Neutral Citation Number: [2021] EWHC 2103 (QB)

Case No: QB-2019-004644

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before:

MR JUSTICE LINDEN

- -

Between:

BISHOPSGATE CONTRACTING SOLUTIONS LIMITED	**Claimant**
- and -	
DAVID THOMAS O'SULLIVAN	**Defendant**

- -
- -

Mr Paul Chaisty QC (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Mr Simon Forshaw (instructed by **Howard Kennedy LLP**) for the **Defendant**

Hearing dates: 5, 6, 7, 10, 11, 12, 20 May 2021

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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.

....

MR JUSTICE LINDEN

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII, if appropriate, and/or publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 2pm on Friday 30 July 2021

THE HONOURABLE MR JUSTICE LINDEN:

Introduction

1. From April 2007 until his resignation with effect from 9 June 2017, the Defendant was an employee of Munnelly Support Services Limited ("MSSL"), a company which formed part of a family business known as the Munnelly Group, of which Mr Philip Munnelly was the head. The business of the Munnelly Group is labour supply, logistical support and waste management, and it operates largely in the construction sector.

2. From 2012, when he was Financial Controller of MSSL, on the instructions of Mr Munnelly, the Defendant was involved in the incorporation and development of the business of a group of companies which were referred to in these proceedings as the Bishopsgate Group. This group included the Claimant. The Defendant did increasing amounts of work for the Bishopsgate business and, at the time of the events which are the subject of these proceedings, he described himself as its Managing Director.

3. The case against the Defendant is that at all material times, in addition to his employment by MSSL, he was a de facto director and/or an agent of the Claimant. It is alleged that, in or around mid-2016, Mr Munnelly repeatedly gave a clear oral instruction to the Defendant that he was not permitted to provide or extend credit to any new client of the Claimant without |Mr Munnelly's consent, and that this instruction was agreed by the Defendant and had contractually binding effect.

4. In October 2016, the Defendant authorised the provision of unsecured credit of up to £250,000 to a new client of the Claimant, G-Force Groundworks Limited ("G-Force") and, over the following months, he permitted the level of credit to grow so that it stood at £578,072 when he left MSSL. It is said that the Defendant did so without the knowledge or consent of Mr Munnelly, and therefore contrary to this instruction and negligently and that this was in breach of contract and of his duties as a de facto director and/or agent.

5. G-Force subsequently went into administration in August 2017 and the Claimant wrote off a debt of £481,727. The Claim is therefore in this sum.

6. At the beginning of the trial, Mr Chaisty QC confirmed that the Claimant's pleaded case alleges three particulars of breach of duty, which are pleaded at paragraph 32 of the Amended Particulars of Claim ("APOC"). These are:

    i) Providing/extending credit to G-Force;

    ii) Failing to ensure the payment of the sums owed by G-Force; and

    iii) Deliberate concealment of his actions in relation to G-Force.

7. Mr Chaisty also stated that, contrary to the impression given by his skeleton argument, the allegation of deliberate concealment was pursued. The matters which it was alleged the Defendant deliberately concealed were:

    i) The grant of credit to G-Force; and

ii) The growth of G-Force's debt and the size of the problem.

8. Mr Chaisty confirmed that the duties of which the Defendant was alleged to be in breach were pleaded at paragraph 24(a)-(g) APOC which, he said, were *"taken largely…from the Companies Act"*.

9. Mr Chaisty's case was refined in the light of the oral evidence in respects which I will come to.

10. The Defendant says that he did all of his work in his capacity as an employee of MSSL and owed duties to that company, but not to the Claimant of which he was neither a de facto director nor an agent. He denies that there was any instruction or agreement that he would not extend credit to new clients without Mr Munnelly's authorisation. He also says that Mr Munnelly was well aware that G-Force was a client and that credit had been extended to it. He denies that his actions were negligent and that he concealed his dealings with G-Force. In the alternative, he argues that if it is found that he was a de facto director and that he acted in breach of his duties as such, he nevertheless acted honestly and reasonably at all material times and should therefore be relieved from any liability pursuant to section 1157 of the Companies Act 2006.

The trial

11. The Claimant called Mr Munnelly (Chief Executive Officer and director of Munnelly Group plc), Mr Geoffrey Vine (Finance Director of Munnelly Group Plc) and Mr Patrick Sexton (senior consultant at West Coast Haulage Limited and former statutory director and nominee shareholder of the Claimant for Mr Munnelly). The Defendant gave evidence and he called Mr Daniel Madadi (former Head of IT of the Munnelly and Bishopsgate Groups and Operations Manager of MSSL) and Mr Gary Pegg (who described himself as a former finance director/financial accountant working for the Claimant and other Bishopsgate companies).

12. I allowed a week after the close of the evidence for Counsel to prepare written submissions before making their oral submissions.

Observations about the credibility of the witnesses

13. I found Mr Munnelly to be a highly unreliable witness, for reasons which will become increasingly apparent as I explain more about the case below. At this stage, suffice it to say that his evidence in chief began with supplemental oral evidence which, in my view, he had made up in order to address a fairly obvious weakness in his account. He was then cross-examined for approximately an hour before the end of the court day, in the course of which he was asked about whether he had paid Mr Sexton £500,000 when the shares in the Claimant were transferred back to him in 2018, and if so why, given that Mr Munnelly was the owner of the shares in any event. Mr Munnelly said that he had made a payment to Mr Sexton but refused to say how much it was, and he gave explanations for the payment such as that it was *"for all the trouble that he had been put through"*.

14. At the end of the court day, in the usual way, I told Mr Munnelly that until he resumed his evidence the next morning *"you must not discuss your evidence under*

any circumstances with anyone". Overnight, it came to the Defendant's attention that Mr Munnelly had nevertheless discussed his evidence with Mr Sexton (and, quite possibly, the evidence which Mr Sexton was to give). The following exchanges with Mr Forshaw ensued at the beginning of the second day of the trial:

> *"Q. Last night after you left court, Mr. Munnelly, you telephoned Mr. Sexton, did you not?*
>
> *A. No, I did not telephone Mr. Sexton.*
>
> *Q. You telephoned him and you wanted to know how my client knew that the shares in [the Claimant] had been sold for £500,000*
>
> *A. No, I mean, we talked about going to a race meeting on 3 Saturday.*
>
> *Q. You did telephone him then?*
>
> *A. I had a conversation, but not about this. I had a conversation about racing….*
>
> *Q. I want to be absolutely clear about this, Mr. Munnelly. It is a matter of some importance. When I first asked you, you said you had not telephoned him. You have now accepted that you did telephone Mr. Sexton. Did you or did you not speak to him about this issue?*
>
> *A. No, I did not speak to him about this issue.*
>
> *Q. Not at all?*
>
> *A. No.*
>
> *Q. Did you talk to him about the case at all?*
>
> *A. Did I speak to him about the case? No, not really.*
>
> *Q. "Not really"; what does that mean?*
>
> *A. Well, I do not know. He said, "How are things going?" I said, "Yes, it seems to be all right." That was it.*
>
> *Q. You were told at the close of your evidence yesterday by the judge, in clear terms, not to speak to anybody about the case, were you not?*
>
> *A. I did not. I did not, as I said, I did not have a -- he asked me how things were going, and I did mention that there was some sort of mention about this deal.*
>
> *Q. So you did discuss the shares with him last night?*
>
> *A. I said the deal was discussed, yes, I did.*
>
> *Q. So you discussed your evidence with him?*
>
> *A. I did not discuss my evidence with him…"*

15. The combination of untruthfulness, evasiveness and obfuscation which is apparent from these exchanges was representative of Mr Munnelly's qualities as a witness and it continued throughout his evidence. He admitted, in the course of his evidence, that he had declared that if the Defendant went anywhere near the clients of the Munnelly and Bishopsgate groups he would *"have the house from over his family's heads"* and it appeared that he was determined to achieve this objective, however poor an impression of his own honesty and competence he gave in the process.

16. It is also relevant to note that Mr Munnelly came across as overbearing and liable to be irrational or simplistic, and he may well have been seen in this way by colleagues. This observation is based not just on how he presented as a witness, but also on what was hinted at by other witnesses. He appeared to me to be someone who probably needed to be "managed" by his colleagues and this may well have played a part in what happened in this case, particularly in Mr Vine's dealings with Mr Munnelly on the subject of the issues with G-Force.

17. Mr Vine had been Mr Munnelly's right hand man for many years. He appeared to be an intelligent man and, as will be seen, he was in an awkward position given that he knew about the problems in relation to G-Force for some time before it came to the attention of Mr Munnelly, and yet to admit this would put him in a difficult position with Mr Munnelly and undermine the Claimant's case. He gave the impression of being uncomfortable about being a witness in these proceedings and of having decided that the best strategy was to be as non-committal as possible in the hope that his loyalty to Mr Munnelly and his duty to tell the truth would come into conflict as little as possible. He was also prepared to concede some points where he had no choice, but he stuck to the "line" which was required if the Claimant was to succeed. That this was a "line" was, in my view, apparent from a number of features of the evidence, including that there were passages in Mr Vine's witness statement which appeared to have been cut and pasted from Mr Munnelly's, or vice versa.

18. Mr Sexton did a convincing job of showing that he knew very little about the business of the Claimant. His evidence was peripheral to the issues in the case, but it was striking that he disowned parts of his witness statement. An important example was paragraph 11 which said that *"It has become apparent to me in preparing this statement that [the Defendant] failed to consult me on a number of occasions and deliberately took steps to avoid updating me as to the financial position of [the Claimant]"*. He was asked, as a preliminary to further questions on the point, whether he stood by what was, a serious allegation, and he said *"No"*. He confirmed that he did not stand by this evidence because: *"I had nothing to do with the running of the business. That is clearly established"*. He also made the same factual error as Mr Munnelly had made in relation to the size of a personal guarantee, referred to below, which he had been asked to give in January 2017. Overall, Mr Sexton and his evidence enhanced the impression that the Claimant's witnesses had signed what had been drafted for them, and/or had agreed "lines", rather than their witness statements containing truthful accounts of their recollections.

19. The Defendant was clearly very nervous and concerned about the consequences should he lose the case. As a consequence, he tended to try to cover all bases in giving his answers, with the result that a number of his answers were lengthy and not always to the point. There were also some inaccuracies in aspects of his written evidence and in emails which he wrote in relation to the events which are the subject of this case.

Some of these inaccuracies were errors, but he freely admitted that part of his approach to putting pressure on G-Force to address the issues with its debt was to make statements which exaggerated the pressure he was under personally from his superiors. I have taken these points into account in assessing his evidence in the context of the evidence as a whole but, importantly, and very much in contrast to the Claimant's witnesses, when the inaccuracies were put to him, he accepted them. He did answer the bulk of the questions which were put to him and, I find, he did so truthfully and, for the most part, reliably.

20. Mr Pegg was an excellent witness in the true sense of the word. It was clear that he took his affirmation seriously and he answered questions honestly, directly and in a non-partisan way. There were areas in his evidence where his recollection was understandably hazy given the passage of time and, where this was the case, he was open about it. I had little hesitation in accepting his evidence where it came into conflict with that of the Claimant's witnesses.

21. Mr Madadi's evidence was somewhat generalised and covered some subjects which did not prove to be relevant. I considered that he was doing his best to provide a reliable account but ultimately his evidence did not provide a great deal of assistance on the central issues.

My approach to fact finding.

22. Mr Forshaw referred me to the well-known passages at [15]-[22] of the judgment of Leggatt J (as he then was) in **Gestmin SGPS SA v Credit Suisse (UK) Ltd** [2013] EWHC 3560. He also relied on Lord Pearce's observations on the nature of credibility in **Onassis v Vergotis** [1968] 2 Lloyds Rep 403, 431 and on Leggatt LJ in **Brogden v Investec** [2014] EWHC 2785 at [50] and [52]. I had this guidance in mind in assessing the evidence and making my findings of fact.

The facts

The Munnelly Group

23. During the period of time, which is relevant to this case, the Munnelly Group comprised various companies including MSSL, and the business of MSSL was the supply of temporary workers to contractors and subcontractors operating on sites in the construction sector. Mr Philip Munnelly was the ultimate owner of and a director of each of the companies within the Munnelly Group and his brother (PV Munnelly) and three of his children (Paul, Sarah and James) also held various directorships within the Group.

The Claimant's employment by MSSL

24. The Defendant joined MSSL as an Accounts Executive in April 2007. He was issued with a written contract of employment when he joined, and he entered into a further written contract on 11 April 2008.

25. In 2010, the Defendant was promoted to the position of Financial Controller. In broad terms, this meant that he was responsible for running the accounts department of MSSL and another company within the Group, Integrated Contract Waste

Management Limited, and he managed a team of 6-8 staff. He is not a qualified accountant, but he reported to Mr Vine, the Finance Director, who is. In his witness statement Mr Munnelly describes Mr Vine as the Defendant's line manager. After a couple of years in this role, the Defendant also began to report directly to Mr Munnelly and the rest of the board of MSSL. He enjoyed a high degree of trust and he assisted with Mr Munnelly's personal finances as well as the company finances.

The Bishopsgate companies

26. In around 2011, Mr Munnelly decided to set up two payment intermediary companies, the role of which would be to engage temporary workers or operatives and then supply them to MSSL which, in turn, would supply them to its clients. The advantages of this approach would be that the operatives would not contract directly with MSSL and it would not be liable for their tax or national insurance. Nor would it be their employer for the purposes of any statutory employment protection which might otherwise arise. Operatives could also be charged a fee for the services provided to them by the new companies. It was also envisaged that, in the longer term, operatives could be supplied to other, non-Munnelly Group, contractors.

27. Accordingly, the Defendant and Mr Vine were tasked by Mr Munnelly with setting up the new companies. They all took advice from Osborne Clarke LLP and BDO LLP which included advice that it was important that the new companies be truly separate from MSSL. Essentially this was because, if they were not, the arrangement would potentially he held to be a sham and the tax and other advantages to MSSL of not contracting directly with the operatives would be lost. As an employment business, MSSL also could not be seen to be charging a fee to operatives for its services.

28. On 13 June 2012, the Claimant was incorporated. Bishopsgate Business Solutions Limited ("BBSL") was incorporated on 14 June 2012. The businesses of these two companies, both of which operated within the Construction Industry Scheme, were slightly different:

    i) The Claimant contracted directly with the operative, or the operative's service company, to pay them for the services which they provided on site. They were then supplied to the client. The Claimant made appropriate tax deductions and accounted for them to HMRC. It also produced pay statements for each subcontractor. The Claimant invoiced the client for the sums which it paid the operatives and the services which it had provided.

    ii) BBSL was a so-called PAYE umbrella company which acted as an intermediary employment business between a recruitment agency and the client. It engaged operatives as an alternative to them setting up and operating their own service companies, and it dealt with their administration and accounts. It then invoiced the agency for the work which the operative carried out and the services which it provided, and it paid the operative through PAYE, making the appropriate deductions.

29. Subsequently, two further companies were incorporated, again on Mr Munnelly's instructions: BG Care Ltd ("BGCL") (of which the Defendant was a statutory director) and BGC Accountancy Limited (" BGCAL") and, together, these formed what was referred to as the Bishopsgate Group. BGCL was similar to the Claimant

but it operated in the care sector, and BGCAL provided accountancy services to operatives engaged by the other Bishopsgate companies.

30. Mr Vine was a director of BBSL from the point of its incorporation, and the Defendant was appointed a director of this company on 1 June 2013. They were both asked to become directors of the Claimant but declined. Mr Sexton was therefore appointed as the sole director. The Defendant's evidence, which I accept, was that he and Mr Vine declined to be appointed as directors of the Claimant because they were concerned about incurring personal liabilities in the event that its arrangements with MSSL were found to be a sham. Their concern that it might be thought that there was no reality to the separateness of the corporate structure which was set up is unsurprising for reasons which will become apparent.

31. Over time, the Defendant built up the business of the Bishopsgate companies and his work in relation to this part of the business increased alongside his work in relation to MSSL, until May 2016 when Ms Marta Sweda replaced him as Financial Controller of MSSL. He says in his witness statement that from 2013 he was the Managing Director of the Claimant and it is clear that he was in the habit of describing himself, including to third parties, as the Managing Director of the Bishopsgate Group. The Defendant also says that he managed the Claimant and the other companies in the Bishopsgate Group with the assistance and support of senior employees including Ms Sweda, Messrs Philip and Paul Munnelly, as well as Mr Vine who was responsible for preparing the year-end and statutory accounts for all of the companies in both Groups.

32. The Defendant initially managed all day to day aspects of the business but, as it developed, staff were hired to assist him in running the different departments. His role included finding new clients – he was the main generator of sales within the business - managing the sales team, deciding what terms should be agreed with clients, including terms as to credit, setting up new systems and hiring and firing staff with the assistance of Mr Munnelly and Mr Vine. MSSL cross charged the Bishopsgate Group for the Defendant's services on the basis that he was being supplied to the Bishopsgate Group by his employer, MSSL.

33. By 2016, the Bishopsgate Group had a number of staff including others who described themselves as directors but were not de jure directors – for example, Mr Long (Sales Director) and Mr Paul Lee (Payroll Director).

