



Neutral Citation Number: [2019] EWHC 1200 (Comm)

Case No: CL-2016-000586

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 15/05/2019

Before :

MRS JUSTICE COCKERILL DBE

Between :

116 CARDAMON LIMITED

Claimant

- and -

(1) MR ALAN RAMSAY MACALISTER
(2) MRS BIRGITT ALICE MACALISTER

Defendant

Mr Alec Haydon Q.C. (instructed by Weightmans LLP) for the Claimant
Mr Colin West (instructed by Excello Law) for the Defendant

Hearing dates: 4, 6, 7, 8 March 2019

Approved Judgment

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

.....
MRS JUSTICE COCKERILL

Mrs Justice Cockerill :

Introduction

1. In this case the Claimant (“Cardamon”) claims for damages arising out of what it claims are breaches of warranties contained in a share purchase agreement dated 23 May 2014 (the “SPA”). That agreement related to the purchase of 100% of the shares in Motorplus Limited (“Motorplus” or “the Company”) a privately owned company regulated by the Financial Conduct Authority (“FCA”). The business of Motorplus involved selling policies of insurance such as legal expenses insurance and lost key insurance which are “added-on” to policies of motor or household insurance, and also providing claims handling and first notification of loss services to underwriters.
2. Cardamon is an investment company and is part of a group of companies which is also involved in the insurance and claims handling sector.
3. The Defendant sellers (“Mr and Mrs MacAlister”) were the founders of Motorplus and its sole shareholders and directors.
4. The purchase price of the shares was £2,386,247.50 (“the Purchase Price”). Payment was made as to £1,282,472 by means of Cardamon assuming liability for certain directors’ loans in the same sum which had previously been owed to the Company by Mr and Mrs MacAlister. The balance of the consideration in the sum of £1,103,775.50 was paid in cash.
5. Under the terms of the SPA the Purchase Price is the maximum aggregate sum recoverable for any claim for breach of warranty. It is also the principal sum claimed in this action.

6. The basis of the claim is that the MacAlisters warranted the truth, fairness, accuracy and proper preparation of the Company's accounts for the financial year ending 31 August 2013 ("the Accounts") and warranted that the management accounts to 30 April 2014 ("the Management Accounts") fairly represented the assets and liabilities and the profits and losses of the Company as at the date when they were prepared. It is also said that Mr and Mrs MacAlister warranted that the Accounts were not affected by any unusual or non-recurring items or any other factor that would make the financial position and results shown by the Accounts unusual or misleading in any material respect.

7. In essence it is said that, contrary to the picture painted by the Accounts and the Management Accounts, Motorplus was, at the time of purchase, effectively insolvent. Three particular matters are relied on.
 - i) First it is said that the Accounts understated Motorplus's liability to pay claims under a scheme called FamilyPlus, a book of before-the-event (BTE) legal expenses insurance business ("the Underprovision claim").

 - ii) Secondly it is said that the Accounts listed as an asset half of a debt owed by an associated company Boomerang-Tag Limited ("Boomerang-Tag") which should have been written off entirely ("the Boomerang-Tag claim").

 - iii) Thirdly it is said that there was a failure to disclose a change in the method of remunerating insurance brokers which had occurred part way through the 2013 financial year, which had allowed the Company to defer accounting for a large amount of this expense giving an unduly rosy look to the accounts ("the Remuneration of Brokers claim").

8. There was a fourth aspect to the claim, namely that certain business written by the Company as agent was recognised in its accounts as if written as principal, resulting in an over-statement of turnover which required to be corrected (“the Overstatement of Turnover claim”). That claim was not the subject of detailed argument and is dealt with briefly at the close of the judgment.
9. All in all, Cardamon says, Motorplus was effectively insolvent, and Cardamon had to advance sizeable sums – over £1 million - to keep it afloat. It claims that in effect Motorplus was worthless and claims the entire sum paid for it by way of damages for the breach of warranties. Indeed, it says the claim would be larger but for the fact that the claim is limited by the terms of the SPA to the purchase price. There is a damages cap under the SPA which makes the first £500,000 of any claim irrecoverable (the “*de minimis* provision”). However, it is contended for Cardamon that the full purchase price is nonetheless recoverable if the damage suffered is £500,000 or more greater than the purchase price.
10. The case has been heard over four Court days. The major part of the evidence was expert evidence. Cardamon called Mr Graham Nunns, a chartered accountant of over 30 years' experience. Mr and Mrs MacAlister called Mr Andrew Conti, a forensic accountant of over 20 years' experience. Although the experts did not see eye to eye on a number of issues, and regrettably at times did not fully comprehend what the other was aiming to do in performing certain calculations, they did their best to cooperate with each other in the way experts in this Court should do. I formed the view that they were both genuinely trying to assist and that the differences in their approaches were to be attributed to legitimate stylistic differences in the way they approached their tasks, rather than any partisanship.

11. Cardamon called three witnesses of fact:
 - i) Mr Graham Pulford, who has been Cardamon's Managing Director since before the SPA. Mr Pulford's evidence primarily concerned the circumstances surrounding the SPA.
 - ii) Mr Ian Robins, who has been the Group Chief Finance Officer of Cardamon's group since September 2014 (i.e. subsequent to the SPA). Mr Robins' evidence primarily concerned the breach of warranty claims.
 - iii) Mr Nick Leeming. Mr Leeming has worked for the Company (i.e. Motorplus Limited) since 2011 and has been its Financial Controller since around January 2013. Mr Leeming's statement primarily concerns how the Company went about setting the claims provision in the period prior to the SPA.
12. It is a pleasure to say that this was a case where all the witnesses who appeared, both factual and expert, appeared to be doing their best to assist the Court.
13. Nor, I should add, is there anything sinister in the fact that Mr and Mrs MacAlister did not call any factual witnesses. Although they were the Company's sole shareholders and directors up to the date of the SPA in 2014, they had been absentee owners for some time, having moved to Australia in 2002. Mr and Mrs MacAlister are both now in their mid-sixties and retired.
14. Between 2002 and the date of the SPA, the day-to-day management of the Company was in the hands of its management team. Mr and Mrs MacAlister's role over this period was primarily limited to reviewing accounting information (such as Management Accounts) for the Company, as well as reviewing and approving its annual audited Accounts.

15. I will deal with the issues which arise by reference to the following headings:

The Backdrop	Paragraph 16
The SPA and its Terms	Paragraph 34
Events After Purchase	Paragraph 40
Under-Provision for Claims	Paragraph 50
Boomerang-Tag	Paragraph 99
Brokers' Remuneration	Paragraph 107
Quantum	Paragraph 130

The Backdrop

16. The factual backdrop to the sale was substantially not contentious. On 12 April 2014, in correspondence with Mr Chatterton of Speed Medical Examination Limited – a related company to Cardamon, Mr MacAlister proposed that Cardamon should buy 100% of the shares in Motorplus for £5 million and suggested that the deal should be done quickly.
17. On 16 April 2014, Mr MacAlister provided Mr Chatterton with a forecast to the end of the 2014 financial year based on actual figures in the Management Accounts to 31 March 2014 and forecasts to the end of August 2014.
18. Cardamon made an indicative offer of being willing to pay £2.3 million for all of Mr and Mrs MacAlister's shares on 22 April 2014, explaining that, as Cardamon understood the figures, the business would generate around £500,000 in profit in 2014.
19. Initially, Mr MacAlister expressed no interest in selling at that price but, 12 hours later, he accepted it on terms that Cardamon would complete within two weeks and

pay the MacAlisters' transaction costs, telling Mr Chatterton, "*Any delays etc. I will not tolerate as you are onto a good thing.*"

20. The sale was conducted without any due diligence being performed; at least in part because the existing management team were working on obtaining finance for a Management Buy-Out and there was a desire not to alert them until the sale was due to complete. Mr MacAlister indicated in correspondence that Cardamon's willingness to buy the Company without due diligence was "*the reason I offered the company at a discount*".
21. There was also a reason why the sale had to be agreed quickly. Mr and Mrs MacAlister owed the Company the sum of £1,282,474, payments having been made by the Company to them by way of a loan ("the Directors' Loan"). If the full sum was not repaid by 31 May 2013, Motorplus would become liable to pay further tax in the amount of £151,000 under section 455 of the Corporation Tax Act 2010 ("Section 455"). Motorplus had no funds with which to discharge this liability, or the rest of its liability to pay Corporation Tax on the taxable profits shown in the Accounts (of £155,000), without cash being introduced via repayment of the Directors' Loans.
22. It was therefore agreed that the Purchase Price would be paid partly in cash and partly through the discharge of the MacAlisters' liability to repay the Directors' Loan. This was reflected in clause 4.3 of the SPA.
23. In two emails sent on 9 May 2014, referring to the "windfall tax" that the Company would receive once the Directors' Loan had been discharged, the MacAlisters' solicitors proposed that Cardamon should pay an additional £1 for £1 for the amount of the refund and the amount of the cash in the business on completion (then expected to be £200,000-300,000).

24. Mr Chatterton wrote to Mr MacAlister on 9 May 2014 stating:

“We’ve now heard back from your solicitor in relation to the HMRC refund and the existing cash in the business. As we see it, the business has substantial claim liabilities (about £1.5m) which we are taking on, without sufficient cash to pay them. Consequently, the business will need the HMRC refund and the cash in the business to fund these claims, plus possibly some further funding from ourselves.”

25. Towards the end of the negotiations, by email sent on 12 May 2014, referring to the £169,000 reclaimable from HMRC once the Loan was repaid, Mr Chatterton asked for the most recent cashflows so that he could assess the likely amount of cash in the business on completion adding “*We can then potentially agree something as part of the consideration*”.

