Neutral Citation Number: **[2020] EWHC 1118 (Comm)**

Case No: CL-2018-000732

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 7 May 2020

Before :

MR JUSTICE FOXTON

- -

Between :

(1) SCHOOL FACILITY MANAGEMENT LIMITED
(2) BOSHIRE LIMITED
(3) GCP ASSET FINANCE 1 LIMITED

Claimants

- and –

(1) GOVERNING BODY OF CHRIST THE KING COLLEGE
(2) ISLE OF WIGHT COUNCIL

Defendants

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Timothy Straker QC and **Pia Dutton** (instructed by **Stephenson Harwood LLP**) for the **Claimants**
Peter Oldham QC and **Christopher Knight** (instructed by **Stone King LLP**) for the **First Defendant**
Daniel Stilitz QC and **Rupert Paines** (instructed by **DAC Beachcroft LLP**) for the **Second Defendant**

Hearing dates: 2 to 5 and 9 to 12 March 2020.
Post-hearing submissions: 1, 7 and 8 April and 4 and 5 May 2020.

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 7 May 2020 at 10.30am.

Mr Justice Foxton:

INTRODUCTION

1. On 10 February 2009, the Isle of Wight Council ("the Council") approved a request by the Governing Body of Christ the King College ("the College") to expand its age range and open a sixth form. This decision fell to be implemented against the background of the budgetary constraints which impacted the public sector in the wake of the financial crisis, which significantly reduced the funds available for capital projects. The solution which the College ultimately adopted in the face of that dilemma was to enter into what was described as a hire contract ("the Contract") for the construction and hire of a modular building and associated equipment ("the Building").

2. The Building was provided and assembled by a company called Built Offsite Limited ("BOS"), a specialist in modular construction. The transaction was structured so that BOS sold the Building to BOSHire Limited ("BOSHire") (a joint venture company in which BOS held a 50% interest), who in turn entered into the Contract to lease the Building to the College. Subsequent assignments led to School Facility Management Limited ("SFM") and then GCP Asset Finance 1 Limited ("GCP") obtaining the right to payments made by the College under the Contract.

3. Against the background of an increasing budget deficit, the College failed to pay the annual instalment under the Contract which fell due in September 2017. The present proceedings followed a year later, in the course of which the legal characteristics of the Contract, and the process by which it came to be entered into, came under much greater scrutiny within the College and the Council than they had received when the College signed the Contract, and the Council signed a letter supportive of the Contract, back in 2013.

4. Both the College and the Council now allege that the Contract was beyond the capacity of the College and outside the authority of those who signed the Contract on a wide range of grounds. The College resists the claims for debt and damages under the Contract, and seeks to recover the amounts it has already paid in unjust enrichment. In response, the Claimants contend that the Contract was binding on both the College and the Council as the College's principal, but in the alternative advances claims in misrepresentation, misstatement and unjust enrichment. The College and the Council also bring contingent claims against each other.

5. In Credit Suisse v Borough Council of Allerdale [1995] 1 Lloyd's Rep 315, 373, Colman J noted that the case before him "demonstrates that banks and other lending and credit providing institutions that deal with local authorities are exposed to the major risk of finding that their contracts are unenforceable in circumstances not encountered when dealing with the directors and officers of companies". This case shows that this may be equally true of those who lease equipment, goods or buildings to local authorities, or the schools they maintain.

THE PARTIES

6. BOSHire is the joint vehicle of two companies, BOS and Summit Asset Management Limited ("SAM"). As noted above, BOS designs, manufactures and installs modular buildings, principally (but not exclusively) for customers in the education and healthcare sectors. SAM was involved in asset finance, raising finance for transactions for the sale or hire of assets under various forms of asset finance agreement.

7. BOSHire was originally formed in 1993, its role being to put together finance packages for customers who wished to acquire modular buildings from BOS, under an arrangement whereby BOSHire would purchase a building from BOS and then enter into a lease contract with the customer under which regular payments of hire would be made. BOSHire procured external financing for these transactions (which provided the means to pay BOS and a profit element for BOSHire) by selling the income stream constituted by the payments due under the hire contracts.

8. Mr Timothy Spring, a director of both SAM and BOSHire, described BOSHire's "strategic business model" as being:

> "to supply modular buildings to customers in the public sector – principally health and education – where end-user customers are predominantly NHS Trusts, schools or colleges that are subject to statutory restrictions on incurring capital expenditure".

9. It will be apparent that BOSHire is one of a number of companies who operate in the commercial space which has come into existence as a result of limitations on the monies available to public bodies for capital expenditure (whether from allocated or borrowed funds), a space which has been increasingly filled by structured transactions intended to allow the cost of equipment and buildings to be met from periodic payments which, for regulatory and accounting purposes, the public body can treat as revenue expenditure.

10. In circumstances which I describe in greater detail below, on 30 April 2013 BOSHire entered into the Contract with the College for the supply of the Building for a 15-year period. On 5 June 2013, BOSHire assigned the benefit of the Contract to SFM, a subsidiary of BOSHire created for the purpose of raising finance for the Contract. By a Receivable Sales Agreement ("RSA") dated 4 July 2013, SFM assigned its rights, title and interest in rental income under the Contract to GCP, a third party funder from whom BOSHire had raised debt finance for the transaction.

11. The College is a voluntary aided school maintained by the Council. It was formed in 2008 from the merger of two middle schools – one Anglican and one Roman Catholic – and its mission is to provide Christian secondary education on the Isle of Wight. At the times material to the dispute before the Court, the College's governing body ("the Governing Body") was chaired by David Lisseter, its Principal was Mrs Pat Goodhead and its Business Manager was (and still is) Ms Kathrin Williams.

12. The Council is the unitary local authority for the Isle of Wight. Its functions include the provision of maintenance and funding to voluntary-aided schools on the Island. The Council is not responsible for the funding of sixth form education. Between April 2010 and March 2012, sixth-form funding was the responsibility of the Young People's Learning Agency ("YPLA"), and, thereafter, the Education Funding Agency.

THE WITNESSES

The Claimants' witnesses

13. The Claimants called evidence from Mr Timothy Spring and Mr Richard Pierce.

14. Mr Spring is a director of both SFM and BOSHire, with principal responsibility within BOSHire for co-ordinating the financing of transactions and the contractual arrangements between BOSHire and the end-user. I found him a careful and honest witness, who was clearly well-informed about the *ultra vires* risk which arises in dealing with public authorities, and who had sought to manage that risk in relation to the Contract. Mr Spring candidly recognised that the more conservative the approach taken to managing the *vires* risk, the less profitable the Contract would be for BOSHire, and the less attractive BOSHire's funding proposal would be when seeking to attract financing in the secondary debt market. He was understandably keen to defend the efficacy of the risk management steps which had been taken.

15. Mr Pierce is the chairman and director of BOS, which is a family business, and which specialises in the manufacture and supply of modular buildings. Modular buildings are assembled from prefabricated sections manufactured off-site. In some cases, it is feasible to disassemble a building when it is no longer needed, and use the modules elsewhere (the practicality of doing so in this case is an issue on which I have heard evidence, and to which it will be necessary to return). Mr Pierce was also an honest and careful witness. He was very knowledgeable about the technical aspects of modular building construction, and was able to deploy this knowledge to his advantage in the course of his cross-examination. He understood the regulatory sensitives which attached to the BOSHire business model, and was careful in his dealings with the Council to describe the transaction and its legal incidents appropriately. While Mr Pierce left the detail of the financial and contracting issues to Mr Spring, he was clearly alive to the legal implications of issues canvassed with him in evidence such as the potential re-sale market for the Building if the College stopped using it at the end of the Contract. For reasons I explain below, I have concluded that the prospects of marketing the Building to a third party purchaser at the end of the Contract were distinctly bleaker than Mr Pierce's evidence suggested.

The College's witnesses

16. The College called two witnesses: Mrs Patricia Goodhead, who was the Principal of the College from its foundation in 2008 until she retired in 2018, and Ms Kathrin Williams, who was and remains the College's Business Manager.

17. Both Mrs Goodhead and Ms Williams were honest witnesses, whose evidence about contemporary events had not been coloured in any way by the dispute which had subsequently arisen. It was clear that they found themselves in a difficult position in 2013, with strong pedagogical reasons for wanting to provide sixth-form accommodation, and with considerable pressure from the students, parents and the school's stakeholders to do so. The decisions taken by the College were taken on a collective basis with strong support from the members of the Governing Body, and not by Mrs Goodhead or Ms Williams alone. As I explain below, the strength of the Governing Body's conviction that a sixth-form building should be provided, coupled with their view that the College had not been treated fairly by the Council in the provision of funding when compared with other Island schools, contributed to what proved to be an unduly optimistic assessment of the College's ability to meet the payments due over the 15-year life of the Contract.

The Council

18. The Council called evidence from Mrs Janet Giles, who was the Council's Head of Education Finance from 1983 to 2014. Once again Mrs Giles was an honest and careful witness, whose evidence I found to be reliable.

The expert witnesses

19. I heard expert accountancy evidence from Mr Christopher Jackson of PwC for the Claimants and from Mr Adam Smith from BDO for the Defendants. Both experts were fully qualified and doing their best to assist the Court in their oral evidence. To a significant degree, their evidence depended on the assumptions and inputs used which they were not in a position to speak to from their own expertise. As I explain below, on the basis of Mr Jackson's own evidence I have concluded that the 5.6% average RPI rate which Mr Jackson used in his calculations was unrealistic and unduly generous to the Claimants.

20. Finally, I heard valuation evidence from Mr Peter Dodson of Liquidity Services for the Claimants, and from Mr Jonathan Manley and (on construction costs and state of repair) Mr David Pincott of Lambert Smith Hampton for the Defendants. Once again, I have concluded that the experts were appropriately qualified and doing their best to assist the Court. While submissions were directed by the parties to the issue of whether it was experience in valuing plant (of which Mr Dodson had more) or traditional buildings (where Mr Manley was undoubtedly the better qualified) that was more relevant to the task at hand, I have concluded that the Buildings under the Hire Contract were essentially a hybrid of these categories, meeting a demand which would traditionally have been fulfilled by conventional building construction through a form of supply which could more quickly deliver the desired end-product, and do so in a way which offered the potential benefit of an accounting classification more conducive to the transaction proceeding. Both kinds of experience were of value.

21. Where the experts had material differences of view on significant issues, I have resolved those issues on their merits, having regard to the cogency of the justifications offered by the respective experts and their inherent and practical logic, rather than by relying on any pre-disposition to regard the evidence of any one expert as being more likely to be reliable than that of another.

THE FACTS

22. As I have stated, the College was formed in September 2008 as a result of the amalgamation of two existing voluntary-aided schools, one Roman Catholic and one Anglican. In 2009, the College's permitted age range was extended, which gave it the option to create a sixth-form (something which the Roman Catholic and Anglican dioceses had long supported). However, the College did not have sufficient accommodation to house a sixth-form.

23. It had been the College's original intention to address this need through funding from a central Government programme called "Building Schools for the Future" ("BSF"). However BSF was cancelled in 2010. The College held discussions with two other potential providers of sixth-form accommodation, McAvoy Group Limited and an organisation called "Building Schools for Nothing". The College also sought to raise money from the Anglican and Roman Catholic dioceses for a building and equipment which it originally estimated would involve a capital cost of £4.514m. The Dioceses were unable to meet this funding requirement, but the Roman Catholic diocese suggested that the College approach BOS, with whom it had had previous dealings.

24. Discussions between the College and BOS began towards the end of 2011. BOS was represented in those discussions by its sales director (and Mr Pierce's son-in-law), Mr Neil Blow. BOS soon became the College's preferred candidate to provide a sixth-form building, because the College believed it would complete the project more quickly in circumstances in which the first sixth-form entry was arriving in September 2012. It was originally anticipated that the Building would be contracted for in stages, reflecting the fact that in the first year, there would only be one year of sixth-formers to accommodate. Ms Williams explained BOS's offering to the Governing Body in a letter of 10 February 2012 as follows:

> "This can be done over a period of 15 years; the building would then be rented by the College for that time with the responsibility for the refurbishment of the building remaining with the hirer (Built Off Site), hence reducing the maintenance costs for the College during the rental period. This option would enable the College to use its own revenue budget to cover the rental payments and we have produced a revised budget plan that shows that this is possible within the same budget recovery that has currently been licensed by the Local Authority".

25. The proposal was discussed at a meeting of the Governing Body on 21 February 2012, at which Mr Blow was present. The governors were told that "the initial value of the building would be in the region of £2.2 million" and that "the cost of 7 years rent approximately equates to the value of the building, obviously making the hire agreement much more expensive over the full term of the agreement". It was also stated that "the hire agreement is not a loan of any kind" and "sits outside of public sector borrowing".

26. Some of the aspects of the proposed transaction which Mr Blow described to the College were either imperfectly conveyed or understood (for example as to responsibility for maintenance, whether the College would have a legal right to purchase the Building during or at the end of the lease term and who would be

responsible for removing the Building from the site at the end of the Contract) but before the Contract was concluded, I find that Mr Pierce had accurately explained the position and corrected any previous misunderstandings in these respects.

27. The College had operated with a budget deficit from its creation in 2008, and required the Council's permission to do so. On 22 February 2012, the College sought the Council's permission to extend that deficit so as to allow the College to enter into the 15-year hire agreement with BOS in respect of the first phase of the Building. The proposal which the College put forward envisaged the deficit being paid off by 2014/2015, with the College having the option to purchase the Building during the term of the agreement. The Council expressed some concern about the amounts involved. Janet Newton, the Council's Head of Commissioning for Education Services, commented on 22 February 2012 that "their case has more holes in it than Gouda cheese". Other Council communications noted (correctly) that the Council had no responsibility for funding sixth-form education. Nonetheless, in March 2012, Mr Beynon, the Council's Chief Executive, informed the College that the Council was willing to extend the College's deficit to meet the costs of hire.

28. As would be expected for a public body, the College is subject to a number of statutory restrictions as to the financial commitments it can undertake. I will consider the precise nature of the particular restrictions in issue in this case (and whether they impact on the ambit of the College's contractual capacity) in due course. The understanding of Mr Spring in 2012 in relation to this issue was as follows:

> "The statutory scheme in which maintained schools operate prohibits them from entering into borrowing arrangements without the approval of the Secretary of State for Education. I was very well aware that a finance lease is considered to constitute borrowing, so a maintained school cannot enter into such an agreement without the consent of the Secretary of State … I briefly discussed with Richard the possibility that the College could be persuaded to seek the consent of the Secretary of State to enter into a borrowing arrangement but we ruled this out as impracticable and likely to result in a self-defeating delay to the project".

29. Central to Mr Spring's approach in addressing this issue was ensuring that the Contract would, in accounting classification terms, be an operating lease and not a finance lease. I received expert accounting evidence on the differences between operating and finance leases, which I address below, but a crucial and essential aspect of the distinction is whether the usual risks and rewards of ownership are substantially transferred to the lessee. On 6 March 2012, Mr Spring prepared a draft letter for the College setting out BOSHire's likely requirements to address "the operating lease/*intra vires*" question. The draft letter (which was not, in the event, sent) referred to a "statutory constraint" that "the College does not have the power to enter into a 'finance lease' of assets (which, for accounting purposes, is regarded as a loan arrangement) without the consent of the Secretary of State for Education". The draft letter continued:

> "We are confident, given the nature and explicit terms of the hire contract and the financial terms contained in and surrounding it, that the hire contract is an

'operating lease', so does not require SoS approval. However, in order to satisfy our lenders that is indeed the case, we envisage that we will be required to seek the following:

- Minutes of the meeting of the Board of Governors of the College approving the project, the terms of the hire contract, confirming the Governors' opinion that the hire contract is an 'operating lease' and authorising you to sign the hire contract on behalf of the College.

- Confirmation from the Isle of Wight Council, as the funding LEA, of approval of the hire contract and confirmation that it is, in the Council's view, an operating lease; accordingly that it is within the powers of the College to enter into and perform the hire contract".

30. In order to give further consideration to this issue, Mr Spring engaged Ms Sam Yardley, a partner in Watson Farley & Williams LLP specialising in asset finance, to advise on the transaction.

31. In the event, there were difficulties in obtaining planning permission for the Building, with the result that no contract had been signed, and no Building was available, by September 2012. For this reason, the College's first sixth form entry had to be accommodated in less than satisfactory circumstances using various sites across the College, something which placed the College under further pressure to ensure that the issue was resolved by the time the second sixth-form entry arrived in September 2013. In the meantime, and with the encouragement and support of the College, BOS began the ground works, erecting the foundations on which the Building would stand.

32. The planning issues were resolved by December 2012. By this date, the College had decided to contract for the Building in one phase, with a view to having it available by September 2013 when the College would have to accommodate two sixth-form years. In the course of renewed exchanges between BOS and the College, on 17 January 2013, Mr Pierce explained the position so far as any option to purchase and maintenance were concerned in the following terms:

> " We acknowledge that an undertaking has been given to redecorate the facility internally at the 5-year period, this redecoration would be confined to painted surfaces and floor coverings and would not cover the replacement repair or redecoration of any areas or items affected by accidental damage, misuse or vandalism albeit I am sure the latter two would be highly unlikely. Should you wish to purchase the building after a period of time then that is an option we would consider and not unreasonably reject. It is not possible or practicable at this stage to list out what the likely costs would be as we would need to approach the funding partners at the stage you are considering purchase to have them calculate the current replacement value of the facility and then dependent upon the length of time you have had the facility on hire for a discount against the replacement value would be given. Clearly the further through the term you are the higher discount would be. Additionally as I am sure you will recall we did discuss that we cannot write the option to purchase into the agreement as it would substantially change the legal status and tax treatment of the transaction".

33. The vagueness in this communication as to the price at which the College might be able to purchase the Building at the end of the 15-year period was not resolved in subsequent communications during the life of the Contract, or indeed in the course of the trial.

34. In January 2013, Mr Pierce also pushed the College for payment of the £400,000 BOS had already incurred on preparatory works. Mrs Goodhead, after speaking to Mr Pierce, explained in an email of 21 January 2013 that "it was obvious during the conversation that Richard's real fear is still the LA [local authority] stopping this going ahead and the money his firm would lose if that happened". In exchanges in the course of the evening of 21 January 2013, Mrs Goodhead and Ms Williams noted how difficult it would be to find this money from the College's 2012/2013 budget, with Mrs Goodhead signing off at 22.17 with the suggestion that they "sleep on it and see what we can sort tomorrow". She concluded "we can't not let this happen, obviously".

35. BOSHire provided the College with a draft of the Contract which the College sent to its legal adviser Mr Guthrie McGruer of Blake Lapthorn. Mr McGruer made contact with Mr Pierce in January 2013 to discuss the terms of the proposed Contract, and the provision of a side-letter which would record BOSHire's willingness to give favourable consideration to a request by the College to purchase the Building during the 15-year lease.

36. A representative of the Catholic Diocese involved with the College, Ms Hilary Foley, emailed Mr Pierce suggesting that the proposal would have to be considered at a further meeting of the Governing Body before the Contract could be approved. Apparently frustrated at the time it was taking to sign off on the Contract, particularly given the £400,000 of work BOS had already undertaken, Mr Pierce sent an email to the College on 28 January 2013 stating:

> "I have forwarded Guthrie's and Hilary's emails to our funding partners for comment and this has resulted in them determining that they will need undertakings from both the council and the Board of Governors that they are satisfied that the contract meets the requirements of classification as an operating lease. Whilst this should not be a problem to acquire as it is a fairly straightforward event it will further delay all the necessary paperwork being in place. I have instructed our funding partner to assemble the necessary undertaking as soon as possible as a matter of extreme urgency so that we can present the Authority and the Board with documents to approve and sign".

37. Mr Spring and Mr Pierce had exchanges about the draft of the proposed side-letter which Mr Guthrie had prepared, and also about the documented assurances they should seek from the College and the Council with regard to the College's ability to enter into the Contract. Draft documents were prepared, which at that stage envisaged a certificate from the College confirming that it had discussed the classification of the Contract with its auditors who had confirmed it was an operating lease.

38. A meeting took place between Mr Pierce, Mr Spring, Mrs Goodhead, Mr Lisseter and Mr McGruer in Oxford on 4 February 2013 to address a number of topics: the level of comfort which could be given by BOSHire on the subject of the College's

ability to purchase the Building during the life of the Contract; what provision should be made for the possibility that the College might cease to be a maintained school but assume academy status during the life of the Contract; and what statements would be made to BOSHire by the College and/or the Council in relation to the *vires* issue. The College made it clear that it was reluctant to approach the Council for some form of written reassurance for BOSHire and, as will be seen, the final form of assurances provided in both directions were diluted versions of those originally requested.

39. The possibility that the College might acquire academy status was addressed in an additional clause in the Contract which I set out below. The College's desire for an option to acquire the Building during the Contract was the subject of a side-letter which did not give the College a legal right to purchase, but confirmed that BOSHire would look favourably on such a request. So far as the *vires* issue was concerned, amendments were made to the letter to be sought from the College, but the issue of what the Council would be asked to provide remained open. On 13 February 2013 Mr Spring informed Mr Guthrie that:

> "We have deliberated at considerable length on how best to secure the reassurance needed. Our suggestion is that the governing body (or Pat Goodhead on its behalf) should write to the Council/Steve Beynon requesting confirmation on certain matters".

A draft letter was prepared by BOSHire, with input from its solicitors Watson, Farley & Williams LLP, for Mrs Goodhead to send to the Council.

40. The suite of transaction documents was considered and approved by the College Finance Committee. A meeting of the Governing Body was then convened on 13 February 2013, at which Mr Lisseter is recorded as having stated:

> "The governing body has been on a very long journey with this building project and there has been much scrutiny. The governors have been supported with legal advice at all stages from the LA, Built Offsite and independently from Blake Lapthorne [sic]
>
> …
>
> The Finance Committee has scrutinised these documents following legal advice. Janet Giles of the LA confirmed in a meeting with PGO [Mrs Goodhead] this morning that she is very happy with the College's budget recovery and the hire contract".

41. It is clear on the evidence that these statements, at least as recorded in the minutes, somewhat overstated the position. While the College had benefited from information provided by BOS, and from legal advice from Blake Lapthorn, the College had not received legal advice from the Council. Further, I accept Mrs Giles' evidence that, while she had confirmed that the College's paperwork for the budget extension requested by the College was in order, and that the extension would be granted, she had not stated she was "happy" with the extension and had not seen or expressed any views on the Contract.

42. The Governing Body took the decision to proceed, and Mr Lisseter signed the Contract and the letter of reassurance that evening. I shall refer to the letter provided by the College – which Mr Lisseter signed on 13 February 2013 – as "the College's Letter".

43. At 12.54 the following day, Ms Goodhead sent a letter in the form BOSHire had prepared to the Council asking the Council to provide a letter to the College which the College could show to BOSHire. At 15.14 on the same day, Mrs Giles informed Mrs Goodhead that Mr Beynon had confirmed he was happy to sign a letter in the requested terms, and the signed letter was sent out at 19.15 that evening. When Mr Spring saw the letter the next morning, he observed to Mr Pierce "that was really quick". I shall refer to the letter signed by the Council as "the Council's Letter".

44. Armed with the College's and the Council's Letters, BOSHire set about raising the necessary funding. Gravis Capital Partners LLP agreed "in principle" to provide funding on 28 March 2013. Meanwhile, the College was already running into financial difficulties, exacerbated by Blake Lapthorn's costs, the higher than expected payment to BOS and a lower than expected contribution from the Dioceses by way of Locally Co-ordinated Voluntary-Aided Programme payments. On 18 March 2013, the College asked the Council for a contribution of £200,000 towards the Contract. The request was refused, but on 5 April 2013, the Council's acting Chief Executive, Mr Burbage (who had replaced Mr Beynon) confirmed that the Council would approve an increase to the College's budget deficit "in order to allow the College to meet the costs from its revenue budget".

45. With funding in place, Mr Pierce signed the Contract for BOSHire on 30 April 2013. On the same day, BOSHire assigned its rights under the Contract to SFM, which had been incorporated on 22 April 2013, and the College acknowledged that assignment in writing on 5 June 2013. On 4 July 2013, SFM entered into a further assignment with GCP on the terms of the RSA.

46. In assembling the Building, it became apparent that various further works were necessary to address matters such as the electricity supply and sockets, the need for a fire hydrant and a boost to the water supply. In the absence of funding alternatives, the amounts due under the Contract were increased by two variations: the first, dated 5 June 2013, increased the initial payment from £915,000 to £950,579, the second payment from £305,000 to £316,000 and the annual payments thereafter from £610,000 to £633,719. The second, dated 5 September 2013, increased these amounts to £1,001,762, £333,920 and £667,851 respectively (exclusive of VAT).

47. The College took possession of the Building on 5 September 2013. It is apparent from the technical specification prepared by BOS that in addition to providing pre-fabricated modules, external cladding, roofing, electrics and plumbing, the Contract also covered the provision of internal lining and wall finish for the modules, platform lifts, units, power and gas (but not the equipment) for the kitchen, art teaching, resistant materials and graphics rooms and the science laboratories.

48. The payments made under the Contract led to a substantial increase in the level of the College's deficit. While the College had filed a budget report with the Council in September 2013 projecting a return to surplus by 2016/2017, on 10 October 2013, Mrs Williams wrote to the Council stating that the College's previous budget was no longer achievable, "mainly but not exclusively due to the additional expenditure with the Sixth Form Centre", and confirming that the College wanted to extend its deficit. In February 2014, the Council's Education Finance team carried out a full review of the College's budgeted income and expenditure and concluded that "the 6th form centre is not affordable through the current Funding Formula".

49. On 6 May 2014, the College informed the Council that it could not prepare a budget plan showing a full recovery from its current deficit without financial support from the Council, and the College sought an additional contribution from the Council of £200,000 a year for a 5-year period. The College's Consistent Financial Reporting to the Council for the year 2013/2014 forecast a deficit of £1,045,686.16 at the year-end.

50. Matters did not improve thereafter. On 8 June 2016, the Council served a formal Notice of Concern on the College. This stated:

> "As a result of the deficit the College is completely reliant on cash flow support from the Isle of Wight Council and support for debt. It is unacceptable to expect the local council taxpayer to support an increased College deficit going forward.
>
> We understand that the majority of the current c£2m (and rising) overspend has been caused by the decision by the college in 2012/13 to lease the sixth form units, a highly expensive financial arrangement that has, to date, proved impossible to service from the school's revenue budgets.
>
> However, in addition to the lease arrangement, the College has struggled to set and keep to a balanced in-year revenue budget since 2008/09. Successive 3-year budget forecasts have proven to be overly optimistic and the school has been unable to halt or in any way reverse the spiralling debt it now faces.
>
> Various conversations have suggested consensus between the College and the local authority that this situation is not sustainable, but, as yet, the College has found no solution and the position continues to worsen".

51. The Notice of Concern imposed a number of requirements, including that "the College prepares a recovery plan (lease costs included) with detailed actions, timescales and governance arrangements which results in a surplus position within five years". It also imposed a requirement that no purchases over £5,000 were to be made without the approval of the Council's Director of Finance.

52. In September 2017, the College submitted a budget plan which involved increasing its existing budget deficit of £2.6m by a further £650,000. The Council refused to authorise any further advances of funds to the College, and communicated this to the College on 8 September 2017. A final warning to return to a balanced budget was served on the College on 8 January 2018.

53. The College failed to make the annual payment of £667,841 payable under the Contract on 5 September 2017. There were attempts at meetings and in correspondence over the following two months to resolve matters, but by 22 November 2017, matters between the Claimants and the College had entered pre-litigation mode.

54. On 22 November 2017, SFM sent the College a formal Notice of Default under the Contract. On 9 April 2018, the College made it clear that it had no intention of paying any further amounts, and it articulated its *ultra vires* defence for the first time. On 11 April 2018, SFM sent a letter terminating the Contract, and informed the College that it was no longer in lawful possession of the Building with its consent, and should cease using it. The Claim Form was issued by SFM on 8 November 2018, with BOSHire and GCP being added as claimants by later amendments.

THE CONTRACT

55. The key provisions of the Contract were as follows:

    i) The College requested BOSHire to purchase the Building (described as "a double storey 6th Form teaching accommodation block constructed from 81 relocatable units") from BOS.

    ii) The College agreed to take the Building on hire in return for paying the hire charges to which I have already referred for a minimum period of 180 months (15 years).

    iii) Hire was payable even if the Building "was not fully operational", with interest at 4% over Barclays base rate (compounded monthly) in the event of late payment.

    iv) It was the College's responsibility to ensure that the Building complied with applicable statutes and regulations so far as use was concerned, and to maintain the Building in good and substantial repair and condition (fair wear and tear excepted).

    v) On termination, it was the College's responsibility to return the Building to BOSHire, with the College being liable "for all costs of inspection, loading, unloading and transportation". The equipment was to be returned in good and reasonably clean condition. Failing redelivery in this condition, the College was liable to pay BOSHire the costs of restoration, with hire continuing to be payable until contractual redelivery took place.

    vi) The College bore all risk of loss and damage, and was obliged to insure the Building for £6,953,000.

56. There are certain clauses in the Contract which have featured extensively in the course of argument and which merit more extended quotation.

57. First, clause 2.6.2 addressed termination for the College's repudiatory breach and provided that in that eventuality:

> "2.6.2.1 the Customer [the College] will no longer be in possession of the Equipment with BOSHire's consent and if the customer has not re-delivered the Equipment in accordance with clause 2.3.6, BOSHire or its agent may enter the Customer's Site without further permission and take possession of the Equipment; and
>
> 2.6.2 the Customer will immediately pay to BOSHire, as an agreed pre-estimate of the loss suffered by BOSHire as a consequence of termination, an amount equal to the aggregate of all Hire Charges then due but unpaid together with interest due under clause 2.2.5; plus all costs incurred by BOSHire in enforcing or seeking to enforce this Contract and in locating and recovering the Equipment; plus the sum of all further Charges which, but for termination, would have fallen due during the Minimum Hire Period, each discounted at 3% per annum for accelerated payment; plus all other sums due under this Contract".

58. Second, clause 2.6.3 addressed what was to happen if the College was converted to Academy status (which would have the effect that the Council was no longer obliged to maintain it). It provided that if the College began taking steps towards such a conversion it would:

> "notify BOSHire and shall provide such information as BOSHire may reasonably require in connection therewith. BOSHire shall consider such information in good faith with a view to novating this Contract to the Academy entity ('the Academy Trust') on such terms as the Customer, the Academy Trust and BOSHire may agree. If the parties fail to reach agreement, then the Customer may give not less than 3 months written notice to BOSHire to terminate the hiring of the Equipment and may require BOSHire to sell the Equipment to the Academy Trust. Upon such termination ('the Termination Date') the Customer shall pay to BOSHire the amount that would be due pursuant to clause 2.6.2.2 upon termination under clause 2.6 and BOSHire shall sell the Equipment to the Academy Trust on terms to be agreed between the parties acting in good faith".

59. Third, clause 2.7.1 allowed BOSHire to assign "the benefit of this Contract or the right to receive payment of Hire Charges and other sums payable under this Contract" to another party.

60. Finally, although this document was not contractual in effect, the side-letter provided by BOSHire, and later SFM, to the College ("the Side-Letter") stated:

> "You have requested that we provide an indication of our position should you wish to terminate the Contract and to purchase the Equipment ...
>
> We would be willing to consider such a request (without any obligation to accept) and, in our current opinion, acceptance of such a request by us would likely require you to pay to us:
>
> (a) a sum equal to the aggregate of all the Hire Charges (as defined) remaining to be paid up to the Expiry Date, discounted at a percentage rate to be agreed between us for accelerated payment; plus

(b) a sum as may be agreed between us that represents the anticipated value of the equipment as at the Expiry Date, discounted at a percentage rate to be agreed between us to reflect early receipt;

plus all applicable VAT, costs and expenses".

THE STATUTORY SCHEME

61. Educational provision by the Council and the College takes place within a complex statutory and regulatory framework. In this section, I set out the key enactments and provisions on which the Council and the College found their *ultra vires* defence, and also their contingent claims against each other.

The SSFA and the Education Act 2002

62. Provision for the legal status of the governing bodies of maintained schools was made in s.36 and Schedules 9 and 10 of the School Standards Framework Act 1998 ("the SSFA"). S.36 provided that "each maintained school shall have a governing body, which shall be a body corporate constituted in accordance with Schedule 9", and that Schedule 10 would have effect in relation to the general powers of the governing body and other matters relating to it as a body corporate.

63. Those provisions were essentially repeated in s.19(1) of the Education Act 2002, which provided that each maintained school "shall have a governing body which shall be a body corporate in accordance with regulations". References in this case to the capacity or *vires* of the College are, therefore, a short-hand for references to the capacity of the body corporate established by statute and constituted in the form of the Governing Body. S.19(6) provides that "Schedule 1 (which contains general provisions relating to the governing body as a body corporate) shall have effect", and it is in that schedule that the capacity of the Governing Body is principally to be found.

64. Paragraph 3 of Schedule 1 provides:

"(1) The governing body may do anything which appears to them to be necessary or expedient for the purposes of, or in connection with—

(a) the conduct of the school …

…

(3) The powers conferred by sub-paragraph (1) … include, in particular, power—

(a) to borrow such sums as the governing body think fit and, in connection with such borrowing, to grant any mortgage, charge or other security over any land or other property of the governing body,

(b) to acquire and dispose of land and other property,

(c) to enter into contracts,

(d) to invest any sums not immediately required for the purposes of carrying on any activities they have power to carry on,

(e) to accept gifts of money, land or other property and apply it, or hold and administer it on trust, for any of those purpose …

….

(4) The power to borrow money and grant security mentioned in sub-paragraph (3)(a) may only be exercised with the written consent—

(a) of the Secretary of State (in relation to England) or the National Assembly for Wales (in relation to Wales),

…

and any such consent may be given for particular borrowing or for borrowing of a particular class.

(7) Where the school is a foundation, voluntary aided or foundation special school, the power to enter into contracts mentioned in sub-paragraph (3)(c) includes power to enter into contracts for the employment of teachers and other staff, but no such contracts may be entered into by the governing body of a community, voluntary controlled or community special school or of a maintained nursery school.

(8) Sub-paragraphs (1) to (3) have effect subject to —

(a) any provisions of the school's instrument of government, and

(b) any provisions of a scheme under section of the 1998 Act ([local authorities]' financial schemes) which relates to the school".

65. In addition to specifying the capacity of the Governing Body, the SSFA also contains numerous provisions addressing the financial relationship between the Council and the College.

66. By s.22 of the SSFA, the Council is under a duty to fund the maintained schools in its area. For voluntary-aided schools such as the College, s.22(5)(a) of the SSFA provides that the Council's duty to maintain includes:

"the duty of defraying all the expenses of maintaining it, except any expenditure that by virtue of paragraph 3 of Schedule 3 is to be met by the governing body ….".

67. Paragraph 3 of Schedule 3 provides:

"(1) In the case of a voluntary aided school, the governing body of the school are responsible for meeting all capital expenditure in relation to the school premises subject to sub-paragraph (2) below.

(2) The duty in sub-paragraph (1) does not extend—

(a) to capital expenditure in relation to playing fields or any building or other structure erected thereon in connection with the use of playing fields, but does extend to capital expenditure in relation to boundary walls and fences;

(b) to capital expenditure necessary in consequence of the use of the school premises, in pursuance of a direction or requirement of the [local authority], for purposes other than those of the school;

(c) to capital expenditure on the provision of any new site which the [local authority] is to provide by virtue of paragraph 4 of this Schedule".

68. Paragraphs 9A-B of Schedule 3 provide, in broad terms, that capital expenditure is expenditure which "falls to be capitalised in accordance with proper accounting practices".

69. The mechanism by which the Council provides the funding which it is obliged to provide to maintained schools is through allocating a budget share for each funding period (s.45 of the SSFA), which is the amount the Council decides to allocate to the school out of its individual schools budget for that funding period (s.47 of the SSFA). In most circumstances, reflecting the autonomy which maintained schools are intended to have, the budget share is to be made available to the maintained school as a delegated budget (ss.49-50 of the SSFA) meaning, in effect, that that part of the budget is managed by the governing body of the maintained school and not the Council.

70. S.48 provides that each local authority "shall maintain a scheme dealing with such matters connected with the financing of the schools maintained by the authority" as are required to be dealt with by regulations made by the Secretary of State or any provision of the relevant part of the SSFA.

71. S.49 provides:

"(1) Every maintained school shall have a delegated budget.

…

(4) Subject to —

(a) section 50 (right of governing body to spend budget share where school has a delegated budget),

(b) paragraph 4 of Schedule 15 (power of governing body to spend amounts out of budget share where delegation of budget suspended),

(c) section 489(2) of the Education Act 1996 (education standards grants), and

(d) any provisions of the scheme,

A [local authority] may not delegate to the governing body of any maintained school the power to spend any part of the authority's [non-schools education budget] or schools budget.