34. Notwithstanding the importance of the Groups being separate, Mr Munnelly was resistant to complying with the advice which had been given by BDO and Osborne Clarke. There was also compelling evidence that the Munnelly Group and the Bishopsgate companies were not as separate as was presented to the outside world. As Mr Brewerton put it in his witness statement dated 25 January 2019 for the purposes of other proceedings against the Defendant in the Queen's Bench Division *"Bishopsgate Group was, in effect, run as a division of the Munnelly Group"*. For example:

    i) When the Claimant first started trading it operated from a different building but, as part of a move to increase the involvement of Mr Munnelly and members of the Munnelly family in the business, it relocated so that the two Groups operated from an office on the Pinner Road in Harrow, albeit with the

Munnelly Group on the first floor and the Bishopsgate Group on the ground floor.

ii) Mr Munnelly remained at the apex of the two groups. As Mr Munnelly accepted, the Defendant reported to him. There were no boards of the Bishopsgate companies or, at least, no board meetings. Matters relating to the Bishopsgate business were discussed and decided at senior management meetings of the Munnelly Group.

iii) Members of the Munnelly family were involved in both groups. For example, Paul Munnelly was a director of MSSL and Munnelly Support Services Holdings Limited, and the CEO of another company in the Munnelly Group: City Calling Limited. He was also Head of Marketing for the Claimant, BBSL and BGCL. He managed social media, the Bishopsgate website and marketing, and he had a sales team which reported to him. Sarah Munnelly worked in marketing for, and was a director of, City Calling Limited as well as working for the Claimant, BBSL and BGCL.

iv) Steps were also taken to disguise the involvement of Paul and Sarah Munnelly. For example, Sarah used her married name *"Sarah Jenkins"* but, on 22 July 2015, she asked for her email address and name on Outlook to be changed to *"Sarah Marie"*, explaining in her mail that *"Phil's worried if I may get found out"* i.e. she may be connected with the Munnelly family. When this was put to Mr Munnelly, he characteristically claimed that he did not *"have a clue"* why his daughter had done this, nor why she was suggesting that he wanted her to do it for the reason which she gave. Similarly, Mr Munnelly's son's Outlook account was in the name of "*Paul David*" rather than Paul Munnelly.

v) Mr Sexton was and is a long-standing friend of Mr Munnelly and they have a shared interest in horse racing and own racehorses. He held the shares in the Claimant, but he did so as a nominee for Mr Munnelly until he transferred them back to Mr Munnelly in 2018. Although he was the statutory director of the Claimant, he said that he had *"nothing to do with"* the running of the business and no involvement in it *"whatsoever"* although from time to time he was required to sign documents *"in order to comply with my role as statutory director"*. Mr Munnelly described him as *"simply fronting and not making any money out of"* the company in an email dated 24 January 2017. Mr Sexton also allowed his electronic signature to be used without his knowledge where it was required to evidence his authorisation of, or consent to, a transaction involving the Claimant.

vi) Similarly, Mr Vine was a long standing and loyal ally of Mr Munnelly and the Finance Director of the Munnelly Group. He was a statutory director of BBSL, but he told the court that he did not in fact perform any of the functions of this role. He also held the shares of this company on trust for Mr Munnelly.

vii) There were other staff who worked across the business. For example, Ms Lovett was Head of Legal for both Groups. Mr Madadi was also Head of IT for both, and operations manager of MSSL.

viii) The impression gained from the evidence, including the evidence of Mr Madadi, was that both parts of the overall business formed part of a small and tight knit family business in which the personnel of both parts mixed regularly. Mr Philip Munnelly was a powerful figure and in overall control of both, exercising his power directly and through family members and trusted senior managers including Mr Vine and the Defendant. There was little respect for, or reality to, the separateness of the two groups of companies from a company law perspective.

Credit and how the Claimant did business

35. The Defendant says, and I accept, that the sector within which the Claimant operated is competitive. The business is a volume business, with low margins, and its success depends on attracting clients who will require large numbers of operatives to be supplied and who will therefore generate a large number of relatively small weekly or monthly fees. There are various ways in which new business may be attracted including, of course, by providing a good service. But it is also common practice for prospective clients to be offered rebates or credit in relation to payments to operatives in order to attract their business.

36. Credit in this context means that the Claimant pays the operatives pursuant to its contracts with them and is then reimbursed by the client, rather than the client being required to pay "upfront". Payment of the operatives will typically be on a weekly basis and the client will be invoiced and required to pay within an agreed period such as a week or a month in arrears. From the operative's point of view this has the advantage that they get paid on time; from the Claimant's point of view it means that the company is exposed to a credit risk. The fact that the Claimant is contractually obliged to pay the operatives for work which they have done means that the exposure continues to increase for as long as they carry on working on site.

37. Initially, the sole client of the Claimant was MSSL and the terms between these companies included the provision of credit to MSSL. The Claimant then won its first "third party" client, Carey London Ltd, which was given two weeks credit with a limit of £250,000. Thereafter, more third-party clients followed, and I accept the Defendant's evidence that a substantial number of these were attracted by being offered credit as an incentive to transfer their business, or some of it, to the Claimant.

The alleged instruction in 2016

38. It is common ground that in February 2016 a client in the care sector, Sea Meadows Supported Living Ltd, went into administration and ceased to trade owing £43,416 to the Claimant. Mr Munnelly discussed this with the Defendant and paragraph 44 of Mr Munnelly's witness statement says that he instructed the Defendant that:

> *"…BCSL must not be permitted to provide or extend credit unless:*
>
> *44.1 It was to a pre-existing customer of any of the businesses operated by companies within the structure of Munnelly Group plc or the companies known as the Bishopsgate Group;*
>
> *44.2 It was to a pre-existing customer that I knew; and*

> *44.3 No extension of credit should be afforded to any other third party save without (sic) my express consent on behalf of BCSL"* (emphasis added)

39. Paragraph 44.3 appears to have been intended to state *"save with"* or, simply, *"without"* i.e. the opposite of what it actually says.

40. The statement goes on to say:

> *"I initially gave this instruction to Mr O'Sullivan orally in a face-to-face meeting, which Mr O'Sullivan agreed to abide by. Following this initial meeting, I repeated this oral instruction on behalf of [the Claimant] on numerous occasions to Mr O'Sullivan in face-to-face meetings, which was accepted by Mr O'Sullivan on each occasion"*

41. Mr Munnelly's statement adds that he *"informed Mr Vine of the express instruction… I repeated this oral instruction to Mr Vine on numerous occasions thereafter"*. And he says that the instruction was known to *"others across the Munnelly Group"*.

42. When I asked Mr Munnelly to say in his own words what the instruction was, he said that there were three points, all of which had to be satisfied. The first was that the company had to be *"known to Munnelly's"* and the third was that *"I had to approve it. The second one – am I allowed to look it up?"*. When I said that since his case was that the instruction was given on numerous occasions and well understood in the business, it would be helpful if he could tell the court in his own words what the instruction was, he said that the first point was that they had to be known to *"MSSL"* – he later said *"the Munnelly Group"* - and the third was that he had to approve the credit. When he was asked what he meant by *"known to Munnelly's"* he said *"The first one was an existing client. I cannot remember what the second one is for the life of me"*. He later agreed that he was saying that any provision or extension of credit had to be with his consent and not just the provision or extension of credit to clients who were not known to Munnelly's etc. He did not draw the distinction between pre-existing clients and new clients which was drawn in his statement and he did not refer to the requirement that pre-existing clients be known to him personally. Nor did he draw a distinction between providing and extending credit.

43. It is clear that the passage cited above, from paragraph 44 of Mr Munnelly's witness statement, was cut and pasted into Mr Vine's witness statement or vice versa. It appears as paragraphs 31-31.3 of Mr Vine's statement with amendments to reflect the fact that the deponent is supposed to be Mr Vine, albeit these amendments were not carried out carefully, nor read carefully by the witness, so paragraph 31.2 (the amended paragraph 44.2) says *"It was to a pre-existing customer known personally that Mr Munnelly knew"*. Paragraph 31.1 of Mr Vine's statement is in materially the same terms as paragraph 44.1 of Mr Munnelly's statement. Paragraph 33.3 repeats paragraph 44.3, including the error highlighted at paragraphs 38 and 39 above.

44. In his statement, Mr Vine adds *"Mr Munnelly repeated this oral instruction on behalf of [the Claimant] to myself and Mr O'Sullivan and it was accepted by myself and Mr O'Sullivan as company policy on each occasion"*. However, when he was asked, in cross examination, what the instruction was he appeared uncertain. The following exchange took place with Mr Vine:

"Q. Now, you will appreciate, Mr. Vine, that one of the principal issues that this case relates to is whether or not Mr. Munnelly gave an instruction to Mr. O'Sullivan and in what terms. You are aware of that, are you not?

A. Yes.

Q. Can you tell us what the instruction was?

A. With regard to who are you referencing?

Q. You just said you are aware of the issue, Mr. Vine. One of the principal issues in this case relates to an instruction that is said to have been given by Mr. Munnelly to Mr. O'Sullivan. I am asking you to tell us what you understand that instruction was?

A. After the Sea Meadows bad debt, it was to do with, you know, not giving credit without authority.

MR. JUSTICE LINDEN: What was the instruction? It was to do with that, but what was the instruction?

A. <u>The clients had to be, or the potential clients had to be, known to Mr. Munnelly. I think that was the principal part, I think</u>.

Q. Can you remember anything else about it? Was that it?

A. That Mr. Munnelly had to effectively okay the credit facility, if there was one.

<u>Q. In every case</u>?

A. After Sea Meadows, <u>I believe so, yes</u>"

45. This account was inconsistent with the account in his and Mr Munnelly's witness statements, which said that Mr Munnelly's authorisation was required for <u>new</u> clients rather than <u>all</u> clients. It was also striking that Mr Munnelly had made the same mistake in his oral evidence. So, Mr Vine was asked which account was correct. He said that the account in his statement was.

46. The Defendant's written evidence was that he had a discussion with Mr Munnelly which resulted in a shared judgment that they would *"tread much more carefully with clients going forward because of the high risk associated with the care industry"*. There was no "instruction" and the discussion related to clients in the care sector rather than clients in the construction sector. Had Mr Munnelly given the pleaded instruction the Defendant would have pointed out that it was impractical and at odds with the business model given the need to be able to offer credit as a means of attracting new clients and to be able to make decisions on credit on a day to day basis.

47. In his oral evidence the Defendant explained:

"It was a shared judgment between myself and Mr. Munnelly. So, it was not like "You cannot do this anymore", I actually agreed that the care industry, it was a new industry that came on board with the hiring of David Long.... -- we were not

experienced in the care industry, so my experience at that stage was we had a lot of care clients who were quite slow in paying,...a lot of the care companies are run by carers themselves and they are not that great at running businesses, shall we say, they are very good people but they are not great at running businesses. So, my conversation with Mr. Munnelly was that we have had a lot of care clients that are a bit difficult to deal with, so the easiest thing going forward would be to just not extend credit"

48. He added:

"…. most of my experience working with the Munnelly Group was in the construction industry. I did not have much experience of the care industry until Mr. Long brought in the care clients. In the experience I had from the care industry, in that short period of time, led me to believe the actual risk was much higher than it would be in the construction industry which is an industry I had all my experience in."

49. In Employment Tribunal proceedings which were brought by the Defendant against the Claimant following the termination of his employment ("the ET proceedings"), the Claimant relied on a witness statement, dated 26 October 2018, which was made by Mr Paul Lee and signed with a statement of truth. Mr Lee's evidence included the following passage:

"14. Looking back on it, I believe we as a business used to take too many risks on credit. A good example (aside from G Force Groundworks Limited ("G Force"), …is Sea Meadows Supported Living Ltd... A business in the care sector, entered administration in February 2016 owing [the Claimant] over £50,000. …<u>After the Sea Meadows loss, we as a business became much tighter on clients in the care industry (which is perceived to be a risky industry). However, we were still more relaxed than we are now for construction clients, including G Force….</u>

16. Since David's departure, we have massively cut down on providing credit, particularly in the wake of the incident with G Force. If the client is a big client, with whom we have a historic relationship, short-term credit may be allowed, but only with the prior approval of our current Managing Director, Paul David Munnelly." (emphasis added)

50. Mr Lee was not called in these proceedings, although he still works for the Claimant. When these passages, which make no reference to an instruction and draw a distinction between care sector clients and construction sector clients, were put to Mr Vine in cross examination he confirmed that they are accurate. They are, of course, consistent with the Defendant's evidence and inconsistent with the Claimant's case in these proceedings.

<u>G-Force becomes a client</u>.

51. G-Force were not known to the Defendant until they were brought to his attention by Ms Victoria Budgen, who was a Senior Business Development Manager in the Bishopsgate sales team. She had previously been employed by the Guild, which was a well-established direct competitor of the Claimant, and G-Force had been a client of the Guild. Ms Budgen had spent a good deal of time seeking to persuade G-Force to

move its business to the Claimant and it was considered to be a very valuable client given that it made use of a large number of operatives.

52. On 11 August 2016, G-Force appeared on a list of clients, circulated by Mr Long, to which a price had been quoted and which were thought to be close to joining in August 2016. It was understood that they would require credit.

53. A credit report was obtained from "creditsafe" on 2 September 2016 at the request of Mr Kerai, who was the credit controller of the Munnelly Group. This gave G-Force a credit rating of 56 which meant that it was *"low risk"* with reference to a credit limit of £50,000. In the first two weeks of September 2016, there were further discussions of the level of credit which should be afforded to G-Force which included the Defendant, Ms Alicia Maher, one of the Claimant's Business Development Consultants, Ms Budgen and Mr Long. Ms Lovett also prepared draft personal guarantees for two of the directors of G-Force, Mr Bleddyn Powles and Mr Jason Cox.

54. On 9 September 2016, Mr Munnelly sent a lengthy email to the Defendant which said that he would be out of the office from 12 September 2016 as a result of a hip operation, although he would be available by phone and receiving emails, and he would be dealing with ongoing business on a daily basis. It is also apparent from the evidence that this was indeed what happened.

55. Mr Munnelly's 9 September 2016 email was following up on a discussion with the Defendant about the sales process which had taken place on the previous day. It also discussed the performance of Mr Long as Sales Director and sales performance more generally, warning against promises by Mr Long to increase turnover which, he said, had not materialised. The email also discussed the movement of funds from Bishopsgate to City Calling Limited and the provision of a rebate by Bishopsgate to Munnelly's in exchange for the Claimant being advertised on City Calling's website and being the sole provider of payroll services for that company. Mr Munnelly said that the onus would then be on the Bishopsgate sales team to react to this outlay and drive the business forward in order to get a return from the investment.

56. The Defendant replied to this email on 13 September 2016 and I was shown drafts of this email on which the Defendant had invited Mr Long to comment. On the question of the rebate, the Defendant said *"It's your company so it's your call , but I would just like to say that taking such a large rebate could potentially stifle Bishopsgate"*, given that Mr Munnelly was requiring the provision of a 50% rebate to the Bishopsgate Group's largest client, and he went on to explain this view.

57. In a reply that day, Mr Munnelly made further points about sales and marketing and the performance of Mr Long, and he proposed that a meeting take place the following week at his home in Bushey as *"there is so much from a sales perspective that I need to go through with you because I am fearful that you may be influenced by a false profit"* (i.e. be over optimistic about current and future levels of sales). I understand that this meeting took place on 22 September.2016. Mr Forshaw relied on the 13 September 2016 email exchange as evidence which was relevant to whether the Defendant was a de facto director, as well as an exchange on 20 September 2016 in which the Defendant raised concerns about whether payments of invoices relating to one of Mr Munnelly's horses were a legitimate company expense and Mr Munnelly

asserted his authority over the Defendant, saying: *"That's ridiculous.....Pay the invoices through [the Claimant] and I'll tell you how it will appear in the company accounts."*

58. In the second half of September 2016, there were also on-going negotiations with G-Force and the Defendant was in discussions with Mr Felix of RBS Invoice Finance about an invoice discounting facility and insurance in respect of four potential client companies, including G-Force. He was seeking to be in a position to offer 4 weeks' credit at £50-75,000 per week and thus, £200-300,000 for each client and a total facility of up to £1.2 million. It is apparent from an email exchange between the Defendant and Mr Felix on 19 September 2016 that RBS were going to investigate G-Force and that the Defendant had discussed the application to RBS with Mr Munnelly, who wished to know why the Claimant could not offer credit to Munnelly's.

59. On 22 September 2016, apparently having investigated the companies in question, Mr Felix emailed the Defendant and said that he was happy to confirm that the funding limits which the Defendant was requesting against the named debtors, including G-Force, had been approved. A facility could therefore be offered *"(subject to survey and board approval)"*. There were, however, various documents relating to the Bishopsgate business which needed to be provided by the Defendant. *"Once I have the documents, I need I can move forward to get your facility established. I look forward to working with you.*

60. This facility had not been established by 12 October 2016 when G-Force became a client of the Claimant, at least in part because the requested documents had not all been provided. In particular, the Claimant had not filled out the necessary FactFinder form in relation to the Claimant and BBSL until 10 October 2016, and RBS therefore had not yet carried out operations surveys on these companies. I note that when he filled out the FactFinder form the Defendant referred to himself as the Managing Director of BBSL and signed on their behalf, although the document was apparently intended to cover this company and the Claimant as *"payment partner"* in that it included the turnover figures for both companies. This appears to be because the Defendant considered that the document could only be filled in by a director of the company.

61. G-Force became a client of the Claimant on terms which included an agreement that the operatives would be paid weekly and, each month, G-Force would pay the Claimant in respect of all sums paid to the operatives in the preceding month. It was anticipated that the Claimant would incur liability of around £50-£60,000 each week and it was agreed that G-Force's credit limit would be £250,000.

62. The capturing of G-Force as a client was regarded as a coup. 100-150 operatives were seen as "the beginning" in that there was the potential for many more to be supplied to G-Force if the business relationship was successful. The fact that the Claimant was supplying operatives to such a substantial client was also seen as likely to enhance its standing in the sector and therefore likely to attract business from other, similarly large, clients.

63. In August 2016 Mr Long and the Defendant had arranged for a group email address to be established. The members of the group ("the new client group") included all of the Bishopsgate staff and its purpose, evidently in the context of a sales drive, was to

keep them informed and up-to-date in relation to new clients and the terms of their agreements so that they were alerted to any steps which required to be taken. Mr Long specifically arranged for Mr Munnelly to be added to the group and informed him of this by email dated 11 August 2016 in the following terms: *"all new client emails to be sent to you and you will be included, this way you will be able to see our progress week in week out"*. I note, given Mr Munnelly's position on the new client group emails, discussed below, that this email was not disclosed by the Claimant but the Defendant was able to obtain it through an access request pursuant to the terms of a Tomlin Order dated 5 February 2019 in other proceedings between the parties.

