Neutral Citation Number: [2017] EWHC 3730 (Admin)
IN THE COUNTY COURT AT MANCHESTER

Case No: C0/2627/2017

Courtroom No. 46

Manchester Civil and Family Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

2.10pm - 4.50pm
Friday, 4th August 2017

Before:
THE HONOURABLE MR JUSTICE KING

B E T W E E N:

LEARN DIRECT LTD

and

OFSTED

MR M HAYTON QC appeared on behalf of the Applicant
MS S HANNET appeared on behalf of the Respondent

JUDGMENT
(Approved)

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

KING J:

1. This is a judicial review challenge to the defendant's report dated 12 April 2017 of an inspection undertaken pursuant to section 126(1) of the Education and Inspections Act 2006 (the 2006 Act), of the claimant's provision of further education and skills training. This inspection had been conducted over four days between Monday 20th and Thursday 23 March 2017.

The Defendant

2. The Defendant, Her Majesty's Chief Inspector for Education, Children Services and Skills, otherwise as known as the HMCI, is the most senior officer of Ofsted. Ofsted is the Office for Standards in Education, Children Services and Skills. It is a non-ministerial government department established by Section 112 of the 2006 Act. The defendant is referred to in the Act as the Chief Inspector. Under section 118(1), the Chief Inspector has the general duty of keeping the Secretary of State informed about, amongst other things, (a) the quality of activities within the Chief Inspector's remit and (where appropriate) the standards achieved by those for whose benefit such activities are carried on, and (b), improvements in the quality of such activities and in any such standards. For these purposes 'activities' includes (1) the provision of any form of education, training or care, (see Section 117(6)(a)(i)) and activities are within the Chief Inspector's remit if, amongst other things, the Chief Inspector exercises any inspection function in relation to them. (see Section 117 (6)(b)(i)).
3. As regards her inspection function of the Chief Inspector, this is to be found in Section 126 of the Act, which is within Chapter 3 of Part 8 of the Act, headed 'Inspection of Further education and training etc'. Under subsection 1 of Section 126 the Chief Inspector may inspect any education or training to which the chapter applies. The chapter applies (see Section 123(1)) relevantly to, amongst others, the following kinds of education and training, all of which fall within the claimant's provision: under subsection (c), further education for persons aged 19 or over which is wholly or partly funded by the Secretary of State; (f) training for persons aged 16 or over which is funded by the Secretary of State under Section 2 of the Employment and Training Act 1973, and (g) training for persons aged 16 or over if it is training the whole or part of which takes place at the premises of an employer and which is wholly or partly funded by the Secretary of State.
4. By subsection 3 of Section 126 on completing any inspection the Chief Inspector may (a) make a written report upon it and (b) arrange for the report to be published in such manner as he considers appropriate.
5. Section 133(1) of the 2006 Act, requires the Chief Inspector to devise a common set of principles applicable to all inspections conducted under Chapter 3. This is referred to as a 'framework'. The relevant framework applying to this inspection was that published in August 2015. It is headed, 'The common Inspection framework: education, skills and early years'. This framework requires a four-point grading scale to be used in all inspections: grade one, ('outstanding'); grade two, ('good'); grade three, '(requires improvement'); grade four, ('inadequate'). Under paragraph 23 of the framework, inspectors are required to make a judgment of the overall effectiveness of the provision. They are also required (see paragraph 24) to make graded judgments on four particular areas using the four-point scale. These are; (1) 'effectiveness of leadership of management'; (2) 'quality of teaching, learning and assessment'; (3) personal development, behaviour and welfare, and (4) outcomes for children and learners.
6. At paragraphs 27 to 32, the framework identifies the criteria to be considered when making judgments. These criteria are said to be common for all the types of provision covered by

the framework. Paragraph 27 also refers to 'individual inspection handbooks for each remit' which '…explain how these criteria are applied in each context'.

7. Further, and relevant for present purposes, paragraph 39 of the framework under the heading 'Further education and skills provision', identifies types of further education and skills provision whose providers will have graded, where appropriate. These include adult learning programmes, apprenticeships and traineeships. It is made clear that these gradings contribute to the overall effectiveness of the provider judgment.
8. As regards the individual inspection handbooks referred to, the defendant has promulgated relevant guidance in the August 2016 'Further education and skills inspection handbook'. This has been placed before me. It is some 71 pages long. It identifies, amongst other things, the matters the inspectors will consider when inspecting apprenticeships.
9. At paragraph 188 of the handbook are set out what are described as the applicable grade descriptions, under the heading 'Grade Descriptors: the effectiveness of apprenticeship programmes'. The grade descriptors are said not to be a checklist. 'Inspectors adopt a best fit approach that relies on the professional judgment of the inspection team'.
10. Relevant for present purposes, the descriptor given of the grade 'inadequate', is in the following terms, 'Effectiveness of the apprenticeships is likely to be inadequate if one or more of the following applies'. Amongst the factors identified are: 'Leadership of apprenticeships is weak…; Weak assessment practice or poor planning mean that training fails to enable apprenticeships to reach required standards or achieve their learning goals; Apprentices or groups of apprentices make inadequate progress from their starting points; Too few apprentices are retained on their programmes, or achieve their core aim including within the planned timeframe…'
11. There are other relevant provisions of the 2006 Act. Section 119(1) requires the defendant to perform functions for the general purpose, amongst other things, of encouraging the improvement of activities within the Chief Inspector's remit. Section 117(1) requires Ofsted to have regard to certain matters when performing its functions, which include, under subparagraph (b) 'views expressed by relevant persons about activities within the Chief Inspector's remit', and under (c) 'levels of satisfaction for such activities on the part of the relevant persons'. 'Relevant persons' for these purposes include 'persons who have an interest in such activities whether (i) as persons for whose benefit they are carried on…, or (iii) as employers'.
12. Paragraph 9 of Schedule 12 to the 2006 Act provides that anything authorised or required to be done by or under any enactment by the Chief Inspector, may be done by Ofsted or by any additional inspector who is authorised generally or specifically for the purpose by the Chief Inspector.
13. The defendant, the Chief Inspector, has also promulgated that which is described as the Incomplete Inspection Protocol. This provides that where the Chief Inspector decides that the evidence base on which judgments were made, were "insecure", the Chief Inspector may carry out further inspection activity to "secure" the inspection. This may include a further visit to garner more evidence. The material protocol which is before me, published in April 2017, is entitled '…gathering additional evidence to secure an incomplete inspection'.

The Claim

14. I turn now to the claim. As I have said this is a judicial review challenge to the report of the 12 April 2017 of an inspection undertaken under the 2006 Act, of the claimant's provision of further education and skills training. As I have stated at the outset, this inspection had been conducted over the four days identified, Monday 20th to Thursday 23 March 2017.

15. Following the completion of the inspection, the claimant made a formal complaint, albeit described as an appeal, through the defendant's internal procedures. This was lodged on 24 March and amplified by letter on 11 April. This summarised the claimant's areas of concern as being: (1) Ofsted's decision in relation to deferral of the inspection: (2) inadequate inspection of what had operationally been two separate businesses since September 2016 (adult learning provision, and apprenticeships); (3) apparent lack of impartial review of the apprenticeship provision. (4) inadequate/insufficient sample size and evidence base considered in the inspection in comparison to the size of the provision, and (5) insufficient time allowed by inspectors for further information in analysis of data leading to what 'we consider' to be 'an incomplete inspection'.
16. That letter also included a request that the defendant apply the Incomplete Inspection Protocol to which I have referred.
17. On 4 May 2017, one Catherine Kirby Regional Director (Northeast Yorkshire and Humberside) wrote to the claimant to state that 'the quality assurance process' for the inspection had been completed. This had included a full review of the evidence base. Ms Kirby said she was satisfied that the evidence base was complete and there was therefore, no need to use the protocol.
18. In a further letter of the same date, Ms Kirby explained that the inspection evidence was considered sufficient to support both the text of the report and the judgments reached and no further on-site inspection pursuant to the Protocol was deemed necessary.
19. By a letter of 11 May 2017, the complaint of the claimant was rejected. A full copy of the outcome of the complaint is in my papers.
20. Ms Hannet, on behalf of the defendant, emphasises that the author of the outcome complaint letter was one Rieks Drijver, a Senior HMI from a different region from the lead inspectors involved in the inspection under challenge, Mr Drijver being based in London. Within this outcome is a further review of the evidence base.

