OUTER HOUSE, COURT OF SESSION

[2025] CSOH 61

CA41/24

OPINION OF LORD BRAID

In the cause

RUBY PROPERTIES (SCOTLAND) LIMITED, formerly known as
ARB AVIATION LIMITED

Pursuer

against

(FIRST) JAMES ALISTAIR WATT and (SECOND) KATHLEEN MAY WATT

Defenders

Pursuer: Jones, KC (sol adv), Reekie, (sol adv); Brodies LLP
Defenders: Upton; Gilson Gray LLP

8 July 2025

Introduction

[1] On 14 December 2021 the parties entered into a Share Purchase Agreement (SPA) whereby the defenders agreed to sell to the pursuer their shareholdings in the company Thistle Aviation Services Ltd (TASL). That company was in turn the shareholder in Tayside Aviation Ltd (TAL), which operated a flight training school and aviation services business out of Dundee Airport. Among its activities was an honours degree course run in collaboration with Middlesex University. TAL's terms and conditions required payment of students' fees in advance, and it is that which has given rise to the present dispute.

[2] The SPA contained a number of warranties pertaining to the accounts of both TASL and TAL (and another subsidiary of TASL, not relevant for present purposes), which the pursuer contends have been breached. In particular, the dispute centres on the accounting treatment in TAL's accounts of the tuition fees paid in advance by students. Stated shortly, the pursuer contends that such fees should have been deferred, and shown in the accounts as a liability, until such time as the income had been earned by the provision of flying hours; but instead were prematurely treated as income, resulting in the accounts giving an inflated view of TAL's financial position, all in breach of various warranties pertaining to the accounts. The pursuer avers it has suffered a loss of just under £910,000 as a result of those alleged breaches of warranty.

[3] Following sundry procedure on the commercial roll, in the course of which, as is standard practice, a timetable was fixed, setting dates for, among other things, the lodging of witness statements and productions upon which the parties wished to rely, a proof restricted to the question of liability called before me.

The proof

[4] The following witnesses for the pursuer adopted witness statements which formed their evidence-in-chief: James Whitby, a flying instructor employed by TAL who spoke to a spreadsheet he had prepared which featured heavily in the evidence and indeed is the lynch-pin of the pursuer's case; Anthony Banks, the pursuer's director, chairman and sole shareholder; Jill Kerr, the Chief Financial Officer of ARB (Scotland) Holdings Ltd, another company owned by Mr Banks; Louise Byars, a director of ARB (Scotland) Holdings Ltd; and Fiona Goodfellow, who was previously employed by TAL as its Accounts Manager. Mr Whitby's evidence was extensively amplified in cross-examination, but none of the other

witnesses were cross-examined by the defenders. One expert witness was led by the pursuer, Gordon McCarlie, a Chartered Accountant, who spoke to three reports he had prepared, on which he was cross-examined. The defenders did not call any witnesses, although had lodged, in advance of the proof, an affidavit and supplementary affidavit by the second defender, a topic to which I will return.

[5] The proof was noteworthy in the following respects. First, the majority of the evidence for the pursuer (including Mr Whitby's spreadsheet) is objected to as inadmissible and was heard under reservation of its relevancy and competency. Second, the 2020 accounts which the pursuer contends were prepared in breach of warranties have not been produced. The pursuer did move to lodge them late shortly before the proof, considerably after the date by which, in terms of the issued timetable, they were due to be lodged. Since I was not satisfied that they could not, with reasonable diligence, have been lodged in time, I refused that motion, save that I allowed them to be lodged for the sole purpose of cross-examining the second defender. That turned out to be an unnecessary exception since, third, she did not give evidence (in fact, removing herself from the court, at around the same time as the pursuer was closing its case, presumably to ensure that she could not be called), resulting in an issue having arisen as to whether the pursuer is entitled to rely upon aspects of the second defender's affidavits. To the extent that the absence of the 2020 accounts from process creates a problem for the pursuer, that is a problem of its own making.

TAL's operations

[6] The following account is derived mainly from the evidence of Mr Whitby, whom I have accepted as both credible and reliable and whose factual evidence I accept as being

accurate (I will say more about his opinion evidence, and in particular the spreadsheet which he prepared, later); or is otherwise uncontroversial.

[7] TAL began offering its honours degree course to aviation students in 2015. It derived its income for the course in two ways: student income, paid by students to TAL; and degree income, paid by the University to TAL for each student. (No exception is taken to the manner in which degree income was recognised.) Students paid yearly in advance for the training they were to receive. The course was designed to be completed within 3 years but some students took longer to complete it, while others dropped out. The modules comprised within each year of the course included the following (with the *minimum* flying hours required to pass each module, if any, shown in brackets):

- Year 1 – ATPL (Airline Transport Pilot Licence).
- Year 2 – Return to Flying[1] (5 hours); Hours Building (100 hours); CPL(A) (Commercial Pilot Licence (Aeroplanes)) (26 hours and 20 minutes[2]); Flight Instructor Course (FIC) (30 hours).
- Year 3 – MEP (Multi Engine Pilot) (land) (6 hours); MEIR (Multi Engine and Instrument Rating) (18 hours); MCC (Multicrew Co-operation).

As can be seen, most of the modules involved flying time but some did not. The year 1 ATPL course was entirely classroom-based, and the MCC module in year 3 also involved no flying. However, that module involved 20 hours of simulator training, and the MEIR module also involved 30 hours of simulator training, in addition to 18 hours of flying time.

[1] This module was offered only from 2018

[2] Including taxi-ing. If the student had already undertaken the instrument rating course, only 15 flying hours were required.

[8] The modules listed above were those included by Mr Whitby in his spreadsheet, but, as he accepted in cross-examination, there was an additional module, Flight Instructor Standardisation, in which a student who was already qualified to act as a flight instructor, was trained in TAL's specific procedures for flight instruction.

[9] In addition to the flying time required of each student, Mr Whitby explained that some of the learning was classroom-based, TAL leasing a building at Dundee Airport which contained two large classrooms. Some of the modules included "quite a lot" of ground instruction. By way of example, there was a requirement of 25 hours ground instruction for the MCC module; the flight instructor module included 25 hours of face-to-face instruction and a further 100 hours of learning of technical knowledge, either face-to-face or accomplished by students on their own; the instrument rating course required 25 to 30 flights, each of which required a pre-brief and a debrief, carried out on the ground, in addition to which there was at least 50 hours of teaching. For most of the modules, the student had to prepare a report, which was reviewed by someone at TAL then sent to the university. All modules, other than hours-building, ended with an assessment or an exam.

The warranties

[10] Before setting out the warranties which the pursuer avers were breached, it is helpful to note the relevant definitions in the SPA. The "Accounts" are defined as being (for present purposes) TAL's accounts for the accounting period ending on 31 December 2020; while the "Previous Accounts" are the accounts in respect of each of the three accounting periods immediately preceding that accounting period, in other words, the accounts for the periods ending on 31 December in each of 2017, 2018 and 2019. The "Accounts Date" is 31 December

2020. The "Completion Accounts", in relation to TAL, are the statement of its financial position as at 13 December 2021.

[11] By clause 6.2 of the SPA, the defenders warranted that, except as disclosed, each warranty was true, accurate and not misleading as at the date of the SPA. Under clause 1, an item was disclosed if it was fairly and accurately disclosed (with sufficient details to allow the pursuer to reasonably assess the nature and scope of the matter disclosed) in the Disclosure Letter. The warranties which the pursuer avers have been breached are:

> "**15 Liabilities**
>
> 15.1 Neither the Company nor the Subsidiary [ie TAL] has any liabilities (including contingent liabilities) other than as disclosed in the Accounts or incurred in the ordinary and proper course of the Business since the Accounts Date;
>
> **18 Accounts**
>
> 18.1 The Accounts
> (a) show an accurate view of the state of affairs of the Company or the Subsidiary to which they relate as at the Accounts Date, and of its profit or loss and total comprehensive income for the accounting period ended on the Accounts Date;
> (b) have been properly prepared in accordance with FRS 102 including the provisions of the small entities regime under FRS 102 Section 1A, using appropriate accounting policies and estimation techniques as required by section 10 of FRS 102
> …
> (e) (save as the Accounts expressly disclose) have been prepared using the same accounting policies and estimation techniques as those adopted and applied in preparing the Previous Accounts.
>
> **20 Financial and other records**
>
> 20.1 All financial and other records of the Company and of the Subsidiary (Records):
> (a) have been properly prepared and maintained;
> (b) constitute an accurate record of all matters required by law to appear in them, and in the case of the accounting records, comply with the requirements of section 386 and section 388 of the CA 2006;
> (c) do not contain any material inaccuracies or discrepancies; and
> (d) are in the possession of the Company or the Subsidiary to which they relate."