64. On 12 October 2016, Ms Maher emailed the new client group at around 7:30 am. The subject line for her email was *"New Client-G Force Groundworks"* and the attachments line recorded that a *"New client checklist-G force"* was attached. The email announced that G-Force was a new client and stated in the first two lines, in bold and underlined: *"I cannot stress enough how much we have to look after this client guys so please keep me updated if you need anything or there are queries"*. It went on to provide particulars of the client including the address and the first payment date. The one page checklist which was attached to the email also contained particulars of the client, including the expected number of operatives to be supplied, and the section headed *"Notes to the team"* included, as one of three notes *"ACCOUNTS: this client has a credit agreement"*.

65. Around 15 minutes later Ms Budgen "replied all" to Ms Maher's email with the following message:

> *"Hi all*
>
> *We are also giving one month's credit.*
>
> *They will clear any debt after one month, so effectively back to 0 debt after four weeks of payment."*

66. Later that morning the Defendant "replied all" to Ms Maher's email reiterating the importance of providing a first-class service to this client. He said that although G-Force was starting with 50 new operatives per week over the coming three weeks there was the potential for 400-500 operatives, and he gave instructions to staff which were intended to ensure that there were no mishaps. It included "*All that's left to say is great work Vicky and Alicia, I think this client will be the first of quite a few large clients that are expected to come on board in the next few weeks"*.

67. I note that in none of these emails did anyone appear to think that the contract with G-Force and the fact that part of the agreement was that credit would be extended were secret or sensitive matters because, for example, credit had not been authorised or was not generally offered to clients. The team were clearly very pleased about what had happened and made no secret of what was regarded as their success.

68. Not long after this on the same day, the Defendant emailed Mr Munnelly, copying Mr PV Munnelly, as part of the continuing discussion between them about the Bishopsgate Group's sales. He attached the latest weekly figures and promised an updated pipeline report shortly. He referred to the meeting between them in Bushey and set out the instructions which he had now given in relation to the City Calling

rebate, in accordance with Mr Munnelly's instructions. He made points by reference to the sales figures which he had provided, and he went on to say that he had a meeting with Mr Courtney of Mitchellsons that day:

> *"I am very hopeful he will confirm the transfer of 100 plus of their workers to Bishopsgate at this meeting. If that is the case and we also get the rest of Renard Resources, Bespoke, ICDS <u>and the 150 from Gforce Groundworks</u> in the next few weeks I expect us to be well on our way to the 5,000 weekly paid mark by the end of November"*

69. I note that at the very least this passage, and particularly the words *"the 150 from Gforce",* shows an understanding on the part of the Defendant that Mr Munnelly had an interest in the detail of the sales position and a prior awareness of the fact that G-Force was expected to require 150 operatives in the short term. Mr Munnelly replied 45 minutes later, from his computer, suggesting a further discussion about a group sales and hospitality meeting which had taken place with Mr Long in the previous week, and the Defendant agreed to this. Consistently with the Defendant's evidence that the matter had been discussed with him, Mr Munnelly did not express any surprise or ask any questions about G-Force.

70. Obviously, the new client group exchanges (amongst other emails), all of which were received by Mr Munnelly, were entirely inconsistent with his evidence that he was unaware that G-Force was even a client of the Claimant until the end of May 2017, let alone that they were to be provided with credit. A glance at these emails would tell him both things whether or not he had discussed the matter with the Defendant. However, in his witness statement he said that he was away from the business at the time and would not routinely check each new client email that he received. The securing of a new client would not be a concern to him unless or until there was a request to extend credit to them. In his oral evidence he said that he would only have known from the emails that G-Force was a new client if he had opened them, and he had not done so.

71. I did not accept Mr Munnelly's evidence that, even after these emails, he had no idea that G-Force was even a client. This is not just because of his overall qualities as a witness. It is also because I accept that, contrary to his protestations in evidence, it is abundantly clear that he took an active interest in sales and new business and was doing so during this period. He was clearly reading and responding to emails on 12 October 2016 and the news that G-Force had come on board was a matter for celebration. The subject line for the new client group email was *"New Client-G Force Groundworks"* so he would not even have needed to open any of the emails to know this. When this was pointed out to Mr Munnelly he asked, somewhat disingenuously, *"Sorry, what is the subject line?"* and then he said, highly implausibly, that his email account was set up so that he would not see the subject line until he had opened it. He then said, in answer to a question, and again totally implausibly given that the business used Outlook, that he did not know whether his email account was Outlook. He was asked to find out the position overnight and, on the following morning, he confirmed that he used an Outlook account and he showed the Court his smartphone which clearly displayed the subject line for each of his emails. In the light of this, he finally accepted that he would have known that G-Force was a new client at this point.

72. Mr Munnelly was also taken through a number of exchanges in the correspondence between the solicitors for the parties in which the Claimant was asked to confirm that he was a recipient of emails to the new client group. The exchanges lasted for the best part of three months and they included a Notice to Admit Facts which was not answered. No doubt on instructions, Mishcon de Reya were extraordinarily evasive about what was a simple question, and effectively refused to answer it. It was not until Mr Munnelly's witness statement was served that the point was conceded. This passage at arms reinforced the impression that Mr Munnelly's evidence that he was unaware that G-Force was a client, and was to be provided with credit, was false.

73. As to the exchange between Mr Munnelly and the Defendant on 12 October 2016 in which the latter referred to *"the 150 from Gforce"* (emphasis added), Mr Munnelly did not claim in evidence that he had not read the email. Rather, he said that the passage, set out at paragraph 68 above, was about potential clients and that it would not have had any significance for him as it was not referring to credit. Again, I do not accept Mr Munnelly's evidence. The Defendant's email was referring to expected numbers of operatives and it was written on the same day as, and shortly after, the new client group emails which announced that G-Force was a new client and was being provided with credit. There is an element of circularity in this but, once it is accepted that Mr Munnelly saw the new client group emails, his position on this email also becomes untenable.

74. Importantly, in relation to the "*the 150 from Gforce*" email, Mr Munnelly was also emphatic that it could not be interpreted as supporting the Defendant's case that they had discussed G-Force. He said, when the email was put to him, that G-Force was not discussed with him at the meeting at Bushey or at all. I have considered whether the Defendant's apparent understanding that he was aware of G-Force was based on the new client group emails which had been exchanged that day, or whether it was based on discussions which they had had. I accept that the Defendant was not able to pinpoint dates or places when or where G-Force was discussed but, on the basis of my assessment of the evidence as a whole, I am satisfied that it was both. It is clear that Mr Munnelly took an active interest in sales and was pushing for an increase. There were also ongoing discussions about sales during this period. G-Force was a good news story in the context of a push to increase sales. There was no reason why the Defendant would conceal the capturing of this client from him and nor was this development concealed. Nor was there any reason why he would conceal the fact that the deal with G-Force was to include credit given that this was a fairly routine way of attracting new clients and, as Mr Munnelly accepted, it was common for them to discuss these sorts of matters. I also accept that, as reflected in an email from Mr Long to the Defendant dated 18 November 2016, Mr Munnelly recognised that it would be necessary to take more risks with credit in order to attract more business.

75. Mr Chaisty submitted that they could not have discussed G-Force *"before during and after securing their business"*, as the Defendant claimed in his witness statement. Nor could they have discussed the need to offer G-Force credit *"on several occasions…in Phil Munnelly's office"* given that G-Force had not *"appeared on the scene until 5 September 2016"*. It is apparent from the emails that the Defendant did not meet with Mr Munnelly in the office after 5 September 2016 and before his hip operation, but the evidence also shows that the Claimant was well down the road in relation to G-Force by 11 August 2016 and had proposed terms, as I have noted. The Defendant

and Mr Munnelly also met in Bushey on 22 September 2016 and it is clear that they had discussions other than face to face during this period. So, it was perfectly feasible that they discussed G-Force before they came on board, albeit not necessarily in the office.

76. Nor do I accept Mr Chaisty's argument, by reference to earlier drafts of the email which the Defendant sent to Mr Munnelly on 13 September 2016 (referred to above at paragraph 56) that the reason why Defendant removed a reference to G-Force and credit was that he was seeking to conceal the matter from Mr Munnelly. This was one of a number of changes to the drafts which were made and were part of what Mr Forshaw described as an iterative drafting process. I did not see anything sinister in this as there was no reason for the Defendant to wish to conceal the matter from Mr Munnelly.

77. The facts that G-Force was to become a client and was to be given credit, and that this is what then happened, were well known to Mr Munnelly at all material times. Despite this, and contrary to the Claimant's case on the alleged instruction, he did not challenge the agreement to credit at the time.

The growth of the G- Force debt

78. From the outset, matters did not proceed smoothly in relation to the G-Force contract. Whilst the operatives came on board, and the Claimant therefore incurred liabilities in relation to them, and costs when they were paid, G-Force did not clear the debt after the first four weeks as agreed. G-Force appeared to consider that they did not have to clear the invoices for the preceding month until the middle of the following month and then they did not even do this in mid-November 2016. G-Force explained, on 21 November 2016, that they had not done so because they had not been paid by their own clients although they expected to be by the end of that week or early in the following week, but it was not part of the agreement that they were only obliged to pay if their own clients had paid them.

79. The Defendant was not particularly concerned, and nor did he doubt that the Claimant would be paid given that G-Force set out what sums it was owed, and by which clients, and the debt to them came to £883,000. G-Force's debtors also included Babcock Rail Limited and J Coffey Construction Limited which were well established companies and well known within the sector. They owed G-Force approximately £525,000 between them. He also understood that RBS had no concerns about the creditworthiness of G-Force, given its apparent willingness, after investigating the matter, to enter into the invoice discounting facility referred to above. He wished to keep trading with G-Force and for them to develop as a lucrative client for the Claimant, as it was expected G-Force would. There was also an obligation to pay the operatives for as long as they kept working. Refusal to pay them, on the other hand, would be a drastic step. He also understood that there were personal guarantees in place from the directors of G-Force, albeit by 22 November 2016 it had become apparent that this was only the case in relation to Mr Cox.

80. However, the running balance had risen to £421,156.98 before the Claimant's invoices in respect of October 2016 were cleared by a payment of £184,783.62 which was made on 9 December 2016. This reduced the debt to £236,373.36, and therefore below the credit limit of £250,000, but thereafter it continued to mount and was at

£385,669.50 by the end of year despite promises by G-Force to make payments which did not then materialise.

81. Again, the Defendant was not unduly concerned as December and January are typically slow months in the sector in terms of payments by main contractors, many of which have year ends at the end of the calendar year and therefore delay payments to creditors so as to show a healthy cash balance in the accounts and thereby improve their credit ratings. This had been the Defendant's experience with MSSL which was regularly owed sums in excess of £500,000 at this point in the cycle. It was also the experience in the rail sector. He expected the position to improve in February and March of the coming year. Mr Shah and Mr Pegg were monitoring the position and communicating with Mr Ryan Williams of G-Force regularly. He appeared transparent about what G-Force was owed and kept them updated about when it expected to be paid, and he was confident that G-Force would be paid whereupon it would pay the Claimant.

82. In the meantime, on 1 December 2016 issues emerged with the anticipated invoicing facility in respect of G-Force. A Mr Nelson of RBS emailed Mr Pegg to say that the surveys of the Claimant and BBSL had not highlighted any issues but that, although a facility of £300,000 was acceptable in respect of three of the four clients of Bishopsgate in question, and although he had requested a facility of £300,000 in respect of G-Force, £50,000 had been approved because of G-Force's financial accounts, albeit this position could be reviewed in 3 months. In an email to Mr Pegg that day, the Defendant said the he was not impressed *"The client we need it for most is getting f all and that will need to change for a start"*.

83. On 2 December 2016, the Defendant spoke and wrote to Mr Nelson, making the case for a bigger facility in respect of G-Force and he said, in effect, that if this could not be agreed he would take his business elsewhere. He received a reply, by return, in which Mr Nelson said that he had, in effect, been covering for Mr Felix and had not been fully aware that the limits which had been imposed were insufficient. He apologised and said that he wanted to get approval of the facilities with the funding limits which were required. Mr Nelson proposed a meeting and he then submitted further limit requests, and told the Defendant on 7 December 2016 that a response was awaited. The discussions continued during December and into January 2017 and an offer was made on 18 January 2017, albeit the limit in respect of G-Force remained at £50,000 and was only increased to £100,000 in June 2017.

84. In the meantime, the debt owed by G-Force had continued to increase and was at £421,166.46 by 13 January 2017. The Claimant's invoices in respect of November and December 2016 had not been cleared. In an email dated 20 January 2017, however, Mr Williams said that G-Force were aiming to pay off the former in the sum of £236,000 *"next week"* and the latter in the sum of £149,000 in the first week of February 2017. He also reiterated that G-Force was looking to change its factoring facility from one with Lloyds, which had a limit of £500,000, to another funder which had offered £1.3 million. When this was in place, G-Force would have a regular cash flow with which to pay the Claimant's invoices on a weekly or fortnightly basis.

85. On 26 January 2017, Mr Williams emailed to say that G-Force was due to be paid the next day and should, therefore, be able to pay the November invoices, or at least the majority of them then. He also set out the sums owed by Babcock Rail and J Coffey,

totalling c£375,000, which were due to be paid in the first week of February and would then be available to pay the Claimant. Following a chaser, on 27 January 2017 G-Force said that it had not received the expected payments but promised to pay at least £300,000 when they were received and, on 31 January 2017, again in response to a chaser, G-Force indicated that things were "on course" for the payments to be made. The exchanges remained cordial and the Defendant was willing to wait. He also turned down an offer by G-Force to pay the operatives directly as this would potentially suggest that the interposition of the Claimant between G-Force and the operatives was a sham, and thereby potentially attract liabilities which the set up was designed to avoid.

Exchanges in January 2017 between Mr Munnelly and the Defendant about the RBS facility

86. There were also email exchanges about the RBS facility between the Defendant and Mr Munnelly on 24 January 2017. These began with Mr Munnelly writing to the Defendant (cc Mr Vine) about Mr Long who he did not wish to be involved in the CIS side of the business. Mr Munnelly added *"...Also Pat mentioned that as part of the loan arrangement with the bank you might want him to sign a personal guarantee? We certainly need to have a chat about this....*". It is apparent from this that Mr Munnelly had some awareness of the steps which were being taken to secure arrangements which would facilitate the provision of credit to clients.

87. The Defendant replied, explaining that a guarantee of £100,000 was needed on what was to be a drawdown facility of a total of £1 million for the Claimant. (In their evidence both Mr Munnelly and Mr Sexton said that a personal guarantee of £1 million had been requested but then accepted that they had each made the same mistake in this regard). The Defendant said that as Mr Sexton was the only director/shareholder of the company, he was the only one who could sign the guarantee, but that the Defendant was hoping that Mr Munnelly could then give Mr Sexton an equivalent personal guarantee. He also explained the detail of the plan in relation to the drawdown facility, which included closing the Claimant in the coming 3-6 months and moving the drawdown facility and the Claimant's operatives to BBSL. The Defendant added:

> *"It's been a difficult job to get RBS to give Bishopsgate a drawdown facility without having any assets. Quite a few of our potential new clients are expecting a few weeks credit if they move from the Guild. If I put this on hold until we close [the Claimant] we could potentially lose those clients e.g..... [ ] G-Force etc. and we might not get this agreed again. Once the facility is in place and the relationship is watertight, I don't see any issue with moving the facility with our clients.* (emphasis added)
>
> *If you think this is going to be a major issue, I'm happy to discuss alternative options with you..."*

88. I accept that this passage was not worded clearly, as on one reading it suggested that G-Force was a potential client whereas it had been a client for more than 3 months. But Mr Munnelly was aware of this, as I have found. I therefore reject the Claimant's argument that the Defendant was seeking to conceal the fact that G-Force was a client from Mr Munnelly. He had no reason to do so, and he knew that Mr Munnelly was aware of this in any event. The Defendant's email is, in fact, further evidence that Mr

Munnelly was well aware, not only that G-Force was a client but also that it was a client to which credit was being provided and, indeed, provided at sufficient levels to warrant a facility of £1 million, albeit to cover three other clients as well.

89. Mr Munnelly did indeed give the required personal guarantee to Mr Sexton and the latter signed on behalf of the Claimant. Again, I accept that Mr Munnelly would not have done this without appreciating that the terms with G-Force included an agreement to provide credit. The suggestion that Mr Munnelly could be in discussions with the Defendant about the RBS facility, and providing a £100,000 guarantee in relation to it, but not appreciate that G-Force had been provided with credit was entirely lacking in credibility.

The G-Force debt continues to grow in February 2017

90. The payment of £236,000 which had been promised for the last week in January 2017 was not made by G-Force, and nor was the payment promised for the first week in February 2017. There were payments of £50,000 and £40,000 on 6 and 24 February 2017 respectively, but the debt had continued to rise, and the second payment merely reduced it to £483,741.90.

91. On 6 February 2017, a second creditsafe report was requested by the Defendant. This assessed G-Force at 41 – moderate risk – with reference to a £25,000 credit limit, and it stated that its cash balances were low in terms of its overall creditor obligations. This was not welcome news, but the Defendant was not unduly concerned given that, in his experience, credit ratings do fluctuate. The Defendant had also been notified by Mr Williams, on 3 February 2017, that G-Force had signed with new funders the day before. The facility could take 14 days to set up but was not expected to take this long. The Defendant was active in instructing Mr Shah, in the credit control team, to monitor the position closely and to chase G-Force, and he ensured that he himself was kept informed of the situation as it developed.

92. Mr Williams continued to be apologetic, to keep the Claimant informed on a regular basis, to respond promptly to requests for information and to appear genuinely to be doing his best to address the situation, albeit it also appeared that he was giving greater priority to other creditors. On 14 February 2017, he provided copies of G-Force's aged debtor reports together with a letter dated 1 February 2017 from its new funder, Independent Growth Finance ("IGF"), which offered a factoring facility of £1 million, albeit with a concentration limit of 20%. He said that the facility would be in place by the end of the week, or the beginning of the next, and he promised that a payment of £200,000 would be made as soon as the funding was in place, and a total of £390,000 would be paid by the end of the month.