The Claimant:

21. I turn to a review of the make-up of The Claimant company in the context of its provision. The claimant company is the largest single provider of further education and skills training in the United Kingdom. At the material time, it was making provision across the United Kingdom for three categories of learners; i) apprentices, that is learners who are 16 or older who are in employment and undertaking an apprenticeship while being employed. ii), trainees, that is learners, 16 years or older, not yet ready for apprenticeships for whom the claimant provided traineeship programmes involving, for example, sessions in English, mathematics and work preparation training. (this was described to me in submission on behalf of the defendant, as a pre-apprenticeship programme); iii) adult learners, that is those aged 19 or over following an academic or vocational course not apprenticeship.
22. The scale of the claimant's provision can be seen from the following numbers. The claimant provides for some 21,000 or so apprentices, and some 12,000 or so adult learners and trainees. The reach of the provision is nationwide. The claimant delivers its provision both directly and through sub-contractors.
23. The Report under challenge described the great majority of apprentices as being employees of small to medium sized enterprises, with the majority being adults spread evenly between intermediate and advanced level qualifications, and with the claimant training the majority directly and with the remaining apprentices trained by 24 sub-contractors.
24. The claimant is funded by public funds through the Education Funding Agency and the Skills Funding Agency.

The Report

25. The Report rated and judged the overall effectiveness of the claimant's provision at the lowest of the four available grades, namely, 'as inadequate'. Two other areas of provision were judged as inadequate, namely, 'the outcome for learners' and 'the effectiveness of the apprenticeship programmes'. Other areas of provision were given a rating one higher up the scale, namely, the grade three rating of 'requires improvement'. This rating was applied to the adult training programmes, and the traineeships, and to 'the effectiveness of leadership and management', and to 'the quality of teaching, learning and assessment' and to 'personal development behaviour and welfare improvement'.
26. The point is made on behalf of the claimant that given the learners are made up of a mixture of adult learners, apprenticeships and trainees, and given it was only the apprenticeships which were deemed inadequate, it must follow it was the inadequate assessment of the apprenticeships which became determinative of both the inadequate rating for the 'learners' outcome', and the inadequate rating for the overall effectiveness of the provision.
27. There is force in this submission. It is the reason, I have no doubt, why this challenge has been directed to the apprenticeship inspection. The focus of the challenge has been on an alleged inadequacy or insufficiency of the evidence base underlying the apprenticeship inspection and upon an alleged procedural unfairness in that particular part of the inspection, said to lie in the appearance of a closed mind or pre-determination on the part of the lead inspector for apprentices, Mr Paul Cocker.
28. As regards the inadequate rating for apprenticeships the report, amongst other things, at internal page nine records the following findings, amongst other things:

    'The management of apprenticeships is ineffective. The structure and delivery of a significant number of apprenticeships do not meet the requirements of the apprenticeship programme. Around one third of all apprentices do not receive their entitlement to off-the-job learning. Consequently, these apprentices do not develop the skills they require to progress to the next steps in their career'.

    'Leaders and managers have allowed standards to slide since the previous inspection. The proportion of apprentices who do not complete their apprenticeships on time has increased steadily over the past three years and is very low'.

    'Leaders and managers oversight of the progress that apprentices make on their programmes is weak…'

    'Leaders and managers fail to ensure that their assessors are sufficiently rigorous and skilled in the identification of apprentices' existing abilities at the start of their programme'.

29. The one positive finding on apprenticeships was at the end of this section. It reads as follows,

    'Leaders and managers develop very effective partnerships with a range of high profile corporate clients. Managers work very closely with these organisations to develop new standards to meet their specific skills requirements. Apprentices at these employers make good progress, develop new skills and enjoy their learning'.

The Extent of the Inspection

30. I turn to the extent of the inspection. Notice of the forthcoming inspection had been given to the claimant two working days before, on Thursday 16 March 2016. The same day, the claimant's Chief Executive Officer, (CEO), Mr Palmer, requested that the inspection of the apprenticeship provision should be deferred. This was on the grounds that this provision was about to novate to a new identity, LAL. This was request was refused the next day when Ofsted confirmed that apprenticeships would be inspected.
31. No complaint was made before me as to the shortness of these timescales. The original grounds one and two of the claim relating to the decision not to defer, for which grounds permission was refused, were not sought to be pursued before me. However, these timescales are relied on by the claimant to this extent; they are put forward by way of mitigation, given the size and scale of the claimant's provision, in response to the defendant's complaints about the organisation of visits throughout the inspection. These complaints are in these circumstances said to be unfair and misplaced. Mr Hayton QC, submitted that the task of readying a nationwide provision for inspection was plainly more onerous for this claimant than for a smaller local provider. It is said this was particularly so when the claimant's Chief Information Officer was on her bereavement leave and unable to help with analysis reports, (as explained in the evidence of the claimant's Ms Wood, the claimant's nominee for the inspection).
32. The inspection under challenge in fact involved 17 inspectors. There was an overall lead inspector, Mr Charles Searle. Beneath him there was a lead inspector for each of the claimant's provision type, that is for adult learners, apprenticeships and trainees. Each had a team of inspectors under him in the field reporting back up the pyramid and filing, in respect of a given inspection activity, what was known as an SIF, a summary inspection form, and an EB, evidence form. Such forms are to be found in my bundle. They cover many pages.
33. The lead inspector for apprenticeships was HMI Paul Cocker, to whom I have already referred. Beneath him were five inspectors from different regions of the defendant's inspectorate. They were a Steve Tucker HMI, a Linda Bourne OI, a Malcolm Bruce OI, a Catherine Richards OI, and a Heather Barrett-Mould. There were seven inspectors under the lead inspector in relation to adult learning and traineeship.
34. In addition, there were lead inspectors for the four key judgments which had to be made (leadership and management; teaching, learning and assessment; personal development, behaviour and welfare; outcomes for learners) to which all inspectors would contribute findings. Those lead inspectors included two senior HMIs, namely, Phil Romaine and Sheila Willis. Mr Romaine was the lead on leadership and management, Ms Willis on teaching, learning and assessment, and on personal development behaviour and welfare. 'Outcome for learners' was under the lead of Charles Searle, the overall lead inspector.
35. On the evidence produced by the defendant, the inspection was subject to an on-site quality assurance visit by another senior HMI, Steve Hailstone, on days two and four of the visit.
36. As already referred to in the defendant's correspondence with the claimant in May, after the inspection had been completed and after the report had been completed, the report was subject to what is described as a full 'evidence base review' (EBR) by Stephen Hunsley, an HMI from a different region than those involved in the lead inspectorate, namely, the east of England. He concluded, under the heading 'EBR strengths and feed back to lead inspector', that the evidence base was, 'a comprehensive evidence base clearly supporting the judgments made'.
37. The full EBR report is in my papers. It is exhibited to Mr Searle's statement as exhibit CS/17.

38. Under the heading 'EBR comments', the following comments of note are made:

> 'Overall, the evidence base for apprenticeships supports the judgment of inadequate. A detailed evidence base has been collated by the lead for the provision type, utilising information and evidence from colleagues across the country. Inspectors had referenced and recognised the strengths and weaknesses of the apprenticeship provision they were able to inspect as part of the inspection. Where appropriate, first hand evidence and the use of competence based interviews were used to determine the progress being made by apprentices. It was apparent too few apprentices either sampled, spoken to or seen, were making the progress expected of them and leaders and managers did not have effective mechanisms in place to ensure they knew that too many apprentices were making slow progress. It appears from the evidence base that the apprenticeship inspector gave leaders and managers every opportunity, including late night telephone conversations, and the opportunity to provide stronger evidence to mitigate the negative findings'.
>
> 'Overall, the evidence base for OE…' (that is overall effectiveness) '…supports the judgment and grade of inadequate. The key judgments and grades are supported by a strong evidence base including detailed evidence forms, key judgment and provision type SIFs, and data provided by managers. The strengths, weaknesses and grades awarded reflect the provision as evidenced by provision type and key judgment inspectors. Recognition is given to more recent interventions by leaders to improve the quality of the provision including teaching, learning and assessment, apprenticeships and particularly outcomes for learning. However, these recent interventions do not appear to have established sustained improvements over time to determine a better grade'.