26. Eventually, Cardamon agreed to pay half of the value of the “windfall tax”, but nothing in relation to any cash in the business.

27. There were also exchanges, with which I will deal below, because their effect is contentious, as to the position with the debt owed by Boomerang-Tag.

28. Shortly before the SPA was concluded, on 21 May 2014, the parties were “*still arguing over the contents of the disclosures and the warranties*”.

29. Later that day, on 21 May 2014, Mr MacAlister sent Mr Chatterton an email he had been sent by his solicitor. This warned him of his exposure to claims for breach of warranty on the transaction and stated that if he chose to give warranties “blind” he should seek to increase the minimum value of any claim that can be made for breach of warranty (referred to as the “*de minimis*”) explaining:

“It would still leave you exposed – whatever is the difference between the value of the company and the price being paid should be the *de minimis*, if the buyer is getting the benefit of a cheap

price for no due diligence then you should get the same in the *de minimis*.... what is the point of selling at a discounted price to have it chipped away even more by unknown issues in relation to the warranties.”

30. A *de minimis* threshold value of any claim was negotiated (see clause 6.2 SPA) by reference to the value of the Company on 21 May 2014.
31. Mr and Mrs MacAlister’s representative made the running on this suggesting that the buyer “wants the cheap price and all the protection” and stating that the *de minimis* needed to be set “to properly reflect the commercial bargain”.
32. She later stated:

“Alan is of the view that based on his previous offers there is at least head room of £500k” “The *de minimis* is £500k (no minimum amount for a claim) and if it exceeds £500k Alan and Birgitt [Mr and Mrs MacAlister] will be liable for over £500k.”

33. Cardamon agreed to the *de minimis* in those terms on 22 May 2014.

The SPA and its terms

34. The relevant contractual terms are as follows.
35. Clause 1.1 of the SPA contains some important definitions:

“Accounts Date: 31 August 2013

Accounts: The Audited financial statements of the Company as at and to the Accounts Date, including the balance sheet, profit and loss account (together with the notes on them), the cashflow statements and the auditor’s and director’s reports.

Management

Accounts: The unaudited balance sheet as at 30 April 2014 and the unaudited profit and loss account of the Company (including any notes thereon) for the

period from 01 September 2013 to 30 April 2014
(a copy of which is included in the Disclosure
Bundle).

Capped

Claims: a claim under Schedule 3, Part One in relation to
warranty....3.3....11.2....11.3....11.4....

Claim: a claim for breach of any of the Warranties...

Completion

Date: the date of this agreement....

Disclosed: fairly disclosed, (with sufficient details to
identify the nature and scope of the matter
disclosed) in or under the Disclosure Letter.

Disclosure

Bundle: the bundle of documents, in agreed form,
annexed to the Disclosure Letter.

Disclosure

Letter: the letter from the Seller to the Buyer [in agreed
form,] with the same date as this agreement and
described as the Disclosure Letter, including the
Disclosure Bundle....

Warranties: the warranties given pursuant to clause 5 and set
out in Schedule 3”.

36. Clause 5 covered warranties:

“5. **WARRANTIES**

5.1 The Sellers acknowledge that the Buyer is entering
into this agreement on the basis of, and in reliance on,
the Warranties and the Sellers warrant that, except as
Disclosed, each Warranty is true, accurate and not
misleading on the date of this agreement.

5.2 Warranties qualified by the expression so far as the
Seller is aware (or any similar expression) are deemed
to be given to the best of the knowledge, information
and belief of the Sellers as directors and shareholders
of the Company and as would be the deemed level of
knowledge that a prudent director of a company,

complying with his statutory duties would have in relation to the day to day running of the Company.

- 5.3 Each of the Warranties is separate and, unless otherwise specifically provided, is not limited by reference to any other Warranty or any other provision in this agreement.
- 5.4 Except for the matters Disclosed, no information of which the Buyer, its agents or advisers has knowledge (in each case whether actual, constructive or imputed) or which could have been discovered (whether by investigation made by the Buyer or on its behalf), shall prejudice or prevent any Claim, or reduce the amount recoverable under any Claim.
- 5.5 Without prejudice to the right of the Buyer to claim on any other basis or take advantage of any other remedies available to it, if any Warranty is breached or proves to be untrue or misleading, the Sellers shall pay to the Buyer on demand any amount necessary to ensure that, after any Taxation of a payment made, the Buyer is left with the same amount it would have had if the payment was not subject to Taxation...”.

37. Clause 6 concerns limitation of claims:

“6. **LIMITATION OF CLAIMS** ...

- 6.3 The Seller shall not be liable for a Claim unless notice in writing of the Claim, summarising the nature of the Claim (in so far as it is known to the Buyer) and, as far as reasonably practicable, the amount claimed, has been given by or on behalf of the Buyer to the Seller:
- (a) in the case of a claim made under the Warranties in Part 2 of Schedule 3, on or before the seventh anniversary of Completion; or
 - (b) in any other case, on or before the second anniversary of Completion.
- 6.4 Any Claim notified in accordance with clause 6.3 shall (if not previously satisfied, settled or withdrawn) be deemed to have been irrevocably withdrawn six months after the date on which notice of the relevant Claim was given (and no new Claim may be made in respect of the same facts) unless, on or before that date, legal proceedings have been issued and served on the Sellers in respect of the relevant Claim.”

38. The warranties themselves were set out in Schedule 3 to the SPA. Those which are in focus in this case are:

“3. CONSTITUTIONAL AND CORPORATE DOCUMENTS

- 3.3 All accounting, financial and other records of the Company (including its statutory books and registers):
- (a) have been properly prepared and maintained;
 - (b) constitute an accurate record of all matters required by law to appear in them, and comply with any applicable requirements of the Companies Act 2006;
 - (c) do not contain any material inaccuracies or discrepancies; and
 - (d) ...

4. INFORMATION

- 4.2 All information given by or on behalf of the Seller to the Buyer (or its agents or advisers) in the course of the negotiations leading up to this agreement, was when given, and is now true, accurate and complete.....

11. ACCOUNTS

- 11.1 In this paragraph 11, Management Accounts means the unaudited balance sheet as at 16 May 2014 and the unaudited profit and loss account of the Company for the period commencing on 01 September 2013 and ending on 16 May 2014 (a copy of which are included in the Disclosure Bundle)
- 11.2 The Accounts have been prepared in accordance with accounting standards, policies, principles and practices generally accepted in the UK and in accordance with the applicable law and give a true and fair view of the state of affairs of the Company as at the Accounts date, and of the profit and loss of the Company for the financial year ended on the Accounts Date.
- 11.3 The Accounts
- (a) make proper and adequate provision for all bad and doubtful debts;

- (b) do not overstate the value of current or fixed assets;
- (c) do not understate any liabilities (whether actual or contingent);
- (d) are not affected by any unusual or non-recurring items [or any other factor that would make the financial position and results shown by the Accounts unusual or misleading in any material respect]; and
- (e) have been prepared on a basis consistent with the audited Accounts of the Company for the two prior accounting periods without any change in accounting policies used.

11.4 The Management Accounts have been prepared on a basis consistent with that employed in preparing the Accounts and fairly represent the assets and liabilities and the profits and losses of the Company as at and to the date for which they have been prepared.”

39. In relation to Warranty 11.1 it is common ground that the Management Accounts intended to be warranted were attached to an email from Mr and Mrs MacAlister’s solicitor to Cardamon’s in-house Counsel, on 22 May 2014 which states, “*You can change the SPA definition of management Accounts to include April 2014 as attached.*” The document attached to this email is a set of Management Accounts for the period from 1 September 2013 to 30 April 2014.

Events after purchase

40. Cashflow was a concern immediately after purchase. On 28 May 2014, Mr Pulford received a first request for additional funds of £200,000 to pay salaries that month.

41. A “Motorplus Analysis” produced on 6 June 2014 and attached to Mr Tripp’s email to Mr Pulford that day referred to £483,000 of claims “due now” and to there being “*a lot more work to do to validate the reserve values and claims handling controls*”. By

11 June 2014, Mr Tripp had found sufficient uncertainty about the historic claims reserves that he suggested an independent audit might be required.

42. There were then calls for more injections of cash. Thus:
- i) An email from Mr Leeming to Mr Pulford of 17 July 2014 referred to the issue of the daily cost of paying FamilyPlus claims and identified short term cash requirements of £300,000 by 31 July, £270,000 by 8 August and £100,000 by 28 August.
 - ii) On 27 July 2014, Mr Leeming referred to having made a few more “*medium sized*” claims payments.
 - iii) Mr Leeming’s email of 5 August 2014 referred to the fact that “*Unfortunately we are very low on cash*” and set out a requirement for a further £590,000 by 28 August 2014.
 - iv) In reply on 5 August 2014, Mr Pulford told Mr Leeming and Mr Tripp that he needed to know “*where the cash is burning*”.
43. Mr Pulford in his evidence described the situation as going well beyond the teething problems which he had expected. “*Every stone we picked up had something under it*”. His sense was that he was continuously firefighting. Ultimately the payments made to Directors’ Loan as was always anticipated) and £1,031,528 which was initially treated as a loan to the Company and then written off. During the course of these events Mr Kay, the incumbent CEO of Motorplus was “let go”; this was felt to be a necessity to reduce overheads, as he was on a fairly substantial salary.

