Neutral Citation Number: **[2023] EWHC 682 (Ch)**

Case No: E30BM472

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
Insolvency and Companies List (ChD)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 27 March 2023

Before :

HH DAVID COOKE

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Between :

MTF Funding Ltd (In Liquidation) (1)	**Claimants**
MTF Resources Ltd (2)	
- and -	
Synergy Agroscience Ltd (1)	**Defendants**
Nicholas Gooch (2)	
D.A.V. Property Ltd (3)	

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Andrew Maguire (instructed by **Clarke Willmott LLP**) for the **Claimants**
Jeffrey Bacon (directly instructed) for the **Defendants**

Hearing dates: 29-30 June 2021, 23-25 November 2021,20-22,28 February 2023

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Approved Judgment

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

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HH David Cooke

HH David Cooke:

Introduction

1. The First ("MTFF") and Second ("MTFR") Claimants are companies established to provide specialist trade finance, They sue to recover what they say are the balances due to them, amounting in aggregate to some £428,000 (excluding interest), pursuant to facilities provided initially by MTFF and later by MTFR, to the First Defendant ("Synergy"). Their claims against the Second ("Mr Gooch") and Third ("DAV") Defendants are pursuant to guarantees given by them for the liabilities of Synergy, which were limited to £250,000 and £50,000 respectively.

2. The Defence denies any liability of Synergy to the claimants, claims rescission of the agreements between the defendants and the claimants on the basis of what are said to have been fraudulent misrepresentations inducing them to enter into those agreements and seeks an account as to what sums are due between themselves and the claimants, and to set off against any sums found due by them for damages for losses incurred by reason of reliance on those misrepresentations.

3. MTFF is in liquidation. MTFR pursues the claim on its behalf, with the authority of its liquidators. No objection has been taken to its ability to do so.

4. The claim was issued in November 2018. The defendants act in person, though have throughout the litigation had the assistance of Mr Simon Loome, a qualified solicitor originally in private practice but more recently employed by Synergy (or another company controlled by Mr Gooch). Mr Loome drafted the Defence and Counterclaim filed in January 2019. At some point subsequent to that, the defendants instructed Mr Bacon as Direct Access Counsel, and he has represented them at hearings since then.

5. The claim has an extraordinary procedural history. It was first listed for trial in August 2020, but was adjourned on an application made shortly before that date by the defendants who said that Mr Gooch and Synergy had received threats from criminals, which were unrelated to the case but made it impossible for them to concentrate on the trial. The relisted date in February 2021 was adjourned on account of Mr Gooch having been offered an elective operation on a date shortly beforehand. The trial eventually began in June 2021 but was adjourned part heard with the evidence of the claimants' principal witness Mr Tinkler unfinished because Mr Gooch, still suffering from the effects of his operation, fell in the court room and was injured.

6. The trial resumed in November 2021 but was again adjourned part heard, with Mr Tinkler's evidence (which he was giving remotely) still incomplete, on the defendants' alleging that he had been heard, during a recess, discussing his evidence with someone else. Mr Tinkler initially denied any discussion with anyone, but the following day accepted that he had spoken to someone during the recess, though he said he had not discussed his evidence. The defendants did not accept that and wished to bring an application for contempt of court against him. Before that application had proceeded however, Mr Tinkler died in March 2022, and the contempt application was consequently dismissed by HHJ Williams.

7. After Mr Tinkler's death his widow provided to the claimants' solicitors some hundreds of pages of invoices and other documentation relating to the accounts with Synergy that she had found at his house which, it was accepted, ought to have been disclosed in these proceedings.

8. The defendants have made a considerable number of applications, beginning shortly before the first fixed trial date, seeking to amend their defence and counterclaim. All those applications have been dismissed, by me and other judges, essentially on the grounds that they were made, without good reason, very late. An appeal in respect of the last of these applications, which I had dismissed in September 2022, was refused permission by the Court of Appeal in January 2023.

9. The defendants' applications also made repeated requests for further disclosure, stating that they were not satisfied that all relevant documents had been provided. They were vindicated in this to some extent by the emergence of the documentation provided by Mr Tinkler's widow, though in the event they have not referred me to any of that documentation as assisting their case.

10. The result is that the matter has proceeded to trial on the basis of the defendants' original defence and counterclaim which, with due respect to Mr Loome, are not particularly well framed, and the defendants have sought to utilise the evidence they filed, which was in large part aimed at the greatly expanded case that they had unsuccessfully sought to make by amendment, by submission that most or all of the issues they sought to raise were open to them on the existing pleadings. I will need to set out the matters they sought to raise, and examine whether they are in the circumstances open to them on the pleadings as they stand.

Factual Outline

11. I begin with a general outline of the facts to set the scene, before descending into more detail.

12. Synergy is one of a number of companies controlled by Mr Gooch. In his evidence in cross examination he said that he had two sides to his business, one of which involved dealing in agricultural products such as feeds, fertilisers and pesticides, and the other which was involved in property. Synergy is or was one of the agricultural chemical companies, and the third defendant is involved in property.

13. Mr Gooch was asked about the group structure, which was the parent company and whether he is still a director of Synergy, but he said he was unable to recall the detail of these matters, on account of medication prescribed following his operation. The one point he was certain about was that there was "no connection whatever" between Synergy and another company called Agchem Access Ltd ("Agchem"), though he said that company was involved in similar business.

14. It appears from the correspondence that initial discussions were held on behalf of Agchem. By late February 2016 those discussions had progressed to the point of submitting draft documentation, and Nina Gooda, who held the job title Procurement Manager and was the principal point of contact on behalf of Synergy for the day to day operation of the facilities subsequently granted, sent an email saying "I am not sure if it was explained however despite all communication taking place through [Agchem] all the work will actually be done through our sister company Synergy Agrochemicals…" (Bundle 2/p 326). That email, and those subsequently sent by her, Mr Gooch and others, generally use email addresses and standard form footers referring to Agchem and not Synergy.

15. Synergy (or Agchem) were initially referred to MTFF by Mr Peter Kirkham, who acted as a broker. A meeting was held, at some point in February 2016, between Mr Gooch,

Mr Derek Bromley, Ms Gooda and Mr Mone Sharma on behalf of Synergy, and Mr Tinkler and Mr Glyn Powell of MTFF. Mr Kirkham was also present. Mr Gooch explained that the business seeking finance involved a process called "tolling" in which various chemicals were purchased from different sources and mixed or combined into a formulation that was sold to customers. Mr Tinkler was familiar with the business, and knew Mr Gooch, because Mr Gooch's businesses had previously been finance customers of Trade Finance Partners ("TFP"), a trade financier of which Mr Tinkler had been chairman prior to 2013, when he left to establish Merchants Transaction Finance Ltd ("MTF") which provided similar trade finance facilities through subsidiaries such as MTFF.

16. The first set of facility documentation was entered into in March 2016 between Synergy and MTFF and included:

    i) An Offer Letter (described as a "Revised Offer Letter", presumably because there was an earlier draft) dated 4 March 2016 setting out the overall nature and terms of the facility, (Bundle 1/18),

    ii) A Trade Finance Agreement ("TFA") dated 14 March 2016 (1/40),

    iii) A Receivables Financing Agreement ("RFA") also dated 14 March 2016 (1/52)

    iv) A Debenture dated 14 March 2016 creating fixed and floating charges over all the assets of Synergy to secure all monies and liabilities of Synergy to MTFF, and

    v) A personal guarantee, limited to £250,000, by Mr Gooch for the liabilities of Synergy (1/115).

    I will refer to the terms of the documentation in more detail later, but in broad outline the Offer Letter describes a combined facility of up to £350,000 under which MTFF would finance the purchase of agricultural chemicals from suppliers intended to be processed into finished product for sale to customers, (which would be governed by the TFA) and might also make advances against the debts due from the customers to whom the finished products were then sold (which would be governed by the RFA).

17. The Offer Letter was revised on 22 September 2016 (1/26) increasing the facility limit to £600,000 and introducing what was referred to as a "Stock Finance Component" of £50,000, and again on 18 October 2016 (1/35) by which the Stock Finance component was increased to £100,000 on the provision of a corporate guarantee given by DAV for the liabilities of Synergy, which was limited to £50,000 (1/121). These changes did not entail any revision of the TFA or RFA.

18. In July 2017, following discussions between the parties (which again I will refer to in more detail later) a second set of facility documentation was entered into between Synergy and, this time, MTFR, including:

    i) An Offer letter dated 14 July 2017 (1/72) providing for the facilities previously provided by MTFF to be "novate[d] … from [MTFF] to [MTFR] with respect any Transaction executed and performed after 14 July 2017…",

    ii) A TFA dated 17 July 2017 (1/81),

    iii) A RFA dated 17 July 2017 (1/94)

iv) A Debenture dated 14 July 2017 (1/133E)

v) A personal guarantee by Mr Gooch to MTFR, dated 14 July 2017 and limited to £250,000 (1/125) and

vi) A corporate guarantee by DAV to MTFR dated 14 July 2017 and limited to £50,000 (1/131).