39. Mr Searle explained in his evidence (see paragraph 51) that this quality assurance of the inspection was standard practice for inspections which had led to an 'inadequate' grading. The unchallenged, before me, analysis of Mr Drijver, the senior HMI to whom I have already referred, and who provided the outcome to the complaint raised regarding the inspection, was that the 17 inspectors provided the equivalent of 55 Inspector days whereas the tariff for a very large national provider was typically 24 inspected on-site days. Mr Hayton for the claimant, emphasises, however, how far bigger than in any other in the sector, was the task for inspectors seeking to conduct an inspection into this claimant's provision, providing, as it does, training, to thousands of individuals across the United Kingdom.
40. Mr Searle in his evidence (see paragraph 17), further states that the team of six lead inspectors, themselves based in Leicester, was very experienced and it was very unusual to have two senior HMIs as part of an inspection team. To quote Mr Searle, 'The allocation of senior experienced individuals to the team was intended to meet the challenges inherent in a national inspection of a provider as big as (the claimant)'. He also explains that each of these Leicester based inspectors had a dual role, overseeing inspectors in the field, and inspecting provision themselves, particularly looking at records held at the claimant's headquarters, and through meetings with various individuals in management roles at the claimant company.
41. I mention these numbers of inspectors, the pyramid of responsibility and the differing levels of seniority and expertise within the inspector team since it is relevant to the grounds of challenge now being pursued in this claim.

42. In relation, for example, to the ground of pre-determination or closed mind, it is of note that Mr Cocker, lead inspector though he was on apprenticeships, still had to get his own conclusions passed the scrutiny of those higher up the pyramid, particularly Mr Searle, before the final grading to be found within the report was reached. There is no allegation of pre-determination or closed mind made against, for example, the overall lead inspector Mr Searle or indeed of any other inspector, in particular those reporting up from the field.
43. It must follow that if the court were to find the appearance of pre-determination was made out as against Mr Cocker, the court would still have to grapple with the question of the extent to which it has been established that Mr Cocker had actually or in appearance, tainted the decision reached by the defendant's inspectorate looked at in its entirety.
44. Further, on the issue of the adequacy or sufficiency of the evidence base, the defendant's submission is that this is essentially a matter for the professional expert judgment of the expert regulator with which the court can interfere only on grounds of rationality, and given the high level of deference which on authority must be given to an expert regulator, the rationality threshold is particularly high and the court has limited scope for intervention.
45. As I will explain later, I agree with this submission. The stronger the demonstrated breadth of expertise of those involved in the inspection, the more difficult it must be for a court to find irrationality on the questions of the, for example, the sufficiency of the evidence base. As indicated however, I shall return to these matters in due course.
46. The report has not yet been published. The defendant, by letter of 11 May 2017, gave notice of its intention to publish the report on 9 June 2017, but by that date these proceedings had commenced, by claim form issued on 2 June and by order of court on 5 June, interim relief was granted restraining publication of the report pending, in effect, the outcome of these proceedings. By these proceedings, the claimant seeks a quashable portion of the defendant's report and a permanent injunction preventing publication of the report.

The Evidence Before Me

47. I turn to identify the evidence which has been placed before me. For the purposes of these proceedings, written evidence has been filed on behalf of both the claimant and the defendant. There has been no application on the part of the claimant for any of the defendant's witnesses to attend to be the subject of cross-examination, in particular in relation to Mr Cocker or Mr Searle. In these circumstances, I accept the defendant's submission that I must proceed on the basis that the written evidence of the defendant must be accepted insofar as there are disputed questions of fact. On this see the observations of Mr Justice Singh at paragraph 94 and the authorities there cited in the *R (Black).v. The Justice Secretary* [2015] 1WLR 3963, [2015] EWHC 528 (Admin).
48. On behalf of the claimant there are the witness statements of Mr Andrew Parker the claimant's current CEO, and of Ms Dereth Wood. Ms Wood is the claimant's Director of Learning, Policy and Strategy. She was the Nominee for the purpose of the inspection. Her role was to act as liaison with the lead inspector, to attend meetings with the inspection team, to support the planning of the inspection, and to arrange for documents and personnel to be available to the inspection team.
49. On behalf of the defendant there is one witness statement from Mr Searle, and two witness statements from Mr Cocker including one dated 26 July, which is in response to matters raised against him for the first time in the claimant's skeleton argument.
50. There is also a very recent witness statement dated 26 July 2017, from the senior HMI, Stephen Hailstone, to whom I have already referred. This statement exhibits, by a schedule, the result of a detailed review of the inspection's full evidence base. Mr Hailstone explained

that this review was carried out by himself and senior HMI, Sheila Willis, after the on-site inspection was completed. This schedule analysis shows in fact, an increase in the number of inspection activities as regards the apprenticeship inspection, that is a total of 241, compared with those activities identified in Mr Cocker's own analysis which amounted to 109. (On this see the grid or schedule set out at page 1521 of the bundle).

51. Mr Hailstone's schedule across the top has headings: apprenticeship, adult learning programmes, traineeships, effectiveness of leadership and management, quality of teaching and learning assessment, personal development, behaviour and welfare, outcomes for learners. Down the side it has headings relating to the types of activities undertaken by the inspectors, thus; centres visited, the learning sessions observed, meetings with groups of learners, learners interviewed individually face to face, learners interviewed by telephone, interviews/meetings with providers, stakeholder and sub-contractor staff; employers interviewed, scrutiny of learner's work, reviews of learners' progress records, reviews of provided documents, review of data. It gives the numbers in respect of those activities, in respect of the types of inspection.
52. Thus, under apprenticeships one finds against centres visited, '2', learning sessions observed, '39', meetings with groups of learners, 'blank', learners interviewed individually face to face, '66', learners interviewed by telephone, '25', interviews/meeting with provider, stakeholder and sub-contractor staff, '24'. Employers interviewed, '24', scrutiny of learners' work, '24'. Review of learners' progress records '28', reviews provided by documents, '4', review of data, '5'.
53. Mr Cocker's analysis at 1521, which is an analysis concentrating solely on apprenticeships, has down the side, types of apprenticeship and the numbers of apprentices of that particular type. For example, under child development and well-being, one sees '5,006'. Under healthcare and social care, for example, '4,973'. Against those different types there are then numbers given to three types of inspection activity: obs, (observations), scrutiny, that is the work of an individual, and CBI, competency based interviews and this is for three levels of events. His activity numbers, as I indicated, come out at 109.
54. At the bottom of Bundle Page 1521, under the heading 'Overall Evaluation', this appears:

> 'The Nominee was attempting to manage while inspectors were visiting throughout the inspections, with over 21,000 apprentices. We were only provided with a possible 97 visits throughout the country on the first day of the inspection. We observed 36 out of 97 equating to a 37% sample. I feel this was appropriate. To mitigate the lack of learning taking place throughout the inspection week and the significant distance between the visits (on average two hours' drive), the team used alternative forms of evidence to contribute to the evidence base. This included portfolio scrutiny and competence based interviews. Much of the portfolio scrutiny was completed with managers at the provider, who agreed with our findings throughout the inspection. See PC…, reference to his initials, …and ST, EFS.
>
> 'Provider assessors advised inspectors throughout the inspection that other assessments took or had taken place before and after the visits that were uploaded onto the portal. This was raised with the Nominee, by the lead and myself at KIT, 'Keep in Touch', and team meetings. Eventually additional visits were provided later on in the inspection but without addresses and postcodes which limited our ability to attend those sessions. This was a strategy used by the provider to limit our evidence base'.

