slipped through the system. The defender did not reclaim VAT on them. On one occasion Mr Keatings had delivered materials, but these were not from the pursuer.

79 He was referred to later invoices being sent to Bath Street, Glasgow. He did not know anything about this. It was the registered office of the defender. He could not explain why they would be sent to Bath Street, and he assumed it was a mistake for Snowcast.

80 He was referred to the Snowcast bank statements (6/1/1). He initially denied having any access to this account (in contradiction to Mr Keatings' evidence). It was down to Mr Keatings to make payments. He said that payments to the defender would either be interest or return of capital. He would have to authorise payments, and demands for payment from Snowcast would be discussed with Mr Keatings. Mr Jenkins would contact him about sums due, but that was because he knew Mr Whyte had lent money to Snowcast. Mr Jenkins was aware of that relationship. He had met Mr Jenkins in London: while he could not remember what they discussed, the pursuer and the defender had a similar interest in being paid by Snowcast. All payments to the pursuer were made by Snowcast, not the pursuer.

81 He did attend a meeting at the pursuer's office in Govan. It was to *"see the set-up"*. Mr Whyte did not remember discussing Snowcast at all on that date (a stance I found odd, as Snowcast was the only link between the parties). He was asked if he had asked about getting a credit arrangement for the defender. He said that "if" he did, it would only be for supplies to the defender. Mr Jenkins may well have discussed a £75,000 limit for the defender, but he did not recall. It was, however, *"completely false"* to say that the defender would become the customer for Snowcast supplies. That *"would be a very strange arrangement"*. He maintained that the signing of the terms and conditions was nothing to do with such an arrangement.

82 If any arrangement like this was mooted, it would be more appropriate to offer a guarantee. Mr Whyte would not offer a guarantee in any event. He denied ever telling Mr Jenkins that there was nothing to worry about, after payment problems

arose. Mr Whyte had exactly the same concerns about Connaught's non-payment. There's *"no way I would agree to the defender being the customer"*. He had met with Connaught once, as part of due diligence.

83 He agreed with Mr Jenkins' comment that the defender was offering a financial lifeline to Snowcast, but this was by way of a loan. He did not invest in Snowcast. He dismissed the alleged invoicing arrangement as "*absolute nonsense*". The invoices sent to the defender were certainly forwarded to Mr Keatings. There was no arrangement that the invoices be sent to the defender.

84 Mr Whyte agreed that this was a business opportunity for the defender, that there might be lots of work, and that it was necessary to secure a supply of materials. He denied that the defender became the customer – if so, the defender may as well have carried out the work itself.

85 In cross-examination, he was asked if Mr Jenkins had ever pressed the defender for payment of the outstanding sum. He denied this had been done. He was then referred to several text and email messages which passed between them (5/6/12 and 13 of process). The text, from Mr Jenkins, states *"Hi Craig...I seen (sic) to have hot (sic) a brick wall regarding the £5000 per month which we agreed you'd pay..."* Mr Whyte denied ever agreeing to pay. He was asked to comment on various emails. Production 5/6/13 states: *"There is still £86,127.36 outstanding. I have received £7,500 to account since both your good self and Tom agreed to settle the Tixway debt...please Craig I am begging you to help me?"* Mr Whyte said he was "*always happy to help*". I found this an odd response, as Mr Whyte was clear there was no such debt. He did not explain the reference to *"the Tixway debt"*. His evidence was that Mr Jenkins would have known there was no such debt. The next email, dated 1 September 2010, also asks him to *"...call me with regards to the outstanding sum from Tixway."* In my view that can only be understood as a reference to liability of the defender. Mr Whyte said *"it was possible"* that he had denied this debt to Mr Jenkins.

86 A further email dated 15 October 2010 states: *"I am obviously very keen to discuss...the outstanding debt between Onestop and Tixway...I can't stress enough how much it would mean to me...if you reinstated the proposal to pay back at*

£5k/month". Mr Whyte's response by email said: *"Clearly the old Snowcast debt is a problem given nothing can now be recovered from Connaught but happy to sit down with you and discuss potential solutions..."* This, in my view, is a striking contemporary failure by Mr Whyte to deny the debt, or at least to query the claimed *"£5k/month"* arrangement which, according to his evidence, he had never agreed.

87 At this stage, Mr Whyte was reminded of the statement he had made, at the start of cross-examination, that Mr Jenkins had ever pressed for payment. Mr Whyte said that no debt was due (which didn't answer this point). He was referred to a 23 November 2010 email from Mr Martin referring to the *"Tixway UK ltd debt"*. Mr Whyte said there was no such debt, but again there was no contemporary attempt to dispute it.

