requirement was to fill a gap that had previously existed.

68. I should finally add this: it has never been part of the DfE's case that some part of the fees should be recovered, for instance fees paid in respect of the period after students had been registered with Pearson for the DET qualification. The case has remained that registration in December 2014 acted retrospectively, as well as prospectively, to remove the students' entitlement to receive funding support in respect of their DTLLS courses. For the reasons I have given I do not accept that the 2011 Regulations, taken together with the 2013 Guidance, had that effect.”

70. I note that the Secretary of State does not seek to have contended for any partial recovery; the Secretary of State's case appears to have been that the fact that CCP had registered the student with Pearson for the DET qualification destroyed the student's entitlement to receive funding for the DTLLS course. It seems to me that May J simply disagreed with that proposition.

71. In conclusion, May J held that the Secretary of State's claim against CCP failed, as set out in paragraph 69 of her judgment as follows:

“ 69. I have concluded that the DfE's claim to recover tuition fees paid to CCP in respect of students taught on a DTLLS course but registered for the DET qualification must be dismissed.”

72. In consequence of that judgment and the resulting order, the Secretary of State took the view that not only could the Secretary of State not recover the £196,862.50 already then paid, but also that there were another tranche of students who fell within the teach out provisions of the 5 June 2014 letter as applied to the actual facts by May J so that those students were entitled to loans with the relevant monies having (under Regulation 113) to be paid to CCP.

73. As a result, the Secretary of State made payments to CCP in respect of those students' tuition fees totalling £98,750. CCP, however, says in this claim, and which contention it had averted to previously, that that was not enough.

This (the second) action

74. CCP issued this claim on 22 October 2021 seeking £459,937 alleged outstanding tuition fees. Further, CCP asserts that the result of the non-payment of such fees has caused the collapse of CCP's business and claims as damages an alleged net loss of profits of £2,784,000 to 2021, and continuing at a rate of £464,000 per year. CCP also claims, on an and/or basis, alleged loss of capital value of its business of at least £3 million plus interest and costs.

75. The Secretary of State filed a defence and applied to strike out or for a reverse summary judgment, supported by witness statements of Cristiana De Faveri, the Secretary of State's solicitor, and Paul Williams, the deputy director in the relevant departments, of 9 March 2022. CCP resisted by witness statements of Minal Popat, solicitor, and Dan Pathirana, director of CCP, of 16 August 2022. The Secretary of State responded by a second witness statement of Ms De Faveri and Mr Williams of 31 August 2022.

76. Following the hearing on 6 September 2022, and as directed by me, CCP produced proposed amended particulars of claim and filed further documents. Shortly before the adjourned hearing on 19 April 2023, both sides adduced further witness statements being from CCP of Nawal Omar of 13 December 2022, and from the Secretary of State a third witness statement of Paul Williams of 14 April 2023 to which CCP responded with a third witness statement of Dan Pathirana of 18 April 2023. I allowed that material to be admitted but noted, in relation to Mr Williams' third witness statement and exhibits, that CCP had had little time to react to them.
77. Following a hearing on 19th and then 20 April 2023, I reserved judgment and directed that I would deliver it today, 16 June 2023, orally. At 14:48pm on 15 June 2023, I received an email from the Secretary of State's solicitors referring to a Court of Appeal decision delivered on 19 May 2023 in *Secretary of State for the Home Department v Cox* [2023] EWCA 551, and to the fact that it concerned the 1999 Act, although the email merely suggested that I might care to read certain paragraphs of it. Having only reached this email, and read it, following the conclusion of a lengthy hearing on 15 June 2023, on conducting a skim reading on the Court of Appeal judgment, I felt that it might very much affect the 1999 Act section of this judgment and the claimant's application to amend to rely on the student contract and the 1999 Act. I therefore directed that the parties should be able to provide oral submissions this morning before I delivered the reserved oral judgment. I heard those oral submissions and, in consequence, have had to revise relevant elements of this judgment. I feel that it was somewhat unfortunate that this authority was only drawn to my attention on 15 June 2023, and possibly also only on 15 June 2023 to the claimant's attention. However, it seems to me that I have been able to hear full submissions and that there is no prejudice which would have led me to delay giving my oral judgment.
78. I have considered all the evidence before me; the parties' lengthy skeleton arguments and written submissions as well as the oral submissions of counsel, and if I do not mention particular points, or do not mention them in detail, that is for considerations of time and space. Of course, a party can always seek clarification should they be so minded.

The applications before me and relevant principles

79. The Secretary of State has brought the application before me relying on various procedural provision. The first set of bases is for the court to strike out the claim and statements of case under the provisions of CPR 3.4(2), which reads as follows:
 "3.4...
 (2) The court may strike out a statement of case if it appears to the court –
 (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
 (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
 (c) that there has been a failure to comply with a rule, practice direction or court order."
80. Sub-rule (a) enables the Court to strike out if the relevant statement of case does not disclose reasonable grounds for bringing the claim. I note that under this provision the Court almost invariably has to accept that what is actually stated in the statement of case is correct as a matter of fact; the Court merely has to consider whether, assuming the relevant material is established as a matter of fact, it affords reasonable grounds for the claim in law.

81. In relation to sub-rule (b), the two distinct questions arise as to (i) to whether there has been an abuse of process and, if so, (ii) whether it is appropriate to strike out the claim. Here, it is said by the Secretary of State that there has been and is an abuse of process: firstly, because the claim is bound to fail including for limitation reasons (albeit that does not seem to me to add much to the claimant’s other contentions regarding limitation to the effect that the pleaded facts do not show reasonable grounds for bringing the claim and also for reverse summary judgment on the basis of no real prospect of success); secondly, the Secretary of State asserts that these proceedings are an abuse as the relevant claim should have been brought, if at all, as a counterclaim in the first action, but Master Cook refused to allow such to occur because CCP had failed to advance a counterclaim at an appropriate time in that process; and, thirdly, in relation to sub-rule (c), which provides for a potential for strike out where there has been a failure to comply with a rule, practice direction or order.
82. With regard to sub-rule (c), the Secretary of State contends that there have been breaches of Civil Procedure Rule 16.4 dealing with the contents of particulars of claim and where CPR16.4(1)(e) requires there to be stated matters set out in the relevant Practice Direction to Part 16. That Practice Direction at paragraphs 7.5 says:
“7.5 Where a claim is based upon an agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done.”
83. The Secretary of State contends that the particulars of claim do not set out what matters are relied on to give rise to the alleged direct contract, which is said to be an implied contract; that is to say an agreement by conduct.
84. The Secretary of State’s second set of bases for the orders sought are an application for reverse summary judgment under Civil Procedure Rule 24.2:
“24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
- (a) it considers that –
- (i) that claimant has no real prospect of succeeding on the claim or issue; or
- (ii) that defendant has no real prospect of successfully defending the claim or issue; and
- (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”
85. The Secretary of State relies on and contends that there are made out CPR 24.2(a)(i) and (b); and it is common ground that in approaching such an application, the Secretary of State needs to show that the claim has no real prospect of success and also that there is no other compelling reason for a trial.
86. On the question of there being no real prospects of success, the principles and approach which the Court applies and takes for common ground are summed up in the White Book notes at 24.2.3:
“no real prospect of succeeding/successfully defending”
The following principles applicable to applications for summary judgment were formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd’s Rep. I.R. 301 at [24]:
i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 3;

vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

In respect of points of law and of construction the notion of “shortness” does not appear to relate to the length of the document to be construed or the length of the material passage in that document but may relate to the length of the hearing that will be required and the complexity of the matrix of fact the court will have to consider: see the comments of Chief Master Marsh in *Commerz Real Investmentgesellschaft MBH v TFS Stores Ltd* [2021] EWHC 863 (Ch). He further commented that there was an overlap between the idea of a point of construction not being “short” and the second limb of CPR r.24.2: there may be some points that the court is capable of grappling with that, nevertheless, due to the context in which they arise or other factors, are best left to be dealt with at a trial.

In some cases the disputed issues are such that their conclusion by settlement or trial largely

depends upon the expert evidence relied on by each side. In such cases, an application for summary judgment will usually be inappropriate unless it is made after the exchange of the experts' reports and, in most cases, after the experts have discussed the case and produced a joint statement (*Hewes v West Hertfordshire Hospitals NHS Trust* [2018] EWHC 2715 (QB), a clinical negligence claim).

In *King v Stiefel* [2021] EWHC 1045 (Comm) Cockerill J held as follows:

“21. The authorities therefore make clear that in the context of summary judgment the court

is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.

22. So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up.”

In the context of an appeal against a refusal to permit amendment of particulars of claim, Asplin LJ said in *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at [41]–[42]:

“41. For the amendments to be allowed the Appellants need to show that they have a real as

opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1.

42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon.”

Guidance as to what is meant by the inappropriateness of conducting a “mini-trial” is provided by the decision of the Supreme Court in *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3; [2021] Bus.L.R. 332. Specifically, at [127]–[128] Lord Hamblen JSC stated that the correct approach, when asking whether the position might change from how it appears at the summary judgment stage, was not to ask whether there was:

“... a clear prospect that new material will become available before the trial which is likely to give the claimants a real prospect of success”, but rather to ask whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success.”

87. As I have said, CCP also now seeks to amend the particulars of claim to include as an alternative to the direct claim, a claim that the CCP can enforce an obligation of the Secretary of State to each student to provide a tuition fee loan by way of a payment to CCP.

88. That application requires permission under Civil Procedure Rule 17.1(2)(b), which reads:

“(2) If his statement of case has been served, a party may amend it only –

- (a) with the written consent of all the other parties; or
- (b) with the permission of the court.”

89. That is power to be exercised in accordance with the overriding objective, which is set out in Civil Procedure Rule 1.1, which reads:

“1.1

(1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders. and which I read into this judgment.”

I note that the overriding objective includes enabling a party to put forward their whole case.

90. Generally, the Court will permit an amendment at an early stage, as is the case here, if, firstly, the amendment is properly framed and particularised, see the notes at White Book 17.3.5, and no point is taken by Mr McGurk, for the Secretary of State, against the CCP in relation to that. Secondly, the amendment has real prospects of success, see the notes at White Book 17.3.6 and the final notes of the White Book at 24.2.3, which I have already cited. It is clear from the case law that the question of the strength of the case which is sought to be advanced is irrelevant once it overcomes the initial hurdle and threshold of having real prospects of success – see the decision in *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 referred to in the White Book notes, but also more recently the Court of Appeal decision in *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs and Anor.* [2023] EWCA 480 at paragraphs 48 to 49 and 69 to 77. That judgment was delivered after argument in this case, but I do not see it as affecting the underlying principles which have been previously advanced to me, and so I have not sought any further submissions on it.

91. However, there is a third requirement is that there is no limitation advantage to be gained by the amendment unless the new claim arises from the same or substantially similar facts to those already in issue. That requirement is set out in Civil Procedure Rule 17.4 and section 35 of the Limitation Act 1980.

92. CPR17.4(1) and (2) read:

“(1) This rule applies where –

- (a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and
- (b) a period of limitation has expired under –
 - (i) the Limitation Act 1980;
 - (ii) the Foreign Limitation Periods Act 1984; or
 - (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings...”

93. Section 35 of the Limitation Act 1980 reads:

“New claims in pending actions: rules of court.

(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

- (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
- (b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—

- (a) the addition or substitution of a new cause of action; or
- (b) the addition or substitution of a new party;

(c) and “third party proceedings” means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county] court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim. For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following—

- (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and
- (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action...”
94. Here, it is common ground that the limitation period for a claim in contract is, in principle, six years, see section five of the Limitation Act 1980. The Secretary of State’s primary assertion is that all, or at least some, of the alleged causes of action arose before 22 October 2015, being six years prior to the issue of the claim form in this case, and so are necessarily limitation barred and bound to fail so that the claim is an abuse within CPR 3.4(2)(b), and also lack real prospects of success.
95. The claimant, CCP, disputes this both generally and because CCP asserts that the Secretary of State suspended payment in 2015 and 2016 so that the causes of action in relation to both the direct contract claim and the student contract claim should be treated as arising only in July 2016 or, in any event, after 22 October 2015 (thus being less than six years prior to the issue of the claim form).
96. The Secretary of State disputes that; but also responds to say that if CCP is correct in that then the student contract claim, which is sought to be introduced by amendment, would be out of time if a new claim form was issued today; that is to say in 2023, more than six years after July 2016. The Secretary of State goes on to submit that the claims which are sought to be raised by amendment are, “new claims”, within section 35 of the Limitation Act 1980, and the Court does not have jurisdiction under section 35 of the Limitation Act 1980 and CPR 17.4 to grant permission for those claims to be introduced now; where, if an amendment is permitted and is made, they will, for limitation purposes, relate back to the date when the claim form was issued, being 22 October 2021 with the consequence that, for limitation purposes, the claim will be treated as having been brought within time, thus depriving the Secretary of State of the limitation defence which would otherwise exist if the proposed student contract claims were made the subject matter of a claim form issued now.
97. Mr Coulter, for CCP, accepts, correctly in my view, this analysis, but relies on Civil Procedure Rule 17.4(2). He says that the student contract claim, “arises from the same or substantially the same facts as are already in issue” and so that the court does have jurisdiction to grant permission to amend. As to this aspect, I bear in mind the White Book notes at 17.4.4.3, which make clear that the Court will be engaged in a value judgment as to whether or not that exception is satisfied, and which will involve considering everything that is presently in issue in the case, including not merely the claimant’s case, but also the case which is presently advanced by the defendant.

Order of Analysis

98. It is convenient to deal with the matters before me in the following order; firstly, the direct contract claim; secondly, the student contract claim; thirdly, the alleged abuse as a result of what happened in the first action.

The direct contract claim

99. I therefore turn to the direct contract claim. The Secretary of State says that this is bound to fail; firstly, because there is no reasonable prospect of the claimant establishing a direct contract between CCP and the Secretary of State at all. Secondly, that CCP has no reasonable prospect of establishing that the Secretary of State is in breach of such a direct contract in the circumstances which have happened. Thirdly, that the claim is, on any event, brought too late for limitation purposes.

100. I return to the present particulars of claim; in paragraphs 13 and 14, they refer to CCP applying to the Secretary of State to designate CCP's DTLLS course and the Secretary of State granting the application. Paragraph 15 states that the mechanism for the payment of the tuition fees would be that such would occur on CCP giving confirmation of the student's attendance to the Secretary of State. Paragraph 16 refers to the fees being paid in three tranches in October, February and May. Paragraph 17 refers to CCP advertising its courses to students.
101. I remind myself of paragraph 18, which I have cited in full above, and that it refers to students applying to the Secretary of State for funding support and, "following the Secretary of State providing confirmation that the student was entitled to funding support... the students were accepted onto the course by CCP." That, in fact, was not how I, now, or, it seems to me, May J, understood CCP's case, which was rather being that at least some students were enrolled prior to and while awaiting the Secretary of State's confirmation that they would be awarded loans rather than simply after the Secretary of State had provided confirmation. I remind myself of the present paragraphs 19 and 20 of the particulars of claim which I have cited in full above.
102. I have previously referred to the next section of the present particulars of claim, and which are headed, "Events subsequent to the contract", and which deal with 2013 onwards events. I remind myself that in paragraphs 23 to 28, CCP referred to the allegations made against CCP in 2014 to 2016, and that in paragraph 24, CCP asserts that the Secretary of State had a right or duty to suspend payment of the tuition fees; CCP's case seemingly being that that right or duty extended until at least 22 October 2015. In paragraph 27 it is stated by CCP that CCP accepted that at the material time the Secretary of State might have had legitimate questions to raise. Paragraph 28 states that by November 2016 all of the Secretary of State's legitimate concerns had been answered, and that the Secretary of State was then bound to pay the outstanding fees within a reasonable period, being one month. Paragraphs 29 and 30 refer to the Secretary of State advancing by letter of 21 December 2016 the matters which eventually became the subject of the first action, and alleges that from receipt of that letter, which was a month after November 2016, the tuition fee payments were wrongfully withheld from CCP, "in breach of the agreement".

Whether a direct contract was formed

103. It seems to me to be clear from the present particulars of claim that the allegation here is that there was a direct contract formed in 2011 as stated in the first sentence of paragraph 19 of the particulars of claim, which I have cited in full earlier in this judgment.
104. Mr McGurk, for the Secretary of State, 's first point is that this is an allegation of an implied contract and therefore CCP needs to plead all the conduct relied upon and state by whom, when and where the conduct was done in accordance with the provisions of 7.5 of Practice Direction 16. Mr McGurk points to the assertion in the particulars of claim, "The Secretary of State promising to pay the tuition fees on behalf of the student (reliant on the Secretary of State's promise of payment)", and says that there are absolutely no particulars of what was done by the Secretary of State and CCP which is said to have amounted to such a promise being made by the Secretary of State to CCP.
105. There is some force in that submission, although it could be said that a possible natural meaning of the words at paragraph 19 of the particulars of claim is that the promise was actually made to the students. However, if there was any failure to comply with the rule and the Practice Direction here, I would consider that the proportionate remedy would not be to strike out the statement of case, but to require clarification and amendment, as long as the result was a pleading which amounted to a statement of reasonable grounds for the claim, and which had real prospects of success; a matter which I, in any event, analyse in the next sections of this judgment. The court has wide powers to deal with breaches of the rules and that sanctions must be proportionate; see *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926. I

do not see any relevant breach of the rules and Practice Directions as justifying, in itself this draconian remedy of strike out.

106. Mr McGurk's second point is that the particulars of claim do not disclose reasonable grounds, in any event, for the existence of a direct contract between CCP and the Secretary of State. He says that all they state is that, at most, there was a promise to students to provide loans for tuition fees, and a decision by the Secretary of State to designate the CCP DTLLS course, and possibly a course of conduct involving the Secretary of State complying with the Secretary of State's loan contract obligation to the students and the Regulations. Mr McGurk says that those are not reasonable grounds from which to imply a contract by conduct as between CCP and the Secretary of State.

107. Mr McGurk relies on the decision of *Baird Textile Holdings Ltd v Marks and Spencer plc* [2001] EWCA Civ 274 to say that a contract will only be implied where there is a necessity so to do, and a necessity to find the existence of a particular contractual relationship. He relies on elements of the judgment of the Vice Chancellor in paragraphs 15 to 21 which read as follows:

"15. For Baird counsel submits that where, as alleged in paragraph 9, one party intentionally induces a particular belief in another, on which the other relies, such conduct attracts legal responsibility. The responsibility relied on is (1) to give reasonable notice to terminate the relationship and (2) during the subsistence of the relationship, to acquire garments from Baird in such quantities and at such prices as were in all the circumstances reasonable. More specifically he contends that the judge was wrong in three respects, namely (a) necessity is not the test for the implication of a contract from conduct, (b) there is a sufficient prospect of success in establishing an intention to create the legal relations relied on, and (c) the obligations are sufficiently certain to be enforceable as part of the alleged contract.

