IN THE HIGH COURT OF JUSTICE **Claim No: 2BS54083**

QUEEN'S BENCH DIVISION

BRISTOL DISTRICT REGISTRY

BRISTOL MERCANTILE COURT

B E T W E E N :

DAVID BEENY

Claimant / Part 20 Defendant

-and-

(1) MR MICHAEL GHERSIE
(2) M G ASSOCIATES LIMITED

Defendants / Part 20 Claimants

JUDGMENT

1.0 INTRODUCTION

1.1 David Beeny (*'DB'*) is a chartered accountant who, prior to 6 December 2010 (*'the Completion Date'*), carried on an accountancy business ('the business')[1] from premises owned by him, at 36 Victoria Road, Dartmouth, Devon, ("the business premises") trading under the name 'DJ Beeny & Co'.

1.2 Michael Ghersie (*'MG'*) is a chartered accountant, whose practice trades through MG Associates Ltd (*'MGAL'*), and, prior to the Completion Date, carried on business from offices at 7A Ilsham Road, Torquay, Devon.

1.3 By a written sale and purchase agreement dated 6 December 2010 (*'the SPA'*) DB agreed to sell, and MGAL agreed to purchase the business, with effect from the Completion Date, as a going concern.

[1] Also referred to by the parties, the experts, and below as "the Dartmouth business", "the Practice", and "the Dartmouth Practice".

1.4 The sale excluded:-

1.4.1 cash in connection with the business at the Completion Date,

1.4.2 the book debts,

1.4.3 the business premises,

1.4.4 the creditors,

1.4.5 the work in progress,

1.4.6 the liabilities, other than the creditors, outstanding or due or arising up to and including the Completion Date.

1.5 The SPA provided for the consideration to be ascertained and paid by means of an "earn out" i.e. by reference to, and out of, the earnings of the business, over the three years following completion, the first instalment being due on 6 June 2011, and the last on 6 March 2013. It also provided for MGAL to make various other payments, including payments for book debts, work in progress, and for consultancy.

1.6 The SPA incorporated a number of schedules:

1.6.1 The Fourth Schedule listed the clients of the business as at the Completion Date (*'the Transferring Clients'*) and the amount of the fees of a recurring nature earned by DB from the Transferring Clients during the 12 months immediately preceding 1 May 2010 – the Gross Recurring Fees ("GRF"). The completeness and accuracy of this information was warranted by DB in clause 13.1.2 of the SPA.

1.6.2 The Second Schedule contained a list of employees together with their current salary and any other emoluments or benefits. The completeness and accuracy of this information was warranted by DB in clause 13.1.8 of the SPA.

1.7 By clause 13.1.21 of the SPA DB warranted as follows:

"... the Vendor is not in relation to the Business and/or the Assets a party to or subject to any agreement transaction obligation commitment understanding arrangement or liability which: ...

13.1.21.4 are not at arms length terms or in any way otherwise than in the ordinary and proper course of the Business; or

13.1.21.5 are known by the Vendor to have been likely to result in a loss to the Purchaser on Completion of performance if the Vendor had not sold the Business pursuant to this Agreement, or

13.1.21.6 involves or is likely to involve obligations restrictions expenditure or receipts of an unusual onerous or exceptional nature and not in the ordinary course of business."

1.8 Clause 26 of the SPA provided:

"Consultancy ...

26.1 The Vendor shall as requested by the Purchaser make himself available upon reasonable notice and at mutually convenient times to effect a smooth handover of the practice for a minimum of 7 hours per week for 3 months after Completion.

26.2 The Vendor will provide reasonable free telephone or Email assistance as and when reasonably required.

26.3 After the expiration of the period in 25.1 (sic) above the Vendor will make himself available during the first year at times to be agreed with the Purchaser to assist with fee paying work on a self employed basis at an hourly rate of £40 (excluding VAT) for the purpose of carrying out consultancy work."

1.9 By clause 8.2 of the SPA, MGAL assumed a responsibility, for a period of 180 days from the Completion Date, to use reasonable endeavours in the collection of the book debts at no cost to DB. MGAL was obliged, under the same clause, to account to DB at weekly intervals for any sums recovered.

1.10 On 21 December 2010 MGAL entered into a six year lease ("the Lease") of the business premises. The lessor, of course, was DB. MGAL's liabilities under the SPA and the lease were guaranteed by MG.

1.11 The transfer of the business ("Completion") was effected on 6 December 2010,"the Completion Date".

1.12 In the first quarter of 2011 MG became concerned as to the accuracy of the Fourth Schedule of the SPA. Over the Easter Weekend (which would have been between the 23rd and 25th April 2011) MG and his wife went through the files of the clients listed in that Schedule and produced an analysis of the GRF attributable to those clients during the relevant period. As a result of the analysis, they concluded that the GRF of clients referred to in the Fourth Schedule had been overstated by £94,105.

1.13 MG had also developed various other concerns about the business, and the information provided by DB. However, neither these nor the concerns about the GRF were raised with DB until 20 July 2011, when Messrs Kitsons, solicitors instructed on behalf of MG and MGAL, wrote a "letter of claim", threatening action in the High Court.

1.14 In the meantime, the first instalment of the consideration for the purchase of the business, which was due on 6 June 2011, was not paid by MGAL. In fact DB, has never been paid anything in respect of the consideration, book debts, work in progress, or consultancy services provided for in the SPA.

2.0 THE TRIAL OF THE ISSUE OF LIABILITY

2.1 In July 2012 DB issued the present proceedings against MGAL and MG alleging that none of the money due to him under the SPA had been paid.

2.2 In or about the latter part of August 2012 MGAL and MG served a Defence and Part 20 claim in which MGAL counter-claimed (*inter alia*) that:

2,2,1 in breach of clause 13.1.2, forty seven of the clients listed in Schedule 4 of the SPA had gone away, ceased trading or had died prior to the Completion Date;

2.2.2 in breach of clause 13.1.2 the client fee income listed in Schedule 4 of the SPA was overstated in respect of 49 clients amounting in total to some £131,600.88 (or in excess of 50% of DB's declared fees) rendering the business unprofitable at the Completion Date;

2.2.3 in breach of clause 13.1.8 the number of employees of the business immediately following completion was 7 whereas only 4 had been detailed in Schedule 2 of the SPA, again rendering the business unprofitable and giving rise to additional employees and redundancy costs of £9,527.43;

2.2.4 in breach of clause 13.1.21 of the SPA, DB had an arrangement with the Dartmouth United Charities and the Dartmouth Trust whereby he charged a fee which was substantially below the market rate for such work.

2.3 MGAL claimed that by reason of the above breaches of warranty MGAL had suffered loss and damage, being the difference between the value of the business as at Completion on the basis that the Warranties were true and the actual value of the business as at that date, which was nil as it was unsaleable.

2.4 MGAL further and/or alternatively claimed that the warranties also had the effect of representations which were false and that MGAL had suffered loss and damage and is entitled to and claims damages under s2(1) of the Misrepresentation Act 1967 representing:

2.4.1 the difference between the purchase consideration payable under the SPA and the fair value of the business and other assets acquired under the SPA;

2.4.2 the consequent losses incurred as a result of its entry into the SPA.

2.5 By an order dated 5 March 2013, His Honour Judge Havelock Alan QC directed that there be a trial of the claim and of the issue of liability (but not quantum or causation) on the counterclaim. These issues were tried by me in 2013. In the Judgment, which was handed down on 2 December 2013, I found, *subject to the Counterclaim*, that DB was entitled to the following sums:

(i) £176,411.49 in respect of consideration;

(ii) £1,963.50 in respect of book debts;

(iii) £30,000.00 (plus VAT) in respect of work in progress;

(iv) £10,544.00 (plus VAT) in respect of consultancy fees.

This totals £218,919.99 + VAT of £8,108.80, totalling £227,027.79.

2.6 In relation to the counterclaim I made inter alia, the following findings:-

2.6.1 *"As it is common ground that the Client list in the Fourth Schedule was inaccurate in many respects there was a clear breach of the warranty in clause 13.1.2 of the Agreement."* [Para 86];

2.6.2 ..... *"the true value of the GRF (Gross Recurring Fees) at the date of Completion in respect of the clients named in the Fourth Schedule was £177,540.10, so that the GRF for the relevant period was overstated therein by £63,782.90."* [Para 94(1)];[2]

2.6.3 ..... *"the Fourth Schedule included the names of some 24 clients whose names should not have been entered therein – because Mr Beeny accepted this by omitting their names from the substituted list, or because there* (sic) *were not Transferring Clients as defined in the Agreement."* [Para 94(2)];

2.6.4 *"Mr Beeny, therefore, was in breach warranties set out in paragraph 82 above to the extent of my findings in the last paragraph. I should make it clear that I make no finding in respect of the allegation in paragraph 37(2) of the Amended Defence that the overstatement of the client fee income "rendered the Business unprofitable at the Completion Date."* [Para 95];

[2] In fact this paragraph in the judgment was inconsistent with paragraph 119 where I found that the true value of the GRF was £177,540.10 plus £943.52, namely £178,483.62. The latter paragraph is correct.

2.6.5 *"It is correct that at Completion there were seven rather than four employees ... It is clear, therefore, that, technically, there was a breach of warranty, but that Mr Ghersie knew prior to signing the Agreement that there would still be seven employees at Completion, so there is no basis for any clam for misrepresentation ... I note that in the closing submissions made on behalf of Mr Ghersie it is stated that the Defendants are content to confine their claim to the actual redundancy costs accepted by Mr Beeny (£2,165) together with the reasonable legal costs which were incurred in effecting the redundancies."* [Paras 124-126].

2.6.6 *....."the allegation is that Mr Beeny failed to disclose that there was significant work which he carried out for Charity and Public Bodies undertaken at "undercosted fees". In his witness statement Mr Ghersie referred in particular to Dartmouth United Charities and Dartmouth Trust, asserting that the client code (2020) would signify a "normal" fee-paying client, and that the fee of £2,390 in Mr Beeny's substituted list would not normally cover the planning stage of an audit of a Trust this size ... I accept this evidence. Mr Beeny's evidence is that the only client for whom he charged a reduced rate was Flavel, but that he made Mr Ghersie aware of that at the meeting on 19 August 2010 and at other meetings. I accept that Mr Beeny did inform Mr Ghersie of the position in relation to Flavel, but I find that he did not refer to the Dartmouth charities .... Accordingly, my judgment is that a breach of warranty and misrepresentation inducing the Agreement are both established, but only in relation to the charities referred to above."* [Paras 146-149].

2.7 Accordingly I found that liability on the counterclaim was established for:

(i) the breach of warranty and misrepresentation in relation to the GRF and Transferring Clients inducing the SPA ("the misrepresentation");

(ii) breach of warranty in respect of the number of transferring employees;

(iii) breach of warranty as a result of DB's failure to disclose the fact that work was done for Dartmouth United Charities and Dartmouth Trust below the 'going rate'.

2.8 Following the Judgment on 4 February 2014 it was ordered that:-

"1.1 Subject to the Counterclaim the Defendants are liable to the Claimant in a total sum of £226,027.89 [which is the judgment sum inclusive of the VAT payable on 2 of the heads of damage];

1.2 The Defendants' liability to interest shall be determined at the trial of the remaining issues; and

1.3 Liability on the counterclaim is only established as follows:

1.3.1 For breach of warranty and misrepresentation inducing the agreement for the sale and purchase of the practice known as DJ Beeny & Co dated 6th December 2010 ("the Agreement") in relation to the incorrect list sent by the Claimants solicitors on 15th November 2010 to the Defendants' solicitors and included as the Client List in the fourth schedule to the Agreement.

1.3.2 For breach of warranty in respect of the number of "transferring Employees" as referred to in the Agreement; and

1.3.3 For breach of warranty as a result of Mr Beeny's failure to disclose the fact that work was done for "Dartmouth United Charities" and "Dartmouth Trust" at below the going rate".

2.0 The following directions shall apply in respect of the remaining issues; namely, the issues as to causation and quantum of any alleged losses suffered by the First Defendant by reason of the breaches of warranty and misrepresentation by the Claimant as the same are referred to at paragraph 168 of the Judgment: …"

3.0 SUBSEQUENT DEVELOPMENTS

3.1 In March 2014 MGAL served Particulars of Loss incorporating a detailed schedule, which is referred to below as "the March 2014 schedule".

3.2 An order dated 24 July 2014, with which the parties complied, provided that MGAL should file and serve amended Particulars of Claim relating to causation and quantum of the counterclaim and that DB should file and serve an Amended Response.

3.3 It is to be noted that in spite of the misrepresentations alleged by MGAL, it has not purported to rescind the SPA or the Lease. It was explained by MG that he was not aware of the possibility of so doing and he was not advised by his solicitors of that possibility. Apparently this alleged omission forms the basis of legal proceedings commenced by MGAL against those solicitors. It is also to be noted that it was not

alleged in the current trial that the failure to rescind the agreement amounted to a failure to mitigate. Accordingly, the trial was not concerned with issues as to whether MGAL could and should have rescinded either the SPA or the Lease, I heard no argument in relation to those issues, and accordingly I make no findings in relation to them.

3.4 At the outset of the present hearing Mr Blackmore, counsel for MGAL and MG, indicated that the claims for breach of warranty would not be pursued because he conceived that the losses recoverable for the breaches of warranty would also be recoverable within the claims based on misrepresentation.

3.5 In the event, MGAL's pleaded claim for damages under s.2(1) of the Misrepresentation Act 1967, was as follows:-

3.5.1 **The losses incurred by MGAL as a consequence of entering into the SPA**

Loss of profits of MGAL resulting from time spent on DB's business[3]	£(106,467)
EBITDA profit / (loss) in Dartmouth business	£52,563
Loss of consultancy income	£(129,000)
	£(182,904)

3.5.2 **MGAL's capital losses resulting from the purchase of DB's business**

Loss of value as at June 2014	£(319,644)

3.5.3 The loss of profits which MGAL would have otherwise made from the purchase of a similar accountancy business

Loss of profits as at June 2014	£(233,474)
Total of above losses	£(733,022)
Consideration to be paid to DB per judgment	£(218,919)
Grand total of loss	£(951,941)

3.6 MGAL's case was supported by an expert report from Mr Geoffrey Mesher of Tempest Forensic Accountancy UK LLP. DB's case was supported by a report from Mr Roger Isaacs of Milsted Langdon LLP. Both are members of the Institute of Chartered Accountants of England and Wales.

[3] The claim for loss of profits resulting from time spent on DB's business is a claim for losses allegedly sustained as a result of the diversion of time and effort from MGAL's existing business based in Torquay to the Dartmouth business.

4.0 CONTENTIONS ON BEHALF OF DB

4.1 On behalf of DB it was contended by Mr Newington-Bridges of counsel that:-

4.1.1 MGAL would have entered into an agreement to purchase the business on substantially the same terms as are contained in the SPA even if MG had been apprised of the true GRF; consequently MGAL had not suffered any recoverable losses as a result of the negligent misrepresentation in respect of the GRF - the "no difference point".

4.1.2 Alternatively, as a general rule the measure of damages, in cases where a business has been acquired as a consequence of misrepresentation, is the difference between the price paid or payable and the actual value of the business acquired at the date when it was acquired. This was the applicable measure in the present case, and that in fact the business had a value broadly equal to the true annual GRF.

4.1.3 In any event, the alleged losses in the Dartmouth business include losses which cannot be attributed to the misrepresentation even if it was causative of MGAL's acquisition of that business, and/or include losses which are not substantiated by the evidence.

4.1.4 The alleged loss of profits of MGAL arising from time and effort diverted to the Dartmouth business, and the claim for loss of consultancy income are not substantiated by the evidence, and in any event should be limited to the period of one year.

4.1.5 The alleged capital losses have been calculated at a date four years after the acquisition of the Dartmouth business, when they should be calculated on the anniversary of the acquisition of that business (at the latest), and in any event cannot be substantiated on the evidence.

4.1.6 The claim in respect of loss of profits which MGAL would have made from the purchase of a similar accountancy practice cannot be substantiated on the evidence.

4.1.7 In any event, MGAL had failed to adequately mitigate its losses.

5.0 CONTENTIONS ON BEHALF OF MGAL

5.1 Initially, it appears to have been contended on behalf of MGAL and MG that any issue as to causation had already been decided in my earlier judgment. However, Mr Blackmore, who appeared on behalf of MGAL, recognised, early in the present hearing, that whilst I had decided that MGAL had entered into the SPA as a result of

the misrepresentation, I had not decided what losses, if any, MGAL had sustained as a consequence of so doing.

5.2 However, he made it plain that he did contend that the argument referred to in paragraph 4.1.1 above was not open to DB because of the findings made in the trial on liability and/or because of subsequent events, and that in any event the submission was unsound as a matter of fact.

5.3 He further submitted that:-

5.3.1 There were exceptions to the general rule that the appropriate date for the assessment of damages in a case such as this was the date of purchase, one of those exceptions being cases in which the deceived purchaser was "locked-in" to his purchase until a date when he was able to resell it, and that the present was one such case.

5.3.2 The appropriate date for the assessment of damages was the date of trial: the general rule that damages should be assessed at the date of the acquisition being displaced so as to ensure that MGAL was fully compensated.

5.3.3 The contentions that the calculation of MGAL's losses were not substantiated on the evidence, and that MGAL had failed to adequately mitigate its losses, were unsound.

6.0 LAW

Misrepresentation

6.1 MGAL's claim in relation to the misrepresentation is made pursuant to S.2(1) of the Misrepresentation Act 1967, which creates a statutory liability for a negligent misrepresentation which induces a representee to enter into a contract. It provides:

> *"Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently ..."*

6.2 In ***Royscot Trust Ltd v Rogerson*** [1991] 3 All ER 294 the Court of Appeal held that, under s2(1) of the Misrepresentation Act 1967, damages in respect of an honest but careless representation *are to be calculated as if the representation has been made fraudulently.* That measure provides that the victim of the misrepresentation is entitled to recover in respect of, and the defendant is bound to make reparation for,

all the actual damages directly flowing from the misrepresentation even if they were not foreseeable at the time of the misrepresentation: see **Peek v Derry** (1887) 37 Ch. D. 541; **Dolby v Olby (Ironmongers) Ltd** [1969] 2 QB 158. These principles are not in dispute.

6.3 In **South Australia Asset Management Corporation v York Montague Ltd** [1996] UKHL10 Lord Hoffman stated, at paragraph 31:-

> *"My second observation is that even if the maker of the fraudulent misrepresentation is liable for all the consequences of the plaintiff having entered into the transaction, the identification of those consequences may involve difficult questions of causation. The defendant is clearly not liable for losses which the plaintiff would have suffered even if he had not entered into the transaction or for losses attributable to causes which negative the causal effect of the misrepresentation."*

6.4 It is plain from the decision of the Court of Appeal in **Dolby** that even in a case of deceit the wrongdoer is not liable for all the consequences which follow from his tortious act, and that *"losses attributable to causes which negative the causal effect of the misrepresentation"* include those occasioned by the claimant's own conduct - see pages 168F and 171G:-

> *"It appears to me that in a case ... where there has been a tortious wrong consisting of a fraudulent inducement, the proper starting-point for any court called upon to consider what damages are recoverable by the defrauded person is to compare his position before the representation was made to him with his position after it, brought about by that representation, always bearing in mind that no element in the consequential position can be regarded as attributable loss and damage if it be too remote a consequence: it will be too remote not necessarily because it was not contemplated by the representor, but in any case where the person deceived has not himself behaved with reasonable prudence, reasonable common sense, or can in any true sense be said to have been the author of his own misfortune. The damage that he seeks to recover must have flowed directly from the fraud perpetrated upon him."* – per Winn LJ.
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> *"The acquiring of a business normally entails the expenses or moving into fresh premises, keeping the business going, and at any rate continuing to keep it going until such time as it can be disposed of; and then one looks also at the expenses of selling. The computation of the loss may in many cases*

not be easy. Thus, the court must obviously take care not to include sums for consequences which may be due to the plaintiff's own unreasonable actions, and also not to include results which are too remote – matters which often involve difficult questions of fact and degree. But such difficulties do not alter the duty of the court, which should approach the matter on a broad basis." – per Sachs LJ.

6.5 It is clear that the losses arising from wrongdoing by a third party after a claimant has acted on a misrepresentation may not be recoverable, not being the *"direct"* consequence of the misrepresentation – see the discussion in McGregor on Damages 19th Ed. At paragraphs 4 7-015 and 47-016.

Consequential Loss

6.6 As appears from paragraph 3.5.3 above, MGAL's claim includes a claim for the loss of profits which MGAL would have otherwise made from the purchase of a similar accountancy business.

6.7 In **East v Maurer** [1991] 1 WLR 461, the Court of Appeal held that loss of profits which would have been earned in a business which a claimant would have purchased but for the deceit may be recoverable as damage directly flowing from the inducement.

6.8 In his speech in **Smith,** Lord Steyn commented:

"East v Maurer is of some significance since it throws light on a point which arose in argument. Counsel for Citibank argued that in the case of a fraudulently induced sale of a business, loss of profits is only recoverable on the basis of the contractual measure and never on the basis of the tort measure applicable to fraud. This is an over-simplification. The plaintiff is not entitled to demand that the defendant must pay to him the profits of the business as represented. On the other hand, East v Maurer shows that an award based on the hypothetical profitable business in which the plaintiff would have engaged but for the deceit is permissible: it is a classic consequential loss."

6.9 It is to be noted that the damages awarded in **East v Maurer** for loss of the profits which would have been earned from a hypothetical alternative business were founded on the effect of the factual findings by the trial judge. This is apparent from a passage in the judgment of Mustill LJ at p.739 letter j, where he stated:-

"... in the present case the act complained of is the making of the fraudulent representation, coupled with the reliance placed upon it by the plaintiffs in concluding the bargain. If this had not happened the plaintiffs would, on the judge's findings, have sold the Oxford business and bought a new business in Bournemouth, albeit not the one in Exeter Road. Thus, by the time the writ was issued they would have had the capital asset constituted by the new business, plus the profits made by that new business in the intervening period...."

6.10 In **Downs v Chappell** [1996] 3 All ER 344, the sellers of a bookshop and their accountants misrepresented the turnover of the business, and those misrepresentations induced the buyers to buy the business, which they subsequently sold at a loss, Hobhouse LJ stated, at 358a:-

"... cases show that where a plaintiff has been induced to enter into a transaction by a misrepresentation, whether fraudulent or negligent, he is entitled to recover as damages the amount of the (consequential) loss which he has suffered by reason of entering into the transaction. The principle is the same. Where the representation relates to the profitability and, by necessary inference, the viability of the business, the plaintiff can recover both his income and his capital losses in the business."

6.11 There will be cases where an award of damages for profit and capital would involve a double recovery, which would be impermissible – see Mustill LJ in **East v Maurer** at p.468, but where there is no such duplication both lost profit and lost capital may be recoverable – see **4 Eng Ltd v Harper and Another** [2009] Ch.91.

6.12 The obverse side of the coin to a case such as **East v Maurer**, is the scenario in which an alternative investment would have produced a loss. As Lord Hoffman also stated in **South Australia Asset Management** (at paragraph 35):

"The calculation of loss must of course involve comparing what the plaintiff has lost as a result of making the loan with what his position would have been if he had not made it. If for example the lender would have lost the same money on some other transaction, then the valuer's negligence has caused him no loss."

Date for Assessing Damages

6.13 Mr Newington-Bridges, in his Skeleton Opening, in relation to the appropriate date at which damages should be assessed, submitted:-

"30. Where the defendant's breach of duty is alleged to have caused the plaintiff to suffer loss in relation to property, damages are awarded as at the date of breach of duty. But this rule is displaced in special cases where assessment at another date may more accurately reflect the overriding compensatory rule: see ***County Personnel (Employment Agency) Ltd. V Alan R. Pulver & Co.*** *[1987] 1 W.L.R. 916.*

31. Prima facie the victim's loss cannot exceed the difference between what he paid and what he received at the time he received it. The assessment of damages as at that date is usually necessary in order to exclude loss caused by extraneous or coincidental factors: see ***Waddell v Blockey*** *4 Q.B.D. 678."*

6.14 This issue, amongst others, was addressed by Lord Browne-Wilkinson in **Smith New Court Securities v Scrimgeour Vickers (Asset Management) Ltd.** [1997] A.C.254 A 286H:-

"In sum, in my judgment the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property; (1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; ***(4) as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;*** *(5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property; (6) in addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."* [Emphasis added]

6.15 Mr Mesher, the expert called by MGAL, took a date close to the date of trial, rather than the date of acquisition, reviewed MGAL's financial history up to that date, and produced an assessment of losses supposedly sustained in the period between the acquisition and that date. This approach was justified by Mr Blackmore, on the basis that MGAL could not have sold the business and hence was "locked-in" to it, and he relied upon the passage, referred to above, from Lord Browne-Wilkinson's speech in Smith, and the fact that in that case the House of Lords specifically approved the judgment of the Court of Appeal in **Doyle v Olby (Ironmongers) Ltd** [1969] 2 All ER 119, which was a case where the plaintiff had purchased a business as a going concern in reliance on the defendant's fraudulent misrepresentations and the acquisition of the business had locked the plaintiff purchaser into continuing to hold the asset until he could effect a resale, from which it is clear that in assessing damages it was not an inflexible rule that the plaintiff must bring into account the value as at the transaction date of the asset acquired.