All these documents were in materially similar form to those previously in place with MTFF.

19. The effect of the MTFR offer letter is that after 14 July 2017 new transactions were financed by MTFR rather than MTFF, but those previously entered into by MTFF remained in place as between MTFF and Synergy. Those existing transactions were not, in legal terms, "novated" to become dealings between MTFR and Synergy, and accordingly MTFF remains the party entitled to claim in respect of them. Although Mr Bacon had earlier submitted that MTFF had no remaining title to sue in respect of those transactions, he abandoned that contention in his closing submissions.

20. Disagreements between the parties escalated later in 2017. In broad terms, Synergy complained about delays in accepting transactions it put forward for financing and in payment of funds for those that had been approved (as it had from the inception of the facilities) and MTFR was concerned about late or non-payment by customers of Synergy, and that it had discovered, it said, that some invoices issued by Synergy to customers had, contrary to the terms of the RFA, directed the customer to make payment to Synergy's bank account and not that of MTFR, to which the receivables had been assigned.

21. The last transaction financed appears to have been on 8 November 2017 (deal ref MTF 118, see statement at 1/137). There was some discussion up to April 2018 of the possibility of Synergy transferring its facilities to another financier called Ex-Works, or of MTFR resuming provision of facilities, but after an unsuccessful meeting on 23 April 2018 Mr Gooch sent an email the next day (2/853) in strong terms from which it is clear that he would not consider any further dealings with MTF and was "pulling together a full summary of our claim against MTF in the next few days for all the damage you have done to our company…".

22. This led to the claimants sending letters to Synergy dated 10 May 2018 stating that the facilities were in default and demanding immediate repayment of the sums said to be due and set out on statements attached, which were signed by Mr Tinkler under the wording "I certify that this is a true record of the amount due". The statements (referred to in the litigation as MTF5, being the number of the appendix to the Particulars of Claim in which they were included) showed balances of £353,298.79 claimed by MTFR and £65,570.65 claimed by MTFF. These letters were also copied to Mr Gooch and DAV, demanding payment of the same amounts from them under the guarantees. The letters do not refer to the limits on the amounts of those guarantees, but it is not in dispute that any judgment against the guarantors will be subject to those limits.

23. There were further discussions between the parties, including a meeting on 15 May 2018 (minutes are included in the bundle, though they refer to the discussion as being without prejudice, see 2/881). No agreement was reached and the claim was issued on 26 November 2018.

Terms of the Facilities

24. It is convenient now to set out in more detail the relevant terms of the facility documentation. Although there were various iterations of the Offer Letter, most of the material terms (save of course for the amount of the facility) are identical in each of them. The two forms of TFA and RFA are materially identical save for the names of the parties. I will refer, therefore, unless otherwise specified, to the clause and bundle page numbering of the first set of documentation, entered into in March 2016.

25. The Offer Letter provides as follows:

    i) It is "for the provision of a TRADE FINANCE FACILITY to you on the terms set out below, together with the associated documents listed in the schedule.."

    ii) It offers "a facility of £350,000 to [Synergy] to source and purchase … chemical pesticides for the agricultural industry ("Goods") for processing into the finished product… to be sold to [Synergy's] Customers against orders and contracts from its Trade Credit Insurable global Customers in the normal course of business."

    iii) "MTFF will buy from [Synergy's] Suppliers the Goods… MTFF will purchase against a Supplier Undertaking and on credit terms. Therefore MTFF will pay the supplier directly. Any Supplier requiring payment shall be approved by MTFF… MTFF shall only buy Goods against confirmed Purchase Orders from [Synergy's] Customers…"

    iv) "MTFF will sell the Goods Purchased to [Synergy] on terms of up to 120 days from the date MTFF is invoiced by… the Supplier… The credit terms of each transaction will depend on the terms of [Synergy's] sale to its Customer."

    v) "Thee Goods purchased shall be delivered into [Synergy's] custodial control… [Synergy] will arrange for the transport… [Synergy] will have the responsibility for the entire processing and storage of the Goods…"

    vi) "All Receivables… created by the sale of [products] in fulfilment of valid purchase orders against which original Goods were purchased must be sold to Customers upon whom MTFF can obtain Credit Insurance or who are insured under [Synergy's] own insurance policy…"

    vii) "Maximum credit terms on the sale to Customer shall not exceed [90 days from issue of invoice to Customer] without the prior agreement of MTFF. All Receivables created must be irrevocably assigned to MTFF and the assignment disclosed to and acknowledged by each Customer" (1/18-20).

    viii) "MTFF shall be repaid with respect to this facility and the related charges by receipts from the Invoices (Debts) that [Synergy] have raised on its Customer(s) which have been purchased by or assigned to MTFF, or in absence of payment, or in the case of any shortfall, by [Synergy]."

26. There is then a set of conditions to be satisfied before MTFF will issue any commitment to purchase goods from a Supplier, including:

    i) Confirmation from the Customer that invoices will be paid to MTFF's nominated bank account,

ii) The Customer to have signed MTFF's Assignment of Proceeds form, and

iii) "The Customer to be up to date with current commitments".

27. As to the relationship between the various documents, the Offer Letter provides:

"The [TFA] and related documents govern the way that MTFF purchases Goods on your behalf. The [RFA] governs the way MTFF purchases the Invoices ("Debts") raised by [Synergy] and the exit process for MTFF from each of [the] transactions conducted under the [TFA]. Together they form a framework within which MTFF may structure financing for [Synergy] as required on all transactions. MTFF may at its sole discretion advance sums under the RFA in addition to those finance[d] under the TFA up to the maximum limit noted below."

28. The Offer Letter includes a number of other terms, including:

i) "The terms of the relevant documents set out in the schedule are part of this agreement but, in case of conflict, the terms of this letter take precedence…". The documents named in the schedule include the TFA, the RFA and Mr Gooch's guarantee.

ii) "We shall not be obliged to commit to buy any Goods for a customer who is currently late in making payment on an assigned invoice or who has a history of late payment." (1/23)

29. The TFA provides that:

i) "1.4 MTFF will pay Suppliers for the supply of Goods… subject to the terms of the Offer Letter and this Agreement…"

ii) "3.2 When so requested by [Synergy] MTFF shall buy the Goods and sell them to [Synergy] when MTFF is satisfied that the conditions precedent to the Transaction as set out in this Agreement, the Offer Letter and any Transaction Operating Procedure or Supplier Undertaking have been met…"

iii) "3.3 … [Synergy] is obliged to buy those Goods from MTFF… and pay for them and MTFF's charges ("the Debt") within the Agreed Period and under the terms of this Agreement." The Agreed Period is defined at Cl 2.4.1 as "The period [of] time agreed between [Synergy] and MTFF for a period of credit extended within which any payment made by MTFF for the purchase of Goods is [to be] repaid by [Synergy] or a Customer." The Offer Letter provides that this is subject to a maximum of 120 days "from delivery of goods to [Synergy]" (1/30 para 1.4)

iv) "3.4… Failure to pay a Debt on time shall be a Fundamental Breach of this Agreement. Any Fundamental Breach…renders all Debts payable immediately on demand."

v) "3.6 [Synergy] shall only have the right to sell to [any] Customer if the price is as expected by or as approved by MTFF… MTFF has the absolute right to refuse to allow [Synergy] to sell to [any] Customer."

vi) "21.1 For the purpose of determining the liability of [Synergy] to MTFF under the Agreement, [Synergy] will be bound by a written certificate from the Company Secretary or by any one of the Directors of MTFF as to the amounts

due under the Agreement which shall be conclusive evidence (save for manifest error) in any legal proceedings against, or any claim brought by, [Synergy]."

30. The RFA provides that:

i) "3.1 [Synergy] will offer for sale to MTFF… every Debt coming into existence in the duration of this Agreement… by inclusion of the Debt in a Notification Schedule. .. "

ii) "3.2 Every such offer of a Debt shall be deemed to be accepted by MTFF unless MTFF has despatched … a notice of refusal of that offer within 7 working days… upon acceptance of that offer… that Debt will belong to MTFF absolutely."

iii) A Debt is defined as a debt arising from sale of Goods, and Goods is in turn defined as any services items materials or products supplied to a customer (1/54). This definition is not limited to goods whose purchase MTFF has financed, or to products made from or including such goods. It follows that the obligation to sell Debts to MTFF extends to all debts falling due from Synergy's customers, whether or not MTFF has financed the purchase or manufacture of any goods sold to that customer, and the RFA is, as both Mr Tinkler and Mr Powell said in cross examination, a "whole turnover" assignment agreement.

31. The three principal documents, the Offer Letter, the TFA and the RFA, were plainly interlinked and created a combined set of obligations that between them constituted the trade finance facility provided. It is relevant to note that there was only one overall facility, subject to the overall limits from time to time set out in the Offer Letters. There were not, for instance, one Trade Finance facility and a separate Receivables Finance facility.