(5) Any amount made available by a [local authority] to the governing body of a maintained school whether under section 50 or otherwise—

(a) shall remain the property of the authority until spent by the governing body or the head teacher; and

(b) when spent by the governing body or the head teacher, shall be taken to be spent by them or him as the authority's agent.

(6) Subsection (5)(b) does not apply to any such amount where it is spent—

(a) by way of repayment of the principal of, or interest on, a loan, or

(b) (in the case of a voluntary aided school) to meet expenses payable by the governing body under [paragraph 3(1) or (2) of Schedule 3, paragraph 14(2) of Schedule 6, […] or paragraph 8 of Schedule 8 to the Education Act 2002] section 75(2)(b) of, or paragraph 4 of Schedule 3 to the Schools Standards and Organisation (Wales) Act 2013].

(7) In this Part —

(a) references to a school having a delegated budget are references to the governing body of the school being entitled to manage the school's budget share; and

(b) where a school has a delegated budget the governing body are accordingly said to have a right to a delegated budget".

72. Section 50 provides:

"(1) Where a maintained school has a delegated budget in respect of the whole or part of a [funding period] the [local authority] shall secure that in respect of [that period] there is available to be spent by the governing body—

(a) where the school has a delegated budget in respect of the whole of that [period], a sum equal to the school's budget share for the [period], or

(b) where the school has a delegated budget in respect of only part of that [period], a sum equal to that portion of the school's budget share for the [period] which has not been spent.

(2) The times at which, and the manner in which, any amounts are made available by the authority to the governing body in respect of any such sum shall be such as may be provided by or under the scheme.

(3) Subject to any provision made by or under the scheme, the governing body may spend any such amounts as they think fit—

(a) for any purposes of the school; or

(b) (subject also to any prescribed conditions) for such purposes as may be prescribed.

….

(6) The governing body may delegate to the head teacher, to such extent as may be permitted by or under the scheme, their powers under subsection (3) in relation to any amount such as is mentioned in that subsection.

(7) The governors of a school shall not incur any personal liability in respect of anything done in good faith in the exercise or purported exercise of their powers under subsection (3) or (6)".

SEYFER 2012

73. Further and more detailed provision for the financing of maintained schools was made under regulations issued under the SSFA in the form of the School and Early Years Finance (England) Regulations 2012/2991 ("SEYFER 2012").These regulations were issued by the Secretary of State for Education pursuant to various provisions of the SSFA and also s.24(3) of the Education Act 2002.

74. There are two particular provisions of SEYFER 2012 which are relied upon by the College and the Council as further limiting the capacity or *vires* of the College.

75. First, Regulation 6 prescribes the contents of the schools budget as follows:

"(1) The classes or descriptions of local authority expenditure specified in sub-paragraphs (a) to (e) and Schedule 2 are prescribed for the purposes of section 45A(2) of the 1998 Act and the determination of a local authority's schools budget, subject to paragraph (2) and the exceptions in regulation 7 —

(a) expenditure on the provision and maintenance of maintained schools and on the education of pupils registered at maintained schools".

76. Regulation 7 then sets out matters which cannot form part of a local authority's schools budget as follows:

"A local authority's non-schools education budget or schools budget must not include the following classes or descriptions of expenditure—

(a) capital expenditure …

(b) expenditure on capital financing, other than expenditure incurred—

(i) on prudential borrowing …".

77. Regulation 1(4) provides that "capital expenditure" means "expenditure of a local authority which falls to be capitalised in accordance with proper practices or expenditure treated as capital expenditure by virtue of any regulations or directions made under section 16 of the Local Government Act 2003". "Proper practices" are in turn defined as:

> "those accounting practices which a local authority are required to follow by virtue of any enactment, or which, so far as they are consistent with any such enactment are generally regarded, whether by reference to any generally recognised published code or otherwise, as proper accounting practices to be followed in the keeping of the accounts of local authorities, either generally or of the description concerned".

The Scheme

78. As I have mentioned, s.48 of the SSFA provided for each local authority to maintain a scheme "dealing with such matters connected with the financing of the schools maintained by the authority" as are required to be dealt with by regulations made by the Secretary of State or the SSFA itself.

79. The Council's 2012 Scheme ("the Scheme") provided at paragraph 1.1 that:

> "The financial controls within which delegation works are set out in a scheme made by the authority in accordance with s.48 of the Act and approved by the Secretary of State …. Subject to the provisions of the Scheme, governing bodies may spend budget shares for the purposes of their school …. An authority may suspend a school's right to a delegated budget if the provisions of the school financing scheme (or rules applied by the scheme) have been substantially or persistently breached, or if the budget has not been managed satisfactorily".

80. Paragraph 1.2 identifies the purpose of the Scheme as follows:

> "This scheme sets out the financial relationship between the authority and the maintained schools which it funds. The requirements of the Scheme in relation to financial management and associated issues are binding on both parties".

81. The College and the Council relied upon a number of provisions of the Scheme as limiting the *vires* or capacity of the College. These are considered below.

82. Before considering the College and the Council's various *vires* challenges, it is first necessary to consider whether, if there was or had been a valid contract concluded, it was between BOSHire and the College, or BOSHire and the Council.

DID THE COLLEGE ACT AS THE AGENT OF THE COUNCIL?

83. The conflicting interests in multi-party litigation can sometimes give rise to strange bedfellows. One issue on which the Claimants and the College found themselves unlikely allies was in the suggestion that, in purporting to enter into

the Contract with BOSHire, the College was acting as the Council's agent such that it was the Council, and not the College, which was liable on the Contract if it was valid. That conclusion was not pushed by the College to its logical conclusion: for example the College relies on its own public law limitations, rather than on limitations on the Council's ability to contract, to establish that the Contract is not binding, and the College seeks to recover the monies which it says were mistakenly paid under the Contract in its own name and for itself, and not for its alleged principal.

84. Any suggestion that the College was the Council's agent as a matter of fact in this case can be immediately discounted. From BOSHire's perspective, the Contract clearly identifies its contractual counterparty as the College, and the Contract contains no reference to the Council. The letter of 14 February 2013 which the College provided to the Claimants, in terms agreed between the legal representatives of both parties, specifically referred to a contract to be entered into by the College, and contained no hint that the Council was the contracting party. Further the letter drafted by BOSHire which the Council signed on 14 February 2013, which was addressed to the College, and, with the Council's knowledge, provided by the College to BOSHire, was wholly inconsistent with any suggestion that the College would be entering into the Contract on the Council's behalf. Paragraph 2 of that letter stated that "the Council agrees that the expenditure to be incurred by the Governing Body under the Hire Contract and otherwise in connection with the project falls within the delegated budget **and is not the responsibility of the Council under the Schools and Standards Framework Act 1998 or otherwise"** (emphasis added).

85. There are numerous other contemporary documents disclosed by BOSHire, the College and the Council which make it clear that everyone was proceeding on the basis that the College, and not the Council, was the contracting party, and which are wholly inconsistent with any suggestion that the Council held the College out as authorised to conclude a contract on the Council's behalf. The pre-action correspondence of the Claimants and the College did not involve the Council or contain any suggestion that the Council was the contracting party. The only contemporaneous document said to point the other way was the draft letter, prepared by BOSHire to go to the College but not sent, which referred to the College as "the *de facto* agent of the Council as the funding LEA". However, far from supporting the agency case, the draft letter effectively accepts that the College was not the Council's *de jure* agent. The other terms of the draft make it clear that it was the College, and not the Council, which would be the contracting party, and the statement relied upon does no more than reflect the College's financial dependence on the Council. In any event, this unsent draft letter cannot carry the day against the weight and clear effect of the documents which did cross the line. The reality of the position was accurately captured in the evidence of Mrs Giles who said:

> "It was made very clear to the school right from the start of these discussions that this was – the contract was entered into by the governing body on behalf of the school and not on behalf of the local authority. Because the school was an aided school, the local authority was very clear that they would not

provide funding for this, could not provide funding for this, and that the contract was entered into by the school independently".

86. The argument that, nonetheless, the College was acting as the Council's agent was advanced on two bases. The first, which I can deal with relatively briefly, was the suggestion that such an agency was implicit in the local authority's duty to fund maintained schools under s.22(1) of the SSFA, and that the assumption that maintained schools acted as agents had been received wisdom since the Education Act 1944. I was not pointed to any legal material in existence in advance of the SSFA which provides any support for the view that a maintained school always contracted as the agent of the maintaining authority. There is an obvious distinction between one party having an obligation under a statute (the mechanisms for enforcement of which were not subject to any significant discussion before me) to fund the activities of another, and one party concluding contracts on behalf of another.

87. In any event, monies coming from a local authority are far from the only source of funds available to a maintained school. Most pertinently, given that the present dispute arises from the College's desire to open a sixth-form, funding for sixth-form education comes not from local authorities but centrally, from the YPLA. The difficulties with the argument that a college, in incurring expenditure relating to the provision of sixth-form education, contracts as agent of the local authority, which is not legally obliged to and does not fund that education, are obvious. I note there was no suggestion that the funding provided to the College by the YPLA for sixth-form education had the effect that the College contracted as agent for the YPLA when spending those funds.

88. The second, and the principal ground, relied upon to establish the agency was s.49(5) and (6) of the SSFA which it is convenient to set out once again here:

"(5) Any amount made available by a [local authority] to the governing body of a maintained school whether under section 50 or otherwise—

(a) shall remain the property of the authority until spent by the governing body or the head teacher; and

(b) when spent by the governing body or the head teacher, shall be taken to be spent by them or him as the authority's agent.

(6) Subsection (5)(b) does not apply to any such amount where it is spent—

(a) by way of repayment of the principal of, or interest on, a loan, or

(b) (in the case of a voluntary aided school) to meet expenses payable by the governing body under [various provisions concerned with capital expenditure]".

89. On its own, the language of s.49(5) lends only limited support for the view that, outside the exceptions in s.49(6), a maintained school contracts as the agent of its maintaining authority. The language addresses the characterisation of money spent, with no reference to contracting at all, and it does so in such a way as to

suggest that the provision applies a "deemed" character to such payments ("shall be taken to be spent") which may differ from the legal character in which they were made. The focus in s.49(5) on the way in which payments are "taken to be spent" does not readily offer an answer to the logically and chronologically anterior question of "who are the parties to the contract under which the payments fall to be made?"

90. There are also various practical difficulties with the College's argument. I posited the hypothesis to Mr Oldham QC in closing submissions of what would happen if a maintained school entered into a contract with a contractor without any settled intention as to the funds which it would use to meet its payment obligations, but used local authority funds to make the first payment one year later. Mr Oldham QC said that in such a case, s.49(5) would have the effect that the local authority would retrospectively be deemed the contracting party once the payment had been made, thereby changing the identity of the contracting party. It would seem to follow from the College's argument that at a stage when no amounts had been paid by the College under such a contract, the claim to recover a debt would be a claim against the College, but once some payment had been made, the Council would become liable.

91. The difficulties with the College's argument do not end here. I received no satisfactory explanation as to what would happen if funds from more than one source were used to effect payments under the same contract, only one of which was local authority funding. These difficulties do not arise if s.49(5) is treated as a provision which allows payments made by a maintained school to benefit from the authority's ability to recover VAT, without rendering the local authority the contracting party in all contracts entered into by the maintained school.

92. Finally, the effect of the construction advanced by the Claimants and the College would be to expose local authorities to liabilities vastly in excess of the funding they had in fact allocated, or were legally liable to allocate, to maintained schools, it being the effect of Mr Oldham QC's submissions that any (presumably non-de minimis) application of funds from the maintained school's designated budget under a contract rendered the local authority the principal under that contract, and liable for the full extent of any amounts due. This course would, as it seems to me, entirely subvert the regulatory system both for proper financial controls within education funding and the fair allocation of resources between different schools. While the maintained school may have authority to spend its delegated budget "as it sees fit" (s.50 of the SSFA), that is very far removed from it having the legal power to commit its local authority to liabilities vastly in excess of the amount of its delegated budget.

93. For these reasons, the construction of s.49(5) advanced by the Claimants and the College is one which finds little support in the language of s.49(5), and would give rise to insuperable practical difficulties in its application. Mr Oldham QC advanced five reasons why I should nonetheless adopt it.

94. The first was to seek to adduce evidence from Hansard as to the reasons why s.49(5) (which was then clause 49(7) of the SSFA Bill) came to assume the form it did. The evidence relied upon was a passage from the speech of Lord Whitty, a Lord-in-Waiting and a Government spokesperson in the House of Lords, when

introducing the amendment, reported at House of Lords Debates, vol. 590, 4 June 1998, cols 551-558. Mr Oldham QC in particular relied upon the passage at col. 553 which provides:

> "Finally, there are two further technical amendments … These relate to Clause 49(7), which provides that, in spending its delegated budget, the governors and heads of a maintained school are ordinarily deemed to be acting on behalf of the LEA. That is to say, they are in law acting as agents, not as principals. This is not intended to change the law. It frankly reflects what the department has always understood to be the legal position. However, for the avoidance of doubt, it seemed advisable to put this express provision in the Bill. One reason for that is that it removes any doubt as to whether VAT can properly be reclaimed by LEAs under Section 33 of the VAT Act in respect of purchases made by schools from their delegated budgets and other funds provided by the LEA".

95. Lord Bingham in R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme Limited [2001] 2 AC 349, 391 specified three conditions for the admissibility of passages from Hansard as a guide to the interpretation of statutory materials: first, the legislation must be ambiguous, obscure or lead to an absurdity; second, the material relied upon must consist of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other parliamentary material as might be necessary to understand such statements and their effect; and third, the effect of such statements must be clear. While the second of these conditions is satisfied, it is debatable whether the first condition is met, and the third most certainly is not. In particular, there is nothing in Lord Whitty's speech which addresses the status of contracts entered into by maintained schools, as opposed to the characterisation to be given (particularly for VAT purposes) to payments once they have been made. Accordingly, the passage from Hansard relied upon does not cause me to alter my preliminary interpretation of s.49(5).

96. Second, Mr Oldham QC relied upon certain authorities which, he said, had adopted a clear and consistent interpretation of s.49(5) to the effect he contends for. The first is the decision of Underhill J in Coventry City Council v SENDIST [2007] EWHC 2278 (Admin), Administrative Court proceedings concerning a decision as to whether the funding of a particular form of education for a child with dyslexia would involve an additional burden for the local authority. In rejecting the argument that there would be no such impact because the cost in question would not come from the local authority but from the delegated budget of a maintained school, Underhill J stated at [13]:

> "Mr Wolfe submits that those provisions [s.49(5)] show that notwithstanding the power given to the school to spend the money under the delegated arrangements, the expenditure remains ultimately that of the Council. In my view that submission is well-founded".

97. It will be apparent that this decision was not addressing the identity of a contracting party at all, but making the practical point that, for the purposes of determining whether a particular form of education would involve an "additional burden …. on the LEA's annual budget", there was no relevant distinction

between funds which came directly from the local authority, and the use of funds which the local authority had placed into a maintained school's delegated budget.

98. The second decision is EH v Kent County Council [2011] EWCA Civ 709. That case was concerned with essentially the same question as the SENDIST case – whether the distinction between local authority funding paid directly from its own pockets and that paid to maintained schools under delegated arrangements was relevant in considering whether a particular educational option involved an increased financial burden for the authority. At [15], Sullivan LJ quoted the passage from Underhill J's judgment which I have set out above. At [25] he noted that there could be said to be public expenditure both when a local authority allocated money to a maintained school's budget, and when that money is spent, and observed that it would be wrong to treat the dicta of Underhill J as "though they were enactments of general application rather than responses to the particular circumstances" ([26]). I do not think that the decision lends any support to Mr Oldham QC's s.49(5) argument.

99. The third decision was LS v Oxfordshire County Council [2013] UKUT 135, a decision of the Upper Tribunal which was once again concerned with educational provision for a child with special needs. The issue for the Tribunal was the significance of the local authority's failure to tell the first instance tribunal of a pending change in the status of a school from a maintained school to an academy, which would have changed the nature of the school's funding. In the course of argument, it was noted that "under section 49(5) of the [SSFA] the local authority remains the owner of funds delegated to a maintained school and the governing body or head teacher simply acts as the authority's agent", whereas academies received a grant from the Secretary of State for Education ([54]). Beyond noting the difference in the source of funding of maintained schools and academies, the Upper Tribunal did not otherwise discuss s.49(5) or consider what implications (if any) it had for contracts entered into by the school. In my view, this decision does not take matters further.

100. By contrast, I have found the decision of Zacaroli J in Brent LBC v Davies [2018] EWHC 2214 (Ch) of real assistance. The case was concerned with the recovery of unlawful payments from members of the teaching and non-teaching staff of a maintained school. One of the grounds on which repayment was sought was that the payments had been made in breach of fiduciary duty, a case advanced on the basis that, by reason of s.49(5), funds advanced by the local authority to the maintained school remained the property of the local authority until spent. In resisting this argument, the defendants contended that the agency created by s.49(5) was of a very limited kind, and one which did not give rise to fiduciary duties. In the course of the case, Zacaroli J was shown the same extract from Hansard which the College relies upon here. He concluded at [344]:

> "So far as Mr Hood's reliance on the limited scope of the agency is concerned, **while I accept that there are significant differences between the deemed agency created by s.49(5) and the paradigm case of an agent, in that neither the [governing body] nor the headteacher is authorised to contract on behalf of the Claimant and that once the money is spent any property acquired with it belongs absolutely to the school**, what remains is a clear statement that until the money is spent, property in it remains with

> the Claimant, such that this is a case where the agent has the power to dispose of property belonging to the principal".

(emphasis added).

101. I accept that the reference to the agent's inability to contract on behalf of the local authority as principal is obiter, but it reflects what I have concluded is the proper interpretation of s.49(5). Further, the fact that, as Zacaroli J noted, the statute provides for the local authority to have ownership of funds *before* they are spent, but not of any property acquired with those funds (a conclusion which the College did not challenge) is itself highly significant. It must be a very rare agent who contracts on behalf of its principal, using its principal's funds to acquire property, but where property under the contract in question passes to and remains with the agent and not the principal.

102. Third, Mr Oldham QC suggests that it would not be possible to achieve the intended effect of the local authority being able to recover VAT on payments made by a maintained school under s.33 of the Value Added Tax Act 1994 unless the payments in question are payments which the local authority is legally liable to make which, in the case of payments under a contract, entails that the local authority is the contracting party. I do not accept this argument. While that would ordinarily be the position when it comes to seeking a VAT rebate, in this case, the local authority does not need to establish its right to recover VAT as a matter of conventional contractual analysis because it has the benefit of a statutory deeming provision treating the payments, for VAT purposes, as payments it has made.

103. Fourth, Mr Oldham QC submitted that the Accounts and Audit (England) Regulations 2011, which required the Council to account for delegated budgets in its own accounts, would "be inexplicable unless the College's interpretation of s.49(5) were correct". However, the accounting regime which applies as between maintained schools and a local authority, and in particular the need for the latter to reflect spending from the schools' delegated budgets in its own accounts, does not require the authority to be the contracting party in respect of contracts entered into by a school (any more than the consolidation of wholly-owned or controlled subsidiaries into group accounts has this effect).

104. Finally, Mr Oldham QC relies on the terms of the Secretary of State for Education's statutory guidance as to the content of local authority schemes for the funding of schools issued under s.48 of the SSFA. Para. 4.11 of that guidance provides:

> "Application of contracts to schools
>
> The scheme should contain a provision which makes clear the right of schools to opt out of authority arranged contracts.
>
> The scheme should include a provision which makes clear that although governing bodies are empowered under paragraph 3 of schedule 1 of the Education Act 2002 to enter into contracts, in most cases they do so on behalf of the authority as maintainer of the school and the owner of the funds in the

budget share (this is the main reason for allowing authorities to require authority counter-signature of contracts exceeding a certain value).

The provision should also however make it clear that other contracts may be made solely on behalf of the governing body, when the governing body has clear statutory obligations; for example, contracts made by aided or foundation schools for the employment of staff".

105. In so far as the guidance was describing what might be the factual position in many cases, I have already explained why that factual position did not apply here. In so far as the guidance suggests that, as a matter of law, spending funds emanating from the local authority under a contract entered into by the school will have the effect of making the local authority, and not the school, the contracting party, I do not believe that this states the law correctly for the reasons I have set out above.

106. For all of these reasons, I reject the contention that the Council is a party to the Contract if the Contract is valid. Had I concluded otherwise, I would in any event have accepted Mr Stilitz QC's submission that payments under the Contract fell within one or both of the exceptions set out in s.49(6) to the deeming provision in s.49(5). Given my conclusion reached below that the Contract involved borrowing because it was in the nature of a finance lease, it follows that payments under the Contract involve the repayment of borrowing under s.49(6)(a), and, as a matter of the relevant accounting classification, that the expenditure under the Contract was in the nature of capital rather than operating expenditure under s.49(6)(b) (something Mr Jackson, the Claimants' accounting expert, confirmed in cross-examination would inevitably follow if the Contract was properly to be classified as a finance lease).

107. Mr Oldham QC's response to these points was to suggest that the Council's liability for a debt or damages due in respect of failure to repay a loan or to make a payment in respect of capital expenditure was (or might) be different in nature to its liability for the repayments under a loan or the incurring of capital expenditure itself because "the liability is, as I say, for debt and damages and not capital expenditure". I found the argument that if the College had voluntarily repaid a loan or made a payment in respect of capital expenditure, s.49(6) applied, but if it refused to pay such that it became liable for an overdue debt or damages in an action, s.49(6) ceased to apply, wholly unpersuasive. The essential character of the obligation does not change merely because it is necessary for the creditor to go to court to enforce it. It has been noted that "the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it" (*Dicey, Morris & Collins on the Conflict of Laws* 15th para. 14-002), and the position of pre-judgment causes of action must be *a fortiori*. If Mr Oldham QC's argument was correct, the College would have a ready means of circumventing the s.49(6) restriction by refusing to repay any loans or pay for any capital expenditure voluntarily and requiring its creditors to commence court proceedings to recover their due.

108. Having established, therefore, that the putative contracting party is the College, not the Council, it is necessary to turn to the issue of whether the Contract is binding on the College.

THE *VIRES* DEFENCE: THE LAW

The problem stated

109. When determining the status of decisions of public bodies, administrative law once distinguished between unlawfulness 'on the face of the record' which rendered a decision void, and unlawfulness within the exercise of powers, which rendered a decision voidable. That distinction was swept away by the decision of the House of Lords in Anisminic v Foreign Compensation Commission [1969] 2 AC 147. At p.171, Lord Reid stated:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors, it is as much entitled to decide that question wrongly as it is to decide it rightly".

110. Lord Dyson JSC in R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening) [2012] 1 AC 245, [66] summarised the effect of Anisminic in the following terms:

> "A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. Anisminic establishes that both species of error render an executive act *ultra vires*, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there is no power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by state, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the Wednesbury sense, it is unlawful and a nullity. The importance of Anisminic is that it established that there was a single category of errors of law, all of which rendered a decision *ultra vires*."

111. The result is that, as a matter of public law, a decision of a public body may be void not simply because the body exceeded the letter of its powers, but also if the decision was taken for an improper purpose, or was substantively irrational (in the

Wednesbury sense), or because the decision was reached taking into account irrelevant considerations or failing to take into account relevant considerations, or because the process by which the decision was arrived at was unfair. Set against the wide range of grounds on the basis of which a decision of a public body might be found to be a nullity are various procedural protections embedded within the judicial review procedure for the benefit of those who have acted on the basis of a decision of a public body which, as Lord Radcliffe noted in Smith v East Elloe Rural District Council [1956] AC 736, 769, "bears no band of invalidity upon its forehead". Those seeking to challenge the lawfulness of decisions of public bodies must bring their challenge promptly and, in the ordinary course, within the three-month time limit provided by CPR 54.5. They must obtain the Court's permission under CPR 54.4 to bring the challenge. Finally, the Court has a discretion as to whether, and in what form, to provide relief (s.31 Senior Courts Act 1981 and, e.g., Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, 656), in the exercise of which the impact of relief on third parties is a relevant consideration.

112. Where, as in this case, the allegedly *ultra vires* nature of a public law decision is invoked by the public body itself as an answer to a private law claim asserted against it, the important public law policies of ensuring the legality and accountability of the decisions of public bodies, and the proper use of public funds, may come into conflict with the policies underlying the relevant field of private law. The law of contract (with its historical roots in the law merchant) has traditionally placed a premium on parties being able to rely on objective appearances when transacting (e.g. through the objective test for the conclusion and construction of contracts, the doctrine of ostensible authority and the various exceptions to the *nemo dat* principle). It regards the upholding of agreements intended to have legal force as a policy goal in its own right (a policy often expressed in the maxim *pacta sunt servanda*).

Public law defences to private law claims

113. It is clear that a public law error can be relied upon either to found, or to answer, a private law claim. In Wandsworth LBC v Winder (No 1) [1985] AC 461, a defendant to the council's claim for re-possession of a council flat for non-payment of rent challenged the validity of the council's rent demand on public law grounds. The House of Lords rejected the suggestion that such an argument could only be deployed by way of a separate challenge for judicial review of the council's decision brought in compliance with the strictures of the-then RSC Order 53, rather than by way of a defence to the council's private law claim.

114. Winder was a case in which the public authority had to rely upon the validity of its own public law decision setting the level of rent in order to establish its private law claim for contractual relief for the failure to pay rent when due. The tenancy in question had been granted under Part V of the Housing Act 1957, s.113(1A) of which (in combination with s.40 of the Housing Act 1980) gave the council a statutory public law power unilaterally to vary the level of rent during the tenancy. The council had purported to exercise that power to increase the rent, but the tenant disputed his liability to pay rent at the enhanced rate (while continuing to pay rent at the original level). In those circumstances, it is scarcely surprising that it was open to the tenant to contend, by way of defence, that the exercise of

the power to increase his rent was a nullity as a matter of public law so that rent at the enhanced rate was not due.

115. In that respect there are similarities between Winder and the position in cases such as R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening) and R (Hemmati) v Secretary of State for the Home Department [2019] UKSC 56, in which the claimants brought proceedings for the tort of false imprisonment, and where the only answer of the Home Secretary to such a claim was that she had validly exercised a public law power of detention. Once again, it is scarcely surprising that it was open to the claimant in a private law tort claim to contend that the public law decision to detain him was a nullity as a matter of public law. Similarly, in a case in which a claimant seeks to rely on a public law decision to found its private law claim against a public body (for example to recover a grant awarded by a public body in the exercise of public law powers which, properly exercised, creates a statutory debt in the claimant's favour), it ought to be open to the public body to defend the claim on the basis that its decision was a nullity as a matter of public law so that no debt arose.

116. In the present case, the Claimants' claims are founded on their private law rights of contract, and the Defendants raise a private law defence to those claims, namely that they lacked the capacity to enter into the contract in question which, accordingly, is not binding. That defence is one which, if valid, operates as a matter of entitlement rather than discretion, and would have the effect in private law that the Contract was never binding upon any of the parties, regardless of when the point was first raised by the Defendants and regardless of the consequences to the Claimants or any third parties of the Contract being void. The issue which arises for determination is whether any public law ground of challenge to a decision to contract suffices to render the contract void *ab initio* as a matter of private law, or whether only some grounds of public law unlawfulness have this effect.

The decision in Credit Suisse v Allerdale BC

117. The first case to give detailed consideration to this issue was Credit Suisse v Allerdale BC, in which a bank sought to recover a substantial sum pursuant to a guarantee which a local council had purported to execute in order to support a financing arrangement under which a limited company created by the council would build a leisure pool and timeshare units. At first instance ([1995] 1 Lloyd's Rep 315), Colman J found the council's decision to grant the guarantee to be a nullity as a matter of public law on three distinct and independently sufficient grounds:

i) The council had no statutory power to enter into the guarantee ("the lack of statutory power ground").

ii) If the council had otherwise had statutory power to enter into the guarantee it did not have such power in this case because it was seeking to use the guarantee as part of a scheme to facilitate the doing by the company of things which the council itself had no power to do, namely (a) borrowing and spending amounts of money which exceeded its borrowing

and spending limits and (b) carrying on a trade in time-share accommodation for profit ("the improper purpose ground").

iii) The decision of the council to enter into the guarantee was Wednesbury unreasonable because it was entered into when the council had given no or no proper consideration to the likelihood of having to pay under the guarantee and the consequences of any such payment ("the Wednesbury ground").

118. It was argued before Colman J that while lack of statutory power would automatically have the result that the guarantee was outside the council's contractual capacity as a matter of private law, this was not so of the improper purpose or Wednesbury grounds. It was argued that, in respect of those grounds, it was first necessary to obtain an order quashing the decision to provide the guarantee in judicial review proceedings before they would provide a basis for defending a private law claim to enforce the guarantee. At p.351 Colman J rejected that argument:

> "The reason why a transaction entered into beyond the powers of a public body is properly described as a nullity is because such a body has no *capacity* in law to act beyond the powers given to it by statute. Those powers comprehend not only what the subject-matter of its decisions may be, but, by implication, *how* its decisions on the permissible subject-matter should be taken."

119. He further held (at pp.356-7) that the remedies available in a private law action where such lack of capacity was established were available as of right, and were not discretionary in the way that the remedies available in public law proceedings would be. Colman J held that the discretionary nature of relief in public law proceedings was a consequence of the terms in which the statutes empowering the court to grant such relief had been framed rather than something intrinsic to the nature of the invalidity established, and that those statutory provisions had no application when the issue arose in private law proceedings as a defence to a private law claim. Colman J did not regard that outcome as satisfactory, but concluded that it was for Parliament to provide a solution:

> "Whatever the answer to that question, there is clearly a real and urgent need in the interests of the continuation of dealings between banks, credit providing institutions and local authorities for a solution to this problem to be found. Whether that solution should be one analogous to the principles which apply to third parties dealing with the directors of companies but in ignorance of their excess of actual authority, as identified in the Rolled Steel case, or one which is based on the flexibility of remedy available in judicial review proceedings, or some other solution, may be a matter for debate, but, as English law on the exercise of powers by public bodies has now developed, it is certainly a matter for Parliament and not for the Courts."

120. In the Court of Appeal, there was a division of opinion on this issue between Neill and Hobhouse LJJ (Peter Gibson LJ expressing no opinion), albeit the Court's observations were *obiter* as Colman J's decision on the lack of statutory power ground was upheld.

121. Neill LJ and Hobhouse LJ referred to the important judgment of Browne-Wilkinson LJ which has brought a welcome clarity to the use of the concept of *ultra vires* in private law when dealing with the issue of corporate capacity in Rolled Steel Products (Holdings) Ltd v British Steel Corporation [1986] Ch 246. Browne-Wilkinson LJ stated at p.302-304:

> "In my judgment, much of the confusion that has crept into the law flows from the use of the phrase 'ultra vires' in different senses in different contexts. The reconciliation of the authorities can only be achieved if one first defines the sense in which one is using the words 'ultra vires.' Because the literal translation of the words is 'beyond the powers,' there are many cases in which the words have been applied to transactions which, although within the capacity of the company, are carried out otherwise than through the correct exercise of the powers of the company by its officers; indeed, that is the sense in which the judge seems to have used the words in this case. For reasons which will appear, in my judgment, the use of the phrase 'ultra vires' should be restricted to those cases where the transaction is beyond the capacity of the company and therefore wholly void. A company, being an artificial person, has no capacity to do anything outside the objects specified in its memorandum of association. If the transaction is outside the objects, in law it is wholly void. But the object of a company and the powers conferred on a company to carry out those objects are two different things . . . If the concept that a company cannot do anything which is not authorised by law had been pursued with ruthless logic, the result might have been reached that a company could not (i.e., had no capacity) to do anything otherwise than in *due* exercise of its powers. But such ruthless logic has not been pursued and it is clear that a transaction falling within the objects of the company is capable of conferring rights on third parties even though the transaction was an abuse of the powers of the company: see, for example, In re David Payne & Co Ltd [1904] 2 Ch 608. It is therefore established that a company has capacity to carry out a transaction which falls within its objects even though carried out by the wrongful exercise of its powers. If the transaction is beyond the capacity of the company it is in any event a nullity and wholly void: whether or not the third party had notice of the invalidity, property transferred or money paid under such a transaction will be recoverable from the third party. If, on the other hand, the transaction (although in excess or abuse of powers) is within the capacity of the company, the position of the third party depends on whether or not he had notice that the transaction was in excess or abuse of the powers of the company."

122. Neill LJ considered whether, in the context of private law claims against public bodies, "a distinction can be drawn, similar to that drawn in the Rolled Steel Products case … between decisions and acts which are beyond the capacity of a public authority and decisions and acts which involve a misuse of power by those controlling the authority" (pp.339-340). His answer was no (p.343):

> "I know of no authority for the proposition that the ultra vires decisions of local authorities can be classified into categories of invalidity. I do not think that it is open to this court to introduce such a classification. Where a public authority acts outside its jurisdiction in any of the ways indicated by Lord

> Reid in Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147, 171 the decision is void. In the case of a decision to enter into a contract of guarantee the consequences in private law are those which flow where one of the parties to a contract lacks capacity. I see no escape from this conclusion. Furthermore this conclusion seems to me to accord with the decision of the House of Lords in Wandsworth London Borough Council v Winder [1985] AC 461.
>
> ……
>
> I do not consider the present law to be satisfactory. I say nothing about the merits of this case which have not been investigated. But there may be cases where it is beyond argument that a third party has entered into a contract with a public body in ignorance of any procedural defect which may later entitle the public body to claim that the contract was made ultra vires and so reject liability under it. But if, as I believe there to be, there is only one category of ultra vires decisions where a local authority is concerned I see no room for a judicial discretion"

123. Hobhouse LJ was of a different view. So far as the "no statutory power" ground was concerned, he noted that there was "no conflict between public law and private law principles" because "the role of public law is to answer the question: what is the capacity of the local authority to contract? The role of private law is to answer the question: when one of the parties to a supposed contract lacks contractual capacity, does the supposed contract give rise to legal obligations?" (p.350). He continued:

> " When a plaintiff is asserting a private law right—a private law cause of action, typically a claim for damages for breach of contract or tort—the plaintiff must establish his cause of action. Any defence raised by the defendant must be one which is recognised by private law. Lack of capacity to contract is a defence recognised by private law".

124. Hobhouse LJ held that the other grounds of invalidity raised by the Council – the improper purpose and Wednesbury grounds – did not amount to a lack of capacity in private law, even if they constituted grounds of nullity in public law (at pp.355-356):

> "Before using the phrase 'ultra vires' or the words 'void' and 'nullity', it is necessary to pause and consider the breadth of the meaning which one is giving them. It is not correct to take terminology from administrative law and apply it without the necessary adjustment and refinement of meaning to private law. Where private law rights are concerned, as in the present case, the terminology must be used in the sense which is appropriate to private law ….
>
> Private law issues must be decided in accordance with the rules of private law. The broader and less rigorous rules of administrative law should not without adjustment be applied to the resolution of private law disputes in civil proceedings. Public law, that is to say, the law governing public law entities and their activities, is a primary source of the principles applied in

> administrative law proceedings. The decisions of such entities are the normal subject matter of applications for judicial review. When the activities of a public law body, or individual, are relevant to a private law dispute in civil proceedings, public law may in a similar way provide answers which are relevant to the resolution of the private law issue. But after taking into account the applicable public law, the civil proceedings have to be decided as a matter of private law. The issue does not become an administrative law issue; administrative law remedies are irrelevant."

At p.357, he concluded:

> "It remains necessary to ask what amounts to a defence to a private law cause of action. Want of capacity is a defence to a contractual claim; breach of duty, fiduciary or otherwise, may be a defence depending upon the circumstances".

125. Mr Stilitz QC for the Council argued that Hobhouse LJ's analysis "founders on the clear words" of Lord Diplock in Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295, 365 where he stated:

> "It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any lesser consequence in law than to render the instrument incapable of ever having had any legal effect upon the rights or duties of the parties to the proceedings".

126. However, that case was concerned with the status of delegated legislation, the enactment of which is an inherently public law activity, and the binding effect of which depends entirely on the valid exercise of the public law power to pass delegated legislation. Hoffmann-La Roche did not consider the status of a private law contract which a public body enters into pursuant to an internal decision which could be impugned on public law grounds, and which had then sought to resist a claim in contract by reference to the private law defence of lack of contractual capacity. In private law, it is the act of contracting itself, not the decision of a putative contracting party to enter into a contract, which is legally significant. If public law unlawfulness is to provide an answer to a claim in contract, it must be because of the effect of that unlawfulness on the legal act of concluding the contract.

127. The rival views of Neill and Hobhouse LJJ have each attracted judicial support in subsequent case law, but the conflict remains essentially unresolved.

128. In Bedfordshire County Council v Fitzpatrick Contractors Ltd [2000] 11 WLUK 790, [19], Dyson J stated that it was not clear to him "to what extent in practice the approaches of Hobhouse LJ and Neill LJ differ but to the extent that they differ" he found "the reasoning of Neill LJ more compelling".