6.16 Mr Newington-Bridges also referred to the decision of the Court of Appeal in **Downs v Chappell** [1996] 3 All ER 344 in which it was found that the sellers of a bookshop and their accountants misrepresented the turnover of the business. The misrepresentation induced the buyers into buying a business, which they subsequently sold at a loss. In his judgment Hobhouse LJ stated in relation to the date at which damages should be calculated that:-

> *"Where a party has been misled, it must always be relevant to consider his position when he discovered the truth. Until that time the misrepresentation will be continuing to affect him and he cannot be expected to mitigate his loss."* [page 359f]
>
> *"In a misrepresentation case, where the plaintiff would not have entered into the transaction, he is entitled to recover all the losses he has suffered, both capital and income, down to the date that he discovers that he has been misled and he has an opportunity to avoid further loss."* [page 361e]

6.17 If, when the representee who has purchased a business discovers that he has been misled, he is "locked-in" in the sense that a re-sale is not a practicable option, so that he continues to run the business and make losses, a question then arises as to the length of the period in which losses are incurred during which the representee is *"locked in"* and for which, on the facts, the misrepresentator should be held liable. In **4 Eng Ltd v Harper** the relevant date was found to be the trial date.

6.18 However, there is no inflexible rule that this is the correct approach in every case in which a representee is *"locked-in"* to his purchase. Hobhouse LJ in **Downs v Chappell** stated, at page 456e:-

> *"The starting point for any consideration of the law of damages is the statement of Lord Blackburn in* ***Livingstone v Rawyards Coal Co*** *(1880) 5 App Cas 25 at 39 that the measure of damage is –*
>
> > *'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'*

6.19 Later in his judgment (page 359a) Hobhouse LJ stressed the need for flexibility:-

> *"In 1986 the law was reviewed by Bingham LJ in* ***Coventry Personnel (Employment Agency) Ltd v Alan R Pulver & Co (a firm)*** *[1987] 1 All ER 289, [1987] 1 WLR 916. He identified a number of different strands in the law regarding solicitors' and surveyors' negligence and the importance of what he called the 'diminution in value' approach. But he also stressed that the law should not be applied 'mechanically' (see [1987]) 1 All ER 289 at 297, [1987] 1 WLR 916 at 925-926). No single approach was to be applied inflexibly. He recognised that the date at which damages fell to be assessed might vary from case to case. This confirms that questions of damages are primarily questions of fact to be decided on the facts of each case. In that case the Court of Appeal declined to apply the diminution of value approach; it was inappropriate and would have led to injustice."*

6.20 Towards the end of his judgment (page 361d) Hobhouse LJ reiterated what he considered to be the applicable principles in *"no transaction"* cases:

> *"These citations confirm that the approach I have adopted is correct. Causation and the assessment of damages is a matter of fact. In a misrepresentation case, where the plaintiff would not have entered into the transaction, he is entitled to recover all the losses he has suffered, both capital and income, down to the date that he discovers that he had been misled and he has an opportunity to avoid further loss. The diminution in value test will normally be inappropriate. Where what is bought is a business, the losses made in the business are prima facie recoverable as is the reduction in the value of the business and its premises. Foreseeable market fluctuations are not too remote and should be taken into account either way in*

the relevant account. These cases do not, however, discuss whether there is any question of causation beyond the no-transaction test. In my judgment it may still be necessary to consider whether it can fairly and properly be said that all the losses flowing from the entry into the transaction in question were caused by the tort of the defendant. I now turn to this qualification.

The qualification

In my judgment, having determined what the plaintiffs have lost as a result of entering into the transaction – their contract with Mr Chappell – it is still appropriate to ask the question whether that loss can properly be treated as having been caused by the defendants' torts, notwithstanding that the torts caused the plaintiffs to enter into the transaction. If one does not ask this addition question there is a risk that the plaintiffs will be overcompensated, or enjoy a windfall gain by avoiding a loss which they would probably have suffered even if no tort had been committed. This would offend the principle upon which damages are awarded (see ***Livingstone v Rawyards Coal Co*** *(1880) 5 App Cas 25 at 39 and* ***Dodd Properties (Kent) Ltd v Canterbury City Council*** *[1980] 1 All ER 928, [1980] 1 WLR 433 at 451 per Megaw LJ)."*

7.0 MR GHERSIE

Mr Newington-Bridges' attack

7.1 Many of the issues of fact in this case turn upon the evidence of MG. In his closing submissions, Mr Newington-Bridges made a strong attack on MG's credibility, asserting that:-

7.1.1 he has a history of acquiring businesses, and then exaggerating problems with them with the clear intent of paying little or nothing for them;

7.1.2 his evidence ranged from spin and exaggeration to outright fantasy.

Outline Chronology

7.2 MG qualified as a chartered accountant with Ernst and Young in 1975. However, he did not immediately practice as an accountant, but instead was employed in various businesses until 1985, when he went into business on his own account, buying, improving, and selling a variety of businesses. In 1983 he obtained a Masters Degree in Business Administration.

7.3 In March 2003 MG started an accountancy practice, originally working from his own front room. In January 2006 he acquired an accountancy practice with premises in Torquay which traded as Durtnall Rowden, and he moved his own business into

those premises. In January 2006 he also acquired a practice in Paignton, the practice of a Mr Robert Heath, who was retiring.

7.4 As stated above, MG, through MGAL, acquired, DJ Beeny & Co. in December 2010. DJ Beeny and Co's offices were in Dartmouth, but it also had offices in Paignton, which MG closed. MG also moved MGAL's Torquay office from the premises formerly occupied by Durtnall Rowden, 71 Ilsham Road, to cheaper council-owned accommodation.,

7.5 On 17 August 2012 MG, through MGAL, acquired a practice with offices in Kingsbridge, which traded under the name of Maceys.

Durtnall Rowden

7.6 The purchase was structured differently to the acquisition of the Dartmouth business in that MGAL paid 50% of the consideration upfront and the rest of the consideration was deferred. He did not purchase the entire business but only £57,000 of the GRF. The upfront payment of £94,000 was made, but £20,000 of the deferred payment due for the acquisition has never been paid. MG said this was because the GRF was overstated by £35,000, the vendors had warranted that the practice had been run in an efficient manner and that there were no unusual events surrounding it when in fact there were serious problems with late or erroneous tax returns, giving rise to liabilities for penalties, and one of the principals departed immediately with previously undisclosed terminal cancer. He said that when the transaction completed on 6 January 2006 there were still 200 personal tax returns to be completed by 31 January. Despite their best efforts with staff working long hours, numerous tax returns were filed late, attracting penalties of £8,200 which he (MG) paid. Clients left in droves. Turnover of £45,000 was lost in the first year. His evidence in cross-examination was that he had *'overpaid'* for the Durtnall Rowden business and that the business was *'left in chaos'*: the vendors agreed to refund monies, but did not do so. The staff, according to MG, were unqualified, young, and inexperienced, and he gradually replaced them all.

Robert Heath

7.7 Mr Heath died suddenly, and his estate needed to sell his practice quickly as a going concern. The annual fee income was £25,000 and MG agreed to pay a price of £25,000. As I understand it, it is not suggested that this was not paid.

Maceys

7.8 This deal was structured similarly to the DJ Beeny & Co acquisition in that the consideration was payable on a deferred basis. MG accepted in cross-examination that he had paid nothing for this business. He was asked *'you haven't paid anything for that [the Macey's business] either'*. The response from MG was *'That's right again'*. MG explained that he was in dispute with the vendors (a) for overstating Maceys' GRF by 28%, (b) because one of the vendors (Mrs Rayner) left shortly after completion, despite having told MG, pre-acquisition, that she would remain with the business and run the Kingsbridge office herself and (c) because Mrs Rayner had set up in competition with MGAL in breach of restrictive covenants, and that dispute was now subject to litigation, which would determine inter alia the consideration, if any, payable by MGAL. He stated:-

> *"I have never said that I will not pay, but I needed confirmation that she* [Mrs Rayner] *would comply with her restrictive covenants."*

7.9 It would be impossible without a detailed investigation of the facts relating to each of the purchases to reach the conclusion that MG makes a practice of acquiring businesses with the intention of not paying for them, and I do not find that he did.

7.10 Mr Newington-Bridges also referred to several instances in which potentially important material was advanced for the first time in MG's oral evidence. There is some substance in this criticism.

7.11 In my judgment on liability I made the following assessment of MG's credibility:

> *"36. Mr Ghersie's evidence was demonstrably unreliable in many respects. He was not in fact a "details man". He had not appreciated that Completion under the Agreement was fixed not just to a date but to a particular hour. His original analysis of the files lacked thoroughness – it was done simply on the basis of the latest invoice relating to each of the clients listed in the Fourth Schedule. The consequences of this, in my judgment, was that he concluded that he had been deliberately misled by Mr Beeny, which conclusion angered him, resulted in a loss of objectivity, permanently coloured his view of the facts, and led him to overstate his case in a number of respects. He was still angry when he gave evidence.*
>
> *37. I do not consider that all his evidence can be relied upon, but equally I do not consider that any of his evidence was deliberately misleading. Although it was tacitly suggested that he made a habit of buying*

accountancy practices without any intention of paying for them, there was no sufficient evidence to support any such finding. He explained that the issue relating to the practice at Kingsbridge arose, as I understand his evidence, from a breach of a covenant against competition, and there is nothing to gainsay that explanation."

7.12 The characteristics referred to above in the extracts from the judgment on liability manifested themselves in the evidence which he gave in the latest hearing. His evidence was careless at times. He is still angry. He has lost objectivity and become blinkered in his view of the entire saga. It has lead him to make sweeping, unsupported, and objectively unsupportable and slanted statements. He is prone to exaggerate. He is over-suspicious, and he has a tendency to rush to judgments and jump to conclusions, drawing unjustified inferences from, and misreading and misrepresenting, communications and events.

7.13 By way of example:-

7.13.1 In his third witness statement, at paragraph 159, he referred, in relation to the "Reliamatics" saga (see below) that in November 2011 he and his wife were directed to the matter in question by a particular document endorsed in the handwriting of Julie Isaacs; this was said to have occurred whilst Ms Isaacs *"was on holiday"*. In fact, it is clear from a letter written by Ms Isaacs that she was off sick and had been since September 2011, and an email from MG to his solicitors dated 28 October 2011 shows that he knew this at the time – *"Julie Isaacs ... has today delivered another 4 week sick note ...."*. In the March 2014 schedule of loss (later superseded) MG asserted that he had spent seven hours with Ms Isaacs *"about her employment and involvement in the fraud"* in August 2011. Had MG considered the documentation in his possession with any care when preparing that schedule and when making his witness statement he would not have made these errors. This lack of thoroughness raises concerns about assertions made by MG when they are not supported by some independent corroboration.

7.13.2 He continued to make repeated complaints of DB's breach of warranty in respect of the number of employees, stating in his third witness statement, that he only discovered on the Completion date that DB had not effected redundancies which DB had earlier stated that he would. In fact, this matter was addressed in the trial on liability, and in relation to it my findings were:-

"124. It is correct that at Completion there were seven rather than four employees. Mr Beeny's evidence is that this arose

because during negotiations he had contemplated making redundancies of staff whom he knew Mr Ghersie did not wish to take on: he consulted an HR consultant who advised him that there might be a risk of unfair dismissal claims if he were to make redundancies prior to the sale: he decided not to carry out the redundancies but confirmed to Mr Ghersie in an email of 18 November 2010 that should he choose to carry out that process after completion he (Mr Beeny) would be responsible for the redundancy costs.

125 It is clear, therefore, that, technically, there was a breach of warranty, but that Mr Ghersie knew prior to signing the Agreement that there would still be seven employees at Completion, so there is no basis for any claim for misrepresentation."

The email dated 18 November 2010 made it clear that DB was not going to effect the redundancies, but MG, in his blinkered state, seems unable to accept this.

7.13.3 In paragraph 194 of his third witness statement MG stated that an email dated 5 July 2011 asked DB *"to stop work on all the clients' files he had been working on"*. In fact the relevant terms of the email were as follows:-

"... Below are the clients I think you still have outstanding work on

DP Cars – year end accounts – almost completed.
SQL – year end accounts – almost completed.
Scope – you are going to complete year end accounts for 31 March and April management accounts. Could you let me know where you are with these, please.
Atlantic Cars – are you doing any work for them, if you are, what are you doing.
If you are working on any other clients, could you please let me have details of who and what is outstanding.

When you have completed the above could we have all the working papers, computer files etc you still have for these clients ..."

7.13.4 In paragraph 199 of his third witness statement he referred to DB being *"chased"*, as shown in particular emails, for some discounting reconciliations.

In fact there was no mention in the emails of DB being *"chased"* – nor can the emails, viewed objectively, be fairly described as *"chasing"* DB.

7.13.5 In a letter to DB dated 17 August 2011 MG stated:-

> *"The terms of the Business Sales Agreement provided at paragraph 26.1 that you would make yourself available as requested for a minimum of 7 hours per week after completion. In fact you departed overseas following the transaction so that you were not available to provide that assistance. My view is that it would have been reasonable to have expected 10-12 hours per week from you for this period, so say 140 hours for free."*

In fact DB's obligation under cl. 26.1 of the SPA was limited to a period of 3 months following Completion (see paragraph 1.8 above), that period expired on 7 March 2011, and DB only left the UK on 4 February 2011 – see further paragraphs 17.1 to 17.3 below – and it is clear that he responded to emails whilst he was abroad. There is no evidence that MG ever have any notice under the terms of cl. 26.1 of the SPA.Putting this matter most favourably to MG, he had plainly not bothered to re-read the SPA before writing the letter. As I found earlier, MG is not a man for detail: he is inclined to making general statements that are not supported by the underlying material.

7.13.6 The Reliamatics saga, addressed in section 12 below, exemplifies MG's over-suspiciousness and tendency to rush to judgments.

7.14 Additionally, the evidence suggests, and I find, that human relations and the management of clients is not his strongest point. He himself stated that when MGAL took over Dartnall Rowden clients *"left in droves"*. He ascribed this to the departure of one of the principals who was seriously ill, and the fact that the other principal had not been spending much time in the office. However, it is common ground between the experts and MG himself that one expects a loss of 10 to 15 per cent of the client base when an accountancy practice changes hands, but *"leaving in droves"* smacks of a much higher percentage. It is plain, also, as appears below that he failed to establish good relations with fee-earners when he inherited the Dartmouth Practice – perhaps because there was only one, Mr Callard, for whom he had, and showed, any respect.

7.15 It is also material to refer to the fact that on 10 September 2014 the Audit Registration Committee of the ICAEW decided to withdraw MGAL's audit registration and also MG's *"responsible individual status"*. The grounds for this decision were not clear. In his oral evidence, MG stated that he had been fined, he disputed the fine,

and the fine was withdrawn, apparently because he stated he did not wish to continue auditing. He indicated that the action against him was connected with his being a director of a company. It appears that MG may have been guilty of at least some error of omission, but not necessarily anything more serious.

8.0 MR BEENY

8.1 Mr Blackmore, in his turn, mounted a strong attack on DB's credibility alleging that in relation to the misleading client list provided to MGAL's solicitors on 15 November 2010 the court would have been justified in finding that, on the balance of probabilities, DB (an accountant selling his own business) knew that that list was misleading and untrue, had acted deceitfully, and was liable in fraudulent misrepresentation.

8.2 I reject that submission. My conclusion at the end of the trial on liability was that the provision of an erroneous list was a mistake, and that any dishonesty on DB's part in relation to the list arose later when, with battle lines already drawn, and not having received a penny from MGAL, he asserted that an agreement had been reached to substitute an accurate list for the misleading one.

8.3 At the hearing on liability, I was of the opinion that on matters of detail DB's recollection was generally reliable and that he gave the appearance of intending to be truthful in the evidence which he gave. I remain of that opinion.

8.4 Nevertheless, conduct which he admitted to, for example in relation to Mr Tozer's tax affairs, also reflected badly on DB's integrity and because of the findings which I made in the trial of liability in relation to DB's integrity, I accept that his evidence needs to be regarded with caution, and I also accept the submission made by Mr Blackmore, based upon a particular ill-tempered response to questioning, that DB holds a deep personal antipathy towards MG which needs to be taken into account when assessing his credibility.

9.0 THE NO DIFFERENCE POINT

9.1 In DB's Response it is alleged that *"if MGAL and MG had been appraised of the true gross recurring fee income as it should have stated in the Fourth Schedule to the SPA, MGAL and MG would have entered into a sale and purchase agreement in respect of the Business on substantially the same terms as those contained in the*

SPA. Consequently, it is alleged that neither MGAL nor MG has suffered any recoverable losses by reason of DB's negligent misrepresentation as to the gross recurring fee income of the Business or by reason of DB's breach of warranty in respect of the gross recurring fee income of the business."

9.2 As already indicated, underlying this contention is the fact that the consideration for the purchase of the business was not only to be paid post acquisition out of the earnings of the business but also to be quantified by reference to those earnings, for which there was a *"target sum"* of £220,000.

9.3 The relevant provisions of the SPA are the following:-

> *"**3. Purchase Consideration***
>
> *The Purchase Consideration payable by the Purchaser to the Vendor for the Business and Assets shall be the sum calculated and payable in accordance with the provisions set out in the First Schedule ...*
>
> ***THE FIRST SCHEDULE***
>
> ***PURCHASE CONSIDERATION***
>
> *1. The Purchaser shall subject to the provision set out below pay to the Vendor a target sum of £220,000 being the total of 'Actual Fees'.*
>
> *1.1 50% of the 'First Year's Fees' payable quarterly in arrears the first payment shall be 6 months after the date of completion.*
>
> *1.2 50% of the 'Second Year's Fees' payable quarterly in arrears.*
>
> *1.3 There shall be a maximum of 12 quarterly payments.*
>
> *1.4 The price shall be apportioned as at £215,000 to Goodwill, £5,000 to equipment ..."*
>
> [In the judgment on liability I found that the effect of clause 1 of this schedule was to entitle Mr Beeny to his share of the fees earned in the first two years provided they were collected within the first three years of the date of completion]

9.4 Mr Blackmore submitted that:-

9.4.1 the court should not entertain this submission because it had been raised earlier at an interlocutory stage and then been withdrawn; in any event,

9.4.2 the effect in law of the court's findings in the judgment on liability was to resolve this issue in favour of MGAL; lastly,

9.4.3 the contention was wrong, as a matter of fact, since MG would not have gone ahead with the purchase if he had known the true GRF of the business, which had been earned and invoiced in the relevant period (i.e. in the year to 1 May 2010).

9.5 As to the point referred to in paragraph 9.4.1, it is correct that prior to the CMC on 24 July 2015, DB had issued an application for an order that that point be determined as a preliminary issue, and that it was then decided not to pursue it. Mr Blackmore submitted that in his skeleton argument for the CMC, counsel for MGAL had demonstrated that the application was misconceived as this issue had already been determined by the judgment. He relied on the principles laid down by Hobhouse LJ in **Downs v Chappell** (above) and also contended that, given the findings made in the judgment, an issue estoppel had arisen. According to Mr Blackmore, having seen that skeleton argument, DB's then counsel withdrew the application.

9.6 Mr Newington-Bridges asserted that the point had not been withdrawn or abandoned and that the application had simply been adjourned. My recollection is that the point was not argued at the CMC. The order of the court, apart from setting out detailed directions for the preparation of the case, simply recorded that the application was adjourned generally with costs reserved. In these circumstances, I do not consider that the court should now refuse to entertain the point.

9.7 Mr Blackmore's second contention was based on the following findings in the judgment on liability:-

- "The true value of the GRF at the date of completion in respect of the clients named in the Fourth Schedule was £177,540.10, so that the GRF for the relevant period was overstated therein by £63,782.90." (*paragraph 94(1)*)
- "... the list was sent on 15 November 2010, and then incorporated in the draft Agreement, and after this, on 6 December 2010, the Agreement was signed. By sending it, Mr Beeny, through his solicitor, made pre-contract representations, at the very least, that the persons named were clients, from whom he derived a fee income of £241,323 ..." (*paragraph 112*)
- "Once the Agreement was executed the representations assumed the force of warranties, but that did not alter the fact that they had also had the potential to be representations inducing the contract." (*paragraph 114*)

- "Mr Ghersie's evidence, which I accept, was that he scrutinised the list carefully and relied upon it in deciding to go ahead with the purchase." (*paragraph 116*)
- "Had Mr Beeny given any critical thought whatsoever to the list sent by his solicitor on 15 November 2010, he would have seen at once, as he later did, that it was incorrect and that as a document intended for inclusion in the Fourth Schedule, misleading. It cannot be said that he had *"reasonable grounds to believe"* that the facts represented in it were true, and hence liability is established in respect of the list." (*paragraph 120*)
- "Liability on the counterclaim is established: (1) for breach of warranty and misrepresentation inducing the Agreement in relation to the incorrect list sent by Mr Beeny's solicitors on 15 November 2010 to Mr Ghersie / MGAL's solicitors." (*paragraph 168*)

9.8 Based on those findings of fact, Mr Blackmore submitted:-

9.8.1 In ***Yam Seng Pte Ltd v International Trade Corporation Ltd***, [2013] 111 (QB) at para 200 Leggatt J set out what a claimant had to prove in a claim for damages under s2(1) of the Misrepresentation Act 1967, viz:

"[200] To establish a right to recover damages under this statutory provision, it is necessary for a claimant to show:

(1) that it has entered into a contract with the defendant;

(2) that it did so after a representation of fact had been made to it by the defendant (and in reliance on that representation);

(3) that the representation was false; and

(4) that as a result of entering into the contract with the defendant, the claimant has suffered loss."

9.8.2 Accordingly MGAL, under the terms of the judgment, had established the right to damages under s2(1) of the Act.

9.8.3 **Downs v Chappell** (above) was a similar case, where the claimants had been induced to enter a transaction for the purchase of a business by the defendant's fraudulent and material representations, or had done so in reliance on the defendants' negligent misrepresentation. Hobhouse LJ, dealing with the same issue as that now put forward on behalf of DB stated, at p.351e:-

> "The plaintiffs have proved what they need to prove by way of the commission of the tort of deceit and causation. They have proved that they were induced to enter into the contract with Mr Chappell by his

fraudulent representations. *The judge was wrong to ask how they would have acted if they had been told the truth. They were never told the truth. They were told lies in order to induce them to enter into the contract. The lies were material and successful, they induced the plaintiffs to act to their detriment and contract with Mr Chappell. The judge should have concluded that the plaintiffs had proved their case on causation and that the only remaining question was what loss the plaintiffs had suffered as a result of entering into the contract with Mr Chappell to buy his business and shop.*" (emphasis applied)

9.8.4 In the present case, as in *Downs v Chappell*, MGAL has proved its case under s2(1) of the Act and in breach of warranty and it is therefore unnecessary for the court to embark upon a hypothetical exercise which would be necessary to determine the issue now being put forward on behalf of DB.

9.8.5 So far as an issue estoppel is concerned DB was estopped from raising this point again:-

9.8.5.1 The court made the material findings on liability in tort and breach of warranty set out in paragraph 8.7 above.

9.8.5.2 As a matter of law, the court having found that DB had by misrepresentation induced MGAL to enter into the contract to purchase DB's business, the causative relationship between DB's tort and the entry into the contract had been established, leaving only the issue of what loss MGAL has suffered.

9.8.5.3 The issue of causation of loss has already been determined by the court between these parties in the judgment on liability, and DB is accordingly estopped from attempting to re-litigate the issue.