32. In essence, the way the facility operated was that Synergy would propose a transaction involving purchase of chemicals from one or more suppliers, setting out the terms of purchase in each case, together with the proposed sale of the finished product to a named customer. If approved by MTFF, the raw materials would be sold and invoiced by the supplier(s) to MTFF, not Synergy, although they would be delivered to, stored and processed by Synergy. That transaction was principally governed by terms set out in the TFA.

33. Under the terms of the TFA, Synergy agreed to repurchase those raw materials from MTFF and pay for them, on a date not later than 120 days after the supplier's invoice to MTFF.

34. In the normal course of events, MTFF expected to be repaid by collecting payment of invoices issued to the end customer. Those invoices had been assigned to MTFF by virtue of the RFA. But, as both the resale provisions of the TFA and the terms of the Offer Letter make clear, if the customer did not pay, or did not pay in full, after the time limit provided in the documentation, Synergy was itself directly liable to pay for the price of the goods and all charges provided for in the facility documentation.

35. The RFA created the possibility of additional finance by MTFF, by way of payment of the stated purchase price of the debts assigned to it, over and above the cost of purchase of the related raw materials that MTF had already paid. If any such payment had been made, it too would in the normal course have been expected to be recovered on payment

by the customer of the assigned debts. Mr Powell referred to this as a "top up" advance, available if the client, ie Synergy, requested it. It is not clear from the evidence whether any such top up payments were in the event made. Thus, although the RFA stated a purchase price in respect of the debts assigned, it was clearly not anticipated that MTFF would make immediate payment of that price, and it was not necessary to do so in order to complete the (equitable) assignment of the relevant debts to MTFF. If and when payment of any part of that stated price had been made, it would of course have triggered payment of finance charges by MTFF. Such advances would also be expected normally to be repaid out of payments made by customers to MTFF, but as the Offer Letter stated, if there was any shortfall, it was to be made good by Synergy.

36. One other aspect to note, though nothing turns on it for present purposes, is that the "Stock Finance component" referred to in the Offer Letters denotes funding that would be made available by way of purchase of chemicals to be held in stock by Synergy, without having an end customer identified in advance. As and when those stocks were sold, however, the effect of the RFA would be that all receivables arising from the sales would be assigned to MTFF.

37. The Offer Letters also provide for payment of various fees and charges, as would be expected. These are expressly stated to be direct liabilities of Synergy: "[Synergy] shall pay to MTFF the following sums…" (1/21), although no doubt the normal expected mode of payment would be by deduction from collections received from customers paying invoices to MTFF.

Relevant aspects of the contractual effect of the documentation

38. It is not in dispute that the contractual terms of the facility required that each trade to be financed required the prior approval of MTFF; hence the process of submission of the proposed terms and other information about the trade, the customer and the supplier(s). Mr Gooch clearly accepted in cross examination that this was so, and that it had also been the case under the previous facility he had operated with TFP:

"Absolutely. We'd look to ensure the supplier had the goods. All deals had to be authorised but we believed as long as we had headroom the deal would be paid out."

39. Mr Bromley, Synergy's Director of Operations, who gave evidence for the defendants, also accepted this. Mr Maguire put to him that MTFF was not bound to fund any particular transaction. He responded:

"That is correct. But right up to the end not one deal was questioned, all of them were paid out eventually… the very last deal [was not approved]."

40. There is not however anything in any of the contractual documentation setting out an obligation on MTFF to approve transactions, either within a particular time, or if there is available headroom in the facility, or indeed at all. There are a number of express provisions as to circumstances in which no funding would be given- eg if the proposed customer was not "up to date with current commitments" or was "currently late in making a payment on an assigned invoice or … has a history of late payment". But over and above that there is an express and apparently unfettered requirement that any Supplier from whom goods are to be purchased must be approved by MTFF. There was also a right to refuse to accept any Customer, and no doubt Mr Gooch and Mr Bromley were right to recognise that the practical combined effect of the documents was to mean that MTFF had the power to give or withhold approval of any proposed transaction.

They also accepted that this was in the nature of specialist trade finance, of which they were experienced users, though their complaint was that in contrast to their experience with MTFF, this had not led other trade financiers to delay approval of deals or payments to their suppliers.

41. It is also accepted that Synergy were obliged to ensure that each of its customers was notified that debts payable by the customer had been assigned to MTFF, and further to ensure that each invoice issued to a customer stated that the invoiced debt had been assigned to MTFF and directed that payment must be made into a named account of MTFF, and not to Synergy.

42. It follows from the fact that the RFA provides for assignment of all Synergy's receivables from its customers, that all payments by any customer ought to be made to MTFF and not to Synergy, and that this would be the case:

    i) Whether or not any finance had been provided by MTFF by way of purchase of raw materials going to make up the products sold to that customer. This is relevant because it is said that Synergy entered into some sales that had not been financed by MTFF, and even some that had been financed by another financier (Bibby). It would be different if those trades had not been made by Synergy at all (but perhaps by an associated company that was being financed by Bibby) such that the invoice had been wrongly issued by Synergy, or if payment of an invoice issued by another company had been mistakenly made to MTFF. In those circumstances, MTFF would not be entitled to receive that payment.

    ii) Even though the payment by the customer might exceed the total of any finance provided by MTFF, and related finance charges, for that particular trade. In practice it appears that MTFF (and probably Synergy) sought to keep track of finance provided, and payments received from customers, by reference to particular trades, each of which was given a deal number. But the facility documentation was not structured so as to require that payments made by a customer were applied only, or first, in order to discharge obligations related to the trade the customer was paying for.

43. It further follows that, if all operated as expected and the trades were profitable, it would be expected that total collections by MTFF would exceed the total of Synergy's obligations to it (ie the total of obligations to reimburse MTFF for the finance it had provided, and MTFF's charges) and one would expect that such surplus would be paid over to Synergy. This is dealt with, briefly, in the RFA which provides that (cl 7.2) "Any Collection Instalment shall be paid [to Synergy] within two clear working days of the receipt by MTFF of sufficient monies from the Customer".

44. However the definition of a Collection Instalment (cl 2.1.7) is "Any amount received from a Customer less the Initial Payment (if any) already paid and after deducting any amounts due to MTFF under this Agreement and any associated Trade Finance Agreement." Accordingly, MTFF would be entitled to deduct, from any payment received from a Customer, any amount for the time being due and payable to it by Synergy, whether or not that amount related to the trade for which the Customer was making payment. Thus, Mr Tinkler was correct when he asserted in his evidence that MTFF had the right to "set off" anything due to it by Synergy before paying over any apparent "surplus" from a customer payment or "profit" element of a particular trade.

45. In the foregoing paragraphs I have referred only to MTFF, but the same applies to MTFR, since its documentation was similar.

The defendants' pleaded allegations

46. Although of course the claim is not brought by the defendants, in the light if the nature of the dispute and the way the case has been argued it is convenient first to consider the allegations made by the defendants. As noted above, the defendants' case falls to be considered only on the basis of their pleaded case and the evidence in relation to that case, and not by reference to other allegations made in their evidence which they might have, but have not, pleaded.

47. The general nature of that case is set out in the following provisions of the Defence and Counterclaim (DCC):

> "5. D 1 intends to claim rescission of any agreement found to have existed between it and [C 1]/and or C 2 based on the misrepresentations set out below…
>
> 6. In the alternative D 1 intends to plead set off as against any monies found to be due from it to C 2 based on the damages in lost profits caused to it by lost sales in turn caused by reliance on confirmations of funding provision by C 2 which C 2 knew or ought to have known and/or ought to have notified D 1 that it was not able to provide.
>
> 7. D 2 and D 3 intend to claim that by virtue of the misrepresentations made to them that they are released from any guarantee… given to C 1 or C 2…"

48. Although para 6 makes an allegation of damage by lost sales against MTFR (C 2), no similar claim is made against MTFF (C 1).

Allegations relating to the First Claimant

49. Paragraphs 8-19 of the DCC set out the allegations of misrepresentation made in relation to MTFF and reliance on them by all the defendants. They describe the introduction of MTFF to Synergy by Mr Kirkham, and the meeting in February 2016 to discuss possible business, attended by (inter alios) Mr Tinkler and Mr Powell for MTFF and Mr Gooch and Mr Bromley for the defendants.

50. Para 9 sets out how Mr Gooch described the nature of the business and the "need for speed of response in the agrochemical purchase and sales engaged in by [Synergy]…It was specifically put to Mr Tinkler that the success of D 1 depended on its ability to commit to the purchase and sale of goods and therefore the ability to rely on its financial providers was essential."

51. Para 10 alleges that "Mr Tinkler confirmed that based on the description of the business model for D 1 as put to him… C 1 could offer trade finance products to D 1 which would properly and reliably support its trading operations."