16. In connection with the wide proposition counsel referred to academic discussion with regard to "relational contracts" and the legal implications to which they may give rise. But the articles which he produced did not suggest that the normal rules as to the implication and formation of contracts or the usual requirements of certainty did not apply to "relational contracts". Accordingly it is to those rules that I turn.

17. Counsel suggested that the requirement of necessity to which the judge referred was derived from the judgment of Bingham LJ in *The Aramis* [1989] 1 L.L.R 213. He submitted that it was either confined to the cases exemplified in that case or, at least, inapplicable to cases in which there had been a long continuing relationship or an intentional inducement such as Baird relies on in this case.

18. *The Aramis* [1989] 1 L.L.R 213 concerned the question whether a contract could be implied between the transferee of a bill of lading to whom the goods had been delivered and the carrier. Prior to the Carriage of Goods By Sea Act 1924 the implication of such a contract was necessary if the transferee and the carrier were to have rights enforceable between themselves in respect of, for example, damage to the goods or the payment of freight. Bingham LJ considered the authorities at some length to see how the implication of contracts in this field had grown and developed. He cited with approval from the judgment of May LJ in *The Elli* [1985] 1 L.L.R. 107, 115 that

"... no such contract should be implied on the facts of any given case unless it is necessary to do so: necessary, that is to say, to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."

18. Bingham LJ accepted that the authorities showed that "a contract will only be implied if it is necessary to do so". In expressing his own view Bingham LJ said (page 224): "... it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to

contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.”

19. Counsel for Baird relied on the fact that in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 , a case concerning the implication of a contract from a request for tenders and a submission in response, Bingham LJ put the matter somewhat differently. In that case he referred (pp. 1201 and 1202) to the “confident assumptions of commercial men” and the need to “be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for”.

20. For M&S it was submitted that it would be odd if the principle for the implication of a contract at all should be different or less onerous than the principle for the implication of a term in a contract. Reliance was placed on *Wilson v Partenreederei Hannah Blumenthal* [1983] AC 854 and *The Gudermes* [1993] 1 Ll.R.311 . The former concerned the question whether a contract to abandon an arbitration might be implied from conduct, or more precisely lack of conduct. Lord Brandon of Oakbrook considered (p.914) that an actual abandonment, as opposed to an estoppel precluding an assertion of continuance, required proof of conduct of each party, as evinced to the other party and acted on by him, as “leads necessarily to the inference of an implied agreement” between them to abandon the contract. Lord Roskill referred (p.923) to “the only possible inference [being] that the agreement to arbitrate has been rescinded by mutual consent”. Though Lord Diplock made no similar observation both Lords Keith of Kinkel and Brightman agreed with Lords Brandon and Roskill. In *The Gudermes* the cargo owner sought to establish a further contract with the ship-owners arising out of arrangements made to cope with the situation arising from an unauthorised diversion to Malta rather than Ravenna. The judge, Hirst J, held that the appropriate test was that described by May LJ in *The Elli* [1985] 1 Ll.R. 107 , 115. The Court of Appeal upheld that direction. Staughton LJ giving the judgment of the court considered (p.320) that

“... it is not enough to show that the parties have done something more than, or something different from, what they were already bound to do under obligations owed to others. What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract.”

21. In my view the judge did not adopt the wrong test for the implication of a contract from conduct. It is apparent that the statements in *The Aramis* are not confined to the limited circumstances with which that case was concerned and are reflected in one form or another in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* , *Wilson v Partenreederei Hannah Blumenthal* and *The Gudermes*.”

108. I have also borne in mind, in the judgment of Judge, LJ, its paragraph 48:

“48. I agree with the judgment of the Vice Chancellor on the contractual issue generally, and in particular his analysis of the problems of ascertaining with any sufficient precision the parties' mutual obligations, and also, by reason of the uncertainty, of establishing a mutual intention to create a legally enforceable relationship.”

And, in the judgment of Mance, LJ, its paragraphs 59 to 64, 69 and 70:

“59. The Vice-Chancellor has set out paragraph 12(1) and (2) of the judgment below, in which Morison J summarised the relevant legal principles as he saw them. For a contract to come into existence, there must be both (a) an agreement on essentials with sufficient certainty to be enforceable and (b) an intention to create legal relations.

60. Both requirements are normally judged objectively. Absence of the former may involve or be explained by the latter. But this is not always so. A sufficiently certain

agreement may be reached, but there may be either expressly (i.e. by express agreement) or impliedly (e.g. in some family situations) no intention to create legal relations.

61. An intention to create legal relations is normally presumed in the case of an express or apparent agreement satisfying the first requirement: see *Chitty on Contracts* (28th Ed.) Vol. 1 para.2–146. It is otherwise, when the case is that an implied contract falls to be inferred from parties' conduct: *Chitty*, para.2–147. It is then for the party asserting such a contract to show the necessity for implying it. As Morison J said in his paragraph 12(1), if the parties would or might have acted as they did without any such contract, there is no necessity to imply any contract. It is merely putting the same point another way to say that no intention to make any such contract will then be inferred.

62. That the test of any such implication is necessity is, in my view, clear, both on the authority of *The Aramis* [1989] 1 Ll.R. 213, *Blackpool and Fylde Aero Club Ltd. v. Blackpool B.C.* [1990] 1 WLR 1195, *The Hannah Blumenthal* [1983] AC 854 and *The Gudermes* [1993] 1 Ll.R. 311 cited by the Vice-Chancellor, and also a matter of consistency. It could not be right to adopt a test of necessity when implying terms into a contract and a more relaxed test when implying a contract — which must itself have terms.

63. Here it is sought by the claimant to argue in reverse. First, the issue of intention to create legal relations is addressed and it is suggested that the judge gave only one reason (based on paragraph 9.28 of the claim) for negating any such intention. Then, having sought to show that reason as ill-founded, it is argued that the only barrier to an enforceable contract is “essentially one of interpretation” and of giving effect to an intention on the part of the parties to contract.

64. It is, in my judgment, more appropriate to take the requirements in the order in which I have set them out, and to recognise their potential inter-relationship. If there is no sufficient agreement on essentials, that is on any view fundamental, and it may well also reflect an absence of intention to create legal relations....

69. Objectively, the only sensible analysis of the present situation is in my judgment that the parties had an extremely good long-term commercial relationship, but not one which they ever sought to express, or which the court would ever seek to express, in terms of long-term contractual obligations. The upshot is that I agree with the judge's conclusion that there was never here any agreement on essentials.

70. In addition, I consider that the fact that there was never any agreement to reach or even to set out the essential principles which might govern any legally binding long-term relationship indicates that neither party can objectively be taken to have intended to make any legally binding commitment of a long-term nature. Their conduct in this regard contrasts with their conduct in entering into short-term commitments relating to each season, as well as their conduct in entering into other particular contracts, such as that made by both M & S and Baird with the clothing designer, Matthew Williamson, dated 27th March 1998.”

109. I note that this approach was reaffirmed in the decision of *West Bromwich Albion FC v El Safty* [2006] EWCA Civ 1299 at paragraph 42.

110. Mr McGurk submits there is an unparticularised alleged promise, and that the fact that CCP have become a designated course provider for students, the payment of whose tuition fees to CCP would be made by the Secretary of State, is simply insufficient to amount to reasonable grounds for it being necessary to infer there having been an actual direct contract between CCP and SLS, rather than some other legal scenario. The most particular other legal scenario being simply the existence of a contract between the Secretary of State and the student, which would enable the student to fund a contract made between the student and CCP; and where the existence of the contract between the Secretary of State and the student would give CCP confidence to enter into the contract between CCP and the student and teach the student the course.

111. Mr Coulter submitted that sufficient had been pleaded to give reasonable grounds from which an implication might be made; saying, in effect, that (i) the simple and sole existence of a contract between the student and the Secretary of State could not, or at least might not, have seemed to be a commercially realistic situation where CCP would wish to have security that the tuition fees would be paid, and (ii) the particulars of claim did state that a promise had been made by the Secretary of State to CCP.
112. I see substantial force in Mr McGurk's submission of there being a breach of paragraph 7.3 of Practice Direction 16. The allegation of a promise by the Secretary of State, including to whom it was being made and how, especially if it was said to be made to CCP, that was done, is all very unparticularised. However, I do not see it as appropriate to strike out on that ground. The particulars of claim do contain an allegation that the Secretary of State was making a promise, and, in effect, that in some way, CCP was accepting such promise by obtaining designation and teaching the student. That could, it seems to me, in principle, in some circumstances, make it arguably necessary to imply a contractual relationship between the Secretary of State and CCP. If that claim has real prospects of success, then any deficiency in its pleading can be remedied by further particulars or amendment, so that what amounts to reasonable grounds are properly expressed.
113. However, that analysis is dependent on such a claim having real prospects of success on the evidence before me, and to which aspect I now turn. Mr McGurk's submissions, in essence, are as follows; firstly, the *Baird* necessity test is a high one. Secondly, the overt express contractual situation here is that there is one contract between the Secretary of State and the student, and a second contract between CCP and the student. Thirdly, that there is no need for a contract to exist between CCP and the Secretary of State. Fourthly, the designation process is simply different from these relationships and non-contractual in nature. Fifthly, if there was to be a contract, it would have taken a form similar to the SFA/EFA contracts and both CCP and the Secretary of State knew that perfectly well, but such did not occur.
114. Mr Coulter submitted that CCP has real prospects of success in establishing a direct contract; he relying particularly on the reference to terms and conditions to be signed, as stated in the 2013 guidance.
115. As I stated to the parties on 6 September 2022, it seems clear to me that the direct contract argument has no real prospects of success; this being for the following main reasons; and where I have all the material which CCP relies on, and it does not seem to me, on the evidence before me, that there is any potential for further relevant disclosure or documents on the evidence, but rather I see there as being no foundation for such a speculation.
116. Firstly, the obvious contractual analysis in the evidence before me is that there is, firstly, one contract between CCP and the student, where the student promises to pay CCP for teaching the student a DTLLS course, and, secondly, another contract between the Secretary of State and the student, whereby the Secretary of State promises to lend the student the money for tuition fees and to provide that loan to the student by remitting the money to CCP.
117. That set of transactions gives rise to an overall contractual scenario which is commercially realistic and workable, and I cannot see that there is any essential need for there to be a contract between CCP and the Secretary of State. If the Secretary of State refuses to pay: (i) the student can enforce the Secretary of State's obligation directly; and (ii) CCP can sue the student, and the student in any proceedings brought by CCP can join in the Secretary of State on the basis that the Secretary of State owes obligations to the student for the money to be paid. It may well be that CCP would like and wish for the Secretary of State to be directly liable to CCP, and it seems to me that it might well be fair and reasonable for the Secretary of State to be so liable to CCP. However, I cannot see any basis for saying that there is a necessity for such a direct liability to exist in order for the scheme to be workable.

118. Further, the scheme that I have identified is that which is set out by the Regulations, which provide for a contract between the student and the Secretary of State, provide for a designated course provider, and provide for payments to be made under the contract between the student and the Secretary of State to that designated course provider. There is no mention in the Regulations of there being any contract between the Secretary of State and the course provider, here CCP; rather there is a glaring absence within the statutory scheme of the direct contract which CCP wishes to assert.
119. Secondly, there is nothing in the 2011 designation process to suggest a contract. That designation process was, in any event, simply, as far as CCP was concerned, a means by which CCP was able to put itself in a position to attract students, and a means by which CCP was able to expect those students to receive loans from the Secretary of State. The fact that a student has a funder who is lending to the student does not mean that there is any need or necessity to imply a contract between that funder and the course provider. The course provider can ask the funder to sign a contract if the course provider wishes to insist on that, but that is not what happened here. Further, the primary purpose of the designation process is clearly for the Secretary of State to be satisfied that the course is suitable. That is to say the designation process is for the benefit of the Secretary of State, not for the benefit of the course provider. It seems to me that it would be very odd if an engagement in that process would lead to contractual obligations being imposed on the Secretary of State to pay money to the course provider where the Regulations do not contain any such provision.
120. Thirdly, I would regard the terms and conditions point as being unfounded. Firstly, it is not actually part of the pleaded case. Secondly, CCP has advanced no evidence with regards to what such terms and conditions were, or as to what was, or would be, relevant in them. Thirdly, the references before me to terms and conditions are in fact part only of a restructuring by the Secretary of State of the process, which restructuring was only to commence in 2013 and 2014 at the earliest, and where the CCP DTLLS designation was in fact revoked in 2014. It seems to me, on the evidence before me, that the terms and conditions referred to in the 2013 guidance were never applicable to the DTLLS designation at all. Fourthly, it is in fact CCP's own case, as is made clear in the particulars of claim, that the alleged direct contract arose in 2011; that is to say before 2013. Fifthly, these terms and conditions would only have been conditions of maintaining the designation, and I do not see why or how they would give rise to a contractual obligation on the Secretary of State to pay tuition fees to CCP.
121. I have, though, given little weight to the SFA/EFA contracts point. The mere fact that other contracts are written in detail with their own substantial terms does not mean that the Court should not apply a contract if it was necessary for the Court to do so.
122. I did note at the time that Mr McGurk seemed somewhat uncomfortable at some points, although it seems to me now much less so, when in the course of submissions I suggested that the logical consequence of the Secretary of State's case is that, if the Secretary of State in any situation refuses to pay tuition fee monies to a course provider such as CCP as a result of a dispute between them, the contractual structure means that the course provider, here CCP, should simply sue the student, and when the student can then decide to sue the Secretary of State, presumably by an additional claim under Civil Procedure Rules Part 20. However, that is the logical consequence of the contractual structure, subject to the 1999 Act, and of the Secretary of State's submission. It is, in my judgment, the correct analysis. It may be unfortunate for students who may not wish to be victims of a dispute between the Secretary of State and the course provider, but that is the structure of the Regulations and the documents. Of course, a student may have their own defence against the course provider dependent on whatever is the subject matter of the dispute raised by the Secretary of State; and if the Secretary of State is correct then it may be that the student can take advantage of whatever the Secretary of State is relying on. However, that is all a matter for the analysis of the contract between the student and the course provider. This is, it seems to me, the

usual consequence of the law of the privity of contract; claims for breach of contract are generally brought by and between the contracting parties unless an exception applies.

123. Here, of course, CCP has now sought to raise the statutory exception to common-law privity of contract of the 1999 Act, and that is what I have termed the student contract claim, as opposed to the direct contract claim. It seems to me that, as far as the contractual structure is concerned, leaving aside the 1999 Act, the Secretary of State is correct to say that, if the Secretary of State has a dispute with a course provider, the student will have to face being sued by the course provider and cannot simply tell the Secretary of State and the course provider to sort the matter out between themselves, if necessary, by litigation between them not involving the student.
124. In all such circumstances, I simply see no real prospects of CCP showing the necessity required for an implied contractual relationship between CCP and the Secretary of State, being that required to establish the direct contract claim. I also see there as being no compelling reason for a trial; it seems to me to be all clear and, so far as I am having to consider particular documents and periods in this case, all to be historic. I would therefore grant reverse summary judgment against the claimant in relation to the direct contract claim and this point alone.

Whether a direct contract (if formed) would not assist the Claimant

125. Mr McGurk, however, advances two further arguments on which I have heard full submissions and which, it therefore seems to me, that I should consider in this judgment. Firstly, Mr McGurk says that, even if there was an implied contract, CCP's claims must still fail because, firstly, the relevant students did not come within the 5 June 2014 letter teach out provisions, and, secondly, CCP have broken the rules by registering students for the DET qualification and not telling the Secretary of State that that was being done, and also, for that matter, not telling Pearson what actually was happening.
126. I have borne in mind the principles and guidance set out in the already cited case law and notes; and I deal with this aspect relatively shortly as I am already going to grant reverse summary judgment against the direct contract claim. I conclude that the Secretary of State has not shown that CCP has no real prospects of success on these grounds.
127. Dealing first with Mr McGurk's argument that the students on whom the CCP bases its claims for unpaid money for tuition fees are not within the 5 June 2014 letter wordings, I remind myself that the Secretary of State said, "Any existing eligible students who commenced one of these courses", that is the DTLLS course, "in the academic year 2013/14, and are already in receipt of student support, will be able to continue receiving it.". Mr McGurk submits that the relevant students, firstly, had not started being taught by 1 September 2014 (the start of the 2014/2015 academic year) and therefore had not commenced their course, and secondly, had not had any payments made by the Secretary of State to CCP in respect of their tuition fees by 1 September 2014. Therefore, they were not "already in receipt of student support" by 1 September 2014. Mr McGurk submits that all the students falling within the 5 June 2014 wordings had, in fact, had all payments made for them either before or after the May J judgment.
128. Mr Coulter submits, as set out in Mr Pathirana's witness statements, including his 18 April 2023 response to Mr Williams' third witness statement of 14 April 2023, firstly, that all the relevant students had been enrolled by CCP by 1 September 2014 and that was sufficient of itself; but also that many, if not all, had started being taught by CCP by 1 September 2014. Secondly, that all the relevant students had made applications for finance to the Secretary of State by 1 September 2014 and that many, if not all, of those applications had been accepted; although the first payment would then often, perhaps not in all cases, only fall to be made under the Regulations after a period of attendance and request, that is to say, after 1 September 2014. However, Mr Coulter submits that acceptance by the Secretary of State of the application, and perhaps also creation of the student contract, would

be sufficient. He submits that this is particularly true of many students who started, he says, the DTLLS course in June 2014.