9.9 In response, Mr Newington-Bridges submitted that in **Downs v Chappell** (above) Hobhouse LJ made it clear that causation is a question of fact and that on the facts it was more likely than not that MGAL would have purchased the business had the true figures for its GRF been disclosed.

9.10 In **Downs v Chappell** (above) the trial judge had found as a fact that the plaintiffs relied upon the false financial information which had been provided to them in deciding to buy and that they *"would not have contracted without verification of the figures ...".* In the present case in the judgment on liability I found that MG (and

hence MGAL) had relied upon the figures for GRF which were provided in the inaccurate list, but I was not asked to decide and made no finding as to, whether MG would have decided to purchase the business if he had known the true figure. It seems to me that my finding went no further than a finding that the figure which MG was given was relevant to his decision to go ahead.

9.11 Further, it does not seem to me that the approach of Hobhouse LJ in **Downs v Chappell** is a rule of law. This was the conclusion reached by Legatt LJ in **Yam Seng Pte Ltd v International Trade Corporation Ltd** [2013] EWHC 111 (QB) after he had reviewed the authorities which supported the approach of Hobhouse LJ in **Downs v Chappell** as well as those which did not. Therefore, the contention advanced by Mr Newington-Bridges is one which, in my judgment, DB is entitled to advance.

9.12 MG's evidence in relation to this issue was that:-

9.12.1 Over the years he had developed a set of due diligence evaluation processes which he followed when considering the purchase of a business, and that he applied them in the present case. [The documentation disclosed supports this evidence].

9.12.2 DB provided him with abridged accounts for the three years to 2008/2009 and estimated figures for 2009/2010. These showed for the years 2008/2009 a gross fee income of £226,839 and a net profit of £139,071, and for 2009/2010 a gross fee income of £236,555 with a net profit of £140,953.

9.12.3 On 15 November 2010 DB sent to MG/MGAL solicitors the list which was later incorporated in the SPA as the Fourth Schedule and which indicated GRF for the 12 months to 1 May 2010 totalling £241,323.

9.12.4 He analysed the make-up of the fee income, he considered the overheads and where he could make savings, and adjusted the abbreviated accounts to reflect the savings he believed he could make, and produced a pro forma profit and loss account for the business post completion. He then ran cash flows incorporating an assessment of funding he believed would be required, and the repayments relating to that funding. Having done this he concluded that he would need to ask DB for the first payment of the purchase monies to be 6 months rather than 3 months from completion, and DB agreed to that and also to reduce the rent.

9.12.5 Whilst the cash flow forecast based on a GRF of £236,555 produced a cash surplus over the first three years of £28,737 which was acceptable to him, the true figure for GRF of £177,540 as found by the court in the trial of liability

would have produced a deficit of £76,013 which would not have been acceptable to him, and he would not have gone ahead with the purchase if he had known that that was the true figure for GRF.

9.12.6 Furthermore, he had considerable difficulty in raising finance even on the basis of the figures taken from DB's abridged accounts, and he would not have been able to obtain funding if the figure for GRF had been the lower figure of £177,540.

9.12.7 MG illustrated his position by reference to a table ("the table") which he produced showing the contrasting cash flow forecasts to be derived from the differing figures for fee income:-

Cash Flow Forecasts	Abbreviated GRF Accounts From Mr Beeny (£)	Actual GRF (£)
Year 1 – Fee Income	187,273	140,553
Overheads	123,888	123,888
Bank repayments	12,000	12,000
Surplus	51,385	4,665
Payments to David Beeny	51,254	38,467
Net cash – surplus / (deficit)	**131**	**(33,801)**
Year 2 – Fee income	236,555	177,540
Overheads	115,630	115,630
Bank repayments	12,000	12,000
Surplus	108,925	49,910
Payments to David Beeny	94,622	71,016
Net cash – surplus / (deficit)	**14,303**	**(21,106)**
Year 3 – Fee income	236,555	177,540
Overheads	115,630	115,630
Bank repayments		12,000
Surplus	108,925	49,910
Payments to Beeny	94,622	71,106
Net cash – surplus / (deficit)	**14,303**	**(21,106)**

Total Cash surplus / (deficit) in first three years	**£28,737**	**(£76,013)**

9.13 MG created the table for the purposes of the trial. The Fee Income for Year 1 is for a period of nine and a half months, it being assumed, as I understand it, that there would be no receipts in the period immediately after the acquisition of the business. The right hand column was based on cash flow exercises carried out by MG in July 2014.

9.14 The figures given for GRF in the right hand column of the table are slightly understated because in the judgment on liability the figure for the actual GRF which should have been incorporated into the Fourth Schedule of the SPA was £178,483.62 – see paragraph 119.

9.15 The cash flow forecasts referred to by MG were challenged by Mr Newington-Bridges, who submitted that they were unreliable because:-

9.15.1 The costs assumptions remained the same in the years post acquisition, where it was plainly MG's plan to reduce costs significantly in the Practice post-acquisition: he did this immediately by making three secretaries redundant in the months after the acquisition: it was his intention to reduce the number of staff in the Practice as he had done in his other acquisitions: this would have been MG's intention prior to the acquisition and would have been factored into his real assumptions in relation to overheads: the proposal sent to the banks for financing shows that MG anticipated reducing overheads immediately post acquisition: in the table referred to above the overheads remain constant in the 4 years post-acquisition, thus artificially depressing the net cash figure.

9.15.2 In the spreadsheet on which the table is based the loan repayments in the calculations start immediately on acquisition. MG's evidence was that the finance he had arranged in advance of the acquisition was an overdraft, which was not to fund the acquisition by way of an upfront payment, but was to fund working capital for the business: MG would not have expected to use all or any of that facility straightaway but would have expected to use it gradually after the acquisition: it was not in fact drawn down until April 2011: the loan repayments of £1,000 per month from October further depress the net cash output in the table.

9.15.3 Mr Newington-Bridges further submitted that, because the consideration was deferred, MGAL did not require finance to purchase the business, so that an inability to raise finance would not have prevented MGAL from making the acquisition.

9.16 It seems to me that there is some substance in the criticisms of MG's table made by Mr Newington-Bridges. The figures for overheads (which include wages) utilised in the table are, as I understand it, taken from the cash flow exercises performed in July 2014. In 2010 MG prepared a document entitled "Proposal for the Acquisition of DJ Beeny & Co." ("the Proposal"). This was, he said, prepared for the purposes of raising finance. Within it there was a sheet setting out the Fee Income and Overheads for the year to April 2010 and a forecast for the year following the proposed acquisition of the business, in which the Overheads were assumed, following reductions in wages and certain other items and increases in rent, to be £103,104. The Proposal also included some cash flow forecasts, but these were for MGAL's existing business and the Dartmouth business together, and the overheads for the two businesses are not shown separately.

9.17 Although it may be argued that even with overheads reduced by £20,000 p.a. the business would still have been unprofitable, one cannot rely upon the table as reflecting the likely cash flow forecast for the Dartmouth business if carried out in the Autumn of 2010.

9.18 The contemporaneous documentation shows that MG did in fact make enquiries with a number of lenders prior to the acquisition and that after a number of lenders had declined his request for funding. On 24 November 2010 Lloyds/TSB agreed to provide MGAL with an overdraft facility in the sum of £60,000 for an initial term of 8 months, secured on a property belonging to Mrs Ghersie. It is plain, therefore, that MG did consider that he needed additional finances for the purposes of the business, though not in order to purchase it. The fact that in the event he did not draw down on the overdraft until April 2011 does not affect this fact.

9.19 It is also clear that Lloyds/TSB, when approached for, it seems, an unsecured loan, declined to do so because the business was thought to be insufficiently profitable. This appears from an email sent to MG by a Mr Elliott on 13 October 2010:

"Hi Michael, thanks for ringing back yesterday, and I'm sorry I didn't have better news for you.

Our concerns are around "worst case scenario" where base rate has risen again, and its impacts on the committed repayment.

As I analysed it, and discussed with my colleagues, there is 40+k of business and personal loan, and 40+k of specialist loans, running for just a few years and thus with a potential servicing cost of 30k pa, to which we must add the new 5 year loan 60k at say 15k pa, and the buyout over 2.5 years at 95k pa (admittedly postponed for 6 months but during months 6-18 the repayment commitment could be as much as 140k pa, and when we apply this to the combined P&L's having added back all I can, to get an EBITDA 137k after the changed wages and rents, the resultant surplus gives a low margin of safety assuming that you have only taken a basic salary and where no doubt your Divs must come from this.

Perhaps we would talk about this when you have time on Friday."

9.20 Although it is not clear what material Mr Elliott was looking at at the time, it is clear that the "combined P&L's" must have been showing a profit which, it can be inferred, reflected the forecast profit for the first year of business, following the purchases, which was shown on the sheet within the Proposal referred to in paragraph 9.16 above. Based on a Fee income of £236,555, and overheads of £103,109, the profit forecast was £133,496, excluding any repayments to DB.

9.21 As can be seen, Mr Elliott assumed annual repayments to DB totalling £95,000 pa. This would have left a profit of £38,500, which Mr Elliott deemed insufficient for a loan, but, it seems, sufficient for a secured overdraft. If the actual fee income (which I found to be £178,484) is introduced, with the repayments to DB reduced commensurately to say £72,000 pa, the profit figure would be just under £35,000. I consider it unlikely that in these circumstances that the bank would have been prepared to advance MGAL £60,000 either as an unsecured loan or as a secured overdraft.

9.22 In the circumstances I consider that, on the balance of probabilities, and I find as a fact, that had MG been informed of the true GRF of £178,484, he would not have felt able to, and would not have, proceeded with the purchase of the business.

9.23 Accordingly, I reject Mr Newington-Bridges' contention that if MG had been informed of the true GRF, MGAL would still have purchased the business on substantially the same terms as, in the event, it did.

10.0 THE DATE FOR ASSESSING DAMAGES

The Parties' Contentions

10.1 On behalf of DB Mr Newington-Bridges made the following submissions:-

10.1.1 MGAL's expert suggested that a point in time some 4 years after the date of the Agreement is the correct point at which damages should be assessed: there was no explanation as to why this was the appropriate date to take, but in any event it was submitted that it was clearly arbitrary and wrong: the date at which damages are assessed cannot extend for an unlimited period into the future from the date of acquisition.

10.1.2 The general rule should apply and damages should be calculated as at the date of the acquisition: this was a straightforward case in which a small business was acquired induced by a misrepresentation: it was simply implausible that the complex and large-scale losses that are alleged, which outweigh the value of the business acquired by nearly four times, actually flowed from the acquisition of the Practice.

10.2 In the alternative, he submitted that the date should be 1 year after the date of acquisition. By this point:

10.2.1 MGAL and MG knew about the misrepresentation and had ample time to do something about it.

10.2.2 MGAL had had a reasonable opportunity to appraise for themselves the true position regarding the fees being generated from 'Transferring Clients', MGAL and MG could then choose to continue running the practice or sell or discontinue the practice and either sublet the premises the subject of the Lease or even leave them empty.

10.2.3 MGAL could have sold the business back to DB, sold it on the open market or discontinued the practice.

10.2.4 Once MGAL had decided to continue the practice DB should not be responsible for any further losses sustained as a result of its continued running of that practice.

10.2.5 Consequently, in order to determine whether any damages are payable under this head the court would need to compare the price paid for the practice (£176,411.49) and its true value one year following the date of the SPA.

10.3 MG's case is that by the date when he appreciated the full extent of the misrepresentation relating to the GRF of the business, he and MGAL were "locked-in" to the purchase because the business could not then have been sold.

10.3.1 Because MGAL was under an obligation to carry on the business for at least 3 years whilst it collected and paid the purchase price and because it was tied into the Lease.

10.3.2 The business had little or no market value, and faced numerous difficulties and therefore would not have attracted a buyer.

10.3.3 MG was a guarantor of both the SPA and the lease.

10.4 MG also referred to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") as being a reason why MGAL was "locked-in" to the business.

The Date of Knowledge

10.5 MG's evidence was that he first had some knowledge that DB had overstated the Practice's GRF in March 2011. On 28 April 2011 he wrote to his solicitors *"so far I have identified over £31,000 Gross Recurring Fees... which do not exist and this amount is bound to increase"*. In an email to his solicitors dated 31 May 2011 he believed the shortfall was £94,000. His evidence at the trial of liability was that he and his wife had been through the files of the clients listed in the Fourth Schedule of the SPA over the Easter Weekend (the 23 to 25 April 2011) and produced an analysis of GRF attributable to those clients. It is clear, therefore, that MG was aware, by the end of April 2011, that that Schedule overstated the GRF, and he believed (incorrectly) that it do so by a sum in the order of £94,000.

Transferring the Business Back to DB

10.6 In the absence of a rescission of the SPA, the business could not have been transferred back to DB without his consent. MG never asked DB, either directly or through solicitors, to take the business back – MG said this was because he knew DB would not do so.

10.7 In his oral evidence DB stated that he might have been prepared to take the business back and sell it. However, his evidence, when cross-examined was that:

10.7.1 he had not given detailed thought to the terms on which the Practice might have been reacquired;

10.7.2 this would have required *"a complete renegotiation"* and, as regards the Lease, *"it is difficult to make a decision four or five years later"*;

10.7.3 he still expected to be paid by MGAL, in accordance with the Agreement and based on the Practice's income, which he testified would have been between £200,000 and £210,000.

10.8 Mr Blackmore, also submitted with some justification that:-

10.8.1 It was inconceivable that DB would have taken the Practice back: in 2008, he wished to retire: by 2010, he had sold the family home in Kingsbridge and moved over 100 miles to Clevedon: by selling the Practice to MGAL at the end of 2010, he was able to retire: if he had taken the Practice back, he would have had to have come out of retirement (at the age of 73 or 74), returned to South Devon, tried to sell the Practice again and, in the meantime, run it.

10.8.2 On his own evidence, he had been unsuccessful in selling the Practice for over two years: whilst three purchasers had shown interest: two could not raise finance and the third was not a registered auditor. MG was the fourth potential purchase, but he was only prepared to proceed on a deferred consideration basis.

10.8.3 It was highly improbable that, in these circumstances, with no obvious possibility of selling the Practice on quickly and at an acceptable price, DB would have taken the Practice back.

10.9 In my judgment, the prospects of DB and MG being able to agree terms upon which DB would take the Practice back are remote. MG believed (incorrectly) that the GRF had been overstated by £94,000 pa. DB recognised that the Fourth Schedule was incorrect, but he believed that the true number of transferring clients and the GRF was not significantly lower than those shown in the Fourth Schedule to the SPA. Many other allegations were being advanced by MG, and DB challenged most of these. MG's evidence is that he considered the Practice was effectively worthless. DB believed it had substantial value. DB's first response to MG's allegations as to the shortfall of GRF was to dishonestly assert that a substituted and correct list had been agreed to, in effect, replace the list in the Fourth Schedule – in other words, his immediate response was dishonestly adversarial. DB was angry with MG for failing to pay any of the monies due under the SPA. MG was angry because he believed he had been misled.

10.10 In the circumstances, I consider that it is extremely unlikely that agreement could have been reached for the Practice to be handed back to DB even if it had been suggested it as a solution. Accordingly, I am satisfied on the balance of probabilities

and find as a fact that there was no realistic possibility of the Practice being transferred back to DB.

Selling the Practice

10.11 The opinion of Mr Isaacs, the expert called on behalf of DB, was that *"by 6 December 2011 MG might reasonably to have been able to have formed a view as to whether the Dartmouth Practice was as he had expected it to have been, and, if it was not, to have been able to have sold it so as to crystallise its loss".*

10.12 Mr Isaacs conducted a review of the post-completion invoices issued in respect of the Dartmouth Practice:-

> *4.2.7 My review of the post-completion invoices shows that £246,115 was invoiced in the year following Completion. In order to ascertain the corresponding turnover of the practice, it would be necessary to:*
>
> *i) deduct from this figure the value of those invoices raised in the period that related to work undertaken pre-completion; and*
>
> *ii) add to this figure the value of those invoices raised in the second year post-completion that related to work completed in the first year post-completion.*
>
> *4.2.8 Mr Ghersie states in his Third witness statement that he invoiced approximately £38,000 post-completion in respect of pre-completion works. I am unable to verify this figure and have not been provided with a calculation to show how it was derived.*
>
> *4.2.9 In addition, paragraph 75 of the Judgment assesses the work in progress to be £30,000.*
>
> *4.2.10 I do not know what was the value of bills raised in the second year post-completion that related to work completed in the first year post-completion. It may have been that the figure was lower than £38,000 or £30,000 because the practice had lost a significant number of clients during the first year post-completion.*
>
> *4.2.11 In any event, in the absence of any data on which to calculate a work in progress adjustment, I have proceeded on the basis that the turnover of the practice during the first year after completion was £246,115."*

10.13 According to Mr Isaacs, the value of the invoices raised by the Dartmouth practice in the second year following completion was £141,345. In the absence of information in relation to the value of work in progress, he assumed that turnover equated to that

amount. He assumed that the fall in turnover could be mitigated by staff reductions, so that on that basis the net annual profit for the year would have been only £25,000. On this basis a hypothetical purchaser might pay no more than £75,000 (possibly only on a deferred basis) for the business, but a hypothetical purchaser with existing offices into which to transfer the client base might well be prepared to pay a sum of £141,000.

10.14 In short, however, Mr Isaac's evidence was that as at the end of the first year after Completion the Dartmouth practice was capable of being sold for a substantial sum.

10.15 The evidence of Mr Mesher, the expert called by MGAL, was that the Practice could not be sold. His evidence was that the range of difficulties it faced made it unsellable, including: the loss of clients; the loss of staff, in particular the dismissal of one, Mr Callard, in November 2011, which led to a further loss of clients and also made it impossible for MGAL to service properly its clients in the December 2011/January 2012 peak period, which led to a further loss of clients; the decline in revenue; and the fact that the business would have been sold 12 months after MGAL had acquired it by a vendor who would remain in practice i.e. from the Torquay premises: not all issues would have been resolved at the end of the first year (but only, at the earliest, at the end of the second year.

10.16 In support of the contention that the Practice could not have been sold at the end of the first year after Completion Mr Blackmore referred to the fact that it had taken two years for DB to find a purchaser for it, and that Mr Isaacs accepted that he had seen no contemporaneous evidence that it could have been sold in December 2011.

10.17 In my judgment, there were potentially two substantial hurdles in the way of any sale of the Practice, namely the existence of the Lease, and MGAL's obligations to make the repayments as quantified and specified in the SPA.

10.18 The copy of the Lease in the trial bundles is very poor, and it appears not to contain the usual covenant against assigning or sub-letting, but even if it did, by virtue of the provisions of Section 19 of the Landlord and Tenant Act 1927, consent to an assignment or to a sub-letting could not be unreasonably withheld. Accordingly, the Lease would not have had any significant "locking-in" effect if a purchaser of the Practice or some other interested party could be found.

10.19 However, the position in relation to the SPA would have been much more complicated. It seems to me that the payment provisions in the SPA could only *"work"* if there were implied into the SPA a term obliging MGAL to conduct the business for 3 years following Completion – otherwise the consideration could be neither quantified nor paid. Accordingly, any sale of the Practice would require the consent of DB, and some carefully negotiated terms to ensure that DB received what he considered he should be paid for the Practice.

10.20 For the reasons stated in paragraph 10.9 above, I do not consider that there was any realistic prospect of DB and MG being able to agree terms which would have enabled the Practice to be sold to a third party. Accordingly, the earliest date at which it could be sold was the date upon which, under the SPA, the last instalment of the consideration fell to be paid, namely 6 March 2013.

Closing the Practice Down

10.21 Mr Blackmore submitted that neither MGAL nor MG or his wife could afford to simply close the business and accept the losses which would follow:-

10.21.1 MG was a director and a sole shareholder in MGAL, and his wife was a director.

10.21.2 MG had personally guaranteed MGAL's obligations under the Agreement and the lease: DB would have enforced these guarantees in the event of MGAL's default, as indeed occurred when he sued both MGAL and MG.

10.21.3 At the time of the acquisition of the Practice, MGAL had outstanding borrowings of approximately £61,000 from a number of lenders, personally guaranteed by MG.

10.21.4 MG was (and remains) a Fellow of the Chartered Institute of Accountants. He would have lost his status in the event of personal bankruptcy: had the guarantees given by him been enforced, MG would most probably have become personally insolvent.

10.21.5 At 30 November 2010, MGAL's directors' current account stood at £140,775: this represented sums owed to them by MGAL, principally loans to the company. This would have been lost in the event of the company's insolvency.

10.21.6 Ms. Baylis had given security over a property owned by her for the overdraft taken out by MGAL: had MGAL defaulted on the overdraft, Lloyds TSB would have enforced the security and she would have lost her property: she had also made unsecured loans to MGAL, which would have been lost in its insolvency.

10.21.7 MG had no other available assets with which to finance the business: his evidence was that everything was in MGAL, which was intended to be his retirement fund.

10.21.8 In 2012, as MGAL's finances deteriorated further, MGAL had to take out further loans from secondary lenders to provide working capital, which MG guaranteed.

10.21.9 In 2013, the directors (MG and Ms Baylis) were required to put significant further capital into the business, to meet legal fees and to pay rent to DB.

10.22 I accept those submissions. Closure of the business was not a reasonable option.

11.0 PURCHASE OF ALTERNATIVE PRACTICE

11.1 A further issue which requires consideration, before the detail of the claim is addressed, relates to MGAL's claim that had it not been induced by misrepresentation to acquire the Dartmouth Practice it would have acquired another accountancy practice and would have profited from so doing.

11.2 In his third witness statement MG gave the following account of his plan to expand his business:-

> *"42. Given the improvements we had made to the practice by late 2009 and 2010, I felt ready to begin to look for another business. I had drastically improved the fortunes of the businesses that I had acquired, notwithstanding the grave economic difficulties of the time, and now had a much bigger practice. I considered that there was no reason why I could not apply the same principles again. I still wanted the critical mass in the South Devon area that I think would have been of interest to a larger practice and began to consider the next business purchase. Ultimately, I wanted to achieve a gross recurring fee income for the business as a whole of £500,000 which, if the acquisition of Mr Beeny's business had gone as planned, we would have achieved. At that point the income from the business would have enabled me to discharge the liabilities which had been accrued over the earlier period. Ultimately, I may have wanted to sell the business to a larger practice."*

11.3 Earlier in that witness statement he explained that in order, amongst other things, to moderate the burden of work in the Autumn and January of every year, and hence to

moderate costly overtime, he had improved the practices which he had already acquired:-

> *"32. I introduced a structured system that was based on a series of spreadsheets which aimed to spread the year's work throughout the whole year. This involved (a) making the staff much more aware of the clients' year end deadlines, (b) contacting clients at a much earlier stage to obtain the documentation that we needed to undertake the work and (c) undertaking the work required during the whole year, rather than "end loading" it. This improved our service to clients, as we could be more responsive and we had more time to deal with queries.*
>
> *33. I also introduced an accountancy software package – "Digita" – which streamlines a lot of the routine work that would ordinarily be done by staff in small accountancy practices. "Digita" automatically transfers accounts information to personal and company tax returns, which not only saves a lot of time but also eliminates transcription errors.*
>
> *34. The combination of altering the core way of working within the practice and introducing certain technologies thus made it possible for us to reduce the number of staff (particularly secretaries and receptionists whom we never used) that the business needed to employ, while the service that we were able to provide improved.*
>
> *35. Of course, the above changes did not happen overnight: the cultural change (not just for staff but for clients too, whom we would ask to provide information at an earlier stage than they were used to) takes time, as does the implementation and effective use of new systems."*

11.4 In his third witness statement MG explained that when looking for a business to buy, it need not be particularly profitable but it did need to be essentially sound and with room for improvement. His intention would be to increase profitability by the implementation of "MGAL's business model". He stated that the principal features of that model were:-

11.4.1 the introduction of effective management systems, including the systematising of working practices for the production of accounts for clients and tax returns;

11.4.2 the introduction of the 'Digita' tax and accounting software system;

11.4.3 the reduction of costs where possible;

11.4.4 the employment of high quality employees;

11.4.5 the establishment of business services which were outside services normally offered by accountancy firms in the South Hams area, such as:-

Tax credits management

Virtual Finance Director for clients – monthly/quarterly board meetings

Limited Liability Partnership strategies (5+ years tax-free profits on new ventures)

Stamp Duty Land Tax strategy (reducing SDLT to nil) etc.