52. Para 11 alleges that "In addition… the issue of insurance for the trade finance to be provided by C 1 was discussed… Mr Tinkler represented to D 1 that C 1 had the facility to put credit insurance arrangements in place … which would cover any lending from C 1 to D 1 in the event of non-payment by D 1's customers… C 1 would… ensure that appropriate insurance arrangements were put in place by C 1 to properly protect its interests in the event [of] non-payment by D 1's customers…"

53. Paras 18- 19 describe how Synergy agreed to sell a consignment of goods to Danrava, a company in Lithuania, and that MTFF arranged credit insurance cover against risk of non-payment by Danrava. It goes on to say that "the requirements of the Letter of Offer indicated that all insurance arrangements in relation to any transaction…should be 'sufficient'- whether such insurance was arranged by C 1 or by D 1…the defendants' position is that the meaning of the word 'sufficient'…is a representation made further to those made by Mr Tinkler at the meeting… and [means] that the credit insurance… would operate to repay the amounts advanced by C 1 against the transaction in the event of non-payment by the customer…. The obligation to ensure sufficient credit insurance cover applied to whichever party had agreed to obtain insurance…".

54. There was quite an amount of evidence, written and oral, devoted to the Danrava transaction and its aftermath. It is sufficient for the present to say that Danrava defaulted on its payments and went into insolvency. After extensive correspondence and disagreement over which of Synergy or MTFF should take the lead in efforts to recover direct from Danrava or its liquidators, a shortfall remained, but MTFF decided not to make a claim on the credit insurance. The amount unpaid by Danrava (strictly, and subject to a point I shall refer to later concerning cross payments from MTFR, the outstanding amount recoverable under the TFA and/or RFA which would have been discharged if Danrava had paid its debt) and related finance charges constitutes most or all of MTFF's claim.

55. Para 19 goes on to say that MTFF "ought to have been able to make a claim against the credit policy… had Mr Tinkler's representations about the suitability and effectiveness of the insurance facilities available to C 1 been true and/or had the requirement of sufficiency of credit insurance referred to in the Letter of Offer been acted upon by C 1. Indeed as would have been known to C 1 either at the time of the making of the representations to D 1 which induced D 1 to enter into the agreement… C 1 did not have access to insurance arrangements which operated to protect its interests and/ or failed to make a claim under the said policy and/ or deliberately and/or negligently misrepresented the nature of those arrangements to D 1…"

56. Para 20 then pleads that "Further or in the alternative…C 1 is in breach of an express term, has entirely failed to mitigate its own losses and/or cannot seek to rely on its own breach to found an action against D 1".

57. The claims by MTFF against the guarantors are resisted on the basis either that Synergy as principal debtor has no outstanding debts due to MTFF, or that entry into their guarantees to MTFF was induced by reliance on the same alleged misrepresentations.

58. These provisions make, firstly, an allegation of a general representation that the facilities to be offered would "properly and reliably support [Synergy's] trading operations." The need for speed in its dealings is referred to as a matter explained to Mr Tinkler, but there is no pleading of anything specific that he is alleged to have said in relation to it. Nor is any allegation made of any discussion, let alone any representation, relating to the financial resources of MTFF, or available to MTFF from those on whom MTFF itself relied to fund its operations, ie the trade finance that it extended to its existing customers and which it was offering to Synergy.

59. These points are relevant because in their later evidence, both written and oral, Mr Gooch in particular complained of delay by MTFF in agreeing to fund transactions that were proposed to it, and explanations and apologies offered to him and Mr Bromley to the effect that these delays were caused, at least in part, by delays in MTFF's own

funders making funds available to MTFF that it could use to fund trades on behalf of Synergy. The contemporary correspondence shows that there were, from the beginning of the operation of the facilities, such delays in many cases, and that Synergy was continually pressing for transactions to be approved and funds paid to suppliers immediately or, it was said, opportunities to purchase goods would be lost and they would be sold elsewhere. That correspondence shows also that in some cases at least Synergy and/ or the suppliers had not completed or provided the paperwork required by MTFF, but it is also clear that over and above that, in many cases MTFF was forced to delay approving trades and/or providing funds because it had not yet received funds it was expecting from its own funders.

60. Mr Gooch went so far as to say (in cross examination though he had not in his witness statement) that it had been clear that MTFF "had no money to pay from the word go" or "never had the funds". This was a point he was anxious to make, and repeated in vitriolic terms, many times, whether or not it was relevant to the question he had been asked. It was an exaggeration, because it is clear that although there may have been delays in funding, MTFF did in fact fund a considerable number of trades, and Synergy was sufficiently content with the operation of the facility to continue it and on several occasions seek to increase the amount of it.

61. However, whatever the degree of justification for these complaints, they are simply not related to the defendants' pleaded case against MTFF. It is necessary to bear in mind the requirements of CPR 16 and the related PD, which relate to particulars of claim but apply also to a counterclaim made by a defendant (and a claim for rescission or damages for misrepresentation is a counterclaim):

"PD 16 para 8.2 The claimant must specifically set out the following matters in the particulars of claim where they wish to rely on them in support of the claim –

(1) any allegation of fraud;…

(3) details of any misrepresentation;…

(5) notice or knowledge of a fact;…"

62. However in the defendants' pleading:

i) There is no pleaded allegation of any discussion relating to availability of funds to MTFF. This may not be surprising; it would I suspect be unusual for a customer dealing with an institutional lender to enquire into the lender's own sources of funding.

ii) A fortiori, there is no allegation of any specific representation being made about the existence or nature of such funding.

iii) If there had been such an allegation, in relation to anything said by Mr Tinkler at the meeting in February 2016, in order to make a case of knowingly false representation it would have to be shown that Mr Tinkler made either a statement as to present fact, which he knew at the time to be false, or a statement as to opinion which was an opinion he did not genuinely hold at the time. There is no evidence to gainsay that given by Mr Tinkler in cross examination, to the effect the MTFF had a $5m line of credit that supported its existing customers and from which he expected to support Synergy.

iv) There is no pleaded allegation of any respect in which anything Mr Tinkler may have said about MTFF's funding was false, let alone that he knew it was false, or did not genuinely believe it to be true.

63. It is true that Mr Gooch expanded upon his allegations greatly in his witness statement, but that is not a statement of case and cannot be relied upon to set out matters which must be pleaded (and so may be properly responded to in the pleadings of other parties). In any event, evidence of later delays in provision of funds is not in itself sufficient to infer that, at the time of the meeting in February, MTFF did not have or expect to have funds available to it from which it could provide the facilities it intended to offer.

64. Accordingly I reject any attempt by Synergy to assert a misrepresentation by Mr Tinkler as to MTFF's funding or its adequacy or suitability.

65. In relation to insurance and the Danrava debt:

i) the Letter of Offer provides that "Prior to issuing any Purchase Commitment on your behalf, MTFF shall require the following:… 4. Sufficient credit insurance on the Customer(s) (if required)…" (1/20)

ii) The TFA provides at cl 17.1 that "MTFF's rights under this agreement shall not be affected by…any failure to exercise or delay in exercising any right or option against any Supplier or other person…"

iii) The RFA refers specifically to credit insurance at cl 8.3 which provides:

> "In certain cases MTFF may elect to use Debt insurance…(a) in the event of a Customer failing to pay its debt in full on time MTFF (at its sole discretion) shall not be obliged to make a claim under such insurance policy whether or not an apparently valid claim exists. (b) MTFF shall have the right to recover any Initial Payment made against a Debt from any other security (including without limitation any personal indemnities)… regardless of whether an apparently valid claim exists…".

66. The representations Mr Tinkler is alleged to have made at the February meeting, at their highest, were that MTFF had the ability to put credit insurance in place which would adequately protect its (ie MTFF's) interests. Clearly MTFF could and did put such insurance in place for some customers, including Danrava, but the extent to which that insurance protected MTFF's interests was a matter for MTFF alone. Such an allegation cannot be extended by inference to include a representation or promise that any insurance would also protect any interest of Synergy, or as to how MTFF would exercise its insurance rights in the future, for example that it would make an insurance claim rather than relying on its rights against its client.

67. The reference to availability of insurance in the Offer Letter is a condition precedent to MTFF's provision of finance to a Customer, and plainly a provision for MTFF's benefit. This is emphasised by the fact that it applies only "if required", ie it could be waived by MTFF if it so chose. The extent to which the insurance was "sufficient" was therefore a matter for MTFF. That provision cannot be interpreted as a representation, or as the defendants plead an "express term", that any insurance would also benefit Synergy, or that insurance rights would be exercised by MTFF so as to benefit Synergy. That would be so if the Offer letter were considered on its own, but is made even more clear by the provisions of the TFA and RFA I have quoted, setting out MTFF's rights

to recover from its client irrespective of any other security or remedy it may have. Thus, whether the claim against the client is considered to arise under the TFA or RFA, it may be exercised in this claim irrespective of any decision by MTFF not to make an insurance claim.

68. I reject, therefore, Synergy's asserted defences against MTFF (including the claim for rescission) based on alleged misrepresentation and/or failure to exercise insurance rights. It follows that those defences insofar as asserted by the guarantors also fail.