44. The first set of accounts produced for the Company after acquisition were the Annual Report and Financial Statements for the 17 months ended 31 January 2015 (the “2015 Accounts”). The date for the accounts was changed to bring it into line with that of Cardamon and other companies in its group. Price Bailey were replaced with Cardamon’s auditors Deloitte. The audit conducted by Deloitte (“the Deloitte Audit”) revealed that the Accounts were inaccurate and needed to be re-stated.
45. The 2015 Accounts explain the adjustments to the Accounts made in the Restated Accounts at Note 8 thus:

“8. PRIOR YEAR ADJUSTMENT	As re-stated year ended 31 August 2013
	£
Increase in provisions for liabilities (see note 16)	2,159,403
Additional provisions against related party balance (see note 25)	570,673
Taxation differences –current tax (see note 9)	(412,963)
Taxation differences – deferred tax (see note 15)	(123,915)

	2,193,198

Included within the provision for doubtful debt in the year ended 31 August 2013 is a prior year adjustment of £570,673 against a related party (Boomerang Tag Limited). This adjustment reduces the carrying value of the debt to nil. The directors have re-assessed the scheme reserve and determined that when the financial statements were authorised for issue it could have been reasonably expected that the relevant information should have been taken into account in the preparation and presentation of those financial statements.

The prior year adjustment of £2,159,403 was to increase the claims provision in respect of the company’s largest scheme, Family Plus. The directors have re-assessed the scheme reserve and determined that when the financial statements were authorised for issue it could have been reasonably expected that the relevant information should have been taken into account in the preparation and presentation of those financial statements.

As a consequence of those adjustments to the prior year financial statements the company’s distributable reserves were eliminated. Had these adjustments been recorded in the correct period, the dividend that was paid out to the previous directors could not have been declared.

As a result of the prior year adjustment above, the company’s corporation tax liabilities are reduced by £412,963 and the deferred tax asset has increased by £123,915.

In addition, management has performed a review of the revenue accounting policies and as a result of this exercise, concluded that certain products should be recognised

on an agency basis. The comparative period has been re-presented in order to make the results more comparable and this has had the effect of reducing revenue and costs of sale by £1,539,377.”

46. It is the case of Cardamon that the difference between the figures “as warranted” and as in fact was the case are represented by the following summary.

	Accounts £	“As re-stated” £	Difference £
PROFIT / (LOSS) ON ORDINARY ACTIVITIES BEFORE TAXATION	1,271,897	(1,457,284)	2,729,181
NET ASSETS (LIABILITIES)	302,990	(1,890,208)	(2,193,198)

47. It is said that the Management Accounts are similarly afflicted by errors relating to net assets and profitability and that they are misleading as regards the treatment of brokers' remuneration.
48. On 19 May 2016, separate letters giving notice of an intended claim (“the Letters of Claim”) were delivered by hand to Mr and Mrs MacAlister. They referred to the 2015 Accounts and attached the Management Accounts. The letters said that they summarised the nature of the claim arising in respect of the understatement of the Provision in respect of claims, the failure to write off the Boomerang-Tag debt, the error in the figures for Turnover and (in terms which are now controversial) the failure to disclose the change in method of remunerating brokers which had occurred part way through the 2013 year of account.
49. Under the heading “Conclusion”, the Letter referred to the warranties relied on in support of the various claims and it was alleged that the breaches had resulted in a reduction of the net assets of the Company as at the date of the Agreement (credit being given for the consequential tax adjustments) and in Cardamon over-paying for the goodwill of the Company in an amount to be assessed by the Court. The warranties they referred to included 3.1, 3.3, 4.2, 10.2, 10.6, 11.2, 11.3, 11.4 and

12(b) of Part 1 of Schedule 3 to the Agreement. The claims now pursued rely only on warranties 3.3, 4.2, 11.2, 11.3 and 11.4.

Underprovision for claims

50. The context for this is that whilst the largest part of the Company's business was dealing with claims under policies of motor insurance (under the "MotorPlus" scheme) there was also an arrangement through underwriters' agents, whereby in return for a large proportion of the premium, the Company took on responsibility for paying claims under policies of household legal expenses insurance (a scheme called "FamilyPlus"). A significant provision therefore needed to be made to reflect the Company's liability to pay these claims.

51. The Accounts contained provision for claims in the amount of £1,455,008. Within that figure was embedded an amount of £1,322,693 in respect of FamilyPlus claims.

52. The provision of £1,322,693 ("the 2013 Provision") was comprised of:

"Family Plus – claims notified	£1,036,082
Family Plus – IBNR	£ 286,611

Family Plus (total)	£ 1,322,693"

53. The amount of £1,036,082 attributed to "*Family Plus – claims notified*" refers to the aggregate of the reserves made in respect of 1,892 relevant claims notified by 31 August 2013. It is common ground that the best estimate of the amount at the balance sheet date should have been based on information available at the later date of 19 February 2014. At that date 2,511 Relevant Claims had been notified and the provision in the Accounts was therefore inaccurate.

54. Against a background where the experts were agreed that there was an error in the 2013 Accounts as to the Relevant Claims provision for FamilyPlus business, there were essentially one macro and three micro issues.
55. The “macro” issue between the parties relates to whether the full amount of that error fell within the 2013 year. It was common ground that the error in the 2013 Accounts depends on a comparison of the opening and closing positions. The amount of the 2013 error therefore depends upon whether the opening position for the year (i.e. the closing position for the 2012 year) was correct, or whether some portion of the identified error afflicted that number also.

The Opening Position

56. Mr and Mrs MacAlister contend that an adjustment should be made to the opening position to the Accounts to reflect a revised “Provision” at 31 August 2012. That would be significant because the profit for 2013 is affected by the amount by which the provision changes from 1 September 2012 to 31 August 2013. It would therefore have an effect on the valuation of the Company “as is”. (This issue has no relevance to the amount of the net liabilities with which the Company is left as at 23 May 2014.)
57. The battle lines are drawn thus.
58. Cardamon relies on PwC’s audited provision of £1.931m at 31 August 2012 appearing in the 2012 Accounts signed by Mr and Mrs MacAlister (“the 2012 Provision”). It says this is robust because as well as Price Bailey (on whom not much weight is put, given the admitted error on the 2013 Accounts), Deloitte confirmed it when they attributed the whole of the adjustment to 2013 in the Re-Stated Accounts. Further Mr Robins’ evidence was that this confirmation was given during the audit process and Deloitte reaffirmed at the Audit Closing Meeting that they were satisfied

that all of the adjustment related to the year ended 31 August 2013. Cardamon relies on the fact that Mr Conti accepted that auditors would have focused on the reserves because of the potential to misstate profits.

59. It also points out that it would have been in the interest of the Company to move the adjustment back because there would have been a cash flow advantage to the Company if the adjustments had been carried back to 2012 or prior periods in terms of greater tax relief.
60. Mr and Mrs MacAlister assert that the Provision in the 2012 Accounts was wrong, like the 2013 Provision, with the result that the opening position was wrong in the Accounts. They submit that it was for the Claimants to demonstrate the position, which they have not done. They suggested in cross-examination of Mr Nunns that it was implicit in the known facts that a proper assessment had not been done.
61. They also rely on “Top Down” calculations performed by Mr Conti known as Approaches 1-5 which are intended to demonstrate that the 2012 Provision was somewhere in the region of £2.4m less than it should have been.
62. Both experts agreed that in order to provide a precise answer to this question it would be necessary to do the same exercise which was done for the 2013 year. Although in the Letter of Claim sent to the MacAlisters in 2016 Cardamon said in terms that it had done this exercise, it is accepted that it did not in fact do so.
63. In considering this area there are effectively three strands of evidence. They are what one can infer from:
 - i) The Accounts and the evidence which surrounds them;
 - ii) The Approaches of Mr Conti;

iii) The light shed by the experts' own investigations of the facts.

64. As for the first strand, I accept that these provide some evidence that the opening position for 2013 was as stated in the Accounts. Two very reputable sets of accountants had looked at this: PwC when auditing 2012, and Deloitte when re-stating 2013 at the time of the 2015 Accounts. I place no weight on Price Bailey's conclusions.
65. So far as the PwC audit is concerned, not only would they necessarily be concerned to look at the reserves, as Mr Conti said, but there is also some evidence as to how they went about this. It was Mr Leeming's evidence that Motorplus had wanted to reserve for less than the reserve figure, but that PwC had not only vetoed this, but had added an uplift. The documents demonstrate that that uplift was of around £590,000. As for what this uplift represented, it appeared from a document which made a late appearance in the trial bundles that PwC did perform an analysis of how many payments were made for cases registered after the year end and how much was paid on cases after the year end (an exercise which should have been, but which was not, performed in 2013). This concluded that there was "*an underprovision of £465k for the cases reported on or before 31 August 2012*". This indicates that the uplift covered the payments after the year end, but that it also included a further uplift, albeit only of about £100,000, on the reserve figure.
66. So far as Deloitte are concerned, there are three factors which indicate that a review was indeed performed. Firstly, they were plainly being asked to set the Accounts straight, which would involve looking into the reserve, and secondly from a financial perspective there was an impact on whether reserves fell into 2012 or 2013, with it being in their client's interests from a tax perspective for the reserves to fall into 2012.

These two are confirmed by the third, Mr Robins' evidence, which was: “[Deloitte] confirmed to me in the audit closing meeting and throughout discussions during the course of the audit that they were satisfied that the 2012 opening position was correct”.