11.5 It is plain, therefore that MG would have been looking for a business which did not employ the approach reflected in the MGAL business model, and so, in his eyes was not as profitable or efficient as it could be (for example, employing more staff than MG considered were required and without modern software), and that once the business was acquired he would apply the MGAL model, making staff redundant where possible and introducing higher calibre staff where necessary – which would involve further redundancies.

11.6 In his evidence MG stated that if in 2010 MGAL had not been induced by the misrepresentations of DB to enter into the SPA, it would have purchased a similar practice to DB within the area with a view to carrying out its business strategy. He referred to two businesses which he thought he might acquire. Whilst no evidence was adduced to demonstrate that there were other practices on the market in 2010 which would have suited MG, MG referred to particulars provided to him by a broker or agent, Vivian Sram Ltd, of practices for sale in 2011, 2012, 2013 and 2014, and since it is a matter of history that MGAL did acquire Maceys, a South Devon practice, in 2012, it is not unreasonable to assume, on the balance of probabilities, that MGAL would have acquired one or more other practices in about 2010 had it not acquired the Dartmouth Practice and I make that assumption.

11.7 It is more likely than not that any other practice which was acquired would be in South Devon, because that was where MG had chosen to live, and that is the area which MG said he was targeting – see paragraph 11.2 above.

11.8 He would have been looking for a practice with a GRF in excess of £200,000 – because he was seeking ultimately to achieve a GRF of £500,000. The picture which emerges from the acquisitions which he did make and from the particulars referred to in paragraph 11.6 above, is that any other South Devon practice which he was likely to acquire would be similar – a relatively small business owned by a single qualified

accountant (or perhaps two qualified accountants) who worked in the practice, assisted by a small number of mainly unqualified staff.

11.9 The consequence of this is that any acquisition which MGAL made was bound to divert MG's time and input from his existing practice, and this would be bound to impact to some degree upon his management of that existing practice. Further, unless he recruited someone else to do the actual accountancy work previously done by him in that practice, or to do the accountancy work previously done by any accountant who departed from any practice acquired, the turnover of one or both of such practices was also bound to be affected.

11.10 The recruitment of one or more qualified accountant would, of course, involve additional cost, which MG was anxious to avoid, and, in the event, when MGAL acquired the Dartmouth Practice he did not immediately endeavour to recruit an accountant to replace DB, his intention clearly being to take over DB's accountancy work himself.

11.11 Similarly, unless any practice acquired already operated in the manner which MGAL's existing practice operated, time and effort would be required to introduce the methodology preferred by MG - referred to above in paragraph 11.4. This, too, had the potential to divert time and effort from MGAL's existing practice unless an additional person or persons with the ability to introduce and manage the changes required were employed, and this again would involve an additional cost.

11.12 In the event, after Completion, MG, no doubt to keep costs down, did not, in the first year, seek to employ a qualified accountant to replace DB, but instead endeavoured to take over and do DB's accountancy work himself, and he did not engage any additional person to introduce and manage the changes which he wanted to make. It may be that there was no such person whom he could employ, but the result was the same.

11.13 Accordingly, it is more likely than not, and I find as a fact, that any practice (other than the Dartmouth Practice) which MGAL was likely to have acquired in 2010/2011 would have a similar impact upon MGAL's existing practice – unless the Dartmouth Practice was subject to a level of problems which was abnormal for small accountancy practices in the South Devon area.

12.0 RELIAMATICS

12.1 The evidence relating to a company called Reliamatics Ltd, a company owned and/or managed by a Mr Lowe, is relevant to a number of issues, especially the dismissal of Dan Callard, who had worked in the Dartmouth Practice for twenty five years.

12.2 In his third witness statement MG stated:-

> *"146. ...*
>
> *e. It has to be said that Mr Callard was a very willing and able person to have around the office. He was a good accountant, although limited to sole trader and partnership accounts, and he produced a good level of output. Given the severe limitations of the other members of the Dartmouth Practice, he was a very important and pivotal member of the Dartmouth team and I made this clear to him. Under normal circumstances, I would never have considered replacing him as he had so much client knowledge, was very willing and was the only person who did have a real skill-set amongst the Dartmouth staff.*
>
> *f. It was therefore very unfortunate that Mr Beeny got him involved in his dishonest preparation of the accounts for Reliamatics, another significant problem the details of which I set out below, which led to his dismissal."*

12.3 Later in the same statement and in his oral evidence MG recounted the events which led up to Mr Callard being dismissed. He asserted that:-

12.3.1 In November 2011, when Julie Isaac was on holiday his wife found a set of accounts with red MGAL stickers affixed at the bottom: that raised alarm bells as they never sent out accounts looking like that. In the bottom left hand corner, there was a note in Ms Isaac's handwriting saying *"Awaiting fax no. from Dan"*: he had a meeting with Dan Callard to ask him about it and he was very vague, neither accepting or denying that he knew anything about it: he used such phrases as *"I might know, I might not ..."*: attached to the accounts there was an earnings statement which DB had prepared and signed dated 11th July 2011 and returned to Lloyds Bank to support an application for a mortgage. The Bank had then returned it to MGAL's office, asking for the earnings report to be stamped with the firm's stamp to show authenticity: it had then been stamped with the old stamp of D J Beeny & Co and returned from MGAL's office to Lloyds on 28th July 2011, at 13.36 by fax.

12.3.2 It transpired that Mr Lowe a friend of DB, had asked DB to provide an official accountant's report to support an application for a mortgage: DB without MG's knowledge, prepared a set of accounts and an accountant's report, and sought to make it appear as though it had come from MGAL by affixing the stickers bearing MGAL's name: he did not know whether the figures were true or untrue, but he could not think of any other reason why DB would not have asked him to sign them off, unless they were untrue: for this reason, he was very alarmed, and reported the matter both to the ethics department of the ICAEW, SOCA, and professional indemnity insurers.

12.3.3 Dan Callard was evasive about it but MG thought that it was clear that he had been involved – the note made it clear that Julie Isaac was awaiting a fax number from Mr Callard: MG contacted the insurers who reminded him that there would be no insurance for fraud, and that he could not in any way be seen to be condoning fraud or not taking appropriate action on discovering the possibility of fraud: it was clear to MG that he had to take disciplinary action in respect of Mr Callard.

12.3.4 He took advice from an external HR consultant Chris Pope: there was a disciplinary hearing chaired by Mr Pope, following which Mr Callard was dismissed: Mr Callard did then appeal, and the appeal hearing was chaired by another external consultant, Ms Caroline Giles: the decision to dismiss was upheld: Mr Callard then brought a tribunal claim, claiming £50,000: a day before the hearing there was an offer by Mr Callard to settle for £1,500, which would cover his advisers' fees: for simple commercial reasons MGAL settled for that sum: the whole affair was extremely expensive and time-consuming.

12.3.5 It is to be noted that MG explicitly stated that the accounting documents were false. In the March 2014 schedule above he asserted it was a *"fraudulent loan application for Mr B. Lowe made by DB"*, as well as asserting that Ms Isaacs was a party to this *"fraud"*, but he has not provided any material to support the allegation that the accounts were fraudulent. There is simply no evidence that the loan application was fraudulent. No attempt was made at the hearing before me to point out in what respects any of the relevant figures was erroneous, let alone fraudulent. Further, it is to be noted that when MG referred the matter to the Police (as he did) the allegation he made in relation to Reliamatics Ltd's accounts was that DB had *"passed off"* the earnings certificate as emanating from MGAL, not that the accounts themselves were fraudulent.

12.3.6 DB's version of events is as follows:-

"I received an email from Julie Isaac on 23 June 2011 stating that Barry Lowe wanted to contact me. I phoned him on that date and he told me he was moving house and as he was self-employed his lender (Lloyds TSB) required the usual accountants' certificate setting out details of his income etc. I told Barry Lowe that I could not act for him as under the terms of the sale contract he was a transferring client. He then told me that he had no intention of continuing to use MG Associates Ltd ('MGAL') as his accountant, ... He also said he thought that MGAL would not act for him as he owed them money from work which I had carried out as a consultant to MGAL. I said that in these circumstances as he was not continuing with MGAL, as I had prepared and completed those accounts I would act for him, but only for this one off certificate, he would then have to find another accountants. (He found another accountant shortly afterwards).

I sent a letter together with the accounts and the certificate to Lloyds TSB ... and asked them to respond to my Clevedon address. ... on 18 July 2011 ... Barry Lowe contacted me and said that Lloyds TSB had some queries and required further information. I answered those queries on that date.

My next recollection was contact with Julie Isaac on 28 July 2011 when she informed me that Lloyds TSB had written to me and asked that the David J Beeny & Co stamp be attached to the certificate ... I asked her to comply with the request and it was faxed to Lloyds TSB on that date. I understand that Julie Isaac sent the fax and that Dan Callard was not aware of the fax and therefore was not involved as claimed by Mr Ghersie.

During August 2011 Mr Ghersie mentioned this to me and I explained the situation. He accepted this and asked me to file all the relevant papers so they could be passed to his new accountants. He said that he would not have provided the certificate as Barry Lowe owed MGAL money and he had instructed agents to collect the debt.

I did not ask for MGAL stickers to be attached to the certificate and the draft accounts. It is clear that those stickers were not attached to the certificate signed by me and faxed to Lloyds TSB. No MGAL stickers

were attached to the accounts sent by me to Lloyds TSB as they were sent from my Clevedon address. It has not been established who attached the stickers to the draft accounts ... but ... I assume Julie Isaac attached those stickers. Lloyds TSB fax number is shown on the top of the certificate ... and on the letter ... The stickers must have been attached to the draft accounts after the certificate had been faxed to Lloyds TSB on 28 July 2011 as my recollection is that I did not return the file to Dartmouth with the print out of the draft accounts for filing until my next visit which was probably on 4 August 2011.

12.3.7 In his fifth witness statement DB stated:-

> *"106. The figures were not fraudulent as the income and profit figures shown in the certificate were in agreement with his accounts and tax return. ... There was no reason to take disciplinary action against Dan Callard as he had not been involved with the preparation and sending the accounts to Lloyds TSB. Mr Ghersie had a different agenda, finding a reason to dispose of his services. ..."*

12.3.8 In his fifth witness statement DB stated:-

> *"106. The figures were not fraudulent as the income and profit figures shown in the certificate were in agreement with his accounts and tax return. ... There was no reason to take disciplinary action against Dan Callard as he had not been involved with the preparation and sending the accounts to Lloyds TSB. Mr Ghersie had a different agenda, finding a reason to dispose of his services. ...*

12.3.9 What the documentation relied upon by MG does show is that staff in the Dartmouth Practice were involved in work for DB when they should not have been – though even then they might have had scope for argument that it was a grey area, having regard to the fact that some work carried out in the Dartmouth office unavoidably related back to work done prior to Completion, and DB had still done some consultancy work at least, it seems, until the end of August 2011. MG could be justly angry about work being done by MGAL staff for DB rather than MGAL, and also by the fact that the provision of the certificate prevented MGAL using Mr Lowe's requirement for the same as a lever to recover outstanding fees. However, on the evidence before me, MG was clearly not justified in jumping to the conclusion that there was a fraud. There is no evidence that the account, or certificate of earnings were fraudulent (and MG did not allege this to the Police) or that the

document was *"passed off"* as MGAL's, there being no evidence that anything actually sent to the bank bore any reference to MGAL.

12.3.10 According to DB, Mr Callard, with whom he had remained in touch, denies having any part in whatever Ms Isaac was doing – save, presumably, to provide a fax number for the bank. MG says that the accounts had been printed off from MGAL's computer system, that Ms Isaac did not know how to do that, but Mr Callard did. DB's evidence was that he himself had done it. On the evidence before me, Mr Callard was at worst guilty of doing something for DB in MGAL's time, and MG therefore had an option of dealing with this by a reprimand, and/or a warning. Instead, MG jumped to the conclusion that he was faced with a fraud and that he had no alternative but to take disciplinary action. As it is, the grounds for the dismissal are not in evidence. These grounds may have been disloyalty, rather than involvement in a fraud.

12.3.11 Mr Callard was a key fee-earner in the Dartmouth Practice. The decision to dismiss him, in the event, on MG's own evidence, lead to the loss of 60 clients and a turnover of over £40,000. MG asserted that significant time (132 hours – or 4 working weeks) was spent resolving these issues. In the case of the various proceedings concerning Mr Callard that may well be true. MG accepted that the dismissal of Mr Callard was not the consequence of the misrepresentation inducing MGAL to enter into the SPA. Irrespective of that admission I am entirely satisfied and find as a fact that neither the loss of clients following Mr Callard's departure, nor the amount of MG's time spent in dealing with his supervision or dismissal were *"the direct result"* of that misrepresentation.

13.0 THE PRACTICES PRE-COMPLETION

The Dartmouth Practice

13.1 The abridged accounts provided to MG by DB in the summer of 2010 showed profit and loss to be (or in the case of 2010, estimated to be) as follows:-

Year ended 30th April	**2008**	**2009**	**2010**
Turnover	221,764	226,839	236,555
Salaries	(95,776)	(100,897)	(106,4170
Other costs	(32,537)	(33,174)	(34,536)
Profit before tax	93,451	92,769	95,602

13.2 The accuracy of the figures for 2008 and 2009 was not questioned when DB was in the witness box, or by the experts.

13.3 The principal fee earners in the Practice were DB himself, Mr Ball, Mr Callard, and Mr Causley – though it appears that Julie Isaac may also have done some work which could be billed to clients.

13.4 In his evidence in chief DB stated that he worked five days a week, but MG noted prior to the sale of the Practice that DB had told MG that he did not work on Fridays, that he worked from home on Mondays, and in the Paignton office on Thursdays and took 8 weeks holiday a year. No doubt DB in his earlier days did work five days a week and in his later years did occasionally do so: but I am satisfied that by 2010 his usual work pattern was as noted by MG.

13.5 In the trial on liability DB accepted that he may have told MG that the Practice *"ran itself"*, but MG was aware that DB did work in the Practice four days a week and had his own portfolio of clients. DB explained that the Practice did *"run itself"* in the sense that each of the fee owners had their own portfolio of clients and could generally look after those clients without needing to refer to him. I accept that explanation.

13.6 It was not suggested that the figures given in the abridged accounts for the years 2008 and 2009 were inaccurate.

The Torquay Practice

13.7 In his expert report, Mr Mesher summarised the historic profit and loss for this Practice in the following table:-

Year ended 30th November	**2008**	**2009**	**2010**
Turnover	174,521	157,207	178,557
Royalties	(20,829)	(16,139)	(16,682)
Salaries	(98,917)	(77,285)	(57,870)
Other costs	(63,957)	(61,470)	(71,096)
Interest	(12,087)	(165,460)	(154,498)
	(195,800)	**(164,460)**	**(154,498)**
Profit/(loss) before tax	**(21,288)**	**(8,253)**	**24,059**
Add back:			
Interest	12,097	10,566	8,850
Depreciation	2,981	2,981	4,579
Amortisation	-	-	25,000
EBITDA	**(6,219)**	**5,294**	**62,488**

13.8 The net losses of the Practice in 2008 and 2009 were attributed by MG and Mr Mesher to the time required to implement changes to, and integrate, the Durtnall and Rowden and Robert Heath practices acquired in 2005 in order to make the combined practice profitable.

13.9 It appears that in 2010 the principal fee earners in the practice were MG himself, another qualified accountant, Mr McDade, and a Ms Hughes who managed the bookkeeping business, being responsible for all bookkeeping, and for pay roll, and VAT for clients.

14.0 THE PRACTICES POST COMPLETION

Personnel

14.1 Following Completion, Mr Ball, Mr Causley, Mr Callard, and Julie Isaac, continued working in the Dartmouth practice as before. DB did some consultancy work, but no longer attended the office. No-one was recruited to replace DB, but his place was taken by MG himself, who, in his third witness statement, asserted that after Completion he never able to work in the Torquay office again.

14.2 In March 2011 MGAL dispensed with the services of three of the secretarial staff – Ms Farley, Ms Walker, and Ms Thorp.

14.3 Mr Ball resigned in July 2011. Mr Callard was suspended, and ceased working in the Practice, in September 2011. Julie Isaacs was off sick from September 2011, and did not return to work. MG's evidence was that Julie Isaac resigned once she had been confronted by MG over her involvement in "the Reliamatics fraud". According to an email from Mr Callard, dated 18 August 2011, on 17 August he had found Ms Isaac in floods of tears after she had been informed by MG that morning in a letter left on her desk that her present post would cease and be replaced by two part-time posts, for only one of which she was qualified to fill. In a subsequent email dated 28 September 2011 Mr Callard stated Ms Isaac had gone off sick with either stress or depression or the like as MG had had *"a right go at her"* over the telephone which had resulted in her breaking down and sobbing uncontrollably. It appears from Ms Isaac`s letter of resignation dated 29 December 2011 that MG had written to her referring to suspending her from her employment and possible disciplinary action after she had gone off work sick, on 15 September 2011, and that these letters had *"added to"* her ill health. The two paragraphs in her letter preceding the paragraph giving her notice were in the following terms:-

"I worked for D J Beeny & Co for 15 enjoyable years and in that time I felt valued as a team member and was often praised for the job I had done. Over the years I developed my skills base alongside other members of staff and had built up a very strong professional relationship with the clients.

My reception duties have changed dramatically over the recent months, especially since your restricting of staff making 1.3 persons redundant from reception duties. Since this time I have been working under extreme pressure and have given many of my own hours to ensure that deadlines are met. During this time my anxiety and stress have increased due to the various meetings and letters received from you regarding the ongoing financial problems with the bank and the significant operational changes needed to keep the office open, thus resulting in possible restricting of my role involving a reduction of my working hours. To date I feel these uncertainties continue."

14.4 Following Mr Callard's departure, MG recruited a Mr Parks. He joined in October 2011 but left in February 2012. Mr Causley told DB that Parks was fresh out of college/university, with no experience in book-keeping, payroll, or accountancy. He did, however, know how to operate the Digita software. A Ms Shutt was engaged between December 2011 and February 2012. She was, apparently a qualified accountant. It was not suggested that she had any pre-existing connections locally or with the existing clients.

14.5 A Ms Cole joined MGAL in May 2012, and a Ms Fleet joined in July 2011. Ms Cole, apparently, has a BA in Finance and Accounting and is regarded by MG as *"a highly talented accountant"*. Ms Fleet is an experienced book-keeper. In August 2012 MGAL acquired new premises in Vaughan Parade, Torquay, and also in that month acquired Maceys, the practice in Kingsbridge.

14.6 MG stated, in his third witness statement, that he had to move Mr McDade, the only other qualified accountant, into the Dartmouth office to assist with problems there. In his fourth statement he referred to Mr Mc Dade and to himself as being required to be *"almost constantly"* in the Dartmouth office. No time sheets were produced to substantiate this.

14.7 MG did not explain when Mr McDade moved to the Dartmouth office on a full-time basis, or when he began to assist with the Dartmouth Practice. At some stage MG

prepared a schedule setting out a claim based on an assessment amongst other things of time spent on addressing alleged problems and errors inherited from work done prior to Completion. No claim was made for any work done by Mr Mc Dade in relation to such supposed errors. For the reasons given below, my conclusion, on the balance of probabilities, is that Mr Mc Dade was not required to provide any substantial assistance to the Dartmouth Practice until Mr Callard was suspended in September 2011, and that he was then engaged on work which Mr Callard would have done, including the urgent work of dealing with accounts and tax returns by 31 January 2012.

MGAL's Contentions

14.8 MG asserted that in the course of negotiations DB had stated that the Dartmouth business would require little or no management, but that post Completion MG found the following:-

Overstated Fee Income

14.8.1 47 of the clients listed in the Fourth Schedule to the SPA had gone away, ceased trading or had died prior to the Completion Date;

14.8.2 the client fee income listed in the Fourth Schedule to the SPA was overstated;

Poor quality staff and equipment

14.8.3 several DB employees did not have the knowledge or experience represented by DB and were in fact unable to prepare accounts and tax returns. Several were also unwilling or unable to grasp the new system and work practice of the MGAL business and over time left the employment of MGAL;

14.8.4 the computers and computer system were outdated, insecure and with data that was not backed up;

14.8.5 The printers were obsolete;

Hand-over

14.8.6 DB not only failed to provide full briefings on major clients at handover and failed to provide assistance during the three-month period following completion but also effectively sought to sabotage the Practice post Completion.

Erroneous work

14.8.7 Numerous errors or omissions in the work which had been undertaken either by DB personally or by his staff, and there was a culture of acceptance of dishonesty by clients.

Excessive staff numbers

14.8.8 the numbers of employees of the Business immediately following completion was 7 whereas only 4 had been detailed in the Fourth Schedule to the SPA, again rendering the Business unprofitable and giving rise to redundancy costs;

Unanticipated Costs

14.8.9 employee wages were understated in the extract from the Profit and Loss Account reproduced in the Seventh Schedule to the SPA'

14.8.10 certain employees had benefits which had not been disclosed prior to the Completion Date;

14.8.11 the holiday entitlement of some of the employees had been understated;

14.8.12 significant work was undertaken by the Business for charities for uncosted sums;

14.8.13 Tax returns in respect of some clients were wrongly filed by DB in May 2010 leading to the imposition of fines;

Misconduct

14.8.14 DB had been negligent in failing to act on the instructions of Mr Tozer, a Transferring Client, and had attempted to avoid the consequence of his negligence by preparing a backdated letter to the HMRC;

14.8.15 Dan Callard, a senior employee, was found to have prepared a set of accounts to assist the client in his mortgage application to a bank, which he falsely represented had been prepared by MGAL. He was dismissed for gross misconduct and took with him £28,000 of turnover.

Performance

14.9 The problems referred to in the last paragraph, it is alleged, resulted in the turnover and profit in the Dartmouth Practice in being lower than anticipated, the profit/loss of which, post completion, were calculated by Mr Mesher to be:-

	Year ended 30th Nov 2011	**Year ended 30th Nov 2012**	**Year ended 30th Nov 2013**	**Year ended 30 Nov**	**Total**

				2014	
Turnover	220,925	149,508	93,384	85,728	
Salaries	(120,179)	(67,997)	(67,259)	(62,725)	
Other costs	(47,617)	(56,8960)	(67,579)	(166,982)	
Interest	(4,340)	(3,980)	(2,110)	(819)	
	(172,127)	(128,871)	(136,948)	(230,526)	
Profit before tax	48,798	**20,636**	**(43,564)**	**(144,800)**	

14.10 A further result, it is alleged, was that it was necessary for MG to be fully engaged in investigating and undertaking remedial action at the Dartmouth office, with the consequence that:

14.10.1 MG was unable to continue his advisory and consulting work for commercial businesses trading in the Torquay area;

14.10.2 MG was unable to continue his role in marketing and development of the Torquay business;

14.10.3 MGAL's Torquay employees were diverted away from servicing Torquay clients to assist in the remedial actions required in DB's Business;

14.10.4 as a result of the above, the MGAL business was not able to dedicate the time and resources required and some of its Torquay clients, amounting to some £56,000 of annual fee income, took their business elsewhere.

14.11 The profit/loss of the Torquay Practice post completion was calculated by Mr Mesher as follows:-

	Year ended 30th Nov 2011	**Year ended 30th Nov 2012**	**Year ended 30th Nov 2013**	**Year ended 30 Nov 2014**	**Total**
Turnover	132,983	109,623	92,827	139,836	
Royalties	(19,368)	(9,348)	(6,512)	-	
Salaries	(57,899)	(54,860)	(34,051)	(27,876)	
Other costs	(104,745)	(75,048)	(65,142)	(40,531)	
Interest	(2,613)	(2,918)	(2,098)	(1,335)	
	(184,625)	(142,174)	(107,803)	(69,743)	
Profit/loss before tax	**(51,641)**	**(32,551)**	**(14,977)**	**70,094**	

14.12 The downturn in turnover and profits of the Torquay Practice was attributed by MG to the matters referred to above, and in particular to the diversion of his and Mr McDade's time and energy from that practice to the Dartmouth Practice.