129. Thirdly, Mr Coulter submits that evidence which has now been produced by the Secretary of State to justify the Secretary of State's factual assertions that relevant students had not had money paid to CCP on their behalf before 1 September 2014 is highly unsatisfactory. Firstly, as stated in Mr Williams' third witness statement, even the Secretary of State has had to correct it and concede that a small number of students for whom monies have not yet been paid to CCP, even on the Secretary of State's case, fall within the Secretary of State's interpretation of the 5 June 2014 letter. Secondly, that the provenance of the Secretary of State's spreadsheets analysing the students relied on by CCP and their applications for finance and payments made, and the source information for such spreadsheets, is extremely unclear; and that they are and will be capable of challenge, particularly following disclosure and evidence. Thirdly, that, in any event, these spreadsheets include inconsistencies, omit various relevant students, and wrongly, according to Mr Coulter (this being contrary to Mr McGurk's second argument below), exclude students who ended up being registered for, and who then obtained, a DET qualification. Fourthly, that even the Secretary of State appears to have problems within the spreadsheets, as they have been altered again and again in each of Mr Williams' various witness statements. Fifthly, Mr Coulter submits that as a result of the collapse of CCP's business due, he says, to the Secretary of State's wrongful non-payment of outstanding fees, many of CCP's records have been lost or are difficult to analyse and that the claim simply requires a full factual examination, including following full disclosure being provided by the Secretary of State.
130. In my judgment, the Secretary of State has not shown that CCP has no real prospects of success for two sets of reasons. Firstly, it seems to me that there are very real questions of contractual construction relating to the 5 June 2014 letter which arise, being, firstly, what is meant by its wording, "commence the course". The Secretary of State says that this means that the student has to have started being taught; CCP says that all is required is for the student to have been enrolled on the course, and which may have led to the student engaged in various pre-teaching activities such as pre-reading. While construction of document issues can be resolved in a summary judgment application and depend much on the words used, they also involve consideration of other matters including the commercial purpose of the document and the factual matrix of the facts reasonably known to the parties to it. These are all factored into the holistic analysis of what the reasonable reader would see as the correct meaning; see *Arnold v Britton* [2015] AC 1619 (a contract case) and other decisions following it and various authorities to which I will be referring later in this judgment.
131. Here, it seems to me, firstly, there is a real prospect the CCP's construction argument would succeed, especially once the factual matrix is considered, which will include how these courses and providers operate and the extent to which that would have been known to both CCP and the Secretary of State. I can see a real prospect of CCP advancing relevant facts and evidence which would influence the construction so that it might well be decided that the mere fact of a formal enrolment is sufficient for a student to have, "commenced the course". Secondly, in any event, the question of what, if the Secretary of State is right on construction, would be sufficient factually to amount to a start of teaching in relation to any individual student, is also a very nuanced question and would itself result in a factual analysis of what happened in relation to each student. For example, such questions would arise as to whether provision of a reading list would be enough, or whether the start of a Freshers' week of induction without any formal lecture or seminar would be enough. Thirdly, there is a construction question as to what is meant by, "in receipt of student support"; the Secretary of State says that an actual payment must already have been made. I am not at all convinced that that is the only possible construction of those words; at first sight it is difficult to see why entry by a student into a student contract containing a promise

by the Secretary of State to the student to pay tuition fees, and upon which the student may very well have relied, would not be enough to amount to the student being, “in receipt of student support”, in the mind of a reasonable reader. This would be reinforced if, for example, the student had already received part of a maintenance loan. It could well be argued that such a student was not to lose what they had already been promised. It seems to me that the Secretary of State’s construction might well be argued to be contrary to the commercial purpose of the letter. Similar arguments could arise where a student had applied, but the Secretary of State had failed to process the application speedily. Here, CCP could reasonably argue that the student was not to be deprived of finance by the Secretary of State’s delay in granting the student what is in fact their statutory right. Again, I see a real prospect of success and where factual evidence will be material to construction. Further, at each point the various possible constructions give rise to particular factual questions when they are sought to be applied to each individual student, and which matters I do not think I can resolve on the evidence before me.

132. Secondly, it seems to me that there is real force in Mr Coulter’s and Mr Pathirana’s criticisms of the Secretary of State’s spreadsheets, which give rise to real prospects of CCP succeeding in showing that there still are relevant students within the 5 June 2014 letter whose tuition fees have not yet been paid by the Secretary of State. I see real prospects of success for CCP on this hypothesis and by extension, on CCP’s wider construction of the letter’s words, including for the following reasons. Firstly, even the Secretary of State now accepts some students fall within the wording; that itself casts a general doubt on the reliability of the spreadsheets. Second, it does seem to me that Mr Coulter and Mr Pathirana have identified what are apparent inconsistencies. Thirdly, the provenance and basis of the spreadsheets are unclear, they have twice mutated and they seem to be something of a work in progress. Fourthly, the Secretary of State will have the underlying data and records and it does not seem to me to be mere Micawberism for CCP to say that disclosure may well enable CCP to construct a very different spreadsheet. I, therefore, would not grant reverse summary judgment against CCP on this basis.
133. I do also note that Mr McGurk has stated that the Secretary of State will now pay the sum £12,000 for students that the Secretary of State now says fell within the terms of the 5 June 2014 letter; notwithstanding that the Secretary of State says that they have no liability, or at least no liability enforceable by CCP, to do so. However, that aspect, it seems to me, is irrelevant to my decisions.
134. Mr McGurk’s second argument in this area is to submit that CCP’s registering of the students for the DET qualification, when CCP was not a designated provider of a DET course, would entitle the Secretary of State not to pay for the relevant tuition fees, assuming a direct contract existed. Mr McGurk submits, firstly, that the situation does not fall within the 5 June 2014 letter at all. Secondly, even if it did, the 5 June 2014 letter, in its footnote, reserved the right to revoke the designation of the course in the event of serious misconduct by the provider and that that was the case here. Thirdly, in any event, such misconduct by CCP would justify non-payment to CCP even if there was a direct contract between CCP and the Secretary of State.
135. Mr Coulter submitted, firstly, that May J had already effectively decided this point in favour of CCP. Secondly, in any event, the Secretary of State had not revoked the DTLLS designation, at least not for the period before 1 September 2014, and that CCP had taught out the DTLLS course and should be paid for doing so.
136. I hold that CCP would have had real prospects of success on this issue. Firstly, it seems to me that the Secretary of State’s argument that the actual situation was that there was not a teach out under the 5 June 2014 letter, because of the registrations for the DET qualification, is inconsistent with paragraph 60 to 63 of the May J judgment. May J held that the 5 June 2014 letter did apply in those circumstances. I also consider, for what it is worth, that May J was right to so conclude for the reasons she gave in those paragraphs, and also

in her paragraphs 65 to 66. The key question is whether or not the course was, and remained, designated; the 5 June 2014 preserved the designation, subject, as the letter said, to any justified revocation of the designation. That (a revocation of the designation) simply has not occurred for those students. It seems to me that whether the students were registered for the DET qualification or for a DTLLS qualification, or any other qualification, is irrelevant; the students had the right to finance for their DTLLS course. In fact, I note that that is the view that the Secretary of State took in paying the further £98,750 tuition fees payment after the May J judgment.

137. Secondly, it is correct that the 5 June 2014 letter reserves the right to un-designate the DTLLS course as provided by CCP for serious misconduct on the part of CCP. However, here it seems to me that the Secretary of State has two problems. Firstly, the Secretary of State did not un-designate the DTLLS course. As recorded by May J in paragraph 63 of the May J judgment, the Secretary of State only un-designated it subject to the transitional provisions in the 5 June 2014 letter, and the Secretary of State did not carry out an un-designation following the Secretary of State learning of the registrations for the DET qualification. The Secretary of State may, for all I know, have felt that it was too late to do so retrospectively, and, if that is right, it merely demonstrates that the Secretary of State is now too late to advance the point. It seems to me that this alone gives CCP real prospects of success.
138. However, I add, secondly, that I do not think that it is at all clear that the Secretary of State could, or would, un-designate CCP as course provider for the DTLLS course as a result of CCP registering students for the DET qualification where: CCP actually did teach the DTLLS course, and anything else sufficient for Pearson to grant the DET qualification; and Pearson did then award the DET qualification to the satisfaction of the students. Although the Secretary of State may very well have designated CCP as a provider of the DTLLS course on the assumption it would lead to the DTLLS qualification, there would, in this situation, be a range of possible responses of the Secretary of State, who would have to act within ordinary public law principles. CCP could well argue, as May J seems to have thought, that the end result should not have been of any particular concern to the Secretary of State; the relevant course had been taught and Pearson had thought it appropriate to award a qualification which the students wanted, and indeed was the Secretary of State's preferred qualification. It could be said that the Secretary of State's argument should actually be with Pearson for its being prepared to award a DET qualification on the basis of DTLLS material.
139. I do bear in mind that the Secretary of State might say that the award of the DTLLS qualification was a key component of any designation of the DTLLS course; however I see there as being considerable arguments both ways, which would lead to a consideration of material relevant to the statutory policies, and it seems to me that CCP would have real prospects of success.
140. Thirdly, in relation to Mr McGurk's argument that CCP's conduct would justify the Secretary of State not paying CCP under any direct contract, again I see CCP as having real prospects of success as, firstly, that would all depend on the terms of the relevant implied contract. Those terms are notoriously fact specific and dependent on the Court having to look at all the parties' conduct to extract them; and, as in the *Baird* decision itself, if there was to have been a direct contract, it may be difficult for the Secretary of State to add in further terms in addition to a basic contract that if CCP taught the relevant course, here the DTLLS course, then the tuition fee would be paid to CCP. Secondly, even if a term is breached or a rule is broken, that does not necessarily mean that the Secretary of State is freed of an obligation to pay. The Secretary of State can be freed from such an obligation, should such a direct contract exist, in one of two situations; firstly, there is a term which provides that compliance with it is a condition of payment. That is possible, but it raises, again, the difficulty as to how such a term would be implied from this factual situation,

particularly where the core of the relationship is the DTLLS course and its being taught, and not what ultimate qualification the student might be awarded. The second possibility is that the breach is fundamental insofar as it goes to the root of the relevant contract. Again, it seems to me that both sides' positions as to whether or not the hypothetical breach in this case is a fundamental one would be arguable, although it does seem to me that the tenor of the May J judgment may well suggest that it would not have been. However, the answer to that question very much depends on the facts and the relevant conduct.

141. It seems to me, for all those reasons, that I would not have granted reverse summary judgment on these grounds, although the difficulty which I have averted to about what would be the terms to imply into any direct contract do reinforce my decision that CCP has no real prospects of implying any direct contract at all.

Whether the direct contract claim (if it existed) would be limitation barred

142. Mr McGurk, however, also has a further set of limitation arguments which support both his abuse-based strike out application, that is to say on the basis that it is abusive to bring a claim which is obviously limitation barred, and his reverse summary judgment application, that is to say on the basis that the existence of a clear limitation defence means that the claim has no real prospect of success. Mr McGurk submits that on the three-tranche payment system laid down by the Regulations and in the student contract, that, if there had been a direct contract, all of the payments would have fallen due by May 2015 at the latest; that is to say, well before 22 October 2015. Thus, CCP's causes of action would all have arisen more than three years before the claim form was issued on 22 October 2021, and all the claims are limitation barred by section 5 of the Limitation Act 1980.
143. Mr Coulter responds to rely on the suspension of payments by the Secretary of State from about October 2014 to November 2015, although Mr McGurk says it was actually from January 2015 to December 2016, and the particulars of claim say it was from October 2014 to July 2016. Mr Coulter submits, firstly, that the Secretary of State had a right to suspend payments under the direct contract where the Secretary of State was reasonably investigating CCP, even if that investigation proved, as was the case, to be unfounded. He also submits that the carrying out of such an investigation, and operation of such right of suspension, would, (i) Prevent a cause of action arising, or at least suspend any limitation period during the suspension period, and, (ii) In relation to any cause of action which had already arisen, would have had a suspensive effect for such period. Mr Coulter submitted that Mr McGurk had actually accepted that in argument at the September 2022 hearing, even if Mr McGurk was subsequently to seek to resile from such an acceptance during the hearing before me on 20 April 2023.
144. Secondly, Mr Coulter submitted that what the Secretary of State did, led, in the circumstances, to the Secretary of State being estopped from relying on any suspension period as part of any six-year limitation period. Mr Coulter, in relation to this, referred to the decision of *Hillingdon LBC v ARC* [2001] CP Rep 33. There, the parties had been negotiating with regards to a possible claim and the claimant argued that both had assumed during the negotiations that no limitation period was running. However, once the limitation period had passed, and only after which a reference had been made by the claimant to the Lands Tribunal, the defendant had then taken a limitation point. The claimant said that the defendant was estopped from doing so.
145. In paragraph 43, Arden J, as she then was, identified the basic requirements for an estoppel by convention as follows:
"43.. The ingredients of estoppel are summarised in Waiver, Variation and Estoppel (Wilkins & Villiers, 1998, page 201–2) as follows:
"9-01 On one level, the elements of estoppel by convention can be simply stated. Thus, the estoppel will arise where:(i) the parties have established, by their construction of their agreement or a common apprehension as to its legal effect, a convention basis; (ii) on that

basis, the parties have regulated their subsequent dealings; and (iii) one party would suffer detriment if the other were to be permitted to resile from that convention. As such estoppel by convention can, on this level, be relatively easily distinguished from estoppel by representation and equitable forbearance. Estoppel by convention depends on a shared assumption which can be one of fact or law and not on either a representation as to a state of facts or a promise as to future obligations. Estoppel by convention is, as the law currently stands, therefore to be distinguished from equitable forbearance or estoppel by representation.

9-02 However, there are three complications to the above analysis. First, when as a matter of fact will the doctrine apply. Secondly, can estoppel by convention provide the party relying on it with a cause of action. Thirdly, can or could estoppel by convention be viewed as part of an overarching doctrine of estoppel. [footnotes omitted]”

146. In subsequent paragraphs, she set out relevant case law. In paragraph 57 she said: “57. The principal issue raised by this case is an important one. It is clearly established that a party may waive the right to rely on a limitation defence and that parties may enter into an agreement to waive the limitation defence (see for example Halsbury's Laws of England, vol 28 (1997) paras. 842 and 843). The courts will enforce any such waiver or agreement duly made. A party may also be *24 estopped in an appropriate case from relying on a limitation defence. However no authority has been cited to us, apart from the decision of the judge in this case, whereby a party has been held disentitled from relying on a limitation defence merely because he has continued to negotiate with another party about the claim after the limitation period had expired and without anything being agreed about the manner in which the claim was to be resolved if negotiations broke down. What was happening here was that the parties were negotiating without any regard to the limitation period. At its extreme the point may be put as it was expressed by Mr Harper in his written argument: “if the judge is right, it means that unless a negotiating party expressly draws the other side's attention to the expiry of the limitation period and expressly negotiates against the background of that threat he will be held estopped from taking the point.”

147. She then considered the facts, and said in paragraph 62: “62. A shared assumption is not on the authorities sufficient to establish an estoppel unless it is communicated. It follows that if in this case there was no shared assumption to the effect that ARC had a valid claim that was not time-barred, there could be no communication by LBH that it was making any such assumption. It also follows from what we have said above that the communication required would in any event be not simply that ARC had a valid claim but also that LBH would not take any defence that might be open to it on the basis of a statutory limitation period.”

148. She also pointed out that any estoppel could be terminated, as set out in paragraphs 63 to 64 of the judgment. She actually rejected the assertion of estoppel by convention on the basis that, in that case: firstly, there had been no shared assumption with regards to limitation at all; and, secondly, any shared assumption would have ended before the expiry of the limitation period and the estoppel with it. She came to that conclusion without even considering in detail the nature of any detrimental reliance required to render it unconscionable on the defendant to take a limitation point.

149. Arden J then dealt with an alternative case of promissory estoppel arising from some clear and unequivocal representation that the relevant defendant would not rely on any limitation defence, and held that there was no such representation on the facts of that case; see paragraph 66 of her judgment:

“66. The judge also alternatively found that there was promissory estoppel. Mr Harper submitted that if the appeal was allowed on convention estoppel the case should be remitted to the judge on the question of promissory estoppel as the facts on which he upheld this claim are not clear. We would have been in favour of this course if we had thought that there

was a reasonable prospect of promissory estoppel now being shown. However it follows from the above that in our view ARC would have to satisfy the court that there was some clear and unequivocal representation by LBH to ARC that its claim was a valid one and in addition that LBH would not rely on any statutory limitation defence. The earliest point in time for a relevant representation is said to be the letter of 17 September 1990. In our judgment this does not amount to a representation of the type required and no such representation is to be found in any later communication, when for the most part LBH rejected ARC's claim or emphasised that its claim had to be substantiated. Moreover ARC has not sought to show that the condition imposed by Mr Rippingale's letter was fulfilled i.e. that the matter was adequately dealt with by the information provided by LBH to ARC. On any view the letter dated 18 March 1994 gave notice that LBH would be relying on a limitation defence and the point made above in relation to estoppel by convention so far as that notice is concerned is as valid in relation to promissory estoppel.”

150. Arden J then dealt with a need for there to be relevant detrimental reliance on any shared assumption or representation so as to make it unconscionable for the relevant defendant to take a limitation point, and held that that did not exist on the facts of that case in paragraphs 67 to 71 of that judgment:

“67. We now turn to the question of unconscionability. This question does not as we see it arise but as we have heard a number of submissions on this question we will set out our conclusions on it.

68. Unconscionability can potentially involve a wide range of factors, including causation on which Mr Harper has particularly relied. The judge does not refer to this argument in his judgment and it may be that this point was not in fact taken as a separate issue at the trial. In a convention estoppel case, the assumption arises by inference or implication rather than from anything said expressly and this presents difficulties when it comes to showing that the party seeking to rely on the estoppel took some course on the faith of the assumption as communicated to him by the party to be estopped. Moreover the difficulties for ARC in this case are increased because on the facts found by the judge it never occurred to Mr Smith and Mr Thompson (representatives of ARC) that there might be a statutory limitation point. In those circumstances, reliance, which is here a matter of inference, cannot be shown. The further points on causation made by Mr Harper are in our judgment also sound, namely that ARC was really acting on the basis of the widely-held view of the law rather than anything LBH is shown to have said or done. In this connection, it is worthy of note that ARC's position was at all times prior to the decision of the Court of Appeal in this case on 7 April 1999 that its claim to compensation was not statute-barred, and that the question of estoppel was not raised at any time in correspondence and only emerged in ARC's skeleton argument lodged for the hearing before Mr Burnton QC.

69. Another aspect of unconscionability is the question of detriment suffered by the party asserting estoppel. In the present case the convention estoppel is not alleged to have arisen before the expiration of the limitation period in respect of phase 1. Accordingly Mr Harper submits that detriment cannot be shown. The claim to compensation was time-barred and worthless, and LBH had promised to pay ARC's surveyors' fees. There is no evidence as to the amount of loss which ARC suffered apart from the loss of its phase I claim. It may have lost a considerable amount of management time dealing with the claim or it may have to pay Strutt & Parker for the difference between their fees on Ryde's scale (which we were told vary according to the amount of compensation obtained) and fees determined on some other basis. The phase II claim may be for a significant amount. Assuming for the moment that such loss could be shown and is not trivial, it would not in our judgment be an insuperable hurdle for ARC that any estoppel arose after the expiration of the limitation period for phase 1. But clearly the amount of any such detriment would *28 be a factor to be taken into account if it had been necessary to determine the issue of unconscionability.

70. Mr King relies on the fact that if there is no estoppel LBH will be able to acquire land compulsorily for no payment. We do not consider that that is a strong point because ARC had ample opportunity to refer its claim for compensation to the Lands Tribunal before the limitation period expired.

71. Mr Harper submitted that ARC had done nothing that it would not have done to pursue its claim in any event. In so far as Mr Harper was suggesting that ARC could have incurred no detriment as a result of any convention estoppel we do not accept his point. If LBH had communicated an assumption to ARC that it would not rely on any statutory limitation period, ARC would for the reasons given above be able to claim that it had incurred expenditure that it would not otherwise have incurred. In our judgment Mr Harper's stronger point is that ARC did not rely on any communication from LBH, and that its loss was not caused by any act of LBH."