[12] Pausing there, and by way of interjection, it is pertinent to note that warranties 15 and 18 apply *only* to the accounts to 31 December 2020. It is therefore nothing to the point whether any previous accounts had been prepared in accordance with FRS 102 or not (or, at any, rate, if they were not, that would not of itself constitute a breach of warranty). The only relevance of the Previous Accounts is, per warranty 18.1(e), that the 2020 accounts must, save insofar as those accounts expressly disclose, have been prepared using the same Accounting Policies and estimation techniques as those adopted and applied in preparing the Previous Accounts.

[13] Paragraphs 4 and 5 of schedule 9, which deal with the Completion Accounts, bear setting out in full (since paragraph 4(c) makes sense only in the context of the whole paragraph (references to the "Subsidiary" again being to TAL):

> **"4. Basis for preparing the Completion Accounts**
>
> The Completion Accounts shall be prepared on the following basis, and in the order of priority shown below:
>
> (a) applying the specific accounting principles, bases, conventions, rules and estimation techniques set out in paragraph 5 of this Schedule (Specific Policies);
>
> (b) to the extent not provided for by the Specific Policies, applying the same accounting standards, principles, policies and practices (with consistent classifications, judgements, valuation and estimation techniques) that were used in the preparation of the Accounts; and
>
> (c) to the extent not provided for by the Specific Policies or the matters referred to in paragraph 4(b) above, in accordance with FRS 102, together with all other generally accepted accounting principles, policies and practices applied in the UK and the applicable accounting requirements of the CA 2006, in each case as in force for the accounting period ending on the Accounts Date.
>
> **5. Specific Policies**
>
> There shall be included as an asset in the Completion Accounts any income of the Subsidiary received prior to Completion in respect of training which is part of university degree courses, whether or not such training has yet been provided by the Subsidiary as at Completion, and there shall be provided for as a creditor the

> proportion of that income which relates to such amount of the relevant training which is still to be provided by the Subsidiary as at Completion."

[14] The Disclosure Letter, signed by the defenders, dated 14 December 2021, provided, *inter alia*, that:

> "By way of general disclosure, the following matters are disclosed or deemed disclosed to [the pursuer] ...
> 4. All matters which would be apparent from an online search of the file of [TAL] at Companies House on the date falling two Business Days prior to the date of this Disclosure Letter".

The letter did not otherwise refer to the 2017, 2018 or 2019 accounts or to any change in accounting practice.

UK GAAP (Generally Accepted Accounting Practice) and FRS 102

[15] FRS 102, referred to in the foregoing warranties, was not produced, but as Mr McCarlie tells us, it considers the recognition of revenue in the UK and Republic of Ireland, in accordance with generally accepted accounting practice. The version which applied at the material time was published in March 2018. Section 23 of FRS 102 states that it applies to revenue arising from (among other things):

> "…
> (b) the rendering of services;"

It is not disputed that TAL was providing a service and that FRS 102 was applicable.

Paragraph 23.14 of FRS 102 states that:

> "When the outcome of a transaction involving the rendering of services can be estimated reliably, an entity shall recognise revenue associated with the transaction by reference to the stage of completion of the transaction at the end of the reporting period (sometimes referred to as the percentage of completion method)".

Paragraph 23.15 states:

> "When services are performed by an indeterminate number of acts over a specified period of time, an entity recognises revenue on a straight line basis over the specified

> period unless there is evidence that some other method better represents the stage of completion."

Paragraphs 23.21 to 23.27 provide guidance for applying the percentage of completion method. In particular, paragraph 23.22 states that:

> "An entity shall determine the stage of completion of a transaction or contract using the method that measures most reliably the work performed. Possible methods include:
>
> (a) the proportion that costs incurred for work performed to date bear to the estimated total costs. Costs incurred for work performed to date do not include costs relating to future activity, such as for materials or prepayments;
> (b) surveys of work performed; and
> (c) completion of a physical proportion of the contract work or the completion of a proportion of the service contract."

Pausing there, it should be observed that none of the suggested methods are prescriptive. The obligation on the entity is to adopt the method that measures most accurately the work performed. Further guidance is given in the Appendix to section 23, which provides examples of revenue recognition under the principles in that section. Example 19 (at paragraph 23A.23) specifically considers tuition fees and states that in this scenario "the seller recognises revenue over the period of instruction."

The accounts

[16] Although the Whitby spreadsheet goes all the way back to 2015, the only relevant accounts for the purposes of the SPA are those for the years ended 31 December 2017, 2018 and 2019 (ie, the "Previous Accounts"); the 2020 accounts; and the Completion Accounts. It is common ground that in 2019 a policy change was adopted by TAL in respect of the stage at which degree course income was recognised. The 2017 and 2018 accounts, as originally prepared, and lodged at Companies House, were prepared under the old policy. Amended accounts for the year ended 2018 were issued and lodged at Companies House in

November 2020. The pursuer avers in article 15 (and it appears not to be disputed) that this resulted in the 2018 comparatives for turnover and creditors being amended by £374,185, the turnover being decreased by that amount, while the accrued income asset was converted to a deferred income liability of £219,013. No amended 2017 accounts were lodged but the amended 2018 accounts disclosed amended figures for that year. The amended accounts also contained, under "Accounting Policies", the following policy which had not appeared in the unamended version:

> "Degree course income is recognised to the stage each student is on the course over a three year period. Middlesex University income is recognised following each claim submitted."

That policy also appears in the 2019 accounts. None of the accounts were spoken to by any witness, but by joint minute the parties agreed that the accounts for the years ended 2017 to 2019 inclusive (including both the unamended and the amended 2018 accounts) were what they bore to be.

The pursuer's case

[17] I now turn to consider what it is that the pursuer offers to prove. In article 12 of condescendence, in a section of the summons headed "Advance Payments by Students", the pursuer avers: "Effectively, students pre-paid for a certain number of training or flying hours in advance. They would then receive those training or flying hours over a period of time." As to how such advance payments should be treated in accounts, the pursuer avers in article 13:

> "Advance payments ... ought to be reflected in a company's balance sheet as deferred income. Only when the services in respect of the advanced payment are rendered (in this case, the actual provision of the relevant training or flying) should the income be deemed to be earned. At that point only, the income can be released to turnover in a

> profit and loss account. The recognition of income in advance of it being earned is contrary to UK Generally Accepted Accounting Practice."

[18] In article 14 the pursuer makes averments about the change in accounting policy:

> "During the course of 2019, the accounting policy adopted by the Group in respect of degree course income was amended. Prior to this all income was accounted for on the basis of when the student's course was supposed to run as opposed to when the student actually undertook the course. For example, if a student had been with the Group for 2 years but only paid for 1 year, a second year's income would be accrued, irrespective of whether the student had progressed sufficiently to complete year 1 and pay the subsequent fee. This resulted in income being accrued and shown as a debtor in financial years from December 2015 to December 2018."

In response to an averment in the defences that the 2019 policy change was reflected in the amended financial statements for the year ended 31 December 2018 which were issued on 20 November 2020, the pursuer goes on to aver, further on in article 14:

> "The accounts later lodged with Companies House do not expressly disclose any amendments to previous financial statements. Those accounts do not disclose what is said to have been amended. There is no explanation in the accounts as to what changes have been made or why they came about."

There then appear the averments in article 15 about the changes to the 2018 accounts, referred to above.