67. I also take into account the evidence given by Mr Leeming that a different approach had been adopted to the maintenance of reserves in the 2012 year than was done in 2013: “I think it was followed a lot better in 2012 than it was in 2013”. He also said that the audit process was likewise more robust: “PwC have looked at the [reserve] and then decided it is not enough, based on their analysis, based on the information they pulled together, based on their samples of the claims files ... and they have upped the reserve.”
68. Similarly, Mr Robins’ evidence was that PwC had conducted a number of file reviews during the course of the audit.
69. In my judgment this evidence taken together provides a prima facie case that the figures as set out in the Accounts are accurate as regards the 2012 Provision.
70. I turn then to consider Mr Conti’s Approaches. I conclude that they provide little if any basis for doubting the picture as painted by the evidence on the Accounts. Mr Conti was very frank about their limitations. His starting position was that he would not advance these Approaches as substitutes for a manual assessment of the claims – and in essence he never resiled from that. His position was that, given that he was not given the material to undertake the manual review of the claims (and indeed lacked the expertise to perform such a review), he regarded these as the “least worst” way of ascertaining the likely position.

71. His position was that all of the Approaches had their limitations and that he would not prefer one over any of the others. Indeed, his preferred approach was, having performed them all, to average the results, effectively in the hope that this would smooth out imperfections in each method. However, he accepted that one could not say how unreliable they would be; and I was not persuaded that the averaging process (quite apart from the skewing effect produced by having two iterations of the same exercise within the averaged group) would have the effect aspired to. Averaging five defective approaches does not make them less defective.
72. I did conclude that each approach was defective; and indeed, if Mr Conti had been happy with any one of them he plainly would not have taken the view that none was to be preferred over the other. In summary form:
- i) Approach 1: This involved extrapolating from claims found to have been under-reserved in 2013 but that depends on extrapolating from an unrepresentative sample of claims (the larger claims), which would naturally skew the result.
 - ii) Approach 2: This involved extrapolating from the uplift in value between 2012 and 2013 of the nine 2012 claims found within the largest claims. It was effectively common ground that this was skewed by using only the largest claims from which to extrapolate.
 - iii) Approach 3: This extrapolates a percentage of claims understated and then applies the percentage error derived from the largest claims. A similar problem afflicts this approach in that the average error is derived from the largest claims.
 - iv) Approach 4 and Approach 5: Both involve a comparison of the provisions for FamilyPlus claims with the figure for the Company's total turnover for that year. Given that FamilyPlus was a small part of the overall business, there was, as Mr Conti accepted, no logical correlation. Mr Conti's assumed correlation appeared to rest on coincidence of the figure in past years. Absent a reason why there should be such a correlation trusting to the coincidence is thoroughly unsafe.
73. Further one could see, inter alia from the document produced by Mr Nunns, that other "Approaches" could be constructed based on assumptions which are just as valid or

invalid as these; and they would produce a wide range of answers. Essentially the “Approaches” amount to speculative number crunching and no more. Mr Conti in large part accepted this; he did not put forward any of these “Approaches” as being ones which were used by accountants. I do not consider that they have any real evidential value. I am therefore unable to accept these “Approaches” as providing a basis for revising the tentative conclusion reached on the basis of the accountancy evidence. Nor was there any basis upon which a simple averaging exercise could “iron out” the defects of these methods.

74. The position however is somewhat different as regards the third strand of the evidence. This was derived from Mr Nunns’ conclusions, arrived at in the context of another exercise, that there were, within the 2013 claims examined, claims which were live and reserved for in 2012. Nine claims which held reserves in 2012 were found within the top 35 claims in 2013. They accounted for 21% of the misstatement found in those 35 claims. The 35 claims themselves represented 82% of the value of the top 81 claims. This does suggest an error. However, although this material formed the basis for Mr Conti’s Approach 2, it was not strongly suggested by Mr Conti that this material relating to 2012 formed a reliable basis for extrapolating the error in the 2012 Accounts to produce an alternative figure, and for the reasons given above, it did not.
75. Despite the evidence of the accountants the way in which such an error could occur was plain from the evidence. Mr Leeming's account of the processes employed by Mr Smith, the Company's claims manager, set out a number of ways in which the processes he used in 2013 were defective. To give one example, his review of claims files was described as “cursory”. Although there is no similar account of his

involvement in 2012, he was in the same role in 2012. Although Mr Leeming's evidence was that the process in 2012 was performed "*a lot better*" than it was in 2013, there was obvious scope for errors to creep in. While PwC's review, which on the evidence involved them looking at "*lots of claims files*", will have picked up some of these, the evidence did not suggest that they performed a full review of all files.

76. The position is therefore that there is evidence suggesting that the 2012 Accounts were reliable; and there is also evidence effectively demonstrating that there were nonetheless errors within them.

77. In relation to this point I am satisfied that on the balance of probabilities that the position as set out in the accounts for the 2012 year was more accurate than that in 2013 but there was some underprovision in those accounts too. It follows that the opening position for the 2013 exercise was not accurately stated in the Accounts.

78. The question is what I should do as a result. There are effectively two options. The first is to say that Cardamon has failed to prove its case and dismiss the claim insofar as it relates to this point. The second is to conclude that damages fall to be assessed and either perform or make provision for that assessment. Cardamon submitted that following *Karim v Wemyss* [2016] EWCA Civ 27 and the multitude of cases cited therein the latter would be the correct course. In particular I have regard to the following:

i) Chitty on Contracts 33rd Ed. paragraph 26-018

"The fact that damages are difficult to assess does not disentitle the claimant to compensation for loss resulting from the defendant's breach of contract. Where it is clear that the claimant has suffered substantial loss, but the evidence does not

enable it to be precisely quantified, the court will assess damages as best it can on the available evidence...”

- ii) *Simpson v The London and North Western Railway Co* (1876) 1 QBD 274 per Cockburn CJ: “*As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all.*”

79. I accept that this is correct – so long as I am satisfied that substantial loss has been caused. I am so satisfied.

80. The next question is whether I should attempt to perform that exercise myself. Strictly it would seem that damages would fall to be assessed and that this would involve at least a manual review of the closing position for 2012. Logically it would also follow (as submitted for Cardamon) that the 2013 closing position would also require to be assessed by the same reviewer. There is however a real question about whether, in view of the exercise already undertaken and the amounts in issue, that would be regarded as proportionate. Neither party could be said to have encouraged me to take this approach. Cardamon positively sought for me to determine this question now, though offering no preferred route; while Mr West for Mr and Mrs MacAlister flagged up the scope for yet further debate between the experts, and commended Mr Conti’s approaches as a basis for an assessment here and now.

81. The doubt as to the desirability of ordering a determination of the exact figures gains ground when one looks at the dicta in the authorities. In *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91 Lord Keith rejected a similar suggestion (a retrial on damages) on the basis that “*the delay, trouble and expense which would be*

involved in further proceedings do not appear to their Lordships to be consonant with the due administration of justice”.

82. Similarly, in *Crewe Services & Investment Corporation v Silk* [1998] 2 EGLR 1 the Court of Appeal (Woolf MR, Millett LJ and Robert Walker LJ) said that in such situations “*the judge must do the best he can, just as the jury would have had to do when civil actions were heard by juries*”.
83. Accordingly, with considerable regret, given that the evidence was clear both that the correct way of doing this would be a claim-by-claim review, and that none of the methods put forward for estimating the under provision in 2012 have any evidential validity, I propose to do the best I can with the materials before me. I will take into account the specific evidence as to the process undertaken, as well as the expert evidence.
84. The starting point is the shortfall found in 2013. That is the £3,482,096 which is the amount of the FamilyPlus claims ultimately identified as at 19 February 2014 less the £1,036,082 actually provided for: £2,446,014. That amounts to an under provision of 236% although when payments are stripped out this becomes an error of 144%, as Mr Conti has pointed out. Of course, this may not be a figure which reflects the percentage error in the smaller claims. However, it is what I have to work with.
85. In answering the question of what the shortfall was in 2012 I am not prepared however to adopt Mr Conti’s approaches which (entirely understandably) neglect the factual evidence which it was not his job to evaluate. I take into account the evidence which suggests that the approach taken in 2013 was less rigorous than that in 2012 and that the accounts in 2012 being approved later gave a greater opportunity to take account of accurate claims figures. It would not therefore be safe to say that an error

of the same magnitude can be inferred to have occurred in 2012. I also have unchallenged evidence that the figure in 2010 should be taken to be accurate, given that provision in that year was significantly higher than in later years and that the approval of the Accounts occurred significantly later, maximising the time for accurate assessment.

86. The picture which I receive from this information is of an accurate start point in 2010 with gradually worsening approach to reserving over the next three years. One would therefore expect the 144% mistake in 2013 to be preceded by smaller but increasing percentage errors.
87. At the same time, I have evidence from the experts that based on their review of the top 35 claims they estimate the 2012 misstatement on those claims to be in the region of £125,000-160,000. That provides some context for the minimum result which may be expected. Of course, that is not completely safe: the experts are not experts in claims reserving for this business. Further there will be some 2012 claims which were not present in the documents they were examining.
88. I conclude that on the balance of probabilities and doing my best with the evidence presented to me, the error in 2011 was 48%, with the error in 2012 being 96% (once payments were accounted for). That would mean that the actual reserve required in 2012 was not £1,200,526 as assessed pre-audit but £2,809,850 (£1,200,526 plus £456,820 plus £1,152,505). That is £1,019,755 more than the amount of £1,790,096 (net of IBNR) ultimately provided for in the Accounts.
89. There is one further issue which arises with regard to this point. Mr and Mrs MacAlister rely upon Clause 6.6(e)(ii) of the SPA, which provides that:

“The Sellers shall not be liable for a Claim to the extent that the Claim ... relates to a matter or circumstances occurring or is otherwise attributable to, or the Sellers’ liability pursuant to such Claim is increased as a result of ... any change after Completion in the accounting bases, policies, practices or methods applied in preparing any accounts or valuing any assets or liabilities of the Company”.