151. Mr Coulter submitted that it was implied, by the Secretary of State's conducting an investigation and suspending payments whilst doing so, that the parties assumed that, at least if CCP did not seek payment in the meantime, the period of the investigation would not count for limitation periods, and so the running of limitation would be suspended during it. Mr Coulter said that by not bringing a claim at that time, CCP had suffered relevant detriment to make it unconscionable for the Secretary of State to rely on that period for limitation purposes, even though limitation then had another three to four years to run after the end of the investigation.
152. In relation to the argument that the investigation had the effect of suspending the coming into being of the cause of action, or of a limitation period running, Mr Coulter relied on a paragraph 52 of a witness statement of Mr Williams of 3 May 2021 in the 2019 claim, which read:
- "52. In October 2014 following an investigation in response to a whistle blowing allegation received by SLC in August 2014, SLC's Counter Fraud Services (SLC CFS) discovered over 100 students or potential students at CCP that had a number of indicators of suspicious behaviour. SLC suspended payments to those students on a case by case basis under its own delegated powers while investigations took place. I understand that SLC communicated with CCP on 25 September 2014 and 8 October 2014, in order to ascertain attendance evidence for students that were registered on the SLC Portal as studying with CCP. Once SLC CFS had completed their investigations into these students, 115 of them were made ineligible for student support."
153. Mr Coulter said that this amounted to an admission that the suspension was justified so that the Secretary of State had no liability to pay while the investigation was being reasonably carried on.
154. Mr Coulter may also at one point have raised a question as to whether the running of any limitation period was restarted by part payments within the meaning of section 29 of the Limitation Act 1980. However he did not pursue that point orally and, in my view, rightly. These obligations, if they existed, gave rise to individual causes of action in relation to each relevant student and each tranche of money; this is not a case of part payments or a running account which could lead to section 29 being in point.
155. Mr Coulter also, in his final submissions, referred to section 32 of the Limitation Act 1980, providing for new limitation periods where there has been a deliberate concealment(s) of facts required to advance a cause of action or the claim is based on a mistake. However, I do not see any evidence before me which could support an assertion of deliberate concealment of any key fact required to plead CCP's case. Also, I see no basis to say that CCP's claims were in any way based on a mistake. Mr Coulter did in fact not press section 32 of the Limitation Act and I think he was right not to do so.
156. Mr McGurk submitted that for an investigation to prevent a cause of action arising, or to cause it to be suspended, would require an implied term and there was simply no basis to imply such a term in any direct contract or also in relation to the student contract. He

referred to the well-known principles on which the Court makes implications; see, for example, *Cine UK Ltd v BNY Mellon (International) Ltd* [2022] EWCA Civ 1021, paragraphs 55 and 137 to 140; and in particular that such an implication (a) must be of a term which would be fair and reasonable And (b) would require either obviousness or a necessity for it to be made in order for there to be business efficacy And (c) the implication must not be inconsistent with the underlying contract or statutory scheme. Mr McGurk also submitted that where Parliament wishes to create suspensions of limitation periods during investigations in the context of a statutory scheme, Parliament tends to use an express wording to such effect, as, for example, appears in section 47F in paragraph 21 of Schedule 8A to the Competition Act 1998 (although the relevant amendment to that Act postdated the statutory provisions with which I am concerned).

157. In my judgment, this point also leads me to the conclusion that it has been shown that CCP has no real prospects of success because, in my view, the original claim was clearly brought out of time and, accordingly, would be limitation barred. It seems to me that CCP has no real prospects of succeeding in showing that it was brought in time and that there is no compelling reason for a trial. It may also render the claim as being an abuse, but I would not seek to strike out separately on this ground where reverse summary judgment seems to me to be more appropriate.
158. I so conclude for the following reasons. Firstly, I have not seen any material, and have not been taken to any provision of the Regulations or the statute, which would confer any power on the Secretary of State not to make payments in relation to tuition fees just because the Secretary of State was conducting an investigation where the outcome of the investigation could demonstrate that the Secretary of State would not be bound to pay but where, in fact, that has not been the outcome.
159. Secondly, it seems to me that that would require an implication into the statutory scheme, which would be contrary to its expressed purpose of funding the students' liabilities for tuition fees to their course providers; here, CCP. It seems to me that there are no grounds for such an implication. Firstly, because it does not seem to me that it is even fair and reasonable to make such an implication; if the Secretary of State has no actual right to resist payment, it does not seem to me that it is fair to the student, or to CCP, for the Secretary of State not to pay on time just because the Secretary of State thinks, reasonably, they might have a right to resist payment. It would leave the student in the position that they could be sued by CCP in the meantime; and, if CCP did have a direct contract with the Secretary of State, it would leave CCP out of pocket and with its business model disrupted without any actual justification and without any potential for CCP to be compensated, even by a payment of interest. However, secondly, it seems to me that it simply cannot be demonstrated that such a term would be necessary for business efficacy or obvious. If the Secretary of State's worries are well-founded then the Secretary of State can refuse to pay because the Secretary of State is not, and will not, be liable to make payment. If the Secretary of State's concerns are not well-founded then the Secretary of State should pay.
160. Thirdly, although this is merely a further consequence of what I have already said; it seems to me that such an implication would cut across the statutory scheme for the reasons which I have given.
161. There is, fourthly, the Competition Act analogy point to the effect that Parliament will adopt a practice of imposing a limitation suspension where it considers that to be appropriate, and which is a factor to bear in mind as to whether or not an implication can be made where there is silence. However, it seems to me that I do not have to rely on that point, but that the case for implication will clearly fail for the reasons I have already given.
162. I do note, and have considered, Mr Coulter's points with regards to the contents of Mr Williams' witness statement of 3 May 2021. However, firstly, it seems to me that Mr Williams' reference to delegated powers is referring here to the Student Loans Company's powers which have been delegated to it by the Secretary of State.

It does not define what power is meant. It seems to me that the natural construction of the witness statement is that it is referring to the Student Loan Company's power to administratively prevent the payment being made, since the Student Loan Company is the entity that enters into the student contract and operates it as delegee of the Secretary of State rather than some statutory power to refuse to make the payment altogether. Secondly, in any event, the witness statement does not identify the relevant power and, even more importantly, it does not suggest that exercising it will have any effect in limitation law. Thirdly, the question before me is one of law, whatever Mr Williams and the Secretary of State may have thought. Fourthly, in any event, firstly, that witness statement was only in relation to 115 students whose claims were altogether refused and therefore does not seem to me to be relevant to this particular claim. Secondly, the witness statement refers to the investigation process being concluded in 2014, which is more than six years prior to the issue of this claim form. Therefore, any suspension to which that witness statement referred, seems to me to be irrelevant; it is not about the matters investigated in 2015 and perhaps also in 2016.

163. I do, however, also note and have considered that, during the August 2022 hearing, Mr McGurk accepted that there would be some sort of ability of the Secretary of State to withhold payments while carrying out a reasonable investigation on the basis of some sort of application of public law. He also accepted at that point that that would lead to an implied provision in any contract which might exist to suspend payment during the currency of such circumstances. When Mr Coulter sought to take advantage of this to say that it would lead to a suspension of limitation periods, Mr McGurk resiled and said that there would be no implied contractual provision, although I am unsure as to what his position would be as to the situation in public law. However, he did make clear that the Secretary of State's case was that any such suspension would not have effect to suspend a limitation period.
164. For the reasons I have already given, I have considerable doubts whether the Secretary of State would have any right to suspend payments in public law (and so as to be able to resist a judicial review in the event of non-payment) and would be inclined to find that such was not the position should I have to do so in the light of my analysis of the statutory scheme and my reasoning above. I would rather see such public law right (if it existed) only as a freestanding basis for resisting judicial review, and I refer to this further below. However, while I have borne this aspect in mind, a more important question which I have to consider is whether the Court should imply into the student contract itself a contractual term for a suspension of an obligation to pay during the course of a reasonable investigation so as to affect the operation of the Limitation Act 1980, and which, for the reasons given above, I do not think that I should do. I do not see that whatever might be the position in public law should affect my conclusion as to contractual limitation with regard to the enforcement of the student contract against the Defendant at contractual common-law by ordinary CPR Part 7 Claim.
165. It seems to me also that there is no basis to imply any term into any direct contract that might exist between CCP and the Secretary of State to that effect i.e., that where the Secretary of State is acting reasonably in investigating allegations and decides to suspend making payments during that period, notwithstanding the allegations are actually ill-founded or otherwise the situation is not actually such as to justify non-payment, any cause of action either does not come into existence or has its limitation suspended. That is in particular for the following reasons. Firstly, I do not see such a term as being fair and reasonable for the same reasons as I gave above with regards to the statutory scheme and the student contract.
166. Secondly, in any event I do not see it as either necessary or obvious, again for the reasons given above. The Secretary of State can take the risk of not paying, and seek to defend any claim which might be brought, as in some circumstances might also the student on the basis of their asserting the truth of the allegations. However, if the Secretary of State fails to

make out the truth of the allegations, I see no reason why it would be obvious or necessary to give business efficacy to the direct contract to have implied a term that the Secretary of State should have been able in the meantime to withhold the money, or to avoid paying interest or any other compensation for the delay in payment.

167. Thirdly, I have found above that there is no such term in the student contract. It would be odd if the situation was different as far as the student was concerned from CCP.
168. Fourthly, even if there was a public law power to suspend, and which I very much doubt as I have said above, it seems to me it would be purely an administrative and/or public law matter which might possibly, for example, enable the Secretary of State to resist a judicial review. However, I do not see why any such situation should invade and effect a direct contract relationship. I accept that such a contract would need to be seen within its statutory and public law context but, as I have said; firstly, I doubt that any such public law power would exist in the first place; and secondly, if it did exist, it seems to me that it would be purely administrative rather than legal and affecting the accrual or continuance of their causes of action.
169. Fifthly, I do also note that if the Secretary of State did not pay and a claim was brought in the County Court or the High Court, then the Court might well, if it considered the circumstances to be appropriate, decide to adjourn the resulting proceedings pending the progress and outcome of the investigation; but that does not lead to a conclusion that the proceedings would not have been properly issued, or that a limitation period would not be and have been running, it would be just simply a case management decision.
170. Finally, in a limitation context there is a difference between the concept of accrual of cause of action and a suspension of an obligation to pay. There are many situations where a cause of action arises and accrues for limitation purposes, but a party cannot sue until something else occurs. However, for limitation purposes, time still runs from the original accrual. For example, under section 69 of the Solicitors Act 1974, the solicitor has to deliver a bill and wait one month before an action can be brought, but that does not prevent the six-year limitation period running from when the underlying work was done; see the White Book notes 7C-105 and cases there cited. It seems to me that even if there was a suspension of the right to sue the Secretary of State through the time of a reasonable investigation, that would not prevent time running for limitation purposes. However, that is a separate point and, in any event, it does not seem to me the necessary implications exist to have the suspensory effect which Mr Coulter seeks to demonstrate in this case.
171. I turn to the estoppel point. Mr McGurk cited later cases to *Hillingdon* in the area of estoppel of convention, *ABN Amro Bank NV v RSA Insurance and Ors.* [2021] EWCA Civ 1789 and *Tinkler v Commissioners for Her Majesty's Revenue and Customs* [2021] UKSC 39? in order to submit that the law of estoppel by convention requires some, "crossing of the line", by a party, which is relied on by the other side to their detriment so as to make it unconscionable for the first party to take a point, here limitation. The question of what amounts to such a, "crossing of the line", or other relevant conduct can be difficult and fact specific, but I do not see that that matters here because of a number of overriding points.
172. Firstly, the Secretary of State never communicated anything about limitation; all the Secretary of State said was that they were not paying while they were investigating. There seems to me to be no basis for any contention that in some way there was a "crossing of the line" upon which the Claimant could have properly relied so as to give rise to any estoppel.
173. Secondly, and perhaps even more importantly, the Secretary of State finished the investigations in 2016 and made clear, from at least 2017 onwards, that the Secretary of State was not paying any more money; thus, CCP had plenty of time after 2017, including in 2019, to bring a claim, or, at the end of 2019, and perhaps even in early 2020, to bring a counterclaim in the 2019 claim (which under section 35 of the Limitation Act 1980 would have related back to the 2019 issue date of the 2019 claim; it being a first counterclaim rather than a new claim). However, CCP did not do any of these things. I do

not see there as being any scope for any contention of detrimental reliance here, even if there had been a conventional representation contrary to my earlier expressed view. It seems to me that the situation is the same as was set out in paragraph 64 in *Hillingdon*.

174. I further think that the estoppel point fails in any event because I cannot see anything unconscionable in the Secretary of State taking the limitation point. CCP was not lulled into not suing because of something which happened in the limitation period which meant that CCP had engaged in that thing and allowed limitation to pass. On the facts before me, it seems that CCP simply decided not to bring its claim for years after the investigation ended and after the Secretary of State had made their position clear; that is to say CCP may have misunderstood the law as to limitation, but that is not the result of anything that the Secretary of State has said or done, or did.
175. For all those reasons, it seems to me that the claim, even the direct contract claim as contained in the existing particulars of claim, was issued outside the limitation period; it is clearly limitation barred and I would grant reverse summary judgment on that basis also.

The student contract 1999 Act argument and proposed amendment

176. I turn next to the proposed amendment. That proceeds on the basis, firstly, that there was a contract, being a student contract between the student and the Secretary of State for the Secretary of State to pay the amount of the tuition fees to the course provider; that is to say CCP. Secondly, that CCP is entitled to enforce the Secretary of State's obligations to pay CCP contained in the student contract under the 1999 Act.

The 1999 Act

177. Section 1 of the 1999 Act into this judgment reads as follows:

“1 Right of third party to enforce contractual term.

(1) Subject to the provisions of this Act, a person who is not a party to a contract (a “third party”) may in his own right enforce a term of the contract if—

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).

(6) Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.

(7) In this Act, in relation to a term of a contract which is enforceable by a third party—

“the promisor” means the party to the contract against whom the term is enforceable by the third party, and

“the promisee” means the party to the contract by whom the term is enforceable against the promisor.”

178. Section 2 of the 1999 Act reads as follows:

“2 Variation and rescission of contract.

- (1) Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if—
 - (a) the party has communicated his assent to the term to the promisor,
 - (b) the promisor is aware that the third party has relied on the term, or
 - (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.
- (2) The assent referred to in subsection (1)(a)—
 - (a) may be by words or conduct, and
 - (b) if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him.
- (3) Subsection (1) is subject to any express term of the contract under which—
 - (a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party, or
 - (b) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1)(a) to (c)
- (4) Where the consent of a third party is required under subsection (1) or (3), the court or arbitral tribunal may, on the application of the parties to the contract, dispense with his consent if satisfied—
 - (a) that his consent cannot be obtained because his whereabouts cannot reasonably be ascertained, or
 - (b) that he is mentally incapable of giving his consent.
- (5) The court or arbitral tribunal may, on the application of the parties to a contract, dispense with any consent that may be required under subsection (1)(c) if satisfied that it cannot reasonably be ascertained whether or not the third party has in fact relied on the term.
- (6) If the court or arbitral tribunal dispenses with a third party’s consent, it may impose such conditions as it thinks fit, including a condition requiring the payment of compensation to the third party.
- (7) The jurisdiction conferred on the court by subsections (4) to (6) is exercisable in England and Wales by both the High Court and the county court and in Northern Ireland] by both the High Court and a county court.”

179. Mr McGurk’s first argument is that he submits that section 1 of the 1999 Act does not assist CCP and so that CCP cannot use the 1999 Act contract to get round its primary problem that CCP is not a party to, and hence cannot sue at common law on, the student contract.
180. It is common ground that the student contract neither includes nor excludes the 1999 Act expressly.
181. The parties cited to me, originally, *Dolphin Maritime & Aviation Services Ltd v Sveriges* [2009] 1 CLC 460. This decision arose from a situation where a ship owner in a club was pursued by insurers of cargo owners who had suffered losses due to a collision said to be the fault of the ship. Insurers instructed agents who negotiated a settlement contract for the club to pay the insurers by paying sums to the agents. The club and the insurers then agreed for the payment to be made direct to the insurers, but the agents, who as a result lost access to the money from which they wished to take their fees, although they could have sued the insurers for their fees, for jurisdictional reasons preferred and sought to sue the club in this jurisdiction.
182. One of the agents’ arguments was that the 1999 Act enabled them to sue for breach of the provision in the contract between the insurers and the club that the money should be paid to the agents. Christopher Clarke J, as he then was, considered first whether the agents,

Dolphin, could satisfy section 1(1)(b), that is to say whether the contract purported to confer a benefit on Dolphin; and secondly, whether it appeared in any event that section 1(2) applied, that is to say whether the parties did not intend the relevant term to be enforceable by Dolphin.

183. Paragraphs 66 to 84 of Christopher Clarke J's judgment read as follows:

"The submissions

Dolphin

66 The LOU [letter of understanding i.e. the settlement contract] does not expressly provide that Dolphin may enforce it. Dolphin submits that it has a good arguable case that the contract purports to confer a benefit on it and that it does not, on its proper construction, appear that the parties did not intend the term providing for payment to Dolphin not to be enforceable by it.

67 As to the former, Dolphin stood to benefit from the receipt of money to itself because such a payment would give it security for its claim to commission. As to the latter, there is, it is submitted, nothing in the LOU to indicate that the parties did not intend it to be enforceable by Dolphin. The fact that the LOU is addressed to Dolphin is a strong indication that it was intended to be enforceable by Dolphin.

68 In developing his submissions in this respect Mr Bright postulated three different situations:

- (i) A agrees with B to pay C \$ 8,500,000;
- (ii) A agrees with B to pay B by making a payment of that amount to a specified account of B at C's bank;
- (iii) The present case.

69 In the first case the payment is plainly for the benefit of C and, all other things being equal, C is entitled to enforce the term against A. In the second case, as he submits, whilst in a sense the payment benefits C (since the bank may have a right of set-off in respect of monies paid into the bank account and will, in any event, benefit from having the funds deposited with it) most people would regard the agreement as providing simply for payment to B. It would not be in their immediate contemplation that the bank would benefit and the bank would not, generally, be entitled to recover. Thus the prospect of a flood of potential claims by banks and other designated recipients (solicitors, agents, etc), which Mr Thomas relies on as sound reason for rejecting any claim to the applicability of the Act, can be disregarded.

70 In the present case the negotiations for the LOU took place, not between A (the underwriters) and B (the Club) but between C (Dolphin), on A's behalf, and B. Dolphin is the addressee of the LOU. The LOU calls for payment to Dolphin on the underwriters' behalf— not to the underwriters (B) at their bank. Further the LOU must like all contracts be construed in its factual matrix. There is evidence in Mr Brown's witness statement that provisions such as those found in the standard terms are standard practice for recovery agents and are adopted so that they do not run the risk of not receiving their fees. If that is so, it lends support to Dolphin being entitled to enforce against the Club.

The Club

71 Mr Thomas submits that the LOU does not purport to confer a benefit on Dolphin and that, on its true construction, the parties did not intend its terms to be enforceable by Dolphin. A distinction is to be made between an intention to confer a benefit and the mere fact that a person may incidentally gain some benefit from the performance of a particular term in the contract between two others. The present case falls into the latter category.