[19] In article 16 the pursuer avers that whilst the accounting policy utilised in the Accounts (ie the 2020 accounts) was consistent with that used in the 31 December 2019 accounts, it was not in accordance with that adopted in the accounts for the year ended 31 December 2017 and 2018, in breach of warranty 18.1(e). That averment is elaborated on in article 19 (albeit in a slightly contradictory fashion) where the pursuer avers that the Accounts were not prepared on the same basis as those for 2018 only.

[20] In answer 16, the defenders make reference to the Disclosure Letter. They go on to aver:

> "The amended accounts were filed at Companies House on 27 November 2020, and the Disclosure Letter was dated 14 December 2021. The contents of the original and amended accounts were accordingly apparent to the pursuer."

[21] In article 17, now in a section headed "Breaches of Contract", the pursuer avers:

> "The recognition of income in advance of it being earned is contrary to UK GAAP. Reference is made to articles 13 and 14 and the defenders' failure to meet the requirements of secondary legislation, FRS 102 and UK GAAP. By not correctly including all deferred income in the Accounts, the defenders breached Warranty 15.1. The incorrect recognition of deferred income also placed the defenders in breach of Warranty 18.1(a) and 18.1(b)".

[22] That is elaborated on in article 18, where the following is averred:

> "Under FRS102 revenue generated from the provision of services should be recognised '*when the outcome … can be estimated reliably … by reference to the stage of completion of the transaction at the end of the reporting period (sometimes referred to as the percentage of completion method)*'. With particular reference to tuition fees, part 23A.23 of the guidance to FRS102 requires that '*the seller recognises revenue over the period of instruction*'. The stage of completion should be determined by using the method that most reliably measures the work performed. In the case of TAL this would mean the various stages of the degree program and the number of flying hours undertaken. Therefore, by not fully recognising deferred income Aviation has not complied with the requirements of FRS102. The defenders were therefore in breach of Warranty 18.1(b)."

[23] Finally, in article 20, the pursuer makes reference to the Completion Accounts:

> "These issues were not disclosed by the defenders prior to the finalisation of the Completion Accounts. They have only been discovered by the pursuers thereafter. The Completion Accounts were prepared in breach of paragraphs 4(c) and 5 of Schedule 9. Consequent upon the said breaches the 'financial and other records' had not been 'properly prepared and maintained' and did not 'constitute an accurate record' and contained 'material inaccuracies or discrepancies' contrary to warranty 20.1"

Notwithstanding those averments, the solicitor advocate for the pursuer clarified at the conclusion of the proof that the pursuer does not seek to establish that the Completion Accounts breached paragraphs 4(c) or 5, (nor could it, in light of Mr McCarlie's evidence, and it is unclear why the averments in article 20 found their way into the pleadings).

The evidence

James Whitby - The Whitby spreadsheet

[24] Key to the pursuer's case was a spreadsheet prepared by Mr Whitby at the instigation of Jill Kerr, to clarify how many hours of flight lessons were being delivered to each student for each course and how much income was being realised in respect of these. The spreadsheet covers the first 13 courses run by TAL, from 1 January 2015 when the first course commenced, until course 13 commencing on 14 October 2020. Mr Whitby explained that the spreadsheet was in three parts. The left hand section shows, for each student enrolled on the course, details of the income paid by the student, and the degree income paid by the university, for each year of the course. Thus:

Course 1 01/01/2015

[student name]		£20,000	£15,000	£10,000	£45,000
Degree Income		£6,680	£6,680	£2,569	£15,929
Total					£60,929

In that example, the figures shown are respectively for the first, second and third years of the course, the top line showing the fees paid by the student, the bottom line the degree income received from the university, £20,000 and £6,680 respectively having been paid in year 1, £15,000 and £6,680 in year 2, and £10,000 and £2,569 in year 3.

[25] The middle section contains Mr Whitby's assessment of the course fee breakdown. It sets out the "modular price" for each module of the course, that is, as Mr Whitby explained it, the price (so far as he could recall) which would be charged for each module for a person walking in off the street. The course fee breakdown also shows how Mr Whitby allocated the fees the student paid for the course (a) to each module and (b) as between Tayside and degree income. Thus, for the student above, he arrived at the following:

	Y1	Y2				Y3		
	ATPL (A)	**Return to Flying**	**Hours Building**	**CPL(A)**	**FIC**	**MEP(land)**	**ME IR**	**MCC**
MODULAR PRICE roughly	£2,500	£875	£15,130	£6,300	£8,000	£2,790	£15,000	£2,000
	£2,500	£30,305				£19,790		
Tayside Income	£1,695	£875	£12,200	£5,300	£7,000	£2,680	£14,000	£1,250
Degree Income	£6,680	£1,670		£1,670	£3,340	£642	£642	£1,285
Total Income	£8,375	£14,745		£6,970	£10,340	£3,322	£14,642	£2,535

Each row is then totalled, arriving at the following totals

Modular price (roughly)	£52,595
Tayside income	£45,000
Degree income	£15,929
Total income	£60,929

[26] The purpose of this exercise, Mr Whitby explained, was to "match" the course fees to modules of corresponding value to show how, on his calculation, fee income should have been realised across the course. The final section of the spreadsheet was an attempt to show, for each calendar year, the value the student had received against the sum paid in that year, and to date. Again for the same student as above, looking only at the year 2015:

Paid this year	**This year ex VAT**
£34,000.00	£28,333.33
Paid to date	**Paid ex VAT**
£35,000.00	£29,166.67
Deliver to date	**Delivered ex VAT**
£1,695.00	£1,412.50
Paid - Justified	**Paid - Justified ex VAT**
£33,305.00	£27,754.17
Y1 & Y2 Paid - ATPL Passed	

This is intended to indicate that the student paid years 1 and 2 in advance (a deposit of £1,000 having been paid in 2014) but by the end of 2015, only the year 1 module, ATPL, had been delivered. This last part of the spreadsheet considered only Tayside income, not degree income.

[27] The thrust of Mr Whitby's evidence was that fees were being realised for flight lessons which had not yet been delivered, and that costs were often being incurred in a different period to the one in which the income was realised. (However, allocation of income according to costs incurred was not the method advocated by Mr McCarlie.) He explained that this could be seen most clearly in relation to year 1 students, who undertook no flying hours at all, instead doing a desk-based theory course (ATPL), which included 14 exams set by the CAA: that course was offered at around £4,000 on a modular basis. According to Mr Whitby, taking the example shown above at para [24], the entire £20,000 paid by that student in year 1 would have been released to TAL's profit and loss account in equal monthly amounts across the year, but by his analysis, it only cost £8,375, and so only that sum should have been released to profit and loss account.

Anthony Banks

[28] Mr Banks is the pursuer's director, chairman and sole shareholder. The majority of his evidence bore no relevance to the issues in dispute. Much of it was designed to denigrate the defenders. His witness statement contained several demonstrable errors. He said that Mr McCarlie was instructed to provide an independent forensic analysis, but in fact, Mr McCarlie provided an opinion based upon the analysis carried out by Mr Whitby. Further, his actual grievance, at paragraph 34 of his witness statement, appeared to be that TAL should have been putting the fees into an escrow account (which Mr McCarlie

confirmed was not so), which betrays a fundamental misunderstanding of FRS 102, and indeed, of the case which the pursuer is pursuing. I attach no weight to his evidence.

Jill Kerr

[29] Jill Kerr's evidence was that TAL's accounting policy had been to divide the total cost of the 3-year course by 36 and allocate the cost equally across the 36 months of the course, irrespective of when the cost was incurred. She referred to an accounting principle called matching which provides that in company accounts, income should be matched against related costs, and said that the effect of the company's policy had been that fees were taken before costs were incurred. She said that Mr Whitby's spreadsheet had been prepared under her direction, the purpose of it being to break down the costs of the course so that income could be allocated appropriately. As regards TAL's Accounting Policies, she spoke to an email from its accountants dated 29 March 2023, in which it had been stated that for the years ending 2016 to 2018, no income had been deferred, under explanation that it had been "prepaid based on policy in place at time". That was explained, in a further email of 30 March 2023, as meaning that "at that time, all monies were accounted for on an annual basis of when the course was supposed to run rather than where the student was on the course"; and that the policy was later recognised as inappropriate; further, that income was recognised although the monies had not necessarily been received. Ms Kerr also said that Mr McCarlie had been engaged to carry out a "forensic review." Ms Kerr's reference to fees being matched against costs undermines any value which her evidence might otherwise have had, as does her evidence that the cost was allocated evenly across 36 months, which may either be a reference to the "old" policy, or simply an error. While FRS 102 provides that that can be a method of allocating revenue, it is not the method advocated by

Mr McCarlie in the present case, and in any event, no evidence was led as to what each module cost. I therefore attach no weight to Ms Kerr's evidence, save that I do accept that TAL's policy changed in 2019.