93. In the event, the debt at the end of February stood at around £523,741. There were also delays in getting the IGF facility set up. It is clear from email exchanges at the end of February 2017 that at this point the Defendant was very frustrated. In an email dated 28 February 2017 he wrote to Mr Williams: *"I know it hasn't been easy or straightforward but, as I know you can appreciate, Bishopsgate have taken a huge risk for a client we had no previous relationship with and we seem to be the supplier suffering the most hardship out of all of this"*. Mr Chaisty submitted that this amounted to an acceptance that the Defendant had taken a huge risk in agreeing to provide credit to G-Force in the first place, but I accept that the huge risk referred to

was to allow the level of debt to reach the level which it had reached at the end of February.

March 2017

94. On 1 March 2017, the Defendant asked Mr Shah to obtain an updated credit report for G-Force which showed a score of 15 – *"very high risk"* – and stated, *"cash transactions"*. It was apparent that the company had made late payments on a medium percentage of invoices and its cash balances were still considered to be low in terms of the overall outstanding creditor obligations. But credit reports which the Defendant asked to be obtained for J Coffey and Babcock Rail showed 76 and 75 respectively – *"very low risk"* - in relation to limits of £1.1 million and £7.85 million. G-Force provided a summary of its ledger and outstanding balances to the Claimant which showed that it was owed £450,000. The information about G-Force's debtors reassured the Defendant. Given the sums which G-Force was owed by these companies, and their high credit ratings, he considered that the fundamentals of the G-Force business remained sound and that its low credit rating was because it had been seeking financing in the market. On the same day, the Defendant was also informed that IGF had agreed G-Force's new invoice financing facility, albeit confirmation of how much money was to be released was awaited.

95. Payments of £40,000 and £50,000 were made by G-Force on 3 and 21 March 2017 respectively. But the payments of much more substantial sums, which would have made inroads into the existing debt, did not materialise. On 9 March 2017, G-Force informed the Defendant that it would not be able to make the expected payments because Babcock Rail, which had been invoiced around £447,715 by G-Force, had said that it would not be paying any of its creditors until 3 April 2017. The pattern of chasing G-Force and monitoring the position, and G-Force appearing to be open about its financial situation and genuine in its intention to pay, continued throughout March.

96. It also became apparent that there was a problem with the IGF facility. The concentration limit on the facility meant that G-Force could only borrow up to 20% of what it was owed by a given debtor, and much of what was owed to it was owed by Babcock Rail and J Coffey in particular. This meant that its cashflow issues continued. In the interests of achieving an adjustment of the concentration limits, the Defendant offered to speak to IGF himself and then did so. Consistently with his view that G-Force could and would solve its cashflow difficulties, and that this was a better strategy for the Claimant than calling in the debt and closing G-Force, his approach was to seek to assist them. By 21 March 2017, G-Force was in discussions with other funders as well, including HH Funders which appeared willing to offer a £1 million facility.

97. On 27 March 2017 the Defendant travelled to Wales to meet with G-Force. He went with Mr Habbijam, the Claimant's compliance manager. Mr Deacon, Managing Director of Crest Finance, who had been introduced to G-Force by the Defendant, also went separately to assist them in relation to their funding options. He and Mr Deacon were both impressed with the set up and Mr Deacon was confident that he would be able to secure a higher level of financing for G-Force. Mr Jason Cox told them that his brother was high up in Babcock Rail and that G-Force was winning a lot of new work. G-Force had therefore invested heavily in plant and equipment, some of which the Defendant saw for himself. He left the meeting feeling very confident that,

with the assistance of Mr Deacon, G-Force would soon bring its account back within the agreed credit limits.

98. At the end of March 2017, the G-Force debt stood at £583,959 notwithstanding the payments which had been made.

The discussions about G-Force with Mr Vine in March 2017

99. The Defendant's evidence was that he first discussed the situation with G-Force with Mr Vine as a potential problem towards the year end 31 March 2017, in case Mr Vine felt that he needed to make provision for a bad debt in the accounts, and that thereafter they had numerous discussions on the matter. He told Mr Vine that G-Force were around £250,000 outside their agreed credit terms of £250,000, that G-Force were owed substantial sums by Babcock Rail and J Coffey, that the reason G-Force had been unable to pay the Claimant monthly, as agreed, was inadequate concentration levels agreed with their current funders. Mr Vine was *"nonplussed"* and asked whether the Defendant had the situation in hand and the Defendant explained what he was doing to resolve the matter. He told Mr Vine that he was helping G-Force to get a better funder in place so that they could bring their accounts within the agreed credit terms of £250,000.

100. After the initial discussion, the Defendant sent an email dated 27 March 2017 to Mr Vine which forwarded an email from Mr Deacon with the simple message *"FYI"*. Mr Deacon's email, in turn, referred to a meeting with the Defendant that day and said:

> *"**G Force ~***
>
> *I have spoken to H & H who have confirmed that they are still very much interested in offering a facility that works for this business and they are aware of the competition they face with Market Invoice so certain this facility can be improved and they believe that IGF will try to improve their facility to try and keep the business.*
>
> *Either way this is good news and should unlock c£200-£300K over the next few weeks which they will hopefully utilise to reduce your exposure.*
>
> *Once this is resolved we will then look to see if we can put in place a Loan facility of c£250K which can then be utilised to reduce your exposure further and extend their debt over a longer period."*

101. This email was consistent with what the Defendant said he had told Mr Vine, and the fact that he forwarded it with the message *"FYI"* supports his evidence that the Deacon email did not need to be explained because Mr Vine was already familiar with the situation. In evidence, Mr Vine accepted that if he had read this email he would have understood that G-Force had been extended credit, that this was in order of £450-550,000, that efforts were being made to secure a facility to enable G-Force to pay the Claimant and that Mr Deacon was optimistic of success.

102. The Defendant's 27 March 2017 email was therefore very much at odds with Mr Vine's oral evidence that he first had a conversation with the Defendant about G-Force in mid/end May 2017, with paragraphs 50-52 of his witness statement for the

purpose of these proceedings which proceeded on this basis, and with his written evidence for the purposes of the ET proceedings in which he had said it was at the end of May 2017. However, Mr Vine sought to meet this point by saying that he had not opened the email and had had no conversation with the Defendant about G-Force at this stage. _The difficulty with this aspect of Mr Vine's evidence was that it was inconsistent with paragraph 41 of his own witness statement which said *"I did not become aware of any issues or credit exposure with G-Force until Mr O'Sullivan updated me as to the situation on, or around 27 March 2017, see paragraph 45 below"*. Paragraph 45 of his witness statement said:

> *"On 27 March 2017, [the Defendant] forwarded me an email chain between himself and Mr Deacon which discussed G force and the potential provision of a facility to "reduce [the claimant's] exposure". Mr O'Sullivan <u>had</u> informed me in person that he was continuing to assist G force with seeking funding in order to ensure that G force could settle any debt owed to [the claimant], <u>however I was not made aware of the extent of the debt at that time</u>"* (emphasis in the original)

103. When it was pointed out to Mr Vine that his written evidence did not claim that he had not opened the email - on the contrary, it addressed the contents of the email - he said that he did not know why this was and he maintained his position that he did not read the email at the time. He said that if he had read it, he would have gone straight to Mr Munnelly. When it was put to him that his own witness statement indicated that the discussion with the Defendant had taken place <u>before</u> the email of 27 March 2017, Mr Vine said that the conversation with the Defendant was in fact <u>after</u> this email. However, he accepted that there had been a discussion in the terms alleged by the Defendant and that the Defendant had said that the situation was under control.

104. I find that this conversation did take place before the 27 March 2017 and that Mr Vine did open the email of that date. Contrary to paragraphs 45, and what is implied by paragraphs 50-52 of his witness statement, he was therefore told at least twice of the situation in relation to G-Force at this point. Quite apart from the email evidence, it would be very surprising if an accountant was informed that it might be necessary to make provision for a bad debt but did not ask what the debt was and how likely it was that it would be recovered. I accept, however, that for whatever reason he did not tell Mr Munnelly. This may have been because he accepted that the situation was under control, because he did not pay sufficient attention to what he was told as to the size of the debt, because he was "filtering" in his dealings with Mr Munnelly, or for a combination of these reasons.

<u>April 2017</u>

105. The G-Force debt continued to rise. The Claimant continued to chase G-Force. Mr Williams continued to provide explanations which appeared plausible, to be apologetic and to promise that G-Force was doing, and would continue to do, its utmost to clear the debt. Payments were made but not in large enough sums to reduce the debt. There were payments of £42,412 on 12 April, £20,000 on 20 April, £46,742 on 21 April and £29,000 on 28 April 2017 but the debt rose from £583,959 at the end of March to £626,004 at the end of April.

106. The Defendant also sought documentary evidence from G-Force as to its financial position, such as its monthly management accounts, a balance sheet and aged debt

reports, all of which pointed to the issue being one of cashflow. He scrutinised the information provided to him and he asked Mr Deacon to check what the Claimant was being told by G-Force. Mr Deacon did so and confirmed that it was true. The Defendant also made threats not to make any more payments to the operatives unless a week's pay was received "up front" and/or "to pull the plug", and the payments summarised above were made. There were concerns that G-Force might not secure funding. Consideration was given to registering a debenture, but this step was not taken because the Defendant considered, and Mr Deacon advised, that this would jeopardise G-Force's chances of securing funding. The Defendant continued to believe that G-Force's cashflow difficulties could and would be resolved, albeit the Claimant's interests did not appear to be being given sufficient priority by G-Force.

107. On or around 23 April 2017, Mr Deacon informed the Defendant that G-Force had secured sufficient lending to bring the total level of debt to the Claimant back within the agreed terms. On 23 April 2017 the Defendant emailed Mr Vine attaching salary data and other documents which Mr Vine had requested and saying:

> *"Hi Geoff,*
>
> *Sorry for the delay, it hasn't been the easiest to collate all the information. I intended on doing it all on Friday but that was before I had all the issues with G-Force, the good news on that front is it looks like we'll get a large payment next week and the week after to bring the account up to speed."* (emphasis added)

108. Again, this email showed that there had been issues with G-Force and it was written in a way which showed that the Defendant understood that Mr Vine was aware of them. Here, Mr Vine did not claim that he had not read the email, but he said that he did not *"take much heed to it"*. It is not clear why he would pay no heed to what he was told if this was the first mention of issues with G-Force. Mr Vine was then evasive in relation to the proposition that the email was further evidence that there had been discussions between him and the Defendant in relation to the G-Force situation.

The Defendant's resignation

109. On 25 April 2017, the Defendant orally resigned to Mr Munnelly on notice. He said that he would leave in 2-3 months' time and it was subsequently agreed that he would work until 9 June 2017.

110. Although it was suggested that the Defendant decided to leave because of the issues with G-Force he says, and I accept, that he did so because of concerns about the ethics and legality of Mr Munnelly's attitude to data protection and because he wanted to set up his own competing business. MSSL was having cash flow problems and Mr Munnelly proposed, on 3 April 2017, that the Munnelly Group would access the personal details of approximately all of the many operatives which were held by BBSL. MSSL would then use these details to recruit operatives. Mr Madadi also gave evidence that there were plans to transfer data from BBSL to MSSL.

111. The Defendant told Mr Munnelly that he did not agree with his plans for the Bishopsgate Group and that he was leaving to set up his own business. As I have said, he had made Mr Vine aware of the G-Force situation but, even if he had not, if he had been intending to dive overboard before the G-Force situation was discovered he

would surely have contrived a way of saying that he was constructively dismissed, rather than agreeing to work until 9 June2017 . When the Defendant was asked why he did not refer to G-Force at this point he said that as far as he was concerned Mr Vine was aware of the situation and there was to be a handover to Mr Vine and Ms Sweda at which the matter would be discussed further. He was also going to work his notice period and deal with it, and it remained his belief that the issues would be resolved. One can also see why, given that he was apprehensive about informing Mr Munnelly of his departure, the Defendant did not feel that this was the sort of conversation in which to give the impression that he might leave unresolved issues of this sort behind him.

End of April/May 2017

112. The loans which Mr Deacon had referred to did not materialise and G-Force's search for funding continued. The situation did not appear to be improving and the Defendant was evidently concerned. But payments were being made and it remained the Defendant's aim to assist G-Force to resolve its then current difficulties so that it could become the lucrative client which he had believed it would be. The alternative, of "pulling the plug" or taking similarly aggressive action, was considered unpalatable given the size of the debt.

113. Nor did the situation in relation to the G-Force debt materially improve in May. Payments were made on a more or less weekly basis, but these merely covered the payments to the operatives for the month and the debt was more or less the same at the end of the month. The pattern of the Defendant's dealings with G-Force continued in much the same way as it had continued in April. The position appeared more promising when G-Force informed the Defendant, towards the end of the month, that Market Invoice would provide a facility with a limit of £1.2 million on a peer to peer lending basis, with a concentration limit of 75% in relation to Babcock Rail. It was also understood that Davenham Asset Finance would provide a loan of £100,000, but there were then delays and issues in relation to this.

The announcement of the Defendant's departure

114. The Defendant announced his resignation by email dated 12 May 2017, in which he referred to his stepping down *"as managing director of Bishopsgate Business Solutions Ltd"*. He went on to reminisce about the preceding four years, during which the business had grown and developed, and he said:

> *"I would also like to extend my thanks to Phil Munnelly for giving me the opportunity to set up and run the Bishopsgate group of companies. Phil has shown a huge amount of faith in me from the time I joined the Munnelly Group 10 years ago… Phil wanted me to stay on as MD of Bishopsgate but understood my need for change and respected my decision"*.

Mr Munnelly becomes aware of the issues with G-Force

115. In his witness statement Mr Munnelly states, consistently with Mr Vine's evidence, that *"Towards the end of May"* Mr Vine came to see him and said that the Claimant was owed a substantial amount of money by one of its customers, G-Force. Mr Vine told him that the debt was approximately £250,000 and that the Defendant had told

Mr Vine that the situation was under control and the debt would steadily reduce over the coming weeks. Mr Munnelly's position in this litigation, and his evidence, is that this was the first time that he became aware that G-Force was a client of the Claimant, let alone that it had been extended credit and still less that the credit was in the sum of £250,000. He was *"extremely alarmed and concerned"* given that this was *"strictly prohibited in accordance with the instructions I gave"* the Defendant. *"However, I trusted that Mr O'Sullivan was being truthful, and that the debt would come down significantly before he left the business"*.

116. Mr Munnelly's statement goes on to say that "*Approximately two weeks later, on 7 June 2017, I attended a meeting with Ms Lovett during the course of which Ms Lovett confirmed that the debt owed by G- Force was in fact approximately £580,000"*. That day, Mr Munnelly wrote an email to the Defendant in the following terms:

> *"Dave,*
>
> *I was staggered to learn that despite our conversations regarding loan arrangements after O C Meadows you took it upon yourself to allow G Force to become a Bishopsgate debtor to the tune of £ 580,000.00!! This was first brought to my notice two weeks ago when the figure was then reported at £250,000.00. This morning it has now been reported at £ 580,000.00. Why the Bishopsgate Business was put in jeopardy by your good self between the months of January to March 2017 is beyond me as commercially the real gain was £ 5,400.00 worth of nett profit to the Group which in order to protect you risked £580,000.00 and the potential very existence of this enterprise.* (emphasis added)
>
> *I believe you are at present attempting to agree stage payments with G Force which now have to be honoured to the letter and which will have to be confirmed by e-mail. If not, we will have no option but to wind the company up.*
>
> *This whole episode has been reckless and an unbelievable lack of commerciality on your behalf the consequences of which have yet to be determined.*
>
> *I am speechless and shocked that we have been left in this position.*
>
> *Kind regards,"*

117. Mr Munnelly's witness statement did not suggest that he had challenged the Defendant or taken any other step in the intervening period of two weeks, and the tenor of his email of 7 June 2017 and his witness statement was consistent with his not having done so. This was surprising if Mr Munnelly and Mr Vine's evidence as to the conversation at the end of May 2017, as to the ban on credit without Mr Munnelly's authority, and as to Mr Munnelly's ignorance of any agreement with G-Force etc was true, given that one would have expected Mr Munnelly to challenge the Defendant immediately when he first learned that credit had been extended to G-Force rather than to wait two weeks before doing so.

118. Evidently Mr Munnelly's attention had been drawn to this discrepancy in his written evidence and, I find, as a consequence he began his testimony with supplementary oral evidence. He was taken to the relevant passages in his witness statement and he said that he wished to add that he spoke to the Defendant on a daily basis in the two

week period after first learning that credit had been extended to G-Force because he was *"trying to get a handle on what was going on"*. The Defendant, he said, did not tell him that the debt was actually £540,000 and he was left with the impression that it was £250,000. In cross-examination he said that the Defendant had positively told him it was £250,000.

119. I had little hesitation in rejecting this evidence given that it was transparently an attempt to patch up a problem in his case. When Mr Munnelly was asked by Mr Forshaw why this evidence had not appeared in his witness statement, Mr Munnelly said *"I have just recalled it"*. The cross-examiner's reply was *"you have just recalled it?*" to which the answer was *"I have not just recalled it. It happened at the time."*. Mr Munnelly was then taken to his witness statement in the ET proceedings, in which he made a number of allegations of misconduct against the Defendant, particularly in relation to G-Force. This statement included an account of the conversation with Mr Vine towards the end of May 2017, and of Mr Munnelly's reaction to the news, and it went on to refer to the 7 June 2017 email. But it made no reference to what Mr Munnelly now said had happened in the intervening period, despite accusing the Defendant of acting *"in an underhand manner by not discussing the debt with me"*.

120. Nor did Mr Munnelly's 7 June 2017 email make any reference to daily conversations with the Defendant or accuse him of lying to Mr Munnelly as one might have expected if that was the case. The paragraph in the email beginning "*I believe you are at present attempting to agree stage payments"* suggests, if anything, that they had not spoken directly and that the source of Mr Munnelly's information was some other person, such as Mr Vine.

121. I note that Mr Munnelly's 7 June 2017 email referred to conversations following the Sea Meadows situation but did not specifically allege that any instruction had been given. The passage which I have highlighted above is consistent with the Defendant's account inasmuch as there had been a conversation about the approach to credit and a cautious position had been adopted, at least in relation to care sector clients.