Discussion

72 In *Prudential Assurance Co Ltd v Ayres* [2007] EWHC 775 Lindsay J held that section 1 (1) (b) of the Act was satisfied if, on a true construction of the term in question, its sense

had the effect of conferring a benefit on the third party in question, and that there was within section 1 (1) (b) no requirement that the benefit on the third party should be the predominant purpose or intent behind the term. In that case the term in question was a provision in a deed between a landlord and the assignee of a lease, which was a firm, that the liability of the assignee for future rent should not extend to the personal assets of the partners and that any recovery by the landlord against the assignee or “any previous tenant” for default under the lease was limited to the assets of the partnership. The previous tenant sought to enforce this provision when sued by the landlord for arrears of rent (the assignee having failed to pay). Lindsay J held that the previous tenant was entitled to enforce this provision against the landlord (itself a lessee of a superior landlord).

73 The Court of Appeal reversed this decision holding that the relevant provision, properly interpreted, did not purport to confer a benefit on the previous tenant but to restrict the rights of the landlord and the previous tenant against the assignee. In those circumstances no question of the application of the 1999 Act arose.

Section 1 (1) (b)

74 A contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed. The reference in the section to the term purporting to “confer” a benefit seems to me to connote that the language used by the parties shows that one of the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party.

75 In my judgment the term in question does not purport to confer a benefit on Dolphin in the sense meant by section 1 (1) (b) of the 1999 Act. The provision in the LOU that payment should be made to Dolphin or underwriters’ solicitors was an agreement as to the means by which the Club’s obligation to underwriters was to be discharged. It was not an indication that the agent payee was an intended beneficiary of the promise. The intended beneficiaries were the underwriters on whose behalf the payment was to be received.

76 A provision for payment of a sum to an agent on his principal’s behalf is to be contrasted with an agreement by A and B that A will pay C (C not being A’s agent or trustee)⁴. Further, the fact that payment is to be made either to one company (Dolphin) or any firm or company in a specified category (underwriters’ solicitors) seems to me to indicate that it is not the purpose of the provision to benefit Dolphin or the solicitors rather than to specify the appropriate mode of payment.

77 Even if it be established that recovery agents usually deduct their commission from the recovery and agree with their clients that the recovery should be paid to them that would not in my judgment transform this agreement into one whose purpose was to confer a benefit on Dolphin. There are, no doubt, many agents who habitually deduct their fees or commission from the recovery that they make. That is not, in my judgment, sufficient to make an agreement to pay an agent on behalf of his principal an agreement which purports, so far as the contracting parties are concerned, to confer a benefit on the agent for the purposes of section 1 (1) (b) of the 1999 Act.

Section 1(2)

78 If I am wrong on that, then the next question is whether, on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by Dolphin. The practical efficacy of any right of enforcement would necessarily be dependent on the settlement monies not being paid to any solicitor appointed by the underwriters. Payment to such a solicitor would not be contrary to the LOU which expressly contemplates such a payment. The question also arises as to whether the LOU prohibits the Club making payment to the underwriters' own bank account and whether, if payment is so made, it would operate as a discharge of the Club's obligations.

79 It seems to me unreasonable to suppose that the parties to the LOU intended the provision for payment to Dolphin or some solicitor of the underwriters to preclude payment to the underwriters direct. If, however, the contract must be construed as having that effect, the next question is whether the parties could vary that agreement by agreeing to make and receive payment direct. Dolphin must necessarily contend that section 2 of the Act prevents such a variation since, if the parties were entitled to vary the agreement, they must be taken to have done so by asking for and making payment to the underwriters.

80 It appears to me unrealistic to suppose that, by agreeing that the Club would pay Dolphin or any solicitors appointed by the underwriters (an expression which Mr Bright suggested should be interpreted as extending to US attorneys in view of the action commenced in New York), the Club and the underwriters intended that Dolphin should, where no solicitors had been appointed by the underwriters, have an enforceable right to require payment of the settlement monies to it, with the result that, although the underwriters could, consistently with the LOU, appoint solicitors and ask the Club to pay them, they could not without breaching Dolphin's rights under the LOU legitimately agree with the Club that it should be paid direct.

81 If such a right was intended to exist it is unclear what the position would be if a solicitor or solicitors were in fact appointed by the underwriters. It would be surprising if, Dolphin, assuming it had a right beforehand, would now have no right at all. If, in those circumstances, it had any right it would, presumably, be a right held jointly with the solicitor(s) to have the settlement monies paid either to Dolphin or an appointed solicitor. Whether or not that right would be of any value would presumably depend on whether it could be established that, if Dolphin had not paid the underwriters direct, it would be more likely to have paid Dolphin. It is unrealistic to suppose that the parties contemplated this issue ever arising.

82 In short, I do not regard it as well arguable that the parties to the LOU intended (or do not appear not to have intended) that the provision for payment to Dolphin or the solicitors should be enforceable by Dolphin and/or any appointed solicitors. On the contrary that provision appears in its commercial context to be a standard provision as to the mode of discharge of an obligation undertaken for the benefit of the underwriters. The parties were not concerned to give Dolphin or any appointed solicitors some right of enforcement. They simply wished to provide for how the benefit to be conferred on the underwriters under any judgment or agreement was to be made.

83 The fact that the LOU was addressed to the cargo interests care of Dolphin does not, in my view, indicate any intention that Dolphin should be a kind of quasi-party, as Mr Bright put it. On the contrary it appears to distinguish between (i) those who are parties and beneficiaries of the obligations contained in the LOU, namely the Club and the Cargo Interests, and (ii) a company which acts on the underwriters' behalf for the purposes of receipt of the monies due under the LOU.

84 In short, although Mr Bright seeks to put this case in his third category it is, as it seems to me, in the same category as that of A who agrees to pay B at B's bankers, C."

184. After reserving judgment in this case, judgment was delivered by the Court of Appeal in *Secretary of State for the Home Department v Cox* [2023] EWCA Civ 551. As I have said above, I therefore permitted further oral submissions with respect to that judgment and its consequential effect on the parties' contentions before me. In that case, government employees were held to have entered into contracts with their government departments which provided that they could opt to have elements of their salaries paid directly to their trade unions or others; in the case of the trade unions, in order to meet the employees' own union subscriptions. The question arose as to whether the trade unions who were not party to those contracts of employment, although they did have other non-binding agreements made directly between them and the government departments, could enforce the provisions contained in the employees' contracts of employment under the 1999 Act. In the majority of the Court of Appeal were Lewis LJ, and Underhill LJ; Stuart-Smith LJ, dissenting on the facts.
185. In his judgment, Lewis LJ, firstly considered counsel's essential submissions in paragraphs 66 to 67, which I read into this judgment as follows:
"Submissions

66. Mr Sheldon submitted that the term in the contract of employment was not intended to be enforceable by PCS. First, he submitted that on a proper construction of section 1(2) of the 1999 Act, having regard to section 6(c) of the Interpretation Act 1978, "parties" meant "either party". The employer in the present case would not have intended the provision governing check-off to be enforceable by the trade union. Secondly, he submitted that the judges below erred in treating as irrelevant the fact that the contractual provision owed its origin to a collective agreement which was not intended to be enforceable as between the union and the employer. That was part of the factual background to the making of the contract of employment and so was relevant having regard to the approach to interpretation set out in, amongst other cases, *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 WLR 896 and *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. Given that the collective agreement would not have been intended to be enforceable by the union or employer, it would not have been the intention of the parties to the individual contract of employment which incorporated that collective agreement that the terms of the contract of employment could be enforced by the trade union.

67. Mr Segal submitted that the effect of the 1999 Act was to create a rebuttable presumption whereby, if a term purported to confer a benefit on a third party, the term would be enforceable by the third party unless on the proper construction of the contract both parties did not intend the term to be enforceable by the third party. The fact that the term derived from an historic collective agreement was irrelevant in seeking to infer the intention of the parties to the contract of employment. Further, the fact that the collective agreement would have been unenforceable as between the parties to that agreement shed no light on whether the parties to the contract of employment would have intended the term of that contract to be enforceable. There was nothing in the material context, or the terms of the contracts of employment entered into after 11 May 2001 (when the material provisions of the 1999 Act came into force), that implied that PCS should not be entitled to enforce the benefit conferred on it by the check-off provisions."

186. He started his discussion of the law in paragraph 68:
"Discussion

68. The issue in this case involves the proper interpretation of section 1 of the 1999 Act. That involves considering the words of the statutory provision, read in context and having regard to the purpose underlying the statute, and bearing in mind any legitimate aids to statutory interpretation,”

187. He then cited section one of the 1999 Act and referred to the Law Commission report which gave rise to it. He then set out his general analysis in paragraphs 75 to 77 of the judgment: “75. The following observations can be made. First sub-sections 1(1)(b) and (2) of the 1999 Act need to be read together. The ultimate question is to determine whether the parties to a contract intended that a contractual term should be enforceable by a third party. Sub-section 1(1)(b) concerns whether the term purports to confer a benefit on a third party. Sub-section 1(2) concerns the qualification, namely that the contractual term will not be enforceable if the parties to the contract did not intend the term to be enforceable by a third party. It is unlikely that the fact that the qualification is expressed in the negative (“that the parties did not intend the term to be enforceable by the third party”) will materially affect the outcome in a particular case. The likelihood is that courts will be in a position to determine whether, on the proper construction of the contract, the term was or was not intended to be enforceable by the third party.

76. Secondly, it should be borne in mind when considering the applicability of subsections 1(1)(b) and (2) that the contract may not expressly deal with the question of whether the contractual term is intended by the parties to be enforceable by a third party. If the contract did expressly provide that the term was to be enforceable, the situation would fall within section 1(1)(a). If the contract expressly provided that the term was not intended to be enforceable that would provide a clear answer to the question posed in subsections 1(1)(b) and (2). Those subsections, however, are also intended to include situations where the contract does not expressly deal with the question of enforceability of a term by a third party.

77. Thirdly, against that background, the question is what was the common intention of both parties, objectively ascertained, “on a proper construction of the contract”. I reject Mr Sheldon’s submission that section 1(2) means that it is sufficient if one of the parties to the contract did not intend the term to be enforceable by a third party.”

188. He then referred to authority on the approach of construing contracts and arriving at the meaning of contracts in paragraphs 78 to 80 of his judgment: “The Proper Approach to the Interpretation of the Contract

78. The process for interpreting contracts is well established. As Lord Hoffmann observed in *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 WLR 896 at pages 912 to 923, the process of interpreting contracts involves:

“... the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”

79. Similarly, in the context of construing a settlement agreement, Lord Bingham observed in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at paragraph 8 that:

“..... 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 course.”

80. To like effect, in the context of the construction of leases, Lord Neuberger said at paragraph 15 of his judgment in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 that:

“15.

When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* [1971] 1 WLR 1381, 1384-1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* (trading as HE Hansen-Tangen) [1976] 1 WLR 989 , 995-997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 , para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011] 1 WLR 2900, paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC.”

189. In this context I add paragraphs 118 to 119 of Underhill LJ, judgment:

“118. Section 1 (2) provides explicitly that the question of what appears to have been the parties’ intention about third-party enforceability is to be determined “on a proper construction of the contract”, i.e. applying the ordinary rules for ascertaining the objective meaning of a contract. I agree with Lewis LJ that it follows that we must reject Mr Sheldon’s argument that if it appears that only one of the parties would not have intended third-party enforceability that is sufficient for the purpose of the subsection. The intention in question must be the common intention of both parties.

119. Since, *ex hypothesi*, in a section 1 (2) case the express words of the contract do not provide for third-party enforceability, the Appellants’ case that it “appears that” the parties did not have the necessary intention has to be established by reference to the context, or factual matrix, to the extent that that is in accordance with the usual contractual principles. As to that, Lewis LJ identifies the key authorities at paras. 78-80 above, but perhaps reference should be made also to *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1175, which is the culmination of the recent series of cases on this topic in the Supreme Court.”

190. Lewis LJ then considered the application of those principles to the facts of that case, albeit also referring to general principle as he did so in paragraphs 81 to 83 of that judgment: “The Application of the 1999 Act to the Facts of the Present Appeals

81. Against that background, I consider the application of section 1(1)(b) and (2) of the 1999 Act to the facts of these appeals. It is accepted that the contractual term in question purports to confer a benefit. The issue then is to ascertain the intention of the parties, having regard to the factual context and the wording of the contract.

82. First, the factual background is a relevant factor in the ascertainment of the intention of the parties. In that regard, the context is that the employer and the union entered into a non-legally enforceable collective agreement. So far as the provisions of the collective agreement were intended to give rise to rights that were to be enforceable by individual employees, the terms of the collective agreement would need to be incorporated into the individual contracts of employment. The context therefore was not, in truth, a situation where the parties to the contract of employment were seeking to confer a benefit on a third party. Rather, the situation was the reverse. The third party and the employer had agreed that certain benefits should be conferred on the employee and the contract of employment incorporated the relevant provisions of the collective agreement in order to ensure that the employees were able to enforce their right to those benefits. That factual background is a relevant, albeit not conclusive, factor in the construction of the contract of employment. It would not be correct to take the view that, as a collective agreement was not intended to be enforceable by a trade union, then the parties to a contract of employment could never have intended that provisions included in that contract but originating in the collective agreement were to be enforceable by the trade union. The judges below erred, however, in considering that the fact that the contractual provisions originated in a collective agreement, that was not intended to be enforceable by the union, was irrelevant. The context is relevant and is a pointer that the parties to the contract of employment were not intending that the provisions be enforceable by the trade union. Rather, the parties were concerned with a different issue, namely ensuring that the provisions would be enforceable by the employees against the employer.

83. Secondly, it is important to consider the words of the contractual term. It is appropriate first to consider the nature of the contractual term. Here the term provides that the employer will offer a facility to the employee, that is, if the employee wishes, he or she may authorise the deduction of money for payment to specified bodies, including trade unions. The contractual provision therefore concerns the offering of a facility to the employee. It is not concerned, for example, with providing that a sum of money will be paid to a named, identified beneficiary or class of beneficiaries. It may well be (as the employers accept) that the offering of a facility to the employee may purport to confer a benefit on the unions because, if employees do authorise deductions for payment of union subscriptions, the employer will hand over the subscription to the union. The nature of the contractual provision, however, is to ensure that the employer offers a facility to the employee.”

191. He applied his approach of principle to the contractual terms for deductions to be made to third parties in paragraphs 84 to 85 of that judgment:

“84. The nature of the contractual term appears from the language used in the provisions that were incorporated into the individual contracts of employment. In the Code, for example, paragraph 4051 talks of a “civil servant who wishes to authorise deductions from his pay for any of the purposes or organisations listed”. The CSMC talks of circumstances where “departments and agencies offer arrangements for

deducting subscriptions to trade unions”. The HMPO handbook in Cox provides that the department “will if you so authorise make deductions from you salary for direct payment” to certain specified organisations. The other staff handbook is to like effect (see paragraph 11 above). In the handbook relevant to the second claimant in Crane, the handbook provides that there “are facilities for the deduction from pay, at the request of staff, of periodic payments to organisations with which the Agency has arrangements for the collection and remittance of payments”. Further “members of staff can arrange for trade union subscriptions to be paid directly from their salaries”. Similar provisions apply to the other two individual claimants in that case. In the case of HMRC, the staff handbook applicable to two of the individual claimants provided that the employee “may have deductions from salary or wages for premiums or subscriptions to the following organisations” which are then listed. The provisions applicable to the other individual claimants provided that there were “arrangements with a number of charities, companies and organisations to make voluntary deductions from pay.”

85. The contractual term in question, therefore, is one that involves the employer offering a facility to employees who may, if they wish, authorise deductions from pay for a variety of purposes.”

192. He then again applied principle to the facts of that case and concluded, in firstly paragraph 87 of that judgment:

“87. The contractual provisions have to be considered as a whole. The provisions oblige the employer to offer a facility whereby employees can request deductions be made from their wages and paid directly to other organisations. The question is whether the obligation to offer that facility to employees was an obligation that was meant to be enforceable by the employees only, as the parties did not intend that the ultimate recipient of any authorised deductions should be able to enforce the provision requiring that employees be offered that facility. In context, it is difficult to see why the parties would take a different view as to the ability of third parties to enforce that contractual provision depending on the identity of that third party or the purpose for which the deduction was to be used. A more natural inference is that the parties intended the contractual provision to be enforceable by the employees and not by any third party who might ultimately be the recipient of any authorised deduction.”

and then in paragraph 88 of that judgment:

“88. In summary, therefore, the contractual provision in question was not intended by the parties to be enforceable by a third party. That follows from the context in which the contractual provisions came to be included in the contract of employment, the nature of the contractual term, in that it offered a facility to employees, and the likelihood that the parties could not have intended the term to be enforceable by all the possible recipients of authorised deductions. On a proper construction of the contract, therefore, the contractual term was one that was not intended to be enforceable by third parties. I would allow the appeals on this ground.”

193. Stuart-Smith LJ, dissented on the facts but not on the law; with regards to the law, he referred to that in paragraphs 100 to 101 of that judgment:

“100. There is no doubt about the mischief that the 1999 Act was intended to address. The mischief was the hardship caused by the common law’s strict adherence to the third party rule that, subject to limited exceptions, a contract made between A and B as the parties to the contract did not confer rights on someone else (C) who was not a party to the contract

but was a third party. That appears from the heading of section 1 (“Right of third party to enforce contractual term”) without the need to refer to the Law Commission’s Report which, as Lewis LJ explains, identifies the purpose of the Law Commission’s proposals in similarly clear terms.

101. Equally, there is no doubt about the means by which the 1999 Act sought to address the mischief. For present purposes, it did so by section 1(1) and (2), the terms of which are clear even if their application may give rise to difficulties. I agree that there are two mutually exclusive categories of case that are of interest in this appeal. The first is those that arise under section 1(1)(a), which enables the third party to enforce a term of the contract if the contract expressly provides that they may. By contrast, sections 1(1)(b) and 1(2) are directly applicable to the facts of the present case because it is common ground that (i) the relevant term of the Claimants’ various contracts with their departmental employers purported to confer a benefit upon the third party PCS; but (ii) the contracts do not expressly provide that the third party may enforce the relevant term. The consequence is that the term is enforceable by PCS unless “on a proper construction of the contract [i.e. the Claimants’ various contracts with their departmental employers] it appears that the parties [i.e. the Claimants and their respective departmental employers] did not intend the term to be enforceable by the third party [i.e. PCS].”

and set out his approach to the 1999 Act in paragraphs 102 to 104:

“102. This provision has been described, correctly in my view, as establishing a “rebuttable presumption.” It was so described in the Law Commission Report: see sections 7.5, 7.17 and 7.18(iii). It is also plain from the words of the statute, without recourse to that Report. Two points may be made at this stage. First, the presumption is not dependent upon the actual (subjective) intentions of the parties; still less is it dependent upon the intentions of the third party. *Chudley and Ors v Clydesdale Bank plc (trading as Yorkshire Bank)* [2019] EWCA Civ 344, [2020] QB 284 may be seen as an illustration of this point: see Davies, “Excluding the Contracts (Rights of Third Parties) Act 1999”, 2021 LQR Vol 137, 101, 106, 111-112.