88 He was asked about the defender, and whether his wife was a director. He replied *"I believe so"*. In my view it was hard to see why such a basic query should elicit such an indirect, equivocal answer. It was becoming apparent to me, by this point, that Mr Whyte was being careful to be as non-committal as possible in his answers. Whether this was due to the pressure of press scrutiny, as he alluded to in his evidence, was difficult to tell. It had, however, the effect of detracting from his evidence.

89 There were no actual orders by the defender that Mr Whyte could recollect. He confirmed that renovation works had started in Castle Grant in 2007, and explained the signing of the terms and conditions (5/4/5) as a new supplier being introduced, notwithstanding the co-incidental timing. Despite there being no orders for Castle Grant, there was no other reason for signing. It was *"complete nonsense"* to say it was the only way of obtaining supply for Snowcast.

90 It was discussed that the defender would take a 51 per cent stake in Snowcast, but it was never carried through. He agreed there was no loan agreement with Snowcast. He instructed payments from Snowcast. He had, however, no access to the Snowcast bank account. He thereafter modified this to saying *"It is a*

91 He did not recollect how much money was invested, but he thought more went in than came out. He *"made no apology"* for asking for repayment.

92 He did not recall Mr Keatings filling out a credit application for the defender. He was not in a position to do so. It would be for goods for the castle, and no other reasons.

93 He had no idea why 600 to 800 invoices were sent to the defender. He said he *"responded"* to these. Mr Keatings should have mentioned these. Mr Whyte had never asked for a credit limit of £75,000.

94 He could not comment on the reclaim of VAT. The defender had never reclaimed. He could not comment on whether Snowcast could reclaim, given that the invoices were not addressed to Snowcast. It was a matter for them. He did know that one needed an invoice, to oneself, to reclaim VAT. He'd told his staff to sort out the addressing to Castle Grant. He would certainly have told Mr Keatings to sort it out.

95 He disclaimed knowledge of Snowcast's history or suppliers. He said that Mr Keatings had sold a story well, or else the defender would not have made a loan. He attended the Connaught meeting not to ask for all the work to be diverted to Snowcast, but only as part of due diligence. He was familiar with credit risk insurance, but did not know the pursuer's arrangements. He agreed that it did not seem very sensible to give credit to Snowcast of £70,000 per month without credit risk insurance. It may be that the pursuer concocted a scheme to use the defender's credit rating, but it was not with Mr Whyte's authority. He had signed the terms and conditions only for Castle Grant supplies.

96 He agreed that a number of invoices went to the defender's registered office at Bath Street, Glasgow. He had *"no recollection"* of instructing such a change. There was no need to investigate, as they were being paid by Snowcast.

97 Mr Whyte agreed that he was accusing Mr Jenkins, Mr Keatings and Mr Snowball of lying. He stated it was possible that *"one of my staff"* had access to the Snowcast bank account. He did not accept that Mr Jenkins was ever chasing the defender for payment.

98 He accepted that sometimes he required access to bank accounts for investments in smaller companies. This allowed monitoring of the flow of funds, and the taking of payment when due.

99 Overall, for the reasons set out below, I have not been able to rely on Mr Whyte's evidence as reliable, and where it contradicts the evidence of the pursuer's witnesses, I have preferred the latter.

Submissions

100 Following Mr Whyte's evidence, both sides made written and verbal submissions. Both parties' procurators discussed the evidence, and I set out my findings below. The agent for the defender founded heavily on the distinction between Snowcast Limited and Snowcast UK Limited, and it is appropriate that I deal with this submission as a preliminary matter.

Snowcast Limited/Snowcast UK Limited

101 On behalf of the defender, it was submitted that it was critical to bear in mind the distinction between these two companies. The former had been set up by Mr Keatings and Mr Snowball, and traded until about May 2008. The latter was a new company of similar name, with which the pursuer started trading in succession to the old company. The agent for the defender referred to the pursuer's pleadings, which referred only to "Snowcast Limited", and to her own line of questioning, in which she maintained she had been careful to ask questions only in relation to "Snowcast Limited". She invited me to draw this distinction between the two, and to conclude that the pursuer's case had not been made out, because all supplies post-April 2008 were made to Snowcast UK Limited, not Snowcast Limited, and accordingly there could be no debt due in respect of the former.

102 The defender's agent is correct that the debt averred in the Initial Writ is that of "Snowcast Limited". That is the limit of my agreement with her submission, however, and I reject this approach as misconceived. The function of pleadings is to give fair notice of the case to be made. Once evidence is led, however, that evidence is available for the court to consider. Only by objecting to evidence which does not correspond with the case on record, can the other party prevent it

being available. There was no objection to the evidence led about Snowcast UK Limited, and indeed none of the witnesses regarded the distinction as significant (save for the focused point about a "clean" company). While the questioning for the defender may indeed have paid punctilious attention to the distinction (although it was not obvious at the time that any distinction was being drawn), it is not the questions that matter, but the answers. The witnesses plainly did not take the same careful approach, and it is their evidence which forms the basis of judgement.