122. The Defendant responded with a lengthy email sent at 11:25 pm that night in which he set out some of the history of the dealings with G-Force with particular reference to the steps which had been taken to recover the debt, albeit his account was inaccurate in some respects, as he accepted in cross-examination. He said that *"in hindsight"* he should not have agreed to provide credit in the first instance *"but unfortunately we are here now, and I need to get a result"*. He said that he would sit down with Mr Munnelly the following day to show him the correspondence and documentation:

> *"They said it had to be monthly or they would go to a different payment intermediary. In hindsight I should have left it there…I can only apologise for the ill judgement on my behalf. I can assure you I've had months of sleepless nights trying to get this sorted. I have no intention on (sic) letting this turn into a bad debt and now all the hard work has been done to get them in a position to start repaying, I am very confident it will start reducing significantly over the coming weeks and months"*

123. I note that, in this email, the Defendant did not suggest that Mr Munnelly's surprise at the level of the debt was anything other than genuine. Nor did he claim that Mr

Munnelly was aware of the steps which he had been taking to recover the debt. His offer to meet with Mr Munnelly to take him through it suggests that Mr Munnelly had not been aware of these matters. Mr Chaisty also relies on the fact that the Defendant's email does not challenge Mr Munnelly's claim that what had happened was *"despite our conversations regarding loan arrangements after OC Meadows"*. I accept that the Defendant might have responded to the 7 June 2017 email by challenging the relevance of these conversations given that they were about care sector clients. But Mr Munnelly's email did not contain a clear statement that there had been the instruction now alleged, and in relation to construction sector clients. In any event, the aim of the Defendant's email was clearly to placate Mr Munnelly by taking a highly apologetic stance rather than to antagonise him by challenging his view. I therefore did not find this point particularly compelling.

124. For essentially the same reasons I did not accept Mr Chaisty's suggestion that the Defendant was effectively admitting his own negligence, albeit with the benefit of hindsight. Mr Chaisty also suggested that the inaccuracies in the Defendant's email which the Defendant accepted, were deliberate, but I accept that they were not. The email was written late at night from the Defendant's phone and without reference to the documents. It is understandable that there were errors.

Mr Munnelly blames Mr Vine

125. Mr Pegg's evidence, which I accept, was that in June 2017 he attended a meeting with Mr Munnelly and Mr Vine at which the former was very exercised about the G-Force debt and *"had a go at"* Mr Vine saying words to the effect that *"you knew about this as far back as February and you never said a word to me"*. Mr Vine went purple, but he did not dispute this accusation.

126. Mr Pegg also said, and I accept, that Mr Vine was periodically sent aged debt reports – 4 or 5 times between November 2016 and June 2017 - which showed that G-Force was a debtor and the amount of the debt *"so he should certainly have known about the position"*. Mr Vine disputed this and/or said that he did not look at these documents, but I do not accept his evidence in this regard. It is quite clear, for the reasons which I have given, that Mr Vine was aware of the issues with G-Force. Mr Pegg said he thought that Mr Vine filtered what Mr Munnelly needed to see and I accept that he did. This may be part of the explanation for why he did not inform Mr Munnelly immediately when he became aware of the issues in relation to G-Force, as I have indicated.

Events after the Defendant's departure

127. On 9 June 2017, there was a meeting between Mr Munnelly, Mr Vine and the Defendant at which the Defendant was heavily criticised by Mr Munnelly. This was the Defendant's final day in the office. It is not necessary to deal with the detail of the meeting other than to note that Mr Sexton phoned the Defendant beforehand to tell him that he had been asked by Mr Munnelly to attend and to lambast the Defendant for what had happened in relation to G-Force. Mr Sexton confirmed in evidence that he had been brought in, despite knowing nothing of the situation, because he was the statutory director of the Claimant.

128. On the evening of 9 June 2017, G-Force wrote to the Defendant stating that Grosvenor Park had agreed to assist them with a turnaround recovery and investment plan which they believed would resolve the current funding issues and address its debt situation. This was presented as good news, but Grosvenor Park was in the business of assisting companies to avoid insolvency. The Defendant forwarded this to Mr Munnelly who replied *"I've no doubt that we've had it and I waved goodbye to £500k. We should never have taken this risk on board. It was insane. Grosvenor website tells you it all. I'm still in shock over how I've let this situation happen under my roof and how it was let happen. Gutted."* It is to be noted that Mr Munnelly appears to take responsibility in this email rather than accusing the Defendant of failing to comply with his instruction and/or failing to obtain his agreement. Mr Vine's comment was that he wanted a positive outcome but now feared the worst. *"Am struggling to come to terms with this"*. Mr Munnelly replied to this, noting that "*if this becomes a bad debt, we're insolvent… Absolutely gob smacked"*. As I have indicated, I accept that he was genuinely surprised by the size of the debt.

129. On 10 June 2017, Mr Vine then sent an email to the Defendant which said that they needed to meet on the following Monday so that Mr Vine could take control of all financial matters. The email listed topics which required to be addressed and said that other matters would no doubt arise during the course of the meeting. At the end of the email Mr Vine said that he was still in a state of shock:

> *"…as to how and why you have put Bishopsgate in this position. You have probably single-handedly put what should have been an extremely profitable company on the brink of going under, casting a very dark shadow over the Bishopsgate name as well as potentially costing the employees their jobs"*.

130. I note that he did not say in terms that he had been unaware of the G-Force situation. Nor, in the light of my findings, could he truthfully have made such a claim.

131. Mr Vine's parting shot evidently needled the Defendant who responded by email on 12 June 2017, expressing shock and disappointment and countering that this was *"all part of the extensive misrepresentation of the facts and bullying behaviour that has permeated the senior management and owners of Munnelly Support Services Ltd in the past week"*. He then set out a detailed rebuttal of Mr Vine's accusation. He stated that the business regularly gave credit to its customers, he defended the decision to extend credit to G-Force and he pointed out that *"as you know"* he had been working tirelessly to try to resolve the issue with them over the preceding four months. He said that there was provision in the balance sheet for any potential exposure and that this exceeded the current exposure to G-Force *"(which will reduce going forward)"*. He also pointed out that Bishopsgate had extended a £500,000 credit facility to MSSL over the preceding 5 to 6 months.

132. Mr Vine replied at length on 13 June 2017, contesting the Defendant's argument and some of his factual claims. The email began, somewhat legalistically, with a statement that the contents of his 10 June 2017 email "*expressed my personal thoughts and mine alone and not those of the senior management of [MSSL]"*. Again, it is of note that he did not say in terms that he had been unaware of the G-Force situation until late May. He did say that "*With regard to giving credit per se I am of the opinion that after the collapse of Sea Meadows it was agreed credit would not be extended to any new clients without carrying the necessary due diligence and seeking board approval"*.

However, read in context, this was not a claim that there had to be approval by Mr Munnelly:

i) Mr Munnelly was not on the board of the Claimant; Mr Sexton was.

ii) Earlier in the email Mr Vine had said *"the line of credit has been authorised by you and you alone without due consultation with the company statutory director, Pat Sexton. When G force ... defaulted on their credit line you extended it again without due consultation with the company statutory director."*

iii) He went on to say: *"I was not involved in agreeing any credit facilities to any clients, but I believe I am correct in stating that credit was approved and extended to known and trustworthy clients. I also believe I am correct in stating that Pat Sexton had agreed the credit line to [X]….and other known and trustworthy clients"*. Mr Vine was constrained to agree in evidence that, in fact, this was not true.

iv) Later in the email he said that: *"this whole issue could have been avoided if you had consulted with Pat Sexton."*

v) And, towards the end, he said *"in closing I can only reiterate the fact that you offered an initial credit facility to G-Force and then further extended this facility without any consultation with Pat Sexton"*.

133. Thus, a fair reading of Mr Vine's email was that he was asserting that the permission of Mr Sexton was required, or at least consultation with him, before credit could be provided to a new client. This was very odd, given that all concerned understood that Mr Sexton had nothing at all to do with the running of the business. Moreover, the email was entirely inconsistent with the Claimant's current claim that the authorisation of <u>Mr Munnelly</u> was required. Nowhere in this email did Mr Vine suggest, as he surely would have done if it was the case, that Mr Munnelly had repeatedly given a clear instruction in the terms asserted in these proceedings. Mr Munnelly was barely mentioned in the email.

134. When he was asked about this by Mr Forshaw, Mr Vine said that he thought that at this point he was *"just being statutorily correct"* but this did not address the point that he was asserting that the authorisation of someone other than Mr Munnelly was required and was not asserting, at all, that Mr Munnelly's authorisation was required. He suggested that it had something to do with the fact that Mr Sexton had given a guarantee in relation to the invoicing facility. Mr Sexton had a business near where G-Force was located and could have made enquiries given that he was a guarantor of the RBS loan. But, again, this did not address the point that his email was positively inconsistent with the Claimant's case and, in any event, the email made no reference at all to the guarantee and could not be read in this way. Nor was Mr Sexton exposed under the guarantee given the cross guarantee from Mr Munnelly. Mr Vine then said that the omission was because the email was his personal response and he was *"upset about the whole thing"*. When asked by me about the matter, he said that he did not know why he was emphasising failure to consult Mr Sexton.

135. The Defendant did not reply to Mr Vine's email, but he can hardly be blamed for not doing so. His position in cross examination was essentially that the email made no sense, that it appeared that Mr Munnelly and Mr Vine were seeking to set up a claim against him and that he was not going to engage with them. Mr Chaisty's submission that I should draw an inference against the Defendant from his failure to respond, with respect, has no logical basis. This was not an email which asserted the Claimant's current factual case, and failure to deny a case which is not being asserted cannot support an inference that that case is well-founded. In any event, the Defendant's refusal to engage further with Mr Vine was fully understandable given the bizarre contents of his email.

136. On 20 June 2017 Mr Munnelly emailed the Defendant stating:

> *"as you are no doubt aware the expectation is that G-Force is likely to go into receivership this week. No further payments were forthcoming… despite your assurances. Obviously the whole matter is now under investigation to establish why the directors of a cash transaction rated company (sic) was extended virtually unlimited credit by your good self without any consultation and against the specific instructions of the companies that you acted for."* (emphasis added)

137. This was the high point of the Claimant's case on the alleged instruction but, again, it was an odd way of putting it. If it was the case that Mr Munnelly had personally instructed the Defendant that his consent was required before credit could be provided to a client, and had repeated this instruction on various occasions, why not say so? It appeared from this email, Mr Sexton's attendance at the 9 June 2017 meeting and Mr Vine's email of 13 June 2017 that an agreed "line" was being taken that there had been some impropriety on the Defendant's part, perhaps from a company law point of view, in not consulting with or seeking the authority of Mr Sexton as the statutory director with authority to contract on behalf of the company, rather than that there had been a breach of a clear and repeated instruction from, or agreement with, Mr Munnelly.

138. Again, the Defendant did not reply to this email. Mr Chaisty submitted that this was because the instruction had been given and the Defendant was therefore unable to deny it. When this was taken up with him in cross examination the Defendant's position was essentially the same. He thought that Mr Munnelly and Mr Vine were trying to set him up for some form of litigation and he did not wish to engage with them. Again, whilst he might have responded, contesting the suggestion that there are any *"specific instructions of the companies that you acted for"* which he had contravened, I do not consider that his failure to do so inevitably leads to the conclusion that the Claimant's factual case is well-founded. Again, the allegation was ambiguous, and the approach of Mr Vine and Mr Munnelly was peculiar. By now, the Defendant had left the company and, understandably, wanted nothing further to do with them.

139. I was told by Mr Chaisty that G-Force entered into administration in August 2017 leaving the Claimant with a bad debt but there was no evidence adduced by either party as to events after June 2017 or what brought about the administration. Mr Cox claimed that he had not signed the guarantee and I was told that there was no recovery against him but, again, this was not explored in the evidence.

Was there the instruction alleged by the Claimant?

140. I do not accept that there was the instruction alleged in the Claimant's pleaded case or the other versions of it, which have been put forward on its behalf in the evidence. On this point I accept the Defendant's evidence. Quite apart from the points made above about the evidence as a whole, and the unreliability of Mr Munnelly and Mr Vine and their evidence on this point and others, I found the Defendant's account in relation to this issue to be both credible and plausible.

141. In addition, I note that in proceedings in the Companies Court brought by MSSL and Mr Munnelly against the Defendant, Mr Munnelly submitted a witness statement, dated 19 October 2017, which alleged negligence and concealment by the Defendant in relation to G-Force, but made no reference to any instruction or agreement about credit, as might have been expected if his evidence in the current proceedings were true.

142. In the ET proceedings it was part of the Claimant's case that the Defendant would inevitably have been dismissed had he not resigned, given his conduct in relation to G-Force. In his signed witness statement dated 26 October 2018 Mr Munnelly was heavily critical of the Defendant in the course of several paragraphs about what had happened in relation to G-Force and referred to Sea Meadows, but he went no further than to refer to the 7 June 2017 email above and say *"David had previously been aware that I was reluctant to provide credit of any significant level to customers"*. He did not refer to any instruction, repeated or otherwise, or any agreement as to authorisation of credit, when this would have been an obvious thing to do if there had been one given that it would have enhanced the allegation of misconduct.

143. It appears that it was not until late 2019 that it occurred to anyone on the Claimant's side that a claim of the present nature could be brought against the Defendant. The letter before action, which was sent in relation to these proceedings on 9 October 2019, set out the case that the Defendant was a de facto director, and the position in relation to the G-Force debt. It asserted that the Defendant had acted without authority and placed emphasis on the contention that he had deliberately concealed the scale of the debt. The closest it came to asserting the current case was when it alleged that:

> *"Your client is fully and solely responsible for the totally unacceptable level of debt being allowed to accrue. Your client embarked on a course of conduct which was pursued deliberately to withhold the true state of affairs from others. The policy of [the Claimant] and instruction to your client was that credit should not be extended at any one time."* (emphasis added)

144. Later in the letter it was asserted that:

> *"It was your client's duty and responsibility to ensure that the credit extended to G-Force did not extend above the permitted levels and to protect the financial interests of [the Claimant] in its dealings with G-Force. Your client failed in these respects"* (emphasis added)

145. The letter did not assert that any instruction had been given to the Defendant by Mr Munnelly, still less that the instruction was that Mr Munnelly's permission was required in relation to any decision as to credit and that it had been given repeatedly.

The nearest it came to the present case was to assert that the Defendant had exceeded permitted levels of credit, rather than that he had wrongly agreed to credit in the first place.

146. The version of the instruction on which the Claimant now relies therefore appeared for the first time in the Particulars of Claim.

Was there a contract between the Defendant and the Claimant?

147. The argument that there was a contractually binding agreement between the Claimant and the Defendant, of which he was in breach, is pleaded in somewhat vague terms and very little evidence was given about this by Mr Munnelly. The pleaded case alleges that there was an oral agreement reached between Mr Munnelly, for and on behalf of the Claimant, and the Defendant whereby *"the Defendant agreed to be and was responsible for the operation, management and overseeing of the affairs and business of [the Claimant]"*. The agreement was reached at the time when the Claimant and BBSL were being set up and was *"reaffirmed and restated on various occasions during meetings between"* them in the period to June 2017. Mr Munnelly's evidence did not materially add anything to this.

148. In his skeleton argument Mr Chaisty asserted that the *"contractual agreement"* was in effect Mr Munnelly's alleged instruction and its acceptance by the Defendant:

> *"At this stage there is little more to be said as to this part of C's case…..The case is put on the basis that a clear and unequivocal instruction was provided on behalf of C to D after the Sea Meadows issue and that D agreed with C to act as described by Mr Munnelly which promise he broke…"*

149. His closing submissions did not take the alleged contractual basis for this part of the Claim any further.

150. In the light of my finding that there was no such instruction or agreement, this claim falls away. But, in any event, I would not have accepted that any such instruction gave rise to a contract. Nor, more generally, do I accept that the work which the Defendant did for the Bishopsgate companies was carried out pursuant to a contract with the Claimant or any of the other companies in the Group. It was carried out pursuant to the Defendant's contract with MSSL:

    i) There was no dispute that the Defendant remained an employee of MSSL at all material times prior to 9 June 2017 pursuant to his written contract of 11 April 2008. That was also the consistent position of the Claimant and/or Mr Munnelly in the various pieces of litigation involving the Defendant since then.

    ii) There was no formal process of appointing the Defendant to do the work which he did for the Bishopsgate part of the business. Mr Munnelly instructed him, pursuant to his existing contract of employment with MSSL, to carry out this work and it grew organically. For approximately 4 years, the Defendant was working for the business of MSSL and the Bishopsgate business in parallel.

iii) There was nothing in writing and no evidence of offer and acceptance or intention to contract which would be consistent with a separate contract being expressly entered into with the Claimant alongside, and in addition to, his contract with MSSL. Nor was any case on consideration pleaded or developed by Mr Chaisty. In short, there was no evidence which would lead an objective observer to conclude that a parallel contract had been entered into.

iv) Nor was any case pleaded or proved which would lead the objective observer to conclude that any discussions between the Defendant and Mr Munnelly after the loss in relation to Sea Meadows was intended to give rise to a contract between the Claimant and the Defendant which applied in relation to the specific issue of credit, as Mr Chaisty appeared to be suggesting.

v) Consistently with the view that the work which the Defendant did for the Bishopsgate part of the business was carried out, and instructions in relation to that work were given, pursuant to his contract with MSSL, the Defendant was paid by MSSL which then recharged the Bishopsgate companies. Mr Munnelly agreed in evidence that the Defendant was being paid through MSSL and *"farmed out to the Bishopsgate Group*".

vi) The Defendant's contract with MSSL included, at clause 8, a requirement that the Defendant devote the whole of his time, skill and attention during working hours to his work for MSSL and a prohibition on engaging in any other work without the written permission of MSSL. As Mr Forshaw pointed out, in the proceedings in the Companies Court, Mr Munnelly's statement of 19 October 2017 referred to clause 8 and stated that the Defendant *"never asked for, nor was he given any written permission to engage in any work other than in the course of his employment with"* MSSL. I agree.

vii) As for any contention that there was an implied contract, or that a contract was to be inferred from the dealings between the parties, it was not necessary to imply or infer a contract between the Claimant and the Defendant to explain the work which he did for what was in effect the Bishopsgate part of the business. That work was explained by his contract with MSSL and the instructions given by Mr Munnelly pursuant to that contract: see **The Aramis** [1989] 1 Lloyds Rep 213, 224 and its application in e.g. **Tilson v Alstom Transport** [2011] IRLR 169 CA. It would also be inconsistent with the written contract with MSSL to imply or infer such a term given that there would then be potentially conflicting duties owed by the Defendant to the Claimant of which MSSL was, at least in form, a customer.