Louise Byars

[30] Louise Byars gave evidence about various matters, most of it irrelevant to the issues in dispute, such as grievances about the Completion Accounts, and maintenance of the aircraft. Insofar as her evidence was relevant, it was hearsay, she having joined ARB Holdings only in 2022. I attach no weight to her evidence.

Fiona Goodfellow

[31] Fiona Goodfellow was appointed as TAL's accounts manager in April 2021. She criticised TAL's previous accountants for, among other things, the lack of monthly management accounts, another irrelevant matter. In her view, TAL's accounts and accounting systems were "a mess". Her evidence was that when a student had paid fees for a year, the accountants' approach had been to divide the fee income by 12 and release it to P&L in equal monthly instalments across the year. She said that the first problem with that was that each module had a different fee value. The second problem, particularly during Covid, was that students would sometimes not sit and complete the course within the year. Where students were paying a year's fee each year, some were paying fees for a year of the course that they were not in yet and TAL was releasing the income to P&L before the student was in that year of the course. She had assisted James Whitby in his compilation of the spreadsheet. Finally (and this observation applies equally to the evidence of Jill Kerr and Fiona Goodfellow), in criticising "the accounts" it was unclear which accounts were

being spoken of. It is nothing to the point whether the accounts for years ended 2015 to 2019 complied with FRS 102 or not, since those accounts were not warranted to be accurate.

Kathleen Watt's affidavits

[32] Although Kathleen Watt was not called as a witness, she swore two affidavits, both of which are in process, having been lodged by the defenders in accordance with the court's timetable. In the first, dated 14 March 2025, she said that in 2017 and 2018 the deferment of income was based on a percentage-completed method in each of the academic years and not by flying hours. Every student had to re-enrol on the degree course with the university each year to enable their student funding to "kick in". After working out the percentage completed**,** she would advise the company's accountants accordingly. She said, by way of example, that in year 1, which was mostly theory and included 14 exams, if a student had started in April and by the end of the accounting year in December had passed only 7 exams, she would advise that year 1 was 50% complete. Year 2 comprised four modules, each of which was a combination of flying, theory, personal assessment and portfolio submissions. Again, flying hours were not taken into account when working out the percentage completed for the academic year, rather it would be based on how they had progressed within each planned module. In 2019 TAL's accountants advised that there was a discrepancy caused by a book-keeping error, with the consequence that the 2018 accounts would have to be restated. They also advised that it would be easier all round if they divided each academic year by 12 and deferred income on a monthly basis. TAL agreed with that advice. In her second affidavit, also dated 14 March 2025, Mrs Watt said that that advice was adopted only for 2020 and later years.

Mr McCarlie

[33] Mr McCarlie spoke to three reports which he had prepared. Other than in relation to quantum (where reference is made to "the" report of Gordon McCarlie) none are referred to in the pleadings, far less incorporated. In his first report, dated 8 August 2023, Mr McCarlie records, at 2.1.9, that the pursuer had discovered issues in respect of the incorrect recognition of student fees; at 3.3.2 he states that although TAL's statutory financial statements and the Completion Accounts contained various amounts of deferred income, it had transpired that prior to completion not all income received in advance had been properly deferred, but instead had been included as income. In 3.3.3 he states that these errors only came to light post-completion, when certain students requested refunds of fees paid and a full review of the historic recognition of revenue was undertaken. I mention these passages to illustrate that Mr McCarlie himself was not tasked with independently verifying whether income had been properly deferred; rather, he took that as a given from what he had been told by the pursuer in then formulating a view as to whether that would have been a breach of warranty. As for the principle which should be applied, he states at 3.3.1 that payment of fees in advance should be included within the balance sheet as deferred income until the appropriate "training/flying hours" – I comment on his use of this phrase below – had been provided, and only then would the respective part of the income be deemed to be earned and releasable to profit and loss account as turnover. He goes on to say that the recognition of income in advance of it being earned is contrary to UK GAAP and refers to FRS 102, the material terms of which I have set out above; and that by not fully recognising deferred income, TAL had not complied with the requirements of FRS 102. In a later section of his report, when considering the losses sustained by the pursuer due to the perceived breach of warranty, Mr McCarlie makes plain that his calculations are based upon

the analysis in Mr Whitby's spreadsheet but that he has not carried out any independent verification of that analysis.

[34] In his supplementary report, dated 13 December 2024, Mr McCarlie again took as a given that there had been issues in respect of the incorrect recognition of student fees within TAL's financial statements; and that fees paid in advance should have been included within the balance sheet as deferred income until TAL had provided the appropriate training/flying hours (paragraphs 2.1.1 and 2.1.2). Although TAL's statutory financial statements and the Completion Accounts contained various amounts of deferred income, "it had transpired" that not all income received in advance prior to completion had been properly deferred but had instead been included as income: in other words, he was reporting what he had been told, rather than expressing his own opinion. Further, since we are not in this action concerned with the Completion Accounts, it is strictly irrelevant to consider what was or was not done prior to completion.

[35] The second matter considered by Mr McCarlie in his supplementary report was the amended accounts for the year ended 31 December 2018. He noted that a detailed review of the financial statements indicated that trade creditors, deferred income and retained earnings were restated in respect of the year to 31 December 2017 and that amendments were made to various figures for the year to 31 December 2018, including tangible assets, trade debtors, prepayments, deferred income, taxation, deferred tax and retained earnings. He was asked to express his opinion on whether the information in the amended accounts provided an explanation in respect of the changes and whether it accorded with any legal and UK GAAP requirements. He duly stated what the requirements of FRS 102 were in respect of the lodging of amended financial statements, and the correction of prior errors. He concluded that although he was able to identify the figures which had been revised,

there was no further explanation in the financial statements to provide details of the changes and the reasoning behind them, and his opinion was that the amended accounts did not provide sufficient detail for the reader to understand what had happened, and that the requirements of FRS 102 in relation to amended accounts had not been met. However, since the pursuer had not pled a breach of warranty case founded on that aspect of FRS 102, that opinion, and the questions posed of him, largely miss the point. I will revert to this later.

[36] Finally in his supplementary report, Mr McCarlie considered the Completion Accounts Policies. Nowhere in any of his reports does he suggest that the Completion Accounts were prepared in contravention of paragraphs 4 and 5; on the contrary, in his supplementary report, he affirms that preparation of the Completion Accounts in accordance with paragraph 5 would be consistent with UK GAAP, FRS 102 and the Accounting Policies applied from the year ended 31 December 2019 onwards.