103. Second, it is obvious, and has often been observed, that the surest and simplest means of rebutting the presumption is expressly to exclude it. Excluding the effect of section 1(1)(b) of the 1999 Act is obviously the prudent and simplest course for those parties who do not intend the term in question to be enforceable by the third party. It is the course that has been routinely adopted by parties having the benefit of competent legal advice ever since the 1999 Act came into force; and it was treated as a given by Longmore LJ at [92] of *Chudley*. The point was made early on by one of the Law Commissioners, then Andrew Burrows QC, in his article “The Contracts (Rights of Third Parties) Act 1999 and its implications for commercial contracts” [2000] LMCLQ 540, 542, 544; and see Davies *op cit* 101; *Wilmot-Smith on Construction Contracts* 4th Edition, para. 4.45 (“almost as a matter of routine” in development agreements); and *Cannon & McGurk Professional Indemnity Insurance*, 2nd edition para. 13.78 (professional indemnity policies providing that third parties shall not be entitled to enforce their terms). I take it as a given that the departmental employers (and the Claimants) in these cases have always had access to competent legal advice.

104. In the present case, no attempt was made to address the question of enforceability expressly, either so as to bring the case within section 1(1)(a), or so as to rebut the presumption of enforceability. The reasons why the parties said nothing on the point may

not matter: but a ready explanation may be found in the fact that, even after the decisions in *Cavanagh and Hickey v Secretary of State for Communities and Local Government* [2013] EWHC 3163 (QB) (where Popplewell J held that the employees in that case had a contractual right to require their departmental employer to continue to pay their union dues by way of check-off), the departmental employers in the present cases continued to dispute that the check-off provisions gave rise to any contractual obligations at all. Had they been right about that, no question of third party enforcement could have arisen; but they were not, and it did.”

194. He then referred to the question of whether the contract before the Court of Appeal, “purports to confer a benefit”, on the trade union in paragraph 105 of that judgment:
“105. The nub of the dispute, and where I disagree with the majority, is whether on a proper construction of the contract it appears that the parties did not intend the term enforceable by the third party. I agree that the contractual provision in question concerns the offering of a facility to employees, the facility being that their employers would deduct their subscriptions at source and pay them direct to PCS. But this does not determine the issue we have to decide, because it is common ground that, in addition, it purported to confer a benefit on PCS, namely the right to receive the proceeds of check-off in cases where members have taken the necessary steps to avail themselves of the facility. It is that purporting to confer a benefit on PCS that brings the Act into play and generates the rebuttable presumption. Put in slightly different words: the consequence of the contractual check-off obligation owed by the departmental employers to the claimants was a rebuttable presumption that PCS was entitled to enforce the term. It is not right, in my view, to treat the check-off provisions as being solely concerned with offering the facility to the employee. Since the passing of the Act, the critical question is not simply what the term in question offers to the other party to the contract; rather it is whether the term in question purports to confer a benefit upon the third party. In these appeals it does, with the result that a right to enforce the contract was conferred on PCS unless, on a proper construction of the contract, it appears that it was the (joint) intention of the employers and employees that it should not be.”
195. He then explained why he disagreed with the majority’s conclusion that the parties to that contract did not intend the trade union to be able to enforce it.
196. Underhill LJ, agreed with Lewis LJ, both as to law and factual application. On law, in addition to what I have already cited in paragraphs 118 and 119, he said in paragraph 117:
“117. The issue which the Courts had to decide in these cases was whether “it appear[ed] that the parties did not intend [the requirement to provide check-off arrangements] to be enforceable by” the Union. That language, and the structure of sections 1 (1) (b) and (2) generally, creates what the Law Commission describes as a “rebuttable presumption” in favour of third-party enforceability in any case where the contract purports to confer a benefit on the third party: see para. 72 of Lewis LJ’s judgment. I agree with his observation at para. 75 that in the generality of cases the court is likely to be able to reach a conclusion one way or the other about the parties’ intentions, so that the burden of proof created by the statutory language will not be determinative; but that is not necessary to my reasoning in this case.”
197. He expressly agreed with paragraphs 83 to 87 of Lewis LJ’s judgment in paragraph 121 of his judgment.
198. I consider that I can extract the following propositions of law from *Cox and Dolphin*:
 - a. Firstly, that there is a two-limb test; the contractual term needs to satisfy section 1(1)(b), “purports to confer a benefit on the third party”, and if it does so,

then under section 1(2) the parties must not have intended the term not to be enforceable by the third party

- b. Secondly, the ultimate question is whether the parties intended the term to be enforceable by the third party; see paragraph 75 of Lewis LJ's judgment, and 117 of Underhill LJ's judgment
 - c. Thirdly, while section 1(2) gives rise to a rebuttable presumption that, by purporting to confer a benefit on the third party, the parties intended the term to be enforceable by the third party, it would be unlikely that a Court will be unable, by ordinary process of contractual construction, to come to a conclusion as to whether or not the term was intended to be enforceable by the third party. That is to say, the presumption is a weak one; see paragraph 75 of Lewis LJ's judgment and paragraph 117 of Underhill LJ's judgment
 - d. Fourthly, the section 1(2) process is a matter of application of ordinary contractual construction processes and principles; see paragraphs 78 to 80 of Lewis LJ's judgment and paragraphs 118 to 119 of Underhill LJ's judgment. That involves looking at the words in their natural and ordinary meaning; it involves seeing them in the context of the factual matrix, that is to say what is or is reasonably taken to have been known to both parties. It involves looking at everything in the context of the commercial purpose of the contract and commercial common sense, and looking at the contract as a whole. The Court considers the opposing meanings and asks which is most likely rather than looking at one and rejecting it so as to leave the Court adopting the other by default. In this process, the Court is concerned with the nature of the contractual term in the context of the contract and the relevant relationships, and asking itself as to what is the commercial likelihood of the parties having or not having the relevant intention that the third party can enforce the term; see Lewis LJ at paragraphs 83, 85, 87 and 88, and Underhill LJ approving elements of this at paragraph 121
 - e. Fifthly, the Court excludes the subjective intentions of the parties and is looking for a common intention of the parties as expressed in the contract itself; see Lewis LJ at paragraph 77 and his discussion of general contractual principles in the citation at paragraph 80, and Underhill LJ, at paragraph 118, and also Stuart-Smith LJ at paragraphs 109 and 111.
199. Mr McGurk submitted that CCP failed on both aspects of the two-limb test. In relation to section 1(1)(b), he submitted that the student contract was essentially the same as the contract in *Dolphin* and, firstly, was a mere method of payment of the loan monies to the student by paying them to CCP. Secondly, this was no different from a customer/bank situation or the principal/agent situation envisaged in paragraphs 68(ii) and 76 of the *Dolphin* judgment, or the situation of a beneficiary/trustee. Thirdly, this was especially so as the real beneficiary of the payment would be the student, whose obligation to CCP would be discharged by the payment to CCP, and thus it was the student on whose behalf the payment was being made, being similar to that situation contemplated in paragraph 67 of the *Dolphin* judgment. Fourthly, that the benefit to CCP would be merely an incidental one, as envisaged by paragraph 68 of the *Dolphin* judgment. Mr McGurk submitted that the benefit of the contract is all to the student, not CCP, and therefore that the contract did not purport to confer a benefit on CCP.
200. As to the second limb, Mr McGurk submitted, with regards to section 1(2), that it does appear that the student and the Secretary of State, being the parties to the student contract, did not intend the relevant term to be enforceable by CCP. Mr McGurk submitted, firstly, that there was no question of payment of the fees being made to the student and that this was analogous

to paragraph 79 of *Dolphin*, although Mr McGurk did not canvass the situation that the student might pay fees from their own monies to CCP and thereafter seek reimbursement of them from the Secretary of State. Secondly, Mr McGurk did submit that the student might well wish to vary the student contract or prevent the Secretary of State paying CCP, whereas, if the Secretary of State did pay CCP, the student would find themselves liable to the Secretary of State, a liability which the student would wish to avoid. Thirdly, Mr McGurk did submit that the scheme of the Regulations was that the contract would be between, and thus only enforceable by, the student and the Secretary of State, especially as there was a further contract between the student and CCP. Fourthly, Mr McGurk relied on the fact that he said that the Secretary of State plainly did not intend to incur liability to the course provider, here CCP, because, if the Secretary of State did had so wished, the Secretary of State would have caused there to be created something similar to the SFA/EFA contracts.

201. Mr Coulter submitted, firstly, that this was a scheme and a contract where the aim was to pay CCP the tuition fees for CCP's course and therefore it was all about conferring a benefit on CCP. Secondly, the situation was thus wholly different from *Dolphin* where the relevant provisions were wholly mechanistic and any rights of *Dolphin* were simply incidental to the settlement of a claim between the club and the insurers. Mr Coulter submitted that CCP's entitlement was core to the underlying contract. Thirdly, Mr Coulter submitted that a student would have every desire that CCP would be able to enforce the student contract term against the Secretary of State as that would prevent the situation of CCP suing the student and the student having to join the Secretary of State into those proceedings. Mr Coulter referred to the fact that Mr Omar, a student, had made clear in his witness statement that all he would have wanted would have been for CCP to be able to pursue the Secretary of State and effectively leave Mr Omar out of it and any litigation. Fourthly, Mr Coulter submitted that it is inconceivable that the Secretary of State would ever pay any money to the student or wish to do so, and especially where Regulation 113 states that the payments must be made to the course provider. He therefore submitted that the contract does purport to confer a benefit on CCP and that there is insufficient to demonstrate that it was not intended that CCP could not enforce the term.
202. Although the question before me is simply whether the amendment has real prospects of success and there is no need on CCP's part to show any more than that, I do have the full documentary material before me on what is a question of pure construction and law. No-one has identified any question of disputed fact with regards to this, subject to one point to which I will come. The matter is of some general importance as it deals with the scenario of where the Secretary of State has a dispute with a course provider and as to whether or not the course provider can sue the Secretary of State direct in relation to the tuition fees or whether the provider has to sue the student and the student sue the Secretary of State. It is also important to the question as to whether the course provider can claim damages against the Secretary of State; as if no obligation is owed which the course provider can enforce, there is no situation at first sight whereby the course provider can claim damages for any loss which may be suffered by the course provider. I also bear in mind that the course provider's rights against the student will be in the course provider-student contract and that contract may or may not contain similar or very different terms to the student contract between the student and the Secretary of State.
203. I have, with some hesitation, concluded that I should resolve this issue in favour of the Secretary of State on the second but not the first of the 1999 Act limbs, and as a result hold that CCP has no real prospects of success and refuse permission to amend on this ground. My central reasons are as follows.

204. I deal first with section 1(1)(b) and whether the student contract purports to confer a benefit on CCP. Here, I face a major difficulty because I see *Dolphin* and *Cox* as being in some conflict with each other. The conflict arises from the fact that *Dolphin* contains a detailed analysis of the circumstances in which a contract provides for money to be paid to a third party but where, in that judgment, the contract is said not to, “purport to confer a benefit”, for section 1(1)(b) purposes on the third party. However, the *Dolphin* decision is not mentioned and does not appear to be cited in the *Cox* decision, where it appears to have been common ground that the contract enabling employees to opt to have their union subscriptions paid by deduction from their wages, and consequent payment direct to the union, was such as to, “purport to confer a benefit on the union”, even though it was simply a mechanism of payment for the benefit of the employee of part of the employee’s wages. I have concerns as to what extent the Court of Appeal’s judgment is simply based on a concession, and I therefore have decided to analyse these arguments, firstly, simply in *Dolphin* terms, ignoring *Cox*, and then, secondly, to consider whether I have come to the same or a different conclusion having taken into account what is said in *Cox*.
205. Applying therefore, firstly, the pure *Dolphin* analysis, it seems to me that the section 1(1)(b) test is not satisfied and that the student contract would not purport to confer a benefit on CCP within the meaning of the words used in section 1(1)(b) of the 1999 Act. That is for the following reasons; firstly, at first sight, the statutory scheme and the basis of the student contract is to confer a benefit on the student of enabling the student to discharge their tuition fees obligation to the course provider. The student has a statutory entitlement to be benefitted by the state in that way, and it is only the student who can apply for that benefit.
206. Secondly, the statutory scheme works by the student contracting with the Secretary of State, not by the course provider contracting with the Secretary of State, even though the scheme provides for payment to be made to the course provider. That does not appear at first sight to be a situation of a statutory scheme or contract to confer a benefit on the course provider.
207. Thirdly, this is not a situation of a contract, or a term of a contract, between A and B which provides for B to do something which only benefits another person, C, without benefitting A. The paradigm type of contract within the 1999 Act is where A wishes to make a gift to C and pays B to actually effect the provision of the gift e.g. by making a monetary payment of the amount of the gift or by supplying goods or by other some means. However, here the student is contracting with the Secretary of State for the Secretary of State to pay the course provider not as a matter of gift or to otherwise benefit the course provider but because that will discharge the student’s obligation to the course provider and benefit the student.
208. Fourthly, I do not see that much difference between this scenario and that postulated in paragraph 68(ii) of *Dolphin*, where B is overdrawn at C’s bank. There, the contract to make the payment will both result in a payment to C, but also to B’s obligation to C being wholly or partly discharged. Even *Dolphin*’s counsel seems to have accepted that such a contract would not confer a section 1(1)(b) benefit on C, and Christopher Clarke J saw that as being clear. That is notwithstanding that a bank may very much wish for its overdrawn accounts to be liquidated by repayment. That situation seems somewhat analogous to the situation before me.
209. Fifthly, it does seem to me that paragraph 75 of *Dolphin* is directly in point; the beneficiary here is the student on whose behalf the payment to the course provider is made and received, and not the course provider.
210. Sixthly, it does seem to me that paragraph 76 of *Dolphin* is still in point, notwithstanding that it is part of the scheme and contract that the course provider will keep the money paid by the Secretary of State. It is of course not certain that that would be the case as the student may have paid CCP money in advance of the Secretary of State’s payments and where CCP would

- then have to reimburse such money. However, in any event, the real beneficiary is still the student and not the course provider.
211. Seventhly, it does seem to me that the provision to pay CCP is simply mechanistic and designed not to benefit CCP but to protect the Secretary of State from the money going into the student's pocket and being dissipated. There is no suggestion in the scheme that it is to protect the course provider; it may be of commercial comfort to the course provider, but that is a different matter and a similar situation did not lead to the conclusion that the 1999 Act would apply in *Dolphin*.
 212. I see those points as outweighing those advanced by Mr Coulter on this aspect. This is notwithstanding that I do see *Dolphin* as being distinguishable on its facts especially as in that situation *Dolphin* did have a much more incidental and mechanistic role than the course provider has in the situation before me. However, the situation here is still that the scheme is such that the true beneficiary is the student. It might be different if the student had no obligation to pay the course provider, but that is not the structure of the scheme and the student contract. I do also accept that usually the student would like the course provider to be paid, but the same was the case in the *Dolphin* scenario (in that usually the club would like the agent, to whom they owe remuneration, to be paid#0).
 213. Therefore, if I was considering *Dolphin* alone, it seems to me that I would hold that section 1(1)(b) was not satisfied. However, I do need to consider the *Cox* judgment, where there was a contractual provision to have money due to A, the employee, paid to B, the trade union, to discharge A's obligation to pay union dues owed to B. That was conceded to "purport to confer a benefit", on the trade union; see *Cox* at paragraphs 83, 101 and 105. However, the Court of Appeal both accepted the concession and, it seems to me, can be said to have stated that it was rightly made. I refer to paragraphs 83 and 105 of the judgment, even though paragraph 83, when considering the point, opens with the words, "it may well be".
 214. Mr McGurk says that that is not sufficient to cause me to depart from my analysis based on *Dolphin*. However I think it is. The Court of Appeal seems to have thought it sufficient to satisfy section 1(1)(b) for there to be a factual benefit; in that case, and in this one, receipt of money by B to discharge a debt owed to B by A. That is factually a benefit to B; and it is sufficient, it seems to me, according to the Court of Appeal for the contract to, "purport to confer a benefit", on B. The Court of Appeal did not merely accept the concession but, at least at one point, stated that it was both a proper concession and that they assented to it.
 215. I am concerned that *Dolphin* does not appear to have been cited to the Court of Appeal, or taken into account in relation to that concession. However, it seems to me that the situation in *Cox* was effectively one of a contract made between two persons requiring payment to be made by one to a third party in order to discharge their debt to that third party; and that is the situation which is before me. The Court of Appeal appears to have been treating section 1(1)(b) as raising a factual question, i.e. "Will entity B, here CCP, be benefitted by the contract?"; and there, and here, it is clear that that would be the case as a debt would be discharged which is to the benefit of the creditor who is no longer faced with a situation of money outstanding.
 216. Mr McGurk says that there are further reasons as to why section 1(1)(b) is not satisfied. Firstly, because the student contract, he says, does not even purport to factually benefit CCP, and that CCP is merely referred to in a box in the completed application form. However, I disagree. The contract terms of the student contract make quite clear, as I have already cited, both in paragraph "a" of the loan contract conditions referring to the attached guide, and in paragraph "b" of the loan contract conditions referring to the Regulations, that the payment is to be made to the course provider; and, in construing the student contract, it seems to me that

- the application form would form an obvious part of the factual matrix and would reveal the identity of course provider, being CCP.
217. Secondly, Mr McGurk submitted that *Cox* was distinguishable because there, there was a separate non-enforceable collective agreement between the trade union and the government which said that the relevant deduction provisions in the contract of employment were a “benefit”. However, I do not see that the Court of Appeal’s reasoning was in any way based on that, or should have been based on that. This is a pure question of law as to what is a “benefit” and what is the purported “conferring of a benefit” for the purposes of section 1(1)(b); and whether the parties considered it to be a benefit, or a conferring of a benefit, or not, seems to me to not be the point.
 218. In the circumstances it seems to me that the highly persuasive effect of the Court of Appeal’s judgment is such that I ought to follow it rather than my consideration of the *Dolphin* judgment; and I hold section 1(1)(b), being the first limb test, to be satisfied in this case.
 219. However, I then part on to the second-limb section 1(2) test and hurdle, and it seems to me that it does appear that the relevant terms were not intended to be enforceable by CCP as the course provider. I come to this conclusion for the following reasons.
 220. Christopher Clarke J approached this question by asking what, realistically, from an objective perspective, would be in the mind of the contracting parties as to whether or not *Dolphin*, the non-contracting party, could enforce, and, also by extension, as to whether or not *Dolphin*, the non-contracting party, could veto any variation of the contract between the contracting parties. I note that the contracting parties in the situation before me are the Secretary of State and so such a variation would include the student and the Secretary of State making an agreement that the Secretary of State simply did not pay out the tuition fees, or perhaps even switched the course provider from CCP to a different academic institution should the student decide to change course providers.
 221. Christopher Clarke J’s approach seems to me to be, effectively, the same approach as in *Cox*, although *Cox* did not consider the variation aspect because it does not seem to have been raised in any way in that case. However, I recognise that I must apply the full contractual analysis as set out in *Cox*.
 222. *Cox* does make clear that, although the rebuttable presumption exists, it is a weak one and there is not any considerable burden on the Secretary of State to show that, “it appears”, that the term was not intended to be enforceable by the course provider.
 223. I have, therefore, carried out the approach set out in *Cox*, considering the alternative meanings of the contract being as to it being, or not being, intended that CCP could enforce the particular terms. Carrying out that analysis I bear in mind, in particular, the following.
 224. Firstly, the words of the student contract go no further than providing for payment to CCP as a mechanism. There is nothing, it seems to me, in the contract to show that it was intended that CCP would be able to enforce.
 225. Secondly, it is true, as Mr Coulter has stated, that there are no words of exclusion of the 1999 Act in the student contract. Mr Coulter relies on what was said by Stuart-Smith, LJ, in paragraph 103 of *Cox* to say that that is an important point and also that it is relevant that the government is an entity which would be regarded as having been able to take, and have taken, legal advice; and where lawyers, if they wished to exclude the 1999 Act, would propose that a term to that effect would be included. However, that judgment is a dissenting judgment and I bear in mind that in paragraph 104, Stuart-Smith LJ also recognised that in the *Cox* case there was no wording specifically including the 1999 Act and seems to have treated that as being of some relevance in the other direction.
 226. Thirdly, the nature of the contract, which was said by Lewis LJ, to be important, is that this term which the Claimant seeks to enforce is a mere mechanism for the Secretary of State to

provide a benefit to the student. This is not a pure benefitting of a beneficiary case as mentioned by Lewis LJ, in paragraph 83 of *Cox*, and which he seemed to regard, and I regard, as being more obviously attracting the intention that the beneficiary should be able to enforce. Rather, it is a facility and mechanism case closer to the *Cox* case and to the remarks of Lewis LJ at the end of paragraph 83 and in paragraph 85 of *Cox*. It is true that the student has no choice with regards to what happens, unless of course the student decides either to seek to renegotiate the student contract or, alternatively, simply not to attend the college. However, it does seem to me that this contract, being the student contract, is all about the provision of a benefit to the student rather than a benefit to the college. I see, in consequence, the nature of the contract as not being one which at all naturally suggests that it was to be enforceable by CCP, and it seems to me that that conclusion is entirely in accordance with what Lewis LJ, says in paragraphs 83 and 88 of *Cox*.