Was D a shadow director?

The Law

151. I was referred to a number of authorities on how to determine whether a person is or was a de facto director of a company. The starting point is the well-known dictum of Millett J in **re Hydrodram (Corby) Limited** [1994] 2 BCLC 180:

> *"To establish that a person was a de facto director it is necessary to plead and prove that he undertook functions in relation to the company which could*

properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level. A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such."

152. In **Secretary of State for Business Innovation and Skills v Balinder Chohan & Others** [2013] EWHC 680 (Ch) Hildyard J provided a helpful distillation of the cases which have developed this description:

"...the following characteristics are all relevant, though not everyone is required to be established, and there is inevitably some overlap between them:

(1) A de facto director must presume to act as if he were a director.

(2) He must be or have been in point of fact part of the corporate governing structure and participated in directing the affairs of the company in relation to the acts or conduct complained of.

(3) He must be either the sole person directing the affairs of the company or a substantial or predominant influence and force in so doing as regards the matters of which complaint is made. Influence is not otherwise likely to be sufficient.

(4) I am not myself persuaded that an "equality of footing" test is required: I prefer the looser fact-based approach advocated by Jacob J, and consider the indicia to be whether the person concerned has undertaken acts or functions such as to suggest that his remit to act in relation to the management of the company is the same as if he were a de jure director

(5) The functions he performs, and the acts of which complaint is made must be such as could only be undertaken by a director, not ones which could properly be performed by a manager or other employee below board level.

(6) It is relevant whether the person was held out as a director or claimed or purported to act as such: but that, and/or use of the title, is not a necessary requirement, and even that may not always be sufficient.

(7) His role may relate to part of the affairs of the company only, so long as that part is the part of which complaint is made.

(8) Lack of accountability to others may be an indicator; so also, may the fact of involvement in major decisions.

(9) The power to intervene to prevent some act on behalf of the company may suffice.

(10) The person concerned must be someone who was more than a mere agent, employee or advisor."

153. The observation at point 4 above, about the issue of acting on an equality of footing, refers to a passage from the judgment of Mr Timothy Lloyd QC (as he then was)

sitting as a Deputy High Court Judge in **Re Richborough Furniture Limited** [1996] 1 BCLC 507, 524 where he said:

> *"It seems to me that for someone to be made liable to disqualification ... as a de facto director, the court would have to have clear evidence that he had been either the sole person directing the affairs of the company (or acting with others all equally lacking in a valid appointment....) or, if there were others who were true directors, that he was acting on an equal footing with the others in directing the affairs of the company. It also seems to me that, if it is unclear whether the acts of the person in question are referable to an assumed directorship, or to some other capacity such as shareholder or, as here, consultant, the person in question must be entitled to the benefit of the doubt."*

154. I note that the dictum about the benefit of the doubt was cited with approval in **Gemma Ltd v Davies** [2008] BCC 812 Ch [40] and by the Court of Appeal in **Ahmed & others v Wetton** [2011] EWCA Civ 610 [30].

155. Hildyard J's reference to Jacob J was to what the latter said in **Secretary of State v Tjolle** [1998] 1 BCLC 333. Jacob J noted that the equal footing test had been criticised but that the criticisms fell away if it was read as referring to equality of ability to participate in the notional board room. He went on to say:

> *"For myself I think it may be difficult to postulate any one decisive test. I think what is involved is very much a question of degree. The court takes into account all the relevant factors... Taking all these factors into account, one asks, 'Was this individual part of the corporate governing structure', answering it as a kind of jury question....There would be no justification for the law making a person liable to misfeasance or disqualification proceedings unless they were truly in a position to exercise the powers and discharge the functions of a director. Otherwise they would be made liable for event over which they had no real control, either in fact or law."* (emphasis added)

156. Jacob J's view that there is no single test was commended by Robert Walker LJ (as he then was) in **In Re Kaytech International plc** [1999] BCC 390, 492. In **Revenue and Customs Commissioners v Holland** [2010] 1 WLR 2793 the Supreme Court also recognised that there is no single test.

157. The question of what are corporate governance functions, and the dividing line between these and senior managerial functions, is less than fully addressed in the authorities as Arden LJ (as she then was) noted in **Smithton Ltd (formerly Hobart Capital Markets Ltd) v Naggar** [2015] 1 WLR 189 CA. In **Revenue and Customs Commissioners v Holland** [2010] 1 WLR 2793 Lord Collins referred to corporate governance as *"the system by which companies are directed and controlled"*. In **Smithton** Arden LJ added:

> *"31. The Companies Act definition does not elucidate that matter. Provisionally it seems to me that that term is to be tested against the usual split of powers between shareholders and directors under Table A, ie on the basis that the powers of management of the company's business are delegated to the directors and the shareholders cannot intervene except by special resolution. On that basis it means a person who either alone or with others has ultimate control of the*

management of any part of the company's business. In the usual case, in my judgment, it would not include a purely negative role of giving or receiving permission for some business activity." (emphasis added)

158. Arden LJ also distilled practical points derived from **Revenue and Customs Commissioners v Holland** *(supra).*

> *"33. Lord Collins sensibly held that there was no one definitive test for a* de facto *director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of Holland and the previous cases which are of general practical importance in determining who is a* de facto *director. I note these points in the following paragraphs.*
>
> *34. The concepts of shadow director and* de facto *are different but there is some overlap.*
>
> *35. A person may be* de facto *director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.*
>
> *36. To answer that question, the court may have to determine in what capacity the director was acting (as in Holland).*
>
> *37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.*
>
> *38. The court is required to look at what the director actually did and not any job title actually given to him.*
>
> *39. A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.*
>
> *40. The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances "in the round" ….*
>
> *41. It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.*
>
> *42. Relevant factors include:*
>
> > *i) whether the company considered him to be a director and held him out as such;*
> >
> > *ii) whether third parties considered that he was a director;*
>
> *43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.*

44. Acts outside the period when he is said to have been a de facto *director may throw light on whether he was a* de facto *director in the relevant period.*

45. In my judgment, the question whether a director is a de facto *or shadow director is a question of fact and degree…"*

159. Mr Forshaw also placed reliance on the following passage from the judgment of His Honour Judge Hacon in **Elsworth Ethanol Company Limited v Hartley & others** [2014] EWHC 99 (IPEC) [54]:

"(2) The following, although not constituting an exhaustive list, are of particular significance:

(i) Where the individual (the putative de facto director) was acting with one or more others who were true directors, whether he was acting on an equal footing with those others in directing its affairs.

(ii) Whether there was a holding out by the company of the individual as a director and whether he used the title.

(iii) Taking all the circumstances into account whether the individual was part of the corporate governing structure, that is to say the system by which the company is directed and controlled.

(3) Factor (i) is especially important. For someone to be held to be a de facto director alongside one or more de jure directors there must be clear evidence that he was acting on an equal footing with the other(s) in directing the affairs of the company.

(4) If it is unclear whether the acts of a person are referable to an assumed directorship, or to some other capacity such as a consultant, that person must be entitled to the benefit of the doubt, i.e. there will be no inference of a de facto directorship."

Summary of the arguments on the de facto director issue

160. The case that the Defendant was a de facto director of the Claimant was largely built on his own evidence, perhaps because the Claimant's evidence on this issue gave less support for the proposition. In summary, Mr Chaisty highlighted the following points:

i) In the words of the Defendant's announcement of his departure on 12 May 2017 he "*set up and [ran] the Bishopsgate group of companies"* and he *"had four… years steering the Bishopsgate ship"*.

ii) His own evidence was that he *"became the Claimant's Managing Director from 2013" albeit "almost by default"* (emphasis added).

iii) The Defendant held himself out to the workforce and to 3rd parties as *"Managing Director"*, including through his email signature and when he signed documents on behalf of the Claimant such as the Particulars of Claim in proceedings against a director of Sea Meadows which were brought in August

2016. The Defendant himself said that *"it would have appeared to the wider world that I was in charge of the Bishopsgate group"* although, he said, Mr Munnelly was making the big strategic decisions behind the scenes.

iv) The Defendant's own evidence was that whilst others attended the meetings with the professional advisers, he *"was almost always the person left to put the advice into practice*". He set up new systems including *"all the companies, banking facilities, software integrating and IT systems"* albeit with the help of others. He built the businesses of the Bishopsgate companies from scratch and recruited personnel. He said that Mr Munnelly and Mr Vine were involved in certain key appointments but, submitted Mr Chaisty, they were merely involved in a consultative capacity.

v) The Defendant also said that he ran the Claimant on a day-to-day basis. He was *"trusted to get on with it though and certainly had a large degree of autonomy. I would consult with Phil Munnelly, Mr Vine and Paul Munnelly on how to run and develop the business and with ideas for the future*". *"I just did what I decided needed to be done using my best judgement. I was heavily involved in most aspects of the business"*. Mr Pegg said, *"it seemed like Mr O'Sullivan was able to steer it however he liked"*.

vi) He described his role as including *"finding new clients, managing the sales team, deciding which clients to give terms to and on what basis, setting up new systems and hiring and firing with the assistance of Phil Munnelly and Mr Vine. I would generally do what needed to be done until I had the budget available to hire more experienced personnel to manage different departments"*.

vii) Importantly, given the focus in the case law on the capacity in which the individual was acting when he carried out the impugned activities, the Defendant said that he had a free hand in committing the Claimant to credit. *" I had complete autonomy as to which clients should be given credit and on what terms. All my decisions were visible and transparent. I would often discuss them ...with Mr Vine and Phil Munnelly… but not always"*. He did not do this out of obligation. Mr Pegg also said that he was not aware of there being any limits to the Defendant's powers in this regard.

161. Against the proposition that the Defendant was a de facto director, Mr Forshaw relied on the following points:

i) The Defendant had expressly declined to become a statutory director of the Claimant because of his concern about the risks of doing so. It would be surprising if a person who had positively declined to become a director because they did not wish to risk the potential liabilities associated with doing so nevertheless found that in fact, he had become one.

ii) Second, the Defendant was not on an equal footing with Mr Munnelly. As Mr Munnelly said in evidence, the Defendant reported to him and, as the Defendant said, Mr Munnelly was making the big strategic decisions. Mr Forshaw also pointed to concrete examples of Mr Munnelly dictating terms to the Defendant, for example in their exchanges in mid-September 2016,

referred to above, which included exchanges about the movement of funds between the Bishopsgate Group and the Munnelly Group. When "push came to shove" the Defendant had to do what Mr Munnelly told him and this is reflected in his remark at the time that *"it's your company, so it's your call"*. Mr Munnelly freely expressed views on the appropriateness and abilities of senior personnel such as Mr Long and he also gave instructions as to how certain expenses should be presented in the Claimant's accounts, regardless of the Defendant's views.

iii) Third, all of the tasks which the Defendant undertook could properly be undertaken by an employee below board level.

iv) Fourth, the Defendant was not involved in matters which *"are quintessentially matters of corporate governance"*. Mr Forshaw gave the example of the statutory accounts, which were Mr Vine's responsibility. There were also no board meetings of the Claimant. Rather, the Defendant attended senior management meetings with Mr Munnelly and other Munnelly Group managers which were not specific to the Bishopsgate business. Mr Munnelly gave instructions at these meetings and there were no votes.

v) Fifth, in relation to holding out, the Defendant's title was derived from the fact that he was a statutory director of BBSL. There were also occasions when the Defendant himself drew this distinction, including in the announcement of his departure, albeit this was not a distinction which he generally drew in his day-to-day dealings with those who transacted with the Claimant. In general, he referred to himself as Managing Director of the Bishopsgate business rather than any particular Bishopsgate company. There were also other examples of managers who had the title of "director" but were not in fact company law directors in relation to the part of the business of which they were in charge.

vi) The Defendant's influence over its affairs was *"somewhat overstated"*. He was a senior employee, but Mr Munnelly and Mr Vine were involved in decisions on recruitment and, indeed, there was an example of an employee of the Claimant (the credit controller, Mr Kerai) being moved to the Munnelly Group against the Defendant's wishes. The Defendant was not authorised to sign contracts and financial documents on behalf of the Claimant: Mr Sexton was required to do this. And he was not in charge of marketing; Mr Paul Munnelly was.

<u>Conclusion on whether the Defendant was a de facto director of the Claimant</u>

162. Having weighed the competing considerations and looked at matters in the round, I prefer Mr Forshaw's submissions. In my view, the Defendant was not a de facto director of the Claimant for the following reasons.

163. In coming to a view on this issue it seems to me that an important starting point is that, as Mr Brewerton put it in his witness statement referred to above: *"The Bishopsgate Group was, in effect, run as a division of the Munnelly Group"*. In his witness statement, Mr Munnelly said, in effect, that the Defendant was a head of department of a business conducted and operated by Mr Munnelly:

> *"38. As is consistent with the way I conduct and operate a business, including the Munnelly Group and Bishopsgate Group, I appoint Heads of Department, who are responsible for their respective function of the business. I do not micromanage and trust those I have appointed to report to me with respect to their area of the business. However, I expect that any issues be brought to my immediate attention. I allowed [the Defendant] autonomy in the way in which he managed the business, but at all times [the Defendant] was responsible to me. This is consistent with [the Defendant's] appointment as Managing Director of the Bishopsgate group".*

164. The aim of the corporate structure, and the approach to conducting the affairs of the Bishopsgate companies, was to create the impression of separateness whilst Mr Munnelly conducted and operated the business and remained in charge. For this reason, there was no corporate governance structure to speak of which was specific to the Claimant or any of the other Bishopsgate companies. There were no board meetings of the Claimant, only what Mr Munnelly described as *"senior management meetings of the Munnelly Group, where matters relating to the Bishopsgate were also discussed"*. The only statutory director of the Claimant was Mr Sexton who, Mr Chaisty accepted, was a sham director and had no role in the running of the company.

165. Secondly, I accept the Defendant's characterisation of his role as being to arrange the incorporation of the Bishopsgate companies on Mr Munnelly's instruction and then to be responsible for the day to day running of the business. The reality of his reporting line was that Mr Munnelly had a right to tell the Defendant what to do and/or to veto things which the Defendant wished to do: that was Mr Munnelly's own case. As Mr Forshaw points out, there were also concrete examples of this in the evidence.

166. Thirdly, all of this is consistent with the fact that everything the Defendant did for the Bishopsgate part of the business was done pursuant to his contract of employment with MSSL and in that capacity, as Mr Munnelly was at pains to emphasise in his witness statement dated 19 October 2017 in the proceedings in the Companies Court referred to above. This is because what he did was capable of being done by a senior manager of the business and because, under his contract of employment, he reported to Mr Munnelly. The Defendant enjoyed a high degree of trust and autonomy but many senior employees and employed professionals do see e.g. **Percy v Church of Scotland Board of National Mission** [2006] 2 AC 28.

167. Fourthly, I accept that the Defendant held himself out as "Managing Director". The question whether the company did so, and particularly whether it held him out as a statutory director of the Claimant, is more problematic.

    i) There does not appear to have been a formal appointment of the Claimant as Managing Director of any Bishopsgate company. As the Defendant put it, he assumed this title *"almost by default"*. Insofar as there was any holding out by the Claimant and the other Bishopsgate companies it was in permitting the Defendant to refer to himself as "Managing Director". However, his email signature, on which Mr Chaisty relied, did not identify any particular company of which he was the Managing Director, although it gave the web address www.bishopsgatepay.co.uk and included the slogan *"Bishopsgate: The better way to pay"*. He used this signature for all of his work for this part of the business, regardless of the company concerned.

ii) In his witness statement Mr Munnelly does not actually assert, in terms, that the Defendant was the Managing Director of the Claimant. In one instance he refers to him as the Managing Director of BBSL but, apart from this, he defines the term "Bishopsgate Group" as the companies of which it was comprised and then repeatedly asserts that the Defendant was *"Managing Director of the Bishopsgate Group"*. This title accurately reflects the fact that, in his capacity as a senior manager of MSSL, the Defendant was in charge of the day to day running of the business of all of the Bishopsgate companies, rather than being a statutory director, managing or otherwise, of any particular company.

iii) Similarly, in general the Defendant was not specific about which company the title *"Managing Director"* related to. Where he was specific, he said he was the managing director of BBSL. The impression given to third parties, for example from his email sign off, would have been that he was Managing Director of the Bishopsgate business rather than any particular company within the Group.

iv) Third parties will also have understood that the Defendant had authority to agree terms or to enter into a given transaction on behalf of that the relevant company or companies where he did so. On the evidence, however, Mr Sexton's signature was required for certain transactions, albeit he allowed his electronic signature to be used. Precisely where the line was drawn in terms of the Defendant's authority and that of Mr Sexton was unclear but, where the latter's signature was required, this fact is likely to have meant that those who transacted with the Claimant understood that the Defendant was not a statutory director. An example is the guarantee required in relation to the RBS facility, referred to above.

v) Ultimately, whilst relevant, holding out is not decisive. The authorities make clear that the key consideration is the substance of the functions carried out by the individual. But the Claimant's case on this factor was less compelling than Mr Chaisty submitted, particularly in the context of a business in which others referred to themselves as directors, but this was a title rather than reflecting the true position as a matter of company law.

168. Fifthly, and importantly given that the focus should be on the capacity in which the impugned activities were carried out, I have given particular consideration to the capacity in which the Defendant dealt with issues of credit, and particularly in the context of his dealings with G-Force. Here, the irony is that Mr Munnelly insisted that the Defendant had no authority whatsoever to agree credit without his authorisation, and therefore supported the Defendant's case that he was not a de facto director. Conversely, the Defendant said that he had *"complete autonomy as to which client should be given credit and on what terms"*. In cross examination he was skilfully drawn in to asserting, in effect, that there were no limits to his authority, hence Mr Chaisty's argument that the Defendant's own position was that he could take risk on behalf of the Claimant and could authorise lending to the point where the very solvency of the company was in question.