90. They argue that Cardamon’s Underprovision claim arises precisely because Cardamon (and the Company under its control) adopted a different methodology in valuing the FamilyPlus liabilities (and thus in providing for them) in comparison with the methodology employed while the Company was under Mr and Mrs MacAlister’s ownership. Specifically (as was made clear in opening) it was said that the use of a manual review was a change in methodology.
91. Logically this only arises if I were to find (as I have not) that the 2012 Accounts were accurate. It might then be said as Mr West did in closing, that it also follows that the original 2013 provision must also be taken as accurate, because Price Bailey in 2013 signed that off as well, and it was substantially the same process as in 2012. But, if so, it is said that it follows that Cardamon’s Underprovision Claim results from Cardamon adopting a different method post-acquisition for valuing the claims provision, in which case the claim is barred under clause 6.6(e)(ii). In the light of the conclusion I have reached however this does not arise.
92. Had it arisen I would have concluded that this point did not succeed. There was no change in the method – a point on which Mr Leeming was very clear. His evidence was that at all times the policies in place were compliant with accounting standard FRS12, and involved the same kinds of steps as were operated after Cardamon took over. The steps involved included what was, in effect, a manual review, in that reserves were assessed individually for each claims file and reviewed when more

information was provided. What then happened after the sale was an improvement and a tightening up of the policies which were already in place and an audit given that errors had been found (essentially to take the steps which would have been taken if the existing policy had been properly applied). There was no change of policy. There was on re-statement a more extensive manual review; the point is that the review which was done was not in any real way different in type to the 2012/2013 methodologies.

The Micro Issues

93. As for the micro points, the first is Common Reserving Issue 6 (General Reserves) worth £190,428 and £6,257. This issue relates to whether the calculation of historical average costs should include claims historically settled at nil. Cardamon says that it should not, on the basis that, save for certain PI cases, the only cases within the FamilyPlus book which settled at nil were claims rejected for cover, for which it was not appropriate to establish a reserve in the first place. This is because (so Cardamon says) all claims accepted for cover (save for certain PI cases) would incur at the very least the sum of £85 plus VAT (being £102 in total), which was the cost of obtaining an initial opinion on the prospects of success from a panel firm. Mr Conti has instead adopted the approach of treating cases as “live” and in need of a reserve if they were “live” for longer than a month on the Company’s systems, based on Cardamon’s statement that panel firms were expected to revert with an initial view on prospects within two weeks to a month, and therefore counts these cases as cases reserved at £102. Mr West in closing submitted that this gained some support from Mr Nunns’ evidence that the reason the £102 was not included as a claims reserve was that it is not a cost of the claim that the insured is liable for.

94. I conclude that Mr and Mrs MacAlister's approach on this point is artificial and that of Cardamon is to be preferred. The process of establishing reserves goes to anticipated payments to be made to insureds – the proper costs of claims. The £102 was essentially an administration charge which did not form part of this.
95. The second issue, covered by Common Reserving Issues 7, 7A and 10 relates to non-panel firm estimates. It is worth £177,175.27. The issue is whether non-panel firm estimates should be reserved in full or a process of judgment applied to the estimates. Cardamon say the former, in particular given that there was no system of auditing the estimates to see if particular firms regularly overshot the estimates.
96. Mr and Mrs MacAlister via Mr Conti say that the correct approach was to assess the likely outcome and reserve not for 100% but for the likely outcome, and on that basis in the absence of other information Mr Conti advocated allowing 50% plus the costs already incurred.
97. I conclude that Cardamon's approach is correct. Mr Nunns referred the court to the tension in case of uncertainty between prudence and neutrality, which are two aspects of reliability. However, as he noted, in the absence of a basis on which to mitigate the estimate there could be no reliable variation of it, and prudence, and reserving to the estimate in full, must prevail. I am not persuaded that any purely mathematical process could be said to offer any reliable qualifier to an estimate; and there was no evidence of another basis available to qualify these estimates.
98. There were initially said to be some specific issues relating to particular claims involving immaterial amounts, but there was no consideration of these at trial, and I treat them as not being pursued.

Boomerang-Tag

99. On Boomerang-Tag the issue was not one of expert evidence, but of fact. The experts agreed that on the face of it, the debt should have been written off in full. This is a point which goes to the Net Asset Value and not to the maintainable earnings. The issue was whether the position was fairly disclosed to Cardamon, Cardamon maintaining it was not, while the MacAlisters submitted that it was.

100. The relevant materials were as follows.

101. First the Boomerang-Tag debt was addressed in Note 24 under “Related Party Transactions”, as follows:

“Boomerang-Tag Limited

During the year the company made advances, and paid expenses on behalf of Boomerang-Tag Limited, a company in which the directors of Motorplus Limited hold a 40% stake. During the year Motorplus Limited raised sales totalling £477,736 (2012 - £390,197) to Boomerang-Tag Limited.

At the year end the amount due from Boomerang-Tag Limited was £659,323 (2012 - £800,479).

The company has made a total provision for doubtful debt against the above of £659,324 (2012 - £NIL). The amount provided during the year was £659,324 (2012 - £NIL).”

102. Second there was a specific disclosure in the Disclosure Letter in relation to the Boomerang-Tag debt, as follows:

“During the year the company made advances, and paid on expenses on behalf of Boomerang-Tag Limited, a company in which the directors of Motorplus Limited hold a 40% stake. During the year Motorplus Limited raised sales totalling £477,736 (2012 - £390,197) to Boomerang-Tag Limited. At the year end the amount due from Boomerang-Tag Limited was £1,318,647 (2012 - £800,479). The Company has made a total provision for doubtful debt against the above of £659,324

(2012 - £NIL). The amount provided during the year was £659,324 (2012 - £NIL). Only half was provided for as a doubtful debt but that does not mean the other half is considered recoverable.”

103. Third, in the light of the fact that the Disclosure Letter states that all communications between the parties and their advisers are treated as disclosed, the MacAlisters pointed to an email from Mr Leeming of 1 May 2014 as follows:

“Boomerang Loan
The total balance of the related party loan is owed by Boomerang-Tag.
There is no agreement in place and it’s likely the remaining balance will be written off”.

104. That email was forwarded by Mr MacAlister to Mr Chatterton, who was the principal individual with whom Mr MacAlister dealt on behalf of Cardamon during the course of the negotiations. Mr Chatterton then forwarded that email on to Mr Pulford, who stated in an email of 2 May 2014 (passed to Mr MacAlister) as follows:

“As the Boomerang-Tag loan is irrecoverable, would he transfer his share of 40% over to us for a nominal amount (say £1) and would the other Boomerang-Tag shareholders do the same?”

105. Mr Pulford was asked about this correspondence. He maintained that he did not understand that there was no likelihood of recovery. This appears to have been driven by a degree of scepticism since Boomerang-Tag was in the same ownership; he was concerned lest the writing off was a tactic being adopted by the MacAlisters, because they retained a shareholding in Boomerang-Tag, in order to leverage an argument to be made after the sale that the loan should be or had been written off. He dismissed his use of the word irrecoverable as “slightly clumsy”.

106. Ultimately, I formed the view that this wording was actually reflective of Mr Pulford's understanding at the time and that the item had been sufficiently disclosed. The correspondence was in clear terms. The Disclosure Letter effectively echoed this. Further it would appear that the essential worthlessness of Boomerang-Tag was well understood, both based on the offer to buy the share capital for nominal consideration, to which a positive answer was given by Mr MacAlister and on the fact that Boomerang-Tag ultimately did not form part of the deal because of concerns that it might in fact be insolvent.

Brokers' Remuneration

107. The next issue is that of the brokers' remuneration. Originally this was pleaded as an undisclosed change in accounting policy contrary to FRS18. By the date of trial however the case advanced by Cardamon was that the change was an unusual or non-recurring item which affected the Accounts and which had not been disclosed. There was also originally some dispute about why the change had been brought about, with there being some suggestion that it had been necessitated by Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). Ultimately it was common ground that the change was not necessitated by LASPO. However, there was no challenge to the evidence that after LASPO the Company decided to adopt the "distribution fee model" for broker remuneration.

108. In other words, the Company moved from a model of remunerating brokers by a commission paid on referral fees and instead began remunerating them by means of a distribution fee paid on each policy sold. Brokers would receive a fee per policy whether or not any claim arose on the particular policy which could trigger the payment of referral/recommendation fees by solicitors, medical practitioners etc. This

change was intended to be cash-neutral (i.e. it was not intended to result in an increase in the total amounts the Company was paying to brokers).

109. It did however have an accounting effect. The correct accounting treatment of such fees, as adopted by the Company, was to treat them as pre-payments by the Company and release them on a pro-rated basis to the profit and loss account evenly over twelve monthly instalments, reflecting the fact that the distribution fee could generate referral/recommendation fee income to the Company at any stage over the one-year lifespan of the policy. This treatment ensured matching of potential income with expenses in accordance with approved accounting practice, and its appropriateness was not in dispute.
110. The issue arises here because over a period of one year starting with the introduction of the new arrangements in April 2013, these arrangements caused a larger figure to appear in certain lines of the Accounts and Management Accounts than would have been the case under the former arrangements. Cardamon says that there was a temporary inflationary effect between April 2013 and March 2014 on the profits of the Company i.e. that the profits of the Company appeared to be higher than they would have done under the former arrangements, and higher than they would appear in future years.
111. The MacAlisters' principal defence to this allegation prior to the hearing was that the change in broker commissions was not unusual or non-recurring within the meaning of Warranty 11.3(d). This is because it was a change made in the ordinary course of business as part of a general market trend away from remunerating brokers by means of commission on referral fees, and stemmed from the new approach to referral fees

in LASPO. Since changes in legislation are relatively common occurrences in this industry, it could not properly fall within this provision.