[37] Mr McCarlie also prepared an additional supplementary report dated 14 March 2025, in which he commented on Kathleen Watt's affidavit and on the preparation of the spreadsheet. Since much of what Mrs Watt said is irrelevant (such as in relation to the basis of a previous offer to purchase the defenders' shares), I need not refer to Mr McCarlie's comments on those parts. At 2.3.6 of this report, Mr McCarlie observes that while Mrs Watt refers to not taking flying hours into account in determining the percentage of a module completed, she did not state what basis was actually utilised; and at 2.3.7, he said that without the receipt of additional information he was unable to confirm the appropriateness of the method actually adopted. He then expanded upon the view expressed in his previous reports, that in determining the percentage completed and therefore the revenue to be recognised, in respect of modules which are flying-based or where flying represents the largest proportion of the costs incurred, the number of flying hours undertaken is the most

appropriate basis. At several points in his report, Mr McCarlie referred to his "understanding" of the basis upon which Mr Whitby had completed his spreadsheet. He then went on to comment on the spreading of deferred income evenly over 12 months, again making the observation (at 2.3.10) that he had not had access to TAL's accountants' working papers. Subject to that caveat, he said that in his opinion the 3-year degree courses provided by TAL were not an "indeterminate number of acts" as referred to in FRS 102 23.15, but instead a series of determined modules, and that under FRS 102 revenue should not be spread evenly on a monthly basis but instead recognised as the student progressed through the appropriate modules, which "better represents the stage of completion, as required under FRS 102". He then considered whether income should be spread annually or over the whole course. In his view, Mrs Watt was viewing each academic year as an individual contract or arrangement such that once all the modules in that year were completed the full income received in respect of that academic year was capable of being recognised. That was inconsistent with the policy introduced to TAL's 2018 statutory financial statements (as amended) that degree course income was recognised to the stage each student was on the course over a 3 year period. Mr McCarlie believed that the "substance and commercial effect" of the degree course was such that it was one 3-year course (rather than three 1-year courses) based on (i) his understanding that students enrolled on a 3-year course and received a degree only upon completion of the entire course and (ii) the fact that although the fees charged each year remained fairly constant, the value and costs delivered in each year varied.

[38] Finally, insofar as relevant for present purposes, Mr McCarlie made certain observations on the Whitby spreadsheet, which he described as an iterative process which followed discussions he had held with Louise Byars and Jill Kerr. He had not spoken

directly to Mr Whitby during the preparation of the spreadsheet but he had relayed the information he was looking for via Jill Kerr. He understood that she had provided guidance as necessary to Mr Whitby. He confirmed that he had not undertaken a detailed audit of the spreadsheet, nor verifying the information to underlying records, confining himself to a high level review and sense check of certain of the calculations.

[39] In cross-examination Mr McCarlie confirmed that he had not seen the contracts entered into by students, and therefore had not seen the terms and conditions, although he said that it made no difference to the accounting principle of matching revenue with the service provided and the cost. He accepted that he had seen no documents which vouched his assertion that the course was one 3-year course. He did not know whether students obtained a qualification at the end of each year. He acknowledged in answer to an extremely long question put to him by counsel for the defenders, giving the example of school fees and the services provided by a school, that what counsel had described in the question might be described as an indeterminate number of acts over a specified time. He also accepted that a method other than number of flying hours might be used if there was evidence that that other method better represented the stage of completion of a module, which evidence might consist of a written description of the course or evidence of CAA requirements for air training or a student's contract. Finally he acknowledged that, in relation to tuition fees, FRS 102 permitted revenue to be recognised "over", rather than "at the end of" the period of instruction. In re-examination, Mr McCarlie adhered to the view expressed in his reports.

Objections to the evidence

Defender's submissions

[40] In the course of his submissions, counsel for the defenders renewed his objections stated prior to the proof as to the admissibility of much of the pursuer's evidence, and made several new ones, the result of which was that he objected to most of the evidence led by the pursuer. Stated shortly, his first objection was that most of the statements and most of the productions were irrelevant because there was no record for them, and in particular there was no record for any evidence relating to any accounts prior to those for the year ended 2017, which many of the witnesses purported to speak to. That objection is well made. The pursuer's witness statements contain much material which was plainly irrelevant, and which, frankly, ought not to have been there, and I have already made clear that I have paid no regard to those passages of the witness statements which bore no relation to the matters in dispute.

[41] Second, counsel objected to any evidence about the 2020 accounts, on two bases. The first was that there was no record for any case that the 2020 accounts breached any of the warranties. He submitted that on a fair reading of the pursuer's pleadings, the facts alleged to constitute breaches were only those set out in articles 12 to 16 of condescendence, which aver only that the original 2017 and 2018 accounts used a wrong policy and say nothing about the content of the 2020 accounts. Further, the pursuer having averred that the policy was changed in 2019 to what it averred was the correct method, the implication was that that policy was followed in preparing the 2020 accounts; there was certainly no averment to the contrary. The only basis for the pursuer's claim to have a record for a case about the 2020 accounts was article 17 of condescendence, and the final two sentences, quoted in para [21] above. The pursuer's case rested on the use of the capital "A" in referring to the

Accounts, but that was not a natural or fair reading of the pleadings given the pursuer's separation of the factual averments from its averments of how those facts constituted breach of contract, where the Previous Accounts also took a capital "A". Further, the pursuer's factual case being that the policy was amended in 2019 to be correct with the absence of any averment of a change of or failure to follow the new policy thereafter, it had given no fair notice of a case about the 2020 accounts. Finally, nothing was averred about how or in what way the 2020 accounts might "not correctly [include] all income", which was a lack of fair notice of any such case.

[42] The second objection to the 2020 accounts was that as they had not been produced, any secondary evidence about their contents breached the best-evidence rule as formulated by Lord Brand in *Scottish & Universal Newspapers Ltd* v *Gherson's Trustees* 1987 SC 27, at 53, quoted by Lord Drummond Young in *Peacock Group plc* v *Railston Ltd* 2007 SLT 269 at [10] and [11], to the effect that the best-evidence rule is that a party must adduce the best attainable evidence of the facts he means to prove.

[43] Third, counsel argued that the best-evidence rule also rendered Mr Whitby's evidence about the spreadsheet inadmissible. The underlying financial records and student contracts, ought all to have been produced. Fourth, he objected to the evidence of Mr McCarlie as being inadmissible, because there was no factual basis for it. His sources of information included neither the 2017 and 2018 accounts, nor the 2020 accounts. Reference was made to Walker and Walker, *Evidence*, paragraph 16.3.8 to the effect that an opinion based on a certain state of facts is valueless unless the facts are proved. Finally, counsel submitted that the court could not have regard to Mrs Watt's affidavits, as she had not been a witness. Her evidence was hearsay and as such, it was also rendered inadmissible by the best-evidence rule.

Pursuer's submissions

[44] In reply, the solicitor advocate for the pursuer submitted that the pursuer's case was that the 2020 accounts had been prepared contrary to FRS 102, and that the defenders had had fair notice of that case from the terms of Mr McCarlie's reports, the essence of which was that revenue should be released to profit and loss account only when it had been earned, that is, when the appropriate training/flying hours had been undertaken.

[45] As for the best-evidence rule, *Scottish & Universal Newspapers Ltd* and *Peacock Group plc* could be distinguished. In the latter, a crucial production had been lost by the pursuer's agents, and the third party had been deprived of the opportunity of examining it. The dispute in *Scottish & Universal Newspapers Ltd* involved a share purchase agreement, and the pleadings focussed on the accuracy of the balance sheet. The documents in that case, which had not been produced, were of critical importance to the case, but that could not be said of the 2020 accounts in the present case, where the issue was simply whether the policy used in preparing the accounts was in accordance with warranty 18(1)(b). Mr McCarlie told us what should have been done, what the witnesses told us had been done was not in accordance with that, and it was inevitable that the accounts were inaccurate as a result.

[46] As regards Mr McCarlie's evidence, it had been open to the defenders to cross-examine him had they wished to challenge the factual basis for his opinion evidence but they had not done so. Finally, Mrs Watt's affidavits were clearly admissible by virtue of section 2(1)(b) of the Civil Evidence (Scotland) Act 1988. The best-evidence rule did not mean that evidence was inadmissible if there was other evidence which might have been available which was "better". The rule only applied so as to exclude secondary evidence about documents or productions crucial to proof of the case.

Decision on admissibility

What case has the pursuer pled?