227. It also seems to me that this is reinforced by an essential nature of the contract being to create an obligation on the student; that is to say the loan from the Secretary of State creating various loan, debt and related obligations imposed on the student. There was no equivalent to that in the *Cox* situation. Even though the student's obligation to CCP is being discharged by the operation of the relevant student contract terms, they have the consequence that the student is thereby made liable to the Secretary of State. It seems to me, at first sight, that it would be commercially unlikely that the student and the Secretary of State could be intending that CCP could, by deciding to enforce the student contract, foist that loan liability onto the student.
228. Further, in relation to the nature of the contract, it seems to me that the statutory scheme, and the student contract which forms part of it, exist to enable the student to exercise their statutory right to have their tuition fees obligations financed by the Secretary of State; it is not to enable CCP to be paid, even if the fact of payment would confer a benefit on CCP.
229. Furthermore, I cannot see how the scheme and student contract could have been intended to give CCP, as course provider, a damages remedy for breach of the contract if the Secretary of State did not pay. It seems to me that has nothing to do with the underlying statutory scheme at all.
230. In relation to my consideration of the commercial likelihood that the parties to the student contract intended that CCP could enforce it, I do note that the only student from whom any evidence has been sought has said that it would have been far from their mind and intention that they would have been wished to have been dragged into litigation regarding whether or not the tuition fees were payable by the Secretary of State where the dispute is really between the Secretary of State and the course provider. It seems to me that there is some force in Mr Coulter's submission that that would be regarded by the contracting parties as being objectively the case.
231. On the other hand, it also seems to me objectively that the parties to the student contract would not wish CCP, as the course provider, to have control of whether the tuition fees were to be paid by the Secretary of State whether or not the student objected to that occurring with resultant loan obligations being incurred by the student to the Secretary of State. I can well think of situations where a student might well wish to prevent the Secretary of State making payments and thus triggering the student's own obligations to the Secretary of State; for example, the student might complain about CCP's conduct with regards to the registering of the student for the DET course. The students did not actually make any such complaints, but they could have done. A student might have complained about the quality of CCP's teaching or with regards to such matters as to lecturers and teachers having gone on strike with the result that teaching became limited. A student might complain about a disciplinary process or various forms of staff misconduct or failure to police other students, as often happens in

- the tertiary academic context. A student might just simply wish to make a political point for some reason or another and say that CCP should not be paid money.
232. All these matters are common occurrences in tertiary educational life and it seems to me are sufficiently common for me to be able to take judicial notice of them. In any of those circumstances, it seems to me that the Secretary of State and the student would have a common position that the last thing that the student would want would be for the Secretary of State to have to pay, and as a result pay, the course provider so that the student, instead of resisting the course provider's claims, has to pay the Secretary of State. Further, even if the student could say that the Secretary of State might also want to take some of these points as amounting to matters which would entitle the Secretary of State not to pay, that might very well not be the position. It seems to me that the Secretary of State could very well objectively wish to take the same view on the basis that the Secretary of State would not wish to be dragged into a dispute between the student and CCP.
233. It seems to me that in terms of inferring the objective common intention of the parties to the student contract, these matters all lean to those parties having a common intention that CCP would not be able to enforce the contract. It seems to me, further, that that point is all the more strong in circumstances where the student and the Secretary of State might in the future wish to negotiate a variation of the student contract. One possible practical example I have already given, is where the student wishes not to stay at CCP, but rather, on grounds possibly of alleged poor teaching or one or more of the other matters I have mentioned, the student wishes to go to another course provider and to take the student contract with them. Christopher Clarke J rhetorically asked in *Dolphin* as to whether the contracting parties in such a case would wish the third party, under the 1999 Act, to be able to veto such a variation. It seems to me that the same question needs to be asked in this case and that the answer is clearly that the student and the Secretary of State would not intend such to be the case.
234. It seems to me that all these points outweigh those advanced by Mr Coulter in favour of his construction of the contractual intention. It seems to me his strongest point was the objective argument that the reasonable student would not wish to be involved in any litigation to resolve the nature of the disputes which arose in this case, and would wish any such litigation to take place between CCP and the Secretary of State. However, the student will always be exposed to the possibility that the course provider, here CCP, would prefer to sue the student under the course provider-student contract between the student and CCP, rather than to pursue the Secretary of State. In any event, I see the point as outweighed by reason of the other matters.
235. I add that Mr McGurk also relied on the fact of the existence of the SFA/EFA contracts to say that it was clear that the Secretary of State would not have subjectively intended that CCP could enforce the student contract; but rather, if the Secretary of State was to enter into any enforceable obligation with the course provider, the Secretary of State would only do so through a formal written contract of the nature of the SFA/EFA contracts. I, however, do not see that as being a point of any forceful relevance. There is no evidence before me to the effect that the student, or the hypothetical student, would know of the existence of the SFA/EFA contracts, or any reason as to why such a student should do so. Therefore, they would not form part of the relevant factual matrix. It seems to me that Mr McGurk was effectively trying to introduce what is clearly irrelevant to this process, namely a subjective consideration of one side not revealed to the other contracting party. Furthermore, it seems to me that that sort of point would introduce a set of factual questions which might well be the subject matter of disputed evidence and which factual questions could not be resolved in the context of what is, effectively, a summary process.
236. However, for the reasons which I have given, I do not see any real prospect of success for CCP on the 1999 Act argument and I refuse permission to amend on that basis.

Other matters relating to the student contract argument

237. However, I would not refuse permission on the grounds advanced by Mr McGurk that, even if CCP could enforce the student contract, such claim would fail because of the terms of the 5 June 2014 letter, or CCP's conduct, or the absence of any student contract for any of the relevant students, apart from those within the £12,000 odd now accepted group. For the same reasons as stated above, I see real prospects of success for CCP on those various aspects.
238. However, I would refuse permission for limitation reasons, but only for one of the two sets of reasons advanced by Mr McGurk. That set of reasons is because the limitation position seems to me to be indistinguishable from the direct contract scenario; the relevant student contract causes of action accrued more than six years before 22 October 2021, and therefore any claims are limitation barred because the suspension argument and the estoppel argument must fail for the same reasons as I have given above. Therefore, even if amendment was allowed, and even with the relation back to 22 October 2021 for the bringing of the claim, which would be affected by section 35 of the Limitation Act 1980, the claims would still be limitation barred and still have no real prospects of success.
239. Mr McGurk also submitted that I would have no jurisdiction to permit amendment, even if the suspension or estoppel arguments were good, as then the limitation period would have expired after 22 October 2021 but before today. It is common ground that these are new claims within the meaning of section 35 of the Limitation Act 1980 and CPR 17.4, and therefore I would have no jurisdiction to permit amendment on this set of hypotheses unless the new claims arose out of the same or substantially similar facts as are already in issue on the claim.
240. Mr Coulter relied on both the existing particulars of claim and *Goode v Martin* [2002] 1 WLR 1828 to say that the student contract and its terms are matters in issue, both on the particulars of claim and in the Secretary of State's arguments, and that all he is seeking to do is to say that, if the Secretary of State is saying that they are the actual contract and relevant terms, CCP can enforce them in law, and therefore that contention simply arises out of the same or substantially similar facts as already are in issue. Mr McGurk says that is not so, he says that this is the introduction of a new contract and new terms.
241. I conclude that this proposed claim would arise out of the same or substantially similar facts to those already in issue. Firstly, the existing particulars of claim do refer to the Secretary of State's alleged, "promise to pay", and the only promise to which reference is there being made is that contained in the student contract; and CCP is simply wishing to amend to assert that, in law, the 1999 Act enables that promise to be enforced by CCP. Secondly, and more importantly, the Secretary of State's case is that (a) there is no direct contract between the Secretary of State and CCP but only the student contract between the student and the Secretary of State and (b) there is no direct contract because that student contract exists. It seems to me that this is simply analogous to the *Goode v Martin* [2001] EWCA Civ 1899 situation and decision. CCP is simply taking the Secretary of State's defence and saying that, if that defence is right, CCP can use it to succeed by an argument of law under the 1999 Act, and can enforce the student contract with the same result as that for which CCP was previously contending under the direct contract.
242. While it can be said that the terms of the student contract are, in one sense, not in issue within the direct contract claim; firstly, I disagree and think that they are; and, secondly, the student contract and its terms are precisely matters which are raised by the Secretary of State to (successfully – see above) dispute the existing direct contract claim.

243. Therefore, if I had thought that any of the suspension or estoppel or other limitation arguments advanced by Mr Coulter had real prospects of success, I would not have refused permission to amend on this limitation ground. However, as I do not think that they would, I would have refused permission to amend to introduce the student contract claim on limitation as well as the 1999 Act grounds.

Abuse of Process

244. I now come on to the Secretary of State's third argument that, whatever my conclusions on the direct contract or the student contract aspects, I should strike out this Claim out as an abuse of process because the claims which the Claimant is seeking to advance in this Claim were not permitted to be pursued in the 2019 claim by Master Cook.
245. Mr McGurk's argument is effectively that, firstly, this claim arises out of the same circumstances as those in the 2019 claim and should have been brought by counterclaim in it. Secondly, that CCP failed to bring a counterclaim properly and, as a result, CCP's attempt to do so was struck out and refused. Thirdly, that therefore it is an abuse for the claim to be brought now; and so, fourthly, that the Court should not permit it to be brought.
246. Mr McGurk relied on various authorities; firstly, *Aldi Stores v WSP Group plc*. [2008] 1 WLR 748 where at paragraphs 5 and 6 it was said:
"5. The principles applicable to an application to strike out a claim on the basis that it is an abuse of process to bring a claim that could and should have been brought in previous proceedings are set out in the speech of Lord Bingham of Cornhill in *Johnson v Gore-Wood* [2000] UKHL [2002] 2 AC 1. It is, in my view, generally neither necessary nor helpful to refer to the accretion of authority before that decision, as the decision clearly sets out the principles the courts are to apply. At page 31, Lord Bingham summarised the main principles in these terms:

"But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier

proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.”

6. It is, however, helpful to refer to the judgment of Clarke LJ in *Dexter v Vlieland-Boddy* [2003] EWCA Civ 14, where he summarised the principles to be derived from *Johnson v Gore-Wood* at paragraphs 49-53.

“49...:

i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.

ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.

iii) The burden of establishing abuse of process is on B or C or as the case may be.

iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.

vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.

50. Proposition ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C, D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others.

51. Those reasons include, for example, the cost of proceeding against more than one defendant, especially where B is apparently solvent and the case against B seems stronger than against others. More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means follows that either the public interest in efficiency and economy in litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all.

52. It seems to me that the courts should be astute to ensure that it is only in a case where C can establish oppression or an abuse of process that a later action against C should be struck out. I could not help wondering whether the defendants in this case would have given their lawyers the same instructions on the question whether they should have been sued in the

first action if they had been asked before that action began as they have given now that a later action has been begun.

53. It is clear from the speeches of both Lord Bingham and Lord Millett that all depends upon the circumstances of the particular case and that the court should adopt a broad merits based approach, but it is likely that the most important question in any case will be whether C, D, E or any other new defendant in a later action can persuade the court that the action against him is oppressive. It seems to me to be likely to be a rare case in which he will succeed in doing so.”

247. Mr McGurk says that that shows that if a party could have raised a claim in previous proceedings, that may well be sufficiently abusive for the party to raise the claim in subsequent proceedings to justify a strike out following a broad merits base test being applied.

248. Next, Mr McGurk referred me to *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426 at 1432G:

“The fact that the limitation period has not expired, does not figure to the same degree in a case where there has been contumelious conduct on behalf of a plaintiff or where the proceedings which are being struck out constitute an abuse of process: see *Grovit v. Doctor* [1997] 1 W.L.R. 640 . In such circumstances, the plaintiff may well find that if he brings fresh proceedings after the original proceedings are struck out they are stayed because of his conduct.”

249. Mr McGurk says that this is exactly what has happened in this case with regards to the counterclaim and the 2019 claim being struck out, and therefore for it to be an abuse for the claim to be sought to be (re)raised in this case.

250. Mr McGurk then referred me to *Securum Finance Ltd v Ashton and Anor.* [2001] Chancery 291; here, a bank had sued directors and guarantors of a loan but been struck out for delay and had brought a second claim to enforce the security grant by the guarantors over their property. The guarantors said that this was an abuse. At paragraphs 16 to 17, Chadwick LJ, rejected a *Henderson v Henderson* [1843-60] All ER Rep 278 argument of abuse as he held that the *Henderson* doctrine did not apply to creditors who sued first for payment and then second to enforce a security. In paragraph 18 Chadwick LJ said:
“18 The real question under head (1) of the summons of 10 March 1999, as the judge appreciated, is whether it is an abuse of process to seek to litigate, in subsequent proceedings, issues which have been raised (but not adjudicated upon) in earlier proceedings which have themselves been struck out. The question arises because, in order to succeed on its claim for payment under the covenant in the legal charge, the bank must establish the two points which I have already identified—namely: (i) whether there was a debt owed by Trafalgar to the bank and (ii) whether the guarantee was enforceable—which were in issue in the earlier proceedings but which were not adjudicated upon in those proceedings because those proceedings were struck out.read paragraph 18 into this judgment. Chadwick, LJ, then considered the case law prior to the Civil Procedure Rules, where applications had been made to strike out a second claim where a first claim had been struck out for delay, and then the post-CPR position, concluding in paragraphs 34 to 36, which I read into this judgment.”

251. After carrying out a further analysis, Chadwick, LJ, concluded at paragraphs 52 to 56:

“Should the present action be struck out?

52 In my view, for the reasons which I have sought to give, it is open to this court to strike out the claim for payment made in the present action. That is a claim which, in substance, is indistinguishable from the claim for payment made in the first action. If that claim stood alone it could be said with force that to seek to pursue it in a second action when it could and should have been pursued, properly and in compliance with the rules of court, in the first action is an abuse of process. It is an abuse because it is a misuse of the court's limited resources. Resources which could be used for the resolution of disputes between other parties will (if the second action proceeds) have to be used to allow the bank "a second bite at the cherry". That is an unnecessary and wasteful use of those resources. The bank ought to have made proper use of the opportunity provided by the first action to resolve its dispute in relation to the claim for payment.

53 But the claim for payment does not stand alone. It is conjoined with claims to enforce the security under the legal charge. It is important to keep in mind that, by striking out the claim for payment, the court does not extinguish the underlying debt. Nor, of course, is the underlying debt extinguished by the expiry of a limitation period. The debt (if it exists) remains secured on the mortgaged property. I can see no basis on which the claims to enforce the security under the legal charge can be struck out on the grounds of abuse of process. Those claims were not made in the first action; and, for the reasons which I have already given, there was no reason why they should have been.

54 The bank does not need to establish its claim for payment in order to obtain an order for possession. It is entitled to possession by virtue of its legal estate; subject to the court's powers under section 36 of the Administration of Justice Act 1970—in a case to which that section applies. *316 The defence to the claim for possession—and to the claims for the appointment of a receiver, for sale and foreclosure—is that the mortgage ought to be discharged on the basis that there is no debt. That, also, is the basis of the Ashtons' counterclaim. The effect, as it seems to me, is that the issue whether or not there is a debt secured by the legal charge will have to be resolved whether or not the claim for payment under the covenant is struck out. That issue will have to be fought on the claim for possession; it will have to be fought on the counterclaim if Mr and Mrs Ashton are to achieve their objective of freeing their property from the fetter of the mortgage. That, of course, is an objective which they could have pursued at any time by pursuing their counterclaim, either in the first action or in the present action. If they are prejudiced by delay, the delay in pursuing the counterclaim to obtain the discharge of the mortgage is delay for which they must bear responsibility.

55 If the issue whether or not there is a debt secured by the legal charge will have to be resolved in litigation in any event, then the need to have regard to the appropriate allocation of resources as between the litigation between these parties and litigation between other parties has little weight. Whether or not the claim for payment is struck out makes little or no difference to the resources which will be needed in relation to the litigation between these parties.

56 I have considered whether the claim for payment should be struck out, nevertheless, in order to mark the court's disapproval of the delay that occurred in the prosecution of

the first action. There would, or might, be some benefit to the Ashtons in that course, in that the bank would not then obtain a money judgment on which to found a petition for bankruptcy. It would be unable to recover more than the value of its security. But I am satisfied that to strike out the claim for payment on that basis would be a wrong exercise of discretion in the present case. It would, I think, be seen as a further punishment inflicted on the bank for a course of conduct which, although the subject of disapproval by this court in the first action, was not then stigmatised as an abuse; in circumstances in which it was said by this court that the new approach would not be applied retrospectively to delays which had already occurred.”