Allegations against the Second Claimant

69. Paragraphs 21-31 of the DCC set out the defendants' allegations in relation to the facilities provided by MTFR. Para 21 alleges that an unsolicited phone call was made by Mr Tinkler on or about 30 June 2017 in which he invited Mr Gooch to agree to transfer Synergy's facilities to MTFR "which Mr Tinkler specifically represented would be better able to support D 1's business operations- such needs including the specific need for rapid and reliable responses having been provided by Mr Tinkler to [MTFR] in order for it to make the representations as to suitability made in that conversation". The latter part of this appears to be garbled, but I take it to mean that Synergy's need for rapid and reliable responses to its proposal of trades to be funded was known to Mr Tinkler and was therefore something that Mr Tinkler represented MTFR would be "better able to support".

70. Para 24 alleges that the real reason for suggesting a transfer was that "[MTFF] had lost financial backing and was no longer able to abide by the agreements it had entered into with [Synergy]… the decision to conceal the reason for the transfer from [MTFF to MTFR] was a deliberate deceit on the part of Mr Tinkler designed to conceal the fact that…. [MTFF] would be in breach of agreement based on its inability to provide the funding it had agreed…".

71. Para 27 pleads reliance on these representations in agreeing to transfer the facilities, and para 28 alleges that "The representations… were false and were known by Mr Tinkler to be false or ought to have been known by Mr Tinkler to have been false. Without disclosing the same to the Defendants, it subsequently transpired that the funding basis for [MTFR] was a 'matched funding' basis… when proposed transactions were notified by [Synergy]… rather than being in a position to provide the funding needed by [Synergy], [MTFR] would have to approach a panel of funders to ascertain whether or not there was a preparedness on the part of those funders concerned to fund at all… there would be inevitable delay which Mr Tinkler knew or ought to have known would prejudice [Synergy's] ability to meet the demands of its suppliers and customers. "

72. Para 28 goes on to allege that "… approximately one month after the Defendants signed agreements with [MTFR]… Mr Tinkler advised that [MTFR] was not in fact able to service its offer of receivables finance to [Synergy]. [MTFR was effectively declaring itself to be in repudiatory breach of the [RFA] and sought and received acceptance of that repudiatory breach by [Synergy]."

73. Paras 29- 30 allege that Synergy was unable to complete the purchase of products from suppliers because of failure by MTFF to provide finance, giving one example of a transaction which it says had to be taken over by AgChem Access Ltd, causing losses to Synergy. Particulars of further losses are to be given later.

74. Para 30 alleges that sales opportunities were lost because customers "were not prepared to risk delays in delivery as a result of [MTFR] not fulfilling its obligations under its agreement" Further particulars are to follow but one example is given of proposed sales to a customer called Aloa "despite the same having been discussed with Mr Tinkler on 15 December 2017 and with him having agreed to fund those sales."

75. Para 31 states that based on the alleged misrepresentations Synergy claims damages for these losses without prejudice to its claim for rescission.

76. The alleged misrepresentations are again expressed in very general terms, that MTFR would be "better able to support" Synergy's business requirements, including its business need for a speedy response to funding requests. Notably, it is not said that any specific representation was made to the effect that MTFR would fund all requests, or that it would give a decision or provide funds within any particular period. Nor is there any pleaded allegation that MTFR was contractually bound, either by the terms of its documents or by any collateral agreement, to do either of these things. Mr Bacon devoted a considerable amount of his written submissions to arguments under the heading "Breach of Contract", but all such arguments are irrelevant because there is no pleaded claim for breach of contract. The allegation as to representations of better ability to support Synergy's need centres on what is alleged about MTFR's own funding being provided on a "matched funding" basis and whether that was or was not explained to Mr Gooch or Synergy before the MTFR facilities were agreed.

77. In his witness statement, Mr Gooch stated that he knew what matched funding entailed and regarded it as fundamentally different from a revolving facility, which was what he had been offered in the various Offer Letters. A revolving facility, he said, meant that as funding was repaid from one transaction, and as long as there was headroom in the facility, it could be drawn upon for further transactions. Matched funding by contrast required that each proposed transaction had to be approved by the trade finance company's own funders with consequential delay. There had been no mention of matched funding in relation to MTFF, nor when discussions were held concerning a transfer to MTFR.

78. In cross examination Mr Gooch was even more emphatic on these points. A revolving facility meant that funding would be available in very quick timescales for any deal proposed, as long as the customer was insurable. He compared it to an overdraft facility, the implication being that the client was entitled to have its requests for funding met, as long as there was headroom in the facility. Other funders he had dealt with over many years, and those he dealt with now, had no problem in providing funds the next day. None of them offered matched funding facilities, which would be wholly unsuitable for his business. He referred to the idea of matched funding, and the arrangement with MTFR relying on matched funding as "ludicrous", among other colourful phrases. He was adamant that no mention had ever been made to him of matched funding being involved and if it had been he would immediately have walked away from any discussions with MTF.

79. Mr Tinkler in his witness statement described how in his view the facility provided by MTFF had performed well, with high volumes of trades and only one bad debt (that of Danrava). However, he said, he had been under pressure from Synergy to increase the facility limits to fund larger transactions, and there was a limit to the amount of trade that MTFF could fund given the funding resources available to it. Its sister company MTFR however had access to a separate line of credit of £5m from a Singapore company, Naval Elite, though it was on a more specialised basis, referred to as

"matched funding", ie that each transaction had to be put to and approved by Naval Elite. However, the availability of this funding meant that MTFR would be able to offer increased facilities, up to a limit of £750,000. A meeting had been arranged on 13 September 2016 at which he and Mr Powell had explained the matched funding concept and proposed a new facility with MTFR. He had he said spent some time explaining matched funding to Mr Gooch, who was a sophisticated individual and seemed to understand it and to be happy with the idea.

80. Mr Powell, MTF's Director of Risk, also made a witness statement and gave evidence. He described the initial negotiations with Synergy which led to the MTFF facilities, and said that in the operation of that facility there had been some "niggles" relating to provision of information by Synergy, which he regarded as a "difficult" customer. In particular there had been requests for funding that exceeded the facility limit. As a result he considered the MTFF facility was not large enough for Synergy, and he and Mr Tinkler had discussed the matter and decided to offer a new facility, based on matched funding from Naval Elite, which they had decided would best suit Synergy's requirements. He recalled attending a meeting with Mr Gooch, Ms Gooda and others (he did not give a date) at which the matched funding concept was explained in detail. Apart from the source of MTF's own funding, the new facilities offered were in the same format as those from MTFF.

81. There are no minutes of any meeting, either in September 2016 or at any other time, at which a change to matched funding is shown to have been discussed. The contemporary correspondence however supports the evidence that Synergy, whatever its concerns about any delays in MTFF approving trades, was seeking to extend the facilities it had- the £350,000 limit in the March 2016 Offer Letter was raised to £600,000 in September 2016 and on 3 March 2017 Mr Gooch sent an email (2/664) saying that Synergy was entering a busy period and wanted to extend the facility to £750,000 and then quickly to £1m. On 13 March 2017 an offer letter was sent for an extension to £1m (in the name of MTFF, 2/667), though this was never taken up.

82. During the same period, early 2017, it is clear from the correspondence, the bad debt from Danrava was becoming a significant problem. Much of that correspondence is devoted to efforts to collect, promises made by Danrava and their failure to deliver on those promises. On 23 June 2017 Mr Rowe, a member of finance department at Synergy, sent an email to Mr Tinkler (2/699) stating that Synergy wished to draw down some £96,000 against invoices using the receivables element of the facility (ie the RFA) and complaining that Sharon Charles, who administered the account for MTFF, had indicated that only £30,000 would be available. This he said was "significantly below expectations and the facility we are paying for".

83. Mr Tinkler replied that "the reason for the explanation made by Sharon is that £30,000 was all that we had available in Sterling due to the changed nature of our funding drawdowns. As we made you aware of during our meeting, our funding is now on, almost exclusively, a matched funding basis. This means that we have to show our funders each and every deal and its audit trail. Therefore, receivables finance is a bit more of a challenge for us in the short term. We are addressing this situation and hope to secure in the next 4 weeks more flexible inputs which can be directed to the type of service we are offering you."

84. Ms Gooda was copied into this correspondence. Mr Rowe forwarded it to Mr Gooch and Mr Bromley (2/701), specifically so that it could be discussed at an "Operations meeting" of Synergy executives. On 11 July 2017 Mr Gooch emailed Mr Tinkler

expressing concern that funding requests were being delayed and saying "we are not getting any firm dates as to when funds will flow again, which is holding up payment…in the last week we have taken well over 500k in new orders all of which will require funding from yourselves… can you urgently update on funding and when things will properly free up again, we cannot afford to lose one pound of business…". There was more pressure for confirmation of funding from Ms Gooda and Mr Tinkler in emails on 13 July, including a comment by Mr Gooch that "we really need the full funding line we signed up to in place and can't afford any more delays or lost orders due to lack of funding" (2/710).

85. Then on 14 July 2017 Ms Gooda emailed Mr Tinkler (2/712) saying "Morning Paul. When we spoke last night you confirmed we would this morning receive paperwork from MTF in reference to the new funding line. Can you please update where we are on this?".