[47] Dealing first with whether the pursuer has pled a case that the 2020 accounts breached any of the warranties, on any view the pursuer has set out its case in a confusing way. While headings in lengthy pleadings can serve to make pleadings easier to follow, here they serve only to obfuscate. There is some merit in the criticism made by counsel for the defenders that the summons less than helpfully confuses the factual averments with those about breach. Nonetheless, it is tolerably clear that the reference to the Accounts in article 17 is, in context, a reference to the 2020 accounts, and that the pursuer has therefore pled, however clumsily, that those accounts breached the warranties specified. Whether or not the pleadings give fair notice of the case the pursuer now wishes to advance, which is that revenue was (wrongly) released to income evenly across a 12-monthly period, is, however, a different matter. This being a commercial action, strict adherence to traditional principles of pleading is not required and, as a general rule, it is permissible to flesh out pleadings by reference to other documents including expert reports. It might have been helpful if Mr McCarlie's report had been incorporated into the pleadings to put the matter beyond doubt. Nonetheless, as the solicitor advocate for the pursuer pointed out, the defenders have had sight of Mr McCarlie's report from an early stage, and it is apparent from it that the pursuer's case was that in accordance with FRS 102, revenue ought to have been released to P&L only when the corresponding number of flying hours had been undertaken; which, it is claimed, is not what the defenders did in preparing the 2020 accounts.

[48] However, the matter does not end there, because even in a commercial action there are still some basic rules of pleading which must be observed, and a pursuer must still aver, and give notice of, whether specifically or by reference to other documents, the case it wishes to prove. The case the pursuer now advances is not only that revenue was not allocated to income appropriately but, specifically, that the method of dividing annual revenue by 12 and allocating it on month by month basis, was contrary to FRS 102. The first time that Mr McCarlie considered that issue was in his third report lodged shortly prior to the proof, which was prepared long after the pleadings had been finalised, and after he had sight of Mrs Watt's affidavits; and it is not legitimate to have regard to that report in determining what facts the pursuer is offering to prove at proof. Rather, its relevancy and therefore admissibility must be assessed by reference to what has already been pled. I do not consider that fair notice has been given of the case which the pursuer now wishes to advance, and accordingly the evidence founded on by the pursuer in support of such a case is inadmissible. That excludes any evidence given by Mrs Watt, and Mr McCarlie's riposte thereto.

The best-evidence rule

[49] While the best-evidence rule is still, on the authority of *Scottish & Universal Newspapers Ltd* and *Peacock Group plc*, part of Scots law, it is important to understand its scope, which is to exclude secondary evidence about physical objects or documents which have not been produced, and which are crucial to proof of the case, save, in certain circumstances, discussed more fully below. The rule is, perhaps, unfortunately named, since evidence is not rendered inadmissible simply because better evidence might have been led. It is always up to the party seeking to prove a particular fact to decide what evidence is to be

led in support of that fact. If evidence, even if indirect or hearsay, is accepted as credible and reliable and, where appropriate, supports the drawing of an inference, then, generally, the fact will be held to be proved, whether or not additional (and arguably better) evidence might also have been led. That said, there are some situations where a party's failure to call a particular witness may lead to an adverse inference being drawn against that party (see, eg *SSE Generation Ltd* v *Hochtief Solutions AG* 2018 SLT 579 at paras [273] to [278] and [351]) but that is to do with burden of proof, rather than admissibility.

[50] Turning to consider the scope of the rule a little more closely, the facts in *Scottish & Universal Newspapers* Ltd, a decision of the Inner House binding on me, were similar to those of the present case, to the extent that the action was based on an alleged breach of warranty in a share purchase agreement in respect that accounts were said not to give a true and fair view of the financial position of a travel agency; and the issue came to be the accuracy or inaccuracy of the vendor's prime financial records on the basis of which the accounts had been prepared, which had been lost. The Inner House held that the rule was that the contents of documents must be proved by the documents themselves, not by parole evidence, save where the documents were not readily available; secondary evidence of the contents of missing documents would be admitted only if it were shown that they had been destroyed or lost without fault on the part of the party who had effective control of the records when the action began. That rule was applied in *Peacock Group plc*, where a crucial piece of real evidence had been lost by the pursuer's agents, depriving the third party of any opportunity to examine it for themselves. Lord Drummond Young ruled that secondary evidence from the pursuer's expert about the condition of the pipe would be inadmissible at proof and consequently he granted decree of dismissal.

[51] Applying all of that to the present case, and dealing first with the 2020 accounts, there is no question of their having been lost, and to that extent this case can be distinguished from *Scottish & Universal Newspapers Ltd* and *Peacock Group*. Here, the pursuer has simply failed to lodge them. There is equally no question of the defenders having been prejudiced through an inability to have the accounts examined prior to proof, but prejudice is not the test, and arises as a consideration only where the documents or object in question have been lost, as Lord Drummond Young made clear in *Peacock Group*. The stark question, rather, is whether proof of the contents of the accounts is crucial to the pursuer's case, as the defenders submit, in which event, applying the best evidence rule, secondary evidence about the contents is, as a matter of principle, inadmissible; or whether, as the pursuer contends, one does not have to look at the accounts to know what the effect of applying one policy or another would be. In answering that question, the starting point is the assertion at the heart of the pursuer's action that the 2020 accounts fail to give a true and accurate view of the company's affairs as at 31 December 2020, contrary to warranty 18.1(a) and that they do not disclose all liabilities, contrary to warranty 15. On any view, the accounts themselves are a crucial piece of evidence in establishing that. One cannot know whether the accounts give a true and fair view, or what liabilities are disclosed, without knowing what figures are in the accounts, which self-evidently involves looking at the accounts themselves. On that basis, I uphold the defender's submission that secondary evidence about the figures in the accounts relating to deferred income and liabilities is inadmissible, and that evidence about the content of the 2020 accounts is inadmissible.

[52] Insofar as the spreadsheet is concerned, it is in a different and more complex position. It is a bespoke document prepared by Mr Whitby. Some of the information in it is uncontentious and was derived from his own knowledge (such as which students were on

the course, and what stage they had reached). Other information such as how much had been paid, and when, clearly did derive from other documents, which ought to have been, but were not, produced. However, since there are many other difficulties with the spreadsheet, I propose to treat evidence about it as generally admissible but to deal with the many objections to it as matters of weight.

Mrs Watt's affidavits

[53] I refer to what I said above about the scope of the best-evidence rule. It does not operate as a generality to exclude evidence simply because better evidence might have been available. Section 2(1)(b) of the Civil Evidence (Scotland) Act 1988 provides that in any civil proceedings:

> "a statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible."

Rule 36.8 of the Rules of Court is also relevant:

> "A party who wishes to have any written statement (including an affidavit) … admissible under section 2(1)(b) of the Civil Evidence (Scotland) Act 1988, received in evidence shall lodge the statement … in process and shall intimate such lodging to the other party …"

In accordance with the timetable fixed by the court, Mrs Watt's affidavits were lodged in process by the defenders, presumably in anticipation that Mrs Watt would speak to them. As such, the affidavits may be received in evidence. While the fact that Mrs Watt did not, in the event, give evidence and so did not adopt the affidavits, means that the statements were not made in the course of the proof, the affidavits quite clearly constitute statements falling within the ambit of section 2(1)(b) and are admissible. The defenders' complaint that Mrs Watt was not cross-examined on them is not one they can be heard to make, when they

chose not to call her in the knowledge that her affidavits were already in evidence. To the extent that the affidavits contain material which might be prejudicial to the pursuer's case, of course, it would be highly prejudicial and unfair to attach any weight to any such material, but the same cannot be said of any contents of the affidavits which might assist the pursuer. That all said, to the extent that Mrs Watt speaks to the content of the 2020 accounts her evidence is in any event inadmissible standing my decision about that: see para [51].

Mr McCarlie

[54] Mr McCarlie's qualifications entitling him to give expert evidence were not in question. Rather the objection to his evidence is that there is no factual foundation for it. I propose to treat that as a matter of weight, which I discuss below.

Decision

[55] Having ruled which evidence is inadmissible, I will now consider the pursuer's case in light of the remainder of the evidence.

Introduction

[56] The pursuer's case, insofar as it has a record for it, is essentially twofold. The first branch of the case is that the 2020 accounts breached warranties 15, and 18.1(a) and (b), because they were not prepared in accordance with FRS 102 and failed to show an accurate view of the state of affairs of TAL, and to disclose all of its liabilities, in respect that some revenue which ought to have been shown as deferred income was instead taken to P&L account. The second branch is that the 2020 accounts were not prepared using the same

Accounting Policies as those adopted and applied in preparing the Previous Accounts, in breach of warranty 18.1(d).