14.13 The disappointing financial results in the two practices had occurred, it was alleged, notwithstanding the steps taken by MG to mitigate the problems MGAL having, since the Completion, with a view to mitigating its loss:

14.13.1 reduced the number of employees of the Business and improved the quality of employees;

14.13.2 invested in the 'Digita' tax and accounting software system which is linked into its existing systems;

14.12.3 reduced costs where possible including the purchases for the Business in its existing business purchases, viz bulk purchasing;

14.13.4 improved the efficiency of the Business by systematising the working practices of the Business;

14.13.5 closed DB's Paignton office;

14.13.6 invoiced DB's work in progress that predated Completion;

14.13.7 generated additional fee income from clients not on DB's Transferring Client List;

14.13.8 closed MGAL's Torquay office and moved to serviced office accommodation in Torquay.

DB's Response

14.14 On behalf of DB Mr Newington-Bridges submitted that:-

14.14.1 Over 220 clients were lost post Completion from the Dartmouth Practice over the course of two and a half years, and Mr Mesher conceded that that was *"a very high rate of attrition"* and that *"mismanagement of clients was likely to be a factor"*.

14.14.2 MG accepted in cross-examination that the reason for the loss of a significant number of clients from the business was due to the loss of George Ball, Roger Causely and in particular Dan Callard, who set up in competition having been sacked from the Practice: all of these employees of the Practice had decades of experience and long-standing client relationships: it was clear that it was management incompetence to lose so much experience and the client relationships that went with that in such a

short period of time: the loss of those clients not as a result of the misrepresentations as to the number of Transferring Clients.

14.14.3 A series of clients left the Practice after MG took over DB's work. They included Valeport and Scope, two of the Practices largest clients by fees. These clients expressed dissatisfaction with MG's work describing MG or his work variously as incompetent and poor.

14.14.4 MG worked full-time in the Torquay business prior to the acquisition. His evidence was that he expected to make staff redundant at Dartmouth, take over Mr Beeny's 4 days a week workload, integrate the new business and establish new systems and practices himself: it is plain that he was over-extended and that even had he worked 7 days a week he could not have covered all the extra work that fell to him.

14.14.5 MGAL acquired another business (Maceys) in August 2012: it could not be said that MG's managerial time and energy was focused on dealing with the issues resulting from the misrepresentation if he was prepared to consider acquiring and actually acquire a further accountancy business: the acquisition process would have consumed considerable amounts of MG's time and energy: he would not have been prepared to devote this to the acquisition had he not been assured that the problems he perceived to have existed at the Practice as a result of the misrepresentation had been resolved: it was therefore clear that the misrepresentations were not operative by August 2012.

15.0 OVERSTATED FEE INCOME

15.1 The Fourth Schedule to the SP undoubtedly included the names of persons who, and companies which, were no longer clients of the Practice. I have not been directed to the calculation from which the figure of 47 has been derived. However, the more important considerations for present purposes are the amount by which the GRF was overstated, the fee income following Completion, and the question of whether or not this shortfall lead to the under performance of the Torquay Practice.

15.2 In the judgment on liability I found that the true GRF for the relevant period i.e. to May 2010 was £178,483.62, an overstatement of £62,839.38.

15.3 Mr Isaacs asserted that Mr Mesher's turnover figure of £220,925 for the year to 30 November 2011 was too low, as it was based on a list of invoices which was incomplete, and that a complete list of the relevant invoices produced a total of £246,115. I accept that evidence.

15.4 It is common ground, however, that that figure does call for some adjustment because it includes for work executed prior to, but only invoiced after, Completion. MG asserted that such work in progress amounted to £38,793, but produced no substantiation of that figure. In the judgment on liability (paragraph 65) I found that the sum actually recovered by MGAL attributable to work in progress was £30,000. This figure is not open to review. The deduction of this sum indicates an actual turnover, in the year after completion, of £216,115. MG suggested that there should be a further deduction of £18,183 in respect of receipts from new clients introduced during that year. I reject this – for the purposes of establishing the actual turnover it is irrelevant whether or not it was derived from old or new clients.

15.5 As can be seen, therefore, the difference in turnover between the estimate for the year to May 2010 and actual turnover for the year 30 November 2011 was actually £20,114 (£236,555-£216,115). It being common ground that when an accountancy practice is sold the loss of up to 15 per cent of existing clients is an inevitable consequence, it appears that that discrepancy was not remarkable (indeed was entirely in line with expectation), and the errors in the Fourth Schedule were not by themselves catastrophic. Nor by itself does it suggest that the Practice was in a chaotic state.

15.6 In his fifth witness statement DB suggested that the forecast figure was £220,000, rather than £236,555 and indeed it is clear from MG's own notes that that was the figure which DB gave him when they met on 19 August 2010. However, as I understand it, the figure of £236,555 was that given in the abridged accounts provided by DB. If my understanding is incorrect, and the figure of £236,555 was a figure composed by MG, then the difference between the forecast and actual figures would be reduced to £3,999.

15.7 The fact that the GRF was overstated pre-Completion would not, of course, be causative of any clients leaving post-Completion nor in a direct way, of any reduction in actual turnover post-Completion. The discrepancy between the forecast figure for the year to May 2010 and the actual figure for the year to 30 November 2011 would however, point to a lower than anticipated profit post Completion, but it is to be observed that the Practice was still in profit to the tune, on Ms Isaac's figures, of over £70,000.

16.0 CRITICISMS OF THE QUALITY OF STAFF AND EQUIPMENT

Staff

16.1 As stated above, DB's principal fee earners, apart from himself, were Mr Ball, Mr Callard, and Mr Causley – though it appears that Julie Isaacs may also have done some revenue earning work.

16.2 In his third witness statement MG stated, at paragraph 101:-

> *"... the skills and competencies of the members of staff that I took over at completion were very limited. My brief comments on each of the members of staff who could do chargeable accounting work are as follows:*
>
> *a. Mr Ball could provide advice limited to taxation advice to sole traders, partnerships and individuals (i.e. not companies) only;*
>
> *b. Mr Callard had broader useful expertise, and, in addition to providing limited tax advice to sole traders, partnerships and individuals (i.e. not companies), he could prepare accounts for sole traders and partnerships. He was also able to quickly use the software programmes that we introduced, such as Digita;*
>
> *c. Despite his many years of service, Mr Causley's competencies were very limited indeed, but he could do payroll work for clients."*

16.3 He expanded on these comments later in the same statement, asserting that the poor quality of staff meant that almost in every case only he had the ability to address the problems which existed in relation to many clients' files. His comments on the staff referred to above included:-

16.3.1 *George Ball (Office Manager)*

Mr Ball had been working in Mr Beeny's practice for around 30 years and was responsible for the tax affairs of the Dartmouth Practice's clients. Mr Ball was very out of touch with current tax legislation and this presented a serious client risk. MG recalled one instance where a farmer client had had a particularly good year and was faced with a large tax bill. What Mr Ball did not know was that for a number of occupations where earnings can vary a lot from year to year, the tax legislation allows for the earnings to be averaged over a number of years. MG mentioned this to Mr Ball who gave the impression that he knew about averaging and I left it at that, presuming he would do the necessary. Months later, when the farmer had decided to use another accountant, MG looked at the farmer's accounts and tax file. MG saw that Mr Ball had left on the file pages he had downloaded from the internet explaining the averaging rules worked, but, unfortunately, he had

multiplied the sum of the profits for the years in question by the number of years, instead of dividing by the number of years. Additionally Mr Ball was unable to prepare the simplest of accounts. MG had asked him to prepare the accounts of a small Dartmouth café, but unfortunately, he had simply had no idea how to do them and MG had to finish them himself. Also Mr Ball was not computer literate and had trouble working with spreadsheets, which are the basic tool for accounts preparation.

16.3.3 *Roger Causley*

It was never clear what Mr Causley did during his 25+ years working for Mr Beeny. When MG asked DB about this, his response was *'Oh, you'll never get him to do anything!'* and that really proved to be the case. As far as MG could establish, he acted as bookkeeper for the Practice and did other tasks such as payroll for clients and the Practice. MG tried to get him to prepare accounts for a sole trader, but it soon became evident that he had very little idea how to do them and even less intention of so doing. He tried to do them using a nine column trial balance with pencil and paper. This method was used back in the 1970s and MG realised it was going to be a fruitless exercise trying to get him to produce accounts in which MG could place any trust.

16.4 Notwithstanding a degree of license usually acceptable, MG's criticisms do not fit entirely comfortably with the description of the same staff which were posted on MGAL's web-site:-

*"**George Ball – Dartmouth Office Manager***

George joined us from D J Beeny & Co where he had built up a wealth of accountancy and tax experience, with over 25 years with the firm. He has an extensive knowledge of all types of clients, ranging from individuals and sole traders to large trading enterprises. He is the first point of contact for technical matters at the Dartmouth office and is always available for meetings and advice for existing and new clients.

Dan Callard – Accounts Senior

Dan also joined us from D J Beeny where, during his over 25 years with the firm, he has become a very knowledgeable and experienced accountant. He deals with all client accounting and tax affairs ranging from individuals to the most complex trading concerns. His day to day contact

with clients and his extensive IT skills has made him a key member of the team.

Roger Causley – Account Senior

Another person who joined us from D J Beeny, Roger also brings a huge amount of experience gained from his 21 years plus service with the firm. He heads up the Business Bureau in the Dartmouth office, where he is responsible for Payroll, Bookkeeping, VAT and Management Accounting for a large range of our clients. He spends a lot of time out and about in the Dartmouth area visiting clients on a variety of assignments."

16.5 DB's evidence was that each member of his staff was fully qualified to carry out the tasks assigned to them, but MG assigned to them tasks for which they were not suitably qualified: DB was not aware of complaints about these members of the staff whilst they were working for him, or clients leaving.

16.6 His evidence concerning Mr Ball was that he was born, went to school and had lived in Dartmouth all his life: he was treasurer to the famous Dartmouth Regatta for many years, was involved with numerous societies and was well known in the town: he was very highly experienced, having worked in practice for over 40 years, his knowledge and tax experience was vast: he dealt with numerous HMRC enquiries into clients' affairs over his working life being successful in virtually all of them: he had been aware of the *"averaging"* principle since it was introduced, since he and DB had discussed how it affected their farming clients: the farming client to whom MG alluded was now a client of George Ball's: the problem referred to arose as a result of lack of training on the Digita software, in relation to which he required assistance: he asked MG for advice but he admitted he did not know how to deal with averaging entries on this software when preparing the tax computation, therefore Mr Ball was left on his own to try and prepare the computation and made a mistake: previously the calculation had been done manually and then entered onto the software which my firm used: Mr Ball had been preparing simple accounts for over 40 years and the clients were very satisfied with his work and advice: over that period he would have prepared over 1,000 sets of accounts for clients: MG was informed at the pre-completion meetings that Mr Ball was not all that computer literate: spreadsheets were not the only basic tool for accounts preparation: they were always prepared manually before spreadsheets were introduced.

16.7 In an email dated 15 March, Mr Ball, having been asked to comment on MG's criticisms of him, explained:-

> *"Sadly nothing surprises me where Ghersie is concerned. It was a mistake for me to remain in his employment, since he soon showed just what he was capable of both in leadership qualities and the running of the office, and I was very very relieved when he accepted my offer to leave at the end of July 2011. During the seven months I worked for him he had an uncanny knack of always being in the right and soon threw his toys out of the pram if challenged. Prior to his arrival I had had 46 happy years at that office, first with Bishop Fleming and then from 1982 with you. I worked my way up from tea boy to office manager with Bishop Fleming (a large firm of Chartered Accountants in the South West during the seventies and eighties) and would never have achieved that promotion with them had I displayed the shortcomings that Ghersie has accused me of. ..."*

16.8 In relation to Mr Callard, DB's evidence was that he (Mr Callard) was born, went to school and had lived in Dartmouth all his life. He was involved with various local clubs and societies: as to the comment that he was not able to prepare accounts for limited companies to DB identified 29 corporate clients whose accounts were dealt with by Mr Callard: he managed these clients and had prepared their accounts for many years, including the year to December 2010 and continued to prepare their accounts under MG's regime as there was no other employee at the Dartmouth office capable of that task.

16.9 Mr Causley, DB stated, was also born, went to school and had lived in Dartmouth for all his life. He was associated with various clubs and societies: he was occupied for the majority of the time compiling weekly or monthly payrolls for about 55 clients, preparing some clients' accounts, bookkeeping for clients and the Practice and preparing some clients' VAT returns: during negotiations he (DB) had explained to MG that his main task was the payroll of 55 clients. At the end of the tax year on 5 April 2011, MG transferred all of this work to an employee at the Torquay office. MG stated that Mr Causley never made much of a contribution to the earnings of the practice.

16.10 In his fourth witness statement MG stated:-

> *"As a result the lack of ability of Mr Beeny's staff, considerable MGAL management time was devoted to attempting to improve their performance, reviewing and correcting their work, undertaking work that they could not*

undertake themselves and – in due course – managing their exits from the firm and recruiting, where appropriate, replacements."

16.11 MG also made numerous criticisms of the standard of work carried out prior to Completion, including that performed by DB himself. These criticisms are considered below.

Equipment

16.12 In his third witness statement MG asserted that although the IT systems functioned to a degree, they were not adequate: it was not just the software that was inadequate – the computers and printers themselves were inadequate: particular problems were that the printers were old and functioned very unreliably, and that clients' data was stored insecurely and not backed up, and he regarded this as a real risk for clients and the business: the main server could not be and apparently never had been backed up – a major business risk of which he had not been made aware pre-completion.

16.13 These assertions were addressed and findings of fact were made in paragraphs 137 and 138 of the judgment on liability – this equipment was old but serviceable, and MG was aware of its age, and that the IT equipment was capable of being made secure and backed-up.

16.14 MG's evidence was that the Digita software, used by very many modern accountancy practices, streamlines the day-to-day work, especially the more routine work that an accountancy practice undertakes: the software includes personal tax software, accounts production software, corporation tax software, software that streamlines company secretarial work, practice management software: it assists with client work – the production of accounts and tax returns for example. MG's evidence was that the new Digita software was introduced to the Dartmouth Practice in January 2011.

16.15 DB's evidence which, was clearly hearsay based on information from his former employees, but which was not challenged, was that on Completion only Mr McDade from the Torquay office had the experience to provide the training for Dartmouth staff to use this software: Mr Callard was the only employee to be shown how to use this, probably because only one person could use the software at the time as initially the Dartmouth licence was for just one computer: he was given minimal training, about 3-4 hours as Mr McDade did not have the time to train him properly; in fact he had to learn to use this very complicated software by trial and error: Mr Callard was

expected to train other staff members to use this software as well as manage his increased client portfolio: MG could not help him as he had only limited experience of using this software: consequently there were numerous problems.

16.16 In his oral evidence MG stated that the Digita software was only being used effectively in 2012 when new staff had been recruited. In the light of that evidence and of the evidence of a licence for just one computer, and the lack of training for the Dartmouth staff, it is very unlikely that the introduction of the new software contributed significantly to the fee income of the Dartmouth Practice in the first year following Completion, and I find as a fact that it did not.

Conclusions

16.17 In the years prior to Completion the Dartmouth practice with the staff and equipment criticised by MG generated a turnover of the order of £220,000 p.a. In the year following Completion, with the same staff for much of the time, but with DB replaced by MG, and, as I have found, without any significant contribution from the new equipment, the Practice generated an income of the same order.

16.18 Although MG stated that Mr McDade was required to help in the Dartmouth Practice he did not state when this commenced. Mr McDade, with MG absent from the Torquay Practice, would have been key to its continuance at all, and hence I consider it to be unlikely that he devoted any significant time (apart from the training in the use of Digita referred to above) to the Dartmouth practice until Mr Callard was suspended from work in September 2011. At that stage, facing the busiest period leading up to the 31 January date for lodging tax returns, MG would have had no alternative but to direct resources from the smaller Torquay Practice – see MG's evidence quoted at paragraph 22.3 below. Since Mr McDade's input would not (and in my judgment did not) commence until sometime in September 2011, the fee income for the year to 30 November 2011 is likely to be attributable to the efforts of the inherited staff and MG himself. My conclusion in relation to the date when Mr McDade's contribution to the Dartmouth Practice commenced is consistent with the fact that his name did not feature in the March 2014 schedule. Further, from that schedule it can be seen that time sheets were kept by or for each of the fee earners, recording the work on which they were engaged. Had it been demonstrable that Mr McDade was engaged in supporting the Dartmouth Practice in 2011 I would have expected his time sheets to be in evidence. They were not.

16.19 The attrition in the fee income of the Dartmouth Practice for the year to 30 November 2012 cannot realistically be attributed to the quality of *"inherited"* personnel, because the only one left during that period was Mr Causely, and he left in June 2012.

16.20 DB's management of his practice may not have been the most lean and efficient, and may not have kept up with the times in all respects, but it functioned reasonably satisfactorily prior to Completion. Similarly, although his staff may not have been highly qualified or of the highest calibre, they had the ability required for the nature of the work which each of them undertook. This is evident from the results of the practice pre-Completion, and from the fee income in the first year following Completion. Whilst accepting that MG may have wished to have the services of better qualified and more versatile staff, I consider that, objectively, his criticisms of the staff inherited from DB are not justified.

16.21 No attempt was made to quantify the amount of MGAL management time allegedly called upon because of alleged inadequacies of the staff – see paragraph 16.10 above. In fact in the February 2014 schedule there is only one reference to training – 4.5 hours Digita training provided by Sam Parkes to Mr Causley – and to one meeting of 1.5 hours between MG and Mr Causley over problems due to the latter's inability to do simple accounts.

17.0 HANDOVER

17.1 MG complained that DB had failed to introduce him to clients and failed to spend time explaining clients' files. He stated that DB breached his obligation under the SPA to work alongside MG for a minimum of 7 hours per week for the period of 3 months after Completion, as DB left for New Zealand on 4 February 2011 and only returned on 23 March 2011.

17.2 The complaint about DB being absent in New Zealand is without substance. The period of 3 months only extended to 7 March 2011. MG's own notes show that DB told him on 5 August 2010 that he was going to New Zealand in February 2011 to attend his son's wedding. The relevant provision of the SPA, clause 26.1, is set out at paragraph 1.8 above. As can be seen, DB's obligation was to make himself available *"as requested"*.

17.3 Further, this complaint was addressed in paragraphs 154 to 166 of my judgment on liability, and resolved against MGAL:-

> *"166. So far as clause 26 of the Agreement is concerned, again in my judgment it was necessary for Mr Beeny to be given notice if and when Mr Ghersie wished to meet Mr Beeny or otherwise wished Mr Beeny to make himself available for the purposes of handover. Although both Mr and Mrs Ghersie make general allegations of Mr Beeny not being available or not answering requests, I was not directed to any evidence of any specific requests, either to meet or provide information, which it is alleged Mr Beeny failed to comply with. Mr Beeny's unavailability for the entire 3 months after Completion would have been a breach of clause 26.1 of the Agreement, but I accept Mr Beeny's evidence that he informed Mr Ghersie of his intended trip abroad and that Mr Ghersie did not then raise any objection. Consequently, there was a consensual variation of the Agreement or a waiver of the breach of clause 26.1. In my judgment, therefore, the claim for breach of clause 26.1 is not established."*

17.4 In his third witness statement, MG also accused DB of going out of his way to ensure that a proper handover did not happen. He referred to DB having made *"extreme efforts"* to sabotage MG's efforts to make a success of the Dartmouth Practice.

17.5 He referred to difficulties he was having in respect of directors' loans in the accounts of a client called Valeport Ltd. In respect of the loans, Mr Callard stated to DB in an email of 31st August 2011, *"I'm going to keep my head down. I can see it being a right balls-up. I wasn't aware of them and don't see how I can suddenly just mention them"*: in reply in an email dated 1st September 2011, DB actually expressed amusement in the hope that MG would not find out about how they had been accounted for and would therefore make errors in their accounts, stating *"You are quite right about Valeport's loans but it would be interesting to know if he has picked this up"*: this showed that both DB, the seller who had been contractually required to effect a good hand-over, and Mr Callard, who was an employee of MGAL's to whom of course he owed a duty of care, were making MG's life, MGAL's relationships with its clients, and MGAL's existence, as difficult as possible: at any point, Mr Callard could simply have helped, and DB could simply have told Mr Callard not to be so obstructive and disruptive: instead, they colluded (using Mr Callard's personal email account) to cause as much harm as possible: DB did everything he could to make MGAL's running of his old practice fail.

17.7 MG also complained of lack of co-operation in respect of the accounts of the Dartmouth Trust, pointing to the fact that Mr Callard and DB were aware of the fact that he was having difficulties over the accounts but that they failed to step in and assist. In relation to another, client, Juste Moi, MG complained that DB failed to inform him that he, DB, had completed the accounts, and that in an email to Mr Callard he had asked for the email addresses of two of its personnel. DB endeavoured to scuttle his relationship with clients.

17.8 The complaints referred to in the last paragraph are addressed in the Appendix to this judgment. The problems which MG encountered in relation to Valeport Ltd appear to have commenced about the end of August 2011, those relating to Dartmouth Trust occurred in November 2011, by which time Mr Callard had been suspended, and DB's request for the email addresses of Juste Moi's personnel was made in an email dated 14 September 2011. MG did complain to the ICAEW of a limited number of specific requests for assistance which DB declined to provide, but I was not directed to any finding by the ICAEW upholding those allegations, it is to be remembered that MGAL not only withheld all payments (which should have commenced in June 2011) under the SPA, but also under the lease (until advised of the risk of forfeiture). It would have been entirely unrealistic in those circumstances and after MGAL's solicitors' letter of July 2011 (which was received on 17 August 2011), to expect any voluntary assistance from DB.

17.9 It was obviously not in DB's interest to sabotage the Dartmouth Practice post Completion, since he required its continuance to quantify the consideration for and secure payment under, the SPA, and I am satisfied that he did not. Nevertheless, I am also satisfied that, goaded by MGAL's refusal to pay anything due under the SPA and the Lease and the letter of claim from MGAL's solicitors, which he received on 17 August 2011, he did not volunteer help to MGAL when he was aware of difficulties with which he could have assisted. However, the evidence only establishes that it occurred in the cases of Valeport and Dartmouth Trust, and DB was not under any obligation to volunteer assistance. After 7 March 2011 his only positive obligation, except in the case of the provision of consultancy, was under clause 26.2 of the SPA – see paragraph 1.8 above. There is no evidence that DB's assistance was requested in the case of either the Valeport or the Dartmouth Trust.

17.10 Mr Callard plainly acted disloyally on occasions. It seems that this was not known to MG until the disclosure of documents in these proceedings, so this disloyalty cannot have featured in the disciplinary proceedings concerning him. Further the loss of the

business of Valeport and Dartmouth Trust was not the result of any inactivity on the part of DB or disloyalty on the party of Mr Callard, and was not a direct consequence of MGAL entering into the SPA on the basis of misrepresentation.

17.11 MG also asserted that DB refused to hand over client records and working files, particularly those of the clients he serviced himself, and would not let him have the password for him to gain access to DB's PC on which he kept the client information for his own clients: DB never provided this though requested to do so: DB then stole this PC further ensuring that MG could not get access to this information: a complaint was made to the police: this made looking after these clients (the bigger clients of the practice) and preparing accounts for them extremely difficult to say the least.

17.12 DB's response was that no password was required to access his computer: he had explained to MG that the old computer only held time records in which MG said he was not interested and DB's fees ledger: there was a password to access the payroll program on the computer which was private information relating to the office salaries and to Valeport's payroll: as a number of Valeport's senior staff lived in Dartmouth he gave an undertaking to the directors' that he would prepare the monthly payroll and ensure the details were not made available to his staff.

17.13 It appears that DB did take the computer but the police took no action on it. It is not established that this fact or the failure to provide the password to access the confidential information did genuinely create additional work for MG/MGAL – if, indeed, that is what MG was alleging. No attempt was made to establish whether or not there was on the computer anything which would have been of value to MG which he was unable to access.

18.0 CORRECTING ERRORS

18.1 In his witness statements MG made a complaint that the general standard of the work done at the Dartmouth practice, including the working paper files, was poor and of specific errors in the work of either DB himself or his staff. Additionally, the March 2014 schedule identified work which required his attention and consumed his time because it was erroneous or for some other reason. MG complained that considerable time was spent managing client complaints about poor service: he received considerable complaints about the poor and often tardy level of service that clients had received from DB: this was not surprising given the large number of accounts and tax returns that were simply wrong and the absence of and/or poor quality of working papers and a proper audit trail for client files.