86. The Offer letter in the name of MTFR was sent the same day (2/715) and although the signed documents are dated 14 or 17 July, it appears they were not actually returned signed to MTFR until 25 July 2017 (2/721). In the meantime Ms Gooda had sought and received an explanation of the differences from the MTFF facility documentation (2/719, Mr Powell wrongly stated the amount of the facility ats £750,000 when it was in fact £600,000 as the existing facility had been).

87. Mr Gooch also on 25 July emailed asking "Will this remove all the funding issues we have seen in recent weeks which have caused us lost orders?" to which Ms Prasal, described as a Client Manager for MTF, replied "We await [your] signed copies [;] as soon as MTFR is up and running with yourselves it should eliminate future funding issues."

88. On 2 August Ms Gooda emailed (2/723) seeking commitments as to when outstanding funding requests would be met and saying "We provided all the paperwork for our first MTF Resources deal on Monday. As we were explained the new match funding should then mean we can expect to see funds turned round quickly but as it stands I currently have no information as to when we can expect to see this paid out."

89. Reading this correspondence, it clearly does not sit exactly with the accounts given in the witness statements on either side. However, it does make clear, in my judgment, that:

    i) MTF and Mr Tinkler were well aware, as indeed they accepted, that speed of turnround of funding requests was important for Synergy's business, and that Synergy was dissatisfied at delays that were occurring.

    ii) There had been a meeting, at some point prior to 23 June 2017 at which it had been explained to Ms Gooda and Mr Rowe, at least, that MTFF's funding was by that time "almost exclusively" on a matched funding basis. That explanation and a description of what matched funding entailed was also given in writing in Mr Tinkler's email of 23 June, which was forwarded to Mr Gooch among others, for the specific purpose of being discussed within Synergy. It is not clear whether Mr Gooch was himself in the meeting with MTFF referred to, but even if he was not, Ms Gooda and Mr Rowe were senior employees, so notice to them would amount to notice to Synergy. Further, they were dealing with the financing issue which was clearly a major concern of Mr Gooch's and it is not possible to believe that they did not discuss this point and Mr Tinkler's email

with Mr Gooch at the internal Operations meeting, as they said they were going to.

iii) I am satisfied therefore that despite his denials, Mr Gooch was aware, prior to entering into the MTFR facility, that by June 2017 MTFF was obtaining its own funding on a matched funding basis, and what that entailed.

iv) Further, there plainly was discussion with Synergy of the existence and nature of the "new" funding line available. The detail of that discussion cannot be seen from the correspondence, but Ms Gooda at least was aware that it was on a matched funding basis, as can be seen from her email of 2 August. It is plain she was so aware prior to the new documentation with MTFR being signed, as she indicates this is the basis of the expectation Synergy was given that funds could be turned round quickly under the new arrangement that MTFR had. Even if Mr Gooch was not personally present when Ms Gooda was told this, she is in any event a senior employee of Synergy and was conducting that discussion on its behalf, so that information given to her was given to Synergy itself. Further, it is similarly not realistically possible to believe that she did not communicate that to Mr Gooch. I find therefore that Mr Gooch was aware, prior to signing the 2017 Offer letter and other MTFR documentation, that MTFR's funding would be on a matched funding basis.

v) It is also clear that Synergy were told, at least in the email from Ms Prasal (but very likely also directly in the meeting, whether by Mr Tinkler or someone else) that MTFR expected that the availability of the new funding line, notwithstanding it was on a matched funding basis, was expected to overcome the previous difficulties in approving Synergy's funding requests. I note however that the defendants' pleaded case does not refer to that assurance.

vi) There is no supporting evidence, either in this correspondence or elsewhere, for the allegation in the DCC that MTFF had lost its financial backing. Insofar as MTFF's difficulties in providing the finance Synergy requested being concealed from Synergy, they were openly acknowledged and well known to Synergy and Mr Gooch. The allegation of deceit against Mr Tinkler has no foundation and should never have been made.

vii) There is no support, either in the correspondence or elsewhere, for the allegation that MTFR within a few months repudiated the finance agreement, or that it sought and received acceptance of that repudiation.

90. I accept therefore that in substance Mr Tinkler and MTFR represented to Synergy that they expected that MTFR's facilities would be "better suited" to support Synergy's operations. This was not however because they concealed the fact that MTFR would rely on matched funding. They did not misrepresent the nature of matched funding to Mr Gooch; he was as I have found (indeed as he says himself) aware that it involved presenting a funding request to MTFR's own funder for approval. To the extent this inevitably involved some delay, Mr Gooch was aware of that, and must have accepted it. The allegation that there was any misrepresentation by failing to disclose that matched funding would be used must be rejected. I should say that there is no support, in the correspondence or elsewhere, for the pleaded allegation that it was necessary to present to a panel of lenders as distinct from one funder.

91. What Mr Tinkler and MTFR can be inferred as representing to Synergy was only therefore that they considered that the requirement to obtain the funder's approval should not be likely to operate either so as to prevent funding, or delay it unduly, in relation to a proposal that MTFR itself would otherwise be prepared to accept. That is in my judgment a matter of their opinion, and not a statement of present fact, and there is no evidence from which I could conclude that it was not the opinion that they genuinely held at the time. Indeed if they did not, there would have been little point in proposing the new facility at all. No doubt, Synergy may consider that these expectations were not fulfilled, but even if they are correct in that (and I should say there is much support in the correspondence for the contention by MTFR that the funder's reluctance was caused by documentary discrepancies and late payment by customers) these subsequent events are not themselves evidence that the opinion was not genuinely held at the time the statements concerned were made.

92. Accordingly I reject the claims made by Synergy against MTFR on the basis of alleged misrepresentation, both as to rescission and damages. It is not therefore necessary to address the instances of lost business referred to, nor the obstacles that the claim for rescission would have faced in terms of the possible waiver of the right to rescind by electing to continue the contract and seek funding under it long after, on Synergy's account, the difficulties in providing funding had become apparent, or the requirement to restore MTFR to the position it would have been in before the agreements. As with MTFF, it follows that the similar claims made by the guarantors also fail.

93. For completeness, I repeat that no claim is pleaded to the effect that MTFR's failure to approve funding requests, or provide funding sought, more quickly than it did, was in breach of contract. A related issue that I deal with because of the amount of evidence and submissions it took up was Mr Gooch's often repeated insistence that he had been offered a revolving facility but that was not what had been provided. He was wrong, in my judgment, to equate a revolving trade facility of this kind with a bank overdraft (under which a bank pays any cheque or other payment request, up to the overdraft limit, without generally enquiring as to the purpose of the payment), and Mr Powell was right when he said in evidence that the revolving nature of the facility meant that as and when any part of the facility drawn was repaid, it becomes available to be drawn again, subject to and in accordance with the terms of the facility. Those terms, as Mr Gooch and Mr Bromley accepted, included the requirement that trades proposed must be approved by MTFF (or MTFR) and the fact that it was designated as a revolving facility was neither a waiver of that requirement nor any representation or promise (none having been pleaded in any event) that approval would be given in all cases or in any particular timescale.

The claimants' claims

94. I turn then to the claims made by the claimants themselves, and the remaining defences and arguments as to quantum made against them.

95. The claimant companies sue for what they say are the balances due to them, shown on, and they say evidenced by, the statements sent to the defendants and exhibited to the Particulars of Claim. There are two sets of such statements, the first (MTF5) sent with the notices of default and demands for payment, which are signed by Mr Tinkler and certified as correctly showing the balances due and the second (MTF6) which are not so signed and were only served with the Particulars of Claim. The MTF6 statements include relatively minor changes and are said to be updating.

96. It is right to note that the form of these statements is not, as a bank statement might be, a record of all debits and credits on an account, but only a statement of those items, whether advances or charges, that are said to be outstanding. Thus, for instance, they do not show payments received from customer debts collected, but only the advances, or balances of advances, that the claimants say remain after those collections have been credited.

97. The defendants accept that Synergy received funding from both companies, that not all of that funding, and not all the costs and charges due, have been paid and that therefore some amount is (subject to their various defences) due to each claimant. They have however consistently declined to put forward any statement or estimate of what they say that amount is, nor have they ever, so far as can be seen from the material I was referred to, descended into any detail of any challenge to the entries on either set of statements. In his skeleton for trial Mr Bacon set out a great many detailed points of objection to those entries, but these appeared to be his own submissions, did not refer to any evidence from his clients, were not put to any of the witnesses and were not repeated (I do not say they were abandoned) in his closing submissions.

98. Rather, the defendants' position throughout seems to have been to assert that although they have their own records and calculations of what is due which they say show significant differences from the claimants' statements, they are unable to reconcile the two sets of figures until provided with more information from the claimants. They have never been prepared to put forward their own figures, or to say in what respect or by how much they differ from those of the claimants.