103 What became clear from the evidence of every single witness was that nobody, in fact, made such a distinction. The two companies were referred to by each and every witness as "Snowcast". That was because the distinction was not a real one in any witness's mind. The same business, with the same principals, with the same supplier and customers, operated after April 2008 as had prior to April 2008. There was absolutely no evidence that any party knew or cared that a new company had been formed. The only reason for a new company was to make sure there was a clean vehicle to which the defender might give financial support. Accordingly, on no fair view could it be said that the pursuer intended to supply the old company, or that the supplies were being ordered by the old company, or that the defender was being asked to invest in the old company. All were agreed that the business was "Snowcast", and all were intent on promoting that business. No lawyer was involved. Consequently, while the pursuer's averments indeed refer to "Snowcast Limited" operating post-April 2008, the evidence shows that averment to be in error, and the evidence also shows that the same business was in fact operated by "Snowcast UK Limited". I have no difficulty with that evidence, and nor did any of the witnesses. A court must reach its opinion on the evidence, not the pleadings, which have limited relevance once the evidence is led, except as a guide to whether evidence is admissible.

104 I would say that, even had this distinction been founded upon in objecting to evidence, it is likely that I would have allowed the pursuer to amend the reference in the pleadings to become "Snowcast UK Limited", and allowed the defender time to respond. It is difficult to see how the defender's case could have changed, in consequence. It is no more than an error in the pleadings in relation to

distinction which (as the evidence shows) had no practical relevance to any of the witnesses, or the underlying contract, or the supply of goods, or the payment obligation of the defender. Even hypothetically, therefore, this formal point has no substantive merit.

105 I now turn to discuss the remainder of the evidence.

Discussion of evidence

106 The parties are in dispute as to whether there was any agreement that the defender would become the customer of the pursuer. The pursuer's evidence was that such an agreement was reached between Mr Jenkins and Mr Whyte, on behalf of the parties, on or about 29 April 2008 at the pursuer's offices. That was to allow the pursuer arranging credit risk insurance against the defender's credit rating, rather than that of Snowcast, and therefore free them up to extend credit to a much higher value. The defender denies any such agreement. In submission, the agent for the defender accepted that this was a sharply polarised situation – either the pursuer's version was correct, or it was a case of deliberate fraud by the pursuer on the insurer in the knowledge that the credit risk was misrepresented. It is hypothetically possible that the parties simply misunderstood each other. Having considered the evidence, however, I accept the evidence of Mr Jenkins about what occurred at that meeting, and reject Mr Whyte's evidence as unreliable. I accept the evidence of Mr Keatings, Mr Martin and Mr Snowball, as it substantially coincides on the central points, and where it conflicts with Mr Whyte's evidence, I accept the former as the accurate account. I would set out the overall structure of the evidence, before turning to the detailed reasons for coming to my view.

The context of the April 2008 meeting

107 Parties agree that Craig Whyte met Mr Jenkins at the pursuer's premises either once or twice in April 2008. The context was that Mr Whyte, as director of the defender, was offering some type of financial assistance to Snowcast. Snowcast's problem was that it was a relatively small trading company, attempting to service a large, and potentially much larger, roofing contract. Snowcast's cash flow was an extremely important issue, as it required very large amounts of roofing materials, while depending on the flow of cash from the main contractor,

Connaught. Snowcast required to finance supplies and labour for the customary payment period of 30 days. Large amounts of roofing materials were required to allow roofing works to be undertaken, but the credit limit was not enough to cover the amount of materials require.

108 The importance of cash flow was demonstrated in Mr Keatings' evidence. He spoke not only to the issues with credit for roofing materials, and the slow payment by Connaught, but also to the importance of obtaining gross payment status for tax purposes. Such status resulted from a concession from HMRC that income did not require to have 20 per cent tax deducted at source, but could be received gross, provided that monthly tax returns were submitted on time, and all tax outstanding was paid at the end of the tax year. This was such a requirement that he was not able to be a director of the new Snowcast UK Limited, in order to preserve that status for the new company. Mr Snowball's said that Craig Whyte required that the new company had gross payment status

109 Against that background, it was "*crucial*", in Mr Keatings' view, that Snowcast had a secure supply of materials from the pursuer.