18.2 The general criticisms advanced in his evidence were of the absence of:-

18.2.1 Lead schedules or copies of information supplied by clients;

18.2.2 Bank reconciliations;

18.2.3 Reconciliation of closing and starting balances;

18.2.4 Notes and evidence to prove the accounts;

18.2.5 Evidence that DB ever looked at accounts prepared by others before signing them off.

18.3 DB challenged all these allegations. Their validity would have been best assessed by a detailed examination of the relevant documents by experts. As it is, that was not done, but instead MG gave evidence of particular cases apparently intended to illustrate the validity of his broad attack. These examples are addressed in the Appendix to this judgment and in paragraph 18.6 below. The level of income achieved in the first year after Completion is inconsistent with the allegation that the staff were devoting a lot of time to correcting errors for which no fees could be charged. My conclusion is that MG's allegations about the general standard of work in the Dartmouth Practice prior to Completion are not made out, and whilst, in the nature of things, there would have been errors which needed to be addressed by MGAL it has not been demonstrated that the errors were widespread. On the evidence, MG's general criticisms are simply not substantiated.

18.4 For the avoidance of doubt, I am quite satisfied that there was not a culture of dishonesty within the Dartmouth Practice prior to Completion. The fact that Ms Isaac drew MG's attention to the offending letter on the Tozer file is inconsistent with the existence of such a culture. That episode, in which DB contemplated dishonestly covering up a negligent omission was not carried through, and his preparation of accounts for Mr Lowe when Reliamatics was a *"transferring client"* under the SPA was improper, but the evidence does not support any conclusions other than that these were isolated incidents.

18.5 In July/August 2010 the Dartmouth Practice was subject to a routine two-day inspection on behalf of the ICAEW: this inspection, which was carried out over two days, involved an examination of the practices and systems and of a sample of clients' working papers and files, both for audits and other clients, and the inspector raised no queries. The report, which was in evidence, included some criticisms but concluded that the audit work was of an appropriate standard for the size and types of audit undertaken, and that the firm had generally followed the Practice Assurance

Standards. There was a criticism that, although the firm was not engaged in the provision of exempt regulated activities, there was still a requirement of the Designated Professional Handbook to carry out an annual compliance review and that this had not been done. Nevertheless, it seems to me that this report is supportive of the broad conclusions which are expressed in paragraphs 18.3 and 18.4 above.

18.6 The specific criticisms advanced by MG are set out and addressed in the Appendix to this judgment. My findings may be summarised as follows:-

18.6.1 Incorrect filing of P35s:

MG asserted that significant management input was required because Mr Causley, who had been responsible for the filing of P35's on behalf of clients of DJB had failed to do so in numerous occasions. This allegation was not substantiated.

18.6.2 Mr Tozer:

MG's evidence was that getting to the bottom of it and informing insurers took up 15 hours of his time. This is a matter which undoubtedly would have absorbed some of MG's time.

18.6.3 Standard of Work:

MG's assertion that *"even such rudimentary a practice as reconciling the bank accounts was not often carried out"*. This was not substantiated.

18.6.4 Culture of Dishonesty:

MG alleged that when told by MGAL that it would not falsify accounts a number of clients took their business elsewhere. This allegation was not substantiated. No single example was proved.

18.6.5 Unsigned Tax Returns:

MG referred to a schedule prepared by Ms Isaac purportedly showing a list of 20 clients whose tax returns DB had filed on 31 January 2011 without the client seeing, agreeing or authorising him to file them. This allegation was not substantiated.

18.6.6 Atlantic Torbay Ltd:

This file was referred to as an example of unsatisfactory work by DB. It was not substantiated.

18.6.7 Dartmouth Trust:

This client was also referred to as an example of an error by DB, of his refusal to hand over audit working papers, and of inadequate *"handover"*, and MG alleged that as a result it absorbed an enormous amount of his time. The alleged error was not substantiated. DB did refuse to give MG

the audit working papers, as he was exercising a *"lien"* over them. Otherwise DB was not in breach of the handover provisions of the SPA. MGAL lost this client through its dissatisfaction with MGAL.

18.6.8 Dartmouth United Charities:

MG asserted that this was also a job which took far longer than it should have done, because DB had failed to keep proper records and an audit trail of the previous year's accounts. He also asserted that this would not have taken up a vast amount of time if DB *"had bothered to do a proper handover"*. This complaint was not substantiated. MGAL lost this client through its dissatisfaction with MGAL.

18.6.9 Juste Moi of Dartmouth:

This was a complaint of delay and errors on the part of DB leading to the loss of the client. The client was lost, it seems, but on the evidence, it was not established that this was due to any act or omission on the part of DB.

18.6.10 Scope Communications Ltd:

MG complained of errors in management accounts, and that this involved corrective work of 3.5 hours for which he could not charge, and of DB's failure to leave any notes to explain certain *"accruals"* which resulted in the absorption of a further 21 hours of his time. DB accepted the error in relation to the management accounts, but otherwise the allegation was not proved. MGAL lost this client because of its dissatisfaction with MGAL.

18.6.11 Boxout Ltd.

This work, in preparing discounting reconciliations, was done by DB and was done poorly and late.

18.6.12 APECC Holdings Ltd.

This is in effect a claim for DB to account for monies allegedly due to MGAL. It is not relevant to the current issues.

18.6.13 Valeport:

MG complained that DB had failed to inform him that Valeport had made a small companies election, and of errors in accounts audited by DB. DB was not in breach of the handover provision. The alleged errors were not substantiated.

18.6.14 Dartmouth and District Guides, Creekside Boatyard, D. Green:

MG complained of errors made, and erroneous advice given, by DB. These allegations were not addressed by DB. If correct they would have generated extra work for MG, but it was not suggested that any client was lost as a result.

18.6.15 Apportionment:

MG alleged that Mr Causley spent two weeks doing *"apportionments"* for DB. It is not clear what these were. On the evidence, this allegation was not substantiated.

19.0 EXCESSIVE STAFF NUMBERS

19.1 This complaint is addressed in paragraph 17.13.2 above. Clearly any staff overhead would affect profits, but in the first year after Completion the Dartmouth Practice made a substantial profit in spite of the fact that salaries (for some reason which MG did not explain) increased by £25,000). Plainly management time would be involved in effecting redundancies, but MG was likely to have been effecting redundancies in any practice which he took over, and there is nothing to suggest that the three redundancies which were effected in March 2011 were anything other than entirely straightforward.

20.0 UNANTICIPATED COSTS

Wages and Benefits

20.1 MG asserted that certain of the employees had significant benefits which DB had simply not disclosed before Completion and which carried both a heavy cost for the business and made the business less able to service its clients properly.

20.1.1 George Ball had 20 weeks holiday a year when DB warranted that he had 10 weeks holiday: he had an informal agreement with DB whereby he could apparently take unlimited time off to 'baby-sit' his grandchildren: he usually took long periods of time off during the Summer: when asked about this DB said that there was an agreement whereby Mr Ball would be back around October each year to begin preparing tax returns.

20.1.2 DB told him at a meeting on 19th August 2010 and in the SPA and that his agreement with Mr Callard was that he would pay Mr Callard a bonus of 30% of profits made on client work he carried out at home and that this equated to a bonus on top of his salary of roughly 30% of the stated salary for Mr Callard: Mr Callard told MG that this bonus actually amounted to 40% of his basic salary and MG paid him this so he would not receive less from MGAL than he had received from DB. However, in fact that was incorrect – the bonus only amounted to 30% and DB admitted to this in the letter of 18 August 2011.

20.1.3 In the letter referred to above, DB admitted the inaccuracy of the Second Schedule in respect of the amount of holiday taken by Mr Ball it being 14 weeks rather than 10, and he admitted that Mr Callard's percentage bonus was 40% rather than the 30% specified. In his evidence at the present

hearing DB stated that Mr Callard's bonus (in lieu of overtime) was a percentage of profits earned on work done at home, and not of basic salary. Mr Ball's holidays depended upon the amount of overtime which he worked in December, January, and were in lieu of pay for overtime.

20.1.4 It appears that MG did not contact DB before agreeing to pay Mr Callard the additional bonus. It is not clear that the overstatement of Mr Ball's holiday entitlement had any practical effect, since he resigned from MGAL in May 2011.

20.1.5 Any increase in salaries would affect profitability, and though it must have occupied some management time (and these might well have been issues which would have arisen if he had purchased another practice) MG did not suggest that the discrepancies referred to above engaged an untoward amount of such time.

20.1.6 DB did not challenge the evidence as to the flexibility of working enjoyed by Mr Ball. It seems likely to me that if MGAL had acquired another practice in South Devon similar instances of flexible working would have been encountered.

20.2 In his third witness statement MG asserted:-

> *"126. Employee wages had been grossly understated in the SPA. I would refer the Court to the extract of the Profit & Loss Account in the Seventh Schedule to the SPA which states that for the 2009/2010 year, the wages were £106,417. In my revised overheads, ... I had budgeted that the wages bill for the Dartmouth staff I wished to retain would be £60,971. However, despite the fact that George Ball chose to retire in May 2011 (I had included him in my budget for the whole year, therefore a saving of £11,568 to my budget) the actual wages between December 2010 and November 2011 for the Dartmouth staff amounted to some £105,199. The only explanation for this is that the wages shown in Mr Beeny's abbreviated accounts must have been materially understated, by about £24,000, even allowing for the costs of redundancy for the Dartmouth staff of £9,527.00 plus legal costs of £5,200.00."*

20.3 As appears from paragraph 14 9 above the salaries for the year ended 30 November 2011 amounted to £120,179, and not £105,199 as stated by MG. He must know how that overhead was made up. In fact it is possible that the explanation is to be found

earlier in that statement, at paragraphs 105 and 106, in which he asserted that there had been additional salary costs in respect of Mr Callard and Mr Ball amounting to £12,598, and overtime worked prior to Completion but not paid, amounting to £482.92, and monies claimed in lieu of holidays due prior to Completion in the sum of £8,099, a total of £21,119.92. The amounts claimed by staff as having been due from DB was paid by MGAL *"to avoid bad feelings so early on"*.

20.4 DB denied that at Completion money was due to staff and produced emails (sent in 2015) from Mr Callard to support the assertion that MGAL did not in fact make these payments. It appears that MG did not query with DB the claims which he says were made by the staff. The resolution of these issues would require a detailed examination of the relevant documentation and/or the provision of expert evidence but the court did not benefit from either. Importantly, however, MG did not suggest that these matters absorbed any significant amount of management time or, not surprisingly, gave rise to the loss of clients or turnover.

Work for Charities

20.5 In the judgment on liability I found:-

> *"146. The allegation is that Mr Beeny failed to disclose that there was significant work which he carried out for Charity and Public Bodies undertaken at "undercosted fees". In his witness statement Mr Ghersie referred in particular to Dartmouth United Charities and Dartmouth Trust, asserting that the client code (2020) would signify a "normal" fee-paying client, and that the fee of £2,390 in Mr Beeny's substituted list would not normally cover the planning stage of the audit of a Trust this size, having, as it did, property assets of more than £13M. The complaint, therefore, is that the fees generally paid by these clients were insufficient for the amount of work involved. I accept this evidence – a fee of £2,390 in relation to an organisation with assets of such scale does appear to me to be on the low side."*

20.6 At the present hearing, MG reiterated his complaint about Dartmouth Trust, stating that he was only able to raise an invoice of £2,500 in respect of the 120 hours which it took to complete the accounts – a rate of £21 per hour.

20.7 DB, in spite of the finding in the judgment on liability, continued to assert that he had not worked for this charity for a discounted rate, and asserted that the accountants,

(Bishop Fleming) now appointed by it charged £30,000 for the same work in the year to 30 September 2013.

20.8 MG made the same complaint in relation to the accounts and audit of Dartmouth United Charities. He asserted that he spent over 75 hours on this work for a fee of £1,805, which equated to £24 per hour. He stated that he informed the Charity's administrator, that he was not willing to do this work again for these extremely low fees.

20.9 DB's response was that MG spent so long on the audit because of his lack of experience in preparing accounts and auditing: he referred to the fact that Bishop Fleming, who succeeded MGAL as the charity's auditors, charged £3,675 for the year ended 30 April 2013, and to an email from the administrator of both the Dartmouth Charities, in which she stated that she *"tore (her) hair out with MG and his team"*.

20.10 My previous finding is binding on the court as well as on the parties. The fees charged by DB to the charities were slightly on the low side. The effect of this would be to result in a marginally reduced turnover, nothing more – it would not, for example, result in time or resources being diverted from the Torquay Practice. The fact that the audit took as long as MG asserted is addressed in the Appendix.

21.0 MISCONDUCT

Mr Tozer

21.1 This matter was addressed in paragraph 28 of the judgment on liability and at paragraph 18.4 above.

Reliamatics

21.2 This matter is addressed in Section 12.0 above. The client was lost to MGAL because it was in debt to MGAL and, as MG stated in his evidence, MGAL would not have been prepared to carry out any further work for the client unless the debt was discharged.

22. THE PERFORMANCE OF MGAL

22.1 In his fourth witness statement DB asserted:-

> *"27. The main reason why the actual profit figures were lower than those set out in his forecast submitted to the bank in order to obtain finance for the purchase of my business is that numerous clients, following my departure, Mr Ball's departure (the office manager) in July 2011 and*

Mr Callard's departure (the senior accounts clerk) in November 2011, realised Mr Ghersie and the replacement staff were of a lower calibre than me and my staff and consequentially they left the practice. Mr Ghersie and the replacement staff had no personal knowledge of the clients which we had built up over a number of years and they did not continue to receive the service they had previously enjoyed; despite being told in a circular they would receive a more comprehensive one. At completion, in December 2010 I had approximately 280 clients generating recurring fee income of about £225,000. 24 months later in December 2012 only 81 (29%) of those 280 remained. Therefore about 200 (71%) clients had left the practice. The fee income generated from those 81 remaining clients was approximately £60,000 a reduction in fee income of about £165,000 (73%). The list of remaining clients was provided by Mr Ghersie and is at pages 104 to 105 of DB7."

22.2 MG, in his fourth witness statement, responded:-

"64. Whilst it is true that the Dartmouth office lost a considerable number of clients (and far more than would expected or usual in the acquisition of an accountancy practice of this nature), under my management the practice generated many new ones to achieve (in 2012) a GRF of nearly £150,000, of which only £60,000 (see DB7, pages 104 and 105) was from clients inherited from Mr Beeny.

65. Many of the clients who left did so because of poor service received from Mr Beeny whilst he ran the practice. Others were lost because Mr Beeny failed (Notwithstanding his obligations in the Sale and Purchase Agreement) to effect a proper handover, including in respect of clients he had serviced personally and without the involvement of his employees. He instead preferred to take a seven week holiday in New Zealand in February and March 2011. This inevitably had an adverse effect on the quality of service that we could offer, causing more clients to leave.

66. I categorically reject the claim that clients were lost because (as asserted by Mr Beeny) "Mr Ghersie and the replacement staff were of a lower calibre than me and my staff" (Beeny 4, paragraph 27). My

current team is significantly more highly qualified than the staff I inherited from Mr Beeny. ..."

22.3 MG's own evidence (in his third witness statement) was that things became particularly difficult in December 2011 and January 2012 when MGAL staff were preparing the accounts and tax returns for the 31 January 2012 tax return filing deadline:

"*154. ... By then there was no ex-Beeny staff capable of doing this work ... Dan Callard had been dismissed. ... Mrs Isaacs had resigned ... George Ball had retired ... In short, MGAL was 'up against it'. From the previous Beeny staff of four accountants and five support staff, all of whom had known the Dartmouth clients for over 20 years, the MGAL team was covering this with just one newly hired accountant. Work was taken home by MGAL staff over the Christmas holiday and fortunately the Torquay practice was sufficiently ahead of the 31 January filing deadline that Dartmouth clients were transferred to be worked on by the MGAL staff in the Torquay office. There were late filings of tax returns and inevitably mistakes were made.*

155. Unfortunately, all this caused ill feeling with some ex-Beeny clients and in a small community such as Dartmouth, MGAL soon became known as unhelpful. With all the other negative staff-related problems, MGAL was soon labelled as the bad guys in town. ...

168. Losing Dan Callard was hugely detrimental to the Dartmouth Practice. Firstly, despite the issues with his integrity, he was hardworking and very capable at producing accounts for sole traders and partnerships. I had told him that he was pivotal, and this was especially so after the retirement of George Ball in July 2011 (and in view of the fact that Roger Causley could not produce any accounts). We particularly noticed his absence in December 2011 and January 2012, when we were really up against it in terms of workload. In late 2011 and early 2012 we were really under pressure and I have to admit that our service at that time, after Mr Callard went in November 2011, was below the standard that I would hope for because we lacked the staff. This had a great effect on our level of complaints.

169. Secondly, Mr Callard had acted for numerous clients in the Dartmouth area for up to 28 years and was very well-known by the local community, as he was active socially and involved himself with the local rugby and cricket clubs. For obvious reasons, Mr Callard was very unhappy with us when he left and this did our reputation in the local area no good at all.

170. Thirdly, when he ceased to be an employee of the Dartmouth practice, he set up on his own account. We lost a great deal of business as a result of this, ... We lost most of these clients after January 2012, after Mr Callard's departure and, in each case, he had been the person who had undertaken the work for each of the departing clients. Normally, when a client leaves, the old accountant receives a clearance letter from the new accountant requesting the transfer of documents to the new accountant. At the end of 2011 and beginning of 2012, in respect of a large number of clients to whom Mr Callard had provided services, the clients themselves came in and asked for a copy of their last accounts and tax return. It is quite unusual for clients to do this themselves, and it indicated to me that they were doing to instruct Mr Callard.

171. The loss of clients from the business at the approximate time of Mr Callard's departure amounted to an immediate further drop of turnover in the approximate amount of £40,000."

22.4 In his fifth witness statement, DB drew attention to a number of emails from former clients (whose accounts represented a substantial percentage of the turnover of the Dartmouth Practice) responding to his enquiry as to their reasons for having taken their business away from MGAL:-

22.4.1 Mr Quartley of Valeport, in an email dated 15 November 2011, identified multiple errors by MG as reasons for terminating MGAL's retainer – which it did on or about that date.

22.4.2 Simon Fidler of Scope, in an email dated 3 July 2012, gave the reasons for changing accountants as blunders relating to the preparation of the payroll, poor customer care and management reports repeatedly late (by many months).

22.4.3 Laura Ivey, a Chartered Accountant, and the administrator of Dartmouth Trust and Dartmouth United Charities, in an email dated 5 March 2015, referred to *"tearing her hair out"* at MG and his team.

22.4.4 Ian Mr Ghee of Woodgate and McGhee, in an email dated 31 May 2013, stated that the reasons for leaving MGAL were that the service was very poor, late filing fees were incurred for not filing tax returns on time, and the fees almost tripling – *"the service had gone from friendly faced staff ... to people that did not have a clue who we were"*.

22.4.5 Bob Seymour in an email dated 16 January 2015 stated that they left MGAL in August 2013 as they had become increasingly dissatisfied with everything MG did for them.

22..4.6 Old Market Café:

The proprietors, in an email dated June 2013, stated that they had remained with MGAL for about 6/9 months after they took over: they had been customers of DB for about 7 years, during which everything was dealt with in a totally professional way, deadlines ALWAYS met: they never had complaints and were never fined by HMRC for late payment or anything else: during that time with MGAL they had numerous issues with late payments and on a few occasions had fines imposed by the revenue: on each occasion the blame was put at their feet and MGAL accepted no responsibility for anything: MGAL were not very good at their job: MGAL eventually paid the fines, but only after letters and heated meetings/phone calls they were happy to leave MGAL.

22.4.7 W.G. Pillar and Co:

Two of the partners in a letter, apparently emailed, dated 4 June 2013 explained that they had left MGAL due to errors in their tax bills and an increase in the accountancy charges.

22.5 Christine Watkins on 19 January 2015 emailed:-

"In reply to your email, when we first approached them, after you sold we were apprehensive, as we felt very comfortable with the relationship we had always enjoyed with your office staff and indeed yourself. Unfortunately, we proved to be correct in our thoughts, quite quickly, whilst the members of staff that MG inherited were there and they tried really hard to hold it together and we did not engage with any new people in the office. Then after quite a short period of time it fell apart ... Our set up is not that complicated and we continued with them whilst several other people handled our account ... not once were we contacted to say sorry ...

so and so ... has left (or been pushed) now ... so and so ... will be handling your account, all this left us with a bitter taste for Michael Ghersie and I personally still felt the same after we eventually met him and to this day ... we have found certain confidence with just two members of his staff, we are currently still clients of that office."

22.6 Other clients also complained of increased levels of fees charged by MGAL.

22.7 Mr Blackmore, in his closing submissions, challenged DB's assessment of MGAL's loss of clients and of turnover:-

"93. DB asserts that MGAL lost over 220 clients due to MG's mismanagement. This appears to be based upon MGAL having had 307 transferring clients at completion, of whom (according to DB) 81 remained at 6 December 2012. This is highly misleading: ...

94. ... the Practice never had 307 transferring clients. Of the 307 clients, approximately 86 never transferred to MGAL or were lost for reasons unconnected with MGAL. Assuming client 'churn' of between 10 and 15% in the year after completion, MGAL would therefore have retained approximately 190 to 200 of the transferring clients. From this must be subtracted the clients lost to Mr Ball and Mr Callard, leaving approximately 120 to 130 clients. This leaves a loss of between 40 and 50 clients that might possibly (but not necessarily) have left for reasons connected to MGAL, a magnitude of times smaller than that suggested by DB."

22.8 The figure of 81 referred to by DB was derived from a list of remaining clients (as at 7 December 2012) provided by MGAL's solicitors in a letter dated 7 June 2013. In his oral evidence MG stated that this list was incomplete, but did not provide the names of clients alleged to be missed off the list. I accept that list as being accurate. I do not accept that the loss of clients following the departure of Mr Ball and Mr Callard can be treated as being *"for reasons not connected with MGAL"*. Mr Callard's departure was the result of MG's unnecessarily robust response to "the Reliamatics saga". The email from Mr Ball referred to in paragraph 16.7 gives the clear impression that Mr Ball would not have offered to leave had he been treated differently by MG – although the reason for him wanting to leave, according to MG, was that he needed to provide more assistance in caring for his grandchildren, this was something he had been able to do pre-Completion without causing any problems

under his flexible arrangements with DB, and there was no suggestion that the needs of his grandchildren had increased.

22.9 In the presentation which MG produced, pre-Completion, in order to obtain finance, he noted, as one of the potential *"threats"* to success following the proposed acquisition of the Dartmouth Practice:-

> *"**staff** There is the possibility that DJB staff could decide to leave after the merger. This is considered to be unlikely as there is very little employment for accounting staff in the area (very few accountancy firms in the area) and neither of the 2 accounts staff to be retained can drive. They have also been with DJB for over 25 years, so the prospect of working in a new environment is probably not attractive.*
>
> *If staff did leave, experience shows it would not be difficult to replace them locally with better qualified accountants."*

22.10 It may be fairly commented that this reflected a somewhat complacent attitude to the retention of staff, and a failure to appreciate, when taking over a business, the extent to which goodwill may attach to the existing staff, and of the importance of providing *"glue"* to retain them. In my judgment the departure of Mr Ball as well as of Mr Callard was due to a failure of management, and even if MG`s management was not at fault, neither was the direct result of DB's misrepresentation as to the GRF of the Dartmouth Practice or of MGAL`s having acquired the business in reliance upon that misrepresentation.

22.11 In any event, the precise number of clients lost is less significant than the turnover lost. Based on the figures provided by MGAL's solicitors (see paragraph 22.8 above) by December 2012 the turnover from clients inherited from DB was down to £60,000. I have found (see paragraph 15.4 above) that the turnover during the first year after Completion was £216,150. The loss of 72 per cent of turnover in the space of just over 18 months is remarkable.

22.12 MG took issue with some of Mr Quartley's criticisms of the services provided by MGAL and with some but not all of the criticisms from other clients, and time and the evidence before the court were insufficient to enable the court to resolve these issues. However, whether or not MG and MGAL made the errors alleged, it is clear that MG's management of the clients was not up to the task, since they remained convinced of their position and took their business way.

22.13 As can be seen, on MG's own admission MGAL provided a poor service at times after Mr Ball, Ms Isaac, and Mr Callard had left. Additionally, there is clear evidence that at least some clients were discomforted by errors which they believed were made by MGAL and also by fees which MGAL charged, Additionally, MG`s policy was to invoice clients as soon as a piece of work was completed, whereas DB`s policy was to invoice clients once a year, and this change may not have been welcome to the inherited clients. These are factors to be taken into account when assessing the responsibility for the loss of turnover and the degree of abnormality, if any, of the Dartmouth Practice prior to Completion.