169. Ultimately, my conclusion on this point was that Mr Munnelly and the Defendant were both right, up to a point:

i) It is common for senior managers to be authorised to take financial or other risks on behalf of their employers in the course of the businesses which they manage.

ii) In his role as a senior manager of the Bishopsgate business the Defendant had authority to make decisions as to the terms which would be agreed with clients, which included terms as to credit. He also had authority to manage the risk which had been taken on, as he did in the case of G-Force and any other client to which credit was provided. But he had authority to do so because that authority was given to him by Mr Munnelly pursuant to his contract of employment.

iii) At the same time, Mr Munnelly had the right to take away the authority which the Defendant had been given, or to place limits or procedural constraints upon it, as he said he did. Mr Munnelly rather than the Defendant therefore had *"ultimate control"* (**Smithton**) of the management of this aspect of the Claimant's business, albeit he had not exercised this control in the manner which he alleged in these proceedings.

170. This is not a simplistic application of the equal footing test, which compares the status of the putative de facto director with that of the de jure directors. But it is a recognition of the point made implicitly by Jacob J in **Tjolle**, cited at paragraph 154 above, that a court should hesitate to impose the duties and liabilities of a director on a person who does not have the powers of a director in the sense that they have ultimate control over the issue in respect of which they are said to be liable. It is also consistent with the capacity in which the Defendant was acting at all material times and with the fact that a true director has a duty to exercise independent judgement (section 173 of the Companies Act 2006) and to act in the best interests of the company. The suggestion that a person whose decisions and actions are entirely subject to the say so of another should nevertheless be subject to these duties seems to me to be problematic.

171. Nor, in reaching my conclusion, have I placed weight on the fact that the Defendant specifically declined to become a statutory director of the Claimant. I accept Mr Chaisty's submission that a de facto director will often be a person who did not wish or choose to become a director. I also note that this submission is consistent with the emphasis, e.g. in **Smithton**, on an objective approach and on consideration of the duties and functions which the putative de facto director actually performs. The present case goes further in that the Defendant positively declined to be appointed, precisely because he did not wish to assume the duties of a statutory director, but I am not persuaded that this is a difference in principle. If the Defendant had nevertheless acted as a director of the Claimant, it seems to me that he would have been a de facto director.

172. Nor have I felt it necessary to approach the matter on the basis that the Defendant should be given the benefit of the doubt although, had I felt it necessary to do so, he would have been entitled to it.

173. Contrary to Mr Chaisty's submission I do not accept that the proposition that the Defendant was not a de facto director of the Claimant is a startling one. My finding is consistent with what the parties intended and agreed. It has the consequence that the

Defendant owed duties to MSSL, breach of which could result in contractual or other claims against him and/or his dismissal. Mr Munnelly did not seek to put in place a robust corporate governance structure for the Claimant because the effect of such a structure would have been that the Defendant and Mr Vine were not subject to his control, but the cost of his not doing so was that the Defendant was answerable to him through his contract of employment rather than answerable to the Claimant through the duties imposed by the Companies Act 2006.

174. It follows that the Defendant did not owe the Claimant the duties of a director including the duties under section 172 and 174 Companies Act 2006 on which the Claimant relies. However, in case I am wrong on the issue of de facto directorship I will consider the Claimant's case under these heads on the assumption that he was a de facto director and/or owed fiduciary duties to the Claimant.

Breach of section 172?

175. Section 172 Companies Act 2006 provides, so far as material, as follows:

> ***"172 Duty to promote the success of the company***
>
> *(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—*
>
> *(a) the likely consequences of any decision in the long term,*
>
> *(b) the interests of the company's employees,*
>
> *(c) the need to foster the company's business relationships with suppliers, customers and others,*
>
> *(d) the impact of the company's operations on the community and the environment,*
>
> *(e) the desirability of the company maintaining a reputation for high standards of business conduct, and*
>
> *(f) the need to act fairly as between members of the company…."*

176. Mr Chaisty put the allegation of breach of this duty as a failure by the Defendant to disclose his misconduct and he relied on paragraph 8.2617 of Palmer's Company Law and **Item Sofware v Fassihi** [2004] BCC 994. As is well known, in **Item Software** the Court of Appeal held that a director's common law fiduciary duty of loyalty may require them to disclose their own breach of duty or misconduct, although there is no free-standing duty to do so.

177. The flaw in Mr Chaisty's argument is that, even if the Defendant was a de facto director, I do not accept that there was any breach of a duty owed to the Claimant by him, nor any misconduct on his part. At all material times he acted in relation to G-Force in the way which he considered, in good faith, would be most likely to promote the success of the Claimant for the benefit of its members as a whole, having regard to

the considerations referred to in section 172. There was therefore no breach of duty or misconduct that he was obliged to disclose.

178. For the reasons given above, I am satisfied that the Defendant was perfectly open about the fact that G-Force was to become a client and did become a client, and the fact that the agreement with G-Force was to include, and did include, credit. These matters were well known within the workforce of the Bishopsgate part of the business and were known to senior Munnelly Group personnel including Mr Vine and the Head of Legal, Ms Lovett. They were not concealed from Mr Munnelly, or anyone else, and he was well aware of them. Mr Munnelly was also aware of the broad terms on which credit had been agreed (i.e. monthly payments, credit limit etc) although it is possible that by May 2017 he did not recall them as these were matters of detail and primarily the concern of the Defendant on a day to day basis.

179. Even if Mr Munnelly was not aware of these matters, however, he would not have forbidden the terms which were agreed had he been asked. He was keen to increase sales. G-Force was a potentially lucrative client and he would have agreed with the Defendant's judgement and that of the Bishopsgate team that it was in the Claimant's interests to enter into such an agreement. He had not stood in the way of similar arrangements in the past and the deal with G-Force would have gone ahead.

180. As to the problems which then arose with the G-Force account, I accept that Mr Munnelly was not made aware of them by the Defendant himself. These were operational issues and at all material times the Defendant's belief was that matters were under control, that G-Force would "come good" and that it was not necessary to sound the alarm to Mr Munnelly.

i) In the early stages, the Defendant was confident that the issues were, in effect, teething troubles and that they would be resolved shortly. Thus, for example, when the October and November invoices were not paid he considered in good faith, and was entitled to consider, that they would be. When G-Force paid £184,000 on 9 December 2016, this confirmed his belief that G-Force would prove to be a lucrative client and that things were back on track. Similarly, when there were further issues in December and January, he did not consider that these warranted the attention of Mr Munnelly given that he saw them as "seasonal" and he genuinely did not think that there was any cause for alarm.

ii) As the situation developed in February and into March 2017, the Defendant became more frustrated with G-Force and more concerned, but he believed that the way forward was to keep G-Force trading and to help it to address its cashflow issues. In this way G-Force would be brought back within its credit limits. The Defendant did, however, make Mr Vine aware of the situation from March 2017 when he could see that there were potential issues which went beyond the operational (i.e. the question whether there was a need to make provision in the company accounts). This would be very odd thing to do if he was seeking to conceal the situation from Mr Munnelly given that Mr Vine was his right-hand man and might well have decided that there should be provision made in the accounts.

iii) Thereafter, the Defendant was entitled to work on the basis that Mr Vine would brief Mr Munnelly as appropriate, although Mr Vine may have decided

to filter in relation to Mr Munnelly in the belief that the matter was under control. Ms Lovett was also aware of the situation at the outset and as it developed, and there is no suggestion that she advised that more should be done to bring the matter to Mr Munnelly's attention. There was no attempt on the part of the Defendant to keep the situation secret and nor could there have been given that others were aware of it.

181. I find that, in May 2017, Mr Vine probably mentioned to Mr Munnelly that there were issues with G-Force and referred to the fact that the credit limit of £250,000 had been agreed. Mr Munnelly appears to have thought that the debt, rather than the credit limit, was £250,000 or, at least, to have been comfortable with the situation given that, he understood, the Defendant had things under control. He was then genuinely surprised to learn, on 7 June 2017, that in fact the debt was substantially higher than he had thought. But this was the result of his being misled, or at least not being fully briefed, by Mr Vine, rather than the Defendant lying to or deliberately misleading him.

182. In any event, there was no evidence that earlier notification to Mr Munnelly of the fact that G-Force had exceeded its credit limits and/or of the ins and outs of what transpired thereafter would have led to a materially different outcome and, in particular, that the Claimant would not have sustained the loss which ultimately it sustained. I have considered whether Mr Munnelly might have called a halt when the payment of £184,000 was made on 9 December 2016 had he been aware of the issues that there had been before this, but on balance I consider that he would have allowed the business relationship to continue as the Claimant did, and for the similar reasons: see, further, the discussion below. Thereafter, if he had been involved throughout he would probably have been persuaded to make similar decisions to the decisions of the Defendant which allowed the debt to rise, at least to the levels which ultimately had to be written off, and for similar reasons. Mr Munnelly's evidence on this topic was based on hindsight and without addressing the circumstances in which each decision was made by the Defendant. There was also a significant degree of revisionism on his part in relation the issue of credit.

Breach of section 174?

Law

183. Section 174 Companies Act 2006 provides:

> ***"174 Duty to exercise reasonable care, skill and diligence***
>
> *(1) A director of a company must exercise reasonable care, skill and diligence.*
>
> *(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—*
>
> *(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and*
>
> *(b) the general knowledge, skill and experience that the director has."*

184. Palmer's states at paragraph 8.2804, and I accept:

> *"The approach adopts as the minimum standard that objectively expected of person in the directors' position; that standard may be raised by the subjective element of the test if the particular director has any special knowledge, skill and experience."*

185. See, also, paragraph 8.2809. The duty is owed to the company rather than the members and it is not a fiduciary duty.

186. At paragraphs 8.2810 and 2811, Palmer's states:

> *"On the other hand, directors managing companies are in the business of taking risks…A director is not automatically negligent because the company suffers a loss as a result to the director's activities. The director is not required to be right, just to display reasonable care, "measured by the care an ordinary man might be expected to take in the same circumstances on his own behalf. He is clearly … not responsible for damages occasioned by errors of judgment." In the same vein, Brett LJ. observed: "A director must be guilty of such negligence as would make him liable in an action. Mere imprudence is not negligence; want of judgment is not. It must be such negligence as would make a man liable in point of law."*
>
> *Although the distinction between misjudgement and negligence remains apt, the words in these older cases must now, of course, be read in the light of the statutory imposition of an objective assessment of reasonable care."*

The Claimant's case

187. The Claimant's pleaded case in relation to negligence is somewhat vague. Negligence is not alleged in terms. The fact that it is alleged is to be inferred from the fact that paragraphs 24(a)-(g) APOC allege that the Defendant owed a list of *"fiduciary and common law duties of care"* which included, at 24(e), *"to act with reasonable diligence, care and skill"*. At paragraph 32 APOC the three breaches of all of the duties pleaded at paragraph 24(a)-(g) are then said to include extending credit to a new client without authority and failing to ensure the payment of the fees owed. There are no particulars of why it would be negligent to extend credit to G-Force other than the complaint that this was contrary to Mr Munnelly's alleged instruction. Nor are there any particulars of steps which the Defendant ought to have taken, but did not take, to ensure repayment of the debt.

188. The evidence on behalf of the Claimant did not develop the case in negligence materially beyond what was pleaded. In essence, the Claimant's witnesses emphasised that Mr Munnelly was ignorant of G-Force until the end of May 2017, and of the size of the debt which had accrued. It was asserted that the Claimant was not a bank etc and incredulity was expressed about what the Defendant had done. Indeed, in evidence Mr Munnelly appeared unable or unwilling to say whether there had been any investigation of G-Force itself or of the detail of the steps which the Claimant had taken or ought to have taken. Nor was there any expert evidence.

189. Notwithstanding this, it appeared from Mr Chaisty's cross examination of the Defendant that his strategy was to cross examine in a case of negligence by putting a

number of the documents to the Defendant and making wide ranging criticisms of the Defendant's dealings with G-Force from September 2016 to June 2017, with a particular focus on the levels of due diligence which had been carried out in relation to G-Force before entering the agreement with this company. On one view this was unfair, given the paucity of the pleaded case. But the Defendant's witness statement contained a good deal of evidence about his dealings with G-Force, the checks which were carried out, the safeguards which he believed were in place and the decisions which he had taken. Mr Chaisty's cross examination therefore proceeded without objection.

190. In his oral closing submissions, Mr Chaisty said that his primary case was that *"this should never have happened, but…even if he is given this incredible benefit of the doubt that he made an error of judgement at the beginning the time very very quickly came"* when *"He should have stopped. He should have put the shutters down. If he had done the debt would not have grown "*. This point was reached when the payment of £184,000 was made on 9 December 2016, and the debt went down to £236,373.

191. Although another theme in Mr Chaisty's case was that more should have been done to protect the position of the Claimant he did not appear to argue, still less did the Claimant prove, that steps which might have been taken by the Defendant would have resulted in the debt being reduced to nil or materially below £481,727 or £184,000 as the case may be. Nor did he argue with any conviction, or prove, that once the debt reached the level of the sum claimed in these proceedings, i.e. by around the end of January 2017, the Defendant could have recovered it had he not been negligent. Rather, his case focussed on the argument that credit in this sum or any sum should never have been extended to G-Force or, alternatively, that the Claimant should have cut its losses when it was paid on 9 December 2016.

192. This approach was, with respect to Mr Chaisty, sensible given the limitations in the pleaded case and the evidence referred to above, and given that the Claimant would only recover the damages claimed if the course of history would have been different had the Defendant not acted negligently, as alleged, and the losses claimed by the Claimant would not have been sustained. But the position remained that, the burden of proof being on his client, Mr Chaisty was asking the court to form its own opinion on a series of business judgements which were made by the Defendant on the basis of his experience in the sector and what was known to him at the time. Moreover, Mr Chaisty was asking the court to do so without any evidence as to any accepted benchmark against which to measure the standard of care, and with very little evidence as to the merits of extending credit to G-Force or as to the advisability and effectiveness of other steps which might have been taken, other than the Defendant's evidence.

193. Mr Forshaw submitted that insofar as the Claimant's case in negligence was of failure to carry out due diligence it was an allegation of professional negligence. Expert evidence was required to prove the requisite professional standards against which the Defendant should be judged and yet none had been called. In this regard he relied on Jackson & Powell on Professional Liability 6th Edition [6-008] - [6-011], **Pantelli Associates Ltd Corporate City Developments Number Two Ltd** [2010] EWHC 3189 [17] and **Avondale Exhibitions v Arthur J Gallagher Insurance Brokers Limited** [2018] EWHC 1311 [121].

194. As I have noted, there is no pleaded allegation of any professional standard below which the Defendant's approach fell, but I agree with Mr Chaisty that it is difficult to envisage what true expert evidence might have been called in the context of the present case. Witnesses might have been called to say what they would have done to safeguard the interests of the Claimant and/or to check the creditworthiness of G-Force, but it was not clear to me that there are any acknowledged professional standards in the relevant sector in relation to issues of credit and credit control. I therefore do not regard the lack of a pleaded case or expert evidence as to accepted standards, or a relevant norm, as the knockout point which I understood Mr Forshaw to be submitting it was. I agree with him, however, that this feature of the case and the lack of any pleaded case or positive evidence as to what ought to have been done – other than not to agree credit and to recover the sums owed – is a significant weakness in the Claimant's case.

The initial decision to agree to unsecured credit

195. Mr Chaisty pointed out that G-Force and its directors were not known to the Defendant before they were introduced to the Claimant by Ms Budgen Against this background, in summary his principle criticisms were that there was little or no due diligence in relation to G-Force:

    i) There was a credit report, but this showed a score of 56 in relation to a limit of £50,000. It was also clear from the report that, earlier in its history, G-Force had been rated less highly.

    ii) There was an abbreviated unaudited balance sheet for the year to 31 March 2016, but this did not tell the reader much of importance and, in any event, there were aspects of it which the Defendant had misunderstood. For example, in evidence it appeared that the Defendant thought that the entries for *"profit and loss account"* referred to trading profit in the particular year whereas it referred to retained profits. He also relied on the figures as to tangible assets, stock and debtors without investigating whether the figures would be realised in the Claimant's favour in the event that was necessary to do so.

    iii) There had been personal guarantees sought but it transpired that only one of them had been signed. The Defendant had not personally checked this before 12 October 2016 and nor had he checked whether the directors of G-Force had assets against which any such guarantee could be enforced.

    iv) Undue reliance was placed by the Defendant on the fact that RBS had agreed in principle to the invoicing facility and insurance on 22 September 2016 when such agreement was subject to *"(subject to survey and board approval)"* and the provision of various documents relating to the Bishopsgate business. He had then been slow to supply the documentation required by RBS to approve the facility.

196. Mr Chaisty placed reliance on the Defendant's evidence that he was on *"a steep learning curve"* in terms of introducing credit control mechanisms to the Claimant and was learning on the job. The Defendant had frankly admitted that he was relying

on his personal experience and had not been provided with any formal training for his role. Mr Chaisty's essential submission was that the Defendant was not competent to make the decisions which he had made and had been naïve and over optimistic in relation to G-Force.