252. Mr McGurk then cited *Davies v Carillion Energy Services Ltd* [2017] EWHC 3206. Here, the first claim had been struck out for failure to comply with an unless order to provide particulars. The claimant brought a second claim and the defendant applied to strike out on both *Henderson* and abuse principles. Morris J analysed the authorities and concluded in paragraphs 52 to 55 as follows:

“52. First, the line of cases of *Arbuthnot, Securum and Collins* [*Collins v CPS Fuels Ltd* [2001] EWCA Civ 1597] are authority for the following:

- (1) Where a first action has been struck out as itself being an abuse of process, a second action covering the same subject matter will be struck out as an abuse of process, unless there is special reason: *Securum* §34, citing *Arbuthnot* , and *Aktas* §§ 48, 52.
- (2) In this context abuse of process in the first action comprises: intentional and contumelious conduct; or want of prosecution; or wholesale disregard of rules of court: *Aktas* §§72 and 90.
- (3) Where the first action has been struck out in circumstances which cannot be characterised as an abuse of process, the second action may be struck out as an abuse of process, absent special reason. However in such a case it is necessary to consider the particular circumstances in which the first action was struck out. At the very least, for the second action to constitute an abuse, the conduct in the first action must have been “inexcusable”. *Collins* §§24-25 and *Cranway* §20.

53. Secondly, *Johnson v Gore Wood, Aldi and Stuart v Goldberg* are all cases of the *Henderson v Henderson* type of abuse, where the first action has been resolved by way of adjudication or settlement and where it is said that issues which should have been brought in the first action are being sought to be re-litigated. In such cases:

- (1) Whether a second action raising matters which could have been, but were not, raised in the first action is an abuse of process is not a matter of discretion, but is a judgment to be made by the first instance judge, assessing and balancing all the relevant factors in the case.
- (2) On appeal from a first instance judge’s decision, the appeal court will interfere only where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him or was wrong: *Stuart* §82.

- (3) Even if there is a finding of abuse of process, the court still has a remaining discretion not to strike out, but only in very unusual circumstances: Stuart §24 and Aktas §53.

54. Thirdly, there is a tension between these two lines of authority, which Rix LJ sought to address in Aktas at §53. Even if, as there suggested, the first category of case is to be regarded as an example of the general principles established in Johnson and Aldi, it is difficult to see how, in a “procedural” case, the two approaches can be applied in tandem. If both approaches are to be applied, it is not clear at what point in the analysis the “special reason” identified in Securum/Collins comes into consideration: in the first stage of the assessment of all relevant factors or at the second stage of residual discretion, if abuse is found; nor is it clear what factors come into play in the second stage, if all relevant factors have been considered in the first stage.

55. Against this background, I conclude as follows:

- (1) Where a first action has been struck out for procedural failure, the Court should apply the Securum/Collins approach I set out in paragraph 52 above. Even if Aldi and Stuart state general principles which are now applicable to all categories of abuse of process, I am not satisfied that there is any case authority which has specifically disapproved of the detailed analysis in Securum, Collins and Aktas of cases of procedural failure. Indeed Securum and Collins were not considered in either Johnson or Aldi. In Aktas, Rix LJ did not indicate disapproval of Securum.
- (2) However given the introduction, since those cases, of amendments to CPR 1.1 and given developments in Mitchell and Denton, the “special reason” exception identified in Securum and Collins falls to be more narrowly circumscribed. Where the conduct of the first action has been found to have been an abuse of process or otherwise inexcusable, then the second action will be struck out as an abuse of process, save in “very unusual circumstances”. (Other terminology might equally be used to indicate this strict approach). In addition, in a case where the first action was not itself an abuse of process, whether the conduct in that action was “inexcusable” might fall to be assessed more rigorously and in the defendant’s favour. However, even post-Jackson, ultimately, the importance of the efficient use of resources does not, in my judgment, trump the overriding need to do justice: see Aktas §92.
- (3) A single failure to comply with an unless order is not, of itself, sufficient to conclude that the second action is an abuse of process.
253. I note that the actual outcome in *Davies* was firstly, although there had been failure to comply with an unless order, that had not been a wholesale disregard so as to invoke the *Arbuthnot*, *Securum*, and also *Collins v CPS Fuels Ltd* [2001] EWCA Civ 1597 jurisdiction; see paragraphs 64 to 71 where it was held that the relevant failure to comply with one part of an unless order was understandable and not inexcusable.
254. Secondly, in all the circumstances of that case, the second action was not such an *Aldi/Henderson* abuse as would justify strike out on grounds of re-litigation; see paragraphs 72 to 73:
- “72. Finally, I consider the position if, as a matter of principle, it is correct to apply the Aldi approach to the question whether the Second Action is an abuse of process. This was the approach applied by District Judge Stuart. (Whilst there is some ambiguity in §34 of the

Judgment, he considered both the first stage of assessing all factors and also the second stage of discretion.)

73. In the Judgment, the Judge took account of a wide range of relevant factors in the case. He considered both the use of court resources and doing justice; the fact that the first action had not been litigated; his view that the Claimant, understandably, considered that he had obeyed the first unless order by serving a “fully pleaded” particulars of claim and that there had been no complaint from the Defendant or the court; that the Claimant had not known what to do to comply with the second unless order; that he could take limited account of the Claimant’s position as a litigant in person; that the Claimant had suffered the adverse consequence of having to pay the costs of the First Action; and that it was likely that Carillion would bring the Defendant into the action in any event. He took account of the more robust approach indicated by Mitchell and Denton. Delay was not a relevant consideration and that there was no adverse effect on the availability of witnesses. Taking account of all these factors he concluded that the Second Action was not an abuse. In my judgment, applying the test in Stuart §82, there would be no basis for this court to interfere with his balancing of the relevant considerations. I would add, specifically addressing the important concern of limited court resources, that in the present case the Second Action will proceed in any event, at least as regards Carillion.

255. I note that Morris J here only said that the District Judge’s decision not to strike out on this ground was within a proper balancing exercise and conclusion; not that it was inevitable.
256. Mr McGurk submitted, firstly, that the attempted counterclaim in the 2019 claim was struck out for culpable delay and therefore so should be this claim on *Arbuthnot/Securum/Collins* grounds. Secondly, in any event, where the 2019 claim was litigated to a trial and conclusion, this is precisely the situation of an *Aldi/Henderson* abuse, justifying striking out.
257. Mr Coulter submitted, firstly, although Mr Pathirana, for CCP, had sought to advance the counterclaim in the 2019 claim, he could not pursue it properly due to CCP’s financial difficulties, which themselves had been caused by the Secretary of State wrongly withholding money. He accepted that CCP’s accounts showed a positive balance sheet of £150,000 in 2019, but referred to it then falling and to a bank account only having a four-figure sum of some £13,000 in about August 2020. He adduced no evidence of Mr Pathirana or other shareholder’s own resources. Secondly, he referred to the fact that Mr Pathirana and CCP had made clear their intent to bring a second claim throughout. Thirdly, he said this claim has a different subject matter from the Secretary of State’s 2019 claim, which was about the Secretary of State’s argument that a failure to register students for a DTLLS qualification meant that the Secretary of State could recover money paid.
258. I consider first, as did Morris J in *Carillion*, the *Arbuthnot/Securum/Collins* argument. Firstly, it does seem to me that this is a case of the first action being struck out for procedural failure. I accept that it can technically be said that a counterclaim in the 2019 claim, the first action, was never brought at all; but, on the other hand, it is an equivalent situation. CCP could have raised this claim at close to the start of those proceedings by filing a counterclaim with their defence without requiring permission to do so. However, they failed to take this course, possibly because they had no wish to pay the counterclaim fee and possibly because they did not wish to engage in the burden of a counterclaim. I have no evidence as to which was the case or whether something else was the case. CCP then included the counterclaim with the amended defence without permission, delayed in seeking permission and then had it struck out. It seems to me that, notwithstanding that the counterclaim was technically never brought at all, this is an equivalent situation to a striking out having occurred for procedural failure.

259. However, I, like Morris J in *Carillion*, do not see this as a, “wholesale”, disregard of proper procedure. As in *Carillion*, CCP did, firstly, seek to set out and comply with the rules, and, secondly, did set out a claim in trying to bring the matter forward and also stating their intention to do so. I can see CCP’s approach as being understandable and I do not see it as being inexcusable. I certainly do not see this as a situation of contumely; rather, it is a case where CCP had ventilated a counterclaim but had failed to advance it properly in the context of the 2019 claim, that is to say the first action being brought against CCP by the Secretary of State.
260. Having considered the matters all together, I would not strike out the direct claim or refuse permission for the bringing of the student contract claim on that basis.
261. However, like Morris J in *Carillion*, I now need to consider the question of the *Henderson/Aldi* abuse of process. The first question is whether this claim could have been brought and been sensibly dealt with in the first action; I consider the answer to that question is clearly, “Yes”. The first action and this claim do have, essentially, much of the same subject matter, being whether the Secretary of State was bound to pay the tuition fees to CCP in the 2014 to 2015 circumstances. That is what May J decided in paragraphs 61 to 63 of the May J judgment, at least as far as those students were concerned. Secondly, I accept that the 2019 claim was also about if the Secretary of State could recover from CCP payments which the Secretary of State could have refused to make, and May J did also hold that there was no basis in law for the Secretary of State to do so as there was no unjust enrichment in those circumstances and that aspect does not arise in, and is not proposed to arise in, the claims before me.
262. I do also accept that this claim raises various questions which did not arise in the first action, including,
- A) Who are the relevant students;
 - B) What is meant by, “commence”, and, “in receipt of student support”, in the 5 June 2014 letter;
 - C) Whether there were any actual contractual obligations between CCP and the Secretary of State, whether by means of the direct contract or the student contract routes.
263. However, the first action and its issues in trial did,
- A) Cover the question of a liability of the Secretary of State to pay tuition fees, see above;
 - B) Cover the history and events relevant to this claim, and;
 - C) Cover some of the statutory provisions and regulations relied on with regards to this claim.
264. It did not cover the direct contract or student contract arguments, as far as I can see from the May J judgment; but, on the other hand, it does not seem to me that CCP sought to assert in any way before May J that any such obligations or rights existed between it and the Secretary of State.
265. If the counterclaim had been included originally in the first action, it seems to me that it obviously would have been dealt with within the first action, even if some aspects, for example, quantification, might have been dealt with by splitting issues. It seems to me that on an instant application of the factors identified in Civil Procedure Rule 20.9, the degree of connection between the first action and the claims before me are such that there would be no reason for the Court to have required them to be dealt with separately. It also seems to me that the same is likely to have been the case if the counterclaim had been raised before or at the hearing on 30 October 2020; if the Court had then been concerned about the possible effect of introducing the claim on the length of the June 2021 trial, it could have

- dealt with that in a number of different ways, including by directing that only specific issues would be heard at that trial and, for example, quantum, at a later stage.
266. While I am disadvantaged by there being an absence of any transcript of Master Cook's judgment, I have heard nothing of substance to suggest that Master Cook struck out the counterclaim and refused to permit it to proceed other than by reason of it only having been advanced as a statement of case very late and so as to potentially prejudice the trial of the first action had Mr Cook granted permission. I cannot see any question of an education expert being relevant or meaning that the real problem was anything other than the delay on CCP's part. I proceed on that basis.
267. It seems to me, having considered all the above, that this is a classic *Henderson/Aldi* situation where a party could have, and would have been expected to have, raised, and have had dealt with, this claim by way of counterclaim in the previous first action litigation. It therefore seems to me that it was an actual, or at least potential, abuse for CCP not to have done that, but rather only to have sought properly to bring the matter to the Court in this second set of proceedings.
268. However, I then need to consider the question as to whether CCP not bringing these matters within the first action renders this claim such an abuse as it would be proper to strike out the direct claim and refuse permission to amend to advance the student contract claim. I have applied the broad-based merits test to this and asked myself whether it is such an abuse. I have concluded that this claim, and the possible amended claim, is and would be such an abuse for the following reasons, and for the same reasons I conclude that there are not present such better or extenuating circumstances as would be required to excuse or justify the abuse.
269. Firstly, as I have already said, it is plain that this claim could have been raised in the first action. Secondly, if the claim had been raised in the first action, it would have been resolved in it. Thirdly, I do not see that the first action could not have been sufficiently particularised at the start of the first action, let alone within it. I note that CCP says that much of the data is held by the Secretary of State, but CCP is really in the same situation now as then and could always have sought particulars and disclosure. It does not seem to me that the lack of data has either now prevented, or would then have prevented, CCP formulating the counterclaim, as it has similarly not prevented it formulating this claim.
270. Fourthly, I accept that it is true, as CCP says, that the Secretary of State has not only not paid the money claimed in this claim, but delayed until after the May J judgment in paying the £98,750 and is still, even according to the Secretary of State, at least until recently, failing to pay the further £12,000 odd. However, I do not feel that I have sufficient evidence to say that CCP's financial situation and the absence of those monies prevented CCP advancing these claims in 2019, or for that matter at a stage very early on in 2020 when they could, it seems to me, still have been allowed to be advanced in the first action. CCP apparently had a substantial business in 2019 and substantial cash amounts in its bank account in 2019 and still in early 2020. Moreover, CCP as a limited company could look to its shareholders and sources of finance, and I have no evidence before me to suggest that they would have been unable to, and unwilling to, fund CCP. Further, Mr Pathirana did advance the prospect of precisely the present claim in the original defence. At first sight I can see no reason as to why CCP did not then advance, although it would then have had to pay for, a counterclaim.
271. Further, as I have said, I do not see why, if the matter had been advanced in early or mid-2020, or even at the 30 October 2020 hearing, the Court dealing with the first action would have refused permission to include the counterclaim.
272. I also note that Mr Pathirana accepted that CCP's insurers had agreed to fund CCP's defence to the first action in August 2020. While Mr Pathirana says that the insurers would also have

- required a 51% chance of success for a counterclaim to be advanced, there is no evidence before me of any consideration being given to this and as to any representations being made to insurers or as to their refusing any such representations. It simply seems to me that the counterclaim could, and should, have been brought in 2019 or, if not, then in 2020.
273. Fifthly, the effect of this claim, either the present claim or the proposed amended claim being raised in new proceedings, will result in a substantial waste of the Court's as well as the parties' resources, including time and costs, if it proceeds. That is because the first action trial covered much of the same factual history and consideration of the same documents, including the 5 June 2014 letter and the statute and Regulations; all of that would have to have been gone through again.
274. It is true that CCP will say that it will accept the May J judgment findings of fact and law, and would contend that the Secretary of State is bound by them, but, firstly, there may well be disputes as to what they are and how they apply. Secondly, there will still be significant waste by way of duplication of both reading and argument. Thirdly, there will be significant waste of preparation, including both in terms of procedural hearings themselves and for a trial. Fourthly, there will be the need for witnesses, such as Mr Pathirana and Mr Williams, to give evidence and be cross-examined all over again. In addition, I note that May J clearly rejected various evidence from Mr Pathirana in paragraphs 37 to 41 of the May, J, judgment; it seems to me the Court would be likely to be disadvantaged by not having and dealing with all of Mr Pathirana's evidence on one occasion.
275. Sixthly, there is another important point, although it seems to me the aforesaid would be enough for my conclusions, being that I have a distinct concern that the first action might well have taken something of a different course if CCP's claims of a contractual relationship which CCP could enforce against the Secretary of State had been advanced before May J to the extent which that is sought to be advanced in this claim. I can see no suggestion in the May J judgment that it was suggested to May J that such a contractual relationship existed. Rather, and although paragraph four of the defence in that action did assert that there was a contractual relationship, it seems to me that that point was ignored and that May J assumed that no such contractual relationship existed. If it had been agreed or held that such a contractual relationship did exist as between CCP and the Secretary of State, then it seems to me that would have been of advantage to the Secretary of State in the first action; as, firstly, the Secretary of State would have been able to say that the Secretary of State could pursue CCP simply for breach of contract and for repayment and without having to rely on unjust enrichment as a separate extra/quasi-contractual principle. Secondly, the Secretary of State's unjust enrichment case would have been improved in such circumstances, at least on the aspect of injustice. Thirdly, it would have enabled the Secretary of State to better seek to refute May J's conclusion at paragraph 66 of the May J judgment if the student was entitled to be funded by the Secretary of State. The Secretary of State could argue that in a tripartite contractual analysis, the hypothetical student could say that there was no liability to CCP where the Secretary of State was not bound to pay CCP. It would have been much more difficult for the hypothetical student to argue that proposition where the only contracts, and their enforcement, were only between the Secretary of State and the student on the one hand, and the student and CCP on the other. I accept that I have not seen the terms of the student/CCP contract which might assist with regard to these points but, on the material before me, I can see that the May J judgment might have taken a different course had these arguments of CCP having or being able to enforce a contractual relationship with the Secretary of State been advanced (and all the more so had they succeeded) in the first action.
276. I do accept that May J reached her decision for two reasons; the first being that the Secretary of State had not shown that there was any route in law for the Secretary of State to pursue CCP.

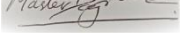
The second being that, in any event, the Secretary of State has shown no basis of recovery from CCP even if a route in law existed. These considerations only impact the first route aspect at first sight, but even if that was right, it would still have affected the course of the trial and possibly the Secretary of State's decision whether or not to appeal May J's conclusion and costs. I also do consider it might even have affected the argument as to whether CCP's breaches of the rules would have enabled the Secretary of State to recover from CCP, at least on a direct contract analysis.

277. Whether I am right or wrong as to this particular set of points, it simply demonstrates the importance of the need to raise all claims in one set of proceedings, even if only by way of counterclaim, so that a fair and just overall conclusion can be reached without allowing one side a potential advantage by defeating the first claim on one set of bases and then bringing a second claim which may have a different (or at least a modified) set of bases.
278. I have considered all those points and, even if I ignored the last set of points, it seems that they render that what is now being sought by CCP by bringing this claim an abuse which justifies strike out and refusal of permission to amend. I do not see any, and, in any event, I do not see sufficient, excusing or special circumstances to allow CCP to proceed.
279. This is notwithstanding that I accept that, in part, the subject matter of this claim is different from the first action and that Mr Pathirana and CCP made their intentions clear throughout, at least to the Secretary of State and Master Cook albeit perhaps not May J. However, both of those are only factors to weigh in the balance; and I have weighed them and consider that they are insufficient to lead me to any other conclusion to that which I have already expressed. It might indeed have been different if Master Cook had granted some permission to raise the counterclaim, which he was striking out, in second proceedings or said something to that effect, but I have no evidence or material to conclude that that was or would have been the case and no-one has suggested it to me.

Conclusion

280. In all the circumstances, it seems to me that the abuse question, in one sense, logically comes first, although it had been useful to go through the rest of the process in order to have the background against which to analyse it, and that in fact the appropriate order I should make is to strike out the claim and refuse permission on grounds of abuse. However, my order will provide that I would have granted reverse summary judgment against the claimant CCP and have refused permission to amend in any event for the other reasons given in this judgment.

End of Judgment.

Approved  16.1.2024

Transcript of a recording by Ubiquis
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