129. In Charles Terence Estates Ltd v Cornwall Council [2012] EWCA Civ 1439, Cornwall Council was sued as the statutory successor to Penwith and Restormel

Borough Councils. Cranston J at first instance found that the councils had taken out leases in breach of their Roberts v Hopwood public law duty. The issue then arose of whether the councils could rely upon that breach as a defence to a claim in private law for the rent. Cranston J suggested that bad faith, improper motive or a breach of the Roberts v Hopwood duty on the part of a public body entering into a contract would all give rise to a lack of capacity as a matter of private law, but not "failure to act for, or take account of, a non-statutory purpose or consideration" or "making a contract in breach of internal rules and procedures" ([2011] EWHC 2542 (QB), [64]).

130. The Court of Appeal reached a different conclusion on the issue of whether the Roberts v Hopwood duty had been breached, with the result that its observations on the effect of such a breach on the council's capacity to contract were *obiter*. Maurice Kay LJ at [37] held:

> "In my judgment, the approach of Hobhouse LJ is to be preferred. I do not think that the assimilation of the various types of public law error in the Anisminic case [1969] 2 AC 147 had the effect of imposing a rule which extends inexorably to public law error as a defence to a private law claim. There is no logical reason why it should and this case demonstrates why it should not. It would be highly undesirable if, years after time expired for the making of a prompt public law challenge by a person with a sufficient interest, the fact of a historic breach of fiduciary duty should inevitably lead to the defeat of a private law claim brought by a party who acted throughout in good faith. The Credit Suisse case was a clear case of lack of legal capacity. Here, however, Penwith and Restormel were doing what they were empowered to do by section 17(1)(b) of the 1985 Act in order to meet their onerous statutory duties. I would respectfully adopt the words of Hobhouse LJ [1997] QB 306, 357D: 'breach of duty, fiduciary or otherwise, may be a defence depending on the circumstances.' I am satisfied that the breaches in this case (if there were any) simply did not go to legal capacity. At some point, it will be desirable for there to be judicial consideration of the territory between the extremes of the Credit Suisse case and the present case. I have come to the conclusion that we have not heard sufficient argument to enable us to articulate more comprehensive guidance."

131. Etherton LJ expressed a similar view at [44]-[47]:

> "There was much debate before us, however, on the wider point of principle about the relationship between private law and public law concepts of ultra vires.
>
> In my view, the principled approach to that issue is clear. If a transaction is beyond the capacity of a statutory corporation, it is void: that is, it was always a nullity.
>
> A corporation can only act by its agents. If its agent enters into a transaction with a third party which is beyond the agent's actual or apparent authority, the transaction is a nullity since the act of the agent was never binding on the corporation. Apparent authority depends upon whether the principal made a representation to the third party about the agent's authority and whether the

> third party had knowledge of any limitation on the existence or scope of that authority.
>
> If the transaction with the third party was within the capacity of the statutory corporation and was within the actual or apparent authority of its agent, then, even if the transaction was a breach of duty by the corporation or by its agent, the transaction is not void. Depending on the facts, the corporation may have legal or equitable rights against the third party, such as for mistake, unjust enrichment or as a constructive trustee, but the transaction itself is not a nullity".

132. Referring to the "critical distinction" as a matter of private law between acts done in excess of the capacity of a company on the one hand and an act done in excess or abuse of the powers of the company on the other, he continued at [49]:

> "I can see no sound reason why the position should be any different where what is in issue is the validity of a commercial private law transaction between a corporation which is a public body and a third party. The existence of public law remedies for breach of public law duties should make no difference to the private law consequences of ultra vires (want of capacity), on the one hand, and breach of duty in respect of a transaction within the capacity of the corporation, on the other hand".

At [51], he too indicated his preference for the reasoning of Hobhouse LJ over that of Neill LJ in Credit Suisse.

133. In Pro-Vision Systems (UK) Ltd v United Lincolnshire [2014] WL 511530, [176], His Honour Judge Waksman QC, in a passage which was once again *obiter,* held at [176]

> "As to the law, for myself I will adopt the views expressed by Etherton LJ in the Charles Terence Estates case, such that a rigid demarcation should be maintained between (a) a public law challenge to a public body decision to enter into a contract; (b) the scope of any private law defence to a claim to enforce it so that the ability to allege something short of pure *ultra vires*, for example, actual incapacity, must at best be very exceptional. On that footing the allegations made here must surely fall on the wrong side of the line, even if true. Although Maurice Kay LJ may have left the point slightly more open, I have no doubt he would have taken the same view on the facts of this case."

134. However, the observations in the case, and the view of Hobhouse LJ, do not find support in the current edition of *Chitty on Contracts* (33rd) para. 11-038.

The cases on "irrationally generous" payments

135. There are a number of decisions in private law litigation to enforce contracts entered into by local authorities with their employees which were said to be inappropriately generous, in which the courts have generally proceeded on the assumption that if a decision by a public body to enter into a contract can be impugned on any ground of public law, there is no binding contract as a matter of private law.

136. The first is Newbold v Leicester CC [1999] ICR 1182 in which street cleaning drivers employed by the council sued for breach of contract, when the council refused to implement the agreed payment of lump sum bonuses in return for a variation in the terms of employment (after receiving advice that the payments might be vulnerable to challenge). The Court of Appeal refused to uphold the Wednesbury challenge on the facts. It appears to have been common ground, and the Court certainly assumed, that if the challenge had been upheld, this would necessarily have entailed that the agreement to pay the bonuses was void.

137. However, Simon Brown LJ made some pertinent observations on the ability of a public body to pray-in-aid its own public law unlawfulness in answer to a claim under a contract it had entered into. At p.1190, he noted that "it appears at first blush a remarkable proposition that a public authority can escape what on its face is a clear contractual liability to its employees by asserting that the contract in question …. was excessively generous …. and thus outside its powers". He distinguished Allsop v North Tyneside Metropolitan Borough Council [1991] ICR 639 (discussed below) and Hazell v Hammersmith and Fulham LBC [1992] AC 1 as cases involving proceedings by local authority auditors against the council for rectification of the councils' accounts under s.19 of the Local Government Act 1982. At p.1191, he described Hazell as a case "concerned only with the legality of the contracts in the public law sphere [which] did not deal with the consequences to third parties of illegality", and stated that:

> "It is arguable that the principle that *ultra vires* contracts are void and unenforceable does not apply in relation to public authorities".

138. Whatever the true position, he suggested that:

> "one may safely assume that no court is going to be astute to allow public authorities to escape too easily from their commercial commitments. That should particularly be the case where, as here, legitimate expectations have been aroused in the other party (who clearly entered the contract in good faith), where the relationship between the parties is essentially of a private law character, where it is the authority itself which is seeking to assert and pray in aid its own lack of *vires*, and where that lack of *vires* is suggested to result not from the true construction of its statutory powers but rather from its own Wednesbury irrationality. The burden upon the authority in such a case must be a heavy one indeed. It does not seem to me that the council came within measurable distance of discharging it here."

139. If, however, *any* ground of public law unlawfulness in a decision to contract deprives a public body of contractual capacity, it is difficult to see how there can be a heavier burden in establishing Wednesbury unreasonableness when it has private law as opposed to public law consequences, or why it would matter that the lack of *vires* rested on Wednesbury unreasonableness rather than the absence of a statutory power.

140. The second decision is Hinckley and Bosworth BC v Shaw [2000] LGR 9, in which a local authority agreed to increase the final year's salary of an employee specifically for the purpose of enhancing the employee's redundancy and pension entitlements. That decision was taken against the background of the Court of

Appeal's decision in Allsop v North Tyneside MBC [1992] ICR 639 holding, as a matter of statutory construction, that a council did not have the power to make redundancy payments exceeding those it was obliged to make under s.81 of the Employment Protection (Consolidation) Act 1978. Hinckley Council's decision to increase Mr Shaw's salary was an attempt (to which Mr Shaw was a knowing party) to effect indirectly the payment of higher redundancy payments which (on the basis of the Allsop decision) the council had no power to pay directly.

141. Bell J held that the agreement between the council and Mr Shaw was beyond the powers of the council and not binding because it had been made "for the extraneous or collateral purpose of increasing the employee's redundancy or retirement benefits beyond what the Acts and regulations would allow, but for the increase in pay" (at [120]). Bell J rooted the unlawfulness in question in the Roberts v Hopwood principle. Allerdale was not cited. Given Mr Shaw's knowledge of the council's improper purpose in varying his contract, it seems likely that the same outcome would have followed whether Neill LJ or Hobhouse LJ's view in Allerdale was adopted. The decision could also be explained on the basis that a decision taken with the improper purpose of evading a statutory limit on a council's powers has the same status in private law as a decision taken outside of those powers. It may be for this reason that Laws LJ in Rose Gibb v Maidstone & Tunbridge Wells NHS Trust [2010] EWCA Civ 678, [7] referred to Hinckley and another similar case, Eastbourne Borough Council v Foster [2000] All ER (D) 2407, as:

> "instances where a local authority unlawfully sought to set in place arrangements which would allow it to make payments above a permitted statutory maximum."

142. The final decision is Rose Gibb v Maidstone & Tunbridge Wells NHS Trust [2010] EWCA Civ 678, a case in which a National Health Service Trust sought to resist a private law claim by its former chief executive for payment of the amounts due under a compensation agreement the Trust had entered into, on the basis that the agreement was "irrationally generous" and hence *ultra vires* as a matter of public law. It appears to have been common ground in the case that the Trust lacked contractual capacity, as a matter of private law, to agree to make "irrationally generous" payments ([4]). Laws LJ was clearly unattracted by the Trust's contention, suggesting that they had "a very steep hill to climb" ([7]). The Court overturned the finding that the payments were irrationally generous, and did not address the issue of whether such a finding led inexorably to a lack of contracting capacity.

The Administrative Court decisions

143. There have also been a number of decisions in the Administrative Court which have addressed the consequences of public law invalidity so far as the decisions by public bodies to enter into contracts were concerned, often in a situation where the decision of the public body to enter into a contract with one entity was challenged by another, who contended that the procurement or tender process was unlawful or unfair.

144. In R (Structadene) Ltd v Hackney LBC [2001] 2 All ER 225, the local authority refused to accept an offer to purchase a number of industrial units from the applicant, and entered into a contract of sale with the existing tenants on less advantageous terms. The applicant obtained permission to apply for judicial review, alleging that the sales involved a breach of s.123(2) of the Local Government Act 1972, being a sale of land for other than the best price without the Secretary of State's permission, as well as being independently unlawful on Roberts v Hopwood and Wednesbury grounds. S.128(2) of that Act contained a saving for transactions entered into without ministerial consent with innocent third parties, but that saving was held to apply only if the contracts had proceeded to completion (which the contracts with the tenants had not). Elias J held that s.128(2) did not apply to the other heads of public law unlawfulness in any event. He found that the applicant was entitled to have the contract with the tenants declared invalid, but there was no discussion of whether this outcome followed inexorably as a matter of private law from the invalidity of the council's decision on public law grounds, or took the form of discretionary relief afforded in public law.

145. R (TGWU) v Walsall Metropolitan BC [2002] ELR 327 was a case in which a trade union whose members worked in the defendant council's catering department successfully challenged the council's decision to award the contract for catering services to an outside contractor in judicial review proceedings. It is clear from Harrison J's judgment that he did not regard the fact that the procurement decision was unlawful as automatically entailing that the contract with the outside caterer was void, and that the decision whether or not to declare the contract void was a matter of discretion. At [43], he accepted that "he had a broad discretion in deciding whether or not [he] should grant relief", but he decided in the circumstances that it was appropriate to grant relief not least because the evidence showed that the council and the outside caterer "went into it with their eyes open" ([46]).

146. The next decision I was referred to was London & South Eastern Railway Ltd v British Transport Police Authority [2009] EWHC 460 (Admin). The facts of the case are complicated, but in short the defendant ("the BTA") was a public body set up to maintain the British Transport Police, and to recover the costs of doing so from users of the rail network ("the TOCs"). Each TOC entered into an agreement with the BTA known as a police services agreement or "PSA". The BTA sought to change the amounts payable under the PSAs in a way which advantaged some TOCs and disadvantaged others, leading to an application for a judicial review by the disadvantaged TOCs. Collins J held that the BTA did not have the power to vary the amounts payable by the disadvantaged TOCs, and accordingly that the amounts for which they had been invoiced were not due. However, the advantaged TOCs contended that they had agreed their more favourable terms with the BTA as a matter of contract, and that the status of their contracts was not affected by the public law unlawfulness established by the disadvantaged TOCs.

147. The Court held that if there was any such agreement, it was "tainted with the illegality" of charging the disadvantaged TOCs more ([46]) and that the

favourable contracts had, in Wednesbury terms, been entered into following a failure to have regard to a material consideration. At [47]-[48], Collins J stated:

> "Mr Fordham submitted that such unlawfulness could not affect contractual obligations entered into by the Authority if the effect would be to the detriment of the other party. He recognised that contracts which were entered into by public bodies which were ultra vires were void and so their terms were unenforceable against or by the public body … Mr Fordham submitted that it was only if the public body had exceeded its lawful powers that a contract could be declared to be of no effect.
>
> I see no good reason for the suggested limitation. An irrational act (to use the term as defined by Lord Diplock in the CCSU case) is unlawful and so if that act is the entering into of a contract that contract cannot be valid. The usual public law requirement that action is taken to set aside the contracts within at most 3 months will prevail, but, following the principles laid down by the House of Lords in Wandsworth v Winder [1984] 3 All ER 976, it would be possible for a party to raise the unlawfulness as a defence to a claim based on the contract. Mr Fordham has to recognise that in R (TGWU) v Walsall MBC [2002] 2 ELR 329 a decision to enter into a contract was quashed and the contract declared void and of no effect because of procedural improprieties in the decision. It follows that the variation in favour of NMF cannot be valid".

Collins J considered, but rejected, a submission by the advantaged TOCs that he should refuse relief as a matter of discretion

148. Finally, it is worth noting the observations of the Privy Council in Central Tenders Board v White [2015] UKPC 15. In that case, the Central Tenders Board of Monserrat raised an *ultra vires* defence to a claim to enforce a contract for the construction of a school hall which the Board had awarded to Mr White. The Privy Council rejected the suggestion that the contract was *ultra vires* the Board. They noted at [26] that:

> "*Ultra vires* is not, of course, the only ground on which a court may quash an administrative decision, but it would be wrong for a court to do so in such a way as to nullify a contract made between a public body pursuant to a legal power and a person acting in good faith, except possibly on terms which adequately protect that person's interest."

149. Those observations lend some support to the suggestion that, even in public law proceedings, it may be appropriate to distinguish between different grounds of public law unlawfulness when determining whether and on what terms to grant a discretionary remedy which would impact on a third party which has contracted with the public body in good faith.

Analysis and conclusion

150. It is clear that if a public body lacks statutory power to enter into a contract of a particular kind, then it will not have contractual capacity to do so as a matter of private law. As Hobhouse LJ noted, public law (through the construction of the statutory regime) answers the question "what is the capacity of the public body to

contract?", and then private law provides that the consequence of that lack of capacity is that no contract comes into existence.

151. The difficulty comes when addressing cases in which the public body has capacity to enter into a contract of a particular kind, but the way in which it has taken the decision to do so can be impugned on public law grounds. The authorities offer conflicting views on that issue, and provide no answer which is binding on a first instance judge. In these circumstances, it is necessary to approach the issue from first principles.

152. So approached, if the nullity of a public body's decision to conclude a contract as a matter of public law was determinative of the status of the contract for all purposes as a matter of private law, then the same consequences ought automatically to follow from establishing that nullity, whether this occurs in public or private law proceedings.

153. However, this is not the case. In Professor Burrows QC's terminology ((2002) 22 OJLS 1), we may do this in private law, but we do that in public law. In public law, the grounds for impugning a decision to contract may (in Hobhouse LJ's words) be "broader and less rigorous", but obtaining relief on the basis of those grounds is subject to a heightened obligation of diligence in bringing a challenge promptly, and relief is discretionary and can be withheld on various grounds intended to avoid injustice to the defendant or third parties. The approach more closely resembles the legal method of equity than that of the common law.

154. Thus, in public law proceedings, it is clear that the court may refuse to grant relief declaring a contract to be invalid as a matter of discretion, and that one consideration which may well weigh strongly in a decision to do so is whether the contract was entered into with a person acting in good faith who would be prejudiced by the declaration of invalidity, particularly where there has been delay in bringing the challenge. For this reason, a party seeking to challenge a public law decision which involves the entry into a contract with a third party will sometimes seek an injunction to prevent such a contract going ahead at all, or allow it to proceed only if a term is included which cancels the contract if the public law challenge succeeds (as in R v Hammersmith and Fulham LBC ex parte Beddowes [1986] QB 1050).

155. It would appear to be implicit in a decision to refuse such relief as a matter of discretion in public law proceedings that the court is acting to protect the private law rights and entitlements of the party who had contracted in good faith. That motivation is sometimes expressly articulated (e.g. in Central Tenders Board v White). If the nullity of the decision to contract as a matter of public law necessarily and inevitably entailed the invalidity of the contract as a matter of private law, there would be no third party interest for the court to seek to protect when deciding what discretionary relief to grant. In any event, any attempt to protect such an interest would be in vain, because whatever relief was or was not ordered in the public law proceedings, the invalidity of the contract as a matter of private law would have been definitively established and would remain for all time. In short, the public law decisions appear to acknowledge, at least to some extent, a legitimate interest in protecting those who have acted on the basis of the apparent validity of a contract and in protecting settled states of affairs which

would be entirely undermined by a wholesale transportation of the scope of public law unlawfulness into the private law issue of contractual capacity. This difficulty strongly suggests that the nullity, as a matter of public law, of a decision to contract does not, without more, equate to a lack of contracting capacity as a matter of private law.

156. Further support for the view that public law invalidity and private law incapacity are not co-extensive can be derived from the fact that the taking of an *ultra vires* point in private law proceedings is not subject to any of the procedural safeguards which apply in public law proceedings. I am conscious that this argument has strong echoes of the submission advanced by Mr Beloff QC but rejected by the Supreme Court in R (Lumba) v Secretary of State for the Home Department. At [67], Mr Beloff QC submitted that it should not be open to Mr Lumba, when advancing his claim for damages for false imprisonment, to impugn the decision relied upon as the basis for his detention on public law grounds because this would involve "a private law action without any of the procedural safeguards which apply in a judicial review application" such as the tight time limit for bringing claims and the discretionary nature of relief. That argument was rejected by Lord Dyson JSC at [70], who stated:

> "As for Mr Beloff's other points, such force as they have derives from the fact that the detention in these cases is unlawful because it is vitiated by a public law error. The significance and effect of that error cannot be affected by the fortuity that it is also possible for a victim to challenge the decision by judicial review proceedings (which are subject to tighter time limits than private law causes of action) and that judicial review is a discretionary remedy. It is well established that a defendant can rely on a public law error as a defence to civil proceedings and that he does not need to obtain judicial review as a condition for defending the proceedings: see, for example, Wandsworth LBC v Winder [1985] AC 461. The same applies in the context of criminal proceedings: see Boddington v British Transport Police [1999] 2 AC 143. Mr Beloff submits that the position of a claimant who relies on a public law error to found his cause of action and a defendant can sensibly be differentiated. But it is difficult to see how or why".

157. However, as I have noted, Lumba was a case in which the public body was, in effect, deploying an exercise of its own public law powers to justify conduct (detaining Mr Lumba) which, in the absence of the lawful exercise of public law powers, was tortious. Adapting Hobhouse LJ's analysis in Allerdale, public law answered the question "was the imposition of a constraint on Mr Lumba's freedom of movement lawful" (it being a necessary ingredient of the private law tort of false imprisonment that it was not), and private law answered the question, "what are the consequences if it was not?" (the tort of false imprisonment is committed).

158. Finally, in a private law context, a test for contractual capacity which was essentially the same for private and public law bodies might be thought a better fit with English law's traditional sensitivity on the issue of whether public bodies should be legally privileged in their dealings with private bodies, save where a differential treatment is mandated by statute or well-established prerogative powers (see e.g. Dicey's second aspect of the rule of law, namely "the equal

subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts": *Introduction to the Study of the Law of the Constitution* 8th ed. p.120). The fact that for companies, the legislative intervention of ss.39-42 of the Companies Act has altered the consequences of *ultra vires* for one species of private law legal persons, just as the Local Government (Contracts) Act 1997 has altered the consequences of an *ultra vires* contract for a certain class of public body where certain requirements are met, does not itself provide a basis for applying a different common law test of what constitutes lack of contractual capacity for private and public law entities (cf. the criticism of Charles Terence Estates advanced in *Chitty* para. 11-038).

159. In the present case, the Claimants are bringing a private law claim in contract, to which the Defendants' private law answer is that the contract is not binding. In this context, the analysis which best addresses the competing tensions and policy considerations is that proposed (obiter) by Hobhouse LJ in Credit Suisse and endorsed (obiter) by the Court of Appeal in Charles Terence Estates by effectively allowing public law unlawfulness to provide a defence to a private law claim in contract when the facts which give rise to that public law unlawfulness also give rise to a private law defence. Thus a contract will be void if a public body lacked power to enter into a contract of that type, in the same way as a contract entered into by a private statutory corporation would be void, absent (in each case) the effect of saving legislation. In such a case, the public law lack of power provides the basis for the private law defence of lack of capacity. Where the public body in question has the power to enter into a contract of the relevant kind, but the exercise of that power is unlawful on public law grounds (for example because the exercise is for an improper purpose or is unreasonable in the Wednesbury sense), then it will be necessary for the facts giving rising to the public law unlawfulness to provide a basis for impugning the contract recognised in private law. This might be because the body's power to enter into contracts has been abused, in which case, (adopting the words of Brown-Wilkinson LJ in Rolled Steel) "the position of the third party depends on whether or not he had notice that the transaction was in excess or abuse of the powers ..." It is suggested that this is what Hobhouse LJ had in mind in Allerdale when stating at p.357 that "breach of duty, fiduciary or otherwise, may be a defence **depending upon the circumstances**" (emphasis added).

160. It is right to note that this distinction between the private law consequences of an absence of a public law power to enter into a contract of the relevant kind (no capacity) and a case where the power has been exercised in breach of public law duties (breach of duty) comes under particular strain when the abuse of power in question arises from it being exercised with the improper purpose of seeking to do indirectly that which there is no power to do directly. In Allerdale, for example, the improper purpose finding was made by Colman J on the basis that (p.323):

> "If the council would otherwise have statutory power to enter into the guarantee it did not have such power in this case because it was purporting to use the guarantee as part of a scheme to facilitate the doing by the company of things which the council itself has no power to do".

161. Similarly, many of the "irrationally generous" payment cases involved attempts to circumvent the lack of any statutory power to pay redundancy other than at the

approved or specified levels. It might be said that there is something unsatisfactory in there being different private law consequences to a contract entered into which the council did not have power to conclude, and a contract entered into for purpose of circumventing the lack of such a power. If, properly construed, the contractual disability resulting from the lack of statutory power extends to the circumventing acts as well as those directly prohibited, then there is no difficulty in classifying both as involving lack of contractual capacity as a matter of private law. It may be for this reason that in Allerdale Neill LJ referred to the improper purpose point as raising "questions which are similar to those which I have already considered under section 111 [i.e. the statutory power point]" (at p.333), and note also Laws LJ's comment in Rose Gibb v Maidstone & Tunbridge Wells NHS Trust at [7] quoted above. Alternatively, in those cases where the public body and the payee have worked together to structure the contract in an attempt to circumvent a statutory control, the requirement of notice before an abuse of a power argument will avail against a third party in private law is likely to be met.

162. In summary, therefore, I have concluded that a decision by the College to enter into a contract which the College did not have power to conclude would give rise to a private law defence of lack of contracting capacity. If, however, the College did have power to enter into contracts of the relevant type, but is alleged to have acted unlawfully in reaching its decision to contract, the consequence of such public law unlawfulness in private law will depend both on the nature of the unlawfulness, and on whether the counterparty had notice of the relevant breach of public law duty.

THE *VIRES* DEFENCE BASED ON BORROWING

163. The College and the Council advanced a number of grounds on which it was said that the Contract was void. However, their principal ground of attack, and the issue which consumed most time at the hearing, was the contention that the Contract was void because it involved borrowing for the purposes of the Education Act 2002 Schedule 1, paragraphs 3(3)(a) and (4)(a), for which the Secretary of State's permission had not been obtained.

The parties' submissions

164. The Defendants' case can be summarised in three propositions:

i) the Contract was a "finance lease" under the relevant applicable accounting standard;

ii) as such it amounted to "borrowing" within the meaning of paragraphs 3(3)(a) and 4(a) of Schedule 1 of the 2002 Act; and

iii) in the absence of the Secretary of State's consent to such borrowing, it was beyond the College's capacity to enter into the Contract.

165. Mr Straker QC, on behalf of the Claimants, denied that it was unlawful for the College to enter into the Contract on the basis of five alternative submissions.

166. First, he contended that on a proper construction of the 2002 Act, paragraphs 3(1) and 3(3)(a) granted a power to the College to borrow, the scope of which was not limited by paragraph 3(4)(a) which merely regulated the manner in which that power was to be exercised. He contends that while exercising the power conferred by paragraph 3(3)(a) without the Secretary of States' consent might be in some sense be open to criticism, it would be *intra vires* ("the Paragraph 3(1) and 3(3)(a) Argument").

167. Second, Mr Straker QC contended that even if paragraph 3(4)(a) does impose a limit on paragraphs 3(1) and 3(3)(a) of the 2002 Act, that limit was not engaged here. He submitted that paragraph 3(4)(a) only requires the Secretary of State's consent in respect of a transaction which involves borrowing *and* the grant of security in conjunction ("the Security Argument").

168. Third, it was Mr Straker QC's case that the Contract did not in any event involve "borrowing" within the meaning to be accorded to that word in paragraph 3(4)(a). He submitted that the ordinary meaning of the word "borrowing" does not extend to a transaction such as the Contract, as evidenced by the fact that no one contemporaneously or for years after the Contract was entered into suggested that the Contract involved borrowing. As the Contract did not amount to borrowing as a matter of ordinary language, Mr Straker QC submitted that the technical question of whether the Contract was an operating or finance lease was not relevant ("the Cozens v Brutus Argument").

169. Fourth, as a variation of the argument in the preceding paragraph, Mr Straker QC submitted that paragraph 3(4)(a) was only engaged when a school borrowed "such sums" as it saw fit. In this case no sums were ever identified by the College as the sums to be borrowed, so the College cannot have needed to obtain the Secretary of State's consent (the "Such Sum Argument").

170. Fifth, and finally, Mr Straker contended even if a finance lease would involve borrowing within the meaning of paragraph 3(4)(a), the Contract was an operating lease and not a finance lease.

Issues as to the interpretation of the Education Act 2002, Schedule 1, paragraphs 3(1), (3) and(4)(a)

171. The first four submissions of the Claimants raise issues which are matters of statutory interpretation and if any one of those arguments succeeds, it would be unnecessary to consider the factual question of whether the Contract is a finance lease. Given the threshold nature of these questions, I consider them first.

The Paragraph 3(1) and 3(3)(a) Argument

172. In my view it is clear that paragraph 3(4)(a) imposed a statutory condition precedent to the power of a governing body to borrowing money, namely obtaining the consent of the Secretary of State:

i) Paragraph 3(1) gave the College power to "do anything which appears to them to be necessary or expedient for the purposes of, or in connection with, the conduct of the school". However, as a matter of statutory

interpretation, that power is subject to the limitations appearing elsewhere in the same schedule.

ii) Paragraph 3(3)(a) identifies specific powers within paragraph 3(1), including "to borrow such sums as the governing body think fit". However, subject to the further arguments I will come to, this was a power to borrow with the written consent of the Secretary of State rather than a general power to borrow. It is not possible to construe paragraph 3(1) as conferring a power on the College untrammelled by the requirement for obtaining written consent for borrowing under paragraph 3(4)(a). This would render the limitation imposed by paragraph 3(4)(a) entirely nugatory. It would seem to follow from Mr Straker QC's argument that the limitation on the power to contract in paragraph 3(7) would be similarly nugatory because that limit would not impact the width of the power afforded by paragraph 3(1).

iii) The correct approach is to construe Schedule 1 as a whole giving proper weight to all its parts. Doing so, it is clear that paragraphs 3(4)(a) and 3(7) limit the powers afforded to the College by paragraph 3(1) and illustrated in paragraph 3(3).

173. Mr Straker QC's second argument was that paragraph 3(4)(a) did not limit the College's power to borrow, but imposed a requirement as to the manner of its exercise. Once again, I am unable to accept this argument:

i) Paragraph 3(4)(a) provides that the power "may **only** be exercised" (emphasis added) with the Secretary of State's consent. This language strongly suggests that paragraph 3(4)(a) was imposing a limit on the power mentioned in 3(3)(a) (as conferred by paragraph 3(1)).

ii) Not only is this the natural construction as a matter of language, it is also supported by authority. In Rhyl UDC v Rhyl Amusements Ltd [1959] 1 WLR 465, Harman J considered the effect of s.177 of the Public Health Act 1875 which provided that "[a]ny local authority may, with the consent of the local government board, let for any term any lands which they possess". The council did not obtain the relevant consent. Harman J held at pp.473-474 that "the only power of letting" which the council had was with the consent of the Ministry of Health and "if, therefore, the consent of that body was not obtained, the lease was, in my opinion, *ultra vires* and void". At p.475, he rejected the argument that "the present was not a case of the plaintiff council having no power, but that they had a power if they obtained the necessary consent" as "a quibble". In my view, Mr Straker QC's attempt to distinguish the wording in that case from paragraph 3(4)(a) is similarly a "quibble", and there is no material difference between the two provisions in this respect.

iii) There are a number of authorities that make it clear that where a power of a public body is subject to a statutory requirement of consent, the requirement of consent limits the *vires* of the body so far as that power is concerned. For example, in Credit Suisse, Neill LJ at p.317 referred to local authority's power to borrow under s.172 and Schedule 13 of the

Local Government Act 1972 for a purpose or class of purpose approved by the Secretary of State, and noted that "a local authority's power to borrow was effectively constrained by the need to obtain the approval of the Secretary of State".

iv) Further, as Neill LJ noted in Crédit Suisse (at pp.317 and 332-333), there is an important policy underpinning the requirement that borrowing is only undertaken with the consent of the Secretary of State, namely, to ensure that central government has control over public borrowing. That control would be undermined if the requirement for the Secretary of State's consent did not limit the capacity of the public authority to borrow.

The Security Argument

174. I was equally unpersuaded by this argument. The Claimants heavy reliance on the word "*and*" in paragraph 3(4) is misplaced. The provision is more naturally read as referring to the power to do two distinct things: first to borrow money, and second to grant security in respect of such borrowing, rather than a requirement which only applies power when both things are done together.

175. This analysis is supported by the wording of paragraph 3(3)(a) which plainly treats the borrowing of money and the granting of security in respect of such borrowing as two distinct activities, *both* of which a governing body is distinctly empowered to do. Paragraph 3(4)(a) is naturally to be read as imposing a limit on the entirety of the power referred to in paragraph 3(3)(a), and not simply on those occasions when the power to borrow is exercised on terms whereby security is to be provided. In short, both a decision to borrow, and a decision to provide security for borrowing, require the Secretary of State's written permission.

The Cozens v Brutus Argument

176. As I understood this argument, it was that the word "borrowing" was to be interpreted as an ordinary English word, in accordance with the approach set out in Cozens v Brutus [1973] AC 854, it being contended that, as a matter of ordinary English language, the Contract would not be described as a loan. Mr Straker QC submitted that "no money was taken on loan; equipment was used on payment of a charge just as a ship may be hired for a time charter or a car may be hired on payment of the hire charges. I borrow my friend's car; I hire a car from Avis".

177. I do not accept Mr Straker QC's submissions as to the ordinary meaning of the word "borrowing" in paragraph 3(4)(a). Adopting Mr Straker QC's vehicular analogy, if a person wishes to purchase a car, but is unable to raise the money, and the dealer offers a lease under which the hirer would assume substantially all of the risks and rewards of ownership in return for periodic payments, with the amount payable being calculated on a basis which reflected the costs of financing being provided to facilitate the transaction, I am satisfied that they would describe this as borrowing.

178. Further, the issue of what constitutes "borrowing" for the purposes of paragraph 3(4)(a) cannot turn on how the transaction is structured or labelled, but must

involve consideration of the economic substance of the transaction. Transactions which involve a credit element take a number of different legal forms. For example a common method of commercial borrowing is a repo transaction. As Blair J noted in Forsta AP-Fonden v Bank of New York Mellon [2013] EWHC 3127 (Comm), [28]:

> "In simple terms, a repo is a transaction in which one party sells an asset (such as fixed-income securities) to another party at one price, and commits to repurchase the asset at a different price in the future. Although a repo is structured legally as a sale and repurchase of the securities, it behaves economically like a secured loan, with the securities acting as collateral".

179. Unless the issue of what constitutes borrowing is approached as a matter of substance, the control which paragraph 3(4)(a) is intended to impose, and the policy which the requirement for the Secretary of State's consent is intended to serve, would be readily capable of circumvention. The established accounting tests for identifying a finance lease involve an analysis as a matter of substance and not of form. If, as a matter of accounting substance, the Contract is a finance lease, then I am satisfied that it would constitute borrowing so as to engage paragraphs 3(3)(a) and 3(4)(a).

180. By way of further explanation, under IAS 17 (which was the accounting standard used by both Mr Jackson and Mr Smith), a finance lease is a lease which transfers substantially all the risks and rewards incidental to the ownership of an asset to the lessee. The reasons why a finance lease is treated as borrowing as a matter of accounting substance are helpfully explained in Notes to the Chartered Institute of Public Finance & Accountancy (CIPFA) Code of Practice at F67:

> "Where a lease is classified as a finance lease, then the substance of the transaction is considered to be the same as if the authority had purchased the asset and financed it through taking out a loan. The authority therefore recognises its interest in the asset together with a liability for the same amount. The lease payments are then treated in a similar way to loan repayments, being split between the repayments of the liability and a finance charge."

181. I am comforted in my conclusion that entering into a finance lease constitutes borrowing for the purpose of paragraphs 3(3)(a) and 3(4)(a) of Schedule 1 by the fact that this is the received wisdom of those who deal regularly with this issue. The statutory guidance issued by the Department for Education under Schedule 14 to the SSFA expressly identifies a finance lease as a form of borrowing for Schedule 1 purposes, as does the Council's Scheme. This was also the understanding of Mr Spring, who had considerable experience in asset finance leases and dealings with public bodies, and who said that he was "very well aware that a finance lease is considered to constitute borrowing". This was also the effect of the legal advice on the basis of which BOSHire and the College proceeded when entering into the Contract. While Mr Straker QC submitted that the best evidence of the meaning of the word borrowing here was the fact that contemporaneously and for years, "no party described what had occurred as borrowing", this was not because, as a matter of ordinary English, they did not

understand that a finance lease constituted borrowing. On the contrary, they had the opposite understanding. It was because they did not understand the Contract to be a finance lease.

The Such Sum Argument

182. This argument proceeded on the basis that the power in paragraph 3(3)(a) to "borrow such sums as the Governing Body think fit", and the restriction on that power in paragraph 3(4)(a), only apply where it was possible to identify a specific sum which the College had decided to borrow, which it was not possible to do in this case. Once again I am unable to accept this submission. The words "such sums as the Governing Body think fit" were not intended to create a limitation on the operation of paragraph 3(4)(a), but to give the Governing Body a discretion as to the amount it borrowed provided the Secretary of State's permission was obtained, making it clear it was for the Governing Body in the first instance to decide how much it wanted to borrow.

183. Where, as in this case, the College chose to enter into a structured transaction which economically incorporates borrowing, but did not choose to disaggregate the amounts it had agreed to pay into their constituent elements, that does not have the effect that that the College has not, after all, purported to exercise its power to borrow. It has purported to exercise its power to borrow that element of the total amount being paid which reflects the credit element of the transaction. The argument that the College was freed from the limitation created by paragraph 3(4)(a) because, in Mr Straker QC's words, "the Governing Body does not appear to have done any sums" is a wholly unattractive one, which would have the result that deficiencies in due diligence and financial analysis would enlarge the contracting capacity of a public body. The argument has nothing to commend it.

Was the Contract a finance lease or an operating lease?

IAS 17

184. As I have noted above, the parties' accounting experts proceeded for the purpose of their evidence on the basis that the accounting standard which falls to be applied in determining whether the Contract is a finance or operating lease is IAS 17 (which applies to the Council in accordance with the CIPFA Code of Practice on Local Authority Accounts).