23.0 LOSS OF TURNOVER AND THE DARTMOUTH PRACTICE

MG's Case

23.1 MG, in his third witness statement, asserted that the turnovers of both the Dartmouth Practice and the Torquay Practice *"were devastated"* by his having purchased the Dartmouth Practice and then *"having to cope with all the problems that came with it"*.

23.2 MG's evidence was that after he had taken over the Dartmouth Practice he found that the GRF had been grossly overstated, and it had numerous serious problems: it was disorganised, chaotic, chronically unprofitable and had no value: he had had to divert time and resources from the Torquay Practice, which suffered as a result: none of the businesses he had purchased over the years had anything like the range of problems that the Dartmouth Practice had: no similar business which he would have purchased would have had the range of problems and required the diversion of time and money which the Dartmouth Practice did. He also stated that the loss of turnover was due to the poor service they had received from DB prior to Completion, and DB`s failure to effect a proper handover. He did recognise that the loss of DB`s staff contributed to the problem. However, he did not consider this to be something which should affect MGAL's claim against DB.

23.3 In fact, the turnover of the Dartmouth Practice was only *"devastated"* following the end of the first year after Completion.

23.4 As can be seen, the suggested causes of the fall in turnover which have been canvassed appear to be:-

23.4.1 The departure of DB's staff.

23.4.2 Inadequate staff and equipment.

23.4.3 Errors and poor service to clients prior to Completion.

23.4.4 An ineffective handover.

23.4.5 Misconduct

23.5 It is not clear whether MGAL also alleged that overstated fee income, excessive staff numbers, and unanticipated costs were in some way causative of the fall in turnover, but I am satisfied and find as a fact that none of them were. Obviously these would all be capable of impacting on profits and cash flow, but not on turnover, there being no reason why any of them should have caused clients to take their business away. Of course, a shortage of funds could prevent the recruitment of extra staff, but that was not something which MG ever intended to do and in my judgment was unnecessary.

23.6 MG's criticisms of the staff whom MGAL inherited are addressed in Section 16 above. My conclusion was that they had the ability required for the nature of the work which they undertook. I do not consider that the loss of turnover was attributable to the inadequacies of those staff. It was common ground that their **leaving** was causative of the fall in turnover.

23.7 The criticisms of the equipment which MGAL inherited are also addressed in Section 16 above. I do not consider that the nature of the equipment contributed to the fall in turnover.

23.8 It appears to me that the handover following Completion was not as effective as it might have been, but I consider that the fault for that lies with MG, who in fact failed to request the help to which he was entitled. It is not clear why he did not do this. It may have been because of a reluctance to ask for help from anyone. In any event, I am satisfied that any impact on the Dartmouth Practice arising from the limited nature of the handover was not a direct result of the misrepresentation but the result of MG failing to operate the handover provisions in the SPA.

23.9 In my judgment, as explained in Section 18 above, MG has not established that errors inherited with the Dartmouth Practice lead to the loss of more than one or two clients, if any, and hence does not account for the fall in turnover following the end of the first year after Completion.

23.10 According to DB, Mr Tozer did part from MGAL, and hence the income from that account was lost. The Reliamatics affair lead to the departure of Mr Callard, and this plainly had a dramatic impact upon turnover. However, as I have already found, the

loss of Mr Callard and the consequent attrition of turnover was due to MG's management of the whole situation and was not a direct result of DB's misrepresentation of the GRF of the Dartmouth Practice.

23.11 It is clear that the dramatic fall in turnover only occurred in the second year after Completion, when, as appears from Section 22 above, only Mr Causley of the inherited staff was still in post (and then only until 12 June 2012). MG admitted, in paragraph 168 of his third witness statement, that MGAL at times provided a poor service, and made mistakes and that accounts were filed late. Clearly, once Mr Callard had left, MGAL lost clients through a combination of the fact that the new staff did not have any established connection with clients, through errors and poor service, and through poor client management.

23.12 For the reasons given above I am satisfied on the balance of probabilities and find as a fact that the dominant cause of the drop in turnover from the end of the first year after Completion was the departure of all the *"inherited"* staff except for Mr Causley. Even staff who were not fee-earners can make a connection with clients. In an email to DB dated May 2013 a Ms Rogers stated: *"I never got to meet George, Roger, Dan, and the girls but could always ring and speak to one or the other any time and felt our business was always in good hands"*. The departure of Mr Callard was a management decision, as was the departure of the three staff who were made redundant in March 2011. The departure of Ms Isaac, Mr Ball, and, perhaps, of Mr Causley, were the result of MG's management style, and of the fact that a relationship of trust and confidence was not established between them and MG. None of the departures was a direct consequence of the misrepresentation which induced MGAL to enter into the SPA. Likewise, the other factors contributing to the fall in turnover, identified in paragraph 23.10 above, were matters within the responsibility of MGAL, and the fall in turnover consequent upon them were not the direct result of MGAL having been induced by misrepresentation to enter into the SPA. Lastly, if the *"flawed"* handover, if it contributed to the fall in turnover, was not something for which DB can be held responsible – see paragraph 23.8 above.

23.13 Further, the dramatic fall in turnover of the Dartmouth Practice (and hence in profits) after the year to 30 November 2011, does not in my judgment support the contention that the Practice was inherently unsound or subject to a level of problems which was abnormal for a small accountancy practice in South Devon. I do not consider that the evidence has established that the level of problems in the Dartmouth Practice pre-Completion was any worse than might be found in other local practices. There is no

expert evidence to this effect, or to indicate what, typically, might be expected, or drawing comparisons. Whilst the Tozer matter might not be replicated in other practices, in the nature of things occasionally serious and time consuming incidents would occur.

23.14 There is no reason why, if the fee earners amongst the inherited staff had remained, the Dartmouth Practice could not have continued to achieve the turnover which it achieved in the first year after Completion, thus producing profits before tax in every succeeding year. Any insufficiency of cash flow resulting from that level of profits would have been the consequence of MGAL's pre-existing and further borrowing, and not a consequence of the misrepresentation of GRF. Whilst it is clear that prior to Completion the Dartmouth practice was not without some problems, the same was true of the Torquay Practice, prior to its acquisition, and has been true, on MG's own admission, of MGAL's practice. In his third witness statement MG asserted that none of the businesses he had purchased over the years had anything like the problems that the Dartmouth Practice had. I do not consider that the evidence has established that to be true – see in particular Sections 16 and 18 above.

24.0 LOSSES IN THE TORBAY PRACTICE

24.1 It is alleged that the Torquay business of MGAL, as a result of the matters set out in paragraphs 14.8 and 14.10 above, made the following losses:

Loss of profits in non-Beeny business resulting from time spent in Dartmouth Business

Anticipated annual profit from MGAL business

EBITDA for year ended 30 November 2010	£60,488
Projected profit for 3 years 8 months since acquisition	x 3 7/12
	£223,915

Actual profit / (loss) in non-Beeny business

Year ended 30 November 2011	£33,513
Year ended 30 November 2012	£18,651
Year ended 30 November 2013	£37,327
7 months to June 2014	£27,957
	£117,448
Loss of profits of MGAL resulting from time spent on Beeny business	£ 106,467

24.2 It is also alleged that in addition to the business consultancy work carried out by MG in the Torquay area, MG in December 2010 had formed MG Services (SW) LLP with a view to offering his services in the UK; however, for the reasons set out in

paragraph 14.10 above, he was unable until 2014 to commence this part of his business and so suffered the following losses:

Loss of consultancy income

Current consultancy contract with Stoke-based company	£36,000
3 years 7 months since acquisition	x 3.7/12
	£ 129,000

24.3 *These losses are consequential losses which clearly flow from the negligent misrepresentations of DB inducing MGAL to purchase the Business.*

24.4 The questions are whether or not the fall-off in turnover and profits of the Torquay Practice in the years from 2010 was the result of time and effort diverted from that Practice to the Dartmouth Practice and if so whether such diversion was the direct consequence of MGAL having acquired the latter practice as a consequence of the misrepresentations which, in the trial on liability, were found to have been made.

24.5 MG's case is that both questions should be answered in the affirmative. So far as the immediate cause of the poor performance of the Torquay Practice during those years is concerned, MG's evidence, in his third witness statement was to the effect that:-

24.5.1 As a result of lack of attention high-paying clients became frustrated and begun leaving.

24.5.2 Over the space of ten months or so his absence from the Torquay practice had a dramatic adverse effect upon it.

24.5.3 He was unable to provide the regular consulting and advisory services which he had done before, and which clients needed.

24.5.4 He lost fifteen named clients to whom he had provided the sort of consultancy services that could not have been provided by other members of the staff at Torquay, and from whom MGAL had earned a fee income of £66,620.

24.6 MG's evidence was that as a result of the requirements of the Dartmouth Practice he had no time to devote to the Torquay Practice and both his time and that of his staff were diverted away from serving the clients of that practice. It has not been shown that the employees at the Torquay practice devoted any significant time to the Dartmouth Practice until the last quarter of 2011, when Ms Isaac was off sick and Mr Callard was suspended. Some of Mr Causley's work was transferred to the Torquay office, but that was simply a policy decision. There was no evidence that Mr Causley was unable to do that work.

24.7 MG's evidence, which I accept was that post-Completion he never worked in the Torquay office again. However, in my judgment if MG had not devoted the time which he did to the Dartmouth Practice, he would have had to devote the same amount of time to the practice which he would have acquired as an alternative to it – see paragraphs 11.7 to11.13 above.

24.8 MG's oral evidence was that he had been contemplating doing the same amount of work in Dartmouth as, DB did, namely two days a week, since the office ran itself: that during a period of *"integration"* post Completion, he should have been in Dartmouth full time for two or three months, but after that should have been in Torquay for two days a week. He did not try to replace himself either in Dartmouth or Torquay. In my judgment this approach was entirely unrealistic. DB worked four days a week, two days in Dartmouth, one day in Paignton, and one day at home, but all this time was devoted to the Dartmouth Practice, of which the Paignton office was a part: since DB was departing, MG would have to take on his work and manage and integrate the practices. Since he would want to implement changes, reduce staff, and introduce new systems into whichever practice he purchased it would be unrealistic to think that this would not take up five days a week. Further, he might have found that, in the hypothetical alternative practice, the proprietor whom he was replacing worked five days a week. MG asserted that after acquiring the Dartmouth Practice he had to work seven days a week, and implied that if he had not had to devote so much time to that practice he would have been able to carry out consultancy work at the weekends. However, any practice which he acquired was likely to be as time consuming as the Dartmouth Practice unless the latter subject to a abnormal level of problems.

24.9 In paragraph 11.13 above I found:-

> *"Accordingly, it is more likely than not, and I find as a fact, that any practice (other than the Dartmouth Practice) which MGAL was likely to have acquired in 2010/2011 would have a similar impact upon MGAL's existing practice – unless the Dartmouth Practice was subject to a level of problems which was abnormal for small accountancy practices in the South Devon area."*

24.10 As stated above, it has not been established that the Dartmouth Practice at Completion was subject to a level of problems which was abnormal for small accountancy practices in the South Devon area. Accordingly, in my judgment the

undoubted fall of turnover and profit sustained in the Torquay Practice post Completion is something which would have occurred in any event, and is not recoverable against DB.

24.11 The claim for the loss of consultancy fees is open to question on a number of grounds, (including the fact some of these fees in the examples given of clients lost may have been earned in 2011, a time when MG asserted that he was too busy to do this work) but the short answer to it is that it, too, was something which would have occurred even if MGAL had not acquired the Dartmouth Practice, because the acquisition of another practice would have had the same impact upon the use of MG's time. This claim, too, must be dismissed.

25.0 MGAL'S CAPITAL LOSSES RESULTING FROM THE PURCHASE OF DB'S BUSINESS

25.1 It is alleged that

25.1.1 In paragraph 74 of the judgment on liability the court determined (subject to the Part 20 / Counterclaim herein) that the total consideration payable in respect of the purchase of the Business under the SPA was the sum of £218,919.09.

25.1.2 In August 2010 MGAL prepared a business plan (*'the Business Plan'*) for the purposes of obtaining finance for the purchase of DB's business. MG set out under the sub-heading 'Outline of Deal':

Purchase price £236,555	*DJB Gross Recurring Fees in the year to 30 April 2010*
Price multiple 1.00	*of gross recurring fees*
Payment to Vendor 40%	*of fees collected post completion to be paid each quarter*

25.1.3 The information set out under the sub-heading was taken from DB's estimated accounts for 2009/10, DB having represented during discussion in August that the GRF was "not less than £220,000".

25.1.4 MGAL, believing that the information regarding the GRF was true, had provided in the Business Plan a valuation for the combined MGAL business.

Anticipated value of combined business at acquisition

Gross recurring fee income

Dartmouth	£236,555

Multiplier		1.0
		£236,555

25.1.5 However, MGAL anticipated that following Completion the combined value of MGAL would attract a higher multiple as MGAL would be able to sell higher margin business advisory and consulting services to DB clients.

Dartmouth		£236,555
Torquay		£200,448
		£437,003
Multiplier – combined	1.25	
Valuation		
Combined		£ 564,254

Current value of combined business		
Gross recurring annual fee income		
Dartmouth		£87,547
Torquay		£139,063
		£226,610
Multiplier	1.0	
		£226,610
Loss of value of combined business as at June 2014		£ 319,644

25.1.6 This claim appears to me to be flawed in principle, being in effect it is based on a calculation of what MGAL's position would have been if there had been no breach of warranty. It is also flawed because the figures fail to take account of the fact that the fall in turnover of the Dartmouth Practice after the first year following Completion cannot be attributed to the misrepresentation which induced MGAL to enter into the SPA, and the fall in turnover of the Torquay Practice is something which would have occurred in any event – see Section 24 above.

25.1.7 Even if this claim were admissible in principle, in my judgment it would be wrong to assess the loss as at June 2014. As indicated above, I am satisfied that any losses incurred after the end of the first year after Completion cannot be attributed to DB.

25.1.8 In my judgment any claim for loss of capital should be assessed at the date of Completion, since the losses which followed after the end of the first year after Completion *"cannot properly be treated as having been caused by ... (DB's) tort"* – to use the words of Hobhouse LJ in **Downs v Chappell** (see

paragraph 6.19 above), and to award damages for loss of capital assessed at a later date would be to over compensate MGAL.

25.1.9 The consideration under the SPA was calculated by reference to the GRF of the clients referred to in the Fourth Schedule for the period to the end of March 2010. A purchaser at the Completion date would be interested in the GRF for the period leading up to that date i.e. the Completion Date. It is common ground that accountancy practices are generally valued by applying to the GRF a multiplier of 0.8 to 1.5. DB calculated the GRF of the Transferring Clients in the year following Completion to have been £204,749. Mr Isaacs calculated the actual receipts for that year as being £246,115, but I consider that that included Work in Progress and should be reduced by £30,000. MG would contend for a greater reduction on the ground that £38,000 related to new clients, but this figure has never been substantiated. In the trial on liability I found that the figure in the Fourth Schedule should have been £178,483.62. The figure for the GRF in the year to 30 November 2010 has not been calculated, but having regard to the actual GRF of £204,749 for the subsequent year, and the actual turnover of that year of £216,115 (Mr Isaacs' figure reduced by £30,000), I consider it not unreasonable to assume for the year to 30 November 2010, a figure of £191,616.62. – that is the sum of £178.483.62 and one half (£13000) of the difference between that figure and the actual GRF for the subsequent year.

25.10 An appropriate multiplier, in my judgment would be 1.0 – that used in the purchase of Durtnall and Rowden and the Health practice. That would result in a valuation in the sum of £191,616.62.

25.11 Since the consideration due under the SPA is the sum of £178,485.62, it is clear that MGAL received good value – the Dartmouth Practice was worth more than MGAL is liable to pay for it.

26.0 THE LOSS OF PROFITS WHICH MGAL WOULD HAVE OTHERWISE MADE FROM THE PURCHASE OF ANOTHER ACCOUNTANCY BUSINESS

26.1 The claim advanced by MGAL is as follows:-

Loss of the profits MGAL might have expected to make from the purchase of similar accountancy business

Anticipated annual profit of Beeny business [as a proxy]	£133,446
3 years 8 months since acquisition	x 3.7/12
	£478,074

Less anticipated purchase costs:	
Legal costs	£5,000
Broker costs	£10,000
Finance costs	£9,600
Loan arrangement fees - £1,500 for 2 years	3,000
	£27,600
Less anticipated consideration for purchase	£220,000
Loss of profits from acquisition of similar accountancy business	£ 230,474

26.2 Under this head MGAL also pleads in the alternative that it has lost the opportunity to have purchased a similar accountancy business.

26.3 MGAL undoubtedly did, by purchasing the Dartmouth Practice, lose the opportunity of buying another practice. I have already made the assumption (based on the balance of probabilities) that MGAL would have been able to do that. However that leaves open the questions of how successful the hypothetical practice might have been from a theoretical point of view and what the chances were that in practice MGAL would have achieved that theoretical level of success.

26.4 Against the background of the acquisitions made by MG/MGAL since 2006 and the unfortunate experiences accompanying them I consider that this head of claim is entirely too speculative to be capable of assessment and should be dismissed on that ground alone. Everything would depend upon the precise nature of the practice purchased (MG's evidence was that one practice he contemplated purchasing was a book-keeping and not an accountancy practice), the staff, the redundancies which MG would have made, the ability of MG to establish a good relationship with the staff, the locality – even the size of the community where the business was located.

26.5 Nevertheless, it is appropriate to address this head of claim in more detail, in case my view that it should be dismissed without further consideration, is incorrect.

26.6 As can be seen, MGAL has assumed that any other practice which it might have acquired would be similar to DB's practice and would perform as MG had forecast in his Business Plan. The business plan, showing an annual profit before tax of £133,446, was prepared at a time when MG understood that DB would make three of the staff redundant prior to Completion. In the event, this did not happen, but the reality is that any vendor would be likely to insist on the purchaser accepting all the staff, because only the purchaser would be capable of fairly dismissing staff surplus

to the purchaser's requirements. It follows that it would be wrong, when preparing a profit forecast for such a purchaser, to assume that the redundancies will have taken place. The Business Plan is also based on an estimated turnover of £236,556 (an estimate taken from DB's abridged accounts) which is inconsistent with the average, over previous years, of approximately £220,000, and includes an incorrect figure for rental.

26.7 I consider that it would be preferable to use the turnover figures that produced a profit before tax of £92,000. That figure requires adjustments for the additional staff. Salary costs pre-Completion were of the order of £100,000, and no rent (£13,000) was paid. The actual salary costs in the year ended 30 November 2011 were £120,179 – see Mr Mesher's figures set out in the table in paragraph 14.9 above. This increase may have been due to some *"unanticipated costs"*. A suggested explanation for them is given in paragraph 20.3 above. That explanation may or may not be correct, but even if it is, it is not unreasonable to assume that any purchaser taking over a practice will be faced with enhanced salary or other anticipated costs. Thus I consider that the historic annual profit of £92,000 would need to be reduced by some £33,000. Thus the profit that might reasonably have been expected from this hypothetical practice would be £59,000 before tax. Since the actual profit before tax was £48,790, the differential would only be £10,202. These figures would require adjustment to calculate the respective EBITDA i.e. earnings before interest tax and amortisation.

26.8 It is also necessary to consider the period in relation to which it was legitimate to make any claim for loss of profits.

26.9 It seems to me that it would be wrong, in this case, to calculate any loss of profits in relation to any period after the first year after Completion because of my finding that DB cannot be held responsible for the losses experienced during that period. It is also to be noted that after both MG's principal acquisitions, in 2006 and again in 2010, the businesses acquired experienced a dramatic downturn in turnover and profitability, followed by a gradual return to profitability. It is distinctly possible that the *"MGAL business model"*, with its emphasis on staff cutting and prompt invoicing, and the MGAL management style was responsible for both the falls and the subsequent rises.

26.10 It follows that even if I am wrong in dismissing the claim outright as being too speculative the claim should be limited to the period of one year, and would be quite modest.

26.11 It should be noted that Mr Isaacs in his evidence stated that he rejected this head of claim because he had *"seen no evidence that Mr Ghersie has ever been able to generate any significant profits ..."*, but then went on to consider, in the alternative, the likely return if the Maceys practice was used as a yardstick for measuring the likely performance of a hypothetical practice which MGAL might have acquired in 2011. By this means he assessed the *"Net Loss of opportunity"* in the sum of £9,000.

27.0 CONSIDERATION

27.1 MGAL claims the sums due under the SPA as damages arising from the misrepresentation inducing it to enter into the SPA. It is difficult to understand the basis of this, which seems counter-intuitive since MGAL has not rescinded the contract and is probably still deriving some income from the transferred clients. However, Mr Blackmore submitted that what the court has to look at is what expenditure or liabilities or losses MGAL has incurred as a consequence of the misrepresentation, and then set off against that any benefits received.

27.2 If one performs that exercise one finds that MGAL has incurred the liabilities set out in paragraph 2.5 above, totalling £227,027.79 inclusive of VAT.

27.3 Against that, MGAL has received:-

The value of the business	-	£191,000
Profit for the year ended 30 November 2011	-	£ 53,393
Back debts and work in progress (included In the £227,027.74 owed to DB)	-	£ 31,996.50
		£276,356.50

27.4 It follows that on the basis advanced by Mr Blackmore, MGAL is not entitled to recover as damages anything which it has become liable to pay to DB.

28.0 CONCLUSION

28.1 For the reasons given above my conclusion on this trial of the issues of causation and quantum, is that MGAL is not entitled to any damages for misrepresentation and that the claims for breach of warranty, which MGAL elected not to pursue should be dismissed.

Draft sent 28 January 2016 David Blunt QC

Judgment handed down .....March 2016 [Recorder]

Incorrect filing of P35

1.1 MG asserted that significant management input was required because Mr Causley, who had been responsible for the filing of P35's on behalf of clients of DJB had failed to do so in numerous cases. An email of 19th May 2011 from Mr Callard to Mr Beeny refers to the difficulty that Mr Callard had had in getting Mr Causley to *"knuckle down to them"*. DB accepted that some P35s may have been filed late, but the email in question tends to show that the P35s were filed in time. The work appears to have been done or overseen by Mr Callard. It is not suggested that anyone from the Torquay Practice had any input to this work, and it is not clear that any clients were lost as a result. In his third witness statement MG referred to the late filing of tax returns, but this was in 2011/2012 and could not be attributable to any act or omission of DB.

1.2 There must be few accountancy practices which do not on occasions fail to get clients' returns on time. Sometimes this will be the fault of the clients, sometimes not. There is no evidence to suggest that the Dartmouth Practice was worse than other in this respect.

1.3 This allegation is not substantiated.

Mr Tozer

2.1 The details of this matter are set out in Section 21 above. MG's evidence was that getting to the bottom of it and informing insurers took up 15 hours of his time. It was not suggested by MG that Mr Tozer took his work elsewhere. This is a matter which undoubtedly would have absorbed some of MG's time. According to DB Mr Tozer did take his business away from MGAL but this was because of MG's *"attitude"*.

Standard of Work

3.1 This is a reference to the general criticisms referred to in paragraphs 18.2 and 18.3 above. MG's asserted that *"even such rudimentary a practice as reconciling the bank accounts was not often carried out"*, and he referred to an email of 13th June 2011 from Mr Callard to DB in which Mr Callard said that he could not find the bank reconciliations on any files.

3.2 In fact, it is plain from a reading of the email that Mr Callard was referring to the bank reconciliations for a single client, Dartmouth TIC. It is not clear that the reconciliations did not exist. It appears that Mr Callard was doing this work. There is no suggestion that any of the staff from the Torquay practice were engaged upon it,

or that the client was *"lost"* as a result of whatever transpired. The suggestion that bank reconciliations were not often carried out is not proven.