55. I should refer to one particular statistic in Mr Cocker's schedule or analysis, for health and social care apprentices, the total of which was just under 5,000. It is recorded that in intermediate, there were no observations, 'one' scrutiny, 'four' CBI, and as regards advanced, one in respect of observations, three in respect of scrutiny and 15 under CBI.
56. Mr Palmer is the relatively newly appointed Chief Executive Officer of the claimant. He was appointed on 7 March 2016. A constant theme on behalf of the claimant, before me has been that although there had been a decline in the claimant's performance since the last Ofsted inspection in 2013, when the overall effectiveness had been rated at grade two, that of good, there had been a significant improvement in performance following the appointment of Mr Palmer as evidenced in Mr Palmer's evidence which, it is said, was not fairly reflected in the conclusions of the report.
57. To understand this aspect, it is necessary to set out the historical data known to the defendant through Mr Searle before the inspection of March 2017 began. The claimant had been the subject of an Ofsted inspection in March 2013. It was rated well. It was rated 'two', that is good, for overall effectiveness with like ratings of two for 'outcomes for learners' and for 'quality of teaching, learning and assessment'. It obtained a 'one', an outstanding rating for 'effectiveness of leadership and management'. Since that inspection, the publicly available material and published results relating to the learner achievement rates for the academic years 2013 to 14, then 2014 to 15, and then 2015 to 16, showed in relation to both the percentage of learners completing their courses and the timeliness of any such completion, a marked deterioration to levels well below the national rates.
58. Mr Searle's analysis of the data which he conducted on 13 March 2017, is exhibited in my bundle at page 931. It is referred to in paragraph nine of Mr Searle's witness statement. The overall performance had gone down from 67 to 59 to 57% and timeliness from 52 to 58 to 40%. Mr Searle's conclusion was that both "overall" and "timely achievement" rates had declined over the past three years and were well below the national rates. 70% of apprentices were below the minimum standards for overall achievement. Six out of 10 apprentices did not achieve their apprenticeships between 'planned timescales'.
59. To complete the picture as to the background material available to the inspectorate before the inspection began; on 14 March 2017, the Skills Funding Agency sent a Notice of Serious Breach to the claimants stating that the services delivered under contract had been assessed as falling below minimum quality standards set by the SFA.
60. Mr Palmer himself in his witness statement at paragraph 27, acknowledged these matters of deterioration, but identified three possible contributing factors by way of mitigation; (a) the extended absence of the former CEO through illness; (b) a reduction of funding with adverse impact on the numbers of frontline and back office staff, and (c) the distraction of an aborted initial public offering of shares in the claimant on the stock market which had demanded significant management time. However, the point being made by Mr Palmer in his written evidence, was that things had now improved.
61. His position is reflected in paragraph 21 of the claimant's skeleton argument which is in these terms:

> 'Mr Palmer demonstrated to the overall lead inspector, Charles Searle, that the internal assessment of apprenticeship performance had showed continuing improvement and gave rise to a reasonable prospect of an improvement in achievement in due course. The percentage of learners who are still participating in their courses at three months had improved from 79% in August 2016 to 96% in March 2017 and the percentage at six months had improved from 74% to 96%. Staff attrition had fallen from 4% to 2%. The number of learners assessed as outstanding and good was also steadily rising. Apprenticeship programmes are at

least a year long and often two or three so it takes some time before positive changes give rise to improved outcome'.

62. That paragraph of the skeleton argument refers in particular to Mr Palmer's evidence at paragraph 44 of his statement, and his exhibit ARAP/14.
63. The submission is said to be supported by paragraph 11 of Ms Wood's statement.
64. It is convenient to record how all this, (that is the decline, the appointment of a new management team, signs of improvement,) was dealt with in the Report. Under the heading on the first page, of 'Summary of key findings'; after the bullet points in support of the judgment 'This is an inadequate provider', there is set out under a heading 'The provider has the following strengths', among other matters, the following:

> *"the new senior management team has begun to tackle the main weaknesses. Early signs of improvement indicate that their actions are beginning to have an impact".*

That particular record under 'The provider has the following strengths', must be set against that which appears in the report under the heading 'Inspection judgments', and in particular under the heading of 'Effectiveness of leadership and management', (this is internal page five), the first bullet point:

> 'Until very recently company directors and senior leaders have presided over a sustained decline in performance across all programmes. A proportion of learners and apprentices achieving their qualifications and the quality of teaching, learning and assessment have all deteriorated significantly. Leaders and managers at all levels of the organisation failed to oversee and challenge the particularly poor provision delivered by apprenticeship sub contractors'.

65. I should record my judgment that based on the evidence before me, I cannot conclude that the way this issue of improvement since the appointment of a new team, was dealt with in the report, was either unfair or unbalanced or not based on a proper evidential base.

The Grounds of Claim

66. I turn to consider the grounds of claim. Three grounds are now pursued, originally pleaded as grounds three, four and five. I shall refer to them as grounds one, two and three.
67. Ground one goes to the issue of closed mind or pre-determination on the part of Mr Cocker. Grounds two and three go to allegations concerning the inadequacy or insufficiency of the inspection and its evidence base, (ground two) and the refusal of the defendant to undertake further inspection pursuant to the Incomplete Inspection Protocol (ground three). It is agreed that grounds two and three are interlinked. They stand or fall together.

Ground One

68. I turn to ground one. This was originally pleaded in the claim form in wide terms covering both actual bias as well as apprehended bias and appearance of pre-determination, namely, *'The defendant's apprehended and/or actual bias and/or appearance of pre-determination was procedurally unfair'*.
69. The matters relied on in the statement of grounds were short. They are contained in paragraphs 85 to 88 of the claim, (page 25 of the bundle):

> '85. The consistent picture presented by the witness Ms Wood is that the lead Inspector for apprenticeships expressed a decided view on the first day of inspection and maintained that view throughout and that he declined to accept evidence that ran contrary to that view.
> 86. It is submitted that this conduct amounts to apprehended and/or actual bias or

the appearance of procedural determination and this has led to procedural unfairness'.

70. Paragraph 87 refers to the observations on the appearance of pre-determination by Lord Justice Rix in the case of the R (*on the application of Lewis) -v- Redcar and Cleveland Borough Council* [2008] EWCA Civ 746.

    'The test would be whether there is an appearance of pre-determination in the sense of a mind closed to the… merits of the decision in question… (what needs to be shown is) something which goes to the appearance of pre-determined closed mind in the decision making itself'.

71. Then paragraph 88:

    'It is submitted there was a clear evidence of a pre-determined closed mind that infected the decision making in relation to the grading of apprenticeships which adversely affected the grading of outcomes for learners and thereby reduce the overall grade to one of 4 (inadequate)'.

72. I observe that within those paragraphs the only factual matter relied for this ground of claim, is that in paragraph 85, based on the evidence of Ms Wood, that the lead inspector for apprenticeship, that is Mr Cocker, expressed a decided view on the first day of the inspection and maintained that view throughout and declined to accept evidence that ran contrary to that view.
73. It is now accepted on behalf of the claimant that this ground is confined to a claim of apparent pre-determination and closed mind on the part of the lead inspector, Mr Cocker, on apprenticeships, which has adversely affected the overall decision making set out in the report. No claim of actual or indeed apprehended bias is pursued. This is a proper concession, there being no application for the attendance of Mr Cocker for cross-examination.
74. All this is said as being on the part of the lead inspector Mr Cocker. He is the person towards whom all the claimant's fire is directed. There is however no pleaded allegation that Mr Cocker exerted undue influence over the other inspectors.
75. What is now being alleged in support of "apparent pre-determination" goes beyond that which was set out in the claim form in the narrow paragraphs to which I have referred. This now emanates from the claimant's skeleton argument.
76. It is being submitted that the defendant's inspectors, prior to the substantive parts of the actual inspection taking place were, *'...pre-determined in their assessment of the claimant so as to be procedurally unfair'*, and secondly, *'alternatively if the defendant's inspectors were not… pre-determined in their assessment of the claimant prior to the substantive parts of this inspection taking place, they became biased and/or pre-determined in their assessment of the claimant so shortly thereafter as to still amount to a procedurally unfair process'*.
77. These are strong allegations to make against an expert regulator, so it is necessary to set out what is relied on in support. These are set out in summary form in the claimant's skeleton argument based on the evidence of Mr Palmer and Ms Wood. The matters so set out are said in the final paragraph of this skeleton under this head to, *'...all combine to give a picture of an inspector who had, for whatever reason, become fixated upon his initial impressions perhaps from the historic data and closed his mind'*.
78. On proper analysis, the matters so relied on in support fall into different categories.
79. First, reliance is placed on comments made by Mr Cocker at the feedback meeting held at

the end of the first day, which, according to the note made by Ms Wood included: *'Consistent picture – not receiving entitlement of off-the-job learning away from their work environment…, portfolio scrutiny - vast majority making slow progress for 50% behind where they should be…, too many learners do not receive planned learning - too little focus on development of new skills'*.