185. The key question under IAS 17 for the purposes of identifying an operating lease is whether the lease transfers substantially all the risks and rewards incidental to ownership to the lessee. In order to answer that question IAS 17 provides as follows:

> "10 Whether a lease is a finance lease or an operating lease depends on the substance of the transaction rather than the form of the contract. Examples of situations that individually or in combination would normally lead to a lease being classified as a finance lease are:

(a) the lease transfers ownership of the asset to the lessee by the end of the lease term;

(b) the lessee has the option to purchase the asset at a price that is expected to be sufficiently lower than the fair value at the date the option becomes exercisable for it to be reasonably certain, at the inception of the lease, that the option will be exercised;

(c) the lease term is for the major part of the economic life of the asset even if title is not transferred;

(d) at the inception of the lease the present value of the minimum lease payments amounts to at least substantially all of the fair value of the leased asset; and

(e) the leased assets are of such a specialised nature that only the lessee can use them without major modifications.

11 Indicators of situations that individually or in combination could also lead to a lease being classified as a finance lease are:

(a) if the lessee can cancel the lease, the lessor's losses associated with the cancellation are borne by the lessee;

(b) gains or losses from the fluctuation in the fair value of the residual accrue to the lessee (for example, in the form of a rent rebate equalling most of the sales proceeds at the end of the lease); and

(c) the lessee has the ability to continue the lease for a secondary period at a rent that is substantially lower than market rent.

12 The examples and indicators in paragraphs 10 and 11 are not always conclusive. If it is clear from other features that the lease does not transfer substantially all risks and rewards incidental to ownership, the lease is classified as an operating lease. For example, this may be the case if ownership of the asset transfers at the end of the lease for a variable payment equal to its then fair value, or if there are contingent rents, as a result of which the lessee does not have substantially all such risks and rewards."

The proper approach to lease classification

186. There was much common ground between Mr Jackson and Mr Smith on the proper approach to classification of a lease pursuant to this standard. They agreed that:

i) lease classification involves the exercise of judgment by an accountant;

ii) this is a qualitative exercise which is informed by certain quantitative assessments;

iii) in order to classify a lease it is necessary for an accountant to consider all the relevant circumstances before forming a view; and

iv) IAS 17 is split into primary indicators (the first five indicators in paragraph 10) and other indicators (those in paragraph 11) and a practitioner would place more weight on the five primary indicators rather than the three other indicators.

187. There was a difference between the Claimants and Defendants as to the proper approach to the primary indicators. The Defendants contended that the statement that those five situations "**individually** or in combination would normally lead to the classification of a finance lease" (emphasis added) meant that if it was shown that just one of those factors was present, that would be sufficient to make the lease a finance lease. In contrast, the Claimants emphasised the point of agreement between the experts that lease classification requires consideration of all the circumstances before reaching a conclusion. The Claimants also relied on the statement in the first sentence of paragraph 12 of IAS 17 that the indicators are not always conclusive.

188. It was Mr Smith's evidence that, generally, if any one of the primary indicators is present then the lease will be classified as a finance lease. In cross-examination, Mr Jackson disagreed with this view. However, it is clear from the words "individually or in combination" in IAS 17 that one indicator *can* be sufficient to cause a lease to be classified as a finance lease, and the guidance issued by KPMG suggests that this will generally be the case. No doubt there will be cases where it will not be appropriate to draw that conclusion on the basis of a single factor.

189. The Claimants argued that there was no distinction between primary and secondary indicators because the expressions "primary" and "secondary" do not appear in IAS 17. However, this dual-classification was supported by both accounting experts in their joint memorandum, which records that "the Experts are agreed that IAS 17 is split into primary indicators and other indicators" and that "an accounting practitioner would place more weighting in practice to the five primary indicators". The distinction was also reflected in guidance material produced by Deloitte, KPMG and CIPFA. I am satisfied that the terminology fairly reflects the relative importance of the matters identified in paragraphs 10 and 11 of IAS 17.

Who decides if a lease is a finance or operating lease and when?

190. The issue of whether the Contract constituted borrowing is, in the final analysis, a question for the Court on the evidence before it, the status of the lease to be determined at the time it is concluded, rather than at the date of the hearing. That offers the unattractive possibility of two different but equally reasonable judgments as to the status of the Contract being reached at different points in time, something which would be wholly incompatible with commercial certainty and leave the parties' dealings in a permanently unsettled state. The practical,

rather than analytical, answer to that conundrum is that if the lease is classified as a finance lease at the time, applying the correct principles and using inputs which fall within the range of reasonable values, a court is likely be reluctant to disturb that classification at a subsequent hearing merely because the choice of other values from the range of reasonable options would have led to a different conclusion.

191. In this case, however, there is no evidence of the College performing any IAS 17 calculation at the time. I accept Mr Stilitz QC's submission for the Council that the College "simply took on trust BOSHire's repeated assertions that the … Contract was an operating lease". Nor did the Claimants seek to adduce evidence of expert consideration which was given to the issue before the Contract was signed, nor to establish and verify the inputs to whatever contemporaneous calculations they may have performed. Rather than putting forward and seeking to defend a contemporaneous assessment, the Claimants have relied upon a retrospective calculation performed by their experts for the purposes of the trial.

192. IAS 17 distinguishes "between the inception of the lease (when leases are classified) and the commencement of the lease term (when recognition takes place)." The inception of the lease is the earlier of the date of the lease, or the date of commitment by the parties to its principal provisions (paragraph 13). In circumstances in which BOSHire kept its options open until signing the lease on 30 April 2013, while it worked out if it could finance the transaction, I am satisfied that the date of 30 April 2013 is the relevant inception date for IAS 17 purposes. The lease term commenced in September 2013.

193. The directions given by Knowles J for the trial on 30 April 2019 provided for the expert accountancy and valuation reports to be served sequentially, with the Claimants going first. The expert report prepared by Mr Jackson for the Claimants performed one of the calculations referred to in IAS 17 – the so-called PVMLP calculation which I address further below – using inputs for the value of the Building derived from the Claimants' valuation expert, Mr Dodson. Mr Dodson was instructed to value the Building "at the date of practical completion, being 5 September 2013", and Mr Jackson used that input in his calculations. In his responsive valuation report, unsurprisingly, Mr Manley for the Defendants was also instructed to and did value the Building as at 5 September 2013. Again, unsurprisingly the Defendants' accounting expert Mr Smith used the two competing 5 September 2013 valuations as inputs in his report. The accountancy experts' joint meeting used the valuations which the valuation experts had provided, agreeing that "if Mr Manley's valuation is preferred, then the PVMPL test would be met for finance leasing classification", and that "if Mr Dodson's valuation evidence is preferred, then the PVMLP test may or may not be met for finance lease classification". The experts' consideration of the specialised use issue (another IAS 17 test which I address below) also expressed differing conclusions dependent on whether "Mr Manley's valuation evidence is preferred" or "Mr Dodson's valuation is preferred". There were a number of other references to the same effect. In short, the expert evidence proceeded at all times on the basis that the value of the Building to be used in the PVMLP calculations was the value as at September 2013.

194. However, in his cross-examination of Mr Smith, Mr Straker QC suggested that the correct date for classifying the lease was either February 2013 (when the College signed the Contract) or April 2013 (when BOSHire signed the Contract). Mr Straker QC then submitted in closing that the relevant inception date was in April 2013 and that there was no evidence of the proper classification or value of the lease at that date. Until Mr Straker QC's cross-examination, there was no hint from the Claimants that they might seek to challenge 5 September 2013 as the appropriate classification date, or to suggest that the valuation evidence had been prepared at the wrong date with the result that there was an evidential gap on the borrowing issue. As a result, the Defendants were unable to explore this issue with Mr Jackson in the course of his cross-examination, or to adduce evidence of the value the Building as at 30 April 2013.

195. In circumstances in which it was the Claimants themselves who selected September 2013 as the valuation date, to which the Defendants' expert then responded, and in which the Defendants were unable to adduce expert evidence-in-chief from Mr Smith on this issue, nor to explore the issue with Mr Jackson in cross-examination, it was in my view too late for the Claimants to seek to take the point that the valuation evidence had been prepared at the wrong date.

196. Further, paragraph 13 of IAS 17 provides that where the parties agree to change the provisions of the lease in a manner that would have resulted in a different classification of the lease, the revised agreement is to be regarded as a new agreement over its term. If the Contract was already a finance lease as at 30 April 2013, then paragraph 13 would not matter. But if one were to assume in the Claimants' favour that the Contract would not have been a finance lease as at April 2013, then the effect of the variations in the rent amount as at July and September 2013 would have to be considered, with any classification of the lease as a finance lease as at September 2013 leading to the Contract being defined as a finance lease throughout its term. While this aspect of IAS 17 was confirmed by Mr Smith in re-examination, this issue was not considered in the experts' reports, and there were no submissions as to how any re-classification of the Contract under paragraph 13 of IAS 17 would impact on the operation of paragraph 3(4)(a) of Schedule 1. The fact that the Defendants were deprived of a proper opportunity to explore the effect of paragraph 13 of IAS 17 in this respect because of the late stage at which the Claimants sought to take this point is a further reason why I have concluded that the point is not open to them.

197. Finally, there was no evidence before me to suggest that there is likely to be any significant difference in the value of the Building at April and September 2013. In circumstances, in which the Defendants could not be criticised for preparing their valuation evidence at this date, and doing the best I can on the evidence which I do have, I am not persuaded that there is any difference in the value of the Building, whether determined as at April 2013 or September 2013, and certainly none sufficient to affect the classification of the Contract for IAS 17 purposes.

Primary indicators (a) and (b): transfer of ownership and option to purchase

198. I should record that it was common ground that two of the primary indicators of a finance lease – whether ownership of the asset passed to the lessee at the end of the lease term, and whether the lessee had an option to purchase the asset at a

price that made it reasonably certain at inception that the option would be exercised – were not present in this case. The fact that the College wished to purchase the Building, and that BOSHire had stated – without committing itself – that it was likely to respond favourably to such a request does not change the position.

199. The Defendants' case focused on primary indicators (c), (d) and (e).

Primary indicator (d): Present value of minimum lease payments

200. As I have stated, primary indicator (d) is "whether at the inception of the lease the present value of the minimum lease payments ['PVMLP'] amounts to at least substantially all of the fair value of the leased asset". Mr Jackson described this factor as the "key indicator" of lease classification.

"Substantially all"

201. The first issue is what counts as "substantially all". There is no express threshold percentage ratio stated in IAS 17.

202. Mr Jackson's evidence was that this is generally taken to be a minimum of 90% although practitioners can apply different percentages. Mr Smith's evidence was that some accountants use a 90% figure, but that since neither IAS 17 nor the guidance on IAS 17 given by KPMG and Deloitte refer to the 90% figure, it should be approached with caution. In his view, there is no single bright numerical line, rather an accountant must exercise his judgment by applying the test of "substantially all" according to the ordinary meaning of those words.

203. The Council's own accounting policy states:

> "One of the key tests for classification of finance leases is that lease payments are substantially all of the fair value of the asset. The council has defined substantial as being where minimum lease payments are at least 70% of the fair value of the leased asset. All other leases are classified as operating leases."

204. Mr Jackson resisted the suggestion that the Council's policy involved classifying leases in which the minimum payments were in excess of 70% of fair value as finance leases. However, it is clear that the Council were treating the primary indicator of whether the PVMLP amounted to substantially all of the fair value of the leased asset as a "key test", and one which would be satisfied if the PVMLP exceeded 70% of fair value.

205. In closing, the College and the Council submitted this 70% threshold should be applied for the purpose of classifying the Contract because it was open to bodies to define "substantially all" in their accounting policies, the Council had done so at 70% and, if the College had formed an assessment of finance lease classification, it should have done so using the Council's policies. This argument gives rise to a number of potential issues:

i) First, it would involve the application of paragraph 3(4)(a) varying depending on the accounting policies adopted in a particular case rather than the Court determining the issue by applying the "substantially all" test. That could produce what might be thought to be the unattractive position that two identical transactions would fall to be treated differently depending on the accounting policy adopted by the lessee.

ii) Second, both the lessor and lessee can define their own accounting policies, raising the prospect that the transaction might constitute borrowing from the perspective of the lessee but not from the perspective of the lessor.

iii) Finally, the legal basis on which it was said that the Council's accounting policy should determine the status of the Contract for the College, in circumstances in which I have found that the College was not acting as the agent of the Council, was not the subject of any detailed submissions at the trial.

206. In circumstances in which the issue of whether the 70% test applies does not affect my determination of the classification of the Contract, I have decided to proceed on the basis of Mr Smith's evidence that "substantially all" is not defined by a single numerical bright line, but falls to be applied in the light of other circumstances. As it happens, I have concluded that the Contract constitutes a finance lease even using the 90% PVLMP test for which the Claimants contends. However, this should not be regarded as an endorsement of the 90% test for all purposes. There are a wide variety of assets which may be the subject of asset leases, and in which the classification of the lease as an operating or finance lease is of critical importance to the commercial viability of the transaction. Some of these are assets which are essentially fungible, eminently transportable and generally subject to lease terms of at most a few years (for example IT equipment or office furniture). By contrast, this case involves a modular building, installed on site after substantial preparatory and groundwork, designed to meet the lessee's specialised requirements, subject to a 15-year lease term and which it would involve a significant financial and logistical effort to relocate. These are characteristics which might be thought to test the outer limits of the concept of an operating lease, and to make the use of a lower PVMLP threshold more prudent.

The PVMLP ratio under the Contract

207. The PVMLP ratio is a function of: (i) the fair value of the leased asset at inception; (ii) the interest rate implicit in the lease (which in turn depends *inter alia* on the unguaranteed residual value of the asset); and (iii) the minimum lease payments. While (iii) is set by the Contract, both (i) and (ii) are matters of assessment.

208. In simple terms, the lower (i) and (ii) (as well as the unguaranteed residual value of the asset) were relative to (iii), the more likely it was that the PVMLP amounted to substantially all of the value of the Building at inception.

209. Mr Jackson and Mr Smith's analysis of the PVMLP under the Contract was therefore dependent on the expert evidence of Mr Dodson and Mr Manley as to

the value of the Building (i) at inception (which for the reasons set out above I have concluded is to be taken as their valuations as at 5 September 2013) and (ii) the unguaranteed residual value of the asset at the end of the lease. In this regard, it is important to note that, Mr Jackson and Mr Smith were agreed that if Mr Manley's expert valuation evidence was to be preferred, even just on (i), then the Contract was a finance lease.

210. A major tension in the valuation evidence arises from the fact that the value of the Building is different *in situ* and *ex situ*. An *in situ* valuation contemplates that the Building is fixed and so can cover works which would be non-recoverable were the asset relocated such as preliminary works and groundworks. Conversely, an *ex situ* valuation conceives of the Building as a chattel which is relocatable so that those non-recoverable works cannot form part of the valuation (because their value cannot be realised *ex situ,* and indeed similar works would be required by any subsequent lessee of the Building).

211. In the following sections, I review the evidence on each of the three inputs before explaining my overall conclusion on the PVMLP.

(i) Fair value

212. Mr Dodson adopted as his valuation *in situ* the cost of completion certified by the Bailey Partnership, namely £7,147,039. This equated to around £2,400 per square metre. Importantly, this value included substantial sums for preliminaries and groundworks.

213. In contrast, Mr Manley valued the Building *in situ* on four different valuation approaches using guidance from the Royal Institute of Chartered Surveyors (RICS). Applying a weighted analysis of the outputs of those four approaches, he valued the Building at £4,540,000. This equated to £1,519 per square metre.

214. I am satisfied that the valuation put forward by Mr Dodson is too high:

i) Mr Dodson cited a number of comparator relocatable buildings used by other schools in his reports. Mr Manley calculated that the cost of build per square metre for these comparables amounted to £1,543, around £800 less than the £2,400 per square metre figure which Mr Dodson used. I agree with the Defendants that Mr Dodson's own comparable suggest that his *in situ* valuation is significantly too high.

ii) Mr Dodson's valuation on this basis is very substantially in excess of the quotation for a modular building which the College obtained from McAvoy of under £4 million plus VAT in March 2011, even allowing for the time interval between the two quotations.

iii) Mr Dodson's approach assumes that the value of the Building was represented by the amount paid to BOS for the construction of the Building. However, I do not believe that this is an appropriate assumption, particularly in circumstances (as I explain below) in which the College made no real attempt to negotiate the hire figures down and in which BOS and BOSHire were not dealing at arms-length.

215. Mr Dodson's response to the suggestion that his valuation was out of line with his own comparables was to suggest that this was not the case once non-recoverable costs such as preliminaries and groundworks were removed from the Bailey Partnership figure. If just preliminaries and groundworks were deducted, then on Mr Dodson's approach the fair value at inception would be £5,722,143. If all non-recoverable costs were deducted, that value would be £5.33 million.

216. I do not accept that this explains the discrepancy. Mr Dodson accepted that he did not know whether his comparables included groundworks and preliminaries (he accepted that "we don't know what is included in these costs"). In any event, Mr Dodson's response reveals a further difficulty with the Claimants' analysis, namely that it involved assessing fair value on an *in situ* basis (i.e. the Building as completed on site at the College), in circumstances in which the Claimants' residual value calculation necessarily had to be done on an *ex situ* basis (its value as an asset capable of being disposed of to someone other than the lessee at the end of the lease). This is the case because, for IAS 17 purposes, it was necessary for the Claimants to establish that at the end of the lease, the Building had a residual value on a third party disposal. Insofar as the Claimants sought to rely on an *ex situ* valuation of the Building, such a valuation cannot include work the value of which is not capable of being enjoyed at another location and which would therefore have no value to a subsequent lessee. In circumstances in which the Claimants' PVMLP case was heavily dependent on the Building being relocatable, such that it could be said to have a further significant economic life at the end of the lease to the College, it was not appropriate for the Claimants to conduct the PVMLP calculation on a basis which included the value of non-transferrable work within the calculation of the fair value of the Building at inception.

217. In addition to using Mr Dodson's valuation, Mr Jackson also used the insurance value of the Building, as stated in the Contract of £6,953,000 which he uplifted by reference both to the cost of the variation works done between April and September 2013 (which came to £487,000) and interest costs. This produced a figure of £7,634,189. Mr Jackson then took the midpoint between Mr Dodson's valuation and his own calculation as his fair value.

218. I am unable to place reliance on this assessment of the Building's value:

i) To the extent it depends on Mr Dodson's valuation, it suffers from the weaknesses I have identified above.

ii) I do not regard the value for which the Claimants required the Building to be insured at the College's expense, as a particularly satisfactory method of valuing the Building. It is certainly much less reliable than Mr Manley's weighted valuation approach.

iii) The groundworks represented 30% of the insurance value defined in the Contract and used by Mr Jackson, raising the same issue as that which arises on Mr Dodson's valuation using the Bailey Partnership figure. When those costs are excluded, as the Council did when calculating the insurance value of the Building, the value was £4.9 million.

iv) Further, it is not appropriate to uplift the insurance value by £487,000 for additional work, in circumstances in which the additional works did not lead to any increase in the required insurance value.

219. In conclusion:

i) Valued on an *in situ* basis, I am satisfied that the value of the Building was substantially less than the figures of in excess of £7m used by both Mr Dodson and Mr Jackson. I have found the methodology by which Mr Manley's valuation of £4,540,000 to be more reliable, but I accept that this might understate the value of the Building. However, I am satisfied on the evidence before me that the *in situ* value of the Building did not on any view exceed £6m.

ii) On an *ex situ* basis, on the Claimants' own figures, the value of the Building cannot have exceeded £5.35 million (the Bailey Partnership figure less non-recoverable costs). For reasons I explain below, I am satisfied that the *ex situ* value of the Building as at September 2013 is very substantially less than that.

(ii) Residual Value

220. It was common ground that at the end of the Contract, there were in principle four options for the future use of the Building: either *in situ* sale or re-lease to the College; or *ex situ* sale or re-lease to a third party. Importantly, it was common ground that, if an *ex situ* sale or re-lease were not economically viable, this would suggest that the Contract was a finance lease (because, on an *in situ* basis, any money received in respect of residual value would have to be paid by the College).

221. The Claimants did not tender any expert valuation evidence as to the residual value at lease expiry (in 2028). This was despite Mr Jackson explaining in his written evidence that assessing the residual value is the most judgmental part of the PVMLP calculation. Mr Dodson stated that he had not been instructed to provide such a valuation. As there was no proper consideration of this issue in Mr Dodson's report (to which Mr Manley would have had an opportunity to reply), I do not feel able to rely on Mr Dodson's suggestion made for the first time in cross-examination (which I did not find it particularly easy to follow) that the residual value of the Building was unlikely to change between 2019 and 2028, save to say that my initial reaction is that this is implausible.

222. The Claimants' failure to proffer expert evidence on this issue meant that their case on residual value was entirely premised on a set of assumptions adopted by Mr Jackson, whose expertise did not extend to the valuation of the Building. Mr Jackson calculated residual value in two ways. First, on a "lessor return" model, he calculated an estimate of initial residual value of £1,461,440. This represented the total cost of the Building (£7,580,730) less the initial payment under the Contract (£1,001,762) and the sale of rights to SFM and subsequently GCP. He then uplifted that initial residual value by RPI (for which he used a figure of 5.6%) on the assumption that an investor would hope to make a return on their investment at least equal to inflation. Second, on a "building cost inflation"

approach, he took the value of the building in 2013 and uplifted it to reflect inflation by RPI (once again using a 5.6% figure). He then applied a 70% reduction to that figure, on the basis of a statement in Mr Dodson's report that the *ex situ* value attributed to a modular building is 30% of the cost of a similar new building.

223. Mr Jackson's calculations both used an RPI figure of 5.6%. Mr Smith's evidence was that this figure was inappropriate. In Mr Smith's opinion, an appropriate RPI rate was around 3%, because the rate in 2013 was 3% and the five-year rate to 2013 was 3.1%. I have concluded that Mr Smith's criticisms of the RPI rate used by Mr Jackson are justified:

i) Mr Jackson's 5.6% figure was arrived at by taking an average RPI for the period from 1949 to 2013. That included the unusually high inflation of the 1970s and 1980s which had the effect of increasing the average RPI. It is for this reason that the RPI figure used by Mr Jackson is considerably higher than the other RPI rates canvassed and above the average rate from the early 1990s to 2013 which Mr Jackson explained in cross-examination, he had calculated to be 3.6%.

ii) In justifying his approach, Mr Jackson relied on the "uncertain economic times" caused by Brexit. However, when giving his oral evidence, it transpired that he had never previously calculated RPI in this manner and he said that it was "the upper limit of what could be acceptable for an accountant".

iii) I am in no doubt that the RPI figure used in Mr Jackson's report was not one which it was appropriate to use. I have concluded an RPI of 3% is appropriate, for the reasons which Mr Smith gave.

224. In addition to the RPI issue, there are other obvious difficulties with Mr Jackson's "lessor return" model (i.e. assuming that an investor would expect to make a return on their investment which was at least equal to inflation). Mr Jackson's assumes that the transaction was undertaken with a view to a particular level of profit, rather than as a "reference project" to promote future transactions. The assumption also fails to address the fact that the level of return the lessor hoped to achieve might depend on achieving a sale or re-lease to the College, rather than a third party, at the end of the minimum lease period. Mr Spring gave the following revealing evidence on this issue:

> "We were taking a real risk on the future value and there was a lot of uncertainty with the lessor about whether it would ultimately be barely profitable, or perhaps even a small loss or break-even, or whether it would actually be a lot more profitable **if you could actually achieve an in situ disposal which is always – the ambition of any operating lessor is to make an in situ disposal because that's the way you actually make your return**".
>
> (emphasis added).

225. Further, Mr Jackson's "lessor return" approach did not appear to have factored in the costs which would be incurred by the College and SFM, in the event of an *ex situ* re-lease or resale in refurbishing, reconfiguring and transporting the Building. These were estimated by Mr Dodson at £1.2 million. Mr Jackson confirmed that it would be appropriate to consider residual values net of "selling costs". That logic would dictate that the residual value in an *ex situ* scenario should be considered net of refurbishment, reconfiguration and transport costs too. In cross-examination, Mr Jackson appeared to accept that residual value should be considered net of these costs but suggested that he had done so by applying the 70% reduction referred to above. However, the reduction appears to have been performed only on Mr Jackson's "building costs inflation" approach and not his "lessor return" approach. There is nothing in Mr Jackson's report to show any part of the £1.2 million figure was reflected in Mr Jackson's lessor return calculation, and I am not persuaded that it was.

226. So far as the Building Cost calculation is concerned:

i) The use of RPI of 5.6% per year is inappropriate for the reasons I have set out above.

ii) The residual value was calculated by taking 30% of the initial residual value uplifted for inflation. However the 30% figure which Mr Jackson relied upon was not put forward by Mr Dodson as an independent means of establishing the proportion of *ex situ* value which survived at the end of the lease. Mr Dodson appears to have used the 70% figure as a rough and ready way of testing his conclusions rather than a means of arriving at a reliable calculation of residual value in its own right.

iii) In short, this is an assessment of value entirely dependent on the use of assumptions, which I have held to be unreliable.

227. Mr Manley's assessment of the residual value in 2028 was that *ex situ*, the Building would be worthless. *In situ*, he valued it at £1.54 million. This was arrived at using the same valuation methodologies he had used when arriving at his valuation as at November 2019, using what he referred to as an accepted convention to "take the current market circumstances and assume that the building is pro-rata at that number of years older", but with an appropriate reduction to reflect the current state of the building and the cost of bringing it up to market standard. I accept the evidence of Mr Manley and Mr Pincott, who inspected the Building and produced a detailed documentary and photographic record of that inspection, that some adjustment for the state of the Building is required.

228. As the only end-of-lease valuation I have, and given Mr Manley's clear expertise as a valuer, I accept Mr Manley's £1.54 million *in situ* valuation at the end of the lease. The question of residual value was necessarily a matter for valuation experts rather than for accounting experts and Mr Jackson's assumption-based approach cannot fill the evidential lacuna resulting from the lack of valuation evidence on this topic from Mr Dodson.

229. I also accept Mr Manley's evidence that the *ex situ* valuation of the Building at the end of the lease is likely to have been insignificant once the costs of dislocation, transport, re-conditioning, marketing, re-configuration to a new user's requirements, and re-installation are taken into account. There are a number of "sense checks" which tell strongly against any suggestion that the Building had a significant *ex situ* value post-installation (and certainly by 2019):

i) It was the evidence of Mr Pierce that BOS, and the modular building industry in general, wrote off any residual value in leased modular buildings after five years.

ii) In explaining why no credit was given in the calculation to be performed under the Contract for the residual value of the Building following a repudiation of the Contract, Mr Spring explained:

> "It is highly uncertain whether the building could be sold or re-let on terms that would represent a value equivalent to the lost income stream and, in any event, the lead time required to identify a subsequent user of modular buildings to a compatible design, which would allow the building to be re-utilised without major refurbishment, would be very substantial, **if it could be achieved at all**" (emphasis added).

iii) Finally, it is striking that while the Claimants wrote terminating the College's right to use the Building in April 2018, at a much earlier point in the life of the Building than if the full 15-year term had run, they have made no effort to re-possess it. That inertia is consistent with the *ex situ* value of the Building already being insignificant, and it would only have reduced after a further 10-years.

(iii) Minimum lease payments under the Contract

230. All parties and their experts assumed that the minimum lease payments remained constant, being the payments specified under the Contract. However, the Contract required the College to pay a substantial additional sum at the termination of the Contract because the College was responsible for returning the Building to BOSHire in good and reasonable clean condition, with the College liable for all costs of inspection, loading, unloading and transportation.

231. In his report, Mr Jackson stated that:

> "If [the College] was to bear the costs of dismantling then this would be expected to reduce risk from SFM's perspective, and so increase the likelihood of it being a finance lease. If [the College] was to, say, bear £400,000 of the relocation costs and this was considered to represent a minimum lease payment under the Hire Contract then this would increase the PVMPLS Ratio by approximately 0.6%".

232. Under IAS 17, minimum lease payments are "payments over the lease term that the lessee is or can be required to make". There was no discussion before me of whether payments the lessee could be required to make to third parties for

dismantling, transportation etc fell within this definition, and accordingly I have ignored any uplift in the minimum lease payments which might result from including these costs. This may involve an element of conservativeness in the calculation, in the Claimants' favour.

Conclusion on the PVMLP ratio of the Contract

233. On the basis of these conclusions, I am satisfied at the inception of the lease the PVMLP amounted to "substantially all of the fair value of the leased asset":

i) Even assuming in the Claimants' favour that the relevant threshold for "substantially all" is 90%, if even one of Mr Jackson's inputs is adjusted in a manner adverse to the Claimants, the 90% threshold is exceeded.

ii) I have concluded that a number of adjustments to those inputs are required, each of which would increase the PVMLP percentage above the 90% threshold.

iii) First, the RPI used should be corrected from 5.6% to 3%. Even if Mr Jackson's alternative RPI figure of 4.5% was used, then PVMLP would still be above 90%.

iv) Second I have accepted Mr Manley's evidence that the Building had a residual value *in situ* of £1,540,000 and concluded that its *ex situ* residual value was insignificant.

v) Third, I have concluded that the fair value in *situ* cannot have exceeded £6m, and that the fair value *ex situ* (which the logic of the Claimants' position requires them to use) should not include the preliminaries and groundworks, on which basis it cannot exceed £5.35m even on the Claimants' own figures.

234. It is worth noting that, on Mr Jackson's analysis and using his RPI rate of 5.6%, the PVMLP ratio is 88%. Only on the further assumption suggested by Mr Jackson - that SFM would expect to make a return of 8% - did Mr Jackson's calculation of the PVMLP ratio fall to 84.6%. However, Mr Jackson accepted that the calculation of residual value premised on an *ex situ* sale or re-lease could not (sensibly) be calculated using this assumption. Putting that assumption aside, even if all of Mr Jackson's inputs were accepted, the PVMLP ratio does not fall below 88%. On the basis of Mr Smith's expert evidence, which I have accepted, that there is no "bright line" test of 90% under IAS 17, that would in my view amount to "substantially all" of the fair value of the Building.

Primary Indicators (c) and (e): Specialised asset and Economic Life

235. Primary indicator (c) provides: "the lease term is for the major part of the economic life of the asset even if title is not transferred". Primary indicator (e) provides: "the leased assets are of such a specialised nature that only the lessee can use them without major modifications".

What is "the asset"?

236. A preliminary question arises as to the identification of the asset or assets to which these tests should be applied. It appeared to be the Claimants' case that the relevant assets were the 81 relocatable units of which the Building was constructed, rather than the Building *per se*. This classification was intended to facilitate the argument that re-use of "the asset" was possible without major modifications. While the 81 relocatable units were of varying lengths and widths, at their most basic level they were simply 81 homogeneous steel frames.

237. In response, the Defendants pointed to the Contract definition (which the Claimants tended to quote only in part rather than in full). The "Equipment Description" provided:

> "Double storey 6th Form teaching accommodation block constructed from 81 no relocatable units all in accordance with Supplier's drawings re AQ194-06-2000=F and AQ194-06-2100-D and technical specification ref AO194-06-9000-F".

238. Those drawings make it clear that the Building comprised, inter alia, an assembly hall, classrooms, workshops, laboratories, studios and a café, and was to be built, configured and finished, both internally and externally, according to a detailed and bespoke plan.

239. I have concluded that the Defendants' submissions are to be preferred and that the asset for the purposes of Primary Indictors (e) and (c) is the Building as described in the full contract description. It is the cost of providing that Building finished in accordance with the specification in the Contract, rather than the cost of 81 steel frames, which the fair value of the Building represents, and which drove the size of the lease payments.

Primary indicator (e)

240. It was common ground between the parties that this was primarily a question for the valuation experts. It was agreed that sale or re-lease of the Building to a third party would involve three steps: (i) dismantling the Building into units; (ii) refurbishing and reconfiguring those units to a new design; (iii) installing those units on another location.

241. Mr Manley's evidence, which Mr Dodson agreed with, was that disassembly would require, *inter alia*, cutting through the existing bolts, and separating the slices and external cladding which currently connects the units in the Building. A 100 tonne crane or equivalent (on Mr Pierce's evidence a number of smaller cranes were used to install the Building) would be needed to move the units, and 81 separate lorry-loads would be needed to transport the units to their new destination. If this location was not on the Isle of Wight, a ferry-crossing would be required.

242. On Mr Dodson's evidence, the cost of refurbishment and reconfiguration, would be £1.2million and the cost of installation would be £2.55 million. Mr Manley suggested that the figures would be substantially higher.

243. On Mr Dodson's evidence alone, it is clear that the Building was of such a specialised nature that only the lessee could use it without major modifications. In any event, I am not persuaded by Mr Dodson's evidence that there would have been any demand for the restored and reconfigured Building at the end of the lease so as to make removal, restoration, reconfiguration and re-installation an economically viable proposition.

244. I accept that there is a market for re-used modular buildings. Mr Manley drew a distinction in this connection between permanent modular buildings and temporary modular buildings, suggesting that while the latter have a generic character and are frequently re-used, the former are not. Mr Manley's evidence was that some modular buildings are intended to be permanent and are built as such. Their design is generally more complex and not conducive to relocation. In contrast, temporary modular buildings are designed with relocation in mind. The most familiar example of these are portacabins. Given these differences in design, it was Mr Manley's opinion that the relocation of permanent modular buildings is more expensive and complex than the relocation of temporary modular buildings. Mr Manley's evidence was that the Building was a permanent modular building whose relocation, while technically feasible, was not economically viable.

245. The Claimants disputed the existence of a distinction between temporary and permanent modular buildings, contending that it was both technically and economically feasible to relocate the Building and buildings like it. This issue was the subject of evidence from Mr Pierce, and also Mr Dodson. To support his evidence that it was economically feasible to relocate the Building at the end of the lease, Mr Dodson attached extracts from webpages or trade publications featuring a number of school buildings built using modular construction. It was the Claimants' case, largely pursued through the cross-examination of Mr Manley, that these buildings were comparable to the Building and that they were all relocatable.

246. There were two difficulties with this approach. First, the documents which Mr Dodson had exhibited and on which the cross-examination was based, contained relatively limited detail, often giving no information about the materials used, the internal finish of the buildings and the wider context in which they had been built, other than that which could be discerned from the photographs. Second, it was Mr Manley's evidence, which I accept, that these communications, as sales publications with potential customers as their intended audience, were likely to emphasise the potential for relocation of modular buildings without explaining that, depending on the design of such buildings, such relocation might be complex and expensive, to the point of being uneconomic.

247. I found a specific focus on the characteristics of the Building, rather than alleged comparisons with other buildings, the most reliable means of determining whether the Building was relocatable and re-leasable once installed *in situ*. In cross-examination, Mr Dodson confirmed that the 81 units, once configured to form the Building, were put to heterogenous uses, with varied internal finishes. The electrical wiring, the plumbing and the partition walls were different in almost every unit. Mr Dodson accepted that the Building was intended for permanent use and that the College expected to occupy the building for its

"natural life". In my view, that reflects the reality of the situation. The Building was intended for permanent use on its original site and was designed in accordance with that intention. The Claimants themselves, in submissions filed on 1 April 2020, described the Building as having been "compiled to the specific and exact specifications of the College". The dismantling, refurbishment, reconfiguration and reinstallation, which Mr Dodson accepted would be necessary before the Building could be used by a third party not only amounted to "major modifications", within any ordinary understanding of that term, but also made any profitable third party disposal of the Building at the end of the 15-year term unlikely.

Primary indicator (c)

248. Mr Jackson and Mr Smith agreed that if Mr Manley's evidence is preferred, such that the primary indicator (e) specialised asset test is met, then the Building will also meet the primary indicator (c) economic life test for finance lease classification, as the economic life of the asset would be consumed by the College. As I have concluded that the specialised asset test is met, it follows that primary indicator (c) is also satisfied.

Conclusion

249. All of primary indicators (c), (d) and (e) point to the classification of the Contract as a finance lease. As explained above, the proper approach to IAS 17 is that, if any of the primary indicators is present, a lease will generally be classified as a finance lease. In this case, three of the primary indicators are satisfied. Whether one employs the qualitative approach emphatically advocated by the Claimants, or considers the weight to be accorded to each of these factors, the answer is clear: the Contract was a finance lease.

250. As the Contract is properly classified as a finance lease, it follows that the Contract involved borrowing. It is common ground that the Contract was entered into without the permission of the Secretary of State, which I have found constituted a limitation on the College's power to borrow. It therefore follows that the Contract was *ultra vires* the College and was void.

251. Before leaving this issue, I should refer to a matter much pressed by the Claimants in argument: that BOSHire, the College and the others routinely referred to the Contract as an operating lease, the Contract so described itself, and that no one disagreed with that classification until April 2018.