197. Mr Forshaw argued that:

i) There had been no expert or other evidence as to the standard or norm to be applied in this context in relation to due diligence, as I have noted above.

ii) The Defendant was not a qualified accountant. The fact that he had not been given any training ought not to be relied on against him given that he had experience in the sector. He had been tasked with his role by Mr Munnelly and Mr Munnelly could, if he thought this to be necessary, have arranged for such training to be undertaken. Mr Munnelly clearly did consider him to be competent. The passages in the Defendant's evidence on which Mr Chaisty relied were part of the Defendant's case that he had introduced improvements in the approach to due diligence in relation to credit, and to credit control, as compared with the Munnelly business as a whole. The standards were higher in the Bishopsgate part of the business.

iii) The credit report of 2 September 2016 was not the only piece of evidence available to the Defendant, but a credit rating of 56 was far from being a cause for concern. The report also said that "*the latest Balance Sheet indicates a very positive net working capital position. There has been an increase in shareholders' funds compared with the previous balance sheet*".

iv) The abbreviated accounts for the year ending 31 March 2016 showed that G-Force was profitable and had healthy levels of net assets-approximately 863,000 in 2015 and 899,000 in 2016.

v) The Defendant also considered G-Force's trading history and shareholder funds. He ascertained that their client base included Babcock Rail and J Coffey. Moreover, G-Force had purchased new plant and machinery in anticipation of an increase in work from these clients and was clearly confident about its future.

vi) The Defendant had obtained agreement in principle for an invoice facility and insurance from RBS at a level of approximately £300,000 in relation to G-Force. The fact that final agreement had not been reached misses the point: RBS had, itself, investigated G-Force before indicating that this would be acceptable in principle. RBS, of course, was better equipped than the Claimant to make such an assessment and more experienced in doing so. The Defendant was entitled to rely on this assessment.

vii) The Defendant also understood that personal guarantees had been obtained from two of the directors of G-Force. Whilst it transpired that this was not the case, and whilst he had not personally checked the net worth of the directors, these were matters which he had left in the hands of Ms Lovett, an experienced lawyer and Head of Legal for both Groups. It was reasonable to do so.

(viii) The reality was that the Defendant had carried out greater due diligence than was applied by MSSL. The practice of Mr Munnelly was to agree to credit on the basis of a credit report alone. Indeed, there had been cases in the past when he had agreed credit on the basis of a lower rating than 56.

198. Again, I prefer Mr Forshaw's arguments. The starting point, it seems to me, is that no evidence was put before the Court that, as at September/October 2016, the financial position or nature of G-Force's business was such that it was unreasonable to agree to provide credit to G-Force, which is the Claimant's pleaded case. Nor has any evidence been adduced by the Claimant that there were warning signs at this stage, nor that if further inquiries had been made this decision would not have been taken by the Defendant or could not reasonably have been taken. On the contrary, all of the evidence was that G-Force was rightly seen as a potentially valuable client both in terms of immediate profits and the indirect benefit to the Claimant of being seen to have such a substantial client. Indeed, as I have found, Mr Munnelly was aware of what had been agreed and, even if he had not been, he would have approved the deal. The Claimant's case was built on what happened after the agreement was entered into and based, therefore, largely on hindsight.

199. Second, nor has any evidence that the directors of G-Force could not be trusted, that they were in fact men of straw and that this evidence might have been discovered had there been further or better due diligence. Nor has it been suggested that there were warning signs in this regard at the time of the initial agreement. On the evidence, the Defendant had no reason to treat G-Force or its directors with suspicion when entering into the agreement. Indeed, although Mr Chaisty hinted, in the light of subsequent developments, that the directors may have been, as it were, stringing the Defendant along this was not central to his case. Nor did he persuade me that, at any point in his dealings with them up to his departure it was unreasonable for the Defendant not to be more sceptical about the promises, apologies and explanations offered by G-Force than in fact he was.

200. Third, G-Force were not known to the Defendant personally, but they were known to Ms Budgen and they were a client of the Guild. He was entitled to take her knowledge and her views into account in deciding whether to accept the terms as to credit required by G-Force.

201. Fourth, the Defendant caused reasonable enquiries to be made in the form of obtaining the September 2016 credit report and examination of the abbreviated accounts of G-Force albeit, as he recognised at the time, the information in the abbreviated accounts would necessarily be somewhat out of date given that it was for the period to 31 March 2016. It was also reasonable for him to rely on the other information which he had available to him, including the information as to G-Force's client base. Most importantly, however, he was entitled to take into account the assessment of G-Force which had been carried out by RBS and which showed that they were willing in principle to agree to a facility of c£300,000.

202. Fifth, as far as the question of personal guarantees was concerned, the Defendant saw these as an additional rather than a decisive safeguard. He was entitled to rely on Ms Lovett to ensure that they were signed. It is true that steps do not appear to have been taken to verify whether the directors had sufficient assets but nor, on the evidence, has

it been established that they did not. Even if they did not, it was clear on the evidence that the Defendant relied on Ms Lovett in relation to this aspect of the arrangements.

203. Sixth, it is true that, as Mr Chaisty pointed out, the Defendant was highly apologetic when the size of the debt came to light, but this was *"in hindsight"*.

204. Assessing the evidence as a whole, then, I am not persuaded that it was unreasonable for the Defendant to enter into the agreement with G-Force, including the terms as to credit. That was a judgement which he was entitled to make and in doing so he took sufficient steps to investigate G-Force and to safeguard the interests of the Claimant. In short, although more might have been done, and greater caution might have been exercised, he did exercise the care, skill and diligence which would be expected of a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions which he carried out in relation to the Claimant and, indeed, of a person with his actual knowledge skill and experience.

The failure to stop credit/terminate the contract when the payment of £184,000 was made on 9 December 2016

205. Turning to the question whether the Defendant should have *"pulled the plug"* on 9 December 2016, Mr Chaisty argued that the terms on which G-Force was extended credit were not clear within the Claimant. More importantly, he added that from the outset the terms were departed from by G-Force: firstly, by their stating that they would pay the invoices two weeks after the month in question; and, secondly, by approaching matters as if they were entitled not to pay until they had been paid by their own creditors. In addition to this, he pointed out that it had become apparent, on 1 December 2016, that RBS had concerns about G-Force which led it to impose a limit of £50,000. These and the delays in payment, he argued, were sufficiently alarming warning signs for it to be negligent for the Defendant to fail to bring the shutters down when the payment was made. He said that the Defendant effectively admitted this when he was asked in cross examination whether he had made mistakes and he said *"the only one I suppose, the main one, was going from 260 to 460, that to me got me in the position that we are trying to get it back in"*. This was a reference to the December/January period.

206. I accept Mr Forshaw's submission that this is an argument based on hindsight. Indeed, the passage from the Defendant's evidence on which Mr Chaisty relied was in answer to a question about what the Defendant thought when he looked back and was prefaced by the Defendant with the words *"in hindsight"*. At the time, it appeared that things were back on course. A substantial payment had been made and G-Force was back within its credit limit. It was also clear that G-Force was owed substantial sums of money by its creditors and the evidence suggested that, apart from cashflow, it was in a healthy financial position. All of the reasons why securing G-Force as a new client was a very positive development continued to apply and the teething troubles did not materially detract from this or, at least, detract anywhere near sufficiently for it to be unreasonable to continue the relationship.

207. Although these were not key considerations at this stage given that the Defendant had no real concerns about G-Force, there were also reasons why refusing to allow credit or, which would amount to the same thing given that this was an essential aspect of the agreement from G-Force's point of view, pulling out of the agreement with G-Force at this stage would have been highly detrimental. The loss of this client would lead to the loss of the profits which the Defendant believed would be made from the relationship with G-Force as it developed over the coming months and years, the reputational harm and the potential difficulties in recovering what was owed were all contraindications to taking this course. Refusing to extend any further credit would also have put the Claimant in breach of its contracts with the operatives and/or would run the risk of the corporate arrangement being seen as a sham and, thus, undermining the business model of, and rationale for, the Bishopsgate business.

208. I agree with Mr Forshaw that, far from it being negligent not to do so, it would have been very surprising for the Defendant to decide to terminate the agreement in respect of credit at this stage. This would have resulted in the loss of G-Force as a client and would not have been in the best interests of the Claimant. This was certainly a judgement which the Defendant was entitled to reach, and he exercised the requisite levels of care, skill and diligence in continuing the contractual arrangements with G-Force at this stage.

Allowing the debt to increase after 9 December 2016

209. Mr Chaisty argued that after the payment on 9 December 2016 the Defendant *"took his eye off the ball"*. I do not agree. I take his point that thereafter the debt continued to rise and that, in December and January 2017, there were further indications of what, it is apparent with hindsight, was to come. But, at this stage, the Defendant also understood from Mr Nelson of RBS that £50,000 was not necessarily its last word and that efforts were being made to obtain authorisation for higher limits. As noted in my findings of fact, in December and January the Defendant made judgements about the situation based on what he knew to be typical in December and January, based on the other pros and cons of terminating the relationship with G-Force at this stage whether by refusing credit or otherwise, and based on his assessment of G-Force personnel who were apologetic and appeared transparent and plausible when they promised payments in the near future.

210. The Defendant considered that there was every reason to think that matters would be on an even keel by February 2017. Given, also, the downsides referred to above, I am not persuaded that the events of December and January meant that it became unreasonable for him to refrain from pulling out of a relationship with what was still expected to be a lucrative client. Indeed, on one view, the increase in the debt made drastic action less desirable given the likelihood of more substantial losses when weighed against the likelihood of G-Force's cashflow problems being resolved. I agree that this was a matter of judgement, and that there was clearly room for a different view. But I also accept that the Defendant could reasonably take the view, and make the judgements, which he did. These judgements were not negligent or in breach of the standards required by section 174 of the Companies Act 2006.

February 2017 onwards

211. By the end of January 2017, the G-Force debt stood at c£468,500. I have summarised the key developments thereafter and, as I have noted, Mr Chaisty did not seriously argue that after the debt had reached this point there were steps which the Defendant took or might have taken which added to, or might have materially reduced, the loss which was ultimately suffered. For completeness, in my judgement he was realistic not to do so. From start to finish, what is in issue in relation to this period is a series of commercial judgements made by the Defendant and his team in the light of the information available to them at the time. In relation to each decision which the Defendant took, he had to judge whether given options would be in the Claimant's interests or would be harmful to those interests, assessing the likely risks and consequences in the light of a number of variables.

212. It is true that, as time progressed, there were more indicators that the Claimant might not recover its money, and the causes for concern increased. The debt continued to grow, the pattern of broken promises, excuses and apologies continued, and it did appear that the Claimant was not first in line when G-Force did get paid by its creditors. The credit reports in relation to G-Force showed that the risk which it presented had substantially increased, and it was clearly having difficulties in securing funding. But, on the other hand, G-Force was making payments, albeit ones which were nowhere near large enough to make inroads into the debt. It continued to be owed substantial sums of money by reputable companies and, if it could resolve its cash flow difficulties, it continued to have the potential to be a very good client. The downsides to terminating the relationship or refusing any further credit remained and, paradoxically, they increased with the increase in the debt.

213. In my judgement, the Defendant did give sufficient attention to the situation with G-Force over this period. He and his team did take adequate steps to keep the debt under control and to seek to recover it. There were adequate steps taken by him and the team to monitor the situation, to chase and to put pressure on G-Force. There were also positive steps taken to assist G-Force to resolve its funding issues. Although Mr Chaisty was scornful of this, and although I agree that it was an unusual step, in my judgement it was indicative of the Defendant taking all reasonable steps to address the problem because it was in the Claimant's interests to do so in this way. Similarly, Mr Chaisty argued that a debenture ought to have been registered, that the Defendant ought to have been less trusting and more aggressive etc. I agree that these arguments can be made, but they are more easily made with hindsight. The Defendant made reasonable judgements in relation to these matters in the circumstances as they were known to him and the team at the time. Even with hindsight, Mr Chaisty has not begun to prove that they, or any other steps which the Defendant might have taken, would have made the slightest difference to the outcome. Indeed, the implication of his overall argument was that what happened was inevitable once the decision had been taken to allow credit to G-Force and then to allow the debt to grow as it did.

214. I also note that the evidence has not established that it was inevitable that G-Force would go into administration and/or that the Claimant would have to write off a bad debt in the size which it did. As I have pointed out, there was little or no evidence about what happened after the Defendant left in June 2017. History therefore does not relate what brought about the administration, although it was suggested that it was Mr Munnelly calling in the debt, and whether the Defendant would have been vindicated

if it G-Force had been permitted to continue to trade. It remains his view that he would have been.

215. For all of these reasons, then, I do not accept that the Claimant has shown that the Defendant was negligent in his dealings with G-Force and, in particular, with the issues relating to the provision and extension of credit to this company, and the recovery of the debt. Even if he had been a de facto director, then, I would have held that at all material times his conduct of these matters met the standards required by section 174 of the 2006 Act.

Should section 1157 Companies Act 2006 be applied?

216. Section 1157 provides, so far as material, as follows:

> *"1157 Power of court to grant relief in certain cases*
>
> *(1) If in proceedings for negligence, default, breach of duty or breach of trust against—*
>
> *(a) an officer of a company, or*
>
> *(b) ...,*
>
> *it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."*

217. Given that I have found that the Defendant was not an officer of the Claimant and that he was not in breach of any Companies Act duties to the Claimant in any event, this issue does not arise. I find that the Defendant acted honestly and reasonably but it seems to me to be artificial to express a view, hypothetically, on how I might have exercised my discretion under section 1157 had I found that he *was* a de facto director and *had* acted negligently or committed some other breach of duty and thereby caused loss to the Claimant. Much would have depended on the findings which led me to this conclusion.

Agency

218. In the light of my conclusions on the issues of breach of authority, deliberate concealment and negligence, the issues in relation to agency are largely academic. However, for completeness:

i) I accept that the Defendant was an agent of the Claimant in that, on behalf of the Claimant, Mr Munnelly permitted him to affect the Claimant's legal relations with third parties. Whilst the precise line between what the Defendant was formally authorised to do in terms of transacting with third parties, and what he was not authorised to do, was not clear from the evidence, it was clear that even where the signature of Mr Sexton was required, the Defendant tended to make the decisions and Mr Sexton signed without exercising any independent judgement (unless he was personally entering into a commitment,

as in the case of the guarantee in January 2017). Also, the Defendant could and did make decisions in relation to credit and its extension which did not require the authority of Mr Sexton.

ii) However, I do not accept, for the reasons given above, that the Defendant was a contractual agent. The only relevant contract was the contract of employment between the Defendant and MSSL. The agency was gratuitous.

iii) I do not accept, for the reasons which I have given, that the Defendant exceeded his authority in relation to the provision and extension of credit to G-Force.

iv) Nor do I accept that the Defendant personally owed a duty of care to the Claimant such that it would be able to claim damages for economic loss against him. The work which he did for the Bishopsgate business was done in his capacity as a senior employee of MSSL which was farming him out to that part of the business owned and operated by the Munnelly family. He was not assuming duties to the Claimant personally: compare **Williams v Natural Health Life Foods** [1998] 1 WLR 830. I agree with Mr Forshaw that there would also potentially be difficulties in reconciling the alleged duty of care owed to the Claimant with the contractual framework pursuant to which the parties agreed that the Defendant would do the work: see **Henderson v Merrett Syndicates Ltd** [1995] 2 AC 145 at 195G/H. The imposition of duties of care owed personally to the Claimant would also potentially lead to a conflict between the duties which he owed to MSSL and the Claimant given that, in theory at least, they were separate and MSSL was a customer of the Claimant. I therefore do not consider that it would be fair, just and reasonable to impose the duty of care contended for by the Claimant on the facts of this case.

v) In any event, as I have said, I consider that the Defendant exercised levels of care, skill and diligence which would be expected of a reasonably diligent person carrying out the work which he did for the Bishopsgate business, including the Claimant, and in dealing with G-Force in particular.

219. As far as concealment is concerned, the case against the Defendant was squarely pleaded as deliberate concealment. The duties alleged at paragraph 24 APOC included a duty *"(d) not to conceal information relevant to the financial affairs of the Claimant and in particular its state of account with third parties"* and paragraph 32 alleged that *"Further, the Defendant deliberately concealed such matters from Mr Munnelly and deliberately provided a false picture that there was no concern as to the financial status of G-Force or the state of its account"*. However, Mr Chaisty relied in passing in his skeleton argument and his written closing submissions on the duty of an agent to keep the principal appropriately informed. In this connection, he cited Bowstead & Reynolds on Agency, 22nd Edition, at paragraph 6-021, which forms part of the commentary on an agent's duty to exercise reasonable care and skill. He did not refer to any authority on the source or scope of this duty, and nor did he develop the argument orally. But he submitted in writing that *"non-disclosure does not have to be deliberate to constitute a breach"*. In his skeleton argument he said that: *"...it is relevant to note that the true owner of C was Mr Munnelly. Mr Sexton acted as his nominee. No information was provided to Mr Munnelly."*

220. I consider that Mr Forshaw is right to submit that the Claimant has not pleaded any case based on mere or negligent failure to inform, and that this claim is not open to the Claimant. I appreciate that it might be said that the allegation of deliberate concealment includes an allegation that there was a failure to inform – in a sense the greater includes the lesser – but it seems to me that the question whether a failure to inform amounted to a breach of the Claimant's duties as agent is a different one to whether he breached his duties by deliberately concealing information, and it engages different legal considerations. I have already commented on the vagueness of the Claimant's pleaded case, and have allowed Mr Chaisty some latitude, but this is a step too far, in my view, and it would not be fair to the Defendant to allow this line of inquiry to be opened up in passing at the trial itself and without any application to amend.

221. In any event, as I read the authorities referred to in Bowstead, failure by an agent to inform a principal of a given matter may be the basis for a claim that the agent did not exercise reasonable care and skill, rather than the failure to disclose, without more, being a breach of duty. Whether such a claim succeeds will be fact sensitive and will depend on the functions and duties undertaken or agreed to by the agent and on what the principal was told or not told and why. In the present case, there is a lack of clarity in the Claimant's case on the point given that the principal has to be the Claimant, whereas the complaint is that Mr Munnelly was not informed. No doubt for this reason Mr Chaisty was constrained to argue that Mr Sexton was Mr Munnelly's nominee – and so presumably Mr Munnelly, rather than Mr Sexton, should have been informed as the former was the true director - although this is not clear, and on one view it cuts against his case on the de facto director issue.

222. I do not consider that the Defendant was negligent or otherwise in breach of duty in failing to inform Mr Munnelly of the issues in relation to G-Force exceeding its credit limit. He did inform Mr Vine, the person responsible for the company accounts, and Ms Lovett, the Head of Legal. Either of them was in a position to inform Mr Munnelly if they thought it reasonable or appropriate to do so.

223. For all of these reasons, then, I reject this argument also.

Conclusion

224. Accordingly, the Claim is dismissed.