80. Mr Cocker had explained to Ms Wood (see paragraph five of her witness statement), that these views were based on conversations carried out by his inspectors with 25 learners. The court is invited to draw the inference that because of the very small sample, these were the concluded views of a closed or pre-determined mind speaking as he did of a "consistent picture and vast majority" based only on a sample size of approximately one percent. Reliance is put in this context on Ms Wood's further evidence that at this first day meeting, *"The lead inspector, Mr Searle, reminded Mr Cocker, 'not to use judgment statements at this stage'*."
81. I should interpose that Mr Cocker's evidence about what and why he said what he did at the first meeting, at the end of the first day, relied on his Evidence Form which is at page 1495 of the bundle, internally form PC8 as part of his exhibit PC1. That on its face stated, *'please note, this is not formal feedback, this is concerns that have been raised by inspectors as instructed by LI'* (lead inspector). '*Formal feedback will be provided 9am Tuesday'*. Under 'Context', it is stated, *'LI requested that we need to feed back any concerns to the nominee at the meeting to allow additional evidence to be provided'*.
82. Next, reliance is placed on a complaint presented through the evidence of Ms Wood and Mr Palmer as fact, that throughout the inspection period and during feedback sessions with the claimant, the defendant's inspectors or more particularly Mr Cocker, had unreasonably failed to take on board and act on information provided to them by the claimant but maintained views expressed on day one for which there was no evidential foundation. Particular examples relied on are expressions in these terms attributable to Mr Cocker made at feedback meetings, *'Apprentices not learning new skills'. 'There is too much assessment not enough learning'.* These are described in the claimant's skeleton argument as 'Ritual incantations made on every single day of the inspection according to the notes of Ms Wood on the feedback sessions'.
83. This reliance on what the claimant perceives to be the lack of any reasonable evidential foundation for the feedback comments made on each day of the inspection, and an alleged unwillingness of Mr Cocker to provide a proper investigation of the provision, is put forward as evidence in strong support of the submissions under this head, that is, of a pre-determined or closed mind or at least an appearance of a closed mind on the part of Mr Cocker. Included within those complaints is an allegation of a failure on the part of Mr Cocker to consider lengthy voice mails. This reliance, is part of an overlap with the matters raised under grounds two and three relating to an alleged inadequate evidence based for conclusions reached.
84. One reads the following in the skeleton argument:

> '6. Usefully set out in paragraph three of the claimant's letter to the defendant on 11 April 2017, apprentices were manifestly learning new skills. By their very nature many of the courses provided required untrained school levers to acquire skills they would not previously had, for example, dental nursing. There is no basis for the repeated suggestion that provision was deficient because apprentices were not learning new skills and the absence of any such reasonable basis is evidence of pre-determination on the part of the defendant's inspectors'.
>
> '7. Similarly, there is a lack of foundation for the conclusion expressed from the

> outset that apprentices received insufficient teaching, learning and assessment. Teaching and learning material was made available to the inspectors. Lengthy voice files stored in the E portfolio system recorded coaching sessions but the lack of any reference by Mr Cocker to those files beyond a bald statement that he '…listened some of these voice recordings', and a later single mention of voice clips, strongly suggest that he did not or could not access the correct material'

85. Any assessment of the validity of these criticisms has have to have regard to that which Mr Cocker states in his written evidence on these matters.
86. Paragraph 7 of the skeleton argument relies on paragraphs 38 and 64 of Mr Cocker's witness statement. These are in terms, which in my judgment do not merit the strong condemnation made in the skeleton argument. Thus paragraph 38: (this is a reference to the third day of the inspection):

> 'In the course of that meeting I advised that the majority of the inspector feedback was that the learners were not developing new skills. I asked how they monitored skills progression and they said they referred to voice recordings and detailed this in the progress review. I later listened some of these voice recordings and scrutinised paper records (as addressed below). I summarised this meeting as, 'a positive while challenging meeting with a group of senior managers of the organisation'. It ended with me advising that the Nominee could decide the best view of my time to see the evidence she wanted me to provide';

and paragraph 64 under the heading, 'The conclusions I reached':

> 'Over the course of the four-day inspection I had spoken to learners myself. I had spoken to and read the feedback forms from my team in the field who were visiting work places and meeting with apprentices and employers. I had conducted reviews of learning and teaching materials which have shown a focus on assessment not learning. I had spoken with managers of Learn Direct and I had reviewed E portfolios of learners including listening to voice clips on their files'.

87. Finally, reliance is placed on particular comments, described as 'complaints', made by Mr Cocker in the course of his witness statement as being consistent *'...with a closed mind that was intent on taking the worst view of the claimant and coming to a pre-determined negative outcome'*.
88. These particular comments were identified as follows:
89. First paragraph 21 of Mr Cocker's witness statement where he refers to his having on the first day 'held a meeting with two internal apprentices at Learn Direct', after which he, concluded that the apprentices did not have an appropriate understanding of the progress that they were making on their apprenticeships and indeed both were making slow progress'. He refers to his Evidence Form at page 1492 of the bundle. The point being made on behalf of the claimant is that this was an unjustified criticism of the claimant, because when one looks at the detail in that Evidence Form, a reference is made to one of the two apprentices *'...not progressing very well on qualification due to jury service'.* I am bound to say that this particular matter is a thin piece of evidence to support the strong allegation of a closed mind on the part of Mr Cocker from the very beginning or very soon thereafter.
90. I do not set out the entirety of the applicable Evidence Form on page 1492 but its entirety is critical to any assessment of the criticism now being made. The focus is said to be meeting with two internal apprentices at LD and the context is, *'Meeting to discuss the progress that two x apprentices are making on their qualifications and the support they received'*. The

evidence set out is a lot more detailed than simply "not progressing very well on qualification due to jury service". The overall evaluation is *'Apprentices do not have an appropriate understanding of the progress they are making on their apprenticeship. Both learners are making slow progress on their apprenticeship. The progress on their qualification is highlighted by a star on PC5(A)…* (a reference back to an earlier Evidence Form of Mr Cocker).'

91. Then reliance is placed on paragraph 60 of Mr Cocker's witness statement, which is said to portray an assumption that he was unable to assess the claimant's digital system at 11pm one night because there was a deliberate attempt by the claimant to lock him out. It is necessary to set out the entirety of that paragraph against whether this submission must be assessed. Paragraph 60 reads as follows:

> 'Learn Direct has also suggested that I had problems or misunderstood their E portfolio system. I did experience difficulty accessing the E portfolio system on one occasion. On 21 March at 11pm, I tried to access the system to do some more portfolio scrutiny and despite entering the log-in details that I had been using for the two days of inspection so far, I was denied access to the relevant directory, (Evidence form PC/14). I was concerned that I may have been prevented from having access intentionally to inhibit my ability to scrutinise more of the evidence. I flagged that as a concern the following day. However, when I attempted to log in at 6.30am on 22 March when I woke up, I was able to enter the system and so the issue was very temporary and did not impede my ability to conduct the inspection'.

92. Finally, reliance is placed on paragraph 55 of Mr Cocker's witness statement which is within a number of paragraphs 54-56 under the heading *'whether we saw a sufficient amount of provision'.*
93. Paragraph 55 refers to his overall evaluation in which he states:

> 'The Nominee was attempting to manage where inspection inspectors were visiting throughout the inspection. We were only provided with a possible 97 visits throughout the country on the first day of the inspection. We observed 35 out of 97 equating to a 37% sample. I feel this was appropriate. To mitigate the lack of learning taking place throughout inspection week and the significant distance between the visits, on average two hours' drive, the team used alternative forms of evidence to contribute to the evidence base. This included portfolio scrutiny and competence based interviews. Much of the portfolio scrutiny was completed with managers at the provider who agreed with our findings throughout the inspection.… Eventually additional visits were provided later on in the inspection but without addresses and postcodes which limited our ability to attend these sessions. This was a strategy used by the provider to limit our evidence base'.