112. That defence was rather undermined by the evidence however. After some initial reservations about whether the question of whether an item was unusual or non-recurring was a legal one, Mr Conti accepted that the change in method of accounting for brokers' remuneration was an unusual or non-recurring item (in the same way that the items expressly identified in Note 8 of the Accounts as "exceptional" are treated as being). Indeed, it was on this basis that he took it into account as part of the process of normalising the 2013 EBITDA (Earnings before interest, tax, depreciation and amortization) to assess the "as warranted" value of the Company. Mr Nunns' evidence had always been that this was properly to be regarded as an unusual and non-recurring item.
113. I accept this expert evidence and to the extent it remained in issue, I conclude that as a matter of construction the change was an unusual and non-recurring item which affected the Accounts. That is also consistent with the background; there is no doubt that LASPO was a major change and there was no evidence of periodic changes, or of any expectation of further change. I do not consider that this issue must stand or fall with the question of "misleading"; warranty 11.3(d) refers to the Accounts being "*... affected by any unusual or non-recurring items [or any other factor that would make the financial position and results shown by the Accounts unusual or misleading in any material respect]*". It is plain from this that an unusual or non-recurring item does not have to make the Accounts misleading.
114. The second point which arose related to the treatment of the change in the Management Accounts. In particular it was alleged that the treatment was one which

did not “*fairly represent the assets and liabilities and the profits and losses of the Company as at and to the date for which they have been prepared*”. This was not strongly pursued, and could not really stand given the fact that no case was made that any figures in the Management Accounts were wrong or in need of amendment.

115. The real thrust of the defence on this issue at trial was the question of disclosure. Mr Conti suggests that a “reasonable valuer” was “on notice” of the change. The process by which he suggested that a reasonable valuer was on notice was this. Firstly, he said that one must bear in mind that LASPO was at the root of the restructuring of brokers’ fees, and was an issue across the insurance industry. Secondly, he pointed to the previous years’ accounts which referred to LASPO’s potential impact: albeit in general rather than specific terms because the impact was uncertain at that time. Mr Conti argued that, in that context, a reasonable valuer could deduce that there was a change in the way MotorPlus paid referral fees to brokers. He placed particular emphasis on the Accounts which showed a material increase in “Prepayments and accrued income” of approximately £1 million which he identified with the Deferred Distribution Charge in the Balance Sheet in the Management Accounts. The conjunction, he said, was enough to put a reasonable valuer on notice that Motorplus had adopted a new method of remunerating brokers.

116. That approach was not accepted by Cardamon whose position was that the effect on profit was not fairly disclosed. Mr Nunns’ evidence was that there were other very real possibilities for the million-pound disparity, given that there was no precise correlation of that figure with the figure in the P&L Accounts for Broker Commission. For example, he pointed to the possibility of the inclusion of trade debts and said that without better visibility it would be impossible to say. He also pointed to

the fact that there were other significant variances in figures, so it was not the case of a single change which could be inferred to correlate.

117. This was an area where cross-examination of the experts was helpful in evaluating the rival submissions. The examination of Mr Conti's process of arriving at his conclusion strongly suggested that this was a step further than one could expect a reasonable valuer acting for a buyer to reach in the absence of knowledge; it was in effect a reconstruction, with the benefit of knowledge. As such it was exactly the sort of view which one would expect a forensic accountant (as opposed to a valuer acting ahead of the transaction for the buyer) to reach. That impression was confirmed when Mr Conti candidly accepted in cross-examination that the exercise he undertook to trace the change in brokers' remuneration involved a "clever reconstruction" which was not something a buyer would have done. He did not take issue with a characterisation of it as "contrived". In particular it was not in issue that the term "Deferred distribution fees" is not a term of art and so does not necessarily designate brokers' remuneration or the change to it. Mr Conti accepted that in the real world, acting for a buyer, his review of the documents would leave him with further questions. He said he would have to ask before knowing anything for sure. He also expressly agreed with Cardamon's counsel that not everything had been fairly disclosed.
118. My conclusion is that this item had not been fairly disclosed. There was certainly no specific disclosure of it. The question was whether the inference was there from the Accounts and the Management Accounts. However, without any specific disclosure the inference would have to be essentially the only one which could follow, for there to be disclosure of it. If the cause could be either A or B, that would not be disclosure. And this was exactly the case, as Mr Conti's evidence clearly demonstrated.

Limitation

119. In relation to this claim, Mr and Mrs MacAlister argue that it is not open to Cardamon to rely on any breach because it is barred by the limitation provision in the SPA. As noted above Clause 6.3 prevents Mr and Mrs MacAlister from being liable to Cardamon unless a claim is notified “*in writing [...] summarising the nature of the Claim [...] on or before the second anniversary of completion*”. Clause 6.4 deems any claim so notified to have been irredeemably withdrawn six months thereafter unless legal proceedings in relation to ‘the relevant Claim’ have been issued and served. The relevant date for giving notice is May 2016. The Letter of Claim was sent on 29 May 2016. The Particulars of Claim were served on 21 December 2016.
120. For present purposes the issue is whether the relevant claim (defined as meaning “*a claim for breach of any of the Warranties*”) was that made in the original Letter of Claim and also in the Particulars of Claim or whether the claim only emerged in the Particulars of Claim or the Amended Particulars of Claim. If the former, it is in time; if the latter, it is not.
121. This requires a consideration of the Letter of Claim and the Particulars. The former provides as follows:

“Management accounts to 30 April 2014 – Change in basis of accounting”

Para 11.4 of the Share Purchase Agreement states....

In April 2013 there was a fundamental change in the way in which the Company operated. Prior to that date payments were made to customers on the basis of the number of personal injury and/ or credit hire cases that occurred as a result of the handling of calls from the non-fault victims of road traffic accidents. After 1 April 2013 the Company moved to what is referred to as the “*Distribution Fee Model*”.... In the first month (April 2013), only 1/12th of the distribution fees paid in that month were charged to the profit and loss account, with the balance treated as a prepayment and released evenly to the P&L

over the remaining 11 months.... in the 11 month period after 1 April 2013, as a result of this change, that profit would have been greater than if the previous method of paying suppliers had continued.

...This above change in accounting method gave a materially different impression of the profitability of the business pre acquisition. This change was not disclosed by you and as such the acquisition was made on the basis of Management Accounts that showed a materially higher level of profits in the period 1 September 2013 – 30 April 2014 than that which would be achieved post acquisition. The Management Accounts were misleading and led to us materially over valuing and overpaying for the goodwill of the Company.”

122. The original Particulars deal with this at paragraph 40 onwards under a heading “*Undisclosed Change in Accounting Policy*”. It details the change and its effect. At paragraph 43 it quotes FRS18. At paragraph 44 it states that FRS18 was not complied with because the Accounts made no reference to the change of accounting policy.
123. At paragraph 57(7) under the heading “*Breaches of Warranties*” a breach of Warranty 11.3(d) is pleaded on the basis that “*the Accounts were affected by the unusual treatment of payments due to brokers during the first 12 months of the introduction of the undisclosed change in accounting policy*”. At paragraph 57(9) a breach of Warranty 11.4 is pleaded by reference to the Management Accounts. At paragraph 63 under the heading “Quantum” there is a claim for the amount by which the assets were overstated, and at paragraph 64 the need for an adjustment to EBITDA is pleaded.
124. It is Mr and Mrs MacAlister’s case that the claim now pursued fails. They say that the claim now pursued, whereby the change in remuneration was an unusual and/or non-recurring item affecting the Accounts and the Management Accounts but not a change in accounting policy, is not one which was ever previously run. While an alternative claim would, it is conceded, have been enough, Cardamon nailed its colours to the

most of breach of FRS18, and when that fell away, so too did its claim in respect of broker remuneration.

125. Cardamon submits that the claim pursued is sufficiently clear to get over what is a low bar in terms of the requirement of the clause and that the claim was not in fact pegged to FRS18 but was broader, raising an undisclosed change in approach.
126. Limitation cases are by no means often successful. However, I have concluded that this is one which must succeed. There was a clear contractual scheme in relation to notice. The requirement of the clause is to “*summarise the nature of the claim*”. What was done in the Letter of Claim was to make clear: (i) that there was a claim in relation to the change in treatment of broker remuneration and (ii) that that claim related to the way in which the matter had been treated in the Management Accounts and (iii) that the nature of the claim was that that document was misleading. If asked to summarise the nature of the claim any reader of the letter would have said that there was a claim in respect of the broker remuneration under Warranty 11.4 – i.e. that the change made the Management Accounts misleading. The reader would not have said that there was a claim in relation to the Accounts or that there was any complaint that there were unusual or non-recurring items.
127. Of course, matters moved on. The complaint was pleaded in far more detail in the Particulars of Claim. At this point accounting policy and FRS18 was prayed in aid; but so too was misleading EBITDA and a breach of warranty arising out of this change including not just Warranty 11.4 (misleading) but also Warranty 11.3(d) (unusual or non-recurring items). So, by this stage there was effectively an alternative case put as to the brokers’ remuneration case and it was put by reference to the

particular warranty now relied on. Had the Particulars of Claim been served within two years of completion this would have sufficed.