252. The parties' own descriptions cannot be decisive of an issue which turns on the economic substance of the transaction. Lord Templeman's observations in Street v Mountford [1985] AC 809, 819 are very much on point:

> "In the present case, the agreement dated 7 March 1983 professed an intention by both parties to create a licence and their belief that they had in fact created a licence. It was submitted on behalf of Mr. Street that the court cannot in these circumstances decide that the agreement created a tenancy without interfering with the freedom of contract enjoyed by both parties. My Lords, Mr. Street enjoyed freedom to offer Mrs. Mountford

> the right to occupy the rooms comprised in the agreement on such lawful terms as Mr. Street pleased. Mrs. Mountford enjoyed freedom to negotiate with Mr. Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

253. The question of what constitutes borrowing under paragraph 3(4)(a) of Schedule 1 is not a self-certification scheme, but a matter to be determined on the objective facts. There is no evidence of anyone on the College or Council's side ever having performed the in-depth analysis necessary to arrive at an informed application of IAS 17, and in the absence of such analysis, the fact that individuals or entities were willing to treat the Contract as what it professed on its face to be is neither here nor there. This also answers Mr Straker QC's points that none of the extensive powers capable of being invoked against the College in the event of financial mismanagement were ever exercised. Unless and until the detailed analysis had been performed to allow a meaningful conclusion on the question of the Contract's classification, there was simply no basis for any such powers to be invoked, even assuming the political will had existed to do so. Now that that analysis has been performed, the proper classification of the Contract admits of no real doubt.

254. For the same reason, the Claimants' invocation of the presumption of regularity, and their reliance on the decision in Calder Gravel v Kirklees MBC (1990) 60 P&CR 322 takes them nowhere. This is not a case in which the original facts are lost in the mists of time, and in which the Court relies upon an evidential assumption as to the original position based on the manner in which people have behaved subsequently. In this case, there is no evidential void for the presumption to fill.

255. In addition to the argument based on paragraph 3(4)(a), which I have upheld, the Defendants ran a number of alternative arguments as to why it was said that the College lacked capacity to enter into the Contract. While on the basis of the finding I have reached on the borrowing issue, it is not necessary to resolve these alternative grounds of argument, in circumstances in which the points were the subject of argument I address the alternative grounds below.

THE *VIRES* DEFENCE BASED ON REGULATIONS 6 AND 7 OF SEYFER 2012

256. I have already referred to SEYFER 2012, regulations made by the Secretary of State in exercise of the delegated legislative power provided for in various of the sections of the relevant primary legislation. The College, supported by the Council, submitted that it was *ultra vires* the school to spend funds from the

Council's "school's budget" (for the purposes of s.45A(2) of the SSFA) on capital expenditure.

257. To the extent that the Contract was to be treated, for accounting purposes, as a finance lease, then I accept that it involved capital expenditure for the purposes of SEYFER 2012, and that use of the local authority's schools budget for that purpose would not be in accordance with Regulations 6 and 7 of SEYFER 2012. I do not think Mr Straker QC for the Claimants contended to the contrary. The factual basis, therefore, for the Defendants argument under Regulations 6 and 7 of SEYFER 2012 could only arise if, for some reason, the College did have capacity to take out a finance lease notwithstanding paragraph 3(4) of Schedule 1 to the Education Act 2002, but then sought to meet payments due under that finance lease from monies emanating from the school's budget. I shall assume, for the purposes of considering this argument, that Mr Oldham QC for the College is right to contend that the restrictions on the use of funds in the delegated budget imposed by Regulations 6 and 7 of SEYFER 2012 apply to the College, even though SEYFER 2012 is not directed to the College but to the Council.

258. Regulations 6 and 7 of SEYFER 2012 are concerned with the use of funds emanating from a particular source, not with capacity to contract. The various statutory provisions under which the regulations were enacted do not include those provisions of primary legislation which directly address the capacity and powers of maintained schools or even of local authorities. SEYFER 2012 was passed many years after those provisions which do clearly define the powers of maintained schools first appeared in the SSFA in 1998 (such that, if any part of those regulations did limit the capacity of maintained schools, this occurred a number of years after those schools were first created and endowed with statutory capacity). Those matters have led me to conclude that SEYFER 2012 does not impose limitations on the contracting powers of maintained schools, but, at best for the College, on the manner in which contractual obligations may be performed.

259. Further, the obligations imposed by SEYFER 2012 are placed on the Council and not on the College. The College's position in closing submissions was as follows:

> "The College does not suggest that all the provisions of SEYFER 2012 impose restrictions on its *vires*, although they certainly regulate the powers of the Council. As set out above, SEYFER is directly addressed to LAs [Local Authorities] and not GBs [Governing Bodies]. They create a restriction on the *vires* of the GB only where the GB's actions constitute a circumvention of the detailed scheme of budgetary allocation and control in SEYFER. Where an LA cannot allocate in an individual delegated budget funds for capital expenditure, it cannot be permissible for the GB to use those funds for capital purposes".

260. Traditionally, the prohibition on performing a contractual obligation in a particular way only rendered a contract illegal as a matter of private law where the contract expressly required performance in that way, or where the shared intention of both parties was to perform the contract in that unlawful way. It has become more difficult to repeat those old certainties with confidence now that a factors-based approach to the issue of illegality falls to be applied following Patel

v Mirza [2017] AC 467, but the broader range of possible responses to illegality identified in that case would itself militate against treating the illegal nature of one party's anticipated method of performance of a contract which can be performed lawfully in some other way as something rendering the contract void for all purposes.

261. If an innocent intention (in the sense that there was no awareness of the illegality) to discharge contractual obligations using funds which could not lawfully be used for that purpose is sufficient to render the decision to contract (rather than the use of the funds) void as a matter of public law (an issue which was not the subject of submissions), in my view such a public law ground of invalidity would not give rise to a defence of lack of capacity to contract as a matter of private law. If the College was or became able to discharge its liabilities under the Contract using funds which were not subject to similar restrictions (such as funds from the YPLA, the two supporting Dioceses or its own commercial activities), I cannot see why it should be relieved from liability merely because it could not use funds in the Council's schools budget for this purpose. Mr Oldham QC accepted in closing submissions that if, the day after the Contract was signed, the College had received funds from the Dioceses to cover all of the hire payable, the Contract would not be outside the College's capacity to contract or void. That in itself strongly militates against the suggestion that Regulations 6 and 7 affect the College's capacity to contract.

262. In the course of closing argument, it became apparent that the College had pleaded an alternative to its "no contract" case, which asserted that even if the Contract was valid, the use of funds in the schools' budget to make payments under the Contract was not, such that these funds were said to be recoverable in unjust enrichment. In circumstances in which (on the evidence of Ms Williams of the College) all funds received by the College from whatever source were paid into a single bank account from which its expenditure was met, it is not clear how the factual predicate for this argument (that monies from the Council were used for an unlawful purpose) can be made out. There are also issues as to what happens if funds which cannot be lawfully used by the payor for a particular purpose (albeit this is unknown to the payee) are used to pay a debt arising under a valid contract. Is there a defence to the claim in unjust enrichment that the sum has been paid to discharge a valid debt and hence good consideration has been provided (*Goff and Jones: The Law of Unjust Enrichment* (9th Ed.), Chapter 29 Section 4)? Or can a claim in unjust enrichment by the payor to recover the sums paid be defeated by a defence of set-off based on the payee's debt claim? These issues were not the subject of submission and, in the light of my previous findings, it is not necessary to decide them. I therefore say no more about them.

THE *VIRES* DEFENCE BASED ON THE CONTRAVENTION OF THE COUNCIL'S SCHEME

263. As I have mentioned, under s.48 of the SSFA the Council is required to issue the Scheme. The College and the Council contend that the powers of the College are "subject to" the provisions of the Scheme, such that (in private law terms) the College does not have contractual capacity to enter into a contract which does not comply with the terms of the Scheme. It is said that there was a failure to comply

with the terms of the Scheme here because in entering the Contract, the College contravened the following provisions of the Scheme:

i) Paragraph 2.1 which required a maintained school to manage its delegated budget with due regard to the Council's Standing Orders, Contract Standing Orders and Financial Regulations, and to the exercise of budgetary and financial controls.

ii) Paragraph 2.4 which required a maintained school to seek to achieve efficiencies and value for money, to optimise the use of its resources and to invest in teaching and learning, taking into account the Authority's purchasing, tendering and contracting requirements.

iii) Paragraph 2.10 which required a maintained school to abide by the Council's Financial Regulations and Contract Standing Orders (including obtaining at least three tenders for any contract with a value exceeding £10,000 a year).

iv) Paragraph 2.14 which required a maintained school to notify any use of its budget share for capital expenditure over £15,000 to the Council, and for decisions in relation thereto to take into account the advice from the Director of Finance or the Director for Children and Young People.

v) Paragraph 2.15 which provides that "the authority may issue a notice of concern to the governing body of any school it maintains where, in the opinion of the Director of Finance and the Director for Children and Young People, the school has failed to comply with any provisions of the scheme or where actions need to be taken to safeguard the financial position of the local authority or the school. Such a notice will set out the reasons and evidence for it being made and may place on the governing body restrictions, limitations, or prohibitions in relation to the management of funds delegated to it".

vi) Paragraph 3.6 which provides that a maintained school is only permitted to borrow money with the written permission of the Secretary of State.

vii) Paragraphs 4.5 and 4.9 which provide that any planned deficit budget is required to be approved by the Council and to be subject to certain limits, including a maximum length of 3 years, and a maximum deficit of £150,000.

Is the College's capacity to contract in private law circumscribed by the terms of the Scheme?

264. As I understand the position, schemes for financial delegation by local authorities to schools were first introduced by Chapter III of the Education Reform Act 1988 ("the ERA"). The ERA provided for the Secretary of State to approve any scheme, and authorised a local authority to suspend a school's delegated budget if the school's governing body had been guilty of a "substantial or persistent failure to comply" with the requirements of the scheme (s.37).

265. At the times material to the present claim, the Scheme was issued by the Council pursuant to s.48 SSFA. S.48 provided that the Scheme would deal with "such matters connected with the financing of schools maintained by the authority" as the SSFA or regulations issued by the Secretary of State required. The description of the purpose of the Scheme is s.48 is not immediately suggestive of a document whose contents will define the legal powers of a maintained school. However, Mr Oldham QC is able to point to other provisions of the SSFA and the Education Act 2002 which provide a better basis for such an argument.

266. First, s.50(3) of the SSFA provides that a maintained school may spend its delegated budget as it sees fit "subject to any provision made by or under the scheme". Those words are certainly capable of supporting an argument that compliance with the Scheme is a limit on one of the College's powers (viz how it spends its delegated budget), albeit that would not constitute a limit on the exercise of its power to contract (see the discussion of SEYFER 2012 above).

267. Second, para. 3(8) of Schedule 1 of the Education Act 2002 – the schedule which sets out the powers of the statutory corporation constituted by a maintained school's governing body - refers to the paragraphs setting out the powers of the governing body and states:

> "Sub-paragraphs (1) to (3) have effect subject to-
>
> (a) any provisions of the school's instrument of government; and
>
> (b) any provisions of [the Scheme].

268. The argument that paragraph 3(8) imposes a limit on the College's powers is a formidable one, but one which (at least in its fullest extent) I am unable to accept. In order to test the argument, I asked to see the College's instrument of government (a document which I was told there is no duty to publish but which, on the College's argument, limited its powers). It provided, inter alia, that:

> "The school is to be conducted both as a Catholic school in accordance with the canon law and teachings of the Roman Catholic Church, and as a Church of England School, in accordance with the Trust Deed of the school and in particular … at all times the school is to serve as a witness of Our Lord Jesus Christ".

269. I put the example to Mr Oldham QC in argument of a contract by the College to hire a contraceptive dispenser. He did not shrink from the suggestion that, if this was contrary to the teachings of the Roman Catholic Church, the contract would be void on grounds of lack of capacity by reason of paragraph 3(8)(a) of Schedule 1 to the Education Act 2002. However, I cannot accept the suggestion that something as fundamental to a third party dealing with the College as the extent of the College's contractual capacity could turn on the resolution of theological disputes such as whether the Guelphs or the Ghibellines had right on their side.

270. There are similarly a number of provisions in the Scheme – a document which is 37 pages long - whose broad-textured and disputable nature makes them inherently unsuitable as limitations on the College's contractual capacity. For

example paragraph 2.4 provides that "schools must seek to achieve efficiencies and value for money, to optimise the use of their resources and to invest in teaching and learning" and that "it's important for schools to review their current expenditure, compare it to other schools and think about how to make improvements". Paragraph 9.1 requires the school to demonstrate when buying insurance that "the cover is relevant to the authority's interests and that it is at least as good as the relevant minimum cover arranged by the authority".

271. The argument that only some provisions of the instrument of government and the lease impose limits on the College's power to contract, and not others, is itself an unattractive one, because of the uncertainty to which such an approach would inevitably give rise when determining which provision do or do not impose such a limit. Unless a particular paragraph of the Scheme itself makes it sufficiently clear that compliance with that provision constituted a limitation on the extent of the College's power, I would not regard any provisions of the scheme as limiting the College's capacity, so much as imposing obligations on the College vis-à-vis the Council as to how it should conduct itself. A distinction of this kind bears some relationship to the distinction drawn in private law between "want of authority" and "abuse of authority" which was referred to by Millet J in Macmillan Inc v Bishopsgate Trust (No 3) [1995] 1 WLR 978, 984 or between validity and propriety referred to by Stuart-Smith LJ in Grupo Torras SA and anr v Sheikh Fahad Mohammed Al Sabah [1995] CLC 1025, 1033.

272. Similarly, in private law, the Courts have been reluctant to allow the internal procedures of a company to serve as a constraint on the authority of the company's agents to enter into contracts which are of a kind permitted on the face of its foundational documents (the rule in Royal British Bank v Turquand (1855) 5 E & B 248). A similar concern not to make the validity of contracts between third parties and a public body over-dependent on the internal workings of the public body can be seen in a number of cases involving public bodies. For example in Charles Terence Estates Ltd v Cornwall CC [2011] EWHC 2542 (QB), [64], Cranston J directly invoked the Turquand principle when saying that "in general a public authority making a contract in breach of internal rules and procedures should not be able to invoke these when they are not readily visible to the counterparty and the counterparty has acted in good faith".

273. These matters suggest a degree of caution in approaching the College and the Council's argument that the terms of the Scheme set limits on the College's capacity to contract. Further, the following provisions of the Scheme support the view that it is generally concerned with the relationship of the Council and College *inter se* rather than the power of the College when dealing with others:

i) Under the heading "the Role of the Scheme", the Scheme provides that "this scheme sets out the financial relationship between the authority and the maintained schools which it funds" and that "the requirement of the Scheme in relation to financial management and associated issues are binding **on both parties**" (emphasis added). This is consistent with the view that the Scheme is generally concerned with setting out the rights and responsibilities of maintained schools and maintaining authorities "inter se" rather than provisions which limit the power of a school to conclude contracts with third parties.

ii) The general sanction which the Scheme provides for non-compliance with its terms is (a) the issue of a Notice of Concern by the Council in respect of a failure to comply with any provision of the Scheme, which allows the Council to impose various requirements on the school's staff and governing bodies such as extra training (paragraph 2.15), and (b) the suspension of the school's right to a delegated budget in the event that the provisions of the Scheme "have been persistently breached or if the budget has not been managed satisfactorily" (paragraph 1.1). The stipulated consequences for non-compliance, therefore, all involve consequences *for the College* rather than the invalidity of transactions.

274. I will now review the specific paragraphs of the Scheme relied upon by the College and the Council in closing argument to consider whether any of them are in such terms or of such a nature as to give rise to limits on the College's capacity to contract. It is right to note that only limited time was devoted at the hearing to exploring these underlying complaints, whether in cross-examination or submission.

Paragraphs 2.1.1, 2.4 and 2.10: failure to comply with the Council's Standing Orders as to Contracts

275. Paragraph 2.1.1 required the College to manage its delegated budget "with due regard to the instructions laid out under the local authority's Standing Orders as to Contracts" and paragraph 2.4 provided that schools had to seek efficiencies "taking into account the Authority's purchasing, tendering and contracting requirements". While I would not regard the phrases "with due regard to" and "taking into account" as phrases limiting the College's capacity to contract, the language of paragraph 2.10 is more emphatic. Paragraph 2.10 states that the College is "required to abide by the authority's Financial Regulations, Standing Orders in respect of Purchasing, Tendering and Contracting Matters" and that "all contracts let by a school for more than £10,000 in any one year must be subject to at least three tenders". For contracts with values of £3,834,411 and above (works) and £153,376 and above (Goods and Services), the procurement process required Invitations to Tender to be issued in accordance with EU Procurement Directives.

276. The Contract Standing Orders document states that "this is an important document that forms part of the Council's Constitution. Compliance by all members and staff is therefore mandatory and contravention is a serious matter".

277. I accept that the College's decision to enter into the Contract did not comply with the Council's Standing Orders. Indeed no attempt was made by the Claimants to establish that it did. However, I do not accept that the effect of such non-compliance was to render the Contract beyond the capacity of the College or otherwise void. Had the Contract in question been with the Council, s.135(4) of the Local Government Act 1972 would have applied. This provides:

> "A person entering into a contract with a local authority shall not be bound to inquire whether the standing orders of the authority which apply to the contract have been complied with, and non-compliance with such orders shall not invalidate any contract entered into by or on behalf of the authority."

278. I accept that, given my conclusion that (s.49(5) notwithstanding) it was the College, and not the Council, which was the putative contracting party, it might be said that s.135(4) does not apply to the Contracts on its own terms because the Claimants are not "a person entering into a contract with a local authority". However, in circumstances in which the Contract Standing Orders do not limit the contractual capacity of the Council, it would be strange if they had this effect when applied to the College through the Scheme. Taken together with the other matters I have referred to which have led me to reject the argument that the Scheme operates generally as a limit on the College's *vire*s, I have concluded that compliance with the Standing Orders does not constitute a legal limit on the College's power to contract, albeit that as between the Council and the College *inter se*, they regulate how the College should exercise its powers. As the College and the Council's defence based on the Scheme was advanced solely on an *ultra vires* basis, and not, for example, on the basis that the Claimants were aware of the College's non-compliance with the Standing Orders, that is sufficient to reject this defence to the claim under the Contract.

Paragraph 2.4: failure to manage the delegated budget with due regard to the Financial Regulations

279. The Council's Financial Regulations are a 49-page document whose purpose is stated to be to "provide a framework for managing the authority's financial affairs". On their face, they do not apply to maintained schools. Para. 1.1.5 provides that "schools with delegated budgets are subject to a separate framework of regulation". It is no doubt for this reason that the Financial Regulations do not have direct application to the College, but are a matter to which College must have "due regard" by reason of paragraph 2.1.1 of the Scheme.

280. The provision of the Financial Scheme relied upon by the College and the Council is para. 1.3 which contains a "Statement of Principles". This records that the council "expects high standards of conduct from its members and officers", and there follows a series of high level statements of principle, including references to the Council's expectation of "high standards in financial management and administration", that "the planning, monitoring and control of the use of resources is of vital importance" and that "value for money is at the core of the council's financial activity" . Finally, paragraph 1.3.2 provides that:

> "The principles of sound financial management, proper exercise of responsibility, and accountability, as set out in financial regulations, should be applied in all circumstances, even where any particular circumstance is not specifically referred to".

281. It will be apparent that the provisions relied upon are of uncertain and highly disputable scope. Taken together with the way in which the Financial Regulations are referred to in the Scheme ("with due regard to") and the factors I have identified as tending against the suggestion that the Scheme generally operates as a limitation on the College's *vires*, I have concluded that paragraph 1.3 does not limit the College's capacity to enter into contracts. Rather it is one of a number of provisions which relate to the College's exercise of that power as between the College and the Council *inter se*.

282. I received relatively limited submissions on which aspects of the Financial Regulation it was said that the College had failed to have "due regard" to. The sum total of what was said in the College's closing submissions on this topic was:

> "Para. 1.3 of the Council's Financial Regulations … sets out the general principles of sound financial management to safeguard public funds … Seen as a whole, and for all the reasons advanced in these submissions, the Council fell well short of those standards".

283. For reasons which I explain below when addressing the College and the Council's submissions on the Roberts v Hopwood and Wednesbury duties I accept that the College proceeded with the Contract without any adequate attempt to ascertain the affordability of the project from the College's resources, and without taking sufficient steps to seek to ensure that the Contract represented value for money. If, therefore, I had concluded that the requirement to have "due regard to" the Financial Regulations gave rise to a limit on the College's capacity to contract, I would have concluded that that limit was not satisfied in relation to the entry into the Contract.

Paragraph 2.4: failure to seek efficiencies and value for money

284. Paragraph 2.4 of the Scheme provided that "Schools must seek to achieve efficiencies and value for money, to optimise the use of their resources and to invest in teaching and learning, taking into account the Authority's purchasing, tendering and contracting requirements". Essentially for the same reasons which led me to conclude that the reference in the Scheme to the Financial Regulations did not limit the College's power to contract, I have concluded that this provision does not create a limit of the College's contractual *vires*, but that, if it did, that limit was not satisfied.

Paragraph 2.14: failure to inform the Council of capital expenditure and related failures

285. Paragraph 2.14 provides:

> "Governors are required to inform the authority if the expected capital expenditure to be met from the budget share is likely to exceed £15,000, and to take into account any advice from the Director of Finance and Director for Children and Young People as to the merits of the proposed expenditure".

286. There is a brief suggestion in the Council's opening, and an even briefer reference back to that reference in the Council's closing, that the College failed to comply with this provision, and that, in those circumstances, the College lacked capacity to enter into the Contract. In circumstances in which the classification of the Contract as one of capital expenditure entails that the Contract constituted a finance lease and, hence, borrowing, it is not necessary to address the position if the Contract had, notwithstanding its status as capital expenditure, been binding on the College apart from paragraph 2.14.

287. My provisional view is that a failure to inform the Council of the proposed expenditure in compliance with paragraph 2.14 would not deprive the College of

capacity to contract. Under the statutory scheme for funding secondary education, the incurring of capital expenditure is principally a matter for the maintained school and not the Council. The purpose of the notification provision appears to have been to allow the Directors of Finance and Children and Young People to give non-binding advice on the merits of the proposal, and the Council's permission is not required for the College to proceed. These matters all militate against paragraph 2.14 constituting a limit on the College's power to contract.

288. So far as the factual position is concerned while the College did inform the Council of the proposed expenditure under the Contract, they did so expressly on the basis that this was **not** capital expenditure. I would not regard this as compliance with the paragraph 2.14 obligation.

Paragraph 3.6: borrowing without the permission of the Secretary of State

289. I have already addressed the substance of this complaint in the context of paragraph 3(4) of Schedule 1 of the Education Act 2002, and concluded that, as a finance lease, the Contract fell outside the contractual capacity of the College as a statutory corporation because it involved borrowing without the permission of the Secretary of State. In my view, paragraph 3.6 of the Scheme is not intended to enlarge upon or vary the content of paragraph 3(4) of Schedule 1, but simply to restate it. I note that the guidance on the content of local authority schemes issued by the Secretary of State under s.48 of the SSFA, which the Scheme tracks closely, provides that "the scheme should contain a provision **reminding** schools that governing bodies may borrow money (which includes the use of finance leases) only with the written permission of the Secretary of State" (emphasis added). Accordingly this paragraph of the Scheme adds nothing to paragraph 3(4) of Schedule 1.

Paragraph 4.9 of the Scheme: the size and duration of the College's deficit

290. Paragraph 4.9 of the Scheme provides:

> "The maximum length for which a deficit may last will be three years. The granting of a licensed deficit would normally be in circumstances of an increasing pupil number base, or the financing of an approved development at the school. A deficit will only be licensed if the school has a viable financial plan for repayment. The maximum deficit allowed will be 10% of the school budget share or £150,000, whichever is less".

291. The College and Council contend that this provision was not complied with because, when it entered into the Contract, the College had been operating at a deficit since it was constituted in 2008/2009, and therefore for more than three years, and because its deficit had exceeded £150,000 from the end of the 2009/2010 year and had reached £760,000 by 2011/2012. It is not clear to me how the failure to comply with the deficit requirements in the Scheme (either as to duration or amount) is said to impact the *vires* of the College to contract: for example whether it is said that once the budget deficit exceeds the stipulated amount or duration, all contractual capacity ceases (or at least all contractual capacity to conclude contracts under which it would fall to the College to make payments) until the budget has been eliminated (if it has continued for over three

years) and/or been brought back below £150,000. Nor was it clear to me what the College and Council alleged would be the consequence if the College became non-compliant with the deficit provisions during the life of a contract.

292. It is obvious that this provision cannot sensibly be treated as a limitation on the College's capacity to contract. The argument becomes even more difficult in this case, in circumstances in which the Council licensed the College's deficit in an amount and for a duration exceeding those specified in paragraph 4.9 of the Scheme in January 2012 and thereafter. In circumstances in which the role of the Scheme is said to be to "set out the financial relationship between the authority and the maintained schools which it funds", and in which paragraph 4.9 provides that the Council is to license deficits, the suggestion that a deficit licensed by the Council in duration and amount may nonetheless lead to contracts which the College purports to conclude being void has little to commend it.

THE ALLEGATION THAT THE CONTRACT WAS ENTERED INTO WITH AN IMPROPER PURPOSE

293. It is clear that one ground of public law unlawfulness which may arise in respect of a decision of a public body (including a decision to contract) will be where the decision was taken for the purpose of frustrating a statutory purpose or constraint which applies to the public body. In Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, a statute gave the Minister a discretion to refer complaints for investigation by a committee, the statutory purpose of that provision being to provide a machinery for investigating complaints by farmers. The House of Lords rejected the argument that the Minister had an unfettered discretion not to refer complaints, on the basis that the discretion had been conferred to promote the policy and objects of the Act. In that case, the discretion could not be exercised so as to prevent something happening which it was the object and purpose of an Act of Parliament should happen in appropriate circumstances.

294. The same issue can arise, in more acute form, where the purpose and effect of an Act of Parliament is that something should not happen at all, and a public body seeks to exercise powers to achieve the same outcome by another route. In Credit Suisse, Colman J considered the position if, contrary to his decision, the council did have statutory powers to do what it did, but had acted with the purpose of avoiding annual borrowing and spending limits on local authorities and so as to be able to trade in time share units which a local authority did not have power to do. He held that this made the decision to contract (and the contract) invalid, on the basis that the decision to contract had been taken on the basis of an irrelevant consideration (viz the desire to evade those limits).

295. That conclusion was upheld in the Court of Appeal. Neill LJ (at p.334) did not found his decision on this issue on the fact that the council had taken account of improper considerations, but because, Parliament having put in place "an elaborate structure to provide for and regulate the manner in which a local authority can obtain funds to carry out its statutory functions", it could not be a proper purpose for the Council "to circumvent the restrictions on borrowing and spending".

296. In this case, the College and the Council contend that even if it was within the power of the College to enter into the Contract, its decision to do so was void as a matter of public law (with the consequence, it is said, that the College lacked capacity to contract as a matter of private law) because "the terms of the Contract were driven by the requirement of BOSHire that they be precisely fashioned so as (as BOSHire thought) to avoid the bar on borrowing". In closing, the College put its case on this issue as follows:

> "On the undisputed evidence the terms of the contract and the structure of the deal were generally fashioned by Mr Spring so (as BOSHire thought) as to avoid the ban on the College borrowing. Mr Spring's evidence was that he sought to draft the Contract to 'satisfy all of the operating lease tests' … If it is not borrowing, it is a circumvention of the restriction on borrowing in the same way that Credit Suisse was and it is, accordingly, *ultra vires* the College's power to agree it".

297. Some care is required when seeking to apply the improper purpose ground of public law challenge where it is alleged that (in effect) the public body had wanted to do X but, having ascertained it had lacked the power to do so, had resolved to do Y as the next best thing. If a school had wanted to provide transport for its students, and on ascertaining that it lacked the power to borrow money to buy minibuses, had resolved to use its funds to hire them as and when needed instead, it could not be suggested that this decision was *ultra vires* because it had been motivated, in part, by the desire to provide by an alternative method the transport which the Council lacked the power to provide on its preferred approach. Similarly, if a public body could not enter into a lease in excess of a certain duration because this would amount to capital expenditure, it could not be suggested that the decision to enter into a lease of a sufficiently short duration not to be susceptible to that characterisation was an impermissible attempt to evade the statutory limitation.

298. In the present case, I have concluded that the prohibition on borrowing without the permission of the Secretary of State requires a substantive test, such that a lease which is, for IAS 17 purposes, a financial lease will be caught by the prohibition. IAS 17 is itself a provision which requires the determination of the nature of the lease to be undertaken as a matter of substance and not form. If, contrary to my findings, I had reached the conclusion that the Contract was an operating lease, in circumstances in which there is no relevant statutory restriction on the College's power to enter into an operating lease, the decision to enter into such a lease could not fairly be characterised as an attempt to evade the statutory prohibition on borrowing or entering into finance leases, because the transaction which the College had entered into would, *ex hypothesi*, be substantively different to the transaction which the statutory scheme prohibited. Nor could it matter, for this purpose, if the terms of the Contract had been drafted with a view to ensuring, as a matter of substance, that it was not a finance lease: for example making it clear that it included no right of purchase for the College, or limiting the duration of the lease so that the lessor retained a significant interest in the Building. On those facts, the decision to enter into the lease would not have been an attempt to achieve indirectly the same substantive outcome which the College had no power to achieve directly, but a decision not to enter into a type of

transaction which statute prohibited, but to enter into a substantively different transaction which the statute allowed.

299. Had I concluded, therefore, that the Contract was an operating lease and not a finance lease, I would have rejected the College and the Council's submission that the decision to enter into the Contract was nonetheless unlawful because it was undertaken for the improper purpose of circumventing the prohibition on entering into finance leases. In these circumstances, it is not necessary to address, on the specific facts of this case, the legal issue which I have discussed above as to the circumstances in which such an improper purpose may provide a basis for resisting a claim under a contract as a matter of private law.

ROBERTS v HOPWOOD AND IRRATIONALITY

300. I can take these two defences together.

301. It has been established since Roberts v Hopwood [1925] AC 578 that "a local authority owes a fiduciary duty to the ratepayers from whom it obtains moneys needed to carry out its statutory functions, and that this includes a duty not to expend those moneys thriftlessly but to deploy the full financial resources available to it to the best advantage": Bromley LBC v Greater London Council [1983] AC 768, 829 (Lord Diplock). A decision to expend money in breach of that duty will be void as a matter of public law. The description of that duty as "fiduciary" is not a direct invocation of the private law concept of fiduciary duty, but one which draws an analogy with the private law obligations of stewardship of a trustee, reflecting the fact that those approving expenditure by a public body are not dispensing their own funds, but public funds.

302. Breaches of that duty have been found when a local authority agreed to pay wages in excess of the market rate with a view to providing employment (Roberts v Hopwood itself), or to levy a supplementary rate to subsidise public transport (Bromley) or to accept a lower offer from tenants than from another potential buyer when selling public property (R (Structadene) v Hackney LBC [2001] 2 All ER 225).

303. In addition, it is, of course, well-established that a decision will be invalid in public law if it is unreasonable in the Wednesbury sense. This will often overlap with the issue of whether there has been a breach of the Roberts v Hopwood duty. For example, in Structadene Elias J found that the council had acted in a Wednesbury unreasonable way "for essentially the same reason" as he found that the Roberts v Hopwood duty had been breached, namely that "a rational council would not have rejected an offer which was £100,000 more favourable than the offer which it in fact accepted" ([33]).

304. The evidence on this aspect of the case developed in a somewhat unsatisfactory way. The witnesses relevant to the issue of whether the College had acted irrationally and in breach of the Roberts v Hopwood duty were Mrs Goodhead, the Principal at the relevant time, and Ms Williams, the Business Manager. However, in circumstances in which the College was, in effect, seeking to establish its own irrationality, the College had no incentive to seek to establish that those individuals or the other members of the College staff and governing

body had acted in accordance with the College's public law duties in this respect. This forensic difficulty is inevitable in the unusual case in which a public body seek to establish the unlawfulness of its own decision-making process. For that reason, I have carefully considered whether there any matters, which did not emerge during the oral evidence, which could be relied upon in support of the argument that the decisions were lawful. However, the essential facts appear relatively clearly.

305. It is clear that those acting for the College in decisions relating to the Contract did so from a profound personal conviction that it was not simply desirable, but essential, to have a sixth-form centre, both for the educational well-being of the College, and more completely to fulfil the College's mission of providing Christian secondary education on the Isle of Wight. I also accept that the same individuals held the strong view that the Council was, in effect, under a moral obligation to provide the funding for the sixth-form building, both to fulfil its original decision that the age-range of the College should be expanded to include a sixth-form, and so as to treat the College fairly and equitably when compared with the treatment of other Isle of Wight schools. I am not in a position to pass any comment on how far, if at all, these views were justified, but it was clearly a factor which was a powerful driver of decision-making within the College at the relevant time.

306. However, as custodians of public funds, it was not appropriate for the College to enter into and then enlarge the scope of this very significant legal commitment without determining that it had or would have sufficient resources to meet its commitments on the basis of a Micawberesque hope (or in this case conviction) that something would turn up. This was essentially the approach which the College adopted.

307. The process by which the Contract was concluded involved almost no effort by the College to ascertain whether the price quoted by BOSHire represented good value. The College's own assessment appears to have been that the costs of the proposal were high (as noted at a meeting of the Finance Committee on 2 February 2012), but that this represented the only means of proceeding with the project within the desired timescale. Ms Williams confirmed in her evidence that "we felt it was a very expensive way of obtaining a building. I certainly was very aware it was public money we were using and I felt it was a very expensive way of going about it".

308. At no stage did the College consider whether the construction of the sixth-form remained a viable proposition when funding alternatives fell away (for example following the cancellation of the "Building Schools for the Future" programme in 2010). When the BOSHire proposal came in, the College did not re-visit two earlier and significantly cheaper proposals for the construction of modular buildings (from Building Schools for Nothing and the McAvoy Group). Ms Williams, giving evidence for the College, stated that she knew of "no good reason the College did not go back" to those "significantly cheaper proposals". The documents before me offer no such explanation, and my conclusion is that having concluded that the BOSHire proposal was likely to achieve a sixth-form building more quickly than other options, the College decided to continue with BOSHire come what may, even when planning permission issues delayed the

construction of the Building until after September 2012, and after it became apparent that the costs of the BOSHire proposal substantially exceeded those previously quoted.

309. The College's determination to proceed with BOSHire is manifest in a number of matters:

i) The absence of any serious attempt to reduce the cost of the BOSHire proposal in commercial negotiations, even when it became apparent that terms which Mr Blow of BOS had originally indicated would feature in the final contract such as a legally enforceable right to purchase would not form part of any deal.

ii) The College's decision to move on 6 December 2012 from a phased implementation of the programme to the immediate implementation of the full proposal in 2013, with limited consideration of the financial implications of such a significant change beyond generalised assertions that the Principal and Business Manager were confident that a whole build could go ahead.

iii) The College's decision that BOS should undertake substantial work on site not only before the Contract was signed (by which point £484,000 of work had been done), but before planning permission had been obtained.

iv) The failure to re-visit the proposal as further costs not originally budgeted for emerged. This had happened even before BOSHire had signed the Contract, when on 18 March 2013 the College informed the Council that "we are finding it very difficult to provide the necessary finances from our budget to fully equip and refurbish the new building". These and other unbudgeted costs led to the two variations to the Contract when these amounts were rolled into higher annual payments over the 15-years of the Contract's duration.

310. In 2017, Ms Elizabeth Goodwin, the Council's Chief Internal Auditor on secondment from PwC, produced a report which provides a fair assessment of the contracting process undertaken by the College. Among other things, it concluded that:

i) Key known or estimated costs for the sixth form were not included until the Contract was effectively committed to.

ii) Assumptions were not stress-tested and there was no robust financial planning.

iii) There was little questioning of the "prevailing view to provide sixth-form education at the College initially, and thereafter little evidence of scrutiny of the financial impact of doing so".

311. In effect, the College had "tunnel vision" in its determination to provide the sixth-form centre it felt the College, its pupils and the Island community so badly needed, which led it to suspend any critical judgment so far as the value,

affordability or viability of the BOSHire proposal was concerned, and to keep going on its current path whatever further set-backs manifested themselves. The attitude of the whole Governing Body is captured in the email which Mrs Goodhead sent to Ms Williams on 21 January 2013, a document frequently quoted by the Defendants but none-the-less informative for that: "we can't not let this happen obviously".

312. The liabilities under the Contract as originally signed involved total payments over the 15-year term of £10,017,615, something which was projected to result in a deficit at the end of the first year of £744,620. There was no evidence before me of any serious attempt by the College to satisfy itself that the cost of the Contract could be met from its own resources. A Finance Committee meeting of 6 February 2013 anticipated difficulty in meeting the lease payments, and it is not apparent what, other than a Panglossian outlook, led to the conclusion at the full Governing Body meeting a week later that the Contract could be signed and that the Council was "happy" with the budget recovery plan.

313. The evidence of Ms Williams, the College Business Manager, in cross-examination was that from the outset, the College's finances were looking "bleak and difficult" and that when the Contract was signed, it was already "unaffordable" from the College's own resources. Mrs Goodhead explained that the Governing Body "believed all the way through that we would eventually get support, they did feel that there was an unevenness in the local authority's support". As she explained in another passage in her evidence (when referring to funding another school had received):

> "It begins to explain why the governing body continued to believe that the right – the truth would out, as it were, and we would receive appropriate funding, equal to other schools".