94. That overall evaluation comes from that which I have already set out in this judgment from the Evidence Form PC26 relating to the first day inspection.
95. It is said on behalf of the claimant, that the statement within paragraph 55 that the difficulties in arranging observations for inspection *'...was a strategy used by the provider to limit our evidence base'*, was, like the comment in paragraph 60 that there had been a "deliberate attempt to lock him out", an extraordinary allegation casting serious doubt on Mr Cocker's partiality.

Conclusion on Ground One

96. I turn to my conclusion on this head of claim. I reject the matters raised as sufficient to make out a case of appearance of pre-determination. My reasoning is as follows.
97. First, I turn to the law and the high threshold test for establishing pre-determination. I was referred to a number of authorities on the test to be applied in this context. *R (on the application of Lewis) -v- Redcar & Cleveland Borough Council* [2008] EWCA Civ 746. *Flaherty -v- National Greyhound Racing Club* [2005] EWCA Civ 117, *R (on the application of Fraser and Another) -v- National Institute for Health* [2009] EWHC 452 (Admin). *Virdi -v- The Law Society (Solicitors Disciplinary Tribunal intervening*) [2010] EWCA Civ 100, [2010] WLR 2840.
98. What emerges from all these authorities is that apparent pre-determination arises where a fair minded and informed observer, knowing the facts, would think there is a real possibility that the decision maker had pre-determined the matter to be decided. (See again the observations already referred to in the claim form, of Rix LJ in *Lewis* at paragraphs 96 and 97).
99. Following the guidance given in *Flaherty*, (see Scott-Baker LJ paragraph 27), this test requires the court to conduct a two-stage process. First, the court must with some precision ascertain all the circumstances which have a bearing on the suggestion that the decision maker was biased. Secondly, the court must then consider whether those circumstances would lead a fair minded and informed observer to conclude there was a real possibility that the decision maker had pre-determined the decision.
100. What further emerges are the following principles:
    i) the importance of appearance is more limited in the context of administrative decision making than in the context of judicial decision makers. For this proposition, which I accept, I was taken to Pill LJ in *Lewis* at paragraph 71.
    ii) the threshold for establishing pre-determination is a high one. I was taken to Longmore's LJ observation at paragraph 109 in *Lewis* that pre-determination was '…an extremely difficult test to satisfy'.
    iii) evidence that an administrative decision maker has expressed a prior view will not in itself be sufficient. The burden on the claimant is to show evidence of pre-determination, that is, a closed mind at an early stage (see Simon J at *Fraser* at paragraph 50).
    iv) the evidence of the decision maker as to what was in his mind is relevant to the court's considerations under this head, though the weight to be attached to such evidence must be a matter for the court and cannot be determinative (see Pill LJ, for example, in *Lewis* at paragraph 66).
101. I find it impossible to find, on the evidence before me, that this high threshold test has been satisfied.
102. One of the problems with the claimant's submissions is its reliance on the written evidence of Mr Palmer and Ms Wood to support many of the propositions put forward, but the court has to set against this, the written evidence of Mr Cocker and indeed Mr Searle. As already observed, there has been no application to cross-examine the defendant's witnesses. In these circumstances, where there is a conflict between the respective evidence on matters of fact, as I have already explained, the court is bound to accept that of the defendant's witnesses, in this case that of Mr Cocker.
103. Mr Cocker not only denies that he had a closed mind as alleged and asserts that he had at all times an open mind, but both in his original and his later witness statements, gives an explanation for matters relied on by the claimants, which in my judgment, goes to demonstrate that any perception of pre-determination to be unfounded.
104. His explanations do undermine the allegations of pre-determination or closed mind. I do not

give particular weight to his assertions of open mind. They are susceptible to characterisation as self-serving statements. His explanations however, in my judgment, must be given proper weight (on this approach see Stanley Burnton LJ in *Virdi* at paragraph 44).

105. In respect of the allegations of unjustified adverse comments demonstrating partiality, made in the skeleton argument, to which I have already referred, Mr Cocker in his second witness statement gives theses explanations:

> '1. This statement is made in response to the claimant's skeleton argument which raises for the first time the allegation that two comments made in my inspection notes cast serious doubts on my impartially'.
>
> '2. As noted in my first witness statement I remained open minded throughout the four days of the inspection. This was and is a true reflection of my approach. I make the following initial comments in light of the further allegations raised and purely for the avoidance of doubt'.
>
> '3. As to paragraph 10, the comment recorded on the evidence form PC14 was an accurate reflection of what had occurred on the evening of 21 March 2017. See also my first witness at paragraph 60. I had a concern that I may have been restricted from accessing the system as I had used the same login details as I had on the first two days of the inspection. This concern was informed at least in part by the continued difficulties identified in the first statement and further discussed at paragraphs four to five below. The concern was dispelled on the morning of 22 March 2017 when I gained access to the system and I had no further problems throughout the inspection'.
>
> '4. As to paragraph 11, this comment must be viewed in the context of the difficulties which had been experienced by our inspectors throughout the inspection. These are discussed at paragraphs 29 and 48 to 50 in my first witness statement and are supported by the underlying contemporaneous documents. See, for example, page 980 (evidence form CS30), 1144 (evidence form SW11a), 1195 (evidence form SW35/35A), 1495 (evidence form PC8), 1505 (evidence form PC16). 1591 (summary inspection form NB2A), 1594 (evidence form NB1), 1611 (evidence form MB18)'.
>
> '5. In my view, this was either a deliberate strategy to limit our, Ofsted's ability to gain inspection evidence or the organisation was not sufficiently well organised to provide us basic information on planned teaching and learning activities that were taking place, which in my professional view cast doubt on managers and leaders' competence. My ultimate conclusion supported by others on the inspection team, was that these difficulties did constitute evidence of poor management. It is not possible to know for sure if there had also been a deliberate strategy of limiting our direct contact with learners'.
>
> '6. Notwithstanding the difficulties encountered, I maintained an open mind throughout the inspection. I used my professional judgment to arrive at a final proposed grade and this was communicated at the grading meeting and agreed by all the inspection team at this meeting. My judgments were fair, balanced and based on the evidence that all inspectors collected throughout the course of the

inspection'.