Warranty 20.1

[57] For completeness, the pursuer also avers that the defenders breached warranty 20.1 to the effect that all financial records of TAL had been properly prepared and maintained and constituted an accurate record of all matters which required to appear in them. It is not entirely obvious to me that the "financial and other records" include the accounts; rather, the accounts are compiled on the basis of those records, and one would not normally speak of accounts being "maintained". However, if the accounts do form part of the financial records, the warranty adds nothing to warranty 18. Insofar as the warranty refers to financial records other than the accounts, there was no evidence, or at any rate no reliable first-hand evidence, that such records were not properly prepared and maintained, Ms Goodfellow's assertion that they were "a mess" being hopelessly vague and lacking in specification. The solicitor advocate for the pursuer did not strenuously pursue his submission that warranty 20.1 had been breached, and accordingly I do not intend to refer to that again.

Warranties 15 and 18.1(a) and (b)

[58] The solicitor advocate for the pursuer referred to various authorities in support of his submission that if the 2020 accounts were not prepared in accordance with FRS 102, that was not only a breach of warranty 18.1(b) but also provided *prima facie* evidence that they failed to give an accurate view of the company's financial state (that being a more stringent test than a "true and fair view"): see *Macquarie Internationale Investments Ltd* v *Glencore UK*

Ltd [2010] EWCA Civ 697, per Jackson LJ at para [51]. In matters relating to best accounting practice, the court should be guided by expert opinions as to what that requires, and the experts will in turn be guided by authoritative statements of accounting practice: *Revenue and Customs Commissioners* v *William Grant & Sons Distillers Ltd* [2007] 1 WLR 1448, Lord Hoffman at [2].

[59] I do not see any of that as particularly controversial insofar as it goes, but the pursuer must first, of course, prove that the accounts were not prepared in accordance with FRS 102. In the absence of the accounts themselves, it is difficult to see how that could ever be achieved, but even had I not ruled evidence about the content of the 2020 accounts to be inadmissible, proof of the pursuer's case would nonetheless hinge on the court (a) accepting Mr Whitby's spreadsheet as a reliable analysis, to which weight can be attached, of how revenue was allocated as opposed to how it ought to have been allocated in order to comply with FRS 102; and (b) also accepting Mr McCarlie's evidence about FRS 102, and the approach to allocation of income. The pursuer's case falls at both hurdles, as I will explain.

The spreadsheet

[60] The spreadsheet is of little evidential value for numerous reasons. First, as Mr Whitby himself pointed out, it is not a forensic accounting document, and he is not an accountant. Rather, it is a document he prepared because the pursuer asked him to, because it was unhappy with the way the accounts had been prepared. Second, as Mr Whitby acknowledged in the course of his evidence, the spreadsheet is not complete. Third, the raw data input into the spreadsheet have not been produced. Mr Whitby explained that some of that came from TAL's entries in a programme called QuickBooks, and that where entries did not make sense they were clarified by Fiona Goodfellow. Other data came from TAL's files,

much of which had been lost during a transfer of data in 2022. Many of TAL's contracts were lost. This does fall foul of the best-evidence rule but in any event, as a matter of weight, it is impossible to test the accuracy of the spreadsheet against any objective criteria. Fourth, in preparing the spreadsheet, Mr Whitby made assumptions, did not have time to go through all the contracts, and his analysis did not take account of refunds likely to be issued to students who had dropped out. In some instances, in arriving at the modular prices, Mr Whitby conceded he had to rely on his memory, although he had price lists for some years. All of this affects the integrity of the spreadsheet. Fifth, Mr Whitby conceded that the spreadsheet was very much his subjective assessment which he had done from "feeling, rather than mathematically". In particular, the amount of income attributed to the modular price varied across the different modules, and from year to year. This can best be illustrated by looking at the above extract from the spreadsheet, replicated here for ease of reference:

	Y1	Y2				Y3		
	ATPL (A)	Return to Flying	Hours Building	CPL(A)	FIC	MEP(land)	ME IR	MCC
MODULAR	£2,500	£875	£15,130	£6,300	£8,000	£2,790	£15,000	£2,000
PRICE roughly	£2,500	£30,305				£19,790		
Tayside Income	£1,695	£875	£12,200	£5,300	£7,000	£2,680	£14,000	£1,250
Degree Income	£6,680	£1,670		£1,670	£3,340	£642	£642	£1,285
Total Income	£8,375	£14,745		£6,970	£10,340	£3,322	£14,642	£2,535

As can be seen, the Tayside Income allocated to the ATPL(A) module is £1,695, being 67% of the modular price; for "Return to Flying" the income allocated is £875, being 100% of the modular price; for "Hours Building", the income allocated is £12,220, being 80% of the modular price; and so on, different percentages applying in each case. Mr Whitby

acknowledged in cross-examination that it might have been better had a straight percentage been applied across the whole course. He also acknowledged that the percentage of income to modular price varied across the years, explaining that he had a "funny feeling" that he was trying to spread the fees across years 1 and 2. Sixth, the value of the spreadsheet is further depleted by Mr Whitby's acknowledgement that an entire course, Flight Instructor Standardisation, had been omitted. Seventh, Mr Whitby acknowledged that the spreadsheet contained further errors. One example will suffice. In his statement, Mr Whitby said that one particular student had £15,000 "knocked off" his total course fee as he had delivered 750 hours of flight instruction at a rate of £20 per hour, but in cross-examination, he conceded that was wrong, as the student was not only not a flight instructor but had not passed his commercial pilot's licence. He went on to concede that no student on the spreadsheet had delivered 750 hours of flight instruction, so that insofar as the spreadsheet suggested that other students had done so, it was erroneous. Finally, the spreadsheet is strictly irrelevant insofar as it considers anything other than how the revenue was treated in the 2020 accounts since, as I have pointed out, those are the only accounts in respect of which warranties were given. The net result of these cumulative deficiencies is that no reliance can be placed on the figure ultimately arrived at as being, allegedly, the extent to which the income for 2020 had been overstated.

[61] However, three further problems with the spreadsheet are more fundamental. The first is that it takes as a given that the revenue ought to have been allocated according to the number of flying hours completed, which is the basis upon which Mr Whitby was asked to complete it. However, that begs the question as to whether that was appropriate, or the only acceptable method of allocating revenue to income. I discuss this more fully when discussing Mr McCarlie's evidence below. Second, at times in his evidence, Mr Whitby

appeared to lapse into talking about costs; but as I have pointed out elsewhere, that is not the basis upon which Mr McCarlie said that the allocation to income ought to have been carried out, and there was anyway no evidence about the cost of providing the respective modules. Third, the ultimate aim of the spreadsheet is to show by how much the company's income had been over-stated, and its liabilities understated, by comparing the figure brought out by Mr Whitby with those in the accounts. That is ultimately an expression of opinion which Mr Whitby is not qualified to give. That this must be so is best illustrated by recalling that the pursuer's case is that the 2020 accounts did not give an accurate view of the state of affairs of the company. That can ultimately be assessed only by having regard to evidence of what the state of affairs of the company actually was; which is evidence one would ordinarily expect to have come from the sort of forensic accounting exercise (carried out by a suitably qualified accountant, on the basis of the primary accounting and financial records of the company) which Mr Whitby freely acknowledged the spreadsheet was not. It is no answer to this to say (as some of the pursuer's witnesses did) that Mr McCarlie carried out that exercise, because he did not. As I point out in my consideration of Mr McCarlie's evidence, he took as his starting point that not all income received in advance had been properly deferred; and he then considered whether that would constitute a breach of warranty. He did not himself undertake the prior exercise of verifying how the income received in advance had been treated.

[62] For all these reasons, I attach no weight to the spreadsheet insofar as its contents constitute admissible evidence. The consequence is that there is no reliable evidence before the court as to how TAL in fact allocated revenue in the 2020 accounts. I should make clear that in reaching that conclusion, I make no criticism whatsoever of Mr Whitby, who was only too willing himself to acknowledge the limitations of the spreadsheet.