She accepted that the matters which led the College to revise its budget in October 2013 were matters which the College was well placed to know when the Contract was signed.

314. The incurring of substantial liabilities with no realistic expectation of paying for them absent some significant change in circumstances which there is no reason to suppose will occur is not consistent with the College's quasi-fiduciary duties in respect of the expenditure of public funds, nor did it fall within the range of reasonable decisions which a body in the position of the College might take. It follows that the College's decision to enter into the Contract, and to agree the two variations to the Contract, was in breach of its Roberts v Hopwood duty and was also unreasonable in the Wednesbury sense.

315. In making these findings, it is important to note the good faith with which the Governing Body and the relevant members of the College staff acted throughout. It is also important to record the difficult position they found themselves in. The College was under a duty to implement the statutory proposal to expand the College's age range under paragraph 40 of Schedule 3 to the School Organisation (Prescribed Alterations to Maintained Schools) (England Regulations) 2007. To do so, and to meet the expectations of students, parents and staff, it concluded that

a sixth-form centre was required. However, it did not have access to the funds necessary to fund and construct one. This was an unenviable dilemma.

316. For the reasons I have set out above, I have concluded that the breaches of these two public law duties do not have the effect that the College lacked capacity to enter into the Contract, which is the only private law defence advanced. In particular, no case was advanced by the Defendants that the Claimants knew that the College was entering into the Contract in breach of these public law duties, and it is not therefore necessary to determine what the private law consequences of these public law breaches of duty might be. However, it is worth nothing that, to the extent that the public law duties reflect an obligation of care, they would not equate to a private law fiduciary duty (Bristol & West Building Society v Mothew [1998] Ch 1). In Charles Terence Estates at [18], Maurice Kay LJ doubted that the findings of the breach of Roberts v Hopwood duty in that case if "transposed to the private corporate sector …. would be characterised as a breach of a company director's fiduciary duties – more a matter of his duty of skill and care". Knowledge that the servant or agent of the contracting counterparty was not acting with reasonable skill and care when committing its principal to the contract does not provide a basis for impugning a transaction (LNOC Limited v Watford Association Football Club Limited [2013] EWHC 3615 (Comm), [64]). It is not necessary to decide whether a different consequence should follow where the counterparty is a public body, but there does not appear to be any compelling reason why it should.

LACK OF STATUTORY AUTHORITY

317. The College advanced a further argument that the Contract, and the two variations to the Contract of June and September 2013, were not entered into in accordance with the College's Scheme of Government with the result that the entry into the Contract was unlawful and void.

318. Regulation 16 of School Governance (Procedures) (England) Regulations 2003 empowers the governing body to delegate any of its functions to a committee, a governor other than the head teacher or the head teacher (dependent on the nature of the function). It does not provide any particular method of delegation, but does require the governing body to review the exercise of delegated functions annually. With effect from 1 September 2013, provision to similar effect was made by Regulation 18 of the School Governance (Roles, Procedures and Allowances) (England) Regulations 2013.

319. The College produced a document called "the Statement of Roles and Responsibilities, Financial Terms of Reference and Scheme of Delegation" ("the Scheme of Delegation") which set out the terms of reference and roles of various committees and of the Principal. It was not clear on the evidence whether this was a public document or not, but it was not suggested that it was a document of which the Claimants were or ought to have been aware.

320. The Scheme of Delegation identified the key responsibilities of the Governing Body as including the "authorisation of non-budgeted expenditure and virements subject to the limits in section 2". The responsibilities of the Finance Committee included:

i) "to review tenders received for contracts, up to the limits in Section 2", to agree on which contractors are to be awarded contracts and to make recommendations to the full Governors meeting;

ii) to authorise expenditure as per limits set out in Section 2;

iii) to receive requests for authorisation to vire expenditure between budget headings as per limits set out in section 2; and

iv) "to review these terms of reference annually and propose any amendments to the Governing Body".

321. The role of the Principal as set out in this document included "amend[ing] the budget by virement between any budget headings up to the limits set out in section 2" and "authoris[ing] the purchase of individual items up to the limits indicated in Section 2". Section 2 sets out a series of activities, and the relevant levels of responsibility of different persons or bodies in relation to those activities. The activity "authorisation of expenditure over £60,000" has an entry only against the Full Governing Body which says, "with the Director of Finance". There is no reference to a single governor being able to exercise any particular powers. Section 2 also states as follows:

Authorisation of Revenue and Leasing Contracts	All revenue and leasing contracts should be entered and authorised as per the LA Scheme for Financing Schools

….

At all times, the principles of Best Value will apply, as per the schools **Best Value Statement** dated ………."

322. Mr Oldham QC for the College submitted that the Scheme of Delegation was not complied with:

i) in relation to the signature of the Contract in 2013, because there was no consultation with the Director of Finance;

ii) in relation to the June and September 2013 variations to the Contract, because they were signed by the chairman of the Governing Body without a decision being taken by the full Governing Body; and

iii) because the Contract and the variations were not in accordance with the Scheme and did not achieve best value.

The non-involvement of the Director of Finance

323. It is clear that the Director of Finance of the Council was not involved in the College's decision to enter into the Contract. As I have set out above, the mutual understanding of the College and the Council was that the decision to enter into

the Contract was a matter for the College, and was not the responsibility of the Council.

324. Does the fact that the decision to contract was taken without the involvement of the Director of Finance constitute a breach of the Scheme of Delegation? I have concluded it does not:

i) First, the words "with the Director of Finance" pre-suppose the involvement of the Director of Finance, but do not make the approval of the Director of Finance a pre-condition to the Governing Body's authority to authorise expenditure over £60,000.

ii) Second, if the involvement of the Director of Finance was a condition of the Governing Body's authority, it would effectively disable the Governing Body from entering into contracts of this kind if, for any reason, there was no Director of Finance for a period or if the Director of Finance took the view that the issue was a matter for the College. It would take clear words to achieve this outcome, assuming it is possible to achieve it at all. In particular, neither Regulation 16 of the School Governance (Procedures) (England) Regulations 2003 nor Regulation 18 of the School Governance (Roles, Procedures and Allowances) (England) Regulations 2013 contemplate the Governing Body being able to delegate its functions to someone outside the College or to provide a veto to such a person.

iii) Third, it is clear from the terms of the Scheme of Delegation that the Governing Body can themselves amend or vary the Scheme. In these circumstances, it must remain open to the Governing Body to dispense with the involvement of the Director of Finance if it thinks fit, particularly where the position of the Council is that the decision to contract is a matter for the College. The power to contract is a power of the Governing Body. It is not a power that the Governing Body should too readily be assumed to have subjected to a third party veto. The position is different from that which arises when two parties to a contract constrain their subsequent freedom to vary the terms of their contract without meeting certain formalities (as considered in Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24) because the Scheme of Delegation was adopted, and could be varied, by the unilateral decision of the Governing Body.

iv) Fourth, the Council (through Mr Beynon's letter of 14 February 2013) confirmed the Council's approval of the College's decision to enter into the Contract. In circumstances in which the Director of Finance reported to the Chief Executive, it would be particularly surprising if the Contract was not binding because the Director of Finance had not been consulted, when the College had obtained the approval of a more senior executive within the Council.

325. For these reasons, I reject the College's argument that the decision to enter into the Contract in its original form involved a breach of the Scheme of Delegation.

The June and September 2013 variations

326. For the purpose of addressing this part of the College's argument, it is convenient to repeat some of my findings on the process by which the Contract and the two variations to it came to be signed.

327. On 13 February 2013, a full meeting of the Governing Body approved the College's decision to enter into the Contract and authorised Mr Lisseter to sign both the Contract and the College's Letter. The College's Letter confirmed that the Governing Body had authorised the execution and performance of the Contract. It stated that Mr Lisseter was "duly authorised on behalf of the Governing Body". The Contract which Mr Lisseter was authorised to sign recorded that modifications of the Contract would have to be in writing.

328. As I have mentioned, it became apparent that that the construction of the sixth-form centre would involve additional costs over and above those allowed for within the Contract signed on 30 April 2013. An email from Ms Williams to Mr Pierce of 10 May 2013 asked "when would you need confirmation of whether or not governors would want this rolled into hire costs?" There is no record of the governors' approving the decision to roll these costs into the Contract, but a variation to this effect was signed by Mr Lisseter on 5 June 2013. The minutes of the Governing Body meeting of 18 July 2013 do not refer to the first variation, but do refer to "surprising additional requirements" for the Building "as already discussed", and express the hope that the Council would pay for them. These costs were covered by the second variation of the Contract which Mr Lisseter signed on 5 September 2013.

329. There was a meeting of the Governing Body of 3 October 2013 at which the College's licensed budget plan was approved. No copy of the minutes of that meeting has been produced, nor of any of the papers which Mrs Goodhead confirmed were circulated in advance of such meetings. However, a letter from Mrs Goodhead to Mr Burbage of the Council dated 21 October 2013 suggests that the revision to the budget reflected the increased cost of the Building. The letter stated:

> "Regrettably, the College's previous plan is no longer achievable, mainly, but not exclusively, due to the additional expenditure associated with the Sixth Form Centre. Therefore, the College would like to accept the Local Authority's kind offer to extend the licensed deficit".

330. Some of those costs featured in discussion with the Council on 4 April 2014 when the College's budget deficit came under discussion.

331. Mrs Goodhead gave evidence that, to the best of her recollection, she did not receive or was not aware of the June and September 2013 variations to the Contract, and that they were not discussed with the College before Mr Lisseter signed them. She was not cross-examined on this evidence. The College's other witness, Ms Williams gave evidence that she was not aware of legal advice being taken prior to the signature of the two variations, but other than that she said nothing about them. She was not cross-examined on this topic.

332. While I accept that her evidence was given in good faith and represented Mrs Goodhead's best recollection some 6 years later, I have concluded that Mrs Goodhead's recollection is likely to be mistaken and that the full Governing Body are likely to have become aware at some point that increased costs had arisen after the preparation of the budget, that attempts to raise alternative funding for these costs had failed, and that they had been rolled into the Contract through the two variations as a result:

i) Mrs Goodhead was clearly aware in 2013 that additional costs had arisen which needed to be provided for, and in my view it is likely that she was aware of the decision to roll these into the Contract. Her own evidence was she worked closely with Ms Williams as the Business Manager.

ii) The revisions to the budget in October 2013, which resulted in part from the increase in costs reflected in the two variations, are likely to have been considered by all of the governors. This would inevitably have involved some discussion of the fact that the College had now agreed to pay larger hire instalments than when the budget was originally drawn up.

iii) The decision communicated in the College's letter of 21 October 2013 to accept the Council's offer to increase the amount of the licensed budget deficit is also likely to have been reached with the approval of the full Governing Body after discussion.

iv) The College have produced no minutes or evidence of what was discussed at that meeting, nor adduced any evidence as to what was said at it.

v) It would be very surprising if Mr Lisseter, who (as chairman of the Governing Body) had signed the two variations to the Contract to accommodate unbudgeted costs which had contributed to the revision of the budget in October 2013, had never mentioned that fact to the full Governing Body, not least at the October 2013 Governing Body meeting when the revised budget was approved. Certainly I would not be willing to find that Mr Lisseter had not informed the full Governing Body of these obviously material matters without a much more secure evidential base than Mrs Goodhead's uncorroborated recollection some 6 years after the event.

vi) Mrs Goodhead confirmed that in 2017, the Governing Body remained committed to honouring the Contract. In my view it is highly unlikely that, by this date, the full Governing Body was not aware of the revisions to the amounts payable under the Contract effected by the two revisions (and, as I have mentioned, no member of the Governing Body was called to suggest otherwise). If Mr Lisseter (who remained on the Governing Body until February 2018) had signed the two variations increasing the amounts payable under the Contract without this coming to the knowledge of, and being approved by, the full Governing Body before 2017, it is inevitable that the issue would have surfaced and left its mark at this point.

vii) Not only is there no evidence that it did so, but there was no suggestion in the College's pre-action correspondence that Mr Lisseter had signed either

variation without authority. The College's position was to the contrary effect: Stone King's letter of 9 April 2018 stated "on 5 June 2013 and 5 September 2013, our client entered into two supplemental contracts with you".

333. In these circumstances, I find that it is not clear on the evidence whether Mr Lisseter had obtained the approval of the full Governing Body at the time he signed the two variations to the Contract, but that the full Governing Body is likely to have become aware of the signature of the two variations subsequently, in particular when the budget came to be revised, and to have approved the decision to enter into the variations at that stage.

The failure to follow the Scheme and the principles of Best Value

334. I have already dealt with the status of the Scheme. I do not accept that the reference in the College's Scheme of Delegation to the Scheme was intended to or did have any effect greater than the Scheme itself did. These provisions served as an important reminder to those taking decisions on behalf of the College as to the obligations they were under when exercising their functions, but they did not define the scope of their authority.

335. I have reached the same conclusion in relation to the principles of "Best Value". However, the College's reliance upon this provision suffers from the further difficulty that this was not intended to be a reference to the concept of "Best Value" at large (an inherently vague concept), but to a specific document which was not identified, and which no one suggested was ever drawn up.

336. In relation to both of these arguments, I have been fortified in my conclusions that they do not provide the College with a defence to a claim under the Contract by the observations of the Privy Council in Central Tenders Board v White [2015] UKPC 39, [25], when addressing the argument that the Board's failure to follow a procedural pre-condition of its own making had the effect that the resultant contract was void:

> "For the court to invalidate a contract entered into between a public body and a party acting in good faith, by reason of a procedural defect in the contractual process, and moreover to do so without compensation (for it is not obvious what compensation would be available), would be a serious denial of that person's rights. It would offend against orthodox principles of private law (contractual rights) and public law (the right not to be deprived of property without compensation)".

THE OTHER CONTRACTUAL ISSUES

337. Two further defences were advanced to the Claimants' claim in contract, which I will deal with briefly.

The repudiation issue

338. First, the College contends that if it was in repudiatory breach of Contract in ceasing to pay and announcing its intention not to pay hire, only GCP could

accept that repudiation, as the assignee of the right to the hire payments under the RSA, but it was SFM who purported to do so.

339. There is nothing in this point:

i) The Notice of Assignment provided by SFM to the College on 12 September 2013 and counter-signed by the College stated that SFM "may not agree to amend, modify or terminate the Contract without the prior written consent of GCP" but that the College "should continue to deal with [SFM] in relation to the Contract until you receive written notice to the contrary from GCP".

ii) The Notice thereby held SFM out to the College as being able to represent GCP for the purposes of the Contract. No written notice to the contrary was ever served with the result that SFM was entitled to terminate the Contract as against the College and did so.

iii) In any event, clause 4.9.7 of the RSA allowed SFM to act on GCP's behalf in terminating the Contract, which provided SFM with GCP's written consent to terminate the Contract.

iv) Further, the Claimants have at all times proceeded on the basis that SFM's termination of the Contract was valid as between SFM and GCP with the result that if, contrary to the view I have reached, SFM's termination of the Contract was not originally binding on GCP and for that reason ineffective as against the College, GCP has since approved and ratified SFM's termination.

The penalty issue

340. The second issue is whether clause 2.6.2.2 of the Contract constitutes a penalty. By way of a reminder, this provides that upon termination of the Contract for repudiation:

> "The Customer will immediately pay to BOSHire, as an agreed pre-estimate of loss suffered by BOSHire as a consequence of the termination, an amount equal to the aggregate of all Hire Charges then due but unpaid together with interest due under clause 2.2.5; plus all costs incurred by BOSHire in enforcing or seeking to enforce this Contract and in locating and recovering the Equipment; plus the sum of all further Hire Charges which, but for termination, would have fallen due during the Minimum Hire Period, each discounted at 3% per annum for accelerated payment; plus all other sums due under this Contract".

341. It will be apparent that this provision gives the Claimants the full value of the bargain lost, without requiring them to give credit for any benefit which the Claimants might obtain as a result of recovering the Building before the expiry of the 15-year period.

342. A failure to allow for benefits of this kind is capable of rendering an agreed damages clause penal in nature. In Campbell Discount Co Ltd v Bridge [1962]

AC 600, 625, one of the grounds given by Lord Radcliffe for finding the clause in that case penal was that "the compensation is paid immediately, and the vehicle comes back into the owner's possession with a realisable value that, in many circumstances, may exceed the one-third balance of the price which the owner has not got in".

343. It was common ground before me that the approach which now falls to be adopted in determining whether a liquidated damages clause is unenforceable as a penalty is that set out in the joint judgment of Lord Neuberger PSC and Lord Sumption JSC in Cavendish Square Holding BV v Makdessi [2016] AC 1172, [32], namely to ask:

> "whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach".

344. However, in upholding the Defendants' argument that the Contract was *ultra vires* the College, I have found that the Building was constructed to the College's individual specification, and that the prospects of realising value from the Building in the event that the College no longer wanted it were remote. Against the background of those findings of fact, the failure to make allowance for the remote possibility of some further re-letting of the returned Building cannot be said to involve a benefit to the Claimants or a detriment to the College "out of all proportion" to the Claimants' legitimate interest. For the same reason, clause 2.6.2.2 cannot properly be described as penal or intended to punish. The failure to make provision for the benefits of the Claimants being able to re-let the Building was not an attempt to generate a windfall for the Claimants or to punish the College, but reflected the reality of the matter which was that the only commercially viable user of the Building as designed and installed was the College itself.

345. The College also suggested that the provision in clause 2.6.2.2 which required the College to indemnify BOSHire against "all costs incurred … in enforcing or seeking to enforce this Contract and in locating and recovering the Equipment" and the right to recover interest on outstanding amounts at 4% over base were penal. However, there is nothing in this suggestion. Both provisions protect legitimate interests on the part of the Claimants (of being made whole in respect of the costs of enforcing its rights following a breach, and in respect of the time value of money of debts which are outstanding, in circumstances in which the failure to pay on time involves an enhanced credit risk). Provisions of this kind are routinely found in many kinds of contracts.

THE MISREPRESENTATION AND MISSTATEMENT CLAIMS

Introduction

346. If (as I have found) the Contract is void, the Claimants bring alternative claims under s.2(1) of the Misrepresentation Act 1967 and in the tort of negligent misstatement based on what are alleged to be statements made in the College's and Council's Letters of 13 and 14 February 2013.

347. The College's Letter provided:

> "I certify to you as follows:
>
> 1. The School is a maintained school for the purpose of the School Standards and Framework Act 1998 (as from time to time amended, varied or re-enacted) and has the power and capacity to enter into leases and lease assets of the type represented by the Asset on the terms set out in the Lease by virtue of the budget delegated to it by The Isle of Wight Council and the expenditure will fall within that budget.
>
> 2. The Governing Body has taken all necessary corporate and other action required by applicable law or regulations to authorise the execution of and performance under the Lease.
>
> 3. In my view and that of the Governing Body, the transaction embodied in the Lease is not one which will result in the School being required, in accordance with proper practice, to recognise a fixed asset in any balance sheet, the Governing Body having concluded that the Lease is 'an operating lease' for the purposes of applicable guidance and standards. Accordingly, the School will not by entering into and performing its obligations under the Lease be in breach of any restriction upon its power to incur capital expenditure or expenditure on capital financing.
>
> 4. So far as the Governing Body is aware, all relevant provisions in the Education Act 2002 and the Schools Finance (England) Regulations 2012 (as from time to time amended, varied or re-enacted) and all other relevant legislation and regulations, together with the Isle of Wight Scheme for Financing Schools (revised April 2012) have been and are being complied with by the School;
>
> 5. To the extent applicable, all legislative and/or regulatory requirements relating to competition have been complied with in approving the Lease; and
>
> 6. The leasing of the Asset under the Lease will facilitate or is conducive or incidental to discharge the statutory function(s) of the School.
>
> I am sending you under cover of this Certificate copies of the minutes of the Governing Body authorising the execution and delivery on behalf of the School of the Lease and Certificate
>
> ....

> I have made all enquiries and obtained all advice necessary to enable me to issue this Certificate to you. I acknowledge that if you enter into the lease you may do so in full reliance upon this Certificate."

348. The Council's Letter provided:

> "1. The Council agrees that the expenditure to be incurred by the Governing Body under the Hire Contract and otherwise in connection with the project falls within the delegated budget and is not the responsibility of the Council under the Schools and Standards Framework Act 1998, or otherwise.
>
> 2. The Council is satisfied that the Governing Body has complied with the requirements of the Council's Scheme for Financing Schools in relation to the procurement of the project.
>
> 3. The Council accepts and agrees the Governing Body's assessment of the Hire Contract as an 'operating lease' for the purposes of applicable guidance and standards.
>
> 4. The Council approves the entry into the Hire Contract by the Governing Body and agrees that the same will not cause the Governing Body to be in breach of any restrictions or obligations stated in the Scheme for Financing Schools or exceed any limitations on the powers of the Governing Body stated in the Schools and Standards Framework Act 1998.
>
> …
>
> The Council….have no objection to the Governing Body providing a copy of the letter to BOSHire Limited."

349. The Claimants' claim that, if the Defendants' "no capacity" defence succeeds, these statements were untrue, that they entered into the Contract in reliance upon them, and suffered loss as a result.

350. The Claimants' pleaded reliance case is as follows:

> "But for the negligent representations which were made by the College and/or Council ….. BOSHire would not have entered into the Hire Contract with the Council and/or College and would have sought to hire the Equipment out to an entity with legal capacity".

351. The case, therefore, was not that, but for the alleged misrepresentations and misstatements, BOSHire would not itself have acquired the Building from BOS (avoiding whatever expenditure it incurred by doing so), nor that that it would not have taken out financing. The case is that loss would have been avoided because BOSHire would have entered into an equivalent contract with a counterparty who did have capacity.

352. When the claim was amended to join BOSHire and GCP as parties, a further act of reliance was pleaded, namely they would not have accepted the assignment but

for the misrepresentation. However, no reliance case was formulated on the basis of the loss suffered by SFM or GCP in entering into the assignment. The bare act of entering into the assignment (which involves a transfer of rights, but, of course, not obligations), would not appear to involve any detriment to SFM.

353. The nature of the Claimants' reliance case, as explained in the Claimants' supplemental opening argument, was that, absent the alleged misrepresentations and misstatements, the position the Claimants would have been in "is one of having had a valid Hire Contract for, at least, its minimum term. This is the sum of £6,678,410".

354. By the time the case closed, the Claimants put the case as follows:

> "The Claimants would have entered into an agreement for, substantially if not the exact, same value, as the Agreement in question. Asking the Court to find that a commercial party whose very business is in the design, manufacture and funding of relocatable modular hire, that it would simply have done nothing at all, flies in the face of commercial common sense and reality. Obviously, BOSHire was 'in the market' to do a deal, in joint venture with Built Offsite, to the tune of the value of the Agreement.
>
> The Claimants plainly suffer an evidential disadvantage in demonstrating that they would have entered into the Agreement with a party with capacity, because it did engage, for a lengthy period of time, with the College and so no evidence can really be adduced that a third party was waiting in the wings, as business resources were directed towards the Agreement. Obviously, if that had not been the case and the College and Council had not been prepared to provide the relevant assurances then BOSHire would have directed those resources to the hypothetical third party. This ought not to pose a difficulty for the Court. The notion of a 'fair wind' is now well-established in the case law. The basic justification for the fair wind principle is that, because it is the Defendants' fault that the Claimants have lost the opportunity of entering into the Agreement, the burden falls to them to demonstrate that no loss is really caused thereby. This works to give the Claimants a fair wind in terms of the value of what they have lost. It is submitted that, in this case, that fair wind should operate such as to encompass the lost Hire Charges that would have been recovered over the Minimum Hire Period from the Defendants. That is what would have been recovered had the Claimants not relied upon the Defendants' misrepresentations, albeit that the specific quantum looks like an expectation measure …".

Are the misrepresentation and misstatement claims barred by the *ultra vires* finding?

355. Clearly, if creatures of statute (be they public or private bodies) could make legally enforceable promises that they had the capacity they lacked, there would be little room for the *ultra vires* doctrine to operate. The same would be true if the public body could be held, by a doctrine of estoppel, to a representation it had made that it had the capacity it lacked.

356. When an attempt was made to advance an estoppel argument in response to a local authority's lack of capacity in Rhyl Urban District Council v Rhyl Amusements Ltd at p.473, Harman J observed:

> "It would destroy the necessity of ever obtaining consent if a statutory body omitting to obtain it could thereafter be held estopped. Such a body could by these means confer on itself a power which it had not got, and the ultra vires doctrine would be reduced to a nullity."

357. The rationale of that rule, as summarised in a passage from Halsbury's Laws which was cited with approval by the Court of Appeal in Janred Properties Limited v Ente Nazionale Italian Per II Turismo unreported 14th July 1983, is that "a party cannot by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is legally disabled from creating".

358. A similar rule must apply where the claimant seeks to enforce a promise that a transaction is *intra vires*, so as to require the defendant to put it in the same position as if the transaction had been *intra vires*. Once again, such a promise, if enforceable, would create the very state of things which the promisor is legally disabled from creating. For this reason, Rix LJ in Eastbourne BC v Foster [2002] ICR 234, [23], when referring to an agreement which the Council had purported to enter into which it was agreed was *ultra vires*, observed that "no reliance can be placed on any promise or misrepresentation that merely reflects an alternative legal foundation for binding the council to an undertaking it had no power to give".

359. Is the rule confined to cases where the claimant seeks to place itself in the same position as if the defendant had had *vire*s (i.e. when a claimant seeks to vindicate a performance interest e.g. by claiming an expectation measure of damages?) In South Tyneside Metropolitan Council v Svenska International plc [1995] 1 All ER 545, 565, Clarke J had to consider a claim in unjust enrichment to recover sums paid under an interest rate swap which was *ultra vires* the claimant council. The bank defended those claims on the basis that it had changed its position, claiming the cost of closing out hedging transactions which had been entered into at or about the same time as the swap to manage the bank's exposure. At p.565, Clarke J rejected the bank's contention that it could rely upon a representation or assumption that the transaction was valid:

> "Mr Mann submits that in so far as he relies upon the representation or assumption the only defence available to him would be one of estoppel. However he submits that both in principle and on the authorities a plea of estoppel would fail. The reason is that the representation or promise that the transaction was valid and any assumption to the same effect would be void. Since … the transaction is *ultra vires* and void, it follows that any promise, representation or assumption to the contrary is also void. I accept that submission. It appears to me that in principle the one follows from the other. The submission is also in my judgment supported by the authorities.
>
> In my judgment in circumstances such as these the bank is not entitled to rely upon the underlying validity of the transaction either in support of a plea of

estoppel or in support of a defence of change of position. That is because the transaction is *ultra vires* and void. It is for that reason that in a case of this kind, save perhaps in exceptional circumstances, the defence of change of position is in principle confined to changes which take place after receipt of the money. Otherwise the bank would in effect be relying upon the supposed validity of a void transaction".

360. Svenska, therefore, is a case in which it was held that the bank could not advance a change of position defence on the basis that it had entered into a further transaction in reliance on a representation made by a public body that the initial transaction was valid, because the representation was also void.

361. In Salmon Harvester Properties Ltd v Metropolitan Police Authority [2004] EWHC 1159 (QB), Owen J heard a strike out application in a case in which the claimant brought a claim for damages for a misrepresentation and negligent misstatement that the defendant "had, or would obtain, power to enter" an agreement with the defendant to re-develop Bow Street police station which the defendant was later advised was *ultra vires*. The defendant sought to strike out the claim on the basis that any misrepresentation or misstatement as to its ability to enter into the transaction was also caught by the *ultra vires* rule and therefore void. In response, the claimant submitted that it was not seeking to claim "the loss of profit that the claimant would have made had the relevant representations been true and the agreement valid and enforceable (expectation loss)" but "expenditure wasted as a consequence of the representations being made (reliance loss)" ([11]). Owen J refused to strike out the claim on the basis that it was "clearly arguable" that Svenska and Rhyl Amusements could be distinguished in the manner suggested because "the critical point is that the claim is not based upon a representation or assumption that the transaction in question was a valid and enforceable contract" ([12]).

362. The arguments in Salmon Harvester disclose two possible grounds of distinction between the facts of that case and the decision in Svenska. The first is between expectation loss and reliance loss. However, as I have indicated, the decision in Svenska, although not concerned with a claim to recover loss, did involve a failed attempt to assert a reliance interest. If an attempt to rely on an additional transaction concluded in reliance on a representation by a public body as to the validity of the first fell foul of the *ultra vires* doctrine, I find it difficult to see why reliance constituted by the failure to enter into an alternative transaction with a third party in reliance on such a representation should be any different. Indeed the argument that, if a claimant had not been led to believe it could contract and had contracted with the public body, it would have done the same or similar deal with someone else might be thought to come even closer to an attempt to visit on the public body the very responsibilities it did not have legal capacity to undertake than the argument advanced before, but rejected by, Clarke J.

363. The second potential ground of distinction is between a representation that the transaction was valid, and a representation that the public body had or would obtain power to enter into a transaction. On its own, this distinction cannot be decisive: it might be said to be implicit in any representation by a public body that it was entering into a valid transaction that it had power to enter into that transaction. However, the facts of Salmon Harvester involved a case in which the

transaction which would have been *ultra vires* was never entered into, but the claimant was led some way down the garden path on the basis that it could and would be concluded, incurring expenditure along the way. I can well understand why Owen J thought that was a factual scenario in which the application of the principle in Rhyl Amusements and Svenska merited consideration after the facts had been found at a trial.

364. In the present case, I do not believe that it is possible to distinguish Rhyl Amusements and Svenska so far as the statement-based claims against the College are concerned. The substance of the Claimants' case is that it was led to believe that it could and had entered into a valid contract with the College. The fact that the representation in question was based on a letter provided by the College at or around the same time as the College signed the Contract cannot provide a meaningful distinction from those cases where the representation is as to the validity of the contract itself, and I do not think that the decisions in Rhyl Amusements and Svenska can be circumvented by this simple drafting device. Further, the form of reliance loss which the Claimants seek, and which is the only claim advanced under the misrepresentation and misstatement heads, is one which protects their expectation interest, and which visits the cost of fulfilling those expectations on a public body which lacked capacity to create and fulfil those expectations in a legally relevant sense.

365. However, the statement-based claims against *the Council*, in relation to a transaction to be entered into (as I have found) by the College, does not give rise to this difficulty. While there are likely to be circumstances in which enforcing a claim against one public body on the basis of a representation or promise by it that a transaction to be concluded by a different public body was *intra vires* might fall foul of the *ultra vires* doctrine (e.g. two public bodies, each lacking the capacity to transact and each promising or representing that the other had it), in this case the Council did not seek to establish that it would have been outside its own capacity to enter into a transaction of this type. There was no attempt to argue that it would have been *ultra vires* for the Council itself to enter into the Contract by reference to the statutory provisions applicable to it, nor to establish that the Council's decision to sign the 14 February 2013 letter was unlawful as a matter of public law.

366. For these reasons, my finding that the Contract was *ultra vires* the College precludes the statement-based claim advanced against the College by reference to the terms of the College's Letter, but does not preclude a statement-based claim against the Council by reference to the terms of the Council's Letter.

The claim under the Misrepresentation Act 1967

367. I can deal with this claim briefly because there are two threshold difficulties with it.

368. First, the Claimants advance this claim on the premise that the Contract is void. However, if there is no contract, there can be no claim under the Misrepresentation Act 1967. I shall not labour the point by extensive reference to the Act, but its provisions make it absolutely clear that it only applies between parties to a contract which is entered into after one contracting party has made a

misrepresentation to the other. None of these preconditions to its application can be satisfied if, as I have found and as this part of the Claimants' case assumes, no contract was ever concluded. This is also fatal to a s.2(1) claim against the College.

369. Second, I have found that the Council was not the actual (or putative) contracting party, which is itself fatal to a claim under the 1967 Act against the Council: Atlantic Lines & Navigation Co Inc v Hallam Ltd [1983] 1 Lloyd's Rep. 188.

The Claimants' case on loss

370. I am going to take the remaining elements of the misrepresentation and misstatement claims out of their logical order, because I have concluded that the claims face insuperable evidential difficulties in relation to the sole basis on which it is asserted that loss was suffered, with the result that I will be able to deal more briefly with the "upstream" issues of what duties were owed, what representations were made, whether any duties were breached and whether there was reliance.

371. The Claimants have adduced no evidence capable of supporting the claim that it would, but for the alleged misrepresentation by the Council, have entered into an alternative transaction on the same or substantially the same terms with a third party. Neither Mr Pierce nor Mr Spring gave any evidence to this effect. The only evidence given by Mr Spring was that if the Council had not provided its letter, BOSHire would not have entered into the Contract.

372. The suggestion that, but for this transaction, BOSHire would have entered into a contract with a third party on essentially similar terms, is inherently unlikely:

i) As I have set out above, I am satisfied that to a significant extent, the Building was constructed to the bespoke requirements of the College. The suggestion that another entity would have leased the same structure on the same terms is implausible.

ii) On the evidence, the Contract represented an unprecedented and unusual transaction for BOSHire. Mr Spring stated that "the value of the project was significantly greater than the projects we usually engaged in", BOSHire's previous experience being of transactions which "ranged from £250,000 to £1.5 million". The Claimants have not begun to establish the likely existence of an available alternative transaction of a similar kind.

iii) Further, the reliance case pre-supposes not simply the existence of another opportunity of this unprecedented size, with a counterparty able to enter into a Contract on the same economic terms without facing the same capacity issue, but also that, had such an opportunity existed, it was one which the entry into the Contract foreclosed. However, I heard no evidence to substantiate that, had any such opportunity existed, BOS and BOSHire would not have been able to enter into it in any event (cf. the position in contract damages in WL Thompson Ltd v Robinson Gunmakers [1955] Ch 177).

373. Against this background, it would take considerably more than a "fair wind" to lift the Claimants' quantum case on its misrepresentation and negligent misstatement claims off the ground. I find that the Claimants have failed to establish this essential element of their statement-based claims.

The factual background to the College's and Council's Letters

374. There can be no doubt that BOSHire knew considerably more about the *vires* risk than the College. Mr Spring accepted that he was "well-versed in the *ultra vires* issue". This is scarcely surprising, given that a central aspect of BOSHire's business was making contracts with "local authorities and with quasi organisations like schools and colleges". In its early dealings with the College, it must have been apparent to BOSHire that the College had, at best a rudimentary understanding of this issue, not least from the fact that the College used terminology and made requests which would not be appropriate on the intended accounting treatment (viz the requests for an option to purchase). BOS's salesman, Mr Blow, appears to have shared some of the same misapprehensions. However, BOSHire was clearly keen that the College acquire a better understanding of the issues, and the informational imbalance was redressed to some extent when the College received legal advice from Mr McGruer of Blake Lapthorn (although I note that unlike BOSHire's adviser Ms Yardley of Watson Farley & Williams LLP, Mr McGruer appears to be primarily a planning rather than an asset finance specialist).

375. However this was not a case in which BOSHire looked to the College for advice or guidance on the law, or for information as to what the legal constraints on the College's power to contract were. Mr Spring was aware of the prohibition on borrowing under paragraph 3(4) of Schedule 1 to the Education Act 2002, and of the terms of the Scheme. He was fully aware of the accounting issues which arose in relation to the classification of leases into operational and finance leases. And so far as the key inputs into that accounting assessment were concerned – the terms of the Contract (which Mr Spring drafted with an eye to the distinction between operating and finance leases), the value of the Building, the extent to which it had been specially modified for the Council's requirements, its economic life and the extent of any likely residual value of the Building after 15-years – BOSHire was considerably better placed than the College to form a view on these issues, and I find that it did so relying on its own knowledge, experience and the legal advice it received.

376. It is significant that BOSHire never asked the College to explain what, if any, calculations it had done in satisfying itself that the Contract was not a finance lease, nor did the College ever ask BOSHire for the inputs necessary to perform such a calculation. It must have been obvious to BOSHire that the College had not undertaken any assessment of this kind before issuing the College's Letter.

377. It was BOSHire which set the economic parameters of this transaction, which were barely negotiated by the College, and BOSHire knew that the status of the Contract as an operating or finance lease would to a significant extent depend on those economic parameters. Mr Spring was commendably frank on this issue when giving evidence:

"Q Yes, and of course it's open to you to be very cautious and to make sure you don't get anywhere near whatever you think the PVLMP bright line is; correct?

A. Correct, yes. But of course, the more cautious I am, the less financial reward there is. It's a typical customer/supplier quandary or conflict, which is where – you know, my duty to my shareholders is to get the best price and the customer is always looking at the best price for them.

Q. So it's a commercial decision?

A. Yes".

378. I accept that BOSHire was keen to ascertain that the College took the same view of the classification of the lease that it took albeit, as I have stated, it must have been obvious to BOSHire that the College's view was not an informed one resulting from any close analysis of the issues. Had the College entered into the Contract, and then immediately classified the lease as a finance lease, the consequences for the Contract and BOSHire were obvious. Obtaining the College's Letter provided some comfort on this score, as well as providing BOSHire with evidence that the College was intending to adopt this classification which BOSHire could deploy when seeking to raise funding. Finally, the College's Letter may have been seen as providing BOSHire with some protection against any argument that the College had relied on BOSHire's advice in entering into the transaction.