Culture of Dishonesty

4.1 MG asserted that clients met requests from MGAL staff for bank statements and underlying documents from which to prepare accounts with hostility, the clients complaining that they had never been asked for this before: when it was explained that these documents were vital to prepare accurate accounts, MGAL staff were met with incredulity and some clients refused to hand over these documents and took their business elsewhere: on other occasions when accounts had been finalised by MGAL staff showed that profits had been made and income tax was due, a number of ex-Beeny clients complained saying that they never paid tax: and that the accounts used to be adjusted so that no tax was paid: on being told that MGAL would not falsify accounts, a number of clients took their business elsewhere: on one occasion a client told Mr Causley that his accounts had to show a profit of £30,000 as he needed to be able to show this level of earnings in order to qualify for a new mortgage: this was mentioned at a team meeting on 31 October 2011 MG said, *"I was told by the Dartmouth Practice staff that the client would not be happy about this. This gave me the impression that the practice of 'adjusting' accounts was a fairly common occurrence in DJB".*

4.2 Referring to a list, provided by DB, of clients who took their business away from MGAL because of dissatisfaction with the services of MG and MGAL, MG asserted that these were few and that the majority left because either MGAL refused to accede to requests to "adjust" their accounts (so that they would not have had to pay income tax, either at all or the correct amount) or they refused to accede to advice that they are required by law to keep proper books of account: no doubt DB had complied with such requests in the past: many of these former clients dealt primarily in cash payments, particularly taxi drivers and builders.

4.3 At one stage in his oral evidence MG asserted that *"the burghers of Dartmouth are dishonest",* implying that all or many of them were tax evaders.

4.4 An example which given was that involving Mr Causley. If it had been the practice to falsify accounts it is unlikely that Mr Causley would have reported the request. Further, the fact that Julie Isaac drew MG's attention to the *"forged"* letter on the Tozer file is entirely inconsistent with there being a culture of dishonesty amongst the staff. DB's evidence was that there was no culture of adjusting accounts for mortgage

purposes, that he checked the accounts and latest tax return before signing any certificate to support a mortgage application. MG did not identify any client who left for the reasons which he suggests except for a client called Sutcliffe. The clients' version of events, set out in an email dated 13 May 2013 is inconsistent with the suggestion that they took their business away rather than make an honest tax return.

4.5 This allegation is unsubstantiated.

Unsigned Tax Returns

5.1 MG referred to a schedule prepared by Ms Isaac purportedly showing a list of 20 clients whose tax returns DB had filed on 31 January 2011 without the client seeing, agreeing or authorising him to file them: he said DB did not inform him that he was filing the returns without authorisation from him or the clients: this was another example of shoddy working practices where DB had failed to complete the work on time and of the culture, endemic, of cutting corners.

5.2 DB's evidence was that all the returns had been approved by the clients, though one of them relating to a Mr Smith had only been verbally approved: this criticism had been reported by MG to ICAEW and he (DB) had provided ICAEW with his response. There is no evidence that DB was criticised by ICAEW. One cannot infer from the mere fact that tax returns are filed at the last moment that this is the fault of the accountant. I was not directed to HMRC rules governing the filing of tax returns on time. It was not suggested that, even if true, this resulted in the loss of any clients or absorbed the time of any of the staff in the Torquay Practice.

5.3 I consider this allegation is not substantiated.

Atlantic Torbay Ltd.

6.1 MG referred to the working papers for Atlantic Torbay Ltd, the accounts for which were prepared by DB himself. He said that by way of working papers there were only two pages of print-out for the year ended 2008, and nothing for the following year, and he listed the accounting documents which he said were on the working file.

6.2 In his fifth witness statement DB responded that the relevant papers must have been removed from the file, and he explained in great detail the information with which he was provided (much of it on a memory stick compatible with the Practice's own software) and the procedure which he followed each year, step by step, in preparing the accounts for that company.

6.3 There was no cross-examination in relation to either the criticism or the response.

6.4 The allegation is not proven.

Dartmouth Trust

7.1 In relation to Dartmouth Trust, MG stated that the accounts for the year ended 29 September 2010 included an entry in respect of rent actually paid after the year end. Accordingly he decided to check all rent receipts against the bank account to ensure that this was just an isolated event, and this took a very long time. Additionally, DB refused to let him have his audit working papers for the two previous years which made it extremely difficult to prepare the accounts and do the audit for 2010. There was a spreadsheet for the previous year's accounts, 870 rows, 12 columns wide but with no linkage or trail to show where the numbers had come from. As a result all this work took much longer than it would have done if he had had the previous year's file to work from. MG did not identify when or how he made a request to DB for the audit working papers, or give any particulars as to the alleged refusal.

7.2 In his response, in his fifth witness statement, DB provided a detailed explanation as to why there was no error in the accounts in respect of the rent, supporting it by reference to contemporaneous documentation. He concluded:-

> *"116. As there were no mistakes in the rental balances there was no requirement to spend this amount of time on attempting to verify the rental income. Mr Ghersie appears to be using this as an excuse to try and explain why he spent 113.5 hours on the audit whereas I would have spent about 40 hours. This again shows Mr Ghersie's inexperience when faced with an audit. He had not had any auditing experience for at least 30 years before he acquired my practice and I have stated before only became a registered auditor in late 2010 so that he could acquire my practice. It will be noted from paragraph 5 above that Mr Ghersie's licence to audit businesses was withdrawn in December 2014.*
>
> *117. The file which I held should not have caused any problems with the audit as all of the working papers were on my office computer, on the server and therefore could be easily accessed, but Mr Ghersie chose not to do this. Under the handover provisions he could have contacted me. When an audit is lost to another accountant the only*

information relating to the audit are the working papers, which I have said were readily accessible. The lead schedules and the backing sheets were on excel and the nominal ledger was on the VT accounts program. It would be self-evident to any experienced accountant to work out how the accounts were prepared from those papers."

7.3 MG referred to an email sent by Mr Callard to DB on 11 November 2012 in which Mr Callard referred to MG as *"the poor love"* and described how MG was having a terrible time with the Dartmouth Trust accounts and had been *"on it"* for weeks. MG stated that DB could simply have made life easier for him by giving him the file. It took him 120 hours to complete the accounts, and a considerable time which his assistant spent on them.

7.4 In a letter to the ICAEW dated 29 October 2013 DB explained that he retained the audit files *"as a lien"* because of MGAL's failure to make payments done under the SPA. DB's evidence was that this was the only file which he did not hand over to MG. I accept that evidence.

7.5 In his fifth witness statement DB's responded:-

"MG was floundering with his lack of experience and was also out of his depth. There was no requirement for the file as all of the working papers required to produce those accounts were on both my computer and on the server. Again MG could have contacted me under the handover provisions: ...."

7.6 Whilst the technical issues could only be resolved by a detailed examination of the relevant material or by expert evidence, or by both, and no such examination took place in the hearing before me, and no such evidence was provided, I was not directed to any request by MG for assistance, and DB was under no legal obligation to volunteer assistance to MG. Further, the email of which MG complained was dated November 2011, by which date MG had still paid to DB nothing under the SPA and had suspended Mr Callard, so it is hardly surprising that neither of them felt a moral compulsion to assist MG.

7.7 Although MG's evidence that these accounts absorbed a good deal of his time is no doubt correct, it is not proven that this should be ascribed to any act or omission on the part of DB.

Dartmouth United Charities

8.1 MG asserted that this was also a job which took far longer than it should have done, because DB had failed to keep proper records and an audit trail of the previous year's accounts. In particular, the lead schedules in DB's working papers file for the year ended 30 April 2010 were no more than schedules with numbers on them with no indication where they have come from: after a lot of searching it became apparent that DB had lifted the numbers from his spreadsheets straight onto his lead schedules, but there was no way to easily find where the numbers had come from on his spreadsheets: given that there was no audit trail he had to try to replicate where DB had got his numbers from: sometimes this involved finding the makeup of a subtotal number by searching as many as 700 lines on the spreadsheet above the subtotal: this took a vast amount of time, which it would not have done if there had been a normal audit trail: if DB had bothered to do a proper handover, as he was supposed to have done according to the SPA, he could have explained how he put these accounts together and saved MG a huge amount of time. In fact this work took MG over 75 hours.

8.2 DB's evidence in relation to those allegations was that the lead schedules were fully referenced to the file: the working papers were on an excel spreadsheet, which were easy to locate and very easy to follow, and had to be cross-referenced to comply with auditing standards, and he again asserted that MG's Registered Auditor status had been withdrawn in December 2014.

8.3 The issues as to the adequacy of the records could only be resolved by examination of them or by the provision of expert evidence, or both. There was no such examination at the hearing and no such evidence. This complaint, therefore, was unproven. I have already rejected the complaint relating to *"handover"*.

Juste Moi of Dartmouth Ltd.

9.1 MG asserted that:-

9.1.1 On 10th January 2011 Juste Moi, sent DB a request to produce a draft set of accounts before he went away in early February of that year.

9.1.2 DB took the client's accounting records with him to New Zealand, telling neither MG nor the client.

9.1.3 In February, the client realised that she had missed out some payments in her cash book and asked that it be returned for her to correct: she was very

annoyed to learn that her records were not available and had been taken out of the country without her knowledge.

9.1.4 Mr Callard emailed DB (from his MGAL work email address) telling him of this and suggesting that the missing entries be added to the next quarter – i.e. including them in the following year.

9.1.5 This was a good example of the culture of the business, where accuracy and the preparation of accounting records in an accurate and lawful manner was not regarded as fundamental.

9.1.6 DB then sent an email on 20th May 2011 to Mr Callard's private gmail address, attaching the annual accounts for Juste Moi – confidential and sensitive information: MGAL's standing instructions were that all business emails must go to the member of staff's MGAL email account, so that all correspondence would be saved on the company's servers in case they needed to be referred to later.

9.1.7 Draft accounts were sent to the client noting some outstanding information. Accounts appeared to have been accepted and approved by the client on or before 10 August 2011.

9.1.8 By way of email dated 5th July 2011 MG had asked DB to stop work on all the clients' files he had been working on: he clearly simply ignored this and continued to work on client files.

9.1.9 Julie Isaac emailed DB on 13th September 2011 asking him to send the Juste Moi records to MG so that MG could finish the accounts which were due for filing by the end of September 2011: all DB needed to do was to let MG know that he had done the accounts. However neither he nor Mr Callard let MG know this.

9.1.10 On the 14th September 2011 DB sent Mr Callard the accounts to Mr Callard's private gmail account, instructing Mr Callard to *'carry forward the cash difference to next year, this is a cumulative difference it may be due to expenses paid by Jane'*: so instead of finding out what the error was and correcting it DB was instructing Mr Callard to ignore it and to carry it forward, compounding the error. DB also asked that Mr Callard provide him with the client's email address *"as they would like to talk to me about the business and not Ghershie* [sic]".

9.1.11 Mr Callard emailed DB on the same day, again from his private gmail account, with content specified to be 'Quoted text hidden' and with the top of the email torn off, clearly doing their best to ensure that MG never found out about their dealings with one of MGAL's clients. DB replied to Mr Callard's private gmail account the next day, with some information relating

to the Juste Moi accounts and further instructions about other clients' accounts: further, he asked that the address be changed to Mr Beeny's then home address in Clevedon: this was an example of DB and Mr Callard, doing their best to scuttle MG's relationship with new clients.

9.1.12 The accounts were due for filing at Companies House by the end of September: he (MG) received a letter on 28th September from the client complaining that the accounts were not ready until 23rd September 2011 despite the records having been submitted on 10th January 2011, and to complaining that there had been no meeting prior to the accounts being signed off: ultimately, this resulted in a late filing penalty of £150 which MGAL paid.

9.1.13 Not surprisingly, any relationship he (MG) had with the clients stood no chance of success, and they took their business elsewhere.

9.2 DB's evidence was that he had obtained Juste Moi's permission to take their papers to New Zealand/Australia as they wanted him not MG to prepare their accounts: it was common practice when preparing VAT returns to base the payments and receipts on a 13 weeks period with the cut-off date being the last Friday or Saturday of the month: he was not informed of the standing instruction: it was immaterial whether or not emails were sent to an office account or to a private account as long as they were filed on the appropriate office file: as could be seen from the email there were no other matters contained in it other than those relating to Juste Moi, despite MG 's suspicion: the draft accounts were sent to the client on 23 May 2011 and were subject to 3 queries: the draft accounts, still subject to those queries, were approved on 10 August 2011: presumably the client provided the answers to those queries which enabled him to finalise the accounts: the email dated 5 July 2011 did not request him to stop all work: it asked for details of current consultancy work: following the receipt of Julie Isaacs's email on 13 September 2011 he forwarded the final accounts to Dan Callard on 14 September 2011, some 16 days before the deadline: these were entered onto the Digita software on 20 September 2011 and sent to the client for signature the following day about 1 week before the deadline: the cash difference was not a material amount: it arose as the client did not balance the cash account and this would have been sorted out during the preparation of the following year's accounts: MG would have seen the cash difference being carried forward when he reviewed the file prior to sending the accounts to the client for approval: MG did not have any concerns as he did not query the cash difference before approving the accounts and consequentially signing the accountant's report: MG's reference to an email from Dan Callard to DB was incorrect: the email was from DB to Dan

Callard : the top of the email was not torn off: MG may have meant to refer to an email dated 15 September: the change of DB's address was necessary as he remained a trustee for the Quartley Trusts: DB always discussed the draft accounts with his clients before they were finalised: as was confirmed in the letters of complaint from the client it appears that no such meetings took place under MG's regime and that was the reason for the complaint.

9.3 An email dated 14 September 2011 shows that DB did send Mr Callard the draft accounts on that day. The letter of 28 September 2011 referred to by MG did include a complaint that the draft accounts were only received on 23 September 2011, but it complained also of MGAL's failure to meet with the clients, an increase in charges of 17.4%, and a duplicate charge. There is no evidence that this client was *"lost"* because of any acts or omissions of DB. The letter implies that the client was not planning to take its business away.

9.4 It does not seem to me that DB was particularly at fault in relation to the dealings with this client.

Scope Communications Ltd.

10.1 MG asserted on 26 January 2012 he reviewed the monthly management accounts of Scope Communications Ltd for December 2010, which DB had done, and noted that they were virtually identical to the November 2010 management accounts: DB had clearly just copied the management accounts for December 2010 from the previous month's, storing up a major problem for MG: he duly notified the client on 26th January 2012: the client confirmed that he had indeed noticed and asked MG to redo them: this was work which DB had already charged for, so this was effectively corrective work which he (MG) had to do at no cost to the client. It engaged his time for 33.5 hours.

10.2 DB accepted that the management accounts had included a minor error but asserted that MG had blown it out of all proportion. He asserted that he did the correction, and referred to a recent email from Scope's Managing Director, Mr Fidler:-

> *"I recall there was an error in the Dec. 10 report where the Nov figures appeared to have been copied across, but this was corrected in Jan '11 figures. It was only relevant as a reference in the "previous year" column of the management reports, as we noticed that the Nov & Dec amounts were identical for that year. So he was clearly looking to make a meal (or rather a feast) out of it. 33.5 hours?! Shouldn't that be minutes!"*

DB also referred to the fact that MG also claimed that there were material errors in the management accounts prepared by DB up to July 2011, and asserted that he was not responsible for those accounts as they were prepared by Mr Callard.

10.3 MG's response was that whilst the client may have thought that this would only take minutes, Mr Fidler was clearly unaware of the work undertaken by MG to correct DB's error, since he was never invoiced for it: as regards DB's assertion that the management accounts up to July 2011 were prepared by Mr Callard, Mr Callard could not and was unable to complete this work, which explains why he had to ask DB for assistance and confirms that MG did this work: contrary to DB's assertion, the contemporaneous emails do not demonstrate that Mr Callard did this work, merely that he had been asked to obtain information for MG.

10.4 The emails are somewhat equivocal as to whether MG or Mr Callard prepared the management accounts in question, but suggest that DB did prepare them up to and including April 2011.

10.5 The issues as to the time required to correct the error in the management accounts could only be resolved by examination of them or by the provision of expert evidence, or both. There was no such examination at the hearing and no such evidence. The complaint that it took an inordinate amount of time to correct the error, therefore, is unproven.

10.6 A second issue concerning Scope Communications relates to accruals made in its management accounts. These included accruals of approximately £220,000, which was significant for a company of that size, with turnover of around £2.8 million. MG asserted that he discussed this issue at some length with management, including Mr Fidler, as he did not know what these accruals represented: DB had not left any notes or other audit trail and had failed to effect a proper handover of this client's affairs. The company's management were also unaware of these accruals at this time, so MG assumed that DB had not discussed this with him either: dealing with this issue, in December 2011, took him 21 hours, self-evidently this was not recovered from the client.

10.7 In an email to Mr Fidler dated 11 February 2011 DB stated:-

> *"The reference to the large number of accruals shows that he did not understand the accounts as it related to the staff bonus paid in July/August*

2011. If he had either contacted me or looked at the accounts file he would have noticed the figures in the working papers."

10.8 Again these issues could only be resolved by examination of them or by the provision of expert evidence, or both. There was no such examination at the hearing and no such evidence. This complaint, therefore, is not proved.

Boxout Ltd.

11.1 In relation to a client called Boxout Ltd, MG asserted that despite being *"chased"* (as shown in particular emails) DB was late in preparing discounting reconciliations and this gave rise to resistance by the client to paying the invoice: he spent 10 hours sorting out anomalies on previous accounts as a result of DB having failed to reconcile factoring accounting: Boxout became insolvent and DB's errors in the management accounts contributed to this: MG had to correct DB's errors.

11.2 DB's explanation was that prior to 2011 the invoice discounting (factoring) account, had always been reconciled by Boxout's company secretary and bookkeeper until about May 2010 when she left. Her replacement was not capable of reconciling that account: in about April 2011 Kevin Johns, the director, asked MG to reconcile that account: there was no mention in the emails of him being chased up: the sole subject of those emails was the factoring accounts: MG stated that there were anomalies in the previous year's accounts but there was no evidence to support that statement: any time he spent on the reconciliation would be chargeable to the client.

11.3 An email dated 14 November 2011 sent to MG by Mr Johns does complain that DB did a particular job poorly and extremely late, and indicated that he was unwilling to pay DB's invoice for it. There is no evidence that MGAL was not paid for MG's work.

APECC Holdings Ltd.

12.1 MG asserted that DB had invoiced the client in advance and had been paid in advance by the client in the sum of £2,450 plus VAT for the audit to the year-end of 30th September 2010. In January 2011 DB told him that once he had done the accounts and audit he would pay MGAL what APECC had paid him - £1,500 excluding VAT: MG was mollified, not knowing, of course, that APECC had in fact paid £2,450 plus VAT: in fact DB hasn't paid him anything for that work.

12.2 DB's account of this matter is that he did not state that he would pay Mr Ghersie £1,500 if MGAL carried out the audit. The agreement with APECC's managing

director and main shareholder was that as he was closing down the company DB billed him in advance on the understanding that if he sold his practice he would finalise the last year's accounts and consequentially would not include this as a consultancy fee: he informed MG of this agreement and after that MG did not discuss this with him. In response, MG asserted that the company was not closing down, as it was still trading two years later.

12.3 It is not clear to me whether DB or MGAL carried out the work for this client, but in any event no claim was made in respect of this item in the trial on liability, and MG does not suggest that any aspect of it occupied any of his time. MG does not suggest that this resulted in the loss of a client.

Valeport

13.1 MG asserted that the previous year's accounts did not comply with the Companies Act as no Cash Flow Statement (referred to by MG as a Source and Application of Funds Statement) was prepared which had to be done for 2010. DB's evidence was that that was incorrect and showed MG's lack of knowledge of Companies Act requirements as the company claimed exemption from filing this statement, as it was a small company: MG did file the 2010 accounts with that statement but there were so many errors in those accounts he had to file revised accounts and those accounts did not include the Cash Flow Statement. MG responded that as DB had not made a proper handover DB had failed to inform him that Valeport had made a small companies election, so that he was unaware that Valeport was not required to file a cashflow statement. The *"handover"* issue is addressed at paragraph 17.5 to 17.9 above.

13.2 MG also complained that the audited accounts for Valeport Limited prepared by DB in the 2009 financial year contained errors relating to the schedule for fixed assets prepared by him: as a result, the accounts did not comply with the requirements of the Companies Act: the closing balance on the schedule prepared by DB did not equal Valeport's trial balance: DB's closing balance was therefore wrong, although it was impossible to determine how Mr Beeny had calculated his closing balance. This was included in MG's complaint to ICAEW. DB refuted the claim in his letter to the ICAEW dated 29 October 2013. This issue could not be resolved without a detailed examination of the documents or the provision of expert evidence or both. No such examination took place in the hearing before me, and so, although these matters must have occupied a good deal of MG's time, it is not established that this was due to any act or omission on the part of DB.

13.3 MG also complained to the ICAEW that incorrect management accounts prepared by DB had resulted in Valeport taking its business away from MGAL. The issue of incorrect management accounts was not explored before me, but the reasons given by Valeport are at odds with MG's contentions. A witness statement from the Managing Director states that during 2011 Valeport encountered a number of issues (spelled out in the witness statement) with MG and MGAL and as consequences of errors and issues lost confidence in MGAL and in November 2011 decided to take its business elsewhere.

13.4 MG also asserted that the 2010 accounts as originally filed in September 2011 were also inaccurate in that they failed to disclose a substantial loan made to a director. Mr Quartley, at the very end of the company's financial year: DB and Mr Callard were aware of this loan, but deliberately did not inform MG of it: the client only informed MG of the existence of this loan when he sent the directors their Representation Letter: he therefore had to prepare amended accounts.

13.5 Valeport criticised MG for incorrect tax advice relating to the acquisition of Croma: MG asserted that he was not instructed on this matter until March 2011 and he had had no input on the transaction structure, and he rejected the assertions that his advice on the tax liability and the calculation of corporation tax were incorrect.

13.6 The complaint of non-disclosure is addressed in relation to the hand-over issue at paragraph 17.5 to 17.9 above. An email from the client dated 7 October 2011 contradicts MG's assertion that he had not been told of the loan. It is not necessary to consider whether or not MG gave erroneous tax advice or made an incorrect calculation.

Dartmouth and District Guides and Creekside Boat Yard

14.1 MG stated that DB had inserted the wrong accountancy fee into the statutory accounts of the Dartmouth and District Guides, and made incorrect allocations of some income and expenditure items: MG was obliged to correct these errors, which was made difficult and unnecessarily time consuming due to his failure to maintain an audit trail. Also, as regards Creekside Boat Yard, he was obliged to spend 3.5 hours finalising the accounts, but was not paid for this work: the client paid DB but he did not account for this.

14.2 This detail was only advanced in MG's fourth witness statement, and was not addressed by DB. It is to be noted that in the March 2014 Schedule MG's claim was for 4.5 hours. The discrepancy was not explained.

D. Green

15.1 An item for which MG made a claim in the March 2014 schedule was in respect of discussions with a Mr Green in November 2011 concerning forestry grants. DB asked why he should be responsible for the giving of advice in November 2011. MG's response was that this was a live matter at the time of the completion which DB had failed to attend to: therefore MG had to deal with this a year later in late November, and could not charge for it.

15.2 MG also alleged that DB had also made serious errors in advising this client on his capital gains tax affairs, by grossly and negligently over-estimating the value of a property sold by him (rather than using the correct sale figure), resulting in the chargeable gain being excessively high and the client paying excessive capital gains tax. DB had personally prepared the client's tax return. MG noted this error when reviewing this tax return and raised the issue with HM Revenue & Customs resulting in the client receiving a tax repayment of around £15,000.

15.3 These allegations were not addressed by DB. If correct, MG's time was taken up, but it was not suggested that the client left as a result of these problems.

Apportionments

16.1 MG stated that when he queried with Mr Causley why he had not recorded any time on client files, he told MG that he had spent approximately two weeks undertaking DB's apportionments for the sale: this seemed to MG to be entirely plausible, as Mr Causley was DB's bookkeeper and DB was highly unlikely (since he was rarely in the office) to know with any accuracy the business's outgoings: as this was work undertaken for DB (without MG's knowledge or consent), it was clearly appropriate for DB to account for it. MG asserted that that must have taken Mr Causley at least two weeks.

16.2 DB's response was that this was totally incorrect: that he had done the apportionments himself, and that it took him less than half an hour. No explanation was given as to what these apportionments related, but on the assumption that they related to such things as light and heat, DB's evidence is to be preferred. If they

related to the apportionment of amounts due to DB and to MGAL for work done for the same client, then it would seem that this was work done for both DB and MGAL.

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BRISTOL DISTRICT REGISTRY

BRISTOL MERCANTILE COURT

Claim No: 2BS54083

B E T W E E N :

DAVID BEENY
Claimant / Part 20 Defendant

-and-

(1) MR MICHAEL GHERSIE
(2) M G ASSOCIATES LIMITED
Defendants / Part 20 Claimants

JUDGMENT