Mr McCarlie's evidence

[63] It follows from the foregoing that the factual substratum for Mr McCarlie's evidence has been swept away, rendering his opinion of no weight. However, aside from that, there are various reasons why his evidence failed to persuade me, on a balance of probabilities, that TAL's approach to the accounts contravened FRS 102, some of which I have adverted to already. First, at various junctures of his report he referred to his "understanding" of what the pursuer's position was, but none of those "understandings" were proved in evidence. Second, it is plain that from the outset, when first approached by the pursuer, Mr McCarlie was told that the pursuer's position was that the appropriate method of allocation of income was by reference to flying hours undertaken, which he appears to have accepted, at least initially, without any form of critical analysis. By his use of the terms "training/flying hours" it is plain that he equates training and flying hours as though they were the same thing, but on Mr Whitby's description of the non-flying elements of the course (not least in relation to year 1, when no flying at all was delivered) they are not. Even if, on Mr McCarlie's evidence, one could conclude that taking flying hours as the indicator of how much of the course had been provided was one method of releasing revenue to P&L account, it is far from clear that it was the only way. To the extent that Mr McCarlie reached his view by having regard to the costs incurred (see, for example, 2.3.7 of his third report) there was no evidence as to what those costs were, nor of the costs of providing the classroom-based elements of the course, nor was it obvious that Mr McCarlie himself had access to such information. Further, Mr McCarlie did not have a reliable basis for rejecting the straight line approach desiderated by paragraph 23.15 of FRS 102, since he has not taken into account the description of the course given by Mr Whitby in his evidence. To the extent

that Mr McCarlie based his opinion on his own conclusion that TAL provided one 3-year course, rather than three 1-year courses, neither he, nor the court, has seen the student contracts which, if nothing else, might have clarified the extent to which the company could be regarded as having earned the revenue paid to it in year 1 of the course, when no flying was involved. Further still, Mr McCarlie has not adequately explained why example 19 at paragraph 23A.23 of FRS 102, which provides that fees for tuition, which is what the company was providing, may be realised over the period of instruction, did not allow the company to treat revenue as it was doing. Mr McCarlie does not contend that he has any particular experience of the accounts of other flight training schools, or how they allocate revenue. Ultimately, his view that TAL's revenue had to be allocated according to the number of flying hours undertaken amounts to little more than his *ipse dixit*, and as such I attach little weight to it.

[64] For all these reasons, even apart from my rejection, as inadmissible, of Mr McCarlie's evidence about the way in which Mrs Watt said revenue had been allocated, and even apart from my rejection of the spreadsheet, I would nevertheless not have been satisfied, on Mr McCarlie's evidence that the 2020 accounts were not prepared in accordance with FRS 102.

Decision in relation to warranties 15 and 18.1(a) and (b)

[65] For all of the foregoing reasons, I have concluded that there is no evidence justifying the conclusion either that the accounts failed to give an accurate picture of TAL's finances as at 31 December 2020, or omitted liabilities, or that the accounts were not prepared in accordance with FRS 102. The pursuer's claim insofar as it is founded upon alleged breaches of warranties 15, and 18.1(a) and (b) therefore fails.

Warranty 18.1(e)

[66] There are two issues here, namely, whether the 2020 accounts were prepared using the same Accounting Policies as those adopted and applied in preparing the Previous Accounts, that is, those for 2017, 2018 and 2019; and whether, if they did not, the fact that they did not do so was disclosed in the Disclosure Letter.

[67] These issues do not turn on the figures in the 2020 accounts themselves, and hence the pursuer's failure to lodge those accounts is of less moment than in relation to the warranties already considered, not least because it is common ground that the accounting policy in relation to the treatment of revenue *was* changed in 2019 and that a similar policy was applied in that year and in 2020. A question next arises as to whether one should have regard to the original or the amended accounts for a particular year in determining which policy was applied in that year. On this point, I accept the submissions of the defender, that where amended accounts have been filed with Companies House, they supersede the original accounts. That is sufficient to save the defenders in relation to the 2018 accounts, in that the pursuer has not proved that the policy applied in the 2020 accounts was different to that in those accounts. However, in relation to 2017, amended accounts were not lodged. Rather the figures were simply restated in the amended 2018 accounts. I do not consider that to be sufficient. Thus, it cannot be said that the 2020 accounts were completed using the same Accounting Policies as those in the only set of 2017 accounts which was filed at Companies House. Of course, where the 2017, 2018 and 2019 accounts were themselves prepared using different policies, compliance with the strict terms of the warranty would be impossible, since no set of accounts could be completed using the same policies as all three sets of accounts, but the defenders would have been able to protect themselves against that

problem, if it is a problem, by making an appropriate disclosure, which leads on to the second question, whether adequate disclosure was made of the change in policy as it applied to the 2017 accounts.

[68] By way of preamble, I accept the defenders' submission that it is nothing to the point whether the amended accounts complied with the requirements of FRS 102, or secondary legislation, dealing with amendment of accounts. As I have already pointed out above, the pursuer does not make a case that those requirements were breached. To that extent, I disregard Mr McCarlie's evidence on this issue. The sole question is whether, in terms of the parties' agreement as encapsulated in the SPA and set out at para [11] above, the Disclosure Letter fairly and accurately disclosed, in sufficient detail to allow the pursuer to reasonably assess its nature and scope, the change of policy effected in 2019 as that may have been applied to the 2017 accounts. The matters disclosed by the Disclosure Letter were all those which would be "apparent" from an online search of TAL's file at Companies House. There is no dispute that the amended 2018 accounts had been lodged by that time. As regards the test to be applied, counsel for the defender referred to what Chadwick LJ said in *Infiniteland Ltd* v *Artisan Contracting Ltd* [2005] EWCA Civ 758 at para [70], although para [72] perhaps contains a clearer exposition of the test:

> "The test which, as it seems to me, must be satisfied − could it fairly be expected that reporting accountants would become aware, from an examination of the documents in the ordinary course of carrying out a due diligence exercise, that an exceptional item in the amount of £1,081,000 had been taken as a credit against cost of sales and that the effect of that was to overstate the amount of operating profits from ordinary activities by that amount - is an objective test."

[69] Counsel for the defender devoted some energy, in his written submissions, to comparing the figures in the 2017 accounts with the restated figures in the 2018 accounts, in support of his argument that an accountant would notice, from the restated 2017 figures in

the 2018 accounts that the figure stated for creditors had increased by more than 82%, and that the figure for "assets less current liabilities" had reduced by nearly a half; that an accountant would know that deferred income fell under creditors; and having noted the policy about deferred income in the amended 2018 accounts which had not appeared originally, would have associated the deferred income policy with the creditors' figures.

[70] In my view that argument involves both a false syllogism and an unduly optimistic view of what is meant by "apparent". An increase in deferred income would result in an increase in creditors, but creditors may also have increased for other reasons. On an objective approach, it is a step too far to say that a change to the policy applied in 2017 had been fairly and accurately disclosed; or that such a change was "apparent" - in the sense of being plainly visible - from an online search. It may be that the change in figures could have given rise to further queries having been made, but on no construction of the word can it be said that the reasoning suggested by counsel in his submissions, had it been followed by an accountant, would have disclosed something which was apparent. "Possibly discoverable" might be a better description, but that is not the test.

Decision in relation to warranty 18(1)(e)

[71] For these reasons, I find that the 2017 accounts were not prepared using the same policy as was applied to the 2020 accounts, and that that matter was not disclosed by the defenders. Accordingly, the defenders are in breach of warranty 18(1)(e), but only in relation to the 2017 accounts.

Conclusions/disposal

[72] In conclusion, I have found against the pursuers in relation to warranties 15, 18(1)(a) and (b) and 20. I have found in their favour in relation to warranty 18(1)(e) in relation to the 2017 accounts only. I will sustain the pursuer's first plea-in-law to the extent of that warranty, and those accounts, only. I will repel the defenders' first to seventh pleas-in-law and reserve all questions of expenses. The case will require to proceed to a proof on quantum, but I will put the case out by order to discuss what further procedure should now be fixed in that regard.