128. However, in the absence of the claim in relation to the Accounts having been made in the Letter of Claim, the form of the Particulars cannot, in my judgment mend matters. The wider pleading in question is not a pleading “*relating to such claim*” as had been notified. It follows that the breach of warranty claim in respect of broker remuneration also fails.

Conclusion: Breach of Warranty

129. I therefore conclude that there were breaches of warranty, and that while the claim in relation to the Brokers' Remuneration breach is time-barred, the claim in relation to the Underprovision breach is not affected by the limitation defence. Accordingly, the question of the quantum of the claim falls to be considered.

Quantum

130. It is common ground that the correct approach in dealing with the question of quantum is that Cardamon is entitled to compensation sufficient to put it into the position in which it would have been had the information warranted been true: *Karim v Wemyss* [2016] EWCA Civ 27 [23-28]. This includes damages for loss of bargain calculated by reference to the difference between the value of the shares purchased (in effect the value of the Company “as warranted”) and the value of the shares given the actual state of affairs (“as is”).
131. Mr and Mrs MacAlister’s position is that the best evidence of that is the price in fact agreed, contending that a company’s market value is what a willing buyer and a willing seller would agree to pay for it. Cardamon and Mr and Mrs MacAlister were

willing buyers and sellers and the price they in fact agreed on the basis that the warranties were true was £2,386,247. This, Mr and Mrs MacAlister say, is direct evidence of what a willing buyer and willing seller in fact agreed to pay in the “real world” and therefore is very strong evidence of the value of the Company “as warranted”.

132. Cardamon does not dispute that the sale price can offer evidence of the value of the Company, but disputes that the “as warranted” value here was the price paid. It contends that any orthodox approach to valuation produces a much higher figure than the sale price. In particular it focussed on the need first to identify the future maintainable earnings of the Company. Based on this approach, in Mr Nunns’ opinion, a reasonable figure for the value of the Company’s trade as warranted is £3,184,000.
133. Although Mr and Mrs MacAlister’s case was maintained, it was apparent that the expert evidence did not really support this case. Although Mr Conti in his first report reached a conclusion consistent with this case, it was plain from his oral evidence that he did so somewhat constrainedly, working on the basis of the assumptions which he was required to make in his instructions, which assumed (reflecting Cardamon's case as then put) that the value of the Company could not be greater than the purchase price. It was however clear both from a reading of his evidence, where (i) he noted that the result to which he came might seem a “perverse conclusion”, and (ii) he was in no doubt that *“the value of its claims handling business was worth a great deal to the Claimant”*, and also from his oral evidence that this was a view to which he did not, absent such constraints, subscribe, and he would have looked at the question

more widely if he had not been instructed to assume the warranted value was the purchase price.

134. In the light of the experts' views I conclude that it would be wrong to take the indication of the Company's value afforded by the Purchase Price as indicative of its value without considering the full expert evidence as to value. This is the more so as there plainly were reasons why the company might have been sold at something of an undervalue. They include the fact that the sale was a quick one, essentially for cash, in circumstances where it appears that the MacAlisters were keen to sell in the immediate future and that there was a need to find someone prepared to take over the Directors' Loan.

135. The issue of quantum requires consideration of two aspects of value: the Enterprise Value ("EV") and the Equity Value ("EQV"). These are related. The experts agree that EQV is calculated:

"by deducting from its EV [Enterprise Value] the market value of its net debt and adjusting for any non-operating and/or surplus assets (essentially those not tied up in the normalised working capital necessary to generate the assumed EBITDA)."

Or, to express it as a formula: $EQV = EV - \text{total debt} + \text{cash/NOAs}$.

The EV issues

136. As regards EV, there is quite a lot between the experts as regards their technique; but little as regards the result.

- i) Both agree that a company can be valued on the basis of a multiple of EBITDA;
- ii) Both agree that 3.75 is an appropriate multiple here;

iii) There are however issues as to the calculation of EBITDA Mr Nunns' calculation produced a figure of £849,000 for "normalised EBITDA"; Mr Conti calculates a figure of £797,000.

137. As a result, applying the multiple of 3.75 which they agreed Mr Nunns' calculation of "as warranted" EV is £3,184,000 whereas that of Mr Conti is £2,988,000. Both experts are therefore of the view that the value of the Company "as warranted" was more than £500,000 more than the Purchase Price.

138. I will consider the specific issues which arise in relation to the stages of the analysis.

The Years to Include and Weightings

139. The first issue concerns the years to take into account for the calculation of the EBITDA. The main division between the experts here was whether to take into account years back to 2009 or just the specific years covered by the Accounts and the Management Accounts. There was also a subsidiary issue as to the weighting to be attached to the years which did fall to be considered.

140. In relation to this Mr Nunns explained that in a business where income and outgoings might vary in considerable measure, it was preferable to look back some years to produce a more rounded picture. What was put to him was that this might skew the position if (as here) there was a change of management, or a loss of business.

141. Thus, it was Mr Conti's evidence that while one might look to take into account a longer period of time, the important thing was to get the best estimate of the value of the Company at the time of the valuation. His opinion was that in the circumstances of this company it was preferable not to go back to 2009 because he did not consider that the past was a reliable guide for this company, essentially because he could see that it

had lost a significant customer and there was a change in relation to broker remuneration.

142. It was slightly surprising to discover that there was not a protocol for this question, to enable a valuer to assess which sorts of changes would signal unsafety in relying on a longer period. Essentially, this question appeared to be a matter of judgment. There were on the evidence plainly factors which pulled in both directions. The vicissitudes of a particular year would be smoothed by looking over a longer period; but it was true that, if those previous years did not represent a continuum in the business, the differences might be ones which were not really apparent.
143. On balance and having heard the evidence, my conclusion is that the better approach was that adopted by Mr Nunns. The broker remuneration issue was on the evidence intended to be fiscally neutral. Changes of customers must be part of a business. What is gained by the longer perspective is not in my judgment outweighed by the particular questions identified.
144. As for the question of weighting, that is a question which was effectively treated in the evidence together with the question of the years. So Mr Conti advocated a 0:1:1 weighting (nothing earlier than 2013 and equal weighting to the 2013 Accounts and the Management Accounts), and Mr Nunns advocated a 1:1:1:1:2:1 weighting (equal weightings for all except the 2013 accounts).
145. I had not dealt specifically with this question of weighting in my draft judgment but it transpires to be a point of some significance in terms of quantum and the parties have subsequently addressed me on it in the light of my conclusion on the years to be taken into account, with the Defendants advocating a 1:1:1:1:1:1 weighting.

146. As to this, I can quite see that there might be arguments in favour of this approach, but there might equally be arguments for entirely other approaches too (such as the 1:1:1:1:2:2 approach pleaded as an alternative case by Cardamon but not reflected in the expert evidence). So too might there be other arguments in favour of the weighting used by Mr Nunns which might have emerged if he had been pressed on the question of weighting per se in cross-examination. The bottom line is that the correct approach to weighting was a matter of expert evidence and the correct weighting to be used if the full range of years was brought into account was not separately addressed in any detail.
147. In those circumstances I do not consider it would be appropriate to diverge from the positions advocated by the experts unless some basis for doing so can be discerned from the expert evidence. I have preferred Mr Nunns' approach on the years to take into account and his position on weighting was one which seemed to have an entirely sensible and rational basis: that the most recent accounts provided the "*most recent indicator*" for the future and justified their being given a greater weighting than the more distant past.
148. Calling them "*the most recent indicator*" does however raise questions about the weight to be given to the still more recent Management Accounts. The issue here is whether the recent status of the Management Accounts means that they should be afforded equal status with the Accounts, or whether their more informal basis and that fact that they are figures extrapolated from eight months trading means that they should be regarded as less reliable than the Accounts and given an equal weighting with the earlier years.

149. Ultimately when evaluating these arguments there is a starting point in that Mr Nunns' evidence on this was clear. There is then certainly something in the argument that as the Management Accounts were warranted they should be accorded equal status with the Accounts. However that has to be weighed against those factors which inform Mr Nunns' conclusion. I do not consider that when this is done this argument in favour of the Management Accounts carries more weight than the concerns about their unaudited status and part year basis. Both of these are factors which could give rise to a significant degree of error; accordingly giving the Management Accounts less weight than the most recent audited figures would appear to be the most intellectually robust, as well as most prudent course. Further it is fair to say that while Mr Conti gave evidence which supported the Defendants' case on this, Mr Nunns' position on this aspect of weighting was not specifically challenged.

150. I therefore conclude that the weighting advanced by Mr Nunns should be used.

Adjustments: Exceptional Items

151. Both experts agreed that exceptional events needed to be taken out of the equation. Both considered that the amount of £659,324 written off in relation to Boomerang-Tag needs to be added to EBITDA because this was a one-off event that would be unlikely to recur. Effectively this reinstates EBITDA to the amount it would have been had no write off occurred.

152. The other issue related to £635,952 paid in settlement of litigation with MTA Solicitors LLP. Mr Nunns made no adjustment for this, on the basis that there were other pieces of litigation evidenced and so settlements for litigation could not be regarded as exceptional. Mr Conti added it back in. His reason for this approach in his Third Report was that a valuer could not reasonably have expected it to recur.