379. Ultimately, however, BOSHire knew that the *ultra vires* risk existed whatever the College said, and that the playing out of that risk would turn upon the application of the relevant legislation and accounting standards in the light of the economic parameters of the transaction. BOSHire did not rely upon the College's assessment in respect of any of those three matters, on each of which it rightly regarded itself as better placed to make an informed assessment.

380. The position in relation to the Council's Letter is even more stark. It is clear on the evidence that the terms of the Council's Letter were prepared by Mr Spring of BOSHire, with input from Ms Yardley of Watson, Farley & Williams LLP. While BOSHire had originally hoped for a more comprehensive and direct assurance from the Council (including a statement that the Council, its legal advisers and auditors agreed with operating lease classification under IAS 17), discussions between Mr Spring and the College and its adviser Mr McGruer culminated in the recognition that this was unlikely to be forthcoming. BOSHire was aware that the more it sought by way of reassurance from the Council, the greater the risk that not only would that request meet with refusal, but that the Council might seek to discourage the College from going ahead. It was decided that the Council was likely to respond more favourably if the request to sign a letter came from the College rather than BOSHire.

381. On 14 February 2013, Ms Goodhead provided the Council with the draft letter from the College to the Council, saying that the College had been asked to provide "certain formal assurances regarding the Governing Body's powers" to

enter into the Contract and that the College had in turn sought "assurances" from the Council as to the College's powers "in order to complete the College's records and as support for the assurances to be provided by the Governing Body". That language was criticised by the Council, on the basis that it did not fairly reflect the process by which the request had come to be formulated and put forward nor the reasons why the Council was being asked to provide the Letter. However, the purpose of the Council's Letter, and the fact that it was being sought to provide reassurance to BOSHire, was clear from its terms, and I do not think the Council can have been in any real doubt as to who wanted the Council's Letter and why.

382. The Council drafted and returned a response which expressed its "agreement" with the "assurances which have been given to the Governing Body". The letter was produced and returned on the same day as the request was made. BOSHire received the signed letter the next morning, which Mr Spring recognised at the time was "really quick". Mr Spring accepted in evidence that he had no idea whether the Council had undertaken any detailed consideration or obtained any advice on the contents of the Council's Letter. Given the turn-around time, it should have been obvious that it had not. The dilution of the reassurance BOSHire decided to seek from the Council, and the removal of any references to the Directors of Finance and Legal Services and the Council's auditors, reflected a recognition that the Council would be reluctant to provide reassurance on this basis, and a hope that, in its diluted form, the letter would not receive significant scrutiny within the Council. It would be wholly inappropriate in these circumstances to give BOSHire, through an implied representation, the higher level of reassurance which BOSHire had decided not to seek in express terms. The Council's Letter would have given BOSHire reassurance that the Council was unlikely to put a spoke in its wheels, and it gave it a document to show potential funders which evidenced a benevolent attitude on the Council's part to the project, but no more.

383. Mr Spring accepted that the Council's Letter gave BOSHire reassurance that the Council took "the same view as the College" – and, he might have added, as BOSHire – "about the status of the hire contract as an operating lease". However, once again I reject any suggestion that BOSHire relied on the Council's letter for the purpose of forming its own view as to the College's power to enter into the Contract. As I have said, it relied upon its own knowledge, expertise and the advice it received.

What representations were made?

384. Against this background, I turn to consider the issue of what representations were made in the College's and Council's Letters. In determining what representations, if any, are made by a document, context is key. In Bankers Trust International plc v PT Dharmala Sakti Sejahtera [1996] CLC 518, 533. Mance J stated:

> "The meaning and effect of words never falls to be viewed in a vacuum. It is shaped by the context of their communication, including the parties' respective positions, knowledge and experience. A description or commendation which may obviously be irrelevant or may even serve as a warning to one recipient, because of its generality, superficiality or laudatory

nature, or because of the recipient's own knowledge and experience, may constitute a material representation if made to another less informed or sophisticated receiver. Even in the case of a written description, there may be cases where a proposal or presentation misrepresents the nature or working of a transaction to a particular reader, although another sophisticated, more analytical or legally qualified reader would have been expected to appreciate the real nature or working of the transaction. What is fair and adequate presentation in one context between one set of negotiating parties may be unfair or inadequate in another context. Whether there was any and if so what particular representation must thus depend upon an objective assessment of the likely effect of the proposal or presentation on the recipient. In making such an assessment, it is necessary to consider the recipient's characteristics and knowledge as they appeared, or ought to have appeared, to the maker of the proposal or presentation. A recipient holding himself out as able to understand and evaluate complicated proposals would be expected to be able to do so, whatever his actual abilities. These are problems on which it is commonly not necessary to focus in a commercial context. The assumption on which most business is conducted is that both parties understand, or avail themselves of advice about, the area in which they are operating and the documentation which they use. Business could not otherwise be carried on".

385. On the basis of the findings I have made, I am satisfied that the College's and Council's Letters involved nothing more than representations of the College's and Council's opinions on the issues addressed at that point, but involved no representation as to whether there were reasonable grounds for those opinions. The issues addressed in the Letters were essentially matters of professional judgment, and BOSHire knew that it was significantly better placed than the College and the Council to make that judgment. Given that imbalance in knowledge and expertise on the key issues, and the fact, as I have found, that it must have been obvious to BOSHire that neither the College or the Council had undertaken any significant independent investigation of the operating lease / finance lease dichotomy, it would not be appropriate to imply a further representation that the College or Council had reasonable grounds for their views. As Mance J noted in the Banker's Trust case at p.531, such an implication will ordinarily only be appropriate where it is reasonable for "the representee to rely on the representor's statements rather than on his own judgment". Such an implication would be fundamentally inconsistent with the realities of the parties' exchanges, which did not involve BOSHire seeking to ascertain the view of more knowledgeable parties so that it could rely upon those views, but BOSHire seeking the reassurance from obviously less knowledgeable parties that they were both on the "same page" in relation to the view BOSHire had independently formed.

386. That limited reassurance was given, but it did not prevent the College or Council from revising its views in the future on further consideration. It would take a promise or an estoppel to achieve that effect, but neither offers a viable legal argument to the Claimants in this case.

Were such representations as were made untrue?

387. The Claimants do not suggest that the College and the Council did not, at the date they issued their respective letters, honestly hold the views set out in those letters. Accordingly, the only representations which were made were true.

388. If I am wrong in my conclusion that the College and/or the Council did not make any implied representation that they had reasonable grounds for the opinions they stated they held, then such further representations would have been untrue in each case. There was no evidence of either the College or the Council undertaking any consideration of the Contract by reference to IAS 17 for the purpose of applying the operating lease/finance lease classification, still less of seeking to obtain the input data necessary to perform such an assessment with reasonable skill and care.

Did the College and/or the Council owe BOSHire a duty of care in making such representations as they made?

389. Had the Misrepresentation Act 1967 applied, there would have been no need for the Claimants to establish a duty of care in relation to representations made to it by its contractual counterparty which led BOSHire to enter into the Contract. However, a claim under the 1967 Act is not available for the reasons I have set out.

390. The Claimants advance an alternative claim based on a Hedley Byrne duty of care. I accept that the College and the Council were obliged accurately to set out their honest opinions on the status of the Contract in their respective letters, and I have found that they did so. However, I reject the suggestion that they owed the Claimants any wider duty to take care, and I also reject any suggestion that either the College or the Council owed any form of advisory duty to BOSHire in relation to the contents of their respective letters.

391. I was referred on this issue to the following statement of the relevant legal principles by Lord Oliver in Caparo v Dickman [1990] 2 AC 605, 638:

> "What can be deduced from the Hedley Byrne case, therefore, is that the necessary relationship between the maker of a statement or giver of advice ('the adviser') and the recipient who acts in reliance upon it ('the advisee') may typically be held to exist where: (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment."

392. I was also referred to the statement by Lord Wilson JSC in NRAM Ltd v Steel [2018] 1 WLR 1190, [19]:

> "If it is not reasonable for a representee to have relied on a representation and for the representor to have foreseen that he would do so, it is difficult to imagine that the latter will have assumed responsibility for it. If it is not reasonable for a representee to have relied on a representation, it may often follow that it is not reasonable for the representor to have foreseen that he would do so. But the two inquiries remain distinct."

393. In his judgment, Lord Wilson JSC referred with approval to the observations of Neill LJ in James McNaughton Paper Group Ltd v Hicks Anderson & Co. [1991] 2 QB 113, 126-127:

> "One should therefore consider whether and to what extent the advisee was entitled to rely on the statement to take the action that he did take. It is also necessary to consider whether he did in fact rely on the statement, whether he did use or should have used his own judgment and whether he did seek or should have sought independent advice. In business transactions conducted at arms' length it may sometimes be difficult for an advisee to prove that he was entitled to act on a statement without taking any independent advice or to prove that the adviser knew, actually or inferentially, that he would act without taking such advice."

394. As these authorities make clear, the negligent misstatement duty is aimed at statements made by an advisor with special skill, undertaking a responsibility to advise another, who will reasonably rely upon that advice without independent inquiry. For the reasons already stated, that is not this case. BOSHire was not looking to the College or Council, neither of whom could be said to have any specialist expertise on the material issues, for advice. There can be no question of either the College or Council knowing the BOSHire would rely on the contents of their respective letters without independent inquiry, nor of it being reasonable for BOSHire to do so. As the College's counterparty in the intended arms-length transaction, it was for BOSHire to form its own views and to take its own advice on these issues, and it did so.

395. If the Council had owed a duty of care in relation to the statements made in the Council's Letter, I would have rejected the Council's submission that this duty did not extend to BOSHire, because they were not an addressee of the Council's Letter. In Playboy Club London Ltd v Banca Nazionale del Lavoro SpA [2018] 1 WLR 4041, [11], Lord Sumption JSC addressed the position in which those making statements might owe a duty of care as to their contents to persons other than the immediate recipient in the following terms:

> "Mr Salzedo QC, who appeared for the Playboy Club, accepted that there was no evidence that BNL knew that its reference would be communicated to or relied on by anyone other than Burlington. He also accepted that in the ordinary course where a statement is relied upon by B to whom A has passed it on, the representor owes no duty to B unless he knew that the statement was likely to be communicated to B. That concession was plainly justified. I would go further and say that the representor must not only know that the statement is likely to be communicated to and relied upon by B. It must also be part of the statement's known purpose that it should be

communicated to and relied upon by B, if the representor is to be taken to assume responsibility to B".

396. In the present case, the College had sought assurances from the Council on matters of obvious potential significance in relation to a proposed transaction between the College and BOSHire, the content of those assurances being directly concerned with BOSHire's rights under that transaction, and permission was sought and given to show the Council's Letter to BOSHire. This was a case, therefore, in which the Council not only knew that the Council's Letter was being shown to BOSHire, but knew that one of the purposes of seeking the Council's Letter was in order that it could be so shown. In these circumstances, it was part of the Council's known purpose in issuing the Council's Letter that it be provided to and relied upon (for whatever it was worth) by BOSHire.

397. Finally, if the College and/or the Council had owed BOSHire a duty to provide advice to them in relation to the matters stated in their respective Letters, and to do so with reasonable skill and care, both the College and the Council would have been in breach of that duty, essentially for the same reasons as I have concluded that any representation by the College or the Council that they had reasonable grounds for the opinions set out in their respective letters would have been untrue.

Did BOSHire rely on such misrepresentations or misstatements as may have been made?

398. I have already found that BOSHire did not rely on the statements in the College's and Council's Letters in the sense that the making of the statements caused or influenced BOSHire's belief as to the correctness of the matters they asserted. BOSHire formed its own view, and (rightly) proceeded on the basis that it knew a good deal more about the issues canvassed in the Letters than either the College or the Council.

399. However, I accept Mr Spring's evidence that BOSHire would not have gone ahead with the transaction if the College and the Council had refused to provide the Letters. Mr Spring had certain minimum documentary requirements for the transaction, influenced to a significant degree by the documents he thought he would need to raise funding, and the Letters formed part of those minimum requirements.

400. However, in my view that is not sufficient to constitute reliance for the purposes of claims in misrepresentation or misstatement if the statements in the Letters proved to be untrue. It has been held that someone with strong suspicions that a statement is untrue may nonetheless rely on that statement for the purposes of the tort of deceit and as a basis for obtaining rescission of a contract (Zurich Insurance Co plc v Hayward [2017] AC 142). Giving the main judgment, Lord Clarke JSC held that "it is not necessary, as a matter of law, to prove that the representee believed that the representation was true" to establish the tort of deceit ([18]). In that case, the tort of deceit was made out when an insurer entered into a compromise agreement because of a risk that a third party (the court) would accept as true a statement made to the insurer and which would be repeated to the court which the insurer strongly suspected was false. In Holyoake v Candy [2017] EWHC 3397 (Ch), [391]-[392], Nugee J identified two important features of the

Zurich decision: (a) that the insurers did not know that the claim was false and (b) that the insured's lies might influence the court that would fix the value of the claim (at [391]–[392]). He concluded at [393]:

> "It was a case where A lies to B and B is induced to act in a particular way because of the risk that A might tell the same lie to C and the effect that that might have on C. It is difficult to see that that principle can have any application where there is no third party or C involved. Where all that happens, as in the present case, is that A tells a lie to B, it is difficult to envisage the circumstances in which that can induce B to act in a particular way unless B is taken in and believes that what A says is true, or at least might be true".

401. The decision in Zurich has not been without its critics (see for example Paul S Davies and William Day, "A Mistaken Turn in the Law of Misrepresentation" [2019] LMCLQ 390). However, it is a case in which the significance of the misrepresentation lay in the fact that the making of the misrepresentation might cause someone (in that case, a court) to believe that the matters asserted were true. Where the only significance of a representor's assertion of the truth of a state of affairs is the fact that it is made, not that the making of the statement would cause someone to accept the truth of the matters represented, that is not, in my view, capable of supporting a cause of action in misrepresentation or misstatement. It would involve a fundamental, and to my mind unjustified, expansion of the traditional scope of representation-based torts if a contracting party could protect itself against a known risk of an intended transaction by requiring someone to make a representation as to the absence of that risk as a condition of proceeding, in circumstances in which the statement did not cause or influence the contracting party's evaluation of the risk. A party who wishes to allocate a risk of contracting of this kind must do so by contract, or not at all. When, as in the present context, it is not possible to allocate the risk to the contractual counterparty by a binding promise because the counterparty lacks the capacity to give such a promise, it would be particularly surprising if the risk of lack of capacity could nonetheless be transferred to that party by requiring it to make a statement on the truth of which the claimant did not rely.

The position as between the First to Third Claimants

402. Given the findings I have made, which involve the misrepresentation and misstatement claims failing at a number of levels, it is not necessary for me to expand an already long judgment by addressing the issue of which of the three Claimants had the right to claim in misrepresentation and misstatement and for what loss. I would only observe that if a viable claim for substantial damages had survived this far in its analytical journey, it is unlikely it would have fallen down a black hole at the finishing line (see Offer-Hoar v Larkstone Ltd [2006] EWCA Civ 1709). Nor is it necessary to consider the arguments on whether BOSHire failed to mitigate any loss which it may have incurred, or whether any damages it can recover fall to be reduced by reason of contributory negligence.

THE CLAIMANTS' CLAIM IN UNJUST ENRICHMENT

403. If, as I have held, the Contract is void because it fell outside the College's capacity to contract, and there is no remedy in misrepresentation or negligent misstatement, the Claimants bring a claim in unjust enrichment against the College, on the basis that the College has been unjustly enriched at the Claimants' expense through the retention and use of the Building.

404. The unjust enrichment claim is advanced by each of BOSHire, SFM and GCP. No defence of change of position is advanced, but the College does say that (a) only GCP is entitled to claim; and (b) that BOSHire and/or SFM and/or GCP acted at their own risk, and for that reason are not entitled to make any recovery

Who is the correct Claimant?

405. The proper claimant in an unjust enrichment claim is the party at whose expense the other party has been unjustly enriched. In this case there are three candidates: BOSHire, SFM and GCP.

406. Lord Reed JSC in Investment Trust Companies v Revenue & Customs Commissioners [2018] AC 275, [37] observed that "decisions concerning the question of whether an enrichment was 'at the expense of' the claimant demonstrate uncertainty as to the approach which should be adopted". He noted at [42] that unjust enrichment was "designed to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions". Lord Reed JSC observed that "the expression 'transfer of value' is … too general to serve as a legal test", but that unjust enrichment presupposes that the defendant has received a benefit from the claimant, with the claimant having suffered a loss through the provision of the benefit ([43]]). The editors of *Goff and Jones: The Law of Unjust Enrichment* (9th ed) para. 6.03 also use the concept of "transfer of value" to identify at whose expense a particular benefit has been conferred, as does Professor Burrows QC in *The Law of Restitution* (3rd ed) pp.66-67. In a case of so-called "direct providers" of benefit (in contrast to the third-party case where a benefit which should have gone from A to B goes from A to C)), the enrichment enjoyed by the recipient will generally come at the expense of the person who directly transferred that value to the recipient.

407. In this case, there was a direct transfer of value by the owner of the Building, who had the right to re-claim possession of it, to the College, who enjoyed that possession. The original owner of the Building was BOSHire – the terms of the Contract record that BOSHire was acquiring the Building from BOS for the purposes of the Contract. However, the Notice of Assignment of 5 June 2013 provided that "SFM will be or become the legal owner of the Equipment in due course". While I have not seen the document by which this transfer was effected, this had clearly happened by 4 July 2013, when SFM entered into the RSA with GCP, clause 3.1.6 of which warranted that SFM was the legal and beneficial owner of the Building. Accordingly I am satisfied that by the time the College took possession of and began to use the Building in September 2013, SFM was the owner.

408. In the period after September 2013, the transfer of value to the College in the form of possession and use of the Building has involved loss to SFM as the owner, because SFM as owner would otherwise have enjoyed those rights, and

would have been able either to use the Building itself or sell or lease the Building to someone else. By contrast, GCP has transferred nothing to the College, and the College's enjoyment of the Building has not been occasioned by any loss to GCP. Even if the College's failure to pay for such enjoyment since September 2017 might in some sense be treated as a loss to GCP, it is not a loss occasioned by the transfer of the benefit of the Building to the College, but by the College's failure to pay for the benefit so transferred.

409. I do not believe that the identification of the party at whose expense the enrichment occurred changes simply because SFM (proceeding on the erroneous basis that the Contract was valid) assigned its rights to payment under the Contract to GCP. While the College submits that "only GCP can have any claim in restitution for the College's use of the building since September 2017, because only GCP has had any right to receive hire payments in that period", this analysis takes no account of the fact that (i) GCP has itself transferred no value to the College; (ii) the assignment by SFM of rights arising from its transfer of value is not a matter between it and the College as the enriched party but something SFM did for its own purposes; and (iii) as the Contract is void, there was never any contractual right to hire payments capable of being assigned to GCP.

410. There is, however, a separate and subsequent question of whether SFM has assigned its claim in unjust enrichment to GCP. When such an assignment takes place, Lord Reed JSC suggested in Investment Trust Companies v Revenue & Customs Commissioners at [48] that "the claimant stands in the shoes of the assignor and *is treated as if* it had been a party to the relevant transaction, and the defendant's enrichment had been directly at his expense".

411. By clause 2.1 of the RSA, SFM assigned "all of the Vendor's right, title and interest in and to the Receivables [i.e. hire due under the Contract]." In my view, those words do not encompass SFM's claim in unjust enrichment against the College. They merely assign the contractual right to payment which all parties believed had arisen.

412. In summary:

i) The enrichment which the College enjoyed and is continuing to enjoy through the use of the Building was and is at the expense of SFM as the owner of the Building throughout the period of possession and use by the College.

ii) SFM has not assigned any claim in unjust enrichment to GCP.

iii) The proper claimant is, therefore, SFM.

Does the claim in unjust enrichment fail because SFM knowingly took the risk that the Contract was *ultra vires*?

413. The College alleges that any claim in unjust enrichment is precluded because SFM was aware of the *ultra vires* risk when the Building was provided to the College.

414. The suggestion that claim in unjust enrichment might fail for this reason appears to have been first articulated in Kleinwort Benson v Lincoln City Council [1999] 2 AC 349, one of the cases concerned with local authorities who had purported to enter into *ultra vires* swaps transactions. Lord Hoffmann noted (at p.401) that:

> "There may be cases in which banks which have entered into certain kinds of transactions prefer not to raise the question of whether they involve any legal risk. They may hope that if nothing is said, their counterparties will honour their obligations and all will be well, whereas any suggestion of a legal risk attaching the instrument they hold might affect their credit ratings. There is room for a spectrum of states of mind between genuine belief in validity, founding a claim based on mistake, and a clear acceptance of the risk that they are not".

415. It will be noted that Lord Hoffmann appears to have had in mind a position where a bank becomes aware of a legal risk to a swap transaction which it had already entered into, but prefers to carry on paying out for fear that raising the issue might have adverse consequences (either from the notional counterparty or in evaluations of the bank's assets). In the same case, Lord Hope (at p.410) addressed the position of a payer who is aware that there is doubt as to whether a particular payment is due, but who pays "without waiting to resolve that doubt", stating "a person who pays when in doubt takes the risk that he may be wrong".

416. Both judges returned to the issue when considering payments of tax demanded and made on the basis of a mistaken understanding of the law in Deutsche Morgan Grenfell Group plc v IRC [2007] 1 AC 557. Lord Hoffmann at [26] said that "the real question is whether the person who made the payment took the risk that he might be wrong. If he did, then he cannot recover the money". He noted the finding at first instance that the person who had authorised the payments in that case – a Mr Thomason – had personally been in no doubt that the payments were due, and observed that this was sufficient to establish a mistake. As is clear from the judgment of Lord Brown at [175], a specific concern in that case was the effect on settled transactions if those who had made payments on a legal basis which they were aware might be false could thereafter seek to recover those payments once the definitive legal position was established with the benefit of the extended limitation period for recovering amounts paid under a mistake provided by s.32(1) of the Limitation Act 1980.

417. However, on the formulation adopted by Lord Hoffmann (with the support of Lord Hope), where a payer takes the risk that the payment may not be due the effect is not simply to take the payment outside s.32(1) for limitation purposes, but to render the payment irrecoverable from the outset. This was confirmed by Lord Walker in Pitt v Holt [2013] 2 AC 108, [114], who further noted that "it does not matter if the mistake is due to carelessness on the part of the person making the … disposition, unless the circumstances are such as to show that he deliberately ran the risk or must be taken to have run the risk of being wrong."

418. The editors of *Goff and Jones* at para. 9-37 doubt that "'assumption of risk' should be elevated to the status of an independent bar", noting that "there is also a danger that assumption of risk will only function as a conclusory label" (para. 9-38). Frederick Wilmot-Smith has also criticised the circular nature of "assumption

of risk" reasoning (because the payer can only be said to have taken the risk of non-recovery if there is no claim in unjust enrichment): "Replacing risk-taking reasoning" (2011) 127 LQR 613.

419. The cases in which the concept of "assumption of risk" has featured have generally involved attempts to recover mistaken payments or where one party does work in anticipation of the conclusion of a contract, rather than a case such as the present in which goods or services are provided pursuant to the terms of a contract which the parties purport to enter into but which is in fact void. Unjust enrichment claims of this kind are generally categorised as "failure of basis" claims, restitution being appropriate because the benefit was conferred on a joint understanding that the recipient's right to it was conditional on counter-performance. Where this basis for unjust enrichment is relied upon, and the failure of basis established, it might be thought that there is limited scope for the claim to fail because the claimant has assumed the risk of its failure. The very fact that the conferring of the benefit was, to the parties' joint knowledge, conditional in this sense involves an allocation of risk, and one which is inconsistent with the party rendering the benefit having assumed the risk of the absence of counter-performance.

420. The attempt to distinguish between mistaken payment cases (where a claim in unjust enrichment would be precluded if the payer took the risk the payment might not in fact be due), and cases where the benefit is transferred on the basis of a void contract (where it would not) runs into the immediate difficulty that the cases concerned with *ultra vires* swaps (unlike those concerned with payments of tax demanded but not due) involve both elements. A party who has made payments under a swap agreement on the basis of a mistake that there is a binding contract, has also made those payments on the basis that there will be counter-performance from the opposing party.

421. It is clear from the treatment of unjust enrichment claims in respect of payments made under wholly executed *ultra vires* swaps that the mere fact that the anticipated counter-performance has been received does not preclude a claim in unjust enrichment by the net payer based on the mistake as to the existence of the contract (Guinness Mahon & Co Ltd v Kensington and Chelsea RLBC [1999] QB 215). This case can be seen as treating payments under void swap contracts as conditional in two respects: conditional on the receipt of counter-performance, but conditional also on the conclusion of a binding contract and the legal rights which would follow from that. I can see no objection in principle to the transfer of a benefit being subject to more than one condition, failure of any one of which will generate a claim in unjust enrichment. This analysis is supported by the editors of *Goff and Jones* (paras. 13.14-13.15) and also by the Singapore Court of Appeal in Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd [2018] 1 SLR 239, [52] in which Judith Prakash JA observed:

> "Although it is usual and convenient to refer to *the* basis of a transfer, the reality is that, as the learned authors of *Goff & Jones* observe at para 13-14, a transfer may have more than one basis".

422. In those cases where the claimant is aware of and can be taken to have assumed the risk that there is no binding contract, that may have the effect that the claimant

cannot allege that the payment was conditional on the existence of a binding contract. However, it does not necessarily follow that a claimant who has assumed the risk that there is no binding contract has also assumed the risk of absence of counter-performance if the transfer of benefit is also conditional in this respect (as benefits provided on the basis of a void contract will generally be). This is an issue which is unlikely to arise in void swaps cases where the claim in unjust enrichment is invariably asserted by the net payer for the net payment, and the *ultra vires* argument will only be raised when the public body is "out of the money". While Tomlinson J in Haugesund Kommune v Depfa ACS Bank [2009] EWHC 2227 (Comm), [145] described the suggestion that assumption of risk might operate differently as between different "unjust factors" as "a somewhat arid controversy", and observed that the nature of the enquiry in respect of both mistake and failure of condition was "the same" on the case before him, he accepted that "that might not in all cases be so".

423. Turning to the present case, the provision of the Building to the College was clearly conditional in the sense that it was the joint understanding of SFM and the College that it was to be paid for, and that the Building was being provided on the condition of such payment. That condition having failed in respect of the period after September 2017, SFM is entitled to a remedy in unjust enrichment. I do not believe that it would be an answer to that claim if it was not open to SFM to contend the transfer of benefit was also conditional in a second respect (namely that the Contract was binding) because SFM had taken the risk that the Contract was void. Each argument of failure of condition has to be considered on its own merits. The fact that the transferor had assumed a risk in relation to one matter, so as to preclude an argument that the transfer was conditional in that sense, is no reason why it cannot point to a different respect in which the transfer was subject to an unfulfilled condition.

424. In any event, in respect of the position up to judgment, I am satisfied that SFM cannot be said to have known of and chosen to take the risk that the Contract was not valid, whether that issue is approached subjectively or objectively (cf. *Goff and Jones* para. 10-037). I accept Mr Spring's evidence that it was his belief when the Contract was concluded, and thereafter, that sufficient steps had been taken to ensure that the Contract was within the College's capacity. Just as this factual finding was conclusive of the position in Deutsche Morgan Grenfell Group plc v IRC, so it is here. While it would not matter whether or not what I have found to be a mistaken understanding was the result of carelessness (cf. Pitt v Holt, [114]), it is clear that Mr Spring took legal advice on the issue, and paid close attention to the terms of the Contract, all with a view to seeking to ensure it was appropriately classified as an operating lease and not a finance lease. While I accept that the desire to maximise profit meant that Mr Spring sought to get as close to the line as he could, I am quite satisfied that he took steps to ensure and firmly believed that SFM had not crossed it. I am also satisfied that the College could never have reasonably understood that, if the Contract proved to be outside the College's capacity, SFM intended to provide the use of the Building gratuitously.

How is any claim in unjust enrichment to be valued?

425. The proper approach to valuing a benefit conferred in these circumstances is set out by the Supreme Court in Benedetti v Sawiris [2014] AC 938. Lord Clarke

JSC at [34] concluded that "the starting point for identifying a benefit which has been conferred on a defendant, and for valuing that benefit, is the market price of the services". That value would ordinarily be what a reasonable person in the position of the defendant would pay for the services provided ([17]), subject to considerations of subjective devaluation which do not arise in this case ([18]).

426. In cases where the parties proceed on the basis that they have concluded a contract for the provision of services, but in fact they have not, or where the parties are in negotiations for a contract which is not concluded, reliance is sometimes placed on the "contractually agreed" rate or the rate offered in negotiations as the best guide to the market value of the benefit conferred. In Benedetti Lord Neuberger PSC stated at [168]:

> "[I]n the absence of any other evidence or any good reason to the contrary, where two parties agree, at arm's length, that one of them will pay a certain sum, or at a certain rate, for a type of benefit to be provided by the other, there must be a prima facie presumption that that amount is, or at least is good evidence of, the market value of that type of benefit."

427. However, in this case there is expert evidence of the market value of the benefit, albeit only from the Defendants' expert, Mr Manley. His valuation – a figure rising from £250,000 per year in 2013 to £270,000 a year by 2019 – is far removed from the amount which the College agreed to pay under the Contract, namely £667,841.00 plus VAT per year. In circumstances in which there is such a significant discrepancy between the Contract price and the objective evidence of value, the decision in Benedetti suggests that the contract price will only be of limited use in valuing the benefit. Lord Reed JSC (at [139]-[140]) suggested that it would be important to know the reason for the discrepancy, which might reflect an imbalance in the bargaining skills of the parties. He cautioned against placing reliance on the agreed price "in the absence of any identified circumstances which could account for the divergence from the value indicated by other evidence".

428. In this case, I am unable to place any significant reliance on the Contract price when valuing the benefit which the College has obtained for the following reasons:

i) First, as I have set out above, there is no evidence of the College taking any steps to seek to negotiate the prices proposed by BOSHire. It simply accepted the prices which were put forward. The comfort which a court may sometimes draw from a price arrived at between two parties bargaining at arms-length is absent here.

ii) Second, there is a very significant difference between the terms under the Contract – under which the College had the benefit of a 15-year period as hirers of the Building, an assignment of BOS's warranty as to the life of the modules, and a strong expectation, at the end of that 15-year period, of purchasing the Building – and the circumstances which prevail in the absence of a contract, in which the College's use of the Building is subject to the risk that BOSHire/SFM might request its return on reasonable notice at any time. As Lord Clarke JSC noted in Benedetti at [99], any contract

which the parties to the unjust enrichment claim have entered into "might have included many other terms and conditions besides a price".

iii) Third, it is important that the valuation of the Claimants' unjust enrichment claim remains consistent with the basis on which I have found that the Contract was beyond the College's capacity. I have found that the Contract was a finance lease because substantially all of the risks and rewards of ownership were assumed by the College. In valuing the benefit which the College received for the purposes of a claim in unjust enrichment, the price payable under a contract which the College lacked the capacity to enter into is, necessarily, a poor guide to the value of the benefits it did receive. For the purposes of the Claimants' claim in unjust enrichment, those benefits fall to be valued on a fundamentally different basis (namely of benefits of a kind for which the College could have obtained by way of an operating lease), with the result that the economics of the benefit being valued are fundamentally different from those inherent in the Contract.

iv) In this regard, it is significant that while the use of property can constitute the transfer of benefit for the purposes of a claim in unjust enrichment when a contract for hire has been found to be unenforceable, no claim in unjust enrichment will be allowed where this would be inconsistent with the policy which led to the contract of hire being void in the first place. It was for this reason that a claim in unjust enrichment for the benefit of using a car failed in Dimond v Lovell [2002] 1 AC 384, 397-398 when the hire contract was unenforceable under the Consumer Credit Act 1974. In this case, the Contract was void because it amounted to a finance lease and therefore borrowing. It would not be inconsistent with this finding to value the enrichment by reference to the market price of the right to use the Building under an operating lease. However, the *ultra vires* nature of the Contract counts strongly against any use of the Contract hire rate as evidence of market value.

429. In supplemental submissions which I asked the parties to file to address the College's claim in unjust enrichment, and which were filed on 1 April 2020, the Claimants made the following comment on Mr Manley's valuation of their unjust enrichment claim:

> "For the avoidance of doubt, the sum identified by Mr Manley at paras 6.15-6.27 and para 8.2 of his report (£250,000-£270,000) was reached by reference to rental of entirely incompatible buildings and did not consider the appropriate market value for the particular Equipment in question (which would obviously have been a great deal higher to account for the specifications and particularities by the College). This was not just a building but a series of relocatable structures compiled to the specific and exact specifications of the College".

430. However in circumstances in which the Claimants had not adduced any evidence themselves of the objective value of the benefit received by the College from possession and use of the Building, nor cross-examined Mr Manley on his evidence on this issue, it is not open to the Claimants to advance these points

some three weeks after trial concluded (whether "for the avoidance of doubt" or for any other purpose). In any event, the Claimants still advanced no alternative figure save (implicitly) to contend that I should use the price payable under the Contract. For the reasons I have set out above, I am unable to place any reliance on that figure.

431. In these circumstances, the only evidence of the objective value of the benefits which the Claimants provided to the College is that of the Defendants' expert, Mr Manley of a market rate per annum of £250,000 in September 2013, rising to £270,000 per annum by November 2019. Accordingly I will ask the parties to agree a calculation of the benefit for each year of hire as follows:

i) For September 2013 to August 2014, £250,000.

ii) For each subsequent year from September 2014 to 4 September 2019, a figure which reflects a straight line extrapolation on the basis that the market value rose on a linear basis from £250,000 to £270,000 over that period.

iii) For the period from 5 September 2019 to the date of judgment, a pro rata proportion of £270,000 per annum.

432. For reasons which I explain below, I am satisfied that SFM has a defence of change of position to the College's claim to recover payments from SFM. This raises an issue as to the interrelationship of SFM's and the College's claims in unjust enrichment. I return to that issue below after I have considered the College's claim in unjust enrichment.

For what period can SFM claim?

433. The unjust enrichment claim is pleaded on the basis that the College has been unjustly enriched by the retention of the equipment. The Particulars of Claim assert a claim in respect of unjust enrichment "to date", albeit one only quantified "as of" 30 October 2018. The Reply similarly notes that the claim for unjust enrichment is one brought "up to and including today's date (the College having insisted on wrongfully retaining the Equipment)".

434. In my view, this involves the assertion of a continuing claim for unjust enrichment for so long as the College continues to insist on retaining the Building. It follows that I reject the College's submission that SFM is only entitled on its statement of case to assert an unjust enrichment claim in respect of the period up to trial and not thereafter.

435. However, the position with regard to any claim by SFM following judgment gives rise to a number of potential difficulties.

436. First, once it is established that the Contract is void, it might be said that any complaint by SFM in relation to subsequent use of the Building by the College is properly the domain of the law of tort. SFM is able to assert its right as owner to recover the Building (albeit, given that the Contract is void, it cannot seek to enforce as it has previously a contractual obligation requiring the College to

dismantle and return the Building). If the College refuses to comply with such a demand, then that is likely to constitute conversion of the Building, triggering a right to user damages (see One Step (Support) Ltd v Morris-Garner and another [2018] UKSC 20, [25]-[30]). If, however, SFM does not choose to seek to reclaim its property, it might be said that any continuing possession on the College's part is not the result of any unjust factor capable of supporting an unjust enrichment claim, but simply a consequence of SFM's own decision not to try and get its property back.

437. Second, if a claim in unjust enrichment is hereafter pursued in respect of the period after judgment, it might be argued that the College's continuing use of the Building after judgment does not involve a separate and independent transfer of value (c.f. Prudential Assurance Co Ltd v Revenue and Customs Commissioners [2019 AC 929). In my view, the preferred analysis is that where the benefit conferred is not the transfer of property outright, but the transfer of the right of possession (and the concomitant right of use) of property which the transferor is entitled to terminate at will, it is appropriate to treat each period during which the right of possession and use subsists as an independent transfer of value. That would be consistent with the fact that the objective valuation of the benefit is itself time-dependent (viz a market rate for use for a particular period). That is very different from the position where there is an outright transfer of money or property, which the transferee subsequently uses (in which case the subsequent use of the money or property will not involve a further and independent transfer of value: cf. Professor Stevens, "The Unjust Enrichment Disaster" (2018) 134 LQR 574, 596-597).

438. Third, if an unjust enrichment claim is to be brought, the effect of my judgment is that it will not be possible for SFM to contend hereafter that it is conferring the right to possess and use the Building on the College on the basis of a mistaken belief as to the status of the Contract. However, for the reasons I have set out above, it may be said that that of itself does not preclude an unjust enrichment claim for the period after judgment. It might still be said that there was joint understanding that one of the conditions on which the Building was provided – that its use would be paid for – was a continuing condition, capable of operating even after it has been definitively determined that the Contract is void.