106. Further, although this is refuted by Ms Wood, Mr Cocker in his first witness statement, gives evidence of Ms Wood, on the last day of the inspection, acknowledging deficits in provision. This is set out in paragraph 47 of his witness statement where he says that Ms Wood having regard to the spreadsheet produced by her, had accepted that not enough apprentices received their off-the-job learning entitlement.
107. Further, as regards relevant facts and circumstances on this issue, I was taken by Ms Hannet through the exhibited Evidence Forms material which undoubtedly, in my judgment, demonstrate that the conclusions reached by Mr Cocker, and indeed by Mr Searle, as overall lead, on a number of concerns relating to the claimant's apprenticeship provision, was based on a considered assessment of the evidence emerging in the inspection and discussed at meetings with the claimant's officers, and was not arrived at by reason of any sort of pre determination.
108. These particular concerns related to three matters which are reflected in the report itself, namely, i) a failure to ensure apprentices received their full entitlement to off-the-job learning; ii) a like failure to ensure apprentices learned new skills from the claimant provider, not just new skills through their being on a new type of employment such as that of a dental nurse, but as added value from the claimant's input; iii) a failure on the part of the claimant to establish the starting points for apprentices and in consequence a failure properly to monitor and understand rate of progression.
109. As to i), I was taken, for example, to the evidence of 23 March, day four, at tab G 1512. This was an Evidenced Based Review, a 'Keep In Touch Meeting' with the Nominee and the National Operations Director. It records Ms Wood's own assessment that only 50% of apprentices were getting their entitlement. It records that at 7.30am that day Ms Wood was still trying to pull material together. There is a reference at pages 1517 and 1519 to a grid provided by Ms Wood as regards off-the-job learning. On the analysis of the figures produced by the claimant, Mr Cocker's conclusion was that only 59% of the apprentices were receiving their full entitlement.
110. The overall conclusion was that too many apprentices did not receive off-the-job entitlement on the provider's own figures. The defendant relies on this again in relation to the second and third grounds of claim. It was said by Ms Hannet, that whatever the sample size of the defendant's inspection, this was a conclusion based on the provider's own figures although it is further said that this was all confirmed by inspectors on the ground.
111. As to concern ii), examples suggesting no new skills were being provided by dint of the provision of the claimant, were identified in various parts of the Evidence Form material. I was taken for example, to the Evidence Form of Linda Bourne at 1527 and that of Mr Malcolm Bruce at 1605. Any fair analysis of Mr Bruce's telephone interview with a learner indicates a balanced, 'plus and minus' assessment, but his overall evaluation was *'learner has difficulty evidencing new working skills which they are developing on the programme'.* Similar examples of like evidence are to be found in the bundle at the Forms at 1601, 1607, 1609, 1613 and 1614, 1617.
112. As to the third concern, failing to identify apprentice starting points, there was existing data, 2015 to 2016. There was nothing published for 2016-17. Understandably Ofsted were interested in what progress had been made since 2015/16 and any trajectory outcomes for the current academic year. Were they going up or down or standing still? The issue was how the claimant was monitoring the progress of the apprentices.
113. I was taken to the record of meetings on day two and day three. The material is in the bundle at 1498 to 1508 involving Mr Cocker and, amongst others, the claimant's National

Operations Manager and the Apprentice Manager. At, for example, 1499, the Apprentice Manager is reported as agreeing that there was no available evidence for the learners concerned to demonstrate the starting points for progress in monitoring. At 1501, the National Operations Manager is recorded as saying he was 'shocked' at what was being revealed on this issue and that it was not good enough.

114. I agree with Ms Hannet's submission that what she described as a trawl through the meetings with leading senior officers, supports the defendant's conclusions on three matters. First, there was complete confusion within the claimant on how data progress was recorded; Secondly, there was an inability to demonstrate how progress was monitored; and thirdly, the claimant's forecasts for outcomes for 2016 and 2017 were insecure because they were based on an inaccurate analysis of what progress had been made.

115. This court, I should emphasise, is not making its own assessment of the claimant's provision. What it is looking to is whether the material exhibited in the evidence supports the proposition that conclusions were being reached without any evidential base and were simply the product of a closed mind. In my judgment, no material has been shown to me which effectively demonstrates that.

116. The above are just examples of circumstances which would be relevant to the thinking of the fair-minded observer on whether there was a real possibility of pre-determination on the part of the decision maker. These examples undoubtedly tend to militate against any such conclusion. Ultimately, however, as already set out, it has been necessary for the court to undertake the two stage test, namely identify all the circumstances which are relevant, then at stage two, consider whether those circumstances would lead a fair-minded and informed observer to such a conclusion.

117. I have undertaken this test and not simply in relation to the matters to which I have already referred. For present purposes, I can do no better than to record, having reviewed the defendant's evidence as well as the claimant's, that I accept the submissions of the defendant in its skeleton argument on both stages of the test.

118. As to the relevant circumstances these are set out in the defendant's skeleton at paragraphs 47 to 52:

> Paragraph 48 goes to the defendant's policy to discuss emerging findings with the Nominee in order that the provider has an opportunity to address any concerns raised.
>
> Paragraph 49 goes to the context from which the allegation of predetermination stems which is the feedback meeting held on the 20 March 2017. It sets out the evidence about that meeting. At the request of Ms Wood, the defendant facilitated and informed the feedback meeting on the afternoon of 20 March to allow feed back to the provider prior to the formal feedback meeting on the morning of the 21st. Ms Wood, '…wanted to hear about any issues or problems at the end of the day so that she could review and respond before the start of the following day's inspection'.
>
> Paragraph 50 goes to the circumstance that nothing was said by any member of the inspection which went beyond the bounds of the defendant's policy communicating emerging conclusions. I do not set out in full all the matters set out in that paragraph in support of that proposition. They are detailed in sub-paragraphs one to four. Suffice it to say I have looked at all those matters and the evidence behind it and they are matters upon which the defendant is entitled to rely on.

Paragraph 51 goes to the claimant having been given ample opportunity throughout the inspection to present relevant evidence, and again the evidence in support is set out in sub-paragraphs there.

119. I observe again that insofar as any evidence of fact is in conflict with the evidence put forward by either Ms Wood or Mr Palmer, for the reasons I have already given, the court is bound to accept the evidence of the defendant. I do not set out the entirety of the evidence relied on, but I record that I have looked at the sources of the material relied on for the propositions set out in this paragraph. In my judgment, the evidence supports the three propositions; i), that the defendant repeatedly invited the claimant to provide further evidence; ii), the defendant offered the claimant opportunities to pick learners for the inspectors to review and iii), the inspectors provided the claimant with further time to adduce additional evidence on the final day.
120. The fifth circumstance set out by the defendant in, is that the inspection team considered all evidence presented by the claimants. There is a forward reference at this point in the skeleton argument to what is set out later in identifying the sources of the evidence relied on for that circumstance. Again I have looked at this evidence. Again my conclusion is that this is a circumstance supported by the evidence.
121. Then, when one reaches the second stage, namely, whether the relevant circumstances would lead a fair-minded and informed observer to conclude there was a real possibility that the decision maker had pre-determined its decision, my judgment is clear: on the basis of these relevant circumstances the answer has to be 'No'. In my judgment, the high threshold test has not been made out.
122. I take on board not only the circumstances I have identified so far but the evidence of Mr Cocker at paragraph six of his first witness statement where he sets out that his initial research showed a negative picture of the claimant's provision but, *'...since it was for the previous academic year it was possible that improvements had been made and that outcomes and quality in this academic year would be better'.*
123. The fair minded and informed observer could not in my judgment, conclude there was a real possibility here that the decision maker pre-determined the decision.
124. Before I leave this ground, I have to record the following. What I have said so far is in effect that a fair-minded informed observer could not conclude that there was a real possibility that Mr Cocker had pre-determined the decision but of course, as I have already indicated, the claimant has to go further. The claimant has to show that whatever the position of Mr Cocker, there was, on the basis of the relevant circumstances, a real possibility which a fair-minded and informed observer could conclude existed, that the entire decision maker, looked at as a totality, had pre-determined the decisions in the Report. There is no evidence of that whatsoever. Had I been in a position, which I am not, to say that the claimant had made out apparent pre-determination on the part of Mr Cocker, there is no material before me to support the proposition that his judgments had so tainted the overall judgments, in particular of the lead inspector, so as to condemn the Report as being based on pre-determination. On this basis, the first ground of challenge must fail.

Grounds 2 + 3

125. I turn to the second and third grounds. It is pleaded as regards the first of the grounds, as: *'The defendant behaved illegally in failing to take account of relevant considerations in conducting the inspection and drafting the report'*, and as regards the interlinked further ground, *'that the defendant's refusal to apply its Incomplete Inspection Protocol was unreasonable'.*

126. The matters relied on are in effect matters said to demonstrate the defendant's failure to receive relevant evidence, the failure to meet with an adequate sample of learners in person, and a failure to consider audio files and hard copy files. Mr Hayton relied on a number of matters of this nature which are set out in his skeleton argument at paragraphs 17 to 29.
127. Although Mr Hayton relied on all those matters, his strong submission centred on what he described as the meagre sample size used as an evidence base, both in relation to numbers and its quality given the different types of apprenticeship learners. He did so by reference to Mr Cocker's evidence and his particular grid, at page 1571 and that of Mr Hailstone's Schedule, to which I have already referred to, showing types of inspection activity undertaken by inspectors in relation to apprenticeships.
128. Paragraph 27 of the claimant's skeleton, sets out the thrust of this submission;

> 'Of the 756 visits offered, Ofsted attended 46… this amounted to contact with 0.2% of the apprentices… Mr Cocker said his team had completed an equal number of observations, portfolios, scrutiny, telephone interviews… This suggested over four days a team of inspectors observed 46 meetings with apprentices, reviewed material held on each for 46 apprentices and spoke to 46 apprentices by telephone. The total number of apprentices reviewed in this way would be (assuming there was no overlap), 138 representing 0.6% of the apprentices. In fact, Mr Cocker gives a lower number - 109 activities; comprising observations, portfolio scrutiny and telephone interviews. This is an insufficient dip sample, inadequate for the purpose of inferring wider trends and it led to an unreasonable conclusion'.