110 From the pursuer's point of view, they were willing to supply Snowcast, and even enthusiastic to do so, because they anticipated that this would allow them to grow their own business. Despite their enthusiasm, however, they were cautious. Mr Jenkins had already noted that Snowcast were *"a bit slow in paying"*, and the credit limit of £8,000 was wholly inadequate for the materials required. He had discussions with Mr Keatings about how to pay for supplies, including a suggestion that the pursuer take a shareholding in Snowcast. In addition, both Mr Jenkins and Mr Martin spoke to the pursuer's practice of obtaining credit insurance, borne out by the applications lodged in process (5/6/8 and 5/4/4). While Mr Jenkins did accept that occasionally they would operate beyond a credit limit, it was not suggested to him that this was such an occasion, and there was no reason to think it was. The defender, and Mr Whyte, were previously unknown to him.

111 At this stage, therefore, Snowcast needed to guarantee a supply; Snowcast knew they were exposed to slow payment from their own main contractor; the

pursuer was only prepared to supply materials if payment was secured; the pursuer knew that Snowcast was not a wholly reliable payer and was in any event unable to offer comfort about payment; and their own insurers would not offer adequate risk protection. The solution, therefore, was security for the pursuer's continued credit to Snowcast.

112 Mr Whyte for the defender says that all that was ever on offer was a loan, to Snowcast. Mr Whyte rejected any suggestion that the defender take a shareholding in Snowcast or otherwise take a stake, and it could only, therefore, have been an arm's length loan. It is difficult, however, to see how this would meet the pursuer's commercial requirement for security of payment. The pursuer could not take more than peripheral comfort from a loan to Snowcast, as there would be no guarantee the cash would be used to pay the pursuer. There would be no guarantee of payment, and upon default the loan would most likely be repaid to the defender, not the pursuer. Further, a loan would do nothing to increase the risk insurance level available. From the outset, therefore, Mr Whyte's position is, at least, somewhat improbable. The next issue is what was agreed between the parties at the meeting of 29 April 2008.

The meeting in April 2008

113 I have set out the witnesses' evidence about the meeting on 29 April 2008 in the pursuer's offices in Govan. Those attending included Mr Jenkins, Mr Whyte, Mr Keatings, Mr Snowball and (according to Mr Snowball) Tom Whyte and Willie Brown. In summary, the reason for meeting with Craig Whyte was that he had stepped in to offer financial assistance to Snowcast, for the purpose of addressing the materials problem. Mr Jenkins was clear that this meeting resulted in an agreement that the defender would become the customer for roofing products supplied to Snowcast. At that meeting, Mr Whyte filled in the terms and conditions form (5/4/5). There was no mention of renovation work at Castle Grant, and Mr Jenkins had not previously heard of Craig Whyte. Mr Martin gave evidence that he saw Mr Whyte in the office that day, but was not party to the meeting.

114 Mr Keatings said he had a "vague recollection" of the meeting, but confirmed that the purpose of the meeting was to give a level of comfort to the pursuer relating to Snowcast. He did not, however, suggest that materials be invoiced to the defender, although the mechanism was for Mr Whyte to decide. He is not able to give direct evidence about what the parties agreed.

115 Mr Snowball confirmed the meeting, that the Snowball supplies question was discussed, and *"that's when Craig and Tom said they'd finance this under the cover of Tixway"*, and stipulated that the invoices be sent to Tixway, along with copy orders, so these could be married up on a monthly basis. Mr Snowball, therefore, agrees with Mr Jenkins' recollection.

116 Mr Whyte's evidence was wholly different. His position was that the meeting was to see the pursuer's establishment in Govan. He did not recall discussing Snowcast at all on that date. He did not deny asking about a credit arrangement, but did not confirm it either. If he had, he said, it would only be for supplies ordered by the defender for their own use. The only aspect he was clear on was that he did not volunteer the defender to be the pursuer's customer, which he described as *"a very strange arrangement"*. He accepted that he had signed the pursuer's terms and conditions, on behalf of the defender, but it had nothing to do with such an arrangement. He said that there was *"no commercial logic whatsoever"* in *"handing a blank cheque"* to a supplier. I have set out his detailed comments already. Mr Keatings' evidence added to that of Mr Whyte only to a limited extent – namely, although he did not know what had been agreed, he would be "*very surprised*" if Mr Whyte had agreed that the defender become the customer, as he was very risk averse. That, plainly, was guess-work.

117 Mr Whyte's evidence as to the meeting was clear only on one point, namely that the defender was never to become the customer. On every other issue his evidence was vague and somewhat ambiguous. It was difficult to know, at times, whether his answers that he "*had no recollection*" of various points meant that events definitely did not occur, or that they might have occurred but he simply did not remember. His demeanour was guarded throughout, and his answers as short as he could manage. It is possible that he may genuinely have a poor recollection of the meeting, but that is double-edged – it means it is more difficult to accept his