99. I have no doubt that this is deliberate. The correspondence, in my view, shows that Mr Gooch adopted the approach from an early stage that whatever information was provided, he would demand more and refuse to put forward any figure of his own. This is not to say that the accounting position was straightforward; it is clear that reconciling what was due from customers was complicated by complaints (a) on the part of MTFR that Synergy had received payments direct from customers that should have been paid to MTFR, in part at least because Synergy had issued invoices with its bank details and not those of MTFR (which Synergy did not appear to deny at the time) and (b) on the part of Synergy that MTFR had applied payments received from customers on relating to one trade to discharge sums due relating to another (which MTFR said, in my view correctly, it was entitled to do).

100. There was a brief period in which it appears that Mr Gooch was prepared to cooperate and engage in a discussion to agree the position, which came in January 2018, when he was exploring a move to a new financier called Ex Works. He wrote an emollient email on 24 January 2018 (2/831) proposing to agree the outstanding balance in order to facilitate that transition. However that transfer evidently did not proceed, and within a few days hostile correspondence resumed with Synergy requesting detailed statements of every debit and credit on their accounts over the whole period of the facility.

101. Mr Gooch again appeared to be willing to reach some accommodation in April 2018 when he approached Mr Tinkler seeking to restart operation of the facilities. Mr Tinkler replied on 19 April (2/852) stating that he would be willing to do so if, among other things, the balance outstanding could be agreed rapidly and a payment plan put in place to clear it. Mr Gooch however renewed his request for a complete statement of every entry on the ledgers, which Synergy would then seek to reconcile "and compare your figures with our own" to resolve what he said was "a large discrepancy" (2/851). There was a meeting on 23 April 2018, but it is clear that no way forward was agreed and Mr

Gooch resumed correspondence in his most vitriolic terms immediately thereafter (eg, 2/853). The following day he told Mr Tinkler that a "dossier [had been] passed to our lawyers for the formal claim against MTF and yourself" (2/856). No such claim was made however, until the DCC in these proceedings.

102. It does appear that a considerable amount of accounting information was provided, in various forms, to Synergy, though they were never given a full ledger showing every entry, credit or debit, relating to the facility. The evidence from Mr Tinkler and Ms Charles was that information as to payments and receipts was entered by MTFR onto spreadsheets for each trade, which had been prepared by Ms Gooda and made available to both parties through a Dropbox facility. MTFR's position was therefore that all this information was already in Synergy's hands, in the form that it had itself requested and set up, and it was not necessary to provide MTFR's own detailed records which were in a different form but contained the same information.

103. On 3 May 2018 Mr Keith emailed Mr Tinkler saying (2/873) "it's your daybook information and Sage transactions that we require in order to compare with our own records". Mr Tinkler replied "You now have the Sage reconciliations and by tomorrow morning you will have copies of our Bank Receipts into HSBC and Client Remittance advices. We are now engaged in calling each of your customers to determine what proportion, if any, of the funds due to MTF have been paid directly to Synergy…". It is common ground that the bank statements and client remittance advices were not sent, but it does not seem to be denied that the Sage accounting information was received by Synergy.

104. Mr Gooch replied saying (2/872) "we have asked for months for this information, I can't understand why it's taken this long to send" to which Mr Tinkler replied "The information sent to you today is no different to the information you have had access to for the last five months. Your company has just not wanted to do any work to examine that record. Today's sheets match exactly those in your possession."

105. It does not appear that Synergy responded to this information, or said why they were unable to do so. Whilst no doubt it may be that if they compared it with their own records there would be some differences, or detailed queries that they might have raised, they do not appear to have been willing to engage in that process at all.

106. At some point in May 2018 the claimants served what they said were statutory demands for the amounts they said were due. Mr Bromley responded on 7 June 2018 (2/875) objecting to the procedure and saying "… also the value of the amount owed has been contested since October 2017 and remains contested. This action has forced us to quantify the value of our losses and damages due to misrepresentation of the capabilities of MTF to service our requirements in order to construct a counter claim which greatly exceeds the value which has been put to us by MTF. Do we really need to engage lawyers or do we resolve this between ourselves?" Mr Bromley denied in cross examination that "constructing" a counterclaim meant making one up for the purposes of negotiation.

The pleaded case and defences

107. By para 17 of the Particulars of Claim the claimants plead that Synergy failed to repay sums advanced to it and consequently they served the notices of default, with statements attached, exhibited at MTF5. The DCC in response at para 43 provides "as to para 17 it is denied that Synergy failed to repay any sums properly due to either claimant. It is

further denied that any statements of account signed on behalf of the claimants were a true record of the amounts due; by the dates referred to the claimants were on notice of their breaches and therefore any attempt to certify the statements as a true record was a deliberate falsehood on the part of the claimants by reason of the matters pleaded above." Insofar as this is an allegation of inaccuracy in the statements, it is only that they fail to take account of Synergy's claims for damages, which I have now rejected.

108. Mr Bacon in his skeleton submitted that this pleading was a denial of breach of the agreements by Synergy, and argued that the claimants had failed to plead or prove any particular breach of the agreements and so had not established any entitlement to serve the default notices or demand payment.

109. I reject that contention. The breach alleged in the Particulars of Claim is failure to pay sums when due, and to the extent that that breach is denied by the rather loose words of the DCC, it is amply established both by the witness evidence of Mr Tinkler and Mr Powell that Synergy failed to pay sums that became due from it when customers failed to pay in full or on time, and by the contemporary correspondence, which is replete with statements on behalf of the claimants as to the amount of "overdues" on the account of MTFR, which statements were not substantially contested at the time. In relation to MTFF, it cannot be seriously disputed that Synergy had defaulted in its obligations to repay the trade finance advanced for the Danrava transaction, not to mention the charges relating thereto (whatever their exact amount) by the date of the default notices. I note that no suggestion was made to any of the claimants' witnesses that Synergy had not been in default.

110. The defendants' substantial objection is to quantification of the claims, and whether the claimants have pleaded, or can rely on, conclusive evidence clauses in any of the various agreements, and if so against which defendant.

111. Mr Bacon points out that the references to conclusive evidence provisions in the Particulars of Claim are not ideally drafted. Para 21 pleads that the MTF5 demand letters with schedules attached constitute "conclusive evidence of the defendants' liability to the claimants pursuant to the terms of the Guarantees". This can only refer to the second and third defendants, who were party to the guarantees, and not to Synergy, which was the principal debtor. Para 10 of the claimants' Reply refers to a conclusive evidence provision contained in the TFA and para 11 avers that that clause is determinative of the amounts due from Synergy, but Mr Bacon submits that it is not open to the claimant to raise this by way of Reply, since it amounts to a new ground of claim that ought to have been raised, if at all, by way of amendment to the Particulars of Claim, referring to *Martlett Homes Ltd v Mullalley & Co Ltd* [2021] EWHC 296 (TCC).

112. I do not however agree with that submission. The grounds of claim in this matter are the breaches of contract asserted (whether under the facility documentation against Synergy, or the guarantees against Mr Gooch and DAV). In determining liability for those breaches, the parties are entitled rely on any of the terms of the contracts, and although no doubt it is good pleading practice to set out those that are particularly relied on, that does not mean that every term of the contract is or becomes a separate ground of claim. A conclusive evidence clause is, as the term suggests, an evidential provision and not in itself the basis of a claim. In my judgment, a claimant may rely on such a provision to support his claim for sums due under a contract just as he could, for example, on a term fixing a rate of interest.

113. Accordingly, in my judgment, the claimants are entitled to rely in principle on any relevant conclusive evidence clause in their contractual documentation with Synergy. Mr Bacon points out however that although cl 21 of the TFAs contains such a provision (which I have quoted above) the RFAs do not.

114. That clause uses the expression, twice, "the" Agreement. Elsewhere in the TFA the expression used, so far as I can see without exception, is "this" Agreement. Neither is among the terms specifically defined. I was not addressed in any detail about whether as a matter of construction "the" Agreement extended to the whole facility arrangement, or was limited to the TFA; Mr Maguire taking the position that it did so extend and Mr Bacon that it did not. The point may make a difference if the sums claimed, or any of them, are due by virtue of advances made under the RFA rather than the TFA, but neither the statements, nor any of the evidence or argument, was devoted to any such distinction.

115. In the end I have come to the conclusion that the better construction is that the clause is limited to liabilities under the TFA. Although there is a difference in terminology between cl 21 and other clauses, it is slight and may simply be a drafting mistake. Although the documentation as I have said establishes a composite arrangement for a facility, the provisions of the TFA and RFA are generally specific to the transactions that they respectively govern, and "boiler plate" clauses where they occur are in general duplicated if appropriate to both sets of transactions (eg the provisions for notices). Provisions of general application are, by and large , contained in the Offer Letter.

116. The result is that in my judgment the claimants are unable to place any effective reliance, as against Synergy as principal debtor, on the certified statements included at MTF5. This is because those statements do not either state that the sums included in them all arise under the TFA, or, if they do not, distinguish between those that are due under the TFA and the RFA respectively. Nor can they rely on the MTF6 statements as conclusive evidence, since (in addition to thee points) those statements have no certificate at all. That is the position as against Synergy; I deal with the claims against the guarantors later.