439. Finally, the position might arise in which SFM was offered a reasonable opportunity to disassemble and remove the Building, but refused to take it, raising the issue of whether use of the Building by the College thereafter would be capable of generating an unjust enrichment claim in circumstances in which it had made it clear it no longer wanted the Building (see the discussion in *Goff and Jones* at para. 17-10).

440. These are potentially deep waters, which were not navigated at the trial, and which are best left for final determination as and when the precise facts prevailing in the period after judgment are known. The observations in paragraphs 436 to 439 are not intended to determine any of these issues, but are made in the hope that they might be of some assistance to the parties in reaching agreement on the future position.

THE COLLEGE'S COUNTERCLAIM IN UNJUST ENRICHMENT

441. The College also brings an unjust enrichment claim, seeking to recover the payments it has made. Its pleaded case is that it has made:

i) payments to BOSHire of £2,001,613.75 (inclusive of VAT) over the period November 2011 to January 2014; and

ii) payments to SFM of £2,003.522.40 (inclusive of VAT) over the period from August 2014 to September 2017.

442. The claim for repayment was originally advanced by the College solely against SFM (the only claimant at the relevant time), with the result that the defence of change of position to that claim was only pleaded by SFM. Once BOSHire and GCP were amended into the claim form as additional claimants, the College amended its counterclaim to seek repayment from all three Claimants. However, no amendment was made to the change of position defence, which continued to be advanced only by SFM. This has led to extensive debate in post-hearing submissions as to whether the defence of change of position is available in respect of any of the payments, and thrown up a number of further issues which were not fully explored during the hearing.

How much was paid and to whom?

443. In a supplemental statement served on 10 February 2020, Ms Williams gave evidence about the invoices paid by the College, identifying amounts said to have been paid to BOSHire and amounts said to have been paid to SFM.

444. The statement gave the following information:

Invoice No	Date	Amount	Supplier
BOS11884 [A]	30/11/2011	£36,000	BOSHire
BOS2268 [B]	12/02/2013	£348,000	BOSHire
BOS2286 [C]	11/03/2013	£372,000	BOSHire
BOS2424 [D]	11/09/2013	£1,202.114.40	BOSHire
BOS2452C [E]	11/09/2013	(£720,000) CREDIT	BOSHire
5395228 [F]	20/01/2014	£48,499.35	BOSHire

008 [G]	01/08/2014	£380,230.80	SFML
0010 [H]	03/09/2014	£20.473.20	SFML
0011 [I]	01/08/2015	£801,409.20	SFML
0012 [J]	22/08/2016	£801,409.20	SFML

I have added the letters in the first column to make it easier to identify the specific invoices under consideration in the discussion which follows.

445. Mr Spring said that payments A and F had been made to BOS and not to BOSHire. Mr Spring gave the following evidence about invoices D and E:

"A The two payments under 242 – invoice numbers 2424 and 2425 – were – they ended up with BOSHire, but they were actually --- or they ended up with SFM rather.

Q When you say 'ended up', do you mean?

A Well, because I think Built Offshore actually –

Q -- paid by them or –

A Yes, but BOSHire ended up with the money or SFM received the benefit of the cash but I think the invoicing was done on those two payments by Built Offshore, just as an accident of the way the administration worked".

446. By the time closing submissions came to be made, there was no dispute that payment under invoice A issued in November 2011 was made to BOS. Further, the invoice was not paid pursuant to the Contract (which was not signed for another 16 months). In these circumstances, the College realistically accepted that it was not in a position to seek recovery of this amount against the Claimants on the basis of a finding that the Contract was *ultra vires*. However, the position of invoices B to F remained in dispute.

447. It is clear from the documents that the invoices which Ms Williams had identified as having been paid to BOSHire were issued by BOS which provided its own bank account details for payment. It is also clear that the credit note which Mrs Williams identified as having been received from BOSHire was a credit note from BOS. That credit note was issued in the amount of £720,000 as a means of giving credit for the payments made under invoices B and C (which totalled £720,000), with the result that invoices B and C, and credit note E cancel each other out. For that reason, I do not consider them further. That leaves invoices D and F.

448. So far as invoice D is concerned:

i) In supplemental closing submissions, the Claimants produced a further invoice from SFM to BOS in the amount of invoice D, which was described as follows:

> "Hire charge for period from 05.09.13 to 04.09.14 due from Christ the King under Hire contract ref 1022 – invoiced by Built Offshore as agent".

ii) As this invoice suggests, invoice D is in the amount of the first hire payment as set out in the September 2013 supplement to the Contract.

iii) At the date this payment was made, BOS had no entitlement to it (because it was never a payee under the Contract) and BOSHire had no right to it because it had assigned its right to rent to SFM, and the College had been notified of that assignment.

iv) The evidence of Mr Spring, with which the invoice produced by the Claimants following the trial is consistent, is that this amount found its way to SFM.

v) In these circumstances, I reached the provisional conclusion that invoice D was paid by the College to BOS who received it as agent for and accounted for it to SFM. However, given that the fact and transmission of the payments ought to be matters of record, I decided to allow the Claimants and the College the opportunity to check the position before reaching a final conclusion. After checking the position, the College confirmed that invoice D had indeed been paid to BOS, with the College's accounting system showing that credit note E came from "Built Offsite Ltd" and that invoice D was paid to "Built Offsite Ltd". SFM provided a copy of its bank statement for the relevant period which confirmed that the amount had been accounted for by BOS to SFM.

449. That leaves Invoice F which, on Mr Spring's evidence, was paid to BOS and not BOSHire and for which there is no evidence to suggest it was ever re-billed to SFM. I accept Mr Spring's evidence:

i) As I have noted, invoice D was in the amount of rent due on the commencement date of the Contract. Similarly, invoices G and H, added together, are exactly equal to the amount of rent payable on the first anniversary of the Completion Date under the Contract. Invoices I and J respectively are equal to the payments due under the Contract in September 2015 and September 2016 respectively.

ii) By contrast, Invoice F is not referable to any amount payable under the Contract. This corroborates Mr Spring's evidence that this amount was not paid under the Contract.

iii) In these circumstances, I have concluded that the College had no right to recover the amount paid under invoice F, which (a) was not paid under the Contract, and therefore is not susceptible to a claim in unjust enrichment

on the basis that the Contract was void; and (b) was not paid to or for the benefit of SFM, but to BOS.

450. As I have noted, through the RSA, SFM entered into an agreement to assign its right to payments under the Contract to GCP. The effect on that purported assignment of my conclusion that the Contract was void, with the result that SFM had no right to rent to assign, was not explored before me. The notice of the assignment given to the College provided that the College should make payments into a bank account in the name of GCP, but also provided that the College should continue to deal with SFM until they had received written notice from GCP to the contrary. Further, the invoices in question were issued by SFM and not by GCP.

451. As I have noted, the College's evidence was that it made the payments to BOSHire or SFM. The College's case in opening was that "no payments were in fact ever made to GCP", and its case in closing was that the amounts it had paid fell "to be recovered from BOSHire and SFM" and that "no payments were made to GCP". That remained the College's position in the further submissions which I asked it to file after the hearing.

452. In these circumstances, I have concluded that I should proceed on the basis that the College's unjust enrichment claim is being advanced against BOSHire and SFM, and I have not considered the issues which would arise if the claim were to be advanced against GCP instead. If, however, I had concluded that it was necessary to consider the College's unjust enrichment claim on the basis that GCP was the appropriate defendant, I would have given GCP the opportunity to make an application for permission to amend to advance a change of position defence.

453. In summary:

i) The College cannot bring an unjust enrichment claim in respect of invoices A and F.

ii) The College can bring an unjust enrichment claim in respect of invoices D, E, G, H, I and J in the total amount of £2,485,636.80 inclusive of VAT, and the appropriate defendant to those claims is SFM.

454. Unless SFM can establish one of the recognised defences to an unjust enrichment claim, the College is entitled to recover these payments. The basis of the claim can be analysed in a number ways: that the payments were made under a mistake of law or subject to a condition (which failed) that the College was acquiring legal rights (Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349) or under the principle in Auckland Harbour Board v The King [1924] AC 318 that *ultra vires* payments by a public body are recoverable in unjust enrichment.

455. The only defence advanced to the College's claim in unjust enrichment is the defence of change of position.

SFM's change of position defence

Is it open to SFM to advance a change of position defence, and if so what basis?

456. SFM's pleaded change of position defence is as follows:

> "It is averred that SFM has, in good faith, changed its position. In particular, it is averred that such sums as were received as hire charges pursuant to the terms of the Hire Contract have been spent, in good faith and in the honest belief that the Hire Contract was not ultra vires, on servicing its financial obligations arising out of the manufacture, commissioning, transportation, and construction costs involved at the beginning of the Hire Contract".

457. The College's unjust enrichment claim, and SFM's defence to it, were not addressed in the Claimants' opening skeleton argument. For its part, the College's opening skeleton provided:

> "It is understood from the Claimants' Defence to Counterclaim that SFM (alone) pleads a change of position defence by reference to 'servicing its financial obligation arising out of the manufacture, commissioning, transportation, and construction costs involved at the beginning of the Hire Contract'. No evidence has been advanced in this respect on behalf of SFM, which has provided no disclosure as to its finances at all, and the College does not presently understand the basis for a change of position defence".

458. In this case, the pre-trial directions provided for the service of supplementary opening skeletons. The Claimants' supplemental skeleton did not respond to that allegation, or otherwise address the College's claim in unjust enrichment.

459. As the College's opening skeleton rightly observed, no witness evidence was adduced by the Claimants which directly addressed the change of position defence. While Mr Spring gave some evidence as to the financial arrangements between the Claimants and the structure of the transaction on the Claimants' side, he did not engage in any detailed explanation of what amounts SFM had paid and when.

460. In its written closing submission, SFM explained its case as follows:

> "SFM was, under both the Deed of Assignment and RSA, responsible for the costs of manufacture, commissioning and transportation and construction costs in relation to the Equipment. The College criticises the Claimants for failing to advance evidence on this change of position (which is blindingly obvious from the fact of the buildings themselves and the construction of the RSA and the Deed of Assignment). No further evidence is necessary. SFM might potentially have advanced receipts for expenditure, however, there is ample evidence already before the Court which demonstrates that the costs expended by SFM in installing and erecting these units were considerable and far in excess of the Hire Charges paid under the Contract".

461. The only evidential reference given to support the paragraph was a reference to the expert evidence of Mr Dodson which addressed the cost of the Building, but not who had paid for it. No other submissions were made (legal or factual) and no other evidential references were given.

462. The editors of *Goff and Jones* observe at para. 23.32 that:

> "The onus of pleading and proving the change is on the defendant who must put it forward 'fairly and squarely' in his statement of case so that 'its factual merits can be explored at trial'; he must also adduce evidence and give disclosure in support of the defence";

(quoting from Adrian Alan Ltd v Fuglers (A Firm) [2002] EWCA Civ 1655, [16] and Prudential Assurance Company Limited v HMRC [2016] EWCA Civ 376, [150]).

463. I have given careful consideration to the question of whether it should be open to SFM to pursue its change of position defence, given the limited attempts to develop the point in argument at trial or to point the Court to any evidence said to support it. However, there are a number of documents in the chronological bundle which are capable of supporting such a defence in the form it was advanced in SFM's written closing (i.e. a defence premised on the amounts paid by SFM for the construction of the Building). In these circumstances, I decided to allow a further round of written closing submissions on the change of position defence as formulated in the Claimants' written closing. The Claimants filed 19 pages of submissions. The College served a responsive submission of some 11 pages, to which the Claimants replied in a further 8-page document served on 8 April 2020.

464. Understandably, the College has objected to the Claimant's failure to develop their change of position defence adequately at trial. In particular the College relies on paragraphs J8.6-J8.7 of the current edition of the Commercial Court Guide, which provides that not all documents in the trial bundle are in evidence, and that a Claimant wishing to put a document in the trial bundle into evidence must "actively adduce the document in evidence by some other means". The Guide also provides that "it will not normally be appropriate for reliance to be placed in final speeches on any document not already specifically adduced in evidence by one of the means described" (the parties' agreement, an invitation to the judge to read the document in opening or putting the document to a witness).

465. This provision is clearly intended to ensure that the Judge and the parties have a fair opportunity to comment upon documents which one party (or indeed the Judge) relies upon, and to take up any issues which arise in relation to those documents either with a relevant witness or in submission. In this case, while there was no specific reference to the various interim payment documents in opening, the expert report of Mr Dodson, which was adduced in evidence, did refer to and rely on BOS's invoices and Bailey Partner's valuations, and Mr Dodson's evidence on the costs of construction was not challenged. Given the narrow nature of the issue, and the absence of any genuine controversy between the parties in relation to the cost of the Building, I have concluded that I can fairly rely upon these documents for the purpose of my judgment now that the College has been afforded, and taken, an opportunity to make submissions about them.

SFM's change of position defence: the law

466. So far as SFM's change of position defence is concerned, the applicable legal principles can be briefly stated:

i) There is a defence of change of position to a claim in unjust enrichment where the defendant's "position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively restitution in full": Lipkin Gorman (A Firm) v Karpnale Ltd [1991] 2 AC 548, 580.

ii) A change of position can be established from action taken before, but in anticipation of, the receipt of the payment: Dextra Bank and Trust Co Ltd v Bank of Jamaica [2002] 1 All ER (Comm) 194, [38]; Commerzbank AG v Gareth Price-Jones [2003] EWCA Civ 1663, [38], [47] .

iii) "The mere fact that the defendant has spent the money in whole or in part does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things": Lord Goff in Lipkin Gorman, p.580.

467. The change of position which SFM advanced in closing at trial was based on the fact that it had paid for the acquisition and construction of the Building which had happened by November 2013. The College did not seek to argue that a defence of change of position was not open to SFM to the extent that its claim in unjust enrichment was premised on a failure of basis, no doubt recognising that the nature of the change of position relied upon in this case was expenditure directly incurred in preparation for the Contract (see the discussion in *Goff and Jones* at paras. 27-58 to 27-60).

468. However, the payments which the College seeks to recover from SFM include payments made after the last amount was paid to BOS. As I noted above, the Privy Council held in Dextra Bank & Trust Company Limited v Bank of Jamaica that the fact that the change of position occurs before rather than after the receipt in question does not preclude a change of position defence. The Privy Council observed at [38]:

> "It is true that, in the second case, the defendant relied on the payment being made to him in the future (as well as relying on such payment, when made, being a valid payment); but, provided that his change of position was in good faith, it should provide, pro tanto at least, a good defence because it would be inequitable to require the defendant to make restitution, or to make restitution in full".

469. The Court of Appeal in Commerzbank AG v Gareth Price-Jones [2003] EWCA Civ 1663, [38], [47] has also confirmed that reliance in anticipation of the receipt of a payment which is then received can establish the defence of change of position.

470. The College argued that the defence of change of position cannot be advanced by way of a defence to a claim by a public body to recover monies paid out under an *ultra vires* contract where the change of position in question was effected in anticipation of, rather than following, receipt of the payments in question. The College relied upon the decision Clarke J in South Tyneside Metropolitan Council v Svenska International plc, in which the judge rejected a defence of change of position by the bank premised on a hedging swap which the bank had entered into

at the same time as the void swap and in reliance upon the validity of the swap agreement with the local authority. The local authority submitted that the change of position in question had occurred when the hedge was taken out, which preceded the receipt by the bank of any payments from the local authority. At p.565, Clarke J accepted the local authority's argument:

> "In my judgment in circumstances such as these the bank is not entitled to rely upon the underlying validity of the transaction either in support of a plea of estoppel or in support of a defence of change of position. That is because the transaction is ultra vires and void. It is for that reason that in a case of this kind, save perhaps in exceptional circumstances, the defence of change of position is in principle confined to changes which take place after receipt of the money. Otherwise the bank would in effect be relying upon the supposed validity of a void transaction … It does not however follow that the defence of change of position can never succeed where the alleged change occurs before receipt of the money …"

471. The Privy Council in Dextra observed of this passage at [39]:

> "It follows that the exclusion of anticipatory reliance in that case depended on the exceptional facts of the case; though it is right to record that the decision of Clarke J has been the subject of criticism — see, e.g., Goff and Jones, Law of Restitution".

472. It is not clear which "exceptional facts" the Privy Council thought might justify the exclusion of anticipatory reliance in that case. The editors of *Goff and Jones* suggest that it might be that the payment of money under a back-to-back hedging contract with another bank was too remote (para. 27-36 footnote 101). However, the terms of Clarke J's judgment suggest that he attached particular significance to the fact that the swap with the local authority was void, and took the view that allowing a defence of anticipatory change of position in those circumstances would involve the bank establishing change of position in reliance on the existence of the swap contract (and therefore on an *ultra vires* transaction) rather on the fact of payment (which had yet to occur).

473. There can be no objection in principle to allowing a party who receives an *ultra vires* payment from a public body to advance a change of position defence. The editors of *Goff and Jones* at para. 27-64 suggest that "the recipients of ultra vires payments by public bodies should be allowed to raise the defence of change of position on appropriate facts". They also note that the defence has been upheld in response to claims by local authorities to recover amounts paid under *ultra vires* redundancy agreements in Hinckley & Bosworth BC v Shaw [2000] LGR 9 and Eastbourne BC v Foster 20 December 2000 QBD. As the defence does not involve holding a public body to a representation as to its ability to make a payment which it is outside its capacity to make, but rather a defendant-focussed enquiry in circumstances in which the public body is asserting a cause of action to recover the amounts paid, the recognition of the change of position defence does not subvert the principle propounded by the House of Lords in Howell v Falmouth Boat Construction Co Ltd [1951] AC 837, 844-5 that the *ultra vires* doctrine cannot be subverted by allowing payees to hold public bodies to false statements by public officials as to the bodies' *vires*.

474. The College did not contend "that a change of position defence can never arise in a restitution claim based on *ultra vires*", and it accepts that in cases not involving public authorities, anticipatory change in position can give rise to the defence. However, it contends that there can be no anticipatory change of position defence to claims to recover *ultra vires* payments by public bodies. The College argues that:

> "In an anticipatory change of position context, giving effect to the defence has the effect of holding that the public authority was legally required to make the *ultra vires* payments it then subsequently made. That is an infringement of the *ultra vires* doctrine in the way that recognising that a payment made *ultra vires* which is subsequently spent, cannot be recovered is not".

475. In my opinion, this submission proceeds on a misapprehension. The recognition of the defence of anticipatory change of position does not place a party under an obligation to make payments for which the legal basis has not been satisfied, simply because the other party has acted in anticipation of the receipt of such payments. If the failure of basis comes to the putative payor's attention before the payment is made, there will be no obligation to make the payment, whether or not there has been anticipatory reliance. If, however, the party makes the payments in ignorance of the failure of basis, and then requires the Court's assistance to recover the payment back, the defence of anticipatory change of position may provide an answer to such a claim, in whole or in part. As the Privy Council noted in Dextra at [38]:

> "Since ex hypothesi the defendant will in fact have received the expected payment, there is no question of the defendant using the defence of change of position to enforce, directly or indirectly, a claim to that money."

476. I note that Cranston J allowed a defence of anticipatory change of position to be advanced in response to a claim to recover payments under an *ultra vires* contract in Charles Terence Estates Ltd v Cornwall Council [2011] EWHC 2542 (QB), stating at [98]:

> "It does not matter that on some occasions that change of position occurred before CTE received the moneys, since it did so in anticipation of their future payment".

477. Further, the defence of anticipatory change of position, as explained in Dextra Bank and Commerzbank does not rest on the payee's reliance on the validity of the void transaction, but on the payee's reliance on the future payment (as the Privy Council observed in Dextra, [38], "it is surely no abuse of language to say, in the second case as in the first, that the defendant has incurred the expenditure in reliance on the plaintiff's payment"). It is for this reason that the operation of the defence in these circumstances is sometimes described as one of "anticipatory reliance" (on the payment yet to be made) rather than actual reliance (on the existence of an obligation to effect the payment): see for example Commerzbank, [38] in which Mummery LJ stated:

> "As was held by the Judicial Committee of the Privy Council in the Dextra Bank case at p.204, the question whether it would be inequitable to require restitution can arise in cases of 'anticipatory reliance' where a recipient of an overpayment has already changed his position in good faith in the expectation of receiving a future benefit".

478. For these reasons, I have concluded that there is no principled basis for the distinction which the College invites me to draw in its submissions between anticipatory and consequential change of position in public authority cases.

SFM's change of position defence: the facts

479. The College are right to observe that SFM's change of position defence received little attention in the course of the trial. However, the documents in the trial bundle clearly establish the following:

    i) On 30 April 2013, SFM entered into a contract with BOS under which BOS agrees to erect the Building for the contract sum of £6,660,000 ("the Build Contract"). Variations led to the price being increased to £7,147,039.

    ii) "Notification of Interim Payment" were provided by the Bailey Partnership, the construction consultants responsible for certifying when payments had been earned under the Build Contract, to SFM on 30 April 2013 (£1,892,715 plus VAT); 13 June 2013 (£3,598,640.15 plus VAT); 7 August 2013 (£767,210.85 plus VAT) and 20 November 2013 (£888,473 plus VAT).

    iii) Invoices were rendered by BOS to SFM on 17 May 2013 for £900,000 plus VAT; on 13 June 2013 for £695,461.29 plus VAT and on 7 August 2013 for £339,538.71 plus VAT.

    iv) On 13 September 2013:

        a) SAM invoiced SFM for £222,491.00 for arrangement fees for the term and construction funding facilities. Mr Spring's email of 12 September 2013 records that SFM invoiced SAM at or around the same time in the amount of £95,518.

        b) SFM rendered invoices to BOS of £766,039.00 plus VAT and £597,683 plus VAT.

        c) BOS rendered a further invoice to SFM of £5,319,984 plus VAT (which invoice referred to the fact that £1,935,000 plus VAT had already been invoiced).

    v) On 20 November 2013, a further interim payment notice was issued by the Bailey Partnership for an amount due from SFM to BOS of £888,473. The notification referred to a total valuation of work done by BOS for SFM under the contract of £7,147,039, of which £6,258,566 had already been notified.

480. The College argued that there was no evidence that any of the invoices had actually been paid. It relies in this connection on a statement in *Goff and Jones* at para. 27-32, sourced to the New Zealand case of Saba Yachts Ltd v Fish Pacific Ltd [2006] NZHC 1452, that it is not enough that there is "evidence that an invoice was issued by the defendant's business associate, unaccompanied by evidence that this was ever paid". In Saba Yachts, the defendant had relied upon an invoice rendered by a related company for work alleged to have been done. Winkelmann J at [65] suggested that production of an invoice at arms-length might have been sufficient to prove a change of position because "if an invoice is issued, it is to be inferred that it is to be paid". However, she was not prepared to draw that inference on the facts before her.

481. The issue of whether there is sufficient evidence to establish the defence of change of position is ultimately one of fact. I am satisfied on the evidence in this case that the overwhelming likelihood is that the invoices were paid:

   i) There is clear evidence of the work done by BOS (in contrast to the position in Saba Yachts).

   ii) The invoices were produced as a result of formal certification by the Bailey Partnership as an independent third party.

   iii) The commercial arrangements which Mr Spring describes in his witness statement could only work if BOS was paid for the Building which was then leased by the acquirer to the College. It was Mr Spring's evidence that the purpose of the various arrangements put in place was "to fund the purchase of the Buildings from [BOS] to that they could be leased to the end-customer".

   iv) The Notifications of Interim Payments all provided for payment within a specified period of time, were all issued following an application by BOS for an interim payment, and in each case BOS then invoiced SFM for the payments. I can think of no sensible reason why BOS, having sought an interim payment, established its entitlement to the same and then issued an invoice, would not have sought and obtained payment of the amounts certified.

   v) It is clear from documents in the trial bundle that when SFM was late in making payments, BOS chased SFM and demanded payment by return. By way of example, in an email concerning the third interim payment in August 2013, Mr Pierce informed Mr Spring "payment would now be appreciated, it so offends when we come to remove furniture, fittings and personal effects".

   vi) Finally, the terms of BOS's invoices provided that property did not pass until payment. As I have noted above, it is clear on the evidence that SFM became the owner of the Building.

482. On this basis, I am satisfied that SFM made a net payment to BOS in anticipation of the receipt of rent under the Contract of in excess of £5.7m plus VAT and a net payment to SAM on the same basis of in excess of £125,000.

483. In their second round of closing submissions, filed on 1 April 2020, the Claimants also argued that SFM had borrowed and paid money in reliance on the receipt of payments from the College under the Contract and that this constituted a change of position. As the amounts paid by SFM to BOS for the Building, and for which I have invoices and/or notifications of interim payment, are sufficient to establish a change of position defence in respect of all of the amounts paid by the College to SFM, it is not necessary for me to address this alternative ground for a change of position defence.

Has a sufficient causal link been shown between the payments made by SFM and the receipt of payments from the College

484. The College contends that no sufficient causal link has been established between any payments made by SFM, and the receipt of hire charges, and also suggests that SFM took the risk in relation to any transaction it entered into.

485. So far as the amounts expended by SFM in paying for the acquisition, transportation and installation of the Building are concerned, it is clear on the evidence that SFM incurred this expenditure in reliance on, and anticipation of, the prospective payments under the Contract:

i) SFM was a single purpose company specifically incorporated for the purposes of this Contract.

ii) The Contract specifically contemplated that the Building would be acquired from BOS for the purpose of leasing it to the College.

iii) The College was made aware that SFM was the assignee of the right to hire and was to acquire ownership of the Building which the College was leasing in return for the payment of hire.

486. There is a very strong link between the expenditure relied upon as constituting change of position and the enrichment which the College seeks to reverse in this case: much stronger, for example, than the position where a party incurs expenditure influenced by a general sense of well-being because it anticipates receiving payments in the future; or (as in South Tyneside) where the payee enters into a back-to-back contract for its own purposes and to manage its own risk in respect of the transaction it has purported to enter into with the payer; or (as in Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579) where the payee speculates for its own purposes using money paid to it under an *ultra vires* contract.

487. None of the matters relied upon by the College in its submissions of 7 April 2020 negate the clear and direct connection between the payments relied upon as constituting the change of position and the amounts which the College seeks to recover. Taking them in turn:

i) The reasons for the assignment to SFM are clear on the evidence (viz that GCP wanted the rights held by a single purpose entity over whose assets it could have a debenture). In any event, uncertainty on this topic would not bear on the issue of whether SFM had made the payments for the Building

to BOS in anticipation of the receipt of payments for the Building from the College.

ii) The facts that there was some interchangeability between BOS and BOSHire in the parties' contemporary dealings, that BOS was prepared to incur significant expenditure without a written contract in place and that BOS was willing to accept a reduced margin do not begin to establish that SFM would have paid for the Building without anticipating the receipt of hire under the Contract.

iii) The fact that payments for the period up to 1 August 2014 were paid by the College to BOS and not to SFM lends no support to the suggestion that SFM would have been willing to pay for the Building otherwise than in anticipation of the College's legal obligation to pay hire. On the unchallenged evidence of Mr Spring, and as confirmed by a copy of the notice of assignment signed by BOSHire and acknowledged by the College, SFM had the benefit of an assignment of all BOSHire's rights under the Contract by 14 May 2013, long before the first payment of hire under the Contract fell to be made.

Does SFM have a surviving asset which defeats the defence of change of position?

The legal principles

488. Finally, the College contends that the amounts received by SFM from GCP under the RSA constitute a "surviving asset" which negates SFM's contention that it has changed its position. This argument raises a relatively under-developed aspect of the law of unjust enrichment first averted to by Lord Templeman in Lipkin Gorman at p.560 when he noted:

> "Thus if the donee spent £20,000 in the purchase of a motor car which he would not have purchased but for the gift, it seems to me that the donee has altered his position on the faith of the gift and has only been unjustly enriched to the extent of the second-hand value of the motor car at the date when the victim of the theft seeks restitution. If the donee spends the £20,000 in a trip round the world, which he would not have undertaken without the gift, it seems to me that the donee has altered his position on the faith of the gift and that he is not unjustly enriched when the victim of the theft seeks restitution".

489. It will be noted that Lord Templeman's example focussed on surviving value at the date restitution was sought, and not the mere acquisition of value in the past which could no longer be realised (viz the round-the-world trip). The issues raised by the potential counter-defence of "surviving value" are discussed in *Goff and Jones* at paras. 27-16 to 27-23. The editors refer to the decision of the High Court of Australia in Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd [2014] HCA 14; (2014) 253 C.L.R. 560, [23]–[25] and [95] that a test of "irreversible detriment" should determine whether a defendant's circumstances have changed to such an extent that he should be entitled to the defence of change of position. However, the editors endorse Henderson J's observations in Test Claimants in the FII Litigation v HMRC (No 2) [2014] EWHC 4302 (Ch), [354]:

> "… It may be relevant to consider whether the expenditure or loss relied upon is reversible, and (if so) how easily the defendant could take steps to reverse it … But it would be wrong to elevate this consideration into a general test of irretrievability. Expenditure may well be irretrievable, for example because it is immediately consumed, or for some other reason cannot be recouped from the payee, but that fact alone does not stamp the expenditure as a relevant disenrichment. Among other things, it also has to satisfy the causal 'but for' test if the defence is to be made out."

490. Professor Burrows QC also questions the suggestion that reversibility should be the touchstone of whether steps taken by the payee in anticipation of or as a result of a payment give rise to the defence of change of position, suggesting that the defence is concerned with "the defendant being in a worse position to pay back the money than he would have been in had the payment not been received" (or, presumably, anticipated): *The Law of Restitution* (3rd ed) pages 531-532.

491. The discussions of surviving assets, and most of the cases, are generally concerned with cases of exchange, in which the enrichment (or its anticipation) causes the payee to exchange money for an asset of some other kind – a car, shares and furniture, for example – or to effect an immediate reduction of an existing liability (paying an existing debt). The principle has also been applied to readily reversible unilateral payments – for example where payments have been made to tax authorities which are recoverable (e.g. Hillsdown v Pensions Ombudsman [1997] 1 All ER 862, 904). However, the transaction said to constitute the change of position may be more complex, involving the assumption on the part of the payee of additional liabilities beyond payment in return for the acquisition of an asset or the discharge of a debt. In that case, it may be much more difficult to conclude that there would no net adverse change in the payee's position if the payment was recovered.

SFM's acquisition of the Building

492. The first surviving asset which the College suggest defeats SFM's change of position defence is the Building. I accept that this comes very close to the specific example which Lord Templeman gave in Lipkin Gorman of an asset acquired on the basis of the receipt of funds which the payor then seeks to reverse.

493. However, I have accepted the College's case that the realisable value of this asset – which in the circumstances must mean its *ex situ* value – at the date restitution is sought is negligible, and certainly nowhere near sufficient to reduce the net level of payments which SFM has made to BOS below the amounts which the College seeks to recover from SFM. Giving credit for the realisable value of the Building does not reduce SFM's net expenditure below the amount which the College seeks to recover. That finding is sufficient in itself to defeat this aspect of the College's argument.

494. Further, the evidence establishes that SFM sold residual interest participations in the building to BOS and SAM for payments which I have already taken into account when calculating the level of net payments made by SFM. The effect of that sale is that it is BOS and SAM who stand to benefit from the future exploitation of the Building on the expiry or early termination of the Contract.

The amounts received by SFM from GCP

495. The College also alleges that SFM has not changed its position to its detriment because SFM sold the right to receive rent to GCP for a lump sum under the RSA. While the amount paid by GCP to SFM under the RSA was redacted from the copy before the Court, it is clear on the evidence that this figure substantially exceeded the amount which the College seeks to recover from SFM. A valuation report provided by Mazars to GCP referred to GCP raising around £5m from a loan note issue all of which would be paid by GCP to SFM under the RSA

496. I have concluded that the c.£5m payment does not have the effect of reducing or eliminating the change of position defence which SFM has *prima facie* established in the form of the payments made to BOS for the Building.

497. The RSA involved SFM providing a series of promises to GCP in return for the payment, including transfer of the right to payment under the RSA "with full title guarantee", and, inter alia, warranties at the date of the RSA and on completion that (i) the Contract was subsisting, valid, binding and fully enforceable; (ii) SFM had good and marketable title to the rent payable under the Contract and (iii) the College had no defence to claims for the rent. It would be unrealistic to consider the benefit acquired by SFM under the RSA in isolation from the liabilities assumed by SFM in return. Once those liabilities are taken into account, it cannot be said that the amount received by SFM under the RSA negates the change of position *prima facie* constituted by SFM's payments to BOS.

498. Further, if regard is to be had to the RSA in assessing whether SFM has (in the College's words) "suffered a detrimental change of circumstances" in anticipation of the receipt of payments from the College, then it is necessary to step back and consider the overall net effect of the transactions which SFM has entered into. Those transactions involved SFM transferring any entitlement to payments under the Contract to GCP and making certain promises to GCP in return for the payment of a lump sum. That lump sum was used by SFM (a) to repay the construction facility which was the principal source of the amounts SFM paid to BOS before completion of the Building and (b) to pay BOS the amounts falling due on completion. In net terms, therefore, SFM has acquired the Building, for which it has expended an amount in excess of the sum received from GCP. In circumstances in which I have found that the Building has an insignificant realisable value *ex situ*, and SFM has in any event sold the benefit of any residual value in the Building, the inevitable result of ordering SFM to repay the amounts sought by the College would be to leave SFM out-of-pocket by that amount, even before account is taken of the legal liabilities which SFM has assumed under the RSA.

499. For these reasons, I reject the College's "surviving value" argument, and find that SFM has made out its change of position defence to the College's claim in unjust enrichment.

THE RELATIONSHIP BETWEEN SFM'S AND THE COLLEGE'S CLAIMS IN UNJUST ENRICHMENT

500. I have found that:

i) SFM conferred a benefit on the College in respect of the period from September 2013 to trial.

ii) The payments made by the College for that benefit in respect of the period from September 2013 to September 2017 are not recoverable because SFM has changed its position in anticipation of those payments.

501. What is the combined effect of those findings?

502. In relation to the period from September 2013 to September 2017, SFM can make no further recovery beyond the amounts which the College has already paid and which I have held it cannot recover. This result can be rationalised in a number of ways. It might be said that SFM has received the anticipated counter-performance in circumstances in which the College cannot recover it (because of SFM's change of position defence), and so there has been no failure of condition. Alternatively, it might be said that any enrichment has not come at SFM's expense because SFM had been paid for it. In the further alternative, it might be said that in circumstances in which the College cannot recover back the amounts paid by way of rent for this period because of SFM's change of position, the College has its own change of position defence to any claim in unjust enrichment by SFM for that period.

503. In respect of the period from September 2017 to trial, I have concluded that SFM can recover in unjust enrichment at the market rate I have set out above. It is no answer to such a claim that, in respect of the preceding three years, the College will have paid in excess of the market rate. In circumstances in which the College cannot recover the rent paid during the preceding period because SFM has changed its position, it would not be appropriate to allow the College nonetheless to rely upon those payments as, in effect, creating a credit which can be used to answer SFM's claim in unjust enrichment in respect of later years for which no payment has been made.

504. It will be apparent that my analysis treats the unjust enrichment claim for each year's hire as, in effect, severable for the purposes of analysing the claims and defences to claims in unjust enrichment. In my view, this analysis best represents the nature of the benefit transferred – the possession or use of property over a period of time – and the market valuation of that benefit (which involved a period-dependent payment). It is for this reason that the amounts paid by the College for the period from September 2013 to September 2017, and which I have found to be irrecoverable, do not provide a complete answer to SFM's claim in unjust enrichment for the entire period of use of the Building (cf. the rule that a failure of basis must be total unless the benefit conferred is severable analysed in *Goff and Jones* paras. 12-26 to 12-28).

THE COLLEGE'S AND THE COUNCIL'S PART 20 CLAIMS AGAINST EACH OTHER

505. The College's Part 20 claim against the Council was premised on the College acting as the Council's agent in entering into the Contract, a premise which I have rejected. Accordingly this claim fails.

506. The Council's Part 20 claim against the College was conditional on the Council being found liable to the Claimants, which I have found it is not. Accordingly, the basis of this claim does not arise.

CONCLUSION

507. For the reasons set out in this judgment:

i) The Contract was *ultra vires* the College, with the result that the Claimants' claims against the College under the Contract fail.

ii) The Claimants' claims against the Council under the Contract fail, for that reason and for the additional reason that the Council was not a party to the Contract.

iii) The Claimants' claims in misrepresentation and misstatement against the College and the Council fail.

iv) The College's claim to recover the amounts set out in Ms Williams' second witness statement from the Claimants in unjust enrichment fails.

v) SFM's claim in unjust enrichment against the College succeeds in respect of the period from September 2017 to judgment, and is to be quantified on the basis set out in this judgment.

508. The parties are asked to seek to reach agreement on the terms of an order reflecting the findings in this judgment, and on any consequential issues. Directions will be given for further submissions to be filed on any matters which remain in dispute.