153. He was not challenged on this in cross-examination.
154. This position coheres with the view which I formed on the evidence. It is not enough for a settlement to cease to be an exceptional item to say that there may be other settlements. Were the evidence that there were routinely many such settlements throughout the life of the business, that might be the appropriate conclusion. However, the evidence pointed to just the one settlement of this sort. That is properly regarded as exceptional.
155. The final potential exceptional item was the brokers' remuneration issue. Given the position on limitation it is common ground that it does not fall to be taken into account. Had it been, given that this was exceptional in the context of the warranty, it would plainly be consistent to treat it as such in the context of the "as is" valuation. That is also consistent with the expert evidence on the subject, with both experts taking it into account to "normalise" EBITDA. The only issue was whether it should also come into account in the "as warranted" figures. That depends on the finding I have made above as to disclosure. Accordingly, the adjustment would not fall to be made to either the warranted or the "as is" figures.
156. That leaves the question of the figure to use for the adjustment to the "as is" valuation for broker remuneration. Mr Nunns calculates this as £376,358 (approximately £564,537 "grossed up" for the full year). Mr Conti, working on a different basis, reaches a figure of £700,217. It was accepted by Cardamon that the difference between the two figures was not significant in terms of assessing EBITDA and by Mr Conti in cross-examination that the figures were broadly similar.
157. To the extent that I were required to make a decision between these figures, I would decide for the higher figure offered by Mr and Mrs MacAlister, largely on the basis

that the burden of proof rests with Cardamon as to the difference and has not been discharged, and in line with the principle of prudence.

Issues relating to EQV “As Warranted”

158. Ultimately these issues are not relevant for quantification, and are included for completeness. Where the experts differ at this stage is essentially in the treatment of “Non-Operating Assets” (“NOAs”): that is assets which are surplus to the Company’s requirements for working capital necessary for it to trade and produce a profit.
159. There are two issues here: whether the Directors’ Loan was a surplus asset which fell to be added to the EV and whether the whole of the Company’s cash at bank likewise fell to be added. Mr Conti’s position was that the starting point for an assessment of the Company’s value was that it must be worth at least the amount of £1,344,752 identified as “Cash at Bank” in the Accounts and the Director’s Loans of £1,282,472.
160. As regards the “Cash at Bank” this issue turned on Mr Conti’s assessment of the cash figure as including an amount of £1,156,286 which appeared under the heading “Client Premium” in the Management Accounts and which together with a figure of £186,113 recorded in that document as “Cash and Equivalents” formed a sum closely approximate to the “Cash at Bank” figure. On examination of the documents this appeared to be a misstep; this money was plainly (to anyone familiar with the business) client money and was not properly to be regarded as an NOA of the business.
161. Nor could the remaining cash sensibly be regarded as an NOA given the warnings which had been given ahead of purchase that there was little cash in the business, as Mr Conti accepted. Such cash as there was, was properly regarded as working capital.

162. As to the Directors' Loan, this was the subject of some detailed evidence during the course of which the experts appeared sometimes to be at cross purposes.
163. In essence, it was Mr Conti's opinion that although Cardamon had agreed to pay the Directors' Loans, the loans remained an asset of the Company, in that the Company was entitled to that money. This was an argument which had a logic to it, but one which was specious in the circumstances. Ultimately it has seemed to me that the value of the Company is artificially inflated if something is counted as an asset which the purchaser nonetheless has to fund. I conclude that Mr Conti was wrong to include this amount as an NOA of the Company. Indeed, Mr Conti accepted that, to the extent the buyer anticipated having to use the Directors Loan payment on normal operating expenses within a fairly short period of time, it would not be right to regard the Directors' Loan as an NOA.
164. This conclusion also sits well with the fact that if Mr Conti's approach were correct it would follow that the "Working Capital" table he produced predicated on that assumption and which appeared to demonstrate that the Company had been operating happily with negative net current assets, should be consistent with reality. Whereas in fact, however one might intellectualise his analysis, the reality of the situation was that within months of buying the Company, Cardamon was having to provide significant cash injections to enable the business to go on. For all that a significant portion of the cash paid was the Director's Loan which Cardamon agreed to pay as part of the deal, further not insignificant amounts were needed. The Company therefore did not, as Mr Conti sought to suggest, need funding just to maintain regulatory compliance; it needed funding for practical reasons relating to actually paying claims as they fell due.

165. There is also a point to note as to treatment of the Boomerang-Tag figure at this stage; its treatment in this calculation depends on the conclusion which I have reached above about disclosure of that item.

Issues relating to EQV “As Is”

166. There was a fairly stark difference of approach on this point. Mr Nunns deducts from the EV the amount of the Company’s net liabilities required to be covered by additional finance. This is on the basis that while a company with positive net assets may be assumed to be self-financing, a company with negative net assets (net liabilities) will require additional finance in the short term to remain solvent. It was common ground between the experts that, if additional finance had been borrowed from a third party, it would be a debt that would be taken into account to derive an EQV.

167. In terms of how this was to be calculated, he considered that funding provided by Cardamon should be treated consistently with funding that might have been borrowed by the Company from a third party. He therefore proceeded on the basis that the actual value of the Company to Cardamon was a combination of the actual value of the Company’s Trade, less the amount by which its net assets were diminished below the minimum FCA capital adequacy requirement.

168. Mr Conti, while agreeing that this would be the case in principle, contended that the Company continued to operate as a going concern during the years 2011 to 2013 despite having a significant (but reducing) net working capital deficit (i.e. reducing net current liabilities). Although he accepted that a reasonable valuer would, for FCA compliance reasons, be sufficiently concerned about net liabilities of £1.8m to factor

in the need to borrow that amount by way of a short term loan at 5% he maintained that this debt has no effect on the EQV of the Company. On his analysis Cardamon's loss is the cost of the interest on the loan for 2.9 years, being the time needed to pay off the finance on the basis of the assumed EBITDA of £788,000 per annum. His position was that it was the Company's future earnings and not the position on its balance sheet which is relevant as a matter of company valuation.

169. This difference of view was carefully considered by the experts and explored in cross-examination; but the net result was that the two experts remained fundamentally at odds.
170. As with the question of the treatment of the Directors' Loan, I did not find Mr Conti's argument convincing and indeed Mr West conceded in closing that it was counterintuitive (while maintaining that it was nonetheless correct). In the final analysis if there were a need for financing, revenue which would otherwise accumulate and be available for dividends and for other purposes than being operational, would instead be diverted into paying back the loan. It strikes me as fundamentally wrong to regard the value of the Company as being unaffected by that other than insofar as there was some (minimal) cost of financing. The Company's value may be derived from its future earnings, but the value of those earnings must be affected if they are essentially ring-fenced to deal with the legacy of the past.
171. Further as I have already said, Mr Conti's suggestion that the Company had been operating happily with negative current assets, such that financing could be regarded as a dressing for FCA compliance purposes did not equate with the position on the ground; Cardamon had to pay sums in excess of the Director's Loan (and to "let go"

Mr Kay) to get the Company running as it has since been, profitably. To regard this money as a benefit to Cardamon is artificial.

172. An issue arises as to what my conclusions as to the expert evidence on this issue means, in terms of the consequences for valuation. In particular it has been suggested for the Defendants that (building upon this discussion of the loan analysis) it is appropriate to look at the level of funding needed to enable the Company to continue as a going concern, namely the £1,032,000 in fact injected, rather than adopting Mr Nunns' position (that the difference is that between the Company's net liabilities and the FCA capital adequacy requirement, which has been calculated to be £1,908,000).
173. I consider that no adequate basis has been advanced for adopting an approach other than that adopted by Mr Nunns, which was squarely addressed to the question of what was necessary to compensate Cardamon if the warranties made had been true. That is particularly so in circumstances where it was common ground that (i) the reasonable valuer would take into account the need for the Company to make up any net asset deficiency (ii) the net liabilities were approximately £1,800,000 as at 30 April 2014 and there was no issue as to the FCA capital adequacy requirement being £161,512.
174. The primary approach of the Defendants was to suggest that the cost of loan analysis was correct on the hypothesis that aside from the need for FCA capital adequacy, the company was otherwise a going concern. I have rejected that argument. That rejection, dealing with the question of what happened later, does not however import an acceptance that the damage is represented by the amount of the loan later paid. On the contrary I do consider that the approach now advocated by the Defendants by way of fallback from their primary case involves a somewhat partial assessment of the

position, ignoring the impact which use of profits and/or savings such as Mr Kay's remuneration package would have on the need for financing.

Overstatement of Turnover (Costs of rectifying the Accounts)

175. A further claim has been advanced in the sum of £44,340 for the costs of rectifying the accounts. It is not advanced as an element of the costs of the litigation but part of the compensation necessary to put the Claimant into the position in which it would have been had the warranties been true (ie as part of the damages claim). It is a composite figure which includes all elements of the rectification of the Accounts, including the Boomerang Tag debt, the failed broker commission claim, and various points of detail which have "fallen by the wayside". It is common ground that some element of it would have to be deducted to arrive at a correct figure. I have not been provided with any basis on which this could sensibly be done. To the extent that it were to be relevant I would therefore find that this claim fails.

Conclusion

176. Since delivery of a draft judgment I have been provided with draft damages calculations based on my findings in that draft and the potential findings on the outstanding issues (now incorporated into this final judgment). The conclusions to which I have come indicate that the damages which would prima facie flow from the breach of warranty would exceed the Purchase Price by more than £500,000.

177. Accordingly, the damages recoverable are subject to the contractual cap limiting recoveries to the Purchase Price, but are not further reduced by the de minimis amount. Cardamon's claim succeeds in the amount of £2,386,247.50.