117. If the conclusive evidence clause does not apply, Mr Bacon submits the claimants are put to proof of the amount due by virtue of CPR 16.5 (4) which provides "Where the claim includes a money claim, a defendant shall be taken to require that any allegation relating to the amount of money claimed be proved unless he expressly admits the allegation". Mr Maguire submits that there is an obligation on defendants to admit or deny allegations so far as they are able, and that in particular the option provided by r 16.5(1) to require an allegation to be proved presupposes a genuine ability either to admit or deny it, referring to *Patel v Patel* [2019] EWHC 2643 (Ch) and *SPI North Ltd v Swiss Post International (UK) Ltd* [2019] EWCA Civ 7.

118. On this point I am with Mr Bacon. CPR 16,5(4) provides for a default position in a specific situation, ie the case of a money claim where the amount is not specifically admitted. It does not, it seems to me, impose any obligation, expressly or by implication either to admit the amount if the defendant can do so, or to set out the reasons and extent to which he is unable or unwilling to do so. It is not restricted, as r (1) (b) is, to allegations that the defendant is "unable" to admit or deny.

119. As against Synergy, therefore, the claimants must prove the amounts due to them. Mr Bacon submits that there should be an account ordered to determine the amount due. However, the statements on the account the claimants have produced may not be

"conclusive" evidence of the amounts due, but they are nevertheless evidence. The issue for the court is whether they are sufficient evidence to enable me to come to a just conclusion, or if not whether to order an account or some other disposition.

120. I have no doubt that if an account is ordered, it may become a protracted and expensive process. The defendants will no doubt maintain their position that the starting point must be production by the claimants of a complete statement of every debit and credit on Synergy's account since the inception of the facilities. Bearing in mind the overriding objective, is it justifiable and proportionate to put the parties to that delay and expense? I must consider, it seems to me, whether doing so is realistically likely to result in a figure that is sufficiently different to make the exercise worthwhile.

121. In that connection, it is relevant in my view that the defendants have throughout the operation of the facilities, as they admit, maintained their own records of the operation of the facilities, the advances made to them and payments made by customers. They have been provided with information by the claimants as to any payments received by the claimants from customers, in the form they requested and using the spreadsheets they provided. They have not at any stage been willing to divulge the position as they see it to be, but contented themselves with unspecific references to significant discrepancies. It this in my view fair to infer that if there were good reasons to think that the claimants figures were significantly wrong the defendants would have given them, rather than holding back as they appear to have done from the correspondence in the hope of deterring a claim or perhaps negotiating a much reduced payment on the basis of allegations that I have rejected.

122. When I pressed Mr Bacon for specific reasons why the defendants said they were unable to reconcile their figures with the claimants' statements without the comprehensive statement of debits and credits, four matters were raised:

i) MTF had applied receipts from some customers against liabilities arising on trades with other customers. Mr Gooch referred to this as "robbing Peter to pay Paul" and said it made it impossible to establish what remained outstanding from any particular customer. This seems to relate to the later stages of the facility and so, presumably, liabilities due to MTFR. Mr Tinkler accepted that MTFR had done that and said (correctly in my view as I have said above) it was entitled to do so and had in some cases used receipts to discharge the oldest liabilities on the account rather than necessarily those from the related trades. It is open to question whether this made Synergy genuinely unable to ascertain what was outstanding from any customers, since from the correspondence it appears that Synergy knew itself when customers were paying, and in any event was notified by MTFR when payments were received by it. But even assuming that this difficulty exists, it does not, it seems to me, materially affect the balance on the account between MTFR and Synergy. The amount of the receipt was credited, and as between Synergy and MTFR the discharge of one liability rather than another makes no difference to the overall net position. Conceivably it may make a difference to the charges made for interest (or equivalents), perhaps if different rates applied to the two liabilities, but no such differences were raised in submissions or, so far as I can see, in the correspondence between the parties, and in any event if MTFR is as I have held entitled to apply receipts as it chooses, it is entitled to levy its charges on the facility balances that result.

ii) MTFR had retained payments made by customers whose trades had not been financed by it at all. But, firstly, as I have held, it was entitled to do so since all

the customer debts were assigned to it, and secondly, since it has applied those receipts towards discharge of Synergy's liabilities, Synergy has received a corresponding credit that has reduced, not increased, the balance now claimed.

iii) MTFR had retained payments made on transactions financed by Bibby (and possibly payments that were made on trades by other associated companies and not Synergy). If these payments were due to Synergy, the debts had been assigned to MTFR and it was entitled to the proceeds, irrespective of any arrangement between MTFR and Bibby. If due to another company, at the highest, Synergy has received a credit against its own liabilities to MTFR that it should not have, and so its position as against MTFR is better not worse.

iv) MTFR had applied some payments received from customers on trades financed by it towards reduction of liabilities owed to MTFF relating to the Danrava trade. Again, Mr Tinkler accepted that this had been done. He also accepted that this was incorrect, as the debts being collected were assigned to MTFR and not MTFF. However, it seems to me that at the highest, the result is that Synergy's liabilities to MTFF have been incorrectly reduced, and those to MTFR incorrectly remain higher by a corresponding amount. It makes no difference to the total of its liabilities to the claimants taken together. Since the claimants have committed themselves to the respective amounts they claim, if there is any misapplication between the two of them that is a matter for them, Synergy cannot be made to pay twice and so suffers no injustice if ordered to pay the claims as stated.

123. Taking all these matters into account, in my judgment the delay cost and inconvenience to the parties of ordering an account are not proportionate to any advantage of increased precision in quantifying Synergy's liability that can be reasonably expected to result; accordingly I decline to do so and will give judgment for the claimants against Synergy based on the amounts in their respective statements. Given that this is not in reliance on the conclusive evidence clause, the relevant statements are those in MTF6. For the reasons given, this cannot be seen to result in any substantial increase in Synergy's liability, and accordingly does not give rise to any injustice to Synergy.

124. There is addition a claim for interest. Mr Maguire submits that the claimants are entitled to the rate provided in the Offer Letters, which is described as a "Discount Rate for any sum unpaid after expiry of the Agreed Period", which he says is a provision for compound interest, and puts forward a figure calculated from 21 March 2020 to the date of trial amounting to over £3.1m.

125. I accept that the claimants are entitled to contractual interest. Mr Bacon did not submit otherwise. I did not have any detailed argument on the basis of the calculation, so if it cannot be agreed I invite short written submissions from counsel to be received by the date of handing down so that I can determine any disagreement. Provisionally however it seems to me that the terms of the Offer Letter do not in terms specify compound calculation, and the reference to payments that should have been made within the Agreed Period (a term used in both the TFA and RFA) suggests that the rate applies to the principal amount of the liabilities only and not to the interest as well, and so is a provision for simple interest. There should be separate interest amounts for each claimant.

126. Dealing briefly with another of the pleaded allegations, to the effect that the claimants should have mitigated their losses by pursuing Danrava and/or the credit insurers, I

accept Mr Maguire's submission that concepts of duty to mitigate have no application to a claim in debt, as this is.

127. Finally so far as the claims against Synergy are concerned, I should say that if I had been minded to order an account, I would also have been minded to order an interim payment by Synergy which, in light of the matters I have referred to, would have been substantially the whole of the amounts claimed, plus interest thereon.

Claims against the guarantors

128. In the light of the above, I can deal with these briefly. I have rejected the defences and claims based on misrepresentation. No other defence to liability in principle on the guarantees is put forward. It is accepted that each guarantee contains a conclusive evidence clause, so that as against the guarantors the claimants are entitled to rely on the certified statements in MTF5 as conclusive evidence of the amount due by Synergy.

129. Mr Bacon puts forward in his skeleton a number of submissions as to matters he says show "manifest errors" in those statements; in relation to those the only ones I consider I need mention specifically are the lines which show reduced amounts in MTF6 as compared with MTF 5. I do not accept that these show obvious errors in MTF5, it is much more likely that they represent receipts since the date MTF5 was compiled, for which the claimants would have to give credit in any event. None of the other points raise matters that could be seen to show errors without detailed investigation which, for the reasons above, cannot be seen to be likely to make a material difference in any event.

130. In any event, without regard to the conclusive evidence provisions, the liability of Synergy as principal debtor is now established by the determination I have made above, in the slightly higher figures given in MTF6.

131. In fact, given the limitations on the liability of the guarantors, the exact amount of Synergy's liability will not affect the amount of the judgments against them. One point that may need to be determined if not agreed is how those judgments should be apportioned as between the claimants, since there are separate guarantees to each of them but I do not understand the claim to seek the maximum amount to be claimed under each of them separately.

132. I will list a date for this judgment to be handed down. Handing down will take place without attendance, by sending a copy of the final approved version of the judgment electronically to the parties and submitting it to BAILII. I invite counsel to submit an agreed order in time for it to be approved on the handing down date. Any application for permission to appeal should if possible be made by short written submissions, to be received no later than the handing down date. If the order cannot be agreed, or for any other reason a hearing is required to deal with matters arising, counsel should provide a short note of the matters to be decided, an agreed time estimate and their dates of availability. Any such hearing will be dealt with remotely, at a later date.