129. Although no expert evidence was called on behalf of the claimant to counter the evidence of the expert regulator, the defendant in this case, Mr Hayton submitted that the figures to which I have just referred to, and referred to earlier when setting out the content of the two grids at 1571 and in Mr Hailstone's Schedule, *"speak for themselves"*. For example, he said there was only one scrutiny of a single apprentice at intermediate level in relation to some nearly 5,000 apprenticeships on health and social care. This was the equivalent, he suggested, of plucking just one child out of a school class for a year to determine overall educational progress in a given school.
130. The simplicity of this argument was attractive but I cannot accept it.
131. It is agreed that properly analysed the legal complaint here on the part of the claimant is a failure to comply with the duty of enquiry encapsulated by Lord Diplock in the *Secretary of State for Education -v- Tameside MBC* [1977] Appeal Cases 1014 at 1065. Lord Diplock's observations begin at 1064 at letter H:

> 'It was for the Secretary of State to decide that, it is not for any court of law to substitute its own opinion for his, but it is for a court of law to determine whether it has been established that in reaching his decision…the council, he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his considerations matters that were irrelevant to what he had to consider. (See associated *Provincial Picture Houses Limited -v- Wednesbury Corporation* [1948] 1KB 223 at Lord Green Master of the Rolls at page 229)'.

132. Then Lord Diplock encapsulates the principle in this way:

> 'Or put more compendiously, the question for the court is did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?'

133. I agree with Ms Hannet's submission that the applicable principles were summarised by the Divisional Court in the Richard III Plantagenet case, that is *R (Plantagenet Alliance Limited) -v- the Secretary of State for Justice* [2014] EWHC 1662. At paragraph 100, the applicable principles were set out in these terms:

> 'One, the obligation upon the decision maker is only to take such steps as to inform himself as are reasonable. Two, subject to a Wednesbury challenge it is for the public body and not the court to decide upon the manner and intensity of inquiries to be undertaken… The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of inquiries made that it possessed the information necessary for its decision. Four, the court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable counsel possessed of that material could suppose that the inquiries they had made were sufficient…'.

134. Essentially, this court has to apply a rationality test. In effect, could a rational decision maker in the statutory context take this decision without considering these particular facts or factors? This was the formulation of the Divisional Court in *Plantagenet* at paragraph 139.

135. I agree that in applying these principles to an expert regulator the rationality test is particularly high and the court has limited scope for intervention. I was referred, for that proposition, to Mr Justice Moses at paragraphs 27 to 34 in the *R (on the application of) -v- Rail Regulator & Anor* [2003] EWHC 2607 (Admin).

136. Having reviewed the matters relied under this head, in my judgment, none of these matters, not even the complaint as to sample size, go anywhere near to enabling this court to say that no rational decision maker could have made the decision it did on the evidence before it. This was the hurdle which Mr Hayton, on behalf of the claimant, sought to overcome when he said at paragraph 17 in the Skeleton Argument:

> 'The defendant failed to take reasonable steps to acquaint itself with the relevant information to enable it properly to report on the claimant's provision. No reasonable regulatory body would have been satisfied with the information before the defendant's inspectors in this instance by the time of writing the report into the claimant's activities'.

137. I take on board all the matters relied on by the defendant in its skeleton argument responding to the claimant's attack on the rationality of its decision, under the three sub-heads of complaint identified: the failure to receive relevant evidence, the failure to meet with an adequate sample size of learners; the failure to consider the audio files and hard copy learner files for an adequate sample of apprentices.

138. These are set out at paragraphs 66 through to 90 of the defendant's skeleton argument. Suffice it to say that, I have looked at the evidence underlying the propositions made in those paragraphs and in my judgment, the evidence is before the court to justify the submissions made.

139. I refer in particular to what is said at paragraph 71 and 72 of that the skeleton argument, under the heading 'Failure to meet with an adequate sample size of learners':

> '71. Given the size of the claimant's provision it was necessary to inspect a sample of the learning provided. In the inspection of any provision however large or small, the defendant is necessarily only ever going to inspect a sample of the learning provided. As in all inspections therefore, the defendant had to make a

judgment as to how many apprenticeships if inspected would provide a suitable sample size. That is not merely a numerical judgment but one that requires consideration of the subject area and of the level of the apprenticeship. Further, it is an expert judgment taken by an expert regulator.

72. The test modified accordingly from that set out in *Plantagenet Alliance*, is whether a rational decision maker in this statutory context could take this decision on the evidence or sample size available to it. The court should apply this test with a high level of deference to an expert regulator.'

140. In my judgment, both those paragraphs set out the correct approach which this court has to adopt.
141. Ms Hannet in the skeleton argument at paragraph 72 sets out seven reasons to support the rationality of the decision.
142. The seven reasons as far as headlines goes are these:
    i) the inspection team carefully ensured their sample size for apprenticeship learners was appropriate having regard to the range of subject and geographical areas covered by the claimant's apprenticeship operations.
    ii) the inspection team concluded in its professional judgment there was a reasonable spread of sources of information as between in-person meetings, telephone interviews and portfolio reviews. The 109 inspection activities (referred to by Mr Cocker), consist of 24 portfolio scrutinised, 39 observations and 46 competency based telephone interviews.
    iii) from these sources the inspection team obtained a remarkably consistent picture of the weaknesses in the claimant's apprenticeship provision specifically; (i), a lack of off-the-job learning, (ii), apprentices making slow or no progress and/or not learning new skills and (iii), a failure to monitor progress.
    iv) the picture obtained by the inspectors accorded with the available objective data and two acknowledgments made by the claimant's own representatives. The objective data referred to was that published performance data for 2015/16, to which I have already referred, and Mr Searle's analysis of it. Also relied on is that Skills Funding Agency notice of Serious Breach of 14 March 2017, to which I have already referred. As regards acknowledgments made by the claimant's representatives reliance is placed on the evidence that (i), the claimant accepted its achievement rates had declined since the last Ofsted inspection, (ii), on the claimant's own figures around one third of apprentices were not receiving their entitlement to off-the-job learning, and (iii), members of the claimant's senior team accepted they were not adequately monitoring progress. References are made to meetings to which I have already referred.
    v) The fifth matter relied on is that the proposition the inspection team had formed judgments from a sufficient base, was confirmed by the defendant's own EBR.
    vi) Sixthly, the rejection of the claimant's complaint, including the complaint about sample size, after an investigation by a senior HMI from a different region, again a matter to which I have already referred;
    vii) the seventh reason is that the inspection team, the EBR and the complaint response concluded in their expert judgment that the evidence base was sufficient notwithstanding problems encountered in the provision of information from the claimant.

143. All those reasons are reasons in my judgment, which are well made out on the material before me, much of which I have already referred to in this judgment.
144. Overall, I have no proper basis, in my judgment, upon which I could interfere with the expert judgment made by this expert regulator as to the sufficiency of the evidence base upon which the inspection's findings and conclusions were based. The figures in my judgment, do not speak for themselves.
145. I have taken on board, in particular, that which has already been identified, namely, there was a quality assurance carried out during the course of the inspection by Mr Hailstone and a post inspection review of the evidence base carried by Mr Hunsley. It is impossible for me to conclude on the material before me that no reasonable regulatory body would or could have been satisfied with the information before the defendant's inspectors in this instance by the time of the writing of the report into the claimant activities. It follows that this ground and the linked ground three, must fail.
146. For all these reasons this claim must fail. The claim is dismissed.

End of Judgment

Transcript from a recording by Ubiqus

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(This transcript has been